2012

Serving State Officers in Official-Capacity Suits: Is Mail an Option?

Mark R. Brown

Follow this and additional works at: https://scholarship.law.slu.edu/plr

Recommended Citation
Available at: https://scholarship.law.slu.edu/plr/vol31/iss2/6

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact Susie Lee.
SERVING STATE OFFICERS IN OFFICIAL-CAPACITY SUITS: IS MAIL AN OPTION?

MARK R. BROWN*

INTRODUCTION

Students of constitutional litigation learn early that state agents have two personas. One is “personal” (or “individual”), and the other is “official.” For example, as individuals, state agents can be sued for money damages like—well, something like1—any other American who has allegedly done wrong. As governmental officials, however, these same agents are protected from having to pay damages by constitutional sovereign immunity. Unfortunately, sorting one capacity from the other is not always easy, as attested to by several Supreme Court cases visiting and revisiting the problem over the course of the past quarter century.2 The basic distinction—“personal-capacity” suits seek relief directly from governmental agents and are not suits against states, while “official-capacity” suits challenge actions taken by governmental officers and are suits against states—has proven difficult to employ, and harder still to justify.3 In particular, when requested relief turns from money to equity, the black-letter distinction described above dissolves. An official-capacity suit

* Newton D. Baker/Baker & Hostetler Chair, Capital University Law School; lead counsel in Moore v. Hosemann, 591 F.3d 741 (5th Cir. 2009). Thanks to Jim Pfander for his valuable comments.


2. *See* infra Part VI.

seeking equitable relief is not really a suit against a state—at least not for purposes of constitutional sovereign immunity.\textsuperscript{4} A personal-capacity action for equitable relief, meanwhile, may or may not be an action against an individual—no one is really sure these days.\textsuperscript{5} In short, the dual-persona model for explaining constitutional litigation against state officials is incomplete and somewhat contradictory.

This Article explores a tiny—though important—facet of this big-picture problem. Specifically, it addresses the fundamental question of whether state officials who are sued in their official capacities for prospective relief under 42 U.S.C. § 1983 should be served process as state governments or as individual wrongdoers. One school of thought has it that state officials under these circumstances are simply stand-ins for states; hence they must be served as states.\textsuperscript{6} Another position argues that state officers are technically sued personally in cases of this nature, and should therefore be served as individuals.\textsuperscript{7} The circuits are split.\textsuperscript{8} Neither the Federal Rules of Civil Procedure nor Supreme Court precedents offer a quick, easy, and definitive answer.

Resolving this question is important for several reasons, not the least of which is the overarching theoretical basis for the Eleventh Amendment’s apparent distinction between personal- and official-capacity suits. After all, if state officers are not states for purposes of the Eleventh Amendment, why would they be states for purposes of service under the Federal Rules? Here, however, I hope to avoid this conceptual problem and focus on more practical arguments and results. Not only are the mechanics of service different under Rule 4\textsuperscript{9} for states and individuals,\textsuperscript{10} the availability of Rule 4’s alternative

\textsuperscript{4} See infra note 215 and accompanying text.
\textsuperscript{5} Compare John C. Jeffries, Jr. & George A. Rutherglen, \textit{Structural Reform Revisited}, 95 \textit{CALIF. L. REV.} 1387, 1399 (2007) (“\textit{Ex parte Young} [allows] . . . state officers [to] be enjoined in their personal capacities from fulfilling duties under state law.”), and Pamela S. Karlan, \textit{Disarming the Private Attorney General}, 2003 U. ILL. L. REV. 183, 189 n.37 (2003) (“Private litigants can, to the extent they have standing, seek relief against some ongoing state practices that violate Article I-based laws by using \textit{Ex parte Young}, which permits suits for injunctive relief against state officials, ostensibly in their personal capacity.” (citation omitted)), with Josephine R. Potuto, \textit{Forum Choice in Constitutional Litigation}, 78 NEB. L. REV. 550, 574 (1999) (“Under section 1983, a person may not sue a state or state agency, but may employ the \textit{Ex parte Young} fiction to sue a state officer acting officially for injunctive relief and also may sue a state employee in her personal capacity for damages, with the damages paid by her out of her personal financial resources.”).
\textsuperscript{6} See infra notes 83–85 and accompanying text.
\textsuperscript{7} See infra note 78 and accompanying text.
\textsuperscript{8} See infra notes 72–84 and accompanying text.
\textsuperscript{9} See infra notes 29–41. Both of the modern rules for serving individuals and states also have borrowing provisions, which allow service to be accomplished under the law of the state where the federal action proceeds. See infra note 10. Hence, although the federal requirements
service-by-mail provision hinges on the distinction. If a state officer, sued in his official capacity, is the equivalent of state government, then service-by-mail is simply not an option. If he is an individual, on the other hand, service-by-mail (together with its benefits) is available.

My thesis is that state officers, when sued under § 1983 for prospective, equitable and declaratory relief, must, under the terms of Rule 4, be served as individuals. As every tortured student of the federal court system knows, § 1983 “effectively” authorizes suits against states for this kind of relief only when they are properly structured to avoid the Eleventh Amendment. The

for serving states and individuals differ, it may be that state law does not provide differing requirements. See infra note 10.

10. This problem has flown under the radar of appellate courts for a number of years. The circuit split did not emerge until 2009, when the Fifth Circuit concluded that the alternative process could not be used in official capacity suits. See infra notes 80–84 and accompanying text. The First Circuit’s conclusion to the contrary was by then twenty years old. See infra note 76 and accompanying text. Why did it take so long? Before 1983, of course, Rule 4 did not authorize alternative service, meaning whether a state official was served as a state or as an individual could have no relevance to the question. See infra notes 55–56 and accompanying text. In terms of effective service, meanwhile, Rule 4 has authorized the use of local service rules for both individual and governmental service since its inception, with the singular result being that plaintiffs often simply look to state law for answers. See FED. R. CIV. P. 4(d)(4). The same state rule for serving state officers sometimes satisfies the mechanics of both requirements, thereby making the problem moot. In Jackson v. Hayakawa, for example, where several state officials were sued in their individual and official capacities, a district court concluded that Hayakawa, a state official, although properly served in his official capacity, had not been properly served as an individual. 682 F.2d 1344, 1348 (9th Cir. 1982). The Ninth Circuit did not fully agree: “[A]s plaintiffs indicate, service of process may not have been defective.” Id. The court articulated:

Rule 4(d)(7) allows service in accordance with the law of the state in which the district court is located. Cal. Civ. Proc. Code § 415.20 [which included service on ‘public entities’] permits personal service by serving a person apparently in charge of a defendant’s office during usual office hours. Someone in charge of Hayakawa’s office apparently was served.

Id. (footnote omitted). This suggests that even if official capacity actions must use Rule 4(d)(6), the same state rule that satisfied old Rule 4(d)(6)’s borrowing provision could satisfy Rule 4(d)(7), which at that time was Rule 4(d)(1)’s borrowing mechanism. Still, some state rules clearly distinguish between serving “officials” and “individuals” and provide differing mechanisms. See, e.g., Bogle-Assegai v. Connecticut, 470 F.3d 498, 507–08 (2d Cir. 2006) (holding that the Connecticut service rules for state officers that are applicable to official capacity actions do not apply to personal capacity actions). Thus, the distinction would naturally arise in federal courts located in these states. It may be that the “problem” did not receive treatment in reported appellate decisions simply because it did not arise until the late 1980s at the earliest, when a reported district court decision for the first time concluded that service in official-capacity actions should follow the rules for serving states. See infra note 79 and accompanying text.

11. See infra notes 35, 39–41 and accompanying text.
12. See infra note 41 and accompanying text.
13. See infra notes 35, 39–41 and accompanying text.
Supreme Court ruled in *Ex parte Young* that the Eleventh Amendment requires these suits to name and proceed against individual officers precisely because they are not states.\(^{14}\) For over a century, plaintiffs have for this reason named and sued state officers, in contrast to their state employers, in suits to enjoin unconstitutional state action.

Rule 4 was put in place in 1938\(^{15}\) with full knowledge of the Eleventh Amendment’s command; it must have embraced the logic of *Ex parte Young*.\(^{16}\) Neither the rationale behind *Ex parte Young* nor the language of Rule 4’s distinction between states and individuals has changed. Hence, I argue, Rule 4’s original understanding controls to this day. And derivatively, because state officials are served as individuals, they are also subject to Rule 4’s modern service-by-mail alternative.\(^{17}\)

This Article begins with brief descriptions of the modern service-by-mail alternative and the circuit split that has emerged over its use. It then turns to Rule 4’s history. Headway is made in this historical analysis by comparing service requirements for federal officials and the United States government with those applied to state agents.\(^{18}\) One discovers from this comparison that (1) federal and state officers in 1938, and for a significant time thereafter, were served as individuals in what we today would call “official-capacity” suits;\(^{19}\) (2) legislative and rule-making amendments converted suits against federal officers into suits against the federal government and expressly required service on the federal government;\(^{20}\) (3) no similar changes have ever been made to Rule 4 in the context of state officials and state governments;\(^{21}\) and (4), oddly enough, although federal officials who are sued in their official capacities today are not subject to Rule 4’s service-by-mail alternative, they can be served by mail.\(^{22}\)

History, of course, does not prove the terminus of any legal argument. Law evolves, and as it does, it sometimes drags connected pieces of the puzzle

---

15. Although the Rules were drafted in 1937, they did not become effective until 1938. See *Fed. R. Civ. P.* 86 (1938) (prescribing the effective date as three months subsequent to the adjournment of the second regular session of the 75th Congress, but not sooner than September 1, 1938).
17. My argument is not prescriptive or normative. I am not asserting that state officers *should* be served individually. Nor am I claiming that they *ought* to be subject to Rule 4’s service-by-mail mechanism. My thesis is descriptive. I merely attempt to explain what Rule 4 initially meant, what effect changes in other Rules and Supreme Court precedents wrought, and what the text of Rule 4 and its procedural kin logically and literally require today.
18. *See infra* Part III.
19. *See infra* notes 92–120 and accompanying text.
22. *See infra* notes 140–43 and accompanying text.
with it. I therefore devote a separate section to the Supreme Court’s post-Rules treatment of § 1983 and the Eleventh Amendment. Interestingly, while developments in the law of constitutional litigation have caused significant changes to the Federal Rules,23 Rule 4’s treatment of states and state officers has remained solid. One discovers, I argue, that nothing in the developing law of constitutional litigation has changed Rule 4’s original requirement that state officers sued under the logic of Ex parte Young be served as individuals.24

I. THE BASICS OF “SERVICE-BY-MAIL,” AKA “WAIVER OF SERVICE”

Federal Rule of Civil Procedure 4 requires that defendants be properly served.25 Up until 1983, “formal” service was required.26 Someone, originally a federal marshal and later a disinterested adult,27 was required to hand-deliver a copy of the complaint and an officially sealed summons to the defendant, or at bare minimum leave them with someone of suitable age at the defendant’s usual abode or place of business.28 Proof of this service was then returned to the court.29 Mail and waivers were not options.30

In 1983, Congress added a service-by-mail alternative, which today is codified in Rule 4(d).31 Its goal was to “eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel.”32 According to the Legislative Statement that accompanied this

23. See infra Part VI.
24. See infra notes 252–54 and accompanying text.
31. Fed. R. Civ. P. 4(d). The House Report noted that, H.R. 7154 provides for a system of service by mail similar to the system now used in California. Service would be by ordinary mail with a notice and acknowledgment of receipt form enclosed. If the defendant returns the acknowledgment form to the sender within 20 days of mailing, the sender files the return and service is complete. If the acknowledgment is not returned within 20 days of mailing, then service must be effected through some other means provided for in the Rules.
32. 4A Charles Alan Wright & Arthur A. Miller, Federal Practice and Procedure § 1092.1 (3d ed. 2002) (quoting Fed. R. Civ. P. 4(d) (1993) advisory committee note). “Both the old and the present versions operate to provide plaintiffs with a relatively simple process for asking defendants to waive formal service of process, and to impose upon defendants ‘a duty to avoid unnecessary costs of serving the summons.’” Id.; see Powell v. Carey Int’l, Inc., 548 F. Supp. 2d 1351, 1357 n.6 (S.D. Fla. 2008) (“When opposing counsel is known prior to filing suit, it would behoove counsel to promote the spirit and letter of Rule 1 of the Federal Rules of Civil Procedure by seeking to waive formal service before incurring service fees.”).
addition, “[f]airness requires that a person who causes another additional and
unnecessary expense in effecting service ought to reimburse the party who was
forced to bear the additional expense.”\textsuperscript{33} The 1993 advisory committee notes,
which accompanied clarifications to the waiver mechanism, added that “[t]his
device is useful in dealing with defendants who are furtive, who reside in
places not easily reached by process servers, or who are outside the United
States and can be served only at substantial and unnecessary expense.”\textsuperscript{34}

Following its clarification and reorganization in 1993, Federal Rule of
Civil Procedure 4(d)(1) now provides that “[a]n individual, corporation, or
association that is subject to service under Rule 4(e), (f), or (h) has a duty to
avoid unnecessary expenses of serving the summons.”\textsuperscript{35} Rule 4(e), in turn,
provides the requirements for serving individuals,\textsuperscript{36} while Rules 4(f) and (h)
address how to serve individuals abroad\textsuperscript{37} and business entities,\textsuperscript{38}
respectively. Missing from Rule 4(d)’s list of defendants are minors (who are
served under Rule 4(g)),\textsuperscript{39} federal governmental entities and agents (which are
served under Rule 4(i)),\textsuperscript{40} and state and local governments “subject to suit” (which are
served under Rule 4(j)).\textsuperscript{41}

The mechanics of seeking waivers are relatively straightforward. Rule
4(d)(1) requires that the dated\textsuperscript{42} complaint,\textsuperscript{43} request for a waiver,\textsuperscript{44}
two copies of a waiver form,\textsuperscript{45} and “prepaid means for returning the form”\textsuperscript{46}
be sent, in writing\textsuperscript{47} “by first-class mail or other reliable means,”\textsuperscript{48} to the defendant.\textsuperscript{49}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{33} 128 CONG. REC. 30932–33 (1982) (providing legislative statement on 1983
Amendment).
\item\textsuperscript{34} FED. R. CIV. P. 4 (1993) advisory committee note.
\item\textsuperscript{35} FED. R. CIV. P. 4(d)(1).
\item\textsuperscript{36} FED. R. CIV. P. 4(e).
\item\textsuperscript{37} FED. R. CIV. P. 4(f).
\item\textsuperscript{38} FED. R. CIV. P. 4(h).
\item\textsuperscript{39} FED. R. CIV. P. 4(g).
\item\textsuperscript{40} FED. R. CIV. P. 4(i).
\item\textsuperscript{41} FED. R. CIV. P. 4(j). Defendants who accept informal notice are afforded sixty days to
answer. FED. R. CIV. P. 4(d)(3). Waiver, moreover, does not “waive any objection to personal
jurisdiction or to venue.” FED. R. CIV. P. 4(d)(5).
\item\textsuperscript{42} FED. R. CIV. P. 4(d)(1)(E).
\item\textsuperscript{43} FED. R. CIV. P. 4(d)(1)(C).
\item\textsuperscript{44} FED. R. CIV. P. 4(d)(1). The notice must “inform the defendant, using text prescribed in
Form 5, of the consequences of waiving and not waiving service.” FED. R. CIV. P. 4(d)(1)(D).
\item\textsuperscript{45} FED. R. CIV. P. 4(d)(1)(C).
\item\textsuperscript{46} Id.
\item\textsuperscript{47} FED. R. CIV. P. 4(d)(1)(A).
\item\textsuperscript{48} FED. R. CIV. P. 4(d)(1)(G); see also WRIGHT & MILLER, supra note 32, § 1092.1 (“[i]t
probably is not necessary that the documents be mailed to the defendant’s residence; any address
at which the defendant will receive mail promptly may be used by the plaintiff.”).
\item\textsuperscript{49} FED. R. CIV. P. 4(d)(1)(A). Strict compliance is not required, and “a failure to follow the
form may not invalidate the defendant’s acknowledgment if the defendant effectively is put on
\end{itemize}
\end{footnotesize}
The defendant then has at least thirty days after the request was sent to return the waiver. If a defendant without good cause fails to fulfill the duty spelled out in Rule 4(d)(1)—that is, the defendant refuses to accept informal notice and demands formal service—Rule 4(d)(2)(A) provides that the defendant must pay “the expenses later incurred in making service.” These costs, according to Rule 4(d)(2)(B), include “the reasonable expenses, including attorney’s fees, of any motion required to collect those service expenses.” Consequently, defendants are encouraged to voluntarily accept informal service by the threat of having to pay not only service costs, but also expenses, including attorney’s fees, surrounding the motion to collect. Experience teaches these costs and expenses can reach into hundreds and even thousands of dollars.

51. FED. R. CIV. P. 4(d)(2). In Whatley v. Dist. of Columbia, for example, the court concluded that government officials sued in their official capacities were subject to waiver, but were excused because of their good faith belief that the rule did not apply to them. 188 F.R.D. 1, 2 (D.D.C. 1999). The court concluded that this amounted to good cause. Id.; see also Mosley v. Douglas Cnty. Corr. Ctr., 192 F.R.D. 282, 283–84 (D. Neb. 2000) (“For the future, however, defendants are on notice that municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their individual and official capacities. While the lack of notice constitutes good cause in this case, it will not constitute good cause in the future.”). Contrary to this conclusion, the court in Marcello v. Maine observed that “‘good cause’ for failure to comply with a request for waiver ‘should be rare.’” 238 F.R.D. 113, 116 (D. Me. 2006) (quoting FED. R. CIV. P. 4(d) (1993) advisory committee note). The court observed that the advisory committee’s note, “provides two examples: 1) where the defendant did not receive the request; and, 2) where the defendant was insufficiently literate in English to understand it.” Id. Under this standard, the court concluded, a state official’s failure to waive was not excused by good cause. Id.
54. Attorney’s fees under Rule 4 quite often dwarf the actual expenses incurred in perfecting service of process. See Double “S” Truck Line, Inc. v. Frozen Food Express, 171 F.R.D. 251, 254 (D. Minn. 1997) (awarding costs calculated at $77.51, while attorney’s fees totaled $1,200.00); Davilla v. Thinline Collections, LLC, 230 F.R.D. 601, 603 (N.D. Cal. 2005) (awarding $900.00 in attorney’s fees and $170.28 in costs).
Like its modern incarnation, Congress’s original 1983 version of this waiver rule was limited to individual defendants and business entities— in the words of Rule 4(c)(2)(C)(ii) (which was where the requirements were codified in 1983), to those defendants “referred to in paragraph (1) or (3) of subdivision (d) of this rule.” Because state and local governments that were “subject to suit” had to be served under what was then Rule 4(d)(6), they clearly could not be expected to waive formal service of process. Neither could federal defendants and officers, their service being governed under what was then Rule 4(d)(4) or (5).

In 1993, because of misunderstandings over the alternative’s application, Rule 4’s service-by-mail provision was clarified by the Judicial Conference. Lawyers too often assumed that service by mail was sufficient, even in the absence of a defendant’s formal acknowledgement. To correct this misunderstanding, Rule 4’s service-by-mail option was modified and re-codified. It became Rule 4(d) and was styled “Waiving Service” to make clear that it required the defendant’s assent.

Meanwhile, the provisions for service on individuals, businesses, federal entities, and state/local governments, which were previously found in Rules 4(d)(1) through (6), were moved to separate subsections of Rule 4. Service on individuals was now governed by Rule 4(e); service on federal entities and

55. The service-by-mail alternative adopted by Congress in 1983 was quite similar to what remains in place today. See Fed. R. Civ. P. 4(c)(2)(C)(ii) (1983). Codified as Rule 4(c)(2)(C)(ii), 1983’s version also authorized service of process on individuals and businesses by mailing a copy of the summons and the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to a suggested form, and a return envelope, postage prepaid, addressed to the sender. Id.; see also Tso v. Delaney, 969 F.2d 373, 375 n.5 (7th Cir. 1992) (quoting Rule 4(c)(2)(C)(ii) as it existed before the 1993 amendments). If no acknowledgement was forthcoming, formal service of process was then needed. Fed. R. Civ. P. 4(c)(2)(C)(ii) (1983).  
57. See, e.g., Tso, 969 F.2d at 375 n.6 (noting that a municipal defendant was not subject to service by mail); Norlock, 768 F.2d at 656 (stating the same).  
59. See Fed. R. Civ. P. 4(d) (1993) advisory committee note (“The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.” (citation omitted)).  
60. See id.  
agents fell under Rule 4(i); and service on state and local governments came under Rule 4(j)(2). Like its precursor, the new Rule 4(j)(2) stated that

[s]ervice upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.65

New Rule 4(d)’s waiver provision continued to threaten recalcitrant defendants with costs66 and excluded from its reach those federal defendants who had to be served under Rule 4(i),67 as well as state and local governmental defendants “subject to suit,” who had to be served under Rule 4(j)(2).68 Specifically, the newly-codified waiver provision limited itself to “[a]n individual, corporation, or association that is subject to service under subdivision (e), (f), or (h).”69

Regarding its exclusion of governmental entities, the advisory committee in 1993 noted:

The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j).70

In addition to the physical hardship of sorting mail, the Committee observed that “there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail.”71 These policy reasons were left unstated.

64. See id.
70. FED. R. CIV. P. 4(d) (1993) advisory committee note; see also Moore v. Hosemann, 591 F.3d 741, 746 (5th Cir. 2009).
71. FED. R. CIV. P. 4(d) (1993) advisory committee note. By way of contrast, the legislative history behind the 1983 amendment did not attempt to explain why governmental entities were excluded; rather, it simply stated that the new rule was intended to be “similar to the system now used in California,” which contained no explicit exemption for governmental officers, agencies, or units. See 128 CONG. REC. 30931 (1982).
II. CIRCUIT SPLIT

The First Circuit in *Echevarria-Gonzalez v. Gonzalez-Chapel* ruled that official-capacity claims against state officers are governed by the rule for individual service,\(^\text{72}\) at that time Rule 4(d)(1)\(^\text{73}\):

Although we imagine that in most or all cases where a state officer is sued in his official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state.\(^\text{74}\)

The court explained that “[i]f the Eleventh Amendment bars an action against the state, then the latter is not ‘subject to suit’ pursuant to Rule 4(d)(6) [the provision then applicable to states and localities], and thus the rule is inapplicable.”\(^\text{75}\) The court therefore concluded:

The action is against an individual, albeit in his official capacity, and not against the state. Although the state . . . has a great interest in the outcome, it will be the individual . . . who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. . . . We therefore hold that service upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).\(^\text{76}\)

The First Circuit reiterated this conclusion following the 1993 changes to Rule 4 in *Caisse v. DuBois*, a § 1983 prison conditions action filed against state corrections officers in both their individual and official capacities.\(^\text{77}\) It rejected the claim that Rule 4(j), the new provision that addressed service for state and local government, applied: “[S]ervice of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals.”\(^\text{78}\) The court accordingly ruled that “to serve the defendants in either an individual or official capacity, [the plaintiff] had to comply with Fed. R. Civ. P. 4(e) [old Rule 4(d)(1)], providing for service of process on individuals.”\(^\text{79}\) As a result, though the First Circuit was not

72. 849 F.2d 24, 28 (1st Cir. 1988).
73. Rule 4(d)(1)’s requirements for individual service are now included in Rule 4(e). See FED. R. CIV. P. 4(e); Caisse v. DuBois, 346 F.3d 213, 216 (1st Cir. 2003).
74. *Echevarria-Gonzales*, 849 F.2d at 29 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).
75. *Id.* Rule 4(d)(6)’s provisions for serving government are now included in Rule 4(j)(2). See infra note 144 and accompanying text.
77. 346 F.3d at 216.
78. *Id.*
79. *Id.* The Second Circuit also endorsed this result. See *Stoianoff v. Comm’r of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (holding that where a *pro se* plaintiff failed to comply with Rule 4(j) when serving a state official sued in his official capacity “service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally” (citing *Echevarria-Gonzalez*, 849 F.2d at 28–30)).
concerned with this particular issue in *Caisse*, Rule 4’s service-by-mail alternative was extended to official-capacity actions.80

Twenty years later, the Fifth Circuit, in *Moore v. Hosemann*, a case involving a § 1983 challenge to Mississippi’s ballot access law for minor parties, rejected the First Circuit’s interpretation of Rules 4(e) and 4(j).81 It instead drew an equation between official-capacity suits against federal agents, which require service on the United States under Rule 4(i), and official-capacity actions against state officers.82 “[T]he most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position.”83 Thus, state officers sued in their official capacities under § 1983, the court ruled, must be served as states
under Rule 4(j). Therefore, they, like their federal counterparts, are immune from Rule 4's service-by-mail alternative.

III. HISTORY BEHIND RULE 4'S SERVICE REQUIREMENTS

The waiver alternative put in place in 1983 and re-codified in 1993 expressly excludes governmental entities subject to service of process under what in 1993 became Rules 4(i) and 4(j). The crux of the problem therefore lies in these two provisions. Who and what must be served under Rules 4(i) and 4(j)? If federal and state officers sued in their official capacities are to be served as governmental institutions under Rules 4(i) and 4(j), respectively, then Rule 4's service-by-mail alternative cannot be applied to them. But if they can be served as individuals, then it does.

As explained more fully below, Rule 4(i) makes clear that official-capacity claims against federal officers are treated as actions against the federal government. Rule 4(i) today specifically states that in these cases, the United States is to be served. Consequently, federal officers, when sued in their official capacities, are not subject to the service-by-mail alternative.

Rule 4(j), meanwhile, does not address the problem. Nor does either the legislative history behind Congress's 1983 amendments to Rule 4 or the 1993 advisory committee notes attached to the service-by-mail alternative. Clarifying Rule 4's textual ambiguity requires exploring how individual officers and governmental institutions have historically been served.

A. Service on Individuals

Other than expanding who can serve process and which local laws can be borrowed, today's modern rule for service of process on individuals (which in 1993 was re-codified under Rule 4(e)) is virtually identical to that enacted in 1938. Today it states that individuals “may be served” by the following methods:

84. Moore, 591 F.3d at 747.
85. Id.
87. FED. R. CIV. P. 4(i).
89. As enacted in 1938, Rule 4(a) required that service be effected by United States Marshalls or other specially appointed individuals. See FED. R. CIV. P. 4(a) (1938). Today, any disinterested adult can effect service of process under Rule 4. See FED. R. CIV. P. 4(c)(2).
90. Rule 4(d)'s borrowing provision was expanded in 1993 to allow plaintiffs to use any authorized service device of the forum state, including the forum state's own methods. See FED. R. CIV. P. 4(d)(1) (1993). Previously, a more limited borrowing provision, which allowed plaintiffs only to use the forum state's service rules, was in place. See David D. Siegel, Supplementary Practice Commentaries, 28 U.S.C.A. C4-22, at 169 (West. Supp. 2008); see also FED. R. CIV. P. 4(d)(7) (1938).
delivering a copy of the summons and of the complaint to the individual personally; leaving a copy of each at the individual’s dwelling or usual place of abode...; or delivering a copy of each to an agent authorized by appointment or by law to receive service of process.91

In 1938, of course, Rule 4 provided no service-by-mail option.92 Rather, proper service, which included a summons and copy of the complaint, had to be perfected by either a United States Marshal or some other “specially appointed” agent.93 Service on individuals, according to the 1938 Rules, was governed by Rule 4(d)(1): A copy of the summons and complaint were to delivered to the defendant “personally or by leaving copies thereof at his dwelling house or usual place of abode... or by delivering a copy... to an agent authorized by appointment or by law to receive service of process.”94 Rule 4(d)(7) then authorized borrowing local service rules for individual service, so long as the service was accomplished by a federal marshal or specially appointed agent.95

B. Service on Federal Defendants

Service on the federal government, its agencies, and its officers was covered by Rules 4(d)(4) and (5) under the 1938 Rules.96 The primary concern behind these provisions was, according to the Notes that followed, creating “a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof.”97 Rule 4(d)(4) accordingly addressed how service “[u]pon the United States” was to proceed.98 It was to be effected by:

  delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United

95. See Fed. R. Civ. P. 4(d)(7) (1938); see also 1 James Wm. Moore & Joseph Friedman, Moore’s Federal Practice § 4.15, at 298 (1938) (“In making service upon an individual defendant in the manner prescribed by state law, as permitted by Rule 4(d)(7)... Service must be made by a United States marshal, his deputy, or a person specially appointed by the court to make service.”).
97. Fed. R. Civ. P. 4(d) (1938) advisory committee note. This language was not significantly changed between 1938 and 1983, when Rule 4 was altered to shift the mechanics of service away from United States Marshalls. See Fed. R. Civ. P. 4(d)(5) (1938) (requiring that service be made “[u]pon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency”): see also Heiser Ready Mix Co. v. Fenton, 265 F.2d 277, 279 (7th Cir. 1959) (quoting Rule 4(d)(5)); Micklus v. Carlson, 632 F.2d 227, 240 n.13 (3d Cir. 1980) (same).
States attorney or clerical employee designated by the United States attorney . . . and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

Rule 4(d)(5), in turn, provided that service “[u]pon an officer or agency of the United States” was to be effected “by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency.”

The framers of Rule 4(d)(4) were, of course, familiar with the protections sovereign immunity supplied the federal government and the legal intricacies that resulted. They knew that Congress occasionally waived the United States’ sovereign immunity. This made necessary the specific language describing how the federal government was to be served when its immunity had been waived.

Likewise, the framers of Rule 4(d)(5) were familiar with suits against federal officers. Even in the absence of congressional authorization, the Supreme Court had long recognized an important exception to sovereign immunity. In United States v. Lee, the Court ruled that Robert E. Lee’s estate could effectively proceed against the federal government by pursuing the agents who had taken possession of the Custis-Lee mansion and grounds at

100. FED. R. CIV. P. 4(d)(5) (1938); see also Fed. Landlords Comm., 9 F.R.D. at 623–24 (quoting Rule 4(d)(5)).
101. See RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES: WITH NOTES AS PREPARED UNDER THE DIRECTION OF ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 204–05 (William W. Dawson ed., 1938) (observing that “various federal statutes cover various kinds of service on the United States . . . all of which would have to be studied out by the lawyer”).
103. See RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, supra note 101, at 205 (stating that Rule 4(d)(5) supplied terms of service “when such officer or agency is a party to the suit”).
Arlington. The Court’s theory consisted of two strands: (1) ultra vires actions are not the acts of the federal government; and (2) constitutional wrongs are always ultra vires and thus not protected by sovereign immunity. Although Lee’s reach was later clarified in Larson v. Domestic & Foreign Commerce Corporation, it retained full force in 1938. The framers of the 1938 Rules were familiar with Lee-type actions and filled the gap with Rule 4(d)(5).

In the years immediately following Rule 4(d)(5)’s adoption, courts required individual service on affected federal officers as well as service on the United States government under Rule 4(d)(4), even though Rule 4(d)(5)’s “delivering” requirement was somewhat ambiguous. The reason for this,


106. 337 U.S. 682, 696 (1949). Professor Sisk observes that under Larson, “a suit could go forward against the official only if (1) the official had acted outside of his statutorily delegated authority, or (2) the official had acted contrary to constitutional command.” SISK, supra note 105, at 608. With the 1976 amendment to the Federal Administrative Procedure Act, 5 U.S.C. § 702, which generally waives the United States’ sovereign immunity in the context of non-monetary litigation, these non-statutory suits have lost much of their significance. See id. at 608–09; see also Chen, supra note 105, at 894 (stating that the adoption of the federal APA “erased any doubt about the ability to bring suits challenging the constitutionality of federal statutes”).

107. This held true even though the officer resided outside the state—and outside the territorial authority of the district court—and could not legally be served. See, e.g., Heiser Ready Mix Co. v. Fenton, 265 F.2d 277, 280 (7th Cir. 1959) (holding that General Counsel of National Labor Relations Board who resided in Washington, DC could not be served by a district court in Wisconsin); Fed. Landlords Comm. v. Woods, 9 F.R.D. 622, 624 (S.D.N.Y. 1949) (observing that “personal service on the officer named as a defendant” is required and that a district court in New York could not issue process to Washington, DC). This was true even though the interpretation defeated the action—the officer being indispensable. See, e.g., Sun Life Assurance Co. v. McGrath, 13 F.R.D. 22, 25 (N.D. Ill. 1952) (“[Subdivision 5] has been interpreted to mean that ‘delivering a copy of the summons’ requires personal service, for ‘in non-statutory actions against an individual federal official, personal service on the official is necessary, and service on the United States Attorney or on one of the official’s subordinates is not sufficient to obtain jurisdiction over the official.’” (citation omitted)).

108. See, e.g., Fed. Landlords Comm., 9 F.R.D. at 624 (“While the meaning of ‘delivered’ is not entirely clear the cases establish that, at least in non-statutory actions against an individual federal official, personal service on the official is necessary, and service on the United States Attorney or on one of the official’s subordinates is not sufficient to obtain jurisdiction over the official.”); see also Taylor v. Latimer, 47 F. Supp. 236, 236–37 (W.D. Mo. 1942); Klein v. Hines, 1 F.R.D. 649, 649–50 (N.D. Ill. 1941); Sun Life Assurance Co., 13 F.R.D. at 25.
according to the premier authority of the time, was that any violation of a court order would run against the affected officer; therefore, “the defendant (officer or agency) should be personally served.” Indeed, courts required personal service on federal officials who were beyond their jurisdiction and not even named defendants. The Secretary of Agriculture in 1939, for example, was required to be served individually in an action seeking to enjoin enforcement of the federal Marketing Agreement Act, even though he was not named as a defendant.

Indeed, federal courts entertaining suits against federal officials under the logic of Lee and Larson sometimes ruled that individual service under Rule 4(d)(1) was sufficient, since the action ran against the officer personally rather than against an agency of the United States. Under the old Uniform Equity Rules, after all, service was directed at government officials personally in

---

109. Moore & Friedman, supra note 95, § 4.25, at 331. Moore’s treatise stated that there were basically three classes of cases involving official, federal defendants: “(1) actions for an injunction; (2) actions against a Collector of Internal Revenue to recover a refund of taxes; and (3) actions arising out of commercial transactions against an agency of the United States operating in the form of a corporation.” Id. With the first class, as stated above, the officer was to be personally served. Id. With the second class, Moore’s treatise stated that, “personal service is indispensable because a judgment therein becomes a personal liability of the Collector of Internal Revenue.” Id. at 331–32. With the last class, Rule 4(d)(3) was to be followed, according to Moore’s treatise. Id. at 332.

110. Mass. Farmers Def. Comm. v. United States, 26 F. Supp. 941, 942 (D. Mass. 1939) (stating that “[p]ersonal service upon the Secretary was required,” because “the Secretary was a necessary and indispensable party”); see also Taylor, 47 F. Supp. at 236–37 (in action to annul decision of Railroad Retirement Board, individual board members had to be individually served as well as the United States); Juell v. Comm’r of Immigration, 37 F. Supp. 533, 535 (E.D.N.Y. 1941) (requiring that Commissioner of Immigration be individually served in action seeking order to issue certificate of citizenship).

111. See, e.g., Parker v. Lester, 98 F. Supp. 300, 306–07 (N.D. Cal. 1951) (holding that constitutional action against Coast Guard Commandant under Larson is governed by Rule 4(d)(1) and not Rule 4(d)(5)).

112. Before the Federal Rules of Civil Procedure merged law and equity, federal courts followed state rules of procedure in actions at law and the federal Uniform Rules of Equity in actions at equity. See Charles E. Clark & James Wm. Moore, A New Federal Civil Procedure: I. The Background, 44 YALE L.J. 387, 406–07 (1935) (describing effect of the Conformity Act, which required that district courts follow state procedures in actions at law and federal Uniform Rules of Equity that covered equitable actions in district courts); see also Charles E. Clark & James Wm. Moore, A New Civil Procedure: II. Pleadings and Parties, 44 YALE L.J. 1291, 1299 (1935) (“Under the present system the Conformity Act controls actions at law so that the federal attitude toward the pleadings in law actions is determined by that of the state where the federal district court is sitting.”). Federal Rule of Equity 7 stated that “[t]he process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill.” 226 U.S. 649, 650–51 (1912). Federal Rule of Equity 13 then provided that “[t]he service of all subpoenas shall be by delivering a copy thereof . . . to the defendant personally, or by leaving a copy thereof at the dwellinghouse or usual place of
Lee-type actions. Notwithstanding the clear language in Rule 4(d)(5) requiring service on the United States, too, some courts followed this old equitable practice.

Demanding individual service on federal officers in addition to service on the United States sometimes caused serious difficulties with venue. The named governmental defendant was not always located in Washington, DC, which meant that district courts ran into difficulties serving both the United States Attorney General in Washington and the named defendant. This was corrected in 1962 when Congress added § 1391(e) to Title 28 of the United States Code.

Section 1391(e) enlarged venue in official capacity actions against federal agents and also authorized service by certified mail on federal officers who abode of each defendant, with some adult person who is a member of or resident in the family.”

Id. at 652. No rule provided for service on either the United States government or a state government.

113. E.g., Royal Farms Dairy v. Wallace, 7 F. Supp. 560, 562 (D. Md. 1934) (observing in suit to enjoin Agricultural Adjustment Act that Henry Wallace, the Secretary of Agriculture, was “individually a citizen of the state of Iowa, and having his official residence in the District of Columbia, is not subject to service of process in this cause issued from this [Maryland] court, and no such service has been attempted on him and he has not voluntarily appeared. Therefore, it is clear he is not a party to the case.”); Appalachian Elec. Power Co. v. Smith, 4 F. Supp. 6, 13–14 (D. Va. 1933) (responding to the defense claim that the “former Secretaries of War, Interior, and Agriculture, respectively,” as well as the United States, were indispensable parties who must be joined, the court stated that “[i]f the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. . . . The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments.” (citations omitted) (quoting Philadelphia Co. v. Stimson, 223 U.S. 605, 619–20 (1912))).

114. See Powelton Civic Home Owners Ass’n v. Dep’t of Hous. & Urban Dev., 284 F. Supp. 809, 833 (E.D. Pa. 1968) (“Section 1391(e) is essentially a plaintiffs’ provision. Plaintiffs suing federal officers need no longer travel to the District of Columbia to institute their action. Nor are such plaintiffs now ‘whipsawed’ out of a cause of action by mutually excluding venue and service of process provisions. Section 1391(e) attempts to remove the virtually impenetrable barrier of procedural entanglement which has so frequently provided the government with de facto immunity from law suits.” (footnote omitted)).

115. See id. at 832–33 (“In 1962, in response to plaintiffs’ difficulties in obtaining effective service on the officers of federal agencies, Congress enacted a venue/service provision declaring that: . . . ‘[t]he summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery . . . to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district within which the action is brought.’” (quoting 28 U.S.C. §1391(e) (1964))).
were located beyond a district court’s jurisdiction.\textsuperscript{116} Regarding the latter, it stated that “the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.”\textsuperscript{117} When Rule 4’s treatment of federal defendants was re-codified under Rule 4(i) in 1993, moving the requirements once found in Rules 4(d)(4) and (5) to Rules 4(i)(1) and 4(i)(2), respectively, little was changed in how federal officers sued in their official capacities were to be served. Rule 4(i)(2), like Rule 4(d)(5) before it (albeit with § 1391(e)’s assistance), now provides that in actions against federal agencies, corporations, and officers “sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.”\textsuperscript{118}

Service on the United States, meanwhile, was substantially changed in 1993 to allow the use of registered and certified mail to deliver copies of the summons and complaint to the local United States Attorney along with the Attorney General, which had already been the established practice.\textsuperscript{119} Hence, no personal service of any kind is today required in an official capacity suit against a federal officer or agency.\textsuperscript{120} Rather, the officer can be served by registered or certified mail, as can the Attorney General and the local United States Attorney.\textsuperscript{121} In 2000, Rule 4(i)(3) was added to clarify the fact that Rule 4(i)(2) applied only to “official capacity” actions.\textsuperscript{122} As explained below, Rule 4(i)(3) was inserted to reiterate that in “personal capacity” actions against federal officials, personal service on the officer is still required.\textsuperscript{123} No form of mailing will suffice.

\textsuperscript{117} Id. Following the adoption of this provision, it appears that service by certified mail in official capacity actions became accepted practice. See, e.g., Griffith v. Nixon, 518 F.2d 1195, 1196 (2d Cir. 1975); Micklus v. Carlson, 632 F.2d 227, 240–41 (3d Cir. 1980). Still, in 1983 Congress substituted into Rule 4(d)(5) “sending a copy of the summons and of the complaint by registered or certified mail” for “delivering a copy,” thus making clear that formal, personal service on officers in official capacity actions was not necessary. Pub. L. No. 97-462, § 2(4), 96 Stat. 2527, 2528 (1983). The legislative report accompanying the 1983 changes states that before this change “personal service upon the officer” was required by Rule 4(d)(5), at least when the officer was not beyond the territorial reach of the district court. 128 CONG. REC. 30932 (1982).
\textsuperscript{118} FED. R. CIV. P. 4(i)(2) (1993) (emphasis added).
\textsuperscript{120} See, e.g., Tuke v. United States, 76 F.3d 155, 156 (7th Cir. 1996) (affirming dismissal of a claim due to untimely service when plaintiff’s attorney sought the Attorney General to waive personal service, yet the 1993 amendments to the rule clearly allowed for service by mail).
\textsuperscript{121} FED. R. CIV. P. 4(i)(2) (1993).
\textsuperscript{122} See FED. R. CIV. P. 4(i)(3).
\textsuperscript{123} See infra Part V.
C. Service on States and State Officers

Rule 4(d)(6), when enacted in 1938, stated that service “[u]pon a state or municipal corporation or other governmental organization thereof subject to suit” was to be made

by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.\(^\text{124}\)

When states and state agencies were sued by name, of course, courts uniformly looked to this Rule.\(^\text{125}\) But Rule 4(d)(6) said nothing about service on state officials.\(^\text{126}\)

Moreover, between the adoption of the 1938 Rules and the emergence of modern-day “personal capacity” actions (compliments of the Supreme Court’s 1961 decision in \textit{Monroe v. Pape}),\(^\text{127}\) little was reported on the subject. The only judicial decision that can be located discussing the topic held in 1960 that state officials were to be served as \textit{individuals} under either Rule 4(d)(1) or through its state-rule borrowing mechanism, Rule 4(d)(7).\(^\text{128}\) As predicted by the preeminent authority of the day, Rule 4(d)(6) simply “require[d] little discussion.”\(^\text{129}\)

This dearth of authority may have been attributable to the fact that serving officers as individuals was the accepted practice in the run-up to the 1938

124. \textit{Fed. R. Civ. P. 4(d)(6)} (1938); \textit{see also} United States v. Huff, 36 F. Supp. 18, 20 (S.D. Tex. 1940) (quoting \textit{Fed. R. Civ. P. 4(d)(6)} (1938)). Rules 4(d)(1), (2) and (3), meanwhile addressed service upon individuals, infants and incompetents, and businesses, respectively. \textit{Fed. R. Civ. P. 4(d)(1)–(3)} (1938). Those Rules have since been re-codified as Rules 4(e), (g) and (h), respectively. \textit{See Fed. R. Civ. P. 4(e)–(h)}.


128. Bush v. Orleans Parish Sch. Dist., 187 F. Supp. 42, 44 n.3 (D. La. 1960) (stating in a desegregation action against Louisiana officials, including the state governor, that “[t]he Governor did not appear at the hearing nor was he represented. He was, however, validly served” (citing \textit{Fed. R. Civ. P. 4(d)(7)} (1938))). Rule 4(d)(7) was the state service rule borrowing provision, which did not apply to service of state government under Rule 4(d)(6). \textit{Fed. R. Civ. P. 4(d)(7)} (1938). Rather, Rule 4(d)(7) authorized borrowing only for “a defendant of any class referred to in paragraph (1) or (3).” \textit{Id}.

129. \textit{Moore & Friedman, supra} note 95, § 4.26, at 336; \textit{see also} \textit{Charles Alan Wright, Law of Federal Courts} 264 (2d ed. 1970) (“The procedures set out for service on . . . states and subdivisions of states, are largely self-explanatory, and have given little difficulty.”).
Rules. After all, the Federal Rules of Equity, which governed equitable actions in the federal courts prior to the adoption of the Federal Rules, 130 required individual service in actions against government officials. Federal Rule of Equity 7 stated that “[t]he process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill.” 131 Federal Rule of Equity 13 then provided that “[t]he service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwellinghouse or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.” 132 Consequently, the subject of the contempt action in Ex parte Young, 133 the Minnesota Attorney General, was personally served with a subpoena in 1907 in order to secure his participation in the underlying challenge to Minnesota’s rates. 134

Following Monroe, when modern “personal capacity” actions for damages became common, courts continued to require that government officers sued for prospective relief be served as individuals. 135 This remained true in 1983 when Congress added its service-by-mail alternative to Rule 4. Indeed, no reported decisions before 1986 136 held that a state or local official sued in his official

---

130. See supra note 112.
132. Id. at 652 (emphasis added).
134. See Brief for Petitioner on Hearing of Rule to Show Cause at 8, Ex parte Young, 209 U.S. 123 (No. 10), reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 359, 367 (Phillip B. Kurland & Gerhard Casper eds., 1975) (“[S]ubpoenas were issued and served upon the defendants . . . .”). Ex parte Young is discussed more fully below. See infra notes 145–81 and accompanying text.
135. See Amen v. City of Dearborn, 532 F.2d 554, 557 (6th Cir. 1976) (“Though the amended complaint fails to reflect whether the individuals were sued in their official or their individual capacities, even if they were sued in their official capacities, proper service of process would still be necessary to obtain personal jurisdiction over those officials. . . . Nothing in the record indicates that either the secretary to the clerk or the director of elections [which were sufficient for service on the city under Rule 4(d)(6)] was authorized as the individuals’ agent for service of process.” (citations omitted)); Richards v. N.Y. Dep’t. of Corr. Servs., 572 F. Supp. 1168, 1173 n.3 (S.D.N.Y. 1983) (“[C]ourts have determined that in an action against an individual in his official capacity, personal service pursuant to Rule 4(d)(1) is sufficient because recovery under the Civil Rights Act runs against the official himself in his private capacity and not against the government.”); Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 28 (1st Cir. 1988).
136. Banerjee v. Roberts appears to be the first reported decision stating that state officials sued in their official capacities could be served as states under what was then Rule 4(d)(6). 641 F. Supp. 1093, 1099 (D. Conn. 1986). In distinguishing between service in official capacity and personal capacity suits, the court stated:
It is conceded that such service was effective against the trustee defendants in their official capacities. A state or governmental entity thereof may be served with process “in the manner prescribed by the law of that state,” and Connecticut law authorizes the
capacity was to be served as a governmental entity under Rule 4(d)(6). Only after 1986 did the practice arise, and then only in a handful of districts.

IV. EXPLAINING RULE 4

Over the course of forty years, despite several amendments to the Federal Rules of Civil Procedure and significant changes in the availability of § 1983 in both personal and official capacity actions, Rule 4(d)(6)’s language for serving states “subject to suit” remained virtually unchanged. In particular,

Attorney General to accept service on behalf of the state and “any officer, servant, agent or employee of the state . . . , as such.”

Id. at 1099 (citations omitted).

137. The following search, recently run through the All Federal Cases file on Westlaw, generated forty cases, none of which held that state or local officials sued in their official capacities were subject to service under Rule 4(d)(6): “da(before 1987) & da(after 1937) & ‘rule 4(d)(6)’”.


139. See United States ex. rel. Wood v. Blacker, 335 F. Supp. 43, 44 (D.N.J. 1971) (holding that Rule 4(d)(6) “governs service of process ‘upon a state or municipal corporation or other governmental organization thereof subject to suit’”). The court in Blacker ruled that Rule 4(d)(6) did not apply to a personal-capacity damage action under 42 U.S.C. § 1983 against local public defenders. Id. In Mathias v. City of Milwaukee Department of City Development, the court ruled that while service was proper under Rule 4(d)(6), the city was not subject to suit under 42 U.S.C. § 1983. 377 F. Supp. 497, 498-99 (E.D. Wis. 1974). This case antedated Monell v. New York Department of Social Services, which held that cities and counties are amenable to suit under § 1983. 436 U.S. 658, 690 (1978); see also Thorne v. Commonwealth, 77 F.R.D. 396, 397 (E.D. Pa. 1977) (“Rule 4(d)(6) … outlines the procedures for proper personal service on a state agency: (6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.”). In Thorne v. Pennsylvania, the court ruled that a damage action against a state under Title VII was governed by Rule 4(d)(6). 77 F.R.D. 396, 397, 398 (E.D. Pa. 1977) (noting that “Rule 4(d)(6) outlines the procedures for proper personal service on a state agency”); see also Way v. Mueller Brass Co., 840 F.2d 303, 305 (5th Cir. 1988) (holding that damage action against state commission under Title VII and 42 U.S.C. § 1983 was controlled by Rule 4(d)(6)); Punchard v. State, No. 95-2060,
when Congress added its “service by mail” alternative in 1983, Rule 4(d)(6) was left untouched. 140 This remained true in 1993, when service-by-mail was clarified and moved to its present location in Rule 4(d). 141 Old Rule 4(d)(6)’s requirement that states be “subject to suit” remained the same even after it was moved to Rule 4(j)(2). 142 In sum, history, as well as a lack of any material textual changes to Rule 4’s provisions for serving states and individuals, presents a strong argument that Rule 4 continues to require individual service in official-capacity actions against state agents.

From a constitutional standpoint, moreover, this reading makes sense. The framers of what became Rule 4(j)(2) were well aware of the constitutional immunities afforded states under the Tenth and Eleventh Amendments. Unlike the federal analog, where Congress is king and can relinquish the United States’ sovereign immunity, the drafters of Rule 4 knew that the federal government could not simply and uniformly override constitutional protections afforded states. Instead, waivers of state immunities would in many instances have to come from the states themselves. 143 Moreover, to the extent Congress could override state immunities, 144 the drafters of Rule 4 must have known that

---

1995 WL 638201, at *1 (10th Cir. Oct. 31, 1995) (holding that takings claim against state is governed by Rule 4(j) and that the state could not be asked to waive service).


142. Rule 4(j)(2) now states:

Service upon a state, municipal corporation, or any other state-created governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

FED. R. CIV. P. 4(j)(2). Because of an ambiguity over whether it applied to organizations created by the federal government, Rule 4(j)(2) was amended in 2007 to expressly provide that it applied to a state, a municipal corporation, “or any other state-created governmental organization that is subject to suit” FED. R. CIV. P. 4(j)(2) (2007) advisory committee note (emphasis added).

143. States today remain free to waive their Eleventh Amendment immunity. See Kit Kinports, Implied Waiver After Seminole Tribe, 82 MINN. L. REV. 793, 798 (1998). Waivers, however, must be extremely clear and are rarely found. Moreover, because states are not proper defendants for purposes of § 1983, Lapides v. Bd. of Regents, 535 U.S. 613, 624 (2002), state waiver today is not even a possibility in § 1983 litigation.

some federal actions would still be barred by the Tenth and Eleventh Amendments. Because of this potential patchwork of federal actions involving states, the framers of Rule 4(d)(6) did not attempt a uniform solution.

The lone constant in 1938 that allowed federal challenges to state action was *Ex parte Young*. Outside this exception (and a few others noted below), states were (and remain) immune from private suits in federal court as named defendants. They also were, with few exceptions, immune from private suits that threatened their treasuries. These bars held firm, regardless of the nature of the suit. Put bluntly, states in 1938 were not ordinarily “subject to suit.”

It is not my intent (nor within my capacity) to fully explain or critique the Supreme Court’s Eleventh Amendment jurisprudence. Suffice it to say that the *Ex parte Young* exception to the Eleventh Amendment is a confusing legal fiction—one that is not necessarily consistent with other related constitutional and legal doctrines. It was borne of constitutional necessity, at least if one is comfortable with the Supreme Court’s role as constitutional arbiter. The Court needed an overriding exception to sovereign immunity to facilitate its control over both the Constitution and the states. *Ex parte Young* was meant to play this part in the early twentieth century. It continues to do so today.

The facts and legal context of *Ex parte Young* are not nearly as monumental as its doctrinal result. *Ex parte Young* was a contempt proceeding filed in federal court against the Attorney General of Minnesota, who had sought to enforce a state statute claimed to be unconstitutionally confiscatory under the Fourteenth Amendment. The Attorney General defended by prospective relief—at least as far as the Eleventh Amendment is concerned. See generally Monell v. N.Y. Dep’t of Soc. Servs., 436 U.S. 658 (1978). The same is also true of municipal agents, who can be sued personally for money damages under § 1983 in both state and federal court. See infra notes 224–29 and accompanying text.

145. 209 U.S. 123, 160 (1908) (holding that a suit against the Minnesota Attorney General was not a suit against the state, and thus, was not barred by the Eleventh Amendment).

146. See Edelman, 415 U.S. at 662–63 (“While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”).

147. See id. at 663 (“[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”).

148. 209 U.S. at 126. Following *Ex parte Young*, litigation against states and municipalities—through their officials—for constitutional violations became common. Moreover, nothing beyond general federal question jurisdiction was required; no separate statutory cause of action was required. See MARK R. BROWN & KIT KINPORTS, CONSTITUTIONAL LITIGATION UNDER § 1983 190–91 (2d ed. 2008). For roughly the last thirty or forty years, however, courts have essentially refused to recognize implied constitutional causes of action against states, municipalities, and governmental agents. See, e.g., Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d 857, 875 (E.D. Pa. 2002) (“[M]ost courts have
asserting Eleventh Amendment immunity; after all, a state statute was being challenged, and he was the state official charged with enforcing it.\textsuperscript{149} Even though it named the state Attorney General as the defendant, the action was nothing more, and nothing less, than an action against Minnesota.

The Supreme Court disagreed.\textsuperscript{150} Suits in federal courts seeking injunctions (and other forms of prospective relief) against state officials who are “specially charged with the execution of a state enactment alleged to be unconstitutional,” it ruled, are not prohibited by the Eleventh Amendment\textsuperscript{151}:

\begin{quote}
[T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.\textsuperscript{152}
\end{quote}

The framers of the 1938 Federal Rules of Civil Procedure, like modern students, judges and law professors, struggled with this result. How can actions against state officers premised on constitutional wrongs not be considered actions against the states that both supplied the unconstitutional laws and employed the state officials? If the actions are not against states, then what about the complained-of statutes and actions of state officials? Do these belong to the states? How can there ever be any “state action” under this logic?\textsuperscript{153}

In the event, the framers of Rule 4(d)(6) essentially punted; they simply said that when they are “subject to suit,” states can be served through their held that one cannot sue state and local officials for violation of the constitution of its own force. One must state a claim under § 1983.

\begin{itemize}
  \item [149] \textit{Ex parte Young}, 209 U.S. at 137.
  \item [150] \textit{Id.} at 138.
  \item [151] \textit{Id.} at 158.
  \item [152] \textit{Id.} at 159–60 (emphasis added).
  \item [153] The Court’s logic is odd for a number of reasons, not the least of which is its apparent contradiction of state action doctrine under the Fourteenth Amendment. The same Court that found unconstitutional action \textit{ultra vires} in \textit{Ex parte Young} for purposes of the Eleventh Amendment found five years later in \textit{Home Telephone & Telegraph v. City of Los Angeles} that illegal and unconstitutional action was not \textit{ultra vires} for purposes of the Fourteenth Amendment. 227 U.S. 278, 293 (1913).}
\end{itemize}
chief executive officer, if nothing else.\textsuperscript{154} Rule 4 said nothing about \textit{Ex parte Young} actions.

This does not mean that the 1938 Rules were completely silent about the impact of \textit{Ex parte Young}. Rule 25(d), in particular, was molded to fit the Court’s convoluted \textit{Ex parte Young} logic, which had over the years been interpreted to limit substitutions of public officers in prospective proceedings.\textsuperscript{155} Rule 25(d) of the 1938 Rules specifically authorized the substitution of successors to federal, state and local officers when the named occupant “die[d], resign[ed], or otherwise cease[d] to hold office.”\textsuperscript{156} Unlike its modern descendant, which makes substitution automatic,\textsuperscript{157} however, Rule 25(d) in 1938 required that it be “satisfactorily shown to the court that there is a substantial need for so continuing and maintaining” the action.\textsuperscript{158} The proposed substitute, moreover, was to “be given reasonable notice of the application therefore and accorded an opportunity to object.”\textsuperscript{159}

According to its accompanying notes, Rule 25(d) was designed to accommodate the Supreme Court’s holding in \textit{Ex parte La Prade},\textsuperscript{160} a 1933 decision that cast a large measure of constitutional doubt on automatic substitution of public officials.\textsuperscript{161} \textit{La Prade} was a constitutional action brought under \textit{Ex parte Young}’s fiction against the Arizona Attorney General to enjoin enforcement of a state train-length law.\textsuperscript{162} While the action was pending, the Attorney General’s term of office expired, causing the plaintiffs to move to substitute the incoming Attorney General as the named defendant.\textsuperscript{163} The new Attorney General objected, however, claiming that there was “no pleading charging him with having threatened to enforce the state enactment.”\textsuperscript{164} The lower court rejected the claim, substituted the Attorney General, and enjoined enforcement of the statute.\textsuperscript{165}

The Supreme Court reversed.\textsuperscript{166} Citing \textit{Ex parte Young}, the Court observed that the suit was “brought against defendant, not as a representative

\begin{itemize}
\item \textsuperscript{154} \textbf{FED. R. CIV. P.} 4(d)(6) (1938).
\item \textsuperscript{155} See \textbf{FED. R. CIV. P.} 25(d) (1938) advisory committee note.
\item \textsuperscript{156} \textbf{FED. R. CIV. P.} 25(d) (1938).
\item \textsuperscript{157} \textbf{FED. R. CIV. P.} 25(d).
\item \textsuperscript{158} \textbf{FED. R. CIV. P.} 25(d) (1938).
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textbf{FED. R. CIV. P.} 25(d) (1938) advisory committee note (“With the second sentence of this subdivision compare \textit{Ex parte La Prade}.”).
\item \textsuperscript{161} 289 U.S. 444 (1933).
\item \textsuperscript{162} Suit was predicated on the Commerce Clause, the Fourteenth Amendment Due Process Clause, and various federal railroad statutes. \textit{Id.} at 452.
\item \textsuperscript{163} \textit{Id.} at 453. The motion was premised on a federal statute, 28 U.S.C. § 780(b), that purported to authorize the substitution of new public officials for those leaving office. \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 454–55.
\item \textsuperscript{165} \textit{Id.} at 455.
\item \textsuperscript{166} \textit{Id.} at 459.
\end{itemize}
of the State, but to restrain him individually from, as it is alleged, wrongfully subjecting plaintiff to such unauthorized prosecutions.”167 Substitution was not proper because the “[p]laintiffs did not allege that [the new Attorney General] threatened or intended to do anything for the enforcement of the statute.”168 For all the lower court knew, the new Attorney General “might hold . . . that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it.”169

Further, the Court in La Prade drew a critical structural distinction between the substitution of federal officers and those serving the states:

Congress has authority to direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf, but Congress is not so empowered as to state officers.170

With the state Attorney General in La Prade, then, the difficulty rested not only in Ex parte Young’s constitutional fiction (treating suits challenging state laws as personal actions to avoid the Eleventh Amendment),171 it was also grounded in a lack of federal power over state officers and agents—a dual

167. Ex parte La Prade, 289 U.S. at 455.
168. Id. at 458. The Court noted that had the new attorney general “adopt[ed] the attitude of his predecessor,” substitution might be proper. Id. at 459.
169. Id. at 458. The holding was criticized at its inception. See Note, Substitution of State Officials in an Injunctive Proceeding, 43 YALE L.J. 500, 503 (1934) (“Whatever the attitude of the new Attorney General, there can be no permanent assurance to the plaintiffs that they may ignore the statute with impunity until it has been pronounced void by the courts. The decision, therefore, apparently serves only to postpone a settlement of the matter until a new suit can be started, with all the unnecessary waste occasioned thereby.”).
170. 289 U.S. at 458 (emphasis added) (citation omitted).
171. The difficulty with substitution also arose in the context of suits against federal officers. Because suits against federal officers seeking to compel compliance with federal norms was considered a personal action, substitution was often questioned. In United States v. Boutwell, for example, the Court refused to allow the substitution of the new Treasury Secretary in a mandamus action because:

[W]hat the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty . . . .

84 U.S. 604, 607 (1873).

This view persisted until 1938 when the Federal Rules of Civil Procedure were put in place. See M.C. Dransfield, Annotation, Change of Incumbent of Office or of Personnel of Board or Other Official Body as Affecting Mandamus Proceeding Previously Commenced, 102 A.L.R. 943, 948–52 (1936); see also Shaffer v. Howard, 249 U.S. 200, 201 (1918). But see Thompson v. United States, 103 U.S. 480, 484–85 (1880) (stating contrary view).
federalism concern that remains to this day lodged in the Tenth Amendment. \(^{172}\)

The Court in *La Prade* doubted the authority of the federal government to make state officers “stand in judgment” for wrongs they did not threaten or inflict. \(^{173}\) The framers of the 1938 Rules understood this difficulty and fashioned the language of Rule 25(d) to avoid it, if possible. They understood both that *Ex parte Young* actions are personal and that doubt existed about their power to automatically substitute one state officer for another. They also must have realized that doubt existed over federal power to force one state officer, like the chief executive, to accept service of process on behalf of another state official who was accused of wrongdoing. Today, this doubt can be heard echoing in cases like *Printz v. United States*, which ruled that the Tenth Amendment prohibits Congress from commandeer state and local officials for federal ends. \(^{174}\)

In 1938, when federalism concerns were even stronger, \(^{175}\) it was far from clear that a state’s chief executive officer could be required to accept service of process from a federal marshal on behalf of another state official who allegedly committed a constitutional wrong. \(^{176}\) In short, the

---

172. See, e.g., *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (ruling that the Tenth Amendment prohibits the federal government from requiring that local law enforcement officers conduct background checks on handgun purchasers).

173. 289 U.S. at 458.


175. For instance, before 1938 state employees were constitutionally immune from federal taxes. See *Collector v. Day*, 78 U.S. 113, 128 (1871) (holding that state employees could not be taxed by federal government). But see *Helvering v. Gerhardt*, 304 U.S. 405, 408 (1938) (holding that state employees can be taxed by federal government). Further, before 1937’s famous “switch in time,” Gerald Gunther, *CONSTITUTIONAL LAW* 128–30 (11th ed. 1985), the Court regularly invalidated congressional efforts to regulate local activities on federalism grounds. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 249–50 (1936) (holding that federal maximum hour and minimum wage law for coal industry transcended federal power under Article I of the Constitution); see also *Coyle v. Smith*, 221 U.S. 559, 579 (1911) (holding that state has the authority to locate its capital over federal objection). Of course, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court changed its mind and ceded greater authority to the federal government. 301 U.S. 1, 49 (1937). But Tenth Amendment limitations lived on and continue to be debated. See Nat’l League of Cities v. Usery, 426 U.S. 833, 851–52 (1976) (holding that federal minimum wage and maximum hour law could not be applied to state and local employees); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985) (holding that federal government can force local government to pay minimum wages); *New York v. United States*, 505 U.S. 144, 176 (1992) (holding that federal government cannot force state to take title to low-level radioactive waste); *Printz*, 521 U.S. at 935 (holding that the Tenth Amendment prohibits the federal government from requiring that local law enforcement officers conduct background checks on handgun purchasers).

176. I recognize, of course, that the Court has carved out an exception to the Tenth Amendment’s anti-commandeering principle for state courts. See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that state courts can be forced to entertain federal claims). But this is a far cry from holding that a state executive officer can be forced to accept process from a federal court on behalf of another state agent who allegedly violated the Constitution. Note also that I am
framers of Rule 4(d)(6) did not mimic Rule 4(d)(5)’s service requirement for federal officials because they were not confident they constitutionally could do so.

Of course, we moderns have come to take substitution in Ex parte Young actions and the interchangeability of state officials for granted. But it was not until 1961 that Rule 25(d) was changed to make substitution of public officers (federal, state and local) in “official capacity” actions routine. The advisory committee notes explained that “[t]he expression ‘in his official capacity’ is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment.” Thus, even modern substitution rules genuflect to the structural immunities found in the Constitution.

Obviously, our current notion of Ex parte Young leans more toward “suit against state” than “suit against individual.” This is proved true both by the change in substitution and, as explained in greater detail below, more recent congressional and judicial actions. However, it seems clear that the framers of Rule 4(d)(6) in 1938 understood Ex parte Young actions to proceed against individuals and not states. Whether they believed that Ex parte Young actions had to be treated this way because of the Tenth and Eleventh Amendments is not clear. But what is clear is that Rule 4(d)(6)’s service provision diverged sharply from its federal-sector analog in Rule 4(d)(5). Actions under the logic not arguing that the federal government cannot do so; I am simply pointing out that the question proved more difficult in 1938.

177. FED. R. CIV. P. 25(d) now states:

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer’s successor is automatically substituted as a party. Later proceedings should be in the substituted party’s name, but any misnomer not affecting the parties’ substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

178. See FED. R. CIV. P. 25(d)(2) (1961) advisory committee note. Rule 25(d)(2), also added in 1961, allowed plaintiffs in “official capacity” suits to simply name the defendant by his or her official title. FED. R. CIV. P. 25(d)(2) (1961). The advisory committee notes explained that it was designed “encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution.” FED. R. CIV. P. 25(d)(2) (1961) advisory committee note. Rule 25(d)(2) was moved to Rule 17(d) in 2007. See FED. R. CIV. P. 17(d) (2007) advisory committee note. Rule 17(d) now states that “[a] public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer’s name be added.” FED. R. CIV. P. 17(d).

179. See FED. R. CIV. P. 25(d)(1) (1961) advisory committee note. The notes cautioned that “[e]xcluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets.” Id.
of Lee, and later Larson, required service on the United States.\footnote{180} Analogous actions under \textit{Ex parte Young} did not require service on states\footnote{181}—at least Rule 4(d)(6) did not say so.

\section*{V. The Emergence of Personal Capacity Actions}

Modern suits against state officials in their “individual” or “personal” capacities do not fall under the terms of the Eleventh Amendment.\footnote{182} Though this doctrine did not fully develop until after the Federal Rules of Civil Procedure were put in place, it was clear by 1938 that “personal” suits seeking money damages from government officials were not barred by sovereign immunity.\footnote{183} After all, successful actions for damages come from the pockets of the individual defendants, and because state treasuries are not at stake, neither is the Eleventh Amendment.\footnote{184}

Although passed in 1871, § 1983 played little, if any, part in the early development of this doctrine.\footnote{185} Indeed, § 1983 was rarely used prior to 1961,\footnote{186} when the Supreme Court decided \textit{Monroe v. Pape}.\footnote{187} Like \textit{Ex parte Young} a half a century before, \textit{Monroe} marked a significant change in constitutional litigation.

\textit{Monroe} was a constitutional tort action; the plaintiffs claimed damages under § 1983 based on Chicago police officers having violated the Fourth and Fourteenth Amendments.\footnote{188} The police, for their part, claimed that if the complaint’s allegations were true, they would have not only violated the

\begin{footnotes}
\footnotetext[180]{See United States v. Lee, 106 U.S. 196, 219–20 (1882).}
\footnotetext[181]{\textit{Ex Parte Young}, 209 U.S. 123, 168 (1908).}
\footnotetext[182]{See Hafer v. Melo, 502 U.S. 21, 29–30 (1991) (holding that Eleventh Amendment does not bar personal-capacity suits against state officers).}
\footnotetext[183]{See MOORE & FRIEDMAN, supra note 95, § 4.25, at 331–32 (observing that “actions against a Collector of Internal Revenue to recover a refund of taxes” were personal and required “personal service . . . because a judgment therein becomes a personal liability of the Collector of Internal Revenue”).}
\footnotetext[184]{Of course, states often indemnify or insure their officials, which means that states often choose to pay adverse judgments flowing from personal capacity actions. Because this is voluntary on the state’s part, however, it does not implicate the Eleventh Amendment. See Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 317 n.10 (1990) (Brennan, J., concurring) (“Lower courts have uniformly held that States may not cloak their officers with a personal Eleventh Amendment defense by promising, by statute, to indemnify them for damages awards imposed on them for actions taken in the course of their employment.”).}
\footnotetext[185]{JOHN C. JEFFRIES, JR., ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 42 (2d ed. 2007).}
\footnotetext[186]{Id. (reporting that only twenty-one § 1983 cases were reported between 1871 and 1920, and only a “handful” between 1920 and 1930).}
\footnotetext[187]{365 U.S. 167 (1961).}
\footnotetext[188]{Id. at 168–69.}
\end{footnotes}
Constitution, but also Illinois law.\textsuperscript{189} Hence, they claimed their actions could not be “under color of” Illinois law and they could not be held liable under § 1983.\textsuperscript{190}

The Supreme Court disagreed.\textsuperscript{191} It ruled that even illegal conduct by governmental officials could be “under color of” state law within the meaning of § 1983.\textsuperscript{192} Consequently, local officials—and state officials, too—can be sued for their abusive, even illegal, actions under § 1983 for money damages.\textsuperscript{193} Section 1983’s “under color of” requirement, for the most part, proved coterminal with the Fourteenth Amendment’s “state action” demand.\textsuperscript{194} Monroe opened the doors to personal liability under § 1983 and the Constitution.\textsuperscript{195}

When put in place in 1938, of course, Rule 4 could not have anticipated the development of “personal capacity” constitutional actions. While state\textsuperscript{196} and federal\textsuperscript{197} officials had sometimes been held liable in money damages in federal court prior to the adoption of the Federal Rules of Civil Procedure for illegally or unconstitutionally collecting taxes, state and federal officers rarely were held personally liable in damages for other kinds of what might be called “governmental” wrongs.\textsuperscript{198} Constitutional actions against state and federal

\begin{itemize}
\item \textsuperscript{189} Id. at 172.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Id. at 187.
\item \textsuperscript{192} Id. at 172.
\item \textsuperscript{193} Monroe, 365 U.S. at 172 (1961).
\item \textsuperscript{194} See Home Tele. & Tele. v. City of L.A., 227 U.S. 278, 288–89 (1913).
\item \textsuperscript{195} See \textit{Brown} \& \textit{Kinports}, supra note 148, at 13.
\item \textsuperscript{196} See Ann Woolhandler, \textit{The Common Law Origins of Constitutionally Compelled Remedies}, 107 \textit{Yale L.J.} 77, 135 (1997) (“Litigants early in this century continued, with Supreme Court approval, to pursue actions at law in federal courts against [state] collectors who had collected unconstitutional taxes.”).
\item \textsuperscript{197} See, e.g., Ignelzi v. Granger, 16 F.R.D. 517, 518 (W.D. Pa. 1955); see also \textit{Moore} \& \textit{Friedman}, supra note 95, § 4.25, at 331.
\item \textsuperscript{198} See Fed. R. Civ. P. 25(d) (1961) advisory committee note (observing that “actions which are directed to securing money judgments against the named officers enforceable against their personal assets” were “relatively infrequent”). Federal agents were generally shielded from suits for damages for wrongs committed in the scope of, or on the outside perimeters of, their employment. \textit{See} 28 U.S.C. § 2679(b)(1) (2006) (shielding federal agents from suit for “negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment”); \textit{see also} Paul Friederic Kirgis, \textit{Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation,} 47 Am. U. L. Rev. 301, 314 (1997); James E. Pfander \& Jonathan L. Hunt, \textit{Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic,} 85 N.Y.U. L. Rev. 1862, 1864 n.7 (2010) (“Earlier decisions recognized privileges from tort liability [for federal officials] based on the common law.” (citing Barr v. Matteo, 360 U.S. 564, 570 (1959)); Gregoire v. Biddle, 177 F.2d 579, 580 (2d Cir. 1949) (extending absolute immunity to Attorney Generals in suit for false arrest and malicious prosecution). No federal statutory vehicle other than 42 U.S.C. § 1983, meanwhile, supported actions against state officers, and as noted previously, it was moribund
officers instead sought prospective relief under the models of *Ex parte Young* and *Lee*, which were themselves understood at that time to be “personal” in nature.

For this reason, the framers of the Federal Rules had no reason to distinguish “personal capacity” suits from “official capacity” actions. Neither term was used in 1938. Rather, the distinction seems to have first emerged in 1961, the same year *Monroe v. Pape* was handed down,¹⁹⁹ when Rule 25(d) was amended to authorize automatic substitution of public officers sued in their “official capacity.”

In the wake of *Monroe*, lower courts uniformly held that Rule 4’s requirements for serving governmental entities did not apply to personal capacity actions: “Where money damages are sought from a public official in his individual capacity, . . . the plaintiff must proceed under the terms of Rule 4(d)(1) and effect personal service.”²⁰⁰ This practice was extended to federal officers²⁰¹ following *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which in 1971 created an analogous personal-capacity action for

---


²⁰⁰. Micklus v. Carlson, 632 F.2d 227, 240 (3d Cir. 1986). In so holding, *Micklus* pointed to *Stafford v. Briggs*, which ruled that the broad reach of the federal venue statute for official-capacity actions did not apply to personal-capacity actions against federal agents. 444 U.S. 527, 544 (1980); see also Santiago v. N.Y. Dep’t of Corr. Servs., 725 F. Supp. 780, 785 (S.D.N.Y. 1989) (holding that Rule 4(d)(1) applied to defendant sued in individual capacity); Smith v. Ellington, 348 F.2d 1021, 1022–23 (6th Cir. 1965) (holding that governor was entitled to service under Rule 4(d)(1) in § 1983 action for damages); Bell v. Hosse, 31 F.R.D. 181, 185 (M.D. Tenn. 1962) (holding that local police officers sued under § 1983 for damages must be served as individuals under Rule 4(d)(1) or Rule 4(d)(7)); Red Elk v. Stotts, 111 F.R.D. 87, 87 (D. Mont. 1986) (holding that county officials in damage action were subject to Rule 4(d)(1) and also alternative service by mail); U.S. ex rel. Wood v. Blacker, 335 F. Supp. 43, 44 (S.D.N.J. 1971) (“Even though the acts complained of may have been committed by defendants in their official capacity, a recovery under 42 U.S.C. § 1983 runs against the official himself in his private capacity and not against the Government. Since the defendants are being sued in their private capacity, service of process was sufficient under Rule 4(d)(1) . . .”).

²⁰¹. See, e.g., Lewellen v. Morley, 909 F.2d 1073, 1074 (7th Cir. 1990). Cf. Puett v. Blandford, 895 F.2d 630, 635–36 (9th Cir. 1990) (stating that in a *Bivens* action, service must be accomplished under Rule 4(d)(5) and requires both personal service and service on the United States).
damages in the federal sector. Individual service was found to be implicit in personal-capacity actions seeking money damages, whether against federal, state or local officials.

While the 1983, 1991, and 1993 amendments to the Federal Rules of Civil Procedure left intact the basic rules for serving federal and state governments, and the Federal Rules have never specifically mentioned how to serve state and local officials sued in either their personal or official capacities, the Federal Rules were amended to address questions raised by Bivens. Specifically, in 2000 a new Rule 4(i)(2)(B), later to become Rule 4(i)(3), was added, it stated that federal officials “sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf (whether or not the officer or employee is also sued in an official capacity)” are to be served personally “under Rule 4(e), (f), or (g).” The same rule also provides that the United States, too, must be served. This new rule made clear—if there were ever any doubt—that in Bivens-type actions, individual service, as well as service on the United States, is required.

203. See Shoshone-Bannock Tribes v. Fish & Game Comm’n, 42 F.3d 1278, 1284 (9th Cir. 1994).
204. The Ninth Circuit in Doran v. Roberts-Murray, for example, observed:

Proper service on the United States is accomplished ‘by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney . . . and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. . . .’ No. 89-56217, 1991 WL 42940, at *1 (9th Cir. Mar. 28, 1991) (quoting FED. R. CIV. P. 4(d)(4) (1983)). Meanwhile, “Federal Rule 4(d)(5) provides that if the defendant is an officer or agency of the United States, service must be effectuated by ‘serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.’” Puett v. Blandford, 895 F.2d 630, 635–36 (9th Cir. 1990) (footnote omitted) (quoting FED. R. CIV. P. 4(d)(5) (1983)). Courts, moreover, continued to abide by the distinction between personal and official capacity suits. See, e.g., Johnston v. Horne, 875 F.2d 1415, 1424 (9th Cir. 1989) (holding that in Bivens actions, Rule 4(d)(1) must be complied with).

206. FED. R. CIV. P. 4(i)(3).
207. Id.
208. See FED. R. CIV. P. 4(i) (2000) advisory committee note. (“Paragraph (2)(B) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a
VI. MODERN DEVELOPMENTS IN OFFICIAL-CAPACITY LITIGATION

Since Monroe v. Pape in 1961, the Supreme Court has routinely sought to harmonize § 1983’s reach with the terms of the Eleventh Amendment. While § 1983 has swallowed the great bulk of constitutional litigation against states, municipalities, and government officials, its statutory reach has been interpreted to perfectly preserve Eleventh Amendment doctrine. Perhaps most important among these harmonizing opinions is Edelman v. Jordan, which ruled that although § 1983 was enacted under Congress’s power to enforce the terms of the Fourteenth Amendment, it was not intended to override the Eleventh Amendment. Thus, while Ex parte Young actions under § 1983 can proceed against state officials for prospective relief, § 1983 suits against states by name remain barred from federal court by the Eleventh Amendment.

The Court went so far as to write the Eleventh Amendment into § 1983 in Will v. Michigan Department of State Police, a state-court action for damages under § 1983 against an arm of the state. The action plainly could not be brought in federal court because of the Eleventh Amendment; the question was whether it could be brought in state court. The Supreme Court in Will drew a direct line between § 1983 actions in state and federal court; neither is proper because, the Court concluded, states are not “persons” “subject to suit” under § 1983. Nor do state officials qualify as suitable defendants under § 1983 when sued in their official capacities for money damages. In contrast, personal-capacity suits against state officials are proper under § 1983, as are

requirement that is made explicit.” (citations omitted)). This requirement was later moved in 2007 to Rule 4(i)(3). See Mathies v. Silver, 2011 WL 2293312, at *5 n.7 (D.N.J. June 8, 2011) (noting that “the 2007 amendments to the Federal Rules of Civil Procedure redesignated Rule 4(i)(2)(B) as Rule 4(i)(3). Both versions of the rule require service of individual defendants as well as the United States when a plaintiff sues federal employees or officers in their individual capacity.”). Because officials under these circumstances must be served under Rule 4(e), (f) or (g), Rule 4(d)’s waiver provision applies to their service. See FED. R. CIV. P. 4(i), (2000) advisory committee note (“Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).”).


210. See id. at 675–77.

211. 491 U.S. 58, 63–64 (1989).

212. Id.

213. Id. at 71 (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983.”).

214. Id. (“Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself.” (citation omitted)).
official-capacity suits seeking only prospective relief from state officials under the logic of *Ex parte Young*. 215

The path from *Ex parte Young* to *Will* (and beyond) was not without its bumps. Following the rise of personal-capacity actions in the 1960s and Congress’s addition of fee-shifting in 1976, 216 the distinction between official- and personal-capacity suits, in the words of Justice Marshall, “confuse[d] lawyers and confound[ed] lower courts.” 217 Consequently, the Court was forced to take several stabs at clearing up the confusion.

The Court’s initial effort came in *Hutto v. Finney*, an official-capacity action against state officers under § 1983 challenging prison conditions. 218 The question put to the Court was who, the officers or the state, was responsible for paying costs and attorney’s fees under 42 U.S.C. § 1988. 219 The Court ruled that the state was responsible, even though it was not a named defendant:

Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began. 220

Further, the Court observed, Congress

recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney’s fee awards should generally be obtained “either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).” 221

In response to the claim that the named defendants should pay, rather than the state, the Court responded that “[t]his is manifestly unfair when, as here, the

---

215. *Id.* at 71 n.10 (“Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’ This distinction is ‘commonplace in sovereign immunity doctrine,’ and would not have been foreign to the 19th-century Congress that enacted § 1983.” (citations omitted)). Because the conclusions in *Will* became part of the statute, they apply to state court as well as federal court. Their statutory nature also obviated the problem of state waiver. States cannot waive the protections glued into § 1983. *See* Lapides v. Board of Regents, 535 U.S. 613 (2002). They cannot agree to be sued under § 1983 in federal (or state) court; the action simply does not exist.


219. *Id.* at 680–81.

220. *Id.* at 699.

individual officers have no personal interest in the conduct of the State’s litigation." 222

Seven years later, in *Brandon v. Holt*, the Court sorted through what it means to sue a local official in his official capacity when the relief sought is money damages. 223 Because local governments, unlike states, are subject to suit under § 1983 224 and are not protected by the Eleventh Amendment, 225 the question centered on whether a municipal employer could be held responsible for a § 1983 damage award rendered against one of its employees in his official capacity. 226 Relying in part on *Hutto*, the Court concluded that, “a judgment against a public servant ‘in his official capacity’ imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond.” 227 By adding this proviso, the Court suggested an understanding that in official-capacity suits against local officers, at least, the governmental employer would not be served. 228 After all, if they were required to be served under Rule 4 in the first instance, municipalities would always have notice and an opportunity to respond. 229

---

222. Id. at 699 n.32.
225. See Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).
226. Brandon, 469 U.S. at 465.
227. Id. at 471–72 (emphasis added). The Court in *Brandon* reiterat ed that that “official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.” Id. at 472 n.21 (quoting Monell, 436 U.S. at 690 n.55 (1978)).
228. See id. at 472 n.20.
229. In contrast, the United States government offered a different view. In joining as amicus curiae to support the governmental Petitioners in *Brandon*, the United States suggested its understanding that service of process in official-capacity suits against municipalities was governed by what was then Rule 4(d)(6), rather than Rule 4(d)(1), which governed individual service:

    Procedural requirements that differ according to whether the suit is brought against an officer in his official or personal capacity may also be determinative of the outcome of litigation. A court may lack jurisdiction over a defendant officer in his personal capacity because of failure to effectuate personal service of process in accordance with Rule 4(d)(1) . . . , although the officer sued in his official capacity would have been adequately served by registered or certified mail or by service upon a legally designated representative in accordance with Rule 4(d)(4) through (6). The nationwide venue available to plaintiffs in actions against government officers in their official capacities similarly cannot be invoked when a plaintiff seeks to hold the officer liable as an individual. Like the automatic-substitution provision of Rule 25(d)(1), the service and venue provisions applicable to official-capacity damages suits make sense only if such actions are construed as seeking judgments running against the government.

    Brief for the United States as Amicus Curiae Supporting Petitioners at 4, *Brandon*, 469 U.S. 464 (No. 83–1622), 1984 WL 565759 at *7 (citations omitted). It may be that the United States’ familiarity with service on federal officers sued in their official capacities led it to assume that a similar requirement existed under Rule 4(d)(6). Alternatively, it may be that by 1985, the split
That same year, in *Kentucky v. Graham*, a § 1983 suit for damages against a state official “individually and as Commissioner,” the Court put *Hutto* and *Holt* together to rule that success in a personal-capacity action against a state officer cannot support an attorney’s fee award against his state employer: “[U]nless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense.”

In explaining the differences between official- and personal-capacity suits, much of the Court’s language in *Graham* focused on the former: “Official-capacity suits . . . ’generally represent only another way of pleading an action against an entity of which an officer is an agent.’” It continued:

> As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official’s personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Still, the Court in *Graham* harkened back to *Ex parte Young* and reiterated that the “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.”

*Graham* did not clear away all the confusion surrounding official-capacity actions. Indeed, *Will*’s holding four years later only seemed to further complicate the distinction between personal- and official-capacity suits. Some lower courts even went so far as to hold that when state officers were

231. *Id.* at 167–68.
232. *Id.* at 165–66 (quoting *Monell*, 436 U.S. at 690 n.55).
233. *Id.* at 166 (citing *Brandon*, 469 U.S. at 471–72). The Court further noted:

> Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent’s estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official’s successor in office.

*Id.* at 166 n.11.
234. *Id.* at 167 n.14 (citing *Ex parte Young*, 209 U.S. 123 (1908)).
sued for “official” wrongs—that is, wrongs committed within the scope of their authority—they could not, according to Will, be sued under § 1983.236

The Supreme Court took up this problem in Hafer v. Melo, a personal-capacity action filed against a state officer under § 1983.237 The plaintiffs alleged that Hafer had unconstitutionally discharged them under color of state law—one of § 1983’s basic requirements238—and was therefore liable to them in damages.239 The question put to the Supreme Court was “whether state officers may be held personally liable for damages under § 1983 based upon actions taken in their official capacities.”240

The Court’s unanimous answer was hardly surprising: of course they can.241 Liability, the Court explained, turns on the capacity in which the officer is sued, not on the capacity in which she acts.242 Other than that, however, the Court’s holding added little additional clarity to the distinction between personal- and official-capacity actions. It reiterated its prior holdings that personal-capacity suits against state officials for damages are proper under § 1983,243 and once again stated that “[s]uits against state officials in their official capacity therefore should be treated as suits against the State.”244 Quoting Will, it added that “an official-capacity suit against a state officer ‘is not a suit against the official but rather is a suit against the official’s office . . . it is no different from a suit against the State itself.’”245 As far as injunctive relief is concerned, the Court in Hafer, once again quoting Will, noted that “a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’”246

***

Hutto, Holt, Graham and Hafer evidence the modern confusion that surrounds official-capacity suits.247 Since the emergence of personal-capacity damage actions in the 1960s and 1970s, what we now call official-capacity

---

236. E.g., Cowan v. Univ. of Louisville Sch. of Med., 900 F.2d 936, 942 (6th Cir. 1990); Rice v. Ohio Dep’t of Transp., 887 F.2d 716, 719 (6th Cir. 1989), vacated, 497 U.S. 1001 (1990).
239. Hafer, 502 U.S. at 23.
240. Id. at 24.
241. Id. at 31.
242. Id. at 27–28.
243. Id. at 27 (“[O]fficers sued in their personal capacity come to court as individuals.”).
244. Id. at 25.
246. Id. at 27 (quoting Will, 491 U.S. at 71 n.10).
suits under *Ex parte Young* have become more like suits against states. Consequently, automatic substitution in official-capacity actions for prospective relief is now routine under Rule 25(c); attorney’s fees are the responsibility of states in official-capacity actions seeking prospective relief; and states are expected to absorb the cost of official-capacity suits that proceed under the logic of *Ex parte Young*.

Still, the Court’s holdings have continued to embrace *Ex parte Young*’s central premise—that suits against state officers are not at their inception, and cannot be consistent with the Eleventh Amendment, suits against states. And notwithstanding sporadic adjustments to the Federal Rules drawing distinctions between “personal” and “official” capacity actions—Rule 5.1(a), for example, authorizes state intervention in personal-capacity, but not official-

---

248. See *supra* notes 177–79 and accompanying text.
249. See *supra* notes 218–22 and accompanying text.
250. See *supra* notes 223–29 and accompanying text.
251. Rule 5.1(a), added in 2006, authorizes state intervention whenever the constitutionality of a state statute is called into question and neither “the state, one of its agencies, or one of its officers or employees in an official capacity” is a party. *Fed. R. Civ. P.* 5.1(a)(1)(B) (emphasis added). The same right is afforded the United States government. See *Fed. R. Civ. P.* 5.1(a)(1)(A). Because of Rule 5.1(a), it now seems clear (if it was not before) that states need not be jointly served in personal capacity actions against their officials. Lower courts have never ruled that states are, like the federal government, entitled to joint service, and Rule 5.1(a) seems to provide that, at most, states in personal capacity suits for damages are to only be provided an opportunity to intervene—at least when the constitutionality of a state statute is at stake. Rule 5.1(a) extends intervention rights that were statutorily awarded in 1948 and 1976, respectively, to the federal and state governments. See 28 U.S.C. § 2403 (2006). Congress passed this law in 1948 to require that notice and a right to intervene be given to the United States Attorney General “[i]n any action . . . to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question.” *Id.* § 2403(a). Before that, Rule 24(c) in 1938, in order to implement § 2403’s precursor, stated along these same lines that “[w]hen the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, § 1.” *Fed. R. Civ. P.* 24(c) (1938); see 28 U.S.C. § 2403 historical note (2006). Section 2403 was extended to states in 1976, so whenever “the constitutionality of any statute of that State affecting the public interest is drawn in question” and the “State or any agency, officer, or employee thereof is not a party,” the state can intervene. Act of August 12, 1976, Pub. L. No. 94-381, § 5, 90 Stat. 1120 (codified as 28 U.S.C. § 2403 (2006)). In 1991, Rule 24(c) was amended to reflect this statutory change. See *Fed. R. Civ. P.* 24(c) (1991) advisory committee note; see also Caprio v. Bell Atl. Sickness & Accident Plan, 374 F.3d 217, 220 (3d Cir. 2004). Rule 5.1(a) resulted by relocating Rule 24(c)’s requirements. The new Rule 5.1(a) also expanded Rule 24(c)’s terms, as well as those found in 28 U.S.C. § 2403(b), which were limited to statutes that affected the public interest. See *Fed. R. Civ. P.* 5.1(a). Rule 5.1(a) goes beyond this “by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those ‘affecting the public interest.’” *Fed. R. Civ. P.* 5.1 (2006) advisory committee note. One might also argue that Rule 5.1(a) is more limited, since Rule 24(c) did not exclude official capacity suits.
capacity, actions—Rule 4’s state service requirements have remained unchanged.\footnote{One can argue that Rules 24(c) and 5.1(a) support reading Rule 4(j) to require service on states when their officers are sued in their official capacities. The argument would proceed along the lines that Rule 5.1(a) assumes in official-capacity actions that states are already parties to the proceedings. The argument is facially appealing, but in the final analysis is not overly convincing. Rule 5.1(a) is limited to cases where state statutes are challenged—a small fraction of the universe of personal capacity claims. In cases where state statutes “affecting the public interest” are challenged, moreover, 28 U.S.C. § 2403 already allows states to intervene—whether it is a personal or official capacity action. Further, Rule 5.1(c) provides the same intervention right to the federal government, even though Rule 4(j) now comprehensively requires service on the federal government in both personal and official capacity actions. Rule 5.1(a), then, does not do much more than extend the intervention rights of the federal government to states in a limited range of cases. Rule 5.1(a) would therefore seem to have limited value even under its own terms. Reading into Rule 5.1(a) an implicit intent to alter Rule 4’s service requirements is accordingly unwarranted. The framers of Rule 5.1(a) simply recognized what we moderns now know about constitutional litigation—states, like the federal government, defend official capacity actions. Rule 5.1(a)’s language builds on this reality. It does not project the certainty that should be required to amend Rule 4. In response to the suggestion that Rule 5.1(a) merely codifies the original understanding that Rule 4 requires service on states in official capacity settings, one need only point to history. There is no evidence that Rule 4(d)(6) was originally understood to cover official capacity actions. Rather, the notion that it covers official capacity actions is a modern one, first emerging in 1986. More likely, Rule 5.1(a) was added to clarify the Supreme Court’s more recent efforts to reconcile § 1983 with the Eleventh Amendment. States today “officially” defend official capacity actions because they understand the risks of not doing so. Premier among these is the risk of shifted attorney’s fees, which the states will have to cover should an agent, sued in his or her official capacity, lose the lawsuit.} 252

Rule 4’s treatment of states has stood the test of time. It has not materially changed since 1938. Given the emergence of personal-capacity suits, the importance of official-capacity suits, the continued relevance of the Eleventh Amendment under \textit{Ex parte Young}, and explicit changes in the modern-day Rules for serving federal officials, it would be odd to conclude that Rule 4’s service requirements for states and their officers have been implicitly altered by the Court’s holdings in \textit{Hutto}, \textit{Holt}, \textit{Graham}, and \textit{Hafer}.\footnote{I have deliberately avoided discussing suits against local governments and their officials. Local governments are not protected by the Eleventh Amendment, \textit{Lincoln Cnty. v. Luning}, 133 U.S. 529, 530 (1890), and can be sued by name under § 1983, \textit{Monell v. N.Y. Dep’t of Soc. Servs.}, 436 U.S. 658, 690 (1978). It is not clear, moreover, whether the logic of \textit{Ex parte Young} extends to suits against municipalities. See \textit{L.A. Cnty. v. Humphries}, 131 S. Ct. 447, 453–54 (2010) (holding that the limitations found in \textit{Monell} apply to equitable actions against municipalities). It may be, then, that a better argument can be made for requiring service on local governments under Rule 4 when their agents are sued in their official capacities. When municipalities are sued by name under § 1983, of course, courts have had no difficulty requiring institutional service of process under old Rule 4(d)(6) and new 4(j)(2). See, e.g., \textit{Norlock v. City of Garland}, 768 F.2d 654, 658 (5th Cir. 1985) (holding that city should be served under old Rule 4(d)(6)); \textit{Cambridge Mut. Fire Ins. Co. v. City of Claxton}, 720 F.2d 1230, 1232 (11th Cir. 1983) (holding the same); \textit{Amen v. City of Dearborn}, 532 F.2d 554, 558 (6th Cir. 1976) (holding the}
CONCLUSION

The original understanding of Rule 4 seems clear. State officers sued under *Ex parte Young* were expected to be served as individuals. The same held for federal officers sued under *Lee* and *Larson*, notwithstanding that Rule 4 also expressly required service on the United States. Indeed, the practice of serving federal officers as individuals was so strong that courts continued to require it even though Rule 4’s language arguably did not demand it, and it sometimes caused debilitating jurisdictional problems.254

The framers of Rule 4 understandably questioned their constitutional capacity to force states, as states, to accept service of process in matters where they otherwise enjoyed Eleventh Amendment immunity. Given that the Eleventh Amendment offers immunity from *suit*, they must have questioned whether a state could be forced to take the affirmative steps necessary to initiate litigation in a case to which it was not properly made a party. The Tenth Amendment only complicated things. It was by no means clear in 1938 that the federal government could commandeer a state executive officer and force him to accept service of process for wrongs perpetrated by another state agent.255 Consequently, the framers of Rule 4 left in place the common practice of serving officers as individuals.


254. *See supra* Part II.

255. *See supra* notes 153–59 and accompanying text. Could Rule 4 be changed to require service on states? Would it violate the Eleventh Amendment? Would it violate the Tenth? With the modern evisceration of most of *Ex parte Young*’s justification and changes in our understanding of the Tenth Amendment, one suspects that the federal government could constitutionally require that states accept service of process in official-capacity suits filed under the reasoning of *Ex parte Young*. After all, the Federal Rules already demand that state officers be automatically substituted. Section 1988(b) has been interpreted to require that states pay litigation costs and attorney’s fees when their officials are sued in this manner. Accepting process in the first instance is not that much different. But the decision should be a conscious one. Changing the historical understanding of Rule 4’s service requirements for state officers in *Ex parte Young* actions should be clear and express, as opposed to implicit in other procedural developments.
This historical practice of serving state officers as individuals under Rule 4 must have been known to Congress in 1983 when it added the service-by-mail alternative. No reported decision up to that time ruled to the contrary.\(^{256}\) Rule 4’s language prescribing service on only states “subject to suit” was unchanged. Further, by 1983 Congress was already firmly behind using mail to serve federal officials, a practice that would only be extended by the Judicial Conference in coming years. It therefore should not seem odd that Congress in 1983 intended its service-by-mail alternative to be available in actions filed under the logic of *Ex parte Young*.

By the time the Judicial Conference clarified the service-by-mail alternative in 1993, a handful of lower courts had begun requiring that § 1983 plaintiffs serve states in official-capacity actions.\(^{257}\) However, the 1993 changes to Congress’s original service-by-mail option did not mention this development, nor did the advisory committee notes accompanying the clarifications. There is no reason to believe then that the Judicial Conference in 1993 meant to change Rule 4’s basic service requirements. Nor is there convincing proof that the Judicial Conference in 1993 meant to exclude official-capacity actions filed against state officers from Rule 4’s service-by-mail alternative. The most that can be said is that the framers of Rule 4’s service-by-mail alternative did not want it applied in suits against *states*. But as outlined in this Article, official-capacity actions against state officers have not historically been treated as suits against states for purposes of service of process.

---

256. *See supra* notes 136–38 and accompanying text.
257. *See supra* notes 59–62 and accompanying text.