

1990

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Recommended Citation

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San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino: Constitutionally Protected Public Contract Property Interests Under 42 U.S.C. Section 1983

In 1980, San Bernardino Physicians' Services Medical Group ("the Group"), a California professional corporation, contracted with the San Bernardino County Board of Supervisors to provide professional emergency room, burn-care, and surgical services to the county-operated hospital.¹ In May 1981, the county breached the contracts by harassing the Group's employees, attempting to terminate the contracts prematurely, and systematically impeding the Group's practice.² The Group sued the county and the Board of Supervisors in federal court under 42 U.S.C. section 1983³ alleging that the county had de-

1. *San Bernardino Physicians' Servs. Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1405-06 (9th Cir. 1987).

2. *Id.* at 1406.

3. 42 U.S.C. § 1983 (1982). 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Anyone whose constitutional rights have been violated by persons acting under color of state law has a cause of action under § 1983. E. CHEMERINSKY, *FEDERAL JURISDICTION* 370 (1989). Section 1983 thus provides a vehicle for most suits in federal courts against local governments and state and local government officials to rectify violations of federal law. *Id.* at 369. State governments may not be sued under § 1983 because of eleventh amendment immunity. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979); *see also infra* note 20. Although § 1983 creates a federal cause of action, it does not directly confer federal court jurisdiction. Federal court jurisdiction derives from 28 U.S.C. § 1331 (1982) and 28 U.S.C. § 1343(a)(3) (1982 & Supp. V). *Id.* at 370.

Following the Civil War, endemic violence against blacks led Congress to enact the Civil Rights Act of 1871, § 1 of which is currently embodied in § 1983. E. CHEMERINSKY, *supra*, at 373. The Supreme Court, in summarizing the legislative history of the Act, has concluded that the Act was intended to provide a federal guarantee of "the basic federal rights of individuals against

prived the Group of property without due process.⁴ Determining that a government contract, without more, could not create a constitutionally protected interest, the district court granted summary judgment for the county.⁵ In *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*,⁶ the Ninth Circuit, while acknowledging that some government contracts can create constitutionally protected property interests,⁷ held that the Group did not possess a constitutionally protected property right because the Group's employees did not hold the professional service contracts individually.⁸ In effect, based on its concern for avoiding "federalizing" all breach of contract cases involving governments, the Ninth Circuit determined that corporate public contracts are not entitled to constitutional protection, and thus imposed a new, unique, and questionable limitation on the scope of section 1983 actions.⁹

This Comment argues that the restrictions on the use of section 1983 imposed by *San Bernardino Physicians'* are ill-founded and largely unnecessary. In light of recent Supreme Court decisions, existing mechanisms for screening and deciding section 1983 claims are sufficient, and the Ninth Circuit's distinction disadvantaging corporate public contract property interests is unwarranted. Part I explains the development and limitations of the concept of "protected property" as used in section 1983 litigation. Part II details and analyzes the *San Ber-*

incursions by state power." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982).

Section 1983 has not been used extensively until recently. E. CHEMERINSKY, *supra*, at 375. The Supreme Court decision in *Monroe v. Pape* expanded application of § 1983 to provide a federal cause of action to plaintiffs who alleged that municipal officers, acting under color of state law, deprived them of constitutionally protected rights. 365 U.S. 167, 171-87 (1961); *see also infra* note 20. Since *Monroe*, the number of § 1983 cases has increased significantly. *See* E. CHEMERINSKY, *supra*, at 375 (discussing the "phenomenal" increase in the number of § 1983 suits since 1961); *see also infra* note 23.

4. *San Bernardino Physicians'*, 825 F.2d at 1406 (discussing unpublished district court opinion).

5. *Id.*

6. *Id.*

7. The Ninth Circuit recognized that the district court's conclusion that "contractual rights alone cannot create property interests protected by the Due Process Clause" was "contrary to federal and state decisions holding that contracts may create protected property interests." *Id.* at 1407.

8. *Id.* at 1409-10.

9. The court characterized its approach as requiring "a determination that Physicians' Groups' supply contracts are fundamentally different from tenured employment contracts, which are protected by a due process requirement of predeprivation hearing." *Id.* at 1410 n.7.

San Bernardino Physicians' decision. Part III evaluates the *San Bernardino Physicians'* decision in light of existing precedent and federalism concerns. Part IV recommends that courts employ existing mechanisms for resolving section 1983 claims rather than adopting the *San Bernardino Physicians'* test.

I. "PROTECTED" PROPERTY UNDER SECTION 1983:
DEVELOPMENT OF A LIMITED CONCEPT

A. TOWARD A DEFINITION OF PROTECTED PROPERTY

1. Inception and Development of "Constitutionally Protected Property"

The United States Supreme Court introduced the concept of a statutory entitlement as a form of constitutionally protected property in *Goldberg v. Kelly*.¹⁰ After finding that welfare benefits constituted a protected property interest,¹¹ the Court held that procedural due process rights depend on the balance between the beneficiary's interest and the government's interest.¹² The *Goldberg* decision expanded the possibility for due process clause litigation based on deprivation of entitlements.¹³

10. 397 U.S. 254 (1970). The fourteenth amendment prohibits governmental actions that deprive "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Persons subject to such deprivation are entitled to a "fair procedure to determine the basis for, and legality of, such action." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 452 (3d ed. 1986). The Supreme Court has interpreted this need for procedural due process as requiring "some kind of prior hearing." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). In determining whether due process requirements apply, courts first must ascertain whether constitutionally protected interests have been affected. *Id.* at 570-71.

11. In *Goldberg*, the Court did not specifically define or limit what constitutes a statutory entitlement.

12. The *Goldberg* Court, having found an entitlement (an issue not contested in the case), concerned itself with determining what process, if any, was due the appellant. 397 U.S. at 260-63. The Court stated: "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Id.* at 262-63.

13. The Court recognized in *Goldberg* that a statute can create a constitutionally protected right to a government benefit. *Id.* at 262. Although the Court did not explicitly classify such a "statutory entitlement" as property, this recognition created a completely new class of property entitled to due process protection. *Id.* at 262-63. Later, in *Board of Regents v. Roth*, the Court acknowledged that a statutory entitlement to a government benefit is a prop-

Courts subsequently have found constitutionally protected property interests in diverse circumstances: an interest in renewing a liquor license,¹⁴ a contractor's right to timely payment for work performed under a contract with a state agency,¹⁵ the certification of minority business enterprise status,¹⁶ a driver's license,¹⁷ and medical staff privileges at a county hospital.¹⁸ In

erty interest for due process purposes by citing *Goldberg* as an example of a protected property interest. 408 U.S. 564, 577 (1972).

14. *Reed v. Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983). In *Reed*, the plaintiffs held a municipal annual liquor license that was rescindable only for cause. Municipal officials, without a prior hearing, refused to renew the license and decreased the number of available licenses to deny plaintiffs a license. *Id.* at 947. In determining that the plaintiffs possessed a constitutionally protected property interest in their liquor license, the court defined constitutionally protected property as "what is securely and durably yours under state (or as in *Goldberg*, federal) law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Id.* at 948.

15. *Signet Constr. Corp. v. Borg*, 775 F.2d 486, 489 (2d Cir. 1985). A construction company brought a § 1983 action in *Signet*, alleging that city officials withheld contract payments without providing a prior hearing. *Id.* In assessing the claim, the court determined that the contractor's right to timely payment for work performed under its contract was a constitutionally protected property interest. *Id.*

16. *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667, 676-77 (7th Cir. 1987). In *Baja*, a contractor filed a § 1983 claim against a city and city officials alleging that they denied the contractor Minority Business Enterprise (MBE) certification without due process. *Id.* at 667. The city previously had certified the contractor as a concrete contractor under the city's MBE program, and at that time the city did not distinguish between concrete suppliers and concrete contractors. *Id.* at 671. The court invoked the definitions of property employed in *Roth* and *Reed* and found that the contractor had established a reasonable likelihood of having a property interest. *Id.* at 676-77. The court determined that the city's action to limit the scope of plaintiff's MBE certification to a concrete contractor, as differentiated from a concrete supplier, constituted deprivation of a protected property interest. *Id.*

17. *Bell v. Burson*, 402 U.S. 535, 539-40, 542 (1971). *Bell*, an uninsured motorist involved in an accident, could not post security for the damages and had his driver's license suspended in accordance with state statute. The statute prohibited any consideration of fault or responsibility at presuspension hearings. *Id.* at 536-38. The Supreme Court held that the state could not suspend a driver's license, once issued, without adequate due process involving consideration of the driver's fault or liability for the accident. *Id.* at 539-40, 542.

18. *Northeast Ga. Radiological Assoc., P.C. v. Tidwell*, 670 F.2d 507, 511 (5th Cir. 1982). In *Tidwell*, a radiologist and his professional corporation filed a § 1983 claim against a county hospital authority, alleging deprivation of due process when the hospital authority terminated the radiologist's staff privileges and the corporation's contract. *Id.* at 509-10. The court found that "[t]he contract, incorporating the medical staff by-laws, and the by-laws *per se*, established 'the existence of rules or mutually explicit understandings,' . . . and sustained appellants' claim to a protected property interest." *Id.* at 511 (quoting *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)).

a state requiring the award of a government contract to the low bidder, a federal district court has found that the low bidder has a protected property interest.¹⁹

Until 1978, the definition of "persons" subject to section 1983 actions excluded municipalities.²⁰ In *Monell v. Department of Social Services*,²¹ however, the Court reversed itself and expanded the applicability of section 1983 to include municipalities as "persons."²² Since *Monell*, section 1983 litigation has

19. *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1131 (W.D. Pa. 1980). The *Three Rivers* court found that the lack of nonarbitrary governmental discretion in awarding a contract gave the low bidder a protectible property interest. *Id.* at 1131. The court based its reasoning on *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and *Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980) (en banc). *Id.* at 1129-31. In these two cases, prison inmates seeking parole or discretionary work release sought to establish a liberty interest arising from state statutes that prescribed the procedure and criteria for parole or release. *Id.* at 1129-30 (discussing *Greenholtz* and *Winsett*). The Court in *Greenholtz* determined that the "expectancy of release provided in [the] statute is entitled to some measure of constitutional protection." *Greenholtz*, 442 U.S. at 12. In *Winsett*, the court found a liberty interest arising from the Delaware statute and regulations specifying criteria for work release. *Winsett*, 617 F.2d at 1007. The court in *Three Rivers* accordingly determined that statutes and regulations prescribing the award of the cablevision contract to the "lowest responsible bidder" conferred a protected property interest on the lowest responsible bidder in compliance with the contract specifications. *Three Rivers*, 502 F. Supp. at 1131.

20. Not all governmental entities are "persons" for purposes of § 1983 liability. Section 1983 may not be used to bring an action against state governments in federal court. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (holding that § 1983 does not override state eleventh amendment immunity). In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court held that the provisions of § 1983 did not apply to municipalities. "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." *Id.* at 187. The Court, however, did permit § 1983 suits against municipal officials. *Id.* at 192. *Monroe* provided, for the first time, a federal cause of action to plaintiffs who alleged that municipal officers, acting under color of state law, deprived them of constitutionally protected rights. *Id.* at 171-87. Like municipal officers, federal and state officers may be sued under § 1983. However, federal, state, and municipal officers may be accorded some degree of immunity from suit depending upon the circumstances. See E. CHEMERINSKY, *supra* note 3, at § 8.6 (discussing the applicability and circumstances of government official immunity).

21. 436 U.S. 658 (1978).

22. In *Monell*, female employees of the New York City Department of Social Services and the Board of Education sued the Department and its Commissioner, the Board and its Chancellor, and the City of New York and its Mayor. The complaint alleged that the Board and the Department, as a matter of official policy, required pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. *Id.* at 661. The district court held that the plaintiffs' action was barred because *Monroe v. Pape*, 365 U.S. 167, 187 (1961), completely immunized municipalities from suit under § 1983. *Monell*, 394 F. Supp. at 855. The Court of Appeals affirmed. 532 F.2d 259, 268 (2d Cir. 1976). After examining the legislative history of § 1983, the

contributed a significant portion of the federal docket.²³

Other Supreme Court and lower federal court decisions have narrowed the applicability of the due process clause in entitlement claims cases.²⁴ Determining precisely what "property" is entitled to due process protection is a major issue in these decisions.²⁵ Despite asserting that constitutionally protected property interests extend beyond traditional notions of property,²⁶ the Court often has restricted the definition of con-

Supreme Court held that local governments were "persons" for purposes of § 1983 litigation. 436 U.S. at 690. The Supreme Court therefore explicitly overruled *Monroe*: "we now overrule *Monroe v. Pape* . . . insofar as it holds that local governments are wholly immune from suit under § 1983." *Id.* at 663 (footnote omitted). The Court did, however, limit municipal liability to acts resulting from unconstitutional or illegal municipal policies; municipalities could not be held vicariously liable, under § 1983, for the acts of their employees. *Id.* at 691.

Imposition of municipal liability under § 1983 has raised a host of issues concerning whether and when municipalities' delegation of policy-making authority to municipal officials should result in municipal liability. The Supreme Court has experienced difficulty enunciating a clear standard in this area. See Bannard, *A Foreseeability-Based Standard for the Determination of Municipal Liability under Section 1983*, 28 B.C.L. REV. 937, 966 (1987) (detailing the development of municipal liability under § 1983 and proposing liability when a municipality's policies or customs could foreseeably deprive a person of a constitutional right).

23. Various estimates of § 1983 claim volume are available. In 1961, when *Monroe* was decided, there were 287 § 1983 suits in the federal courts. E. CHEMERINSKY, *supra* note 3, at 371. In 1985, there were 36,582 § 1983 cases in federal court. *Id.* At least one commentator estimates that § 1983 claims comprise approximately 12% of federal district court civil cases since 1977. Baumann, *Civil Rights Litigation: Section 1983*, 1 ANN. SURV. AM. L. 203, 205 n.11 (1985). *Monell*, which held that local governments could be sued under § 1983, was argued before the Court in 1977 and decided in 1978. 436 U.S. at 658; see also *Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting) (noting that in 1961, the year the Supreme Court decided *Monroe v. Pape*, only 270 civil rights actions were brought in federal district courts compared to 30,000 civil rights suits commenced in 1981). One commentator notes that the recent volume of § 1983 claims has not grown disproportionately to the rest of the federal docket. E. CHEMERINSKY, *supra* note 3, at 376.

24. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Roth*, the Court limited application of the due process clause to the deprivation of those interests that the fourteenth amendment's protection of liberty and property addresses. *Id.* at 569. Holding that the respondent did not have a property interest entitled to due process, the Court noted that the range of interests protected by procedural due process is not infinite. *Id.* at 569-70; see also *infra* notes 72-117 and accompanying text.

25. See, e.g., *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 965-67 (2d Cir. 1988) (discussing Supreme Court decisions enlarging the scope of interests that the due process clause protects, requiring the circuit court to determine whether the plaintiff has a protected property interest in its contract).

26. *Roth*, 408 U.S. at 571-72. In defining "liberty" and "property," the *Roth* Court posited broad and developing concepts "purposely left to gather

stitutionally protected property interests.²⁷

Heeding the Supreme Court's warning that the due process clause does not protect all property interests,²⁸ lower federal courts have attempted to interpret and embroider the Supreme Court's decisions elucidating protected property interests.²⁹ One particularly important area for resolving the issue of what constitutes protected property is contracts.

2. Contracts as Protected Property

It is well settled that a contract can create a constitutionally protected property interest. In *Board of Regents v. Roth*³⁰ and *Perry v. Sindermann*,³¹ the Supreme Court recognized that "property," for due process purposes, includes rights to certain contractually conferred government benefits.³² Both *Roth* and *Sindermann* involved public employment contracts.³³ In *Roth*,

meaning from experience. . . . [and which] relate to the whole domain of social and economic fact." *Id.* (quoting *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). The Court explicitly indicated that protected property interests extend beyond traditional notions of property, such as the ownership of real estate, chattels, or money. *Id.* at 572. Rather than adhering to "formalistic limitations," the Court's definition of property goes to the beneficial nature of the interest and the security with which a person holds the interest. *Id.* at 576.

27. In order to establish operable boundaries for the "property" concept, the Court necessarily must restrict its definition. *Roth*, 408 U.S. at 572. Determining that some property interests are entitled to constitutional protection, the Court has slowly defined the parameters of the entitlement through its subsequent decisions. See *infra* notes 72-117 and accompanying text.

28. "[T]he range of property interests protected by the Due Process Clause is not infinite." *Roth*, 408 U.S. at 570.

29. Courts have had difficulty with this task because of the broad definitions that the Supreme Court has employed. See, e.g., *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989) (indicating that this circuit, as well as other courts, has found it difficult to identify which contract rights constitute protectible property interests for due process purposes and which do not).

30. 408 U.S. 564 (1972).

31. 408 U.S. 593 (1972).

32. In *Roth*, the plaintiff, a state university professor with a one year contract, was informed without explanation that his contract would not be renewed. The plaintiff subsequently sued the university, claiming that the university's failure to inform him of the reason for his nonrenewal violated his right to procedural due process. 408 U.S. at 566-69. The Court held that the fourteenth amendment did not require a hearing prior to nonrenewal of a non-tenured state teacher's contract unless a property interest in continued employment could be demonstrated. The Court then found that the terms of the plaintiff's contract granted him no protected property interest. *Id.* at 576-78.

33. In *Sindermann*, the plaintiff had been employed as a professor in the Texas state college system for ten years under a series of one year contracts. 408 U.S. 593, 594 (1972). The Board of Regents, without providing an explanation or prior hearing, declined to renew the plaintiff's contract. *Id.* at 596-97.

the Court found that the plaintiff did not have a protected property right in the renewal of a one year employment contract.³⁴ In *Sindermann*, the Court found a protected property right in a tenured employment contract.³⁵ Rather than limiting its holding to employment contracts, the Court's definition of protected property in *Sindermann* was pointedly expansive. The Court noted that property interests protected by procedural due process are "not limited to a few rigid technical forms."³⁶ Instead, the Court found that "'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'"³⁷

In contrast to its admonition that protected property has no fixed technical categories, the Court in *Roth* and *Sindermann* established some limits on protected property. The Court determined that although independent sources such as state law create and define protected property interests,³⁸ federal law determines whether an interest is entitled to constitutional pro-

Although the college had no tenure system, the faculty guide indicated that faculty members should feel that they had permanent tenure as long as their work was satisfactory. *Id.* at 600. The plaintiff brought an action alleging that, in light of the existing de facto tenure program, nonrenewal of his contract without a prior hearing deprived him of due process. *Id.* at 595. Finding that the plaintiff may have a contractually created protected property interest, the Court found that property interests protected by procedural due process are those interests "that are secured by 'existing rules or understandings'" that may be invoked at a hearing to support the entitlement claim. *Id.* at 601 (citing *Roth*, 408 U.S. at 577). The Court then noted that written contracts, as evidence of a formal understanding, support claims of entitlement and may create a property interest. *Id.* at 601.

34. 408 U.S. at 578.

35. 408 U.S. at 601-03.

36. *Id.* at 601 (citing *Roth*, 408 U.S. at 571-72).

37. *Id.* (citing *Roth*, 408 U.S. at 571-72) (emphasis added). "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.*; see also *supra* note 32.

38. *Roth*, 408 U.S. at 577. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Cases dealing with property interests created by independent sources include: *Sindermann*, 408 U.S. at 601 (holding that a written contract with state college system including specific tenure provision is evidence supporting claim of entitlement to continued employment); and *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983) (holding that statutorily conferred one year municipal liquor license revokable only for cause is constitutionally protected property).

tection.³⁹ Thus, not all state-created contract rights are entitled to federal due process protection.⁴⁰ Additionally, an individual must have a "legitimate claim of entitlement" to possess constitutionally protected property.⁴¹ Because the Court's definition implies that a person must have more than a mere expectation of an interest,⁴² the Court has effectively imposed a threshold requirement that an interest be "held securely" in order to be a protected property interest. The Court's approach to defining protected property's parameters implies that once the plaintiff makes a threshold showing of "secure holding," the Court applies an expansive approach to defining protected property.

Courts generally recognize, in accordance with *Roth* and *Sindermann*, that public employment contracts are the prime protected category of contract-created interests.⁴³ Courts, how-

39. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (citing *Roth*, 408 U.S. at 577).

40. *See, e.g., id.* at 9-12 (stating that federal constitutional law determines whether a property interest rises to the level of a "legitimate entitlement," and distinguishing between an interest in uninterrupted utility service created by Tennessee case law and the constitutional protection conferred if such an interest is terminable only for cause).

41. *Roth*, 408 U.S. at 577; *Sindermann*, 408 U.S. at 601 (citing *Roth*).

42. In *Roth*, the Supreme Court distinguished securely held property from the mere hope or desire for property as a basis for constitutional protection:

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in specific benefits. . . . To have a property interest in a benefit, a person clearly must have *more than an abstract need or desire for it*. He must have *more than a unilateral expectation of it*. He must instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Roth, 408 U.S. at 576-77 (emphasis added); *see also Storek & Storek, Inc. v. Port of Oakland*, 869 F.2d 1322, 1325 (9th Cir. 1989) (finding that plaintiff's preliminary approval of a development project constituted merely an "expectation," rather than a protected property interest); *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983) (distinguishing protected property from an interest that is held subject to so many conditions so as to make it "meager, transitory or uncertain").

43. The seminal cases of *Roth* and *Sindermann* involved claims of employment. In *Roth*, the respondent, an assistant professor with a one year contract at a state university, contested his lack of reappointment without review. *Roth*, 408 U.S. at 566-69. In *Sindermann*, the respondent, a teacher for ten years in a state college system, contested his lack of reappointment without review. *Sindermann*, 408 U.S. at 594-95.

Many of the subsequent developmental Supreme Court cases also have involved employment claims. *See, e.g., Monell v. Department of Social Servs.*, 436 U.S. 658, 660-61 (1978) (involving pregnant employees compelled to take unpaid leaves not contingent on medical necessity); *Bishop v. Wood*, 426 U.S.

ever, have had difficulty determining what other kinds of contract "property interests" deserve due process protection.⁴⁴ Notwithstanding the wide variety of statutorily or contractually created rights held to be property entitled to due process protection, some lower courts have exhibited marked reluctance to extend protected contract property rights beyond those conferred specifically in *Roth* and *Sindermann*.

In *Brown v. Brienen*,⁴⁵ a Seventh Circuit opinion by Judge Posner, the court expressed doubt about extending protected property status to the breach of a contract other than an employment contract.⁴⁶ In *Brown*, sheriff's department employees brought a section 1983 action against the county for refusing to allow them to take accrued compensatory time off.⁴⁷ Although not actually deciding whether the county's breach of plaintiffs' employment contract constituted a deprivation of protected property, the opinion discussed the issue at length.⁴⁸ Recognizing that *Roth* and *Sindermann* concluded that an employment contract could create a protectible property interest, the court nonetheless distinguished a breach of contract that *terminates* employment from all other breaches of the contract.⁴⁹ Admonishing that the fourteenth amendment was not intended to federalize all public law, the court asserted that "[o]nly interests substantial enough to warrant the protection

341, 342-43 (1976) (involving the termination of a municipal police officer without hearing); *Arnett v. Kennedy*, 416 U.S. 134, 136-38 (1974) (dealing with the termination of a civil servant without appropriate due process).

The federal circuit courts also have recognized that employment constitutes the prime protected category for § 1983 actions. *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 967 (2d Cir. 1988) (noting that "[t]hus far, the course of law in this Circuit has not moved beyond according procedural due process protection to interests other than those well within the contexts illustrated by *Goldberg* and *Roth*"); *Physicians' Serv. Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1409 (9th Cir. 1987) (stating that "[t]he prime protected category which has supplied nearly all of the successful contract-based section 1983 actions, is that of employment contracts").

44. Compare *San Bernardino Physicians'*, 825 F.2d at 1409-10 (determining that a physician group's contract to provide medical services is not a constitutionally protected property interest) with *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1131-32 (W.D. Pa. 1980) (determining that in light of a state law mandating the award of a contract to the lowest bidder, plaintiff had a protectible property interest in the award of a cable television contract). See *supra* note 19 (discussing *Three Rivers*).

45. 722 F.2d 360 (7th Cir. 1983).

46. *Id.* at 365.

47. *Id.* at 362.

48. *Id.* at 363-65.

49. *Id.* at 364-65.

of federal law and federal courts are Fourteenth Amendment property interests."⁵⁰ The court then determined that a finding of a substantial interest depends on how securely it is held and its importance to the holder.⁵¹ Although the *Brown* court did not hold that the plaintiffs lacked a protected property interest, the court's analysis implies that breaching an employment contract, short of terminating employment, is not sufficiently important to the holder to warrant protected property status.⁵² In contrast, Judge Posner indicated that constructive discharge through employer harassment would constitute a deprivation of protected property, provided that the employee had a valid contract.⁵³

Other court decisions expressing reluctance to extend protected property parameters include *S & D Maintenance Co. v. Goldin*,⁵⁴ *Walentas v. Lipper*⁵⁵ and *Boucvalt v. Board of Com-*

50. *Id.* at 364 (citing *White v. Thomas*, 660 F.2d 680, 684 (5th Cir. 1981)).

51. *Id.* at 364.

52. *Id.* at 364-65.

53. *Id.* at 365.

54. 844 F.2d 962 (2d Cir. 1988). In *S & D Maintenance*, the Second Circuit considered whether a municipal contract to maintain parking meters is a protected property interest entitling the contract holder to due process. *Id.* at 964-67. The court expressed doubt that a municipal parking contract conferred a protected property interest and voiced its reluctance to extend procedural due process protection to interests beyond those approved by *Roth*. *Id.* at 967. The court manifested both a logistical and a doctrinal concern with federalizing public contract actions. The court first expressed apprehension about federal courts examining the procedural fairness of every breach of a state contract, and then alluded to untoward doctrinal implications resulting from shifting the whole of state public law to the federal courts. *Id.* at 966-67. Because it deemed the contract too insecurely held, however, the court found it unnecessary to rule on whether the corporate contract conferred a protected property interest. *Id.* at 965-67.

55. 862 F.2d 414 (2d Cir. 1988). In *Walentas*, the Second Circuit examined whether a conditional municipal development contract could confer a constitutionally protected interest. *Id.* at 418. The court, citing *S & D Maintenance*, repeated its concerns about extending protected contract property doctrine beyond *Roth*. The *Walentas* court reasoned:

Courts have accordingly been wary of the consequences that might arise if section 1983 were expanded to encompass substantially all public contract rights '[W]e hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor. . . . [T]his case affords no occasion for any extension of existing doctrine because the [plaintiff's] contracts do not provide it with entitlements within the traditional understanding of *Roth*.'

Id. (footnotes omitted) (quoting *S & D Maintenance*, 844 F.2d at 966-67).

The court interpreted *Roth* to be limited to "situations which involve contracts with tenure provisions and the like, or where a clearly implied promise

missioners.⁵⁶ In each of these decisions, the circuit courts find the protected property concept to be problematic and, after extended discussion of the concept's difficulties, resolve their cases through other means.

3. Federalizing Breach of Public Contract Claims

Faced with the difficulty of drawing a line between those public contract property rights that should be accorded constitutional protection, and those that should not, courts have been reluctant to federalize public contract disputes by expanding the scope of section 1983 claims.

The reasons for the courts' reluctance often are not stated explicitly. Courts frequently speak in general terms of the negative consequences of expanding due process to cover all public contract rights. For example, in *Brown*, the court cautioned that the fourteenth amendment was not intended to shift all state law into federal courts.⁵⁷ In *S & D Maintenance*, the Second Circuit expressed concern for the "doctrinal implications" raised by constitutionalizing all public contract rights.⁵⁸ In

of continued employment has been made." *Id.* at 418. The court held that the conditional development contract, terminable at any time at the municipal agencies' sole discretion, did not create a property interest. *Id.* at 419-20.

56. 798 F.2d 722 (5th Cir. 1986). In *Boucvalt*, the Fifth Circuit considered whether a physician's anesthesiology contract with a public hospital conferred a constitutionally protected interest. *Id.* at 728-31. The court contrasted the tenured public employment contract model of *Roth* and *Sindermann* with the plaintiff's fixed term professional services contract, and indicated that the factors that supported a predeprivation hearing in *Roth* and *Sindermann* were not present in *Boucvalt*. *Id.* at 729-30. The factors included: the relative wealth of the parties, the tenured employees' expectancy of permanent employment, and the lack of adequate compensation a public employee might receive in an action for damages. *Id.* at 729. The court then determined that due process would be satisfied with a state post-deprivation breach of contract claim. *Id.* at 730. In support of its determination that a post-deprivation remedy was appropriate, the court cited *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981). See *infra* notes 79, 80, 83-85 and accompanying text. The court added that if any predeprivation process was due, the pretermination notification the plaintiff received and the plaintiff's attendance and presentation at two hospital board meetings met the minimal constitutional standards of notice and an opportunity to respond. *Boucvalt*, 798 F.2d at 730. The court noted that *Boucvalt* had notice of the Board's position and an adequate opportunity to respond. *Id.*

57. *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983) (noting that "[i]n deciding whether a particular breach should be deemed a deprivation of property we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts").

58. *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988) (emphasizing that "the doctrinal implications of constitutionalizing all public con-

Walentas, the Second Circuit, citing *Brown* and quoting *S & D Maintenance*, expressed similar concern for the consequences of federalizing all public contract rights.⁵⁹

A few courts have been more direct and have identified the logistical implications of federalizing public contract claims as the basis for their anxiety. For example, in *Reich v. Beharry*,⁶⁰ the Third Circuit noted judicial recognition that according due process protection to breaches of public contracts would result in "the federal courts [being] . . . called upon to pass judgement on the procedural fairness of the processing of a myriad of contractual claims against public entities."⁶¹

Judicial concern for state law federalization under section 1983 is not limited to contract claims. A substantial body of law and commentary also has accumulated around judicial concern for tort law federalization under section 1983.⁶² Although the Supreme Court has not considered the issue of contract law federalization, the Court has distinguished between a constitutional tort and a state law tort. In *Monroe v. Pape*,⁶³ Justice Harlan noted that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."⁶⁴ The Court later limited availability of section 1983 as a remedy for government conduct that is actionable as a tort. In *Parratt v. Taylor*,⁶⁵ Justice Rehnquist expressed concern that section 1983 "would make of

tract rights would raise substantial concerns and we seriously doubt that *Roth* and its progeny portend such a result").

59. *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); see *supra* note 55 (discussing *Walentas*).

60. 883 F.2d 239 (3d Cir. 1989).

61. *Id.* at 242.

62. See, e.g., Bades, *Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 104 (1986) (arguing that *Parratt v. Taylor* may be used in conjunction with *Monell* to distinguish effectively between state and constitutional torts); Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels*, 28 B.C.L. REV. 813, 816-17 (1987) (arguing that although the Supreme Court has correctly, but unsuccessfully, attempted to limit application of § 1983 to tort law, a reassessment of due process is necessary to prevent tort law federalization); Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225-26 (1986) (arguing that the language of tort inadequately addresses harms caused by governmental institutions and structures).

63. 365 U.S. 167 (1961).

64. *Id.* at 196 (Harlan, J., concurring).

65. 451 U.S. 527 (1981).

the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."⁶⁶

Congress and the Supreme Court nonetheless have explicitly recognized the desirability of section 1983 as a federal basis for adjudicating constitutional claims.⁶⁷ Justice Blackmun, in

66. *Id.* at 544 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

67. In *Parratt*, the Court, determining that § 1983 was not limited to intentional property deprivations, stated:

'[I]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.'

Id. at 534-35 (quoting *Monroe v. Pape*, 365 U.S. at 180).

Reviewing the legislative history of § 1983 in *Mitchum v. Foster*, 407 U.S. 225 (1972), the Court noted that "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights." *Id.* at 242.

It is important to note that § 1983 provides a federal cause of action, rather than federal jurisdiction, for violations of federal law pursuant to state authority. *See supra* note 3. Although § 1983 is not a grant of federal jurisdiction, Supreme Court decisions have indicated that plaintiffs are not required to bring their cases in state forums. *See, e.g.*, *Patsy v. Board of Regents*, 457 U.S. 496, 506 (1982) (reviewing the legislative history of § 1983 and concluding that Congress intended access to state and federal forums to be concurrent); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (stating that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). Consequently, plaintiffs may choose to bring § 1983 claims in either federal or state courts. This jurisdictional option is significant because differences in forums may be advantageous to individual plaintiffs and many appear to prefer federal court. *See P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 894 (2d ed. 1989) (discussing § 1983 jurisdiction options).

The intrusion of § 1983 into state judicial affairs highlights the jurisdictional tension between state and federal courts. The Supreme Court has been less than clear in its rulings on this issue. On one hand, the Court, relying on its interpretation of the legislative history of § 1983, has indicated that § 1983 was intended to be an intrusive cause of action that operates outside of traditional notions of comity. *See Mitchum*, 407 U.S. at 242; *Monroe*, 365 U.S. at 183. On the other hand, the Court has ignored the historical argument and indicated that principles of comity and federal respect for state judicial functions, should govern the federal-state judicial balance. *See Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (holding that principles of comity preclude federal intervention to enjoin state judicial action). The Court has historically vacillated between these two positions. *See Nichol, Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 961-62 (1987) (discussing the Court's inconsistency on the intrusion-comity issue). Commentators have differed as to the appropriateness of the Court's legislative analyses. *Compare id.* at 994 (concluding that the circumstances of the enactment § 1983 support well the intrusive assertion

his comment on section 1983, argues that criticism of section 1983 actions as burdening the federal courts is unpersuasive.⁶⁸ He notes that such criticism is predicated on the assumption that the suits are without merit, but sees no significant evidence supporting this assumption.⁶⁹ He appropriately notes that section 1983 is only a vehicle for claims that are independently grounded in state or federal law.⁷⁰ Consequently, he views complaints about its impact on federalism as "really . . . complaints about the breadth of the underlying constitutional rights."⁷¹

B. LIMITING DUE PROCESS RIGHTS

Circuit court decisions in section 1983 cases often extensively discuss the scope of protected interests. Courts voice concern that extending constitutional protection to public contracts would lead to the wholesale federalization of public contract disputes.⁷² In discussing this concern, courts frequently cite a defined group of cases for the proposition that not every

of federal power) with P. LOW & J. JEFFRIES, *supra*, at 940 (expressing doubt about the "relentless historicity" of the Court's § 1983 opinions). Despite these shifting undercurrents, *Mitchum* and *Monroe* remain good law with respect to the use of § 1983 as a federal cause of action to gain a federal forum.

68. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 21 (1985).

69. *Id.*

70. *Id.*

71. *Id.*

72. The circuit courts have expressed concern about extending protection to property interests arising from public contracts. *See, e.g.*, *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988) (citing *Brown* for the proposition that not all public contract property interests deserve protection); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988) (citing *S & D Maintenance* and echoing this concern); *San Bernardino Physicians' Servs. Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408-10 (9th Cir. 1987) (reasoning that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim . . . [T]he farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts"); *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983) (stating that "[i]n deciding whether a particular breach should be deemed a deprivation of property we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of public law of the states into the federal courts"). Although courts have not articulated clearly the feared consequences of constitutionalizing public contract property rights, it is reasonable to surmise that their concern is logistical. Their language may be fairly interpreted to imply apprehension with managing the large volume of claims that would be routed through the federal courts. *See supra* notes 57-59.

public contract property interest deserves due process protection.⁷³ Although this entire group of cases has been decided in favor of the defendant public entities, an analysis of these cases reveals that none of them resolve the constitutionally protected property issue in reaching a decision. Instead, the courts rely on other well accepted limitations to the applicability of the due process clause.⁷⁴ The following subsections detail and discuss the due process limitations lower courts most frequently employ.

1. Provision of Sufficient Due Process

A valid section 1983 claim depends on whether the plaintiff has a protected property interest and actually has been deprived of adequate procedural due process.⁷⁵ The difficulty in assessing which contract rights constitute protectible property⁷⁶

73. For example, *San Bernardino Physicians' Servs. Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987) is cited by the following cases: *Oceanside*, (Nos. 88-5647, 88-6056) (9th Cir. June 1, 1989) (WESTLAW, Allfeds library, CTA-9 file); *Storek & Storek, Inc. v. Port of Oakland*, 869 F.2d 1322, 1325 (9th Cir. 1989); *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989); *Lagos v. Modesto City Schools Dist.*, 843 F.2d 347, 349 (9th Cir. 1988); *Walentas*, 862 F.2d at 418; and *S & D Maintenance*, 844 F.2d at 967.

Brown v. Brien, 722 F.2d 360 (7th Cir. 1983) is cited by the following cases: *Reich*, 883 F.2d at 242; *S & D Maintenance*, 844 F.2d at 966; *Walentas*, 862 F.2d at 418; *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 416 (7th Cir. 1988); and *San Bernardino Physicians'*, 825 F.2d at 1408.

Casey v. DePetrillo, 697 F.2d 22 (1st Cir. 1983) (per curiam) is cited by the following cases: *S & D Maintenance*, 844 F.2d at 967; *San Bernardino Physicians'*, 825 F.2d at 1408; and *Boucvalt v. Board of Comm'rs of Hosp. Serv. Dist.*, 798 F.2d 722, 730 (5th Cir. 1986).

S & D Maintenance Co. v. Goldin, 844 F.2d 962 (2d Cir. 1988) is cited by the following cases: *Reich*, 883 F.2d at 242 and *Walentas*, 862 F.2d at 418.

Costello v. Town of Fairfield, 811 F.2d 782 (2d Cir. 1987) is cited by the following cases: *Walentas*, 862 F.2d at 418 and *S & D Maintenance*, 844 F.2d at 967.

Jimenez v. Almodovar, 650 F.2d 363 (1st Cir. 1981) is cited by the following cases: *S & D Maintenance*, 844 F.2d at 967 and *Casey*, 697 F.2d at 23.

74. See *infra* notes 75-117 and accompanying text.

75. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (reasoning that "[o]nce it is determined that due process applies, the question remains what process is due").

76. See, e.g., *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 582-83 (2d Cir. 1989) (stating that "[w]e need not decide here, however, whether or not the provider's interest is just such a [property] right . . . [E]ven assuming a property right exists, we conclude that if the DSS notice was inadequate, it was not so inadequate as to require the district court to grant preliminary injunctive relief"); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) (noting that "[e]ven if we were to consider the increased benefits an entitlement, we find no denial of due process because adequate post-deprivation remedies were available to appellants"); *Brown v. Brien*, 722 F.2d 360, 365 (7th

has led courts to apply the second requirement to resolve section 1983 claims.⁷⁷ In particular, courts look to the Supreme Court's decisions in *Mathews v. Eldridge*⁷⁸ and *Parratt v. Taylor*⁷⁹ to ascertain the adequacy of the state process provided.⁸⁰

Cir. 1983) (noting that despite "our doubts that the alleged breach of contract deprived the plaintiffs of property within the meaning of the Fourteenth Amendment, we need not resolve the issue, for there was in any event no denial of due process").

77. For example, although asserting that not every contract property right implicates due process, the Third Circuit in *Reich* observed the difficulty of determining which contract property rights should be protected. *Reich*, 883 F.2d at 242 (observing that "we, as well as many others, have found it difficult to identify precisely which contract rights constitute protectible property interests . . . and which do not"). Rather than attempt a determination, the court reasoned that "it is unnecessary for us to undertake this difficult task of line-drawing. Assuming, without deciding, that [the defendant] did deprive [the plaintiff] of a protected property interest, we think it is clear that he had available to him all the process that was constitutionally due." *Id.*; see also *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 581-83 (2d Cir. 1989) (concluding that post-termination submission of written arguments was sufficient due process for clinical laboratory suspended from Medicaid program, even assuming a protected property interest); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) (assuming plaintiffs had a protected property interest, adequate post-deprivation remedies were nonetheless available to retired police officers alleging deprivation of increased retirement benefits); *Boucvalt v. Board of Comm'rs*, 798 F.2d 722, 730 (5th Cir. 1986) (holding that post-deprivation state court remedy employed by anesthesiologist provides sufficient due process for hospital's breach of contract); *Signet Constr. Corp. v. Borg*, 775 F.2d 486, 492 (2d Cir. 1985) (reasoning that despite possession of a protected property interest, a post-deprivation hearing provided sufficient due process for contractor deprived of timely contract payment by city); *Brown v. Brienens*, 722 F.2d 360, 365 (7th Cir. 1983) (assuming a protected property interest, state court action, rather than predeprivation hearing, is sufficient due process for sheriff's department employees unable to take accrued compensatory time off); *Green v. Board of School Comm'rs*, 716 F.2d 1191, 1193 (7th Cir. 1983) (concluding that pretermination board hearing provided to dismissed school bus driver was adequate for due process purposes); *Casey v. Depetrillo*, 697 F.2d 22, 23 (1st Cir. 1983) (per curiam) (holding that school employees bringing a § 1983 breach of employment contract claim did not allege deprivation of due process and were entitled only to post-deprivation state tort remedy); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982) (reasoning that although possessing a protected property interest, a dismissed teacher with one year contract received a post-termination hearing meeting due process standards); *Jimenez v. Almodovar*, 650 F.2d 363, 370 (1st Cir. 1981) (holding that tenured faculty member, terminated as a result of a program cancellation, was afforded procedure satisfying due process requirements).

78. 424 U.S. 319 (1976).

79. 451 U.S. 527 (1981).

80. In *Mathews*, a state agency terminated the plaintiff's Social Security disability insurance payments based on medical reports that the plaintiff's disability had ceased. 424 U.S. at 324-25. Instead of seeking reconsideration, plaintiff sought immediate reinstatement of benefits pending a hearing. Relying on *Goldberg v. Kelly*, 397 U.S. 254 (1970), which established a right to an

In *Mathews*, the Court, employing a three part test for assessing the sufficiency of the process provided to a complainant, determined that a predeprivation evidentiary hearing is not always required.⁸¹ Under *Mathews*, a court must weigh the importance of the private interest that the governmental action affects; the risk of erroneous deprivation and the extent to which the contended procedure will reduce the risk of erroneous deprivation; and the government's interest in the action along with the burden that requiring a predeprivation process imposes on the government.⁸² In *Parratt*, the Court established that post-deprivation remedies may be appropriate when predeprivation process is impractical or impossible.⁸³ In cases in which a plaintiff's complaint centers on the lack of a predeprivation evidentiary hearing, courts have applied *Mathews* and *Parratt* and have found that post-deprivation hear-

evidentiary hearing prior to termination of welfare benefits, the plaintiff asserted that his right to due process required a pretermination hearing. *Mathews*, 424 U.S. at 325. In reversing the lower court's decision for the plaintiff, the Supreme Court established a three part test for determining what process was due the plaintiff, rather than prescribing a predeprivation hearing as the only adequate process. *Id.* at 334-35. Applying the test, the Court determined that an evidentiary hearing was not required prior to the termination of plaintiff's disability benefits, and the existing administrative procedures provided adequate due process. *Id.* at 348-49. Federal courts regularly apply the *Mathews* test to actions asserting a lack of predeprivation due process. *See, e.g., Reich*, 883 F.2d at 242-43 (applying *Mathews* to an action against county controller for refusing to pay special prosecutor fees and determining that predeprivation process was not required); *Brown*, 722 F.2d at 365-66 (applying *Mathews* to action against county for refusing to allow accrued compensatory time off and determining that predeprivation process was not required).

In *Parratt*, the prison inmate plaintiff filed a § 1983 claim against prison officials because prison employees had lost his personal property. 451 U.S. at 529. Although the main thrust of the court's holding in *Parratt* actually goes to distinguishing between individual acts and state acts for due process purposes, *id.* at 543, courts have seized on another aspect of the case. In its analysis, the *Parratt* Court noted that, due to the random and unauthorized nature of the property loss, requiring a predeprivation hearing would be both impracticable and impossible. *Id.* at 541. Invoking *Mathews*, the Supreme Court held that available post-deprivation state tort remedies satisfied the due process requirements, and thus the plaintiff had not stated a claim for relief under § 1983. *Parratt*, 451 U.S. at 543-44. While recognizing that the fundamental requirement of due process is the opportunity to be heard in a meaningful time and in a meaningful manner, the Court rejected the proposition that due process always requires a predeprivation hearing. *Id.* at 540 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Federal courts regularly apply *Parratt* to actions asserting a lack of predeprivation due process. *See, e.g., Brown*, 722 F.2d at 365.

81. *See supra* note 80.

82. *Mathews*, 424 U.S. at 335.

83. *See supra* note 80.

ings provide plaintiffs adequate due process.⁸⁴ In essence, courts using this approach dismiss section 1983 claims, reasoning that because an available post-deprivation hearing meets due process requirements, the issue of whether a plaintiff possesses a protected property interest is therefore irrelevant.⁸⁵

This approach differs from section 1983 cases in which the plaintiff, while alleging a property deprivation, never effectively asserts that the deprivation occurred without due process.⁸⁶ In these cases, courts generally concur that a due process claim is absent.⁸⁷

2. Discretionary Entitlement

In some cases, courts find no protected property interest

84. See, e.g., *Reich*, 883 F.2d at 242-43 (noting that cost to state, lack of utility in reducing risk of error, and importance of plaintiff's interest in predeprivation hearing fall short of requiring that such a process be mandated constitutionally); *Brown*, 722 F.2d at 365-66 (citing *Parratt* and *Mathews* for the proposition that a predeprivation hearing is not required in every case).

85. It should be noted that *Parratt* does not afford the wholesale elimination of § 1983 claims. See *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984) (stating that "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air"). *Parratt*, read broadly, may be interpreted to stand for the proposition that federal courts are not available when state courts provide an adequate remedy. See Blackmun, *supra* note 68, at 25. However, *Parratt* is limited in one important respect. *Parratt* only applies to random and unauthorized acts by government officials and not official policy. *Parratt*, 451 U.S. at 541. *Parratt* is inapplicable when official policy is challenged, see *Logan v. Zimmerman Brush*, 455 U.S. 422, 435-36 (1982), and courts have accordingly declined to apply it in that circumstance. See, e.g., *Patterson v. Coughlin*, 761 F.2d 886, 891-93 (2d Cir. 1985) (declining to apply *Parratt* when deprivation of prisoner's liberty was neither random nor unauthorized); *Spruytte v. Walters*, 753 F.2d 498, 509-10 (6th Cir. 1985) (declining to apply *Parratt* when prison policy, rather than unauthorized and random action, caused deprivation of prisoner's book); *Augustine v. Doe*, 740 F.2d 322, 327-28 (5th Cir. 1984) (declining to apply *Parratt* and finding that when the state is in a position to provide a predeprivation hearing, the availability of a post-deprivation tort remedy does not satisfy due process requirements).

86. See *San Bernardino Physicians' Servs. Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408 n.3 (9th Cir. 1987) (noting with approval cases that dismissed contract-based § 1983 claims on the ground that the plaintiff essentially alleged breach of contract and not state procedural inadequacy); see also *Casey v. Depetrillo*, 697 F.2d 22, 23 (1st Cir. 1983) (per curiam) (involving plaintiffs making no complaint of any procedural inadequacy and conceding that the action was for simple breach of contract); *Jimenez v. Almodovar*, 650 F.2d 363, 369-70 (1st Cir. 1981) (reasoning that procedure available to, and declined by, plaintiffs met procedural due process requirements and therefore plaintiffs' complaint alleges no procedural inadequacy).

87. See, e.g., *San Bernardino Physicians'*, 825 F.2d at 1408 n.3 (approving dismissal of breach of contract cases not alleging separate due process injury).

when the plaintiff has merely an expectation of an interest, the realization of which is subject to the state's discretion.⁸⁸ The extent of the state's discretion in granting or denying a benefit governs whether the plaintiff has a property interest.⁸⁹ In particular, protection of expectation interests has been litigated in cases involving state awards of zoning certification, licensure, and contracts.⁹⁰ Finding a property interest hinges not on the certainty or likelihood of the award, but on the degree of discretion enjoyed by the issuing authority.⁹¹ Only when the discretion of the issuing authority is constrained significantly do courts consider the likelihood of issuance.⁹² The decisions in these cases are based directly on the Supreme Court's decisions in *Roth* and *Sindermann*.⁹³ The courts in these cases apply the *Roth* standard that a person must have more than a unilateral expectation of a benefit in order to claim a property interest.⁹⁴ When the state has wide discretion to grant a benefit, a person has no more than a unilateral expectation and consequently has no property interest in the benefit.⁹⁵

Similarly, courts have found that constitutionally protected property arises when state statutes or contracts confer an interest that cannot be terminated properly except for cause.⁹⁶

88. See, e.g., *RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 918-19 (2d Cir. 1989) (concluding developer's expectation of building permit not protected by due process when regulator has wide discretion in granting such permits); *Storek & Storek, Inc. v. Port of Oakland*, 869 F.2d 1322, 1325 (9th Cir. 1989) (holding real estate developer's "development project in principle" a mere expectation and therefore not entitled to constitutional protection).

89. See, e.g., *Walentas v. Lipper*, 862 F.2d at 414, 419 (2d Cir. 1988) (citing *R.R. Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir. 1987), and noting that when official action is truly discretionary, an interest in a favorable decision is not a protected property interest); *RRI Realty*, 870 F.2d at 918-20 (holding that regulator's broad discretion permits threshold rejection of due process claims).

90. See *supra* note 88.

91. This approach provides the rationale for the court's decision in *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980). In *Three Rivers*, the statutes controlling public cable television contract bidding left little discretion to the awarding authority. Consequently, the contract award was sufficiently likely to comprise a protected property interest. *Id.* at 1131.

92. See *RRI Realty*, 870 F.2d at 918.

93. See, e.g., *id.* at 917-18 (citing *Roth* as the basis for the entitlement test); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985) (same).

94. *Roth*, 408 U.S. at 577.

95. See *supra* note 88.

96. See, e.g., *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 581 (2d Cir. 1989) (questioning whether medicaid contract is protected property).

When the statute or the contract gives the state significant discretion to discontinue an interest, courts have determined that no protected property interest exists.⁹⁷ In these cases, courts usually analogize to the Supreme Court's decision in *Bishop v. Wood*.⁹⁸ In *Bishop*, the Court determined that a city ordinance governing a police officer's employment, which did not limit termination solely to cause, did not create a protected property interest in continued employment.⁹⁹ The Court limited "protected property" to those interests that the applicable entitling statute defined as not revocable or terminable except "for cause."¹⁰⁰ Because contracts, as well as ordinances, can create property interests, contracts that do not restrict their termination to cause have been held not to confer a protected property interest.¹⁰¹ Courts essentially determine that a contract terminable at will confers no property interest on the party claiming a breach. The courts, therefore, need not address whether the

97. *Id.* At-will termination makes the question of whether a contract constitutes a protected property interest irrelevant because a contract terminable at will is not sufficiently durable to be a protected property interest. *See S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 967-68 (2d Cir. 1988) (comparing employment contract "for cause" termination provisions with plaintiff's meter services contract and finding that a contract termination claim depends on whether the contract's "for-cause [termination] provision [is] sufficient to create a cognizable property interest").

98. 426 U.S. 341 (1976). For example, the Second Circuit, citing *Bishop*, compared a maintenance contract to an employment contract to evaluate the effect of "for-cause" termination provisions on protected property interests. *S & D Maintenance Co. v. Goldin*, 844 F.2d 902, 967 (2d Cir. 1988).

99. *Bishop*, 426 U.S. at 344-47.

100. *See id.* The Supreme Court determined that, although the city ordinance controlling the discharge of permanent city employees prohibited termination except for specified reasons (cause), the petitioner's position was essentially one of "at will employment." *Id.* at 345. The Court found that the ordinance may be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with specified procedures. *Id.* The Court concluded that as a matter of state law the employee "held his position at the will and pleasure of the city," and therefore had no protected property interest. *Id.* at 345 n.8. *Bishop* thus provides a basis for determining that a plaintiff's interest may be held so *insecurely* as to not constitute a protected property interest.

101. *See, e.g., S & D Maintenance*, 844 F.2d at 968 (reasoning that unconditional termination provision in contract for parking meter maintenance defeats asserted property interest); *Lagos v. Modesto Schools Dist.*, 843 F.2d 347, 348 (9th Cir. 1988) (concluding that public school teacher's interest in coaching position was not a protected property interest due to unconditional termination provision in state code); *Bleeker v. Dukakis*, 665 F.2d 401, 403 (1st Cir. 1981) (holding nursing home administrator's employment contract terminable essentially "at will" and thus employment interest did not constitute protected property).

alleged contract property interest is constitutionally protected, because if no property interest exists, due process is not required.¹⁰²

3. Deprivation of Due Process Not Official Policy

In *Monell v. Department of Social Services*,¹⁰³ the Supreme Court determined that under section 1983, a municipality is not vicariously liable for the acts of its employees, but is liable only for interest deprivations pursuant to "official policy."¹⁰⁴ The Court's decision in *Monell* thus made clear that municipal liability under section 1983 rests on whether the government as an entity inflicts the injury.¹⁰⁵

The Supreme Court considered whether county employees' warrantless search of a physician's clinic deprived the physician

102. See *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) (stating that requirements of due process apply only when government action deprives a person of liberty or property).

103. 436 U.S. 658 (1978). In *Monell*, the Supreme Court considered whether a municipal policy requiring pregnant female employees to take medically unnecessary leaves of absence deprived the employees of a protected property right. *Id.* at 662.

104. *Id.* at 690-91; see also *supra* note 22.

In accordance with *Monell*, courts hold that municipalities are liable only for constitutional violations resulting from official policies and customs. *Id.* at 690-91. Courts recognize five methods of establishing the existence of a municipal policy or custom sufficient to impose municipal liability under § 1983. Actions taken by municipal legislative bodies constitute official policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1980). Official policy exists when municipal agencies or boards exercise authority delegated by the municipal legislative body. See *Monell*, 436 U.S. at 694. Actions by those with final authority to make municipal decisions constitute official policy. *Pembaur*, 475 U.S. at 483-84. A government policy of inaction may constitute official policy. E. CHEMERINSKY, *supra* note 3, at 395-96 (indicating that the emerging consensus in the lower courts is that "government inaction constitutes official policy only if there is 'deliberate indifference' or 'callous disregard' amounting to a tacit authorization or encouragement of the wrongful conduct"). Municipal custom also may provide a basis for § 1983 liability. *Monell*, 436 U.S. at 694. There is, however, no judicial unanimity as to what constitutes a custom sufficient to impose § 1983 liability. Some courts have defined custom in terms of well settled practices, while others have found custom only where policy making officials have actual or constructive knowledge of the practice. E. CHEMERINSKY, *supra* note 3, at 398.

105. In *Monell*, the Court determined that:

[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694.

of a protected interest in *Pembaur v. City of Cincinnati*.¹⁰⁶ Because the county prosecutor, a policy-making official, directed the county employees' actions, the Court determined that the physician had been deprived of a protected interest.¹⁰⁷ The Court, however, further limited municipal liability under section 1983 to instances in which municipal officials possessing final policy-making authority deliberately act to deprive the plaintiff of a protected interest.¹⁰⁸

Since *Monell*, courts have recognized municipal liability under section 1983.¹⁰⁹ In accordance with *Pembaur*, municipal liability subsequently has been limited to protected interest deprivations occurring as a result of official policy.¹¹⁰ Since *Pembaur*, at least one court has determined that a municipality has no liability when the alleged due process deprivation does not result from "official policy."¹¹¹

The Eighth Circuit considered whether a city manager's unilateral alteration of a zoning map deprived a shopping center developer of protected property in *Westborough Mall, Inc. v. City of Cape Girardeau*.¹¹² Relying on *Pembaur*,¹¹³ the

106. 475 U.S. 469 (1986).

107. *Id.* at 484-85.

108. *Id.* at 481-84. In *Pembaur*, county deputy sheriffs forcibly entered the plaintiff's clinic in search of two of the plaintiff's employees. The deputy sheriffs entered without a warrant under order of the county prosecutor. *Id.* at 472-73. The plaintiff was convicted of obstructing police for his refusal to permit entry to his clinic. *Id.* The plaintiff brought a § 1983 claim, alleging that the county employees' warrantless entry in search of third parties violated his rights under the fourth and fourteenth amendments. *Id.* at 474. Because the entry appeared to be an isolated occurrence, rather than a part of an established policy, the circuit court dismissed the claim against the county. *Id.* at 476-77. The Supreme Court reversed, finding that under § 1983, even a single action by a policy-maker could expose a municipality to liability. *Id.* at 480-81. The Court then qualified its position:

[W]e hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a policy-making official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Id. at 481-83.

109. *See, e.g., id.* at 471.

110. *Monell*, 436 U.S. at 690-91.

111. *Westborough Mall, Inc. v. City of Cape Girardeau*, 710 F. Supp. 1278, 1282 (E.D. Mo. 1989).

112. 794 F.2d 330 (8th Cir. 1986).

Eighth Circuit remanded the case for a determination of whether the city manager's actions constituted official policy.¹¹⁴ On remand, the *Westborough* district court found that the city council possessed final policy making authority for zoning decisions; therefore the city manager acted unofficially and the municipality was not liable.¹¹⁵ Consequently, a determination of the property interest's protected status is irrelevant if no official policy is found.¹¹⁶

C. CORPORATE DUE PROCESS RIGHTS

The Supreme Court has established that corporations are "persons" for fourteenth amendment purposes.¹¹⁷ In *Pierce v. Society of Sisters*,¹¹⁸ the Court considered whether a state could statutorily compel children to attend only public schools.¹¹⁹ The Society of Sisters, a corporation operating a private school, contested the statute.¹²⁰ Refuting the state's contention that corporations, not being natural persons, could not avail themselves of fourteenth amendment due process protection, the Court determined that corporations were entitled to fourteenth amendment protection of business and property.¹²¹

The Supreme Court addressed the constitutionality of a state statute restricting a corporation's political speech to only

113. 474 U.S. at 481-83; see *supra* notes 106-09.

114. 794 F.2d at 339. In *Westborough*, a mall developer sued the city and its officials for erroneously changing the zoning of its proposed development. The city manager unilaterally changed the zoning map and announced the change to the press without city council approval. The zoning change caused the developer to lose prospective tenants and to halt development. Subsequently, another developer succeeded in acquiring development zoning for a different plot of land and constructed a shopping mall. *Id.* at 332-35.

115. *Westborough Mall, Inc. v. City of Cape Girardeau*, 710 F. Supp. 1278, 1282 (E.D. Mo. 1989).

116. *Id.* The court found it unnecessary to consider whether plaintiff's interest rose to the level of a protected property interest.

117. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (citing *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886)); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (refuting claim that fourteenth amendment due process protection is available only to natural persons and asserting that corporations may claim fourteenth amendment due process protection for business and property); see also *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980) (finding that a corporation has the same federal due process protections as an individual with regard to contracts).

118. 268 U.S. 510 (1925).

119. *Id.* at 529-31.

120. *Id.* at 531-32.

121. *Id.* at 523, 535.

those issues that materially affect its business in *First Nat'l Bank v. Bellotti*.¹²² The Court held the first and fourteenth amendments protect corporate political speech.¹²³ The Court asserted that the Constitution limits the states' ability to determine a corporation's rights,¹²⁴ cautioning that if states could restrict corporate rights in such fashion, corporations could be denied the protection of all constitutional guarantees, including due process and equal protection.¹²⁵ This analysis implies that corporations are entitled to due process rights without state abridgement.¹²⁶ Although courts occasionally use corporate identity as a basis for denying corporations certain constitutional rights, the Supreme Court has determined that corporations should be denied only those rights that are "purely personal" or that have been established by historic precedent.¹²⁷ Ample precedent supports *Bellotti*'s holding affording corporations due process protection.¹²⁸

122. 435 U.S. 765 (1978).

123. *Id.* at 778-84.

124. *Id.* at 778-79 n.14.

125. *Id.* at 779 n.14. Although corporations are creatures of state law, if state law governed all corporate rights, corporations might be deprived of all constitutional guarantees. This would diminish significantly the social and economic utility of the corporation. Such a rule also would conflict with existing decisions holding state laws invalid when they disagree with constitutional guarantees. *See, e.g., id.* at 778-79 n.14 (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 464 (1976) (standing for the proposition that the fourteenth amendment protects corporate speech); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (concerning fifth amendment double jeopardy); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (discussing fourth amendment)).

126. *See infra* note 184.

127. *Bellotti*, 435 U.S. at 779 n.14. In assessing which constitutional guarantees extend to corporations, the Court in *Bellotti* distinguished between cases involving due process and equal protection and those involving "purely personal" guarantees, such as the privilege against compulsory self-incrimination and the right to privacy. *Id.* "Purely personal" guarantees are unavailable to corporations because the guarantees' historic function has been limited to individual protection. *Id.* at 779 n.14 (citing *United States v. White*, 322 U.S. 694, 698-701 (1944)). The Court further considered the nature, history, and purpose of the particular constitutional provisions when evaluating the constitutional protections available to corporations. *Id.* at 779 n.14.

128. *See, e.g., Browning - Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2925-26 (1989) (O'Connor, J., concurring in part and dissenting in part) (distinguishing due process, as a constitutional right enjoyed by corporations, from other rights not enjoyed by corporations); *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 413-14, 418-19 (1984) (holding nonresident corporation's contacts with forum state insufficient to submit corporation to in personam jurisdiction); *Bellotti*, 435 U.S. at 779-80 n.14-15 (implying that corporation is a "person" possessing fourteenth amendment rights of due process and equal protection); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (finding that

Federal appellate courts also have determined regularly that corporations possess due process rights.¹²⁹ In *Old Dominion Dairy v. Secretary of Defense*,¹³⁰ the D.C. Circuit held that a dairy had a cognizable liberty interest and was entitled to challenge, on due process grounds, the government's actions depriving it of government contracts.¹³¹ In *Northeast Georgia Radiological Associates, P.C. v. Tidwell*,¹³² the Fifth Circuit found that a professional corporation was entitled to challenge loss of medical staff privileges on due process grounds.¹³³

The process of defining what constitutes a "constitutionally protected property interest," therefore, is currently one of exclusion, achieved through piecemeal litigation of section 1983 claims. Courts employ various exclusory mechanisms to avoid reaching the issue of whether due process protects public contract rights. In *San Bernardino Physicians'*, however, the Ninth Circuit directly confronted that issue.

II. *SAN BERNARDINO PHYSICIANS'*: A SIGNIFICANT BREAK

In 1980, San Bernardino Physicians' Services Medical Group, a California professional corporation, contracted with the San Bernardino County supervisors to provide professional medical services to the county hospital.¹³⁴ The parties could terminate the contracts only "for cause."¹³⁵ In May, 1981, within the contracts' terms, the county notified the Group that

corporations may claim, and the Court will support, fourteenth amendment protection for business and property); *Signet Constr. Corp. v. Borg*, 775 F.2d 486, 489 (2d Cir. 1985) (holding that contracting corporation's right to timely payment is a property interest that due process protects); *Northeast Ga. Radiological Assoc., P.C. v. Tidwell*, 670 F.2d 507, 512 (5th Cir. 1982) (stating that professional corporation in contract dispute is entitled to assert due process claim).

129. See, e.g., *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980) (finding that a corporation has the same constitutional due process protections as an individual with regard to contracts); *Tidwell*, 670 F.2d at 512 (stating that professional corporation in contract dispute is entitled to assert due process claim).

130. 631 F.2d 953 (D.C. Cir. 1980).

131. *Id.* at 962.

132. 670 F.2d 507 (5th Cir. 1982).

133. *Id.* at 512.

134. *San Bernardino Physicians' Servs. Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1405 (9th Cir. 1987).

135. *Id.* at 1406. In addition, the contracts required the terminating party to give notice within 120 days of the breach prompting the decision to terminate. If the other party cured the breach, the notice of termination would be canceled. *Id.*

the county would terminate the contracts in the fall.¹³⁶ After rescinding the termination notification, county employees and the board harassed the Group's employees, threatened to terminate the contracts prematurely, and systematically impeded the Group's practice.¹³⁷

In December, 1981, the Group sued the county and the board of supervisors in federal court under section 1983, alleging deprivation of property without due process.¹³⁸ In 1982, the Group allowed one contract to expire and terminated the other contract approximately 18 months before its expiration date.¹³⁹ The district court assumed for its ruling that the defendants materially breached the contracts in an effort to frustrate the Group's performance, and that the breaches justified the Group's premature contract termination.¹⁴⁰ The district court, however, determined that a government contract, alone, could not create constitutionally protected property without state or local laws to supplement the contractual rights.¹⁴¹

On appeal, the Ninth Circuit, while recognizing that government contracts can indeed create constitutionally protected property interests,¹⁴² made a significant break from previous cases¹⁴³ and held that a property interest derived from a corporately held public contract is not entitled to constitutional protection.¹⁴⁴ In its analysis, the Ninth Circuit directly addressed most of the approaches used by other courts to dismiss section 1983 claims involving public contract rights. The court noted that other courts dismiss these claims if the plaintiff fails to allege a separate due process claim, but merely alleges that the

136. *Id.* at 1406.

137. *Id.* The Physicians' Group challenged the termination in state court on the basis that the county had ignored the contracts' termination only "for cause" provision. The board of supervisors rescinded the termination notices before trial. *Id.* After rescinding the notices, the county delayed payments owed to the Group, conducted overly intrusive record audits, and refused to provide adequate office space. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. The district court granted the county defendants' alternative motions for summary judgment or directed verdict. The Ninth Circuit treated the district court's order as a summary judgment. *Id.* at 1406 n.2.

142. The Ninth Circuit recognized that the district court's conclusion that "contractual rights alone cannot create property interests protected by the Due Process Clause" was "contrary to federal and state decisions holding that contracts may create protected property interests." *Id.* at 1407.

143. *See supra* notes 76-77.

144. *San Bernardino Physicians'*, 825 F.2d at 1409-10.

contract has been breached.¹⁴⁵ The court recognized, however, that the Group's claims did allege a separate procedural inadequacy, and thus was distinguishable from this line of cases.¹⁴⁶

The court also determined that the case could not be resolved by determining whether the Group either received appropriate process or could have received it through a post-deprivation remedy.¹⁴⁷ Additionally, the court noted that application of post-deprivation due process still would require determining whether the Group's contracts were fundamentally different from the tenured employment contracts protected under *Roth* and *Sindermann*.¹⁴⁸ Although the court did not consider applying the official policy approach to dispose of the case, such an approach likely would be inapplicable because the board of supervisors, the highest policy-making group in the county, allegedly breached the contracts.

Claiming the unavailability of these commonly applied options for resolving this type of case, the court seized upon a new approach to dismiss the section 1983 claim. Recognizing that federal constitutional law necessarily determines whether a contractually derived property interest rises to a level of entitlement worthy of due process clause protection,¹⁴⁹ the court held that a corporate public contract to provide professional medical services did not confer a protected property interest.¹⁵⁰

145. *Id.* at 1408 n.3 (characterizing some of the Group's allegations as claims of deprivation without due process).

146. *Id.*

147. *Id.* at 1410 n.6.

148. *Id.* at 1410 n.7. The court's reasoning here is disingenuous. Although noting that resolving the case through a post-deprivation remedy, an existing mechanism, would require it to determine that Physicians' Group's contracts were fundamentally different from tenured employment contracts, the court nonetheless determined the contracts to be fundamentally different in order to employ its own test. *Id.* at 1409-10. If determining that the contracts are fundamentally different is the necessary predicate to employing either an existing case resolution mechanism or a new mechanism, the court's development of its own test appears unnecessary.

149. *San Bernardino Physicians'*, 825 F.2d at 1409 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)); see also *infra* note 187 and accompanying text.

150. *San Bernardino Physicians'* at 1409-10. The court distinguished the *San Bernardino Physicians'* medical services contract from the employment contracts in *Roth* and *Sindermann* because the *San Bernardino Physicians'* contract did not involve *individual* employment, even though it was a contract to provide personal services. *Id.* at 1409. The court found that, unlike the plaintiffs in *Roth* and *Sindermann*, the Group's employees could not achieve a secure tenure-like position as a result of the county contract. *Id.* In addition, the Group acted as a supplier and not an employee. *Id.*

Arguing that some contract property interests are more worthy of constitutional protection than others, the court, citing *Brown*, identified the crucial distinguishing factors as the security with which the interest is held under state law, and its importance to the holder as an individual.¹⁵¹ The court held up individual employment contracts as the model best embodying these factors.¹⁵² The court refused to assert, however, that individual employment contracts were the *only* contracts entitled to due process protection.¹⁵³ Rather, it claimed only to offer individual employment contracts as a guide for determining whether a contractual property interest rises to the level of a

151. *Id.* at 1409 (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)). Using *Brown* and generalizing from the plaintiffs' situations in *Roth* and *Sindermann*, the court created a two part test from what it perceived to be the essential attributes of protected employment contracts. *Id.* at 1469. In *Brown*, the court determined in dicta that the attributes of an interest that warrant the protection of the fourteenth amendment were the "security with which [the interest] is held under state law and its importance to the holder." *Brown*, 722 F.2d at 364. The *San Bernardino Physicians'* court adopted this test and embellished it by focusing on the importance of the interest to the holder as an *individual*. 825 F.2d at 1409. The court then asserted that individual rights, particularly those related to the deprivation of employment, receive greater protection under § 1983 than other contractual rights. *Id.*

152. *San Bernardino Physicians'*, 825 F.2d at 409. When attempting to determine which contract property interests should be protected, other courts, as well as the Ninth Circuit, sometimes retreat to the Supreme Court employment cases that support modern due process law. *See, e.g.,* *Boucvalt v. Board of Commr's*, 798 F.2d 722, 729 (5th Cir. 1986) (comparing *Boucvalt's* contract with the employment contract of *Roth* and *Sindermann*). Because *Roth* and *Sindermann* involve decisions finding that employment contracts can create protected property interests, courts sometimes use employment relationships as a touchstone when attempting to discern whether protection should be expanded to other types of contract property interests. As a result, courts rely on employment contract attributes to restrict the broader language of the Supreme Court decisions. *See, e.g.,* *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966-67 (2d Cir. 1988) (declining to recognize contract interests extending beyond the context of *Goldberg* and *Roth*); *San Bernardino Physicians'*, 825 F.2d at 1409 (identifying employment contracts as the prime constitutionally protected contract category); *Boucvalt*, 798 F.2d at 729 (confining the *Roth* and *Sindermann* decisions to tenured public employment contracts).

153. *San Bernardino Physicians'*, 825 F.2d at 1409. Indeed, the court could not hold that only employment contracts are entitled to protection given the variety of property found to be entitled to due process protection. *See supra* notes 14-19 and accompanying text. In asserting that "employment contracts are not the only kind [of contracts] that may be entitled to Fourteenth Amendment protection," the court cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), for the proposition that due process protects other types of state secured entitlements. *Logan*, however, deals with state statutory entitlements (employee's statutory right to use Illinois Fair Employment Practices Act procedures), not contractually derived claims. 455 U.S. at 430-33.

protected interest.¹⁵⁴ The court applied the second part of its test, "the importance of the interest to the holder *as an individual*,"¹⁵⁵ and determined that due process did not protect the Group's medical services contract, because as a corporate contract, it was not sufficiently similar to an individually held employment contract.¹⁵⁶ Although the court recognized that corporations are entitled to due process protection in other areas,¹⁵⁷ the court interpreted *Bellotti* to hold that when a property interest represented an individual concern like the right to privacy, due process protection was not available to corporations,¹⁵⁸ and therefore a corporate contract did not confer a constitutionally protected property interest.¹⁵⁹ In justifying this holding, the court explicitly emphasized its concerns about the danger of federalizing all public contract rights.¹⁶⁰

The Ninth Circuit subsequently decided *Oceanside Golf Institute, Inc. v. City of Oceanside*.¹⁶¹ In *Oceanside*, an unpub-

154. The Ninth Circuit reasoned that "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts." 825 F.2d at 1409-10.

155. *Id.* at 1409 (emphasis in original).

156. The court concluded:

[The] Physicians' Group attempts to analogize its contracts to ones of employment But the analogy fails Physicians' Group did not itself become employed as an individual would; it was not capable of doing so Yet the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts. We find nothing in Physicians' Group's contract that confers an interest equal to those contractual interests that have been afforded constitutional protection in the past, or that ought to be afforded it now.

Id. at 1409-10.

157. *Id.* at 1407.

158. *Id.* at 1409 n.4 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 779 n.14 (1978) for the assertion that "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, or purpose of the particular constitutional provision").

159. *Id.* at 1410.

160. The court acknowledged that "[i]t may well be that the requirements of federalism have more to do with the line we draw than the shadings of contract entitlement doctrine." *Id.* at 1410; see also *id.* at 1408 n.3 (noting that "[o]ur decision not to affirm summarily on the ground that the case is at bottom one for breach of contract does not mean that we minimize the danger of federalizing state contract law. As our text indicates, that concern underlies our holding that Physicians' Group's contract confers no federally protected entitlement").

161. (Nos. 88-5647, 88-6056) (9th Cir. June 1, 1989) (WESTLAW, Allfeds library, CTA-9 file).

lished opinion, the Ninth Circuit, relying solely on *San Bernardino Physicians'*, determined that a corporation's development contract and lease with a municipality are not protected property interests.¹⁶² The court reiterated the test it developed in *San Bernardino Physicians'*, and found that the corporation's contracts were not protected by due process because they were too dissimilar to individual employment contracts.¹⁶³ Although *San Bernardino Physicians'* may seem like an anomaly, the Ninth Circuit's decision in *Oceanside* may forecast *San Bernardino Physicians'* potential for expanded application.

III. PRECEDENT AND FEDERALISM DO NOT SUPPORT THE *SAN BERNARDINO PHYSICIANS'* DECISION

A. LACK OF SUPPORTING PRECEDENT

The *San Bernardino Physicians'* court couched its position within the context of *Brown*¹⁶⁴ and other cases emphasizing the problem of federalizing all public breach of contract cases.¹⁶⁵ It is important to note that none of the precedent directly decided the issue of whether corporate public contract property interests should be granted constitutional protection.¹⁶⁶

162. *Id.* at 1-10.

163. The *San Bernardino Physicians'* contract, although not an individual employment contract, indirectly involved employment of the group's physicians. 825 F.2d at 1405-06, 1409. The *Oceanside* contract involved the lease and development of real estate. (Nos. 88-5647, 88-6056) (9th Cir. June 1, 1989) (WESTLAW, Allfeds library, CTA-9 file) at 3. The court compared *Oceanside's* contract to the *San Bernardino Physicians'* service contract and to employment contracts, and found that *Oceanside's* contractual claim was even less similar to an employment contract than the contract in *San Bernardino*. *Id.* at 7. The court found the *Oceanside* contract even more analogous to a typical construction contract than the *San Bernardino Physicians'* contract and, therefore, did not confer a constitutionally protected property interest on the developer. *Id.* at 7-8.

164. *San Bernardino Physicians'*, 825 F.2d at 1408.

165. *See id.*; *see also supra* notes 57-116 and accompanying text.

166. *See, e.g., Brown v. Brienen*, 722 F.2d 360, 366-67 (7th Cir. 1983) (holding that the county's alleged breach of an employment contract did not constitute a denial of substantive due process, nor was county's failure to provide a "pre-deprivation" administrative hearing a denial of procedural due process). The Seventh Circuit, although discussing at great length whether breach of the employees' contract constituted a deprivation of constitutionally protected property, decided that the issue need not be resolved because plaintiffs were not denied due process. *Id.* at 363-65.

Although the *Brown* discussion about property interests is dicta, courts frequently cite *Brown* for the proposition that a breach of a public contract does not constitute a deprivation of constitutionally protected property. *See,*

Reviewing the major cases that address the issue of whether breach of a corporate public contract implicates due process reveals that, despite the rhetoric,¹⁶⁷ none of the cases, other than *San Bernardino Physicians'* and *Oceanside*, actually decide the issue.¹⁶⁸ After often lengthy discussions concerning the potential problems of federalizing breach of public contract claims, the courts nonetheless decide the cases on other grounds.¹⁶⁹ The federalism concerns expressed by the courts therefore might be characterized as dicta. This pattern greatly compromises the precedential value of these cases in assessing the appropriateness of protecting corporate contract property interests.¹⁷⁰

Additionally, the two fundamental propositions in the *San Bernardino Physicians'* opinion, the individual nature of due process protection and the individual employment contract model for constitutionally protected property, lack adequate precedent.

e.g., *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988) (citing *Brown* for distinguishing "between the breach of an ordinary contract right and the deprivation of a protectible property interest within the meaning of the due process clause"); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966-67 (2d Cir. 1988) (using *Brown* as another example in which the Court of Appeals has "been reluctant to surround the entire body of public contract rights with due process protections"); *San Bernardino Physicians'*, 825 F.2d at 1408-09 (citing *Brown* for the proposition that Congress did not intend § 1983 to convert every breach of contract claim against a state into a federal claim).

167. See *supra* note 72.

168. See *supra* notes 72-116 and accompanying text.

169. See *supra* notes 57-116 and accompanying text.

170. Dictum is a court's expression or statement regarding a matter either unrelated, or unnecessary, to the case's holding. BLACK'S LAW DICTIONARY 409 (5th ed. 1979). Although it may be persuasive, courts generally are not bound by dictum as authority or precedent for purposes of stare decisis. 20 AM. JUR. 2d *Courts* § 74, 190 (1965). The Supreme Court has indicated that questions that a court has neither considered nor ruled on should not be considered as precedent. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936) (citing *Webster v. Fall*, 266 U.S. 507, 511 (1925) for the proposition that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"). This is especially true when the dictum relates to a question that the court expressly refuses to decide. *Brehm v. Hennings*, 70 Ind. App. 625, 631, 123 N.E. 821, 823 (1919) (rejecting case authority when the court did not decide the issue in question). Discussions in *Brown*, and other cases addressing which property interests are entitled to constitutional protection, thus would be entitled to significant precedential weight if the courts actually had decided the issue. Because the courts did not decide this issue explicitly, the precedential value of these cases is lessened considerably.

1. The Employment Model and Other Contracts

If followed by other courts, the *San Bernardino Physicians'* decision would effectively restrict protected property status to those contracts that are indistinguishable from individually held employment contracts.¹⁷¹ This approach conflicts with the Supreme Court's direction in *Roth* and *Sindermann* that property interests subject to procedural due process are "not limited by a few rigid, technical forms."¹⁷² The Court has found that the range of due process protected property interests extends "well beyond actual ownership of real estate, chattels, or money,"¹⁷³ and "denotes a broad range of interests that are secured by 'existing rules and understandings.'"¹⁷⁴ Although the Court recognizes that the due process clause does not protect all property interests,¹⁷⁵ in light of the expansive language used to construe protected property interests,¹⁷⁶ it seems unlikely that the Court would restrict narrowly the applicability of so basic a constitutional right to only employment-like contracts. Indeed, the subsequent restrictions that the Court has imposed to determine which property interests are protected all operate to more closely define the security with which the property interest is held,¹⁷⁷ rather than to any notion of the importance or nature of the interest.¹⁷⁸

171. Applying the "duck test", the Ninth Circuit, consistent with *Goldberg*, presumably would be willing to recognize certain welfare benefits as similar enough to employment to be entitled to due process protection. Beyond these benefits, however, it is difficult to ascertain if any other contract interests would quack loudly enough to receive protection.

172. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citing *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972)); see also *supra* note 28 and accompanying text.

173. *Roth*, 408 U.S. at 571-72.

174. *Sindermann*, 408 U.S. at 601.

175. See *supra* note 28.

176. See *supra* notes 26, 33, 36 and accompanying text.

177. See *supra* notes 42, 78-80, 100, 103-15 and accompanying text.

178. The threshold requirement of security contrasts with the Court's willingness to consider the nature and the importance of the property interest to subsequently determine what process is due. In determining what process is due, the Court recognizes that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Court employs a balancing test, considering the following factors: (1) the private interest that official action will affect; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional . . . procedural safeguards;" and (3) "the Government's interest, including . . . fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

2. Corporate and Individual Due Process Rights

The *San Bernardino Physicians'* court inappropriately relied on dicta in *Brown* to establish a test for determining which public contract property interests are protected.¹⁷⁹ The court examined two factors: "the security with which [the interest] is held under state law,"¹⁸⁰ and "the importance of the interest to the holder as an individual."¹⁸¹

The first factor fits well within the *Roth* and *Sindermann* framework. *Roth* and *Sindermann* both identify the security with which the party holds the interest as essential when defining a protected property's existence.¹⁸² In fact, the major parameters established by the Supreme Court all are criteria used in determining the security with which an interest is held.¹⁸³

The second part of the test, however, conflicts with well established precedent. The court's individualization of constitutional due process protection is inconsistent with ample precedent affording due process rights to corporations.¹⁸⁴ The

179. *San Bernardino Physicians'* at 1408-09 (quoting *Brown*, 722 F.2d at 364). The court relied on *Brown* for the proposition that not every interference with contractual expectations creates a § 1983 claim. *Id.* at 1408. In employing this proposition, the court quotes *Brown's* admonition that "we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of public law of the states into the federal courts." *Id.* at 1408. The court then fashioned its two part test from *Brown's* essential due process attributes: "the security with which [the interest] is held under state law and its importance to the holder." *Id.* at 1409 (quoting *Brown*, 722 F.2d at 364). The court inappropriately relied on *Brown* because *Brown's* discussion of due process property interests is dictum. See *supra* notes 72, 76 and accompanying text.

180. *San Bernardino Physicians'*, 825 F.2d at 1409 (quoting *Brown*, 722 F.2d at 364). In *Roth* and *Sindermann*, the Supreme Court determined that a party must hold securely an interest in order to qualify for constitutional protection. *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1977); *Perry v. Sindermann*, 408 U.S. 593, 601 (1977); see also *supra* notes 33, 42 and accompanying text. Subsequent Supreme Court cases endeavored to define more precisely the "securely held interest" concept. See *supra* notes 78-80, 100, 103-08 and accompanying text.

181. *San Bernardino Physicians'*, 825 F.2d at 1409 (emphasis in original); see also *supra* note 152.

182. *Roth* and *Sindermann* both identify the security with which an interest is held as a significant factor in ascertaining whether the interest is constitutionally protected. *Roth*, 408 U.S. at 576-77; *Sindermann*, 408 U.S. at 601.

183. See *supra* notes 26, 33, 38 and accompanying text.

184. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that a corporation is a "person" entitled to fourteenth amendment rights of due process and equal protection); *Signet Constr. Corp. v. Borg*, 775 F.2d 486, 489 (2d Cir. 1985) (concluding that contracting corporation's right to timely payment is a property interest that due process protects); *Northeast Ga. Radiological Assoc., P.C. v. Tidwell*, 670 F.2d 507, 512 (5th Cir. 1982) (holding that a

court's evaluation of *Bellotti* is incomplete. Although *Bellotti* noted that certain constitutional rights, such as the privilege against compulsory self-incrimination, are unavailable to corporations because they are purely personal or historically restricted, *Bellotti* distinguished these restricted rights from those that are available to corporations, notably due process and equal protection.¹⁸⁵ *Bellotti* stands for the proposition that possession of certain constitutional rights, as opposed to the application of rights already possessed, may be unavailable to corporations.¹⁸⁶

In contrast, the Ninth Circuit seeks to impose a rule of "comparable value" for determining due process protection eligibility. Under the Ninth Circuit's approach, a corporate public contract, no matter how securely held, would never be entitled to due process protection unless it became, in some fashion, as socially valuable as an individual employment contract.¹⁸⁷ Employing the second part of the *San Bernardino Physicians'* court's test evaluating the importance of the interest to the holder, it is difficult to distinguish between the importance of employment to an individual and the importance of a medical services contract to a corporation, without also assuming that corporations (and their employees) are less entitled than individuals to due process protection of the means of economic livelihood. The logical outcome of this approach would require any

professional corporation in contract dispute is entitled to assert a due process claim).

185. In a footnote, quoted in part by the *San Bernardino Physicians'* court, 825 F.2d at 1409, the *Bellotti* Court distinguished purely personal constitutional guarantees from those, like due process, that are available to corporations:

Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination . . . but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws. Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

Bellotti, 435 U.S. at 779 n.14 (citations omitted).

186. *Id.* at 778-79 n.14; see also *supra* note 127.

187. "[T]he farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts." *San Bernardino Physicians'*, 825 F.2d at 1409-10.

individual desiring due process protection for a livelihood derived from a public entity to either be employed by, or contract directly with, the public entity.

The inapplicability of the *San Bernardino Physicians'* test becomes apparent if the individual plaintiffs in *Memphis Light, Gas & Water Division v. Craft*¹⁸⁸ are replaced, hypothetically, with a corporate plaintiff. In *Memphis Light*, the Supreme Court determined that a public utility's termination of service without cause deprived the plaintiffs of a protected property right.¹⁸⁹ In light of precedent establishing that a corporation is entitled to due process protection, it is difficult to justify denying a corporation a protected property right in continued utility service (a contractual relationship not terminable except for cause under state law) solely because it is a corporation rather than an individual.¹⁹⁰

The contested contract in *San Bernardino Physicians'* was intended to provide professional medical services.¹⁹¹ The only difference between this type of contract and a personal employment contract is the interposition of a corporation between the county and the physician employees. It is difficult to imagine what type of corporate contract would be any more similar to

188. 436 U.S. 1 (1978).

189. In *Memphis Light*, the defendant utility company terminated the plaintiffs' utility service five times in one year due to the defendant utility company's erroneous double billing. *Id.* at 4-5. In each case, the utility company never apprised the plaintiffs of remedial administrative procedures available to them. *Id.* at 5. Plaintiffs brought a § 1983 action alleging termination of utility service without due process. *Id.* at 3. The Court found that the plaintiffs had a protectible property interest in continued utility service because Tennessee law only permits a utility to terminate service "for cause" when a utility bill is the subject of a bona fide dispute. *Id.* at 11-12.

In its decision, the Court emphasized its finding in *Roth*:

The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Id. at 9 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

In *Memphis Light*, the Court equated protected property with a substantive interest that is not subject to termination at will. *Memphis Light*, 436 U.S. at 11-12. The Court's decision in *Memphis Light* thus expands this concept beyond the employment context of *Bishop v. Wood*, 426 U.S. 341, 344, 349-50 (1976).

190. *Memphis Light*, 436 U.S. at 1405.

191. *Id.* at 1405-06.

an individual employment contract, and yet not deserve due process protection. Despite asserting that its holding does not preclude corporations from invoking section 1983 to protect their purely contractual rights,¹⁹² and that employment contracts are not the only type amenable to fourteenth amendment protection,¹⁹³ the court's holding effectively acts as a categorical bar to due process protection of corporate public contracts.

B. DO FEDERALISM CONCERNS JUSTIFY FURTHER RESTRICTIONS ON SECTION 1983?

The Ninth Circuit's holding in *San Bernardino Physicians'* is grounded in its fear of federalizing state contract law.¹⁹⁴ The court admits that the "requirements of federalism," more than the "shadings of contract entitlement doctrine," compel its approach.¹⁹⁵ The problems inherent in the court's approach suggest that the court developed the *San Bernardino Physicians'* test merely as a means of resisting a federalism bogeyman.

Federalism concerns are insufficient to justify imposing a categorical bar on enforcing corporate due process rights in contract cases. Based on the relative infrequency of reported cases, the number of corporations seeking due process protection for nonemployment contracts appears small.¹⁹⁶ The infre-

192. *Id.* at 1410.

193. *Id.* at 1409.

194. *San Bernardino Physicians'*, 825 F.2d at 1408 n.3; see also *supra* note 72 and accompanying text.

195. *San Bernardino Physicians'* at 1410.

196. The cases cited in this Comment appear to constitute a significant portion of corporate contract due process cases. Westlaw searches for reported cases citing leading public contract due process cases yield surprisingly few similar cases. For example, as of January 1990, only 58 reported federal cases in a 7 year period cite *Brown v. Brienen*, only 9 reported federal cases in a one and one half year period cite *S & D Maintenance v. Goldin*, and only 15 reported federal cases in a two and one half year period cite *San Bernardino Physicians'*. Additionally, a number of citing cases either are not § 1983 cases or do not involve corporate public contracts. For example, of the 15 cases citing *San Bernardino Physicians'*, one case did not implicate § 1983: *Brinkman v. Rahm*, 878 F.2d 263, 265 (9th Cir. 1989) (citing *San Bernardino Physicians'* for the rule that district court findings of pure law are subject to de novo review). Only 4 reported cases involved corporate plaintiffs: *Oceanside Golf Inst. v. City of Oceanside*, (Nos. 88-5647, 88-6056) (9th Cir. June 1, 1989) (WESTLAW, Allfeds library, CTA-9 file) at 3; *Storek & Storek, Inc. v. Port of Oakland*, 869 F.2d 1322, 1322 (9th Cir. 1989); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 962 (2d Cir. 1988); *Long Grove Country Club Estates v. Village of Long Grove*, 693 F. Supp. 640, 640 (N.D. Ill. 1988). Of the thirteen § 1983 cases citing *San Bernardino Physicians'*, all but *Oceanside* either found a protected

quency of such cases suggests that exceptional restrictions are not justified.

Even if the number of corporate contract due process cases increases significantly, restricting a federal cause of action based on a corporate contract's relative similarity to an individual employment contract raises the issue of corporate constitutional rights. Because section 1983 provides only a vehicle for constitutional claims to be heard in a federal forum,¹⁹⁷ critics argue that the claims are not constitutionally grounded.¹⁹⁸ Corporations, however, as well as individuals, may be subject to the state constitutional violations that section 1983 was enacted to address.¹⁹⁹ If federal due process rights extend to corporations,²⁰⁰ there is no less need for a federal forum for non-employment corporate public contracts than for individual employment contracts when due process is implicated. As Justice Blackmun has noted, complaints that section 1983 claims "are burdening the federal courts" are unpersuasive when the claims are meritorious, because such a burden presumably is worth bearing.²⁰¹ Supreme Court decisions also articulate this point. In *Parratt*, the Supreme Court indicated that Congress

property interest, *see, e.g.*, *Rockford Principals and Supervisors Ass'n v. Board of Educ.*, 721 F. Supp. 948, 955 (N.D. Ill. 1989) (concluding that salary package assuring future wage increases is protected property interest), or dismissed the case by employing an approach other than that used in *San Bernardino Physicians'*. *See, e.g.*, *Reich v. Beharry*, 883 F.2d 239, 242-43, 245 (3d Cir. 1989) (applying *Mathews* and finding that sufficient procedural protection was available to plaintiff in payment claim for special prosecutor's duties); *Storek*, 869 F.2d at 1325 (holding that an incomplete property development contract is not a property interest).

197. Although § 1983 only provides a federal cause of action and does not mandate federal jurisdiction, the plaintiff may choose between a state or a federal forum. *See supra* notes 3 & 67.

198. Blackmun, *supra* note 68, at 21-22.

199. *See, e.g.*, *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 408-9 (1984) (involving state violation of foreign corporation's fourteenth amendment due process rights by subjecting it to in personam jurisdiction); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767 (1978) (involving state deprivation of corporation's first amendment freedom of speech rights); *Pierce v. Society of Sisters*, 268 U.S. 510, 511 (1925) (involving state violation of fourteenth amendment rights by statutorily mandating attendance at public schools and threatening private schools with loss of business).

200. *See, e.g.*, *Helicopteros*, 466 U.S. at 418-19 (1984) (holding that corporation's contacts with forum state were insufficient to subject it to in personam jurisdiction); *Bellotti*, 435 U.S. at 778-79 n.14 (1978) (implying that corporations are entitled to due process rights under the fourteenth amendment); *see also supra* note 141 and accompanying text.

201. Blackmun, *supra* note 68, at 20-21; *see also supra* notes 57-71 and accompanying text.

intended section 1983 to provide a federal cause of action "because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the fourteenth amendment might be denied by the state agencies."²⁰²

Reviewing the legislative history of section 1983 in *Mitchum v. Foster*,²⁰³ the Court further noted that "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights."²⁰⁴ Although the Court has been less than consistent in its support for federal intrusiveness over comity,²⁰⁵ the Court nonetheless has continued to decide section 1983 cases based on its intrusive interpretation of legislative intent.²⁰⁶ The Court also recognizes that inappropriate section 1983 claims may be dismissed using other available approaches, rather than by further limiting the scope of section 1983. Justice Blackmun notes that the Court effectively screens cases by employing decisions, such as *Parratt*, that have made it difficult to inappropriately "bootstrap a state-law tort claim into a federal forum."²⁰⁷

IV. DECIDING FUTURE SECTION 1983 CASES: EMPLOYING EXISTING MECHANISMS

Federal courts do not need *San Bernardino Physicians'* highly restrictive threshold for excluding section 1983 actions involving public contract property rights. A review of the cases frequently cited for the proposition that some public contract property interests are less deserving of protection than other contract interests indicates that, in most cases, resolution of the issue is not essential to decide the case.²⁰⁸ Indeed, it appears that the constraints currently imposed by determining that an entitlement is too discretionary to be protected property, that a

202. *Parratt v. Taylor*, 451 U.S. 527, 534-35 (1981) (quoting *Monroe v. Pape*, 365 U.S. 167, 180 (1961)).

203. 407 U.S. 225 (1972).

204. *Id.* at 242.

205. *See supra* note 67.

206. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 540-42 (1984) (quoting *Mitchum's* analysis of legislative history and holding that "judicial immunity is not a bar to prospective injunctive relief" under § 1983).

207. Blackmun, *supra* note 68, at 21.

208. *See supra* notes 72-116 and accompanying text.

property interest does not arise from official policy, or that a plaintiff received the process that was due, act to effectively screen claims asserted under section 1983.²⁰⁹ The logistical fears flowing from constitutionalizing breach of public contract claims thus appear to be illusory.

Courts should rely on the decisional tools already at their disposal to resolve public contract claims under section 1983. In particular, the Supreme Court's decisions in *Mathews v. Eldridge* and *Parratt v. Taylor* expand federal courts' ability to determine the appropriate process due to resolve cases involving contract property rights.²¹⁰ Use of these accepted tools would provide sufficient and more appropriate screening of cases than the *San Bernardino Physicians'* approach. Application of these constraints is not, of course, intended to screen out all section 1983 public contract claims. Certainly, some section 1983 corporate public contract claims merit judicial review.

Courts should recognize that Congress and the Supreme Court have acknowledged the need for section 1983 as a vehicle providing a federal cause of action for constitutional claims.²¹¹ It is most unrealistic to believe that the reasons for providing a federal cause of action should be any less applicable to corporate non-employment public contract claims than to individual employment contract claims. The pervasive role local government plays in our society ensures the development of a large number of contractual relationships between government and private parties. Support for these contractual relationships is essential to maintaining the public/private partnership that characterizes our society and marks the shift from a society based on status, to one employing contract.²¹² In order to main-

209. See *supra* notes 72-116 and accompanying text.

210. See *supra* note 80 and accompanying text.

211. See *supra* notes 57-116 and accompanying text.

212. "[T]he movement of progressive societies has hitherto been a movement from *Status to Contract*." H. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 182 (F. Pollock rev. ed. 1930) (10th ed. 1884) (emphasis in original); see also Hillman, *The Crisis in Modern Contract Theory*, 67 *TEX. L. REV.* 103, 134-35 (1988) (arguing that contract law provides an important social ordering mechanism and remains relevant and responsive to "today's highly relational world").

Despite recent concerns prematurely heralding contract law's death, see, e.g., G. GILMORE, *THE DEATH OF CONTRACT* 87, 94 (1974) (suggesting that expanding tort doctrine is absorbing the contract bargain theory); MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *NW. U.L. REV.* 854, 873-86 (1978) (suggesting that "neoclassical" contract law is unsuitable for the modern world

tain the integrity of these contractual relationships, it is important that private parties have confidence in the judicial recourse available to them in the event of government deprivation of contract based rights. Presumptively confining a corporation's claim against a local government to that government's judicial forums is not likely to inspire corporate confidence in judicial safeguards. Lack of corporate confidence may negatively affect corporations' willingness to do business with government on terms not adequately compensating them for the risk of improper termination. Future section 1983 cases involving public contract property interests may portend and influence the relationship between corporations and government in our society.²¹³

CONCLUSION

Although section 1983 provides a federal cause of action against government entities for persons deprived of constitutionally protected property interests, courts have not been inclined to afford protection to property interests arising from public contracts. Although courts have decried the federalization of all public contract disputes, they have historically re-

of relational contracting), there is significant reason to believe that contract law will continue to metamorphosize and play an important societal role. See, e.g., Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 134-35 (1988) (arguing that contract law is adapting, rather than dying, and that modern contract law remains relevant and responsive to "today's highly relational world").

213. The courts currently have an opportunity to confront this issue directly. A case has been filed in federal district court in Minnesota that appears to squarely present the courts with the issue of § 1983 protection of corporate public contract rights. In *La Societe Generale Immobiliere v. Minneapolis Community Dev. Agency* (D.Minn. June 8, 1989) (No. 3-89-CV-372) (complaint), the plaintiff (LSGI) is suing a municipal development agency for breach of a contract and lease to develop a shopping center in Minneapolis. The contract was developed and entered into in accordance with specific process provisions of MINNEAPOLIS, MINN., CODE § 422 (1980 & Supp. 1988), and is terminable only for cause. The Agency's commissioners, who are also the Minneapolis city council, voted to breach the contract. LSGI alleges deprivation of due process in the breach of the contract and in amendments to the contract by the city. On the pleadings, the case appears to dispense with the court's ability to resolve the issue through application of the traditional previously discussed mechanisms. If none of these approaches is applicable, the court may employ alternatively the tests used in *San Bernardino Physicians'* and *Oceanside*, or forge a new approach. Assuming appellate review by the Eighth Circuit, this case potentially represents a test of the Ninth Circuit's position on constitutionalizing corporate public contract property interests. The court's decision hopefully will not be a mere reaction to the federalism bogeyman.

solved public contract cases through means other than limiting the types of protected property interests. The Ninth Circuit's decision in *San Bernardino Physicians'* moves beyond rhetoric, and limits constitutional protection to those contractually derived property rights that are similar to employment contracts and individual in nature.

The federalism concerns that impel the Ninth Circuit appear illusory given the small number of corporate public contract due process cases, and thus seem outweighed by the need for corporate access to a federal forum to remedy state discrimination. Discrimination against public service contract rights seems unnecessary. By appropriately employing existing accepted distinctions to weed out improper section 1983 claims, courts can expeditiously resolve cases involving public contract property interests without, in the name of federalism, unjustifiably disadvantaging claims that are not individual in nature or that do not resemble employment contracts.

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