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Section 1983 Litigation

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Martin A. Schwartz
Hon. George C. Pratt

Professor Martin A. Schwartz:

Good morning. Thank you, Judge Lazer. Section 1983¹ is a vital part of American Law. This is the statute that authorizes individuals to go into court to seek redress for violations of their federally protected rights by state and local officials.² It is utilized in a very broad range of situations, perhaps most prominently in police misconduct cases.³

Let me list what I think are certainly among the most important issues regarding Section 1983.⁴ First, what types of federal rights are enforceable under Section 1983? Second, when is a municipality liable for constitutional wrongdoing? Third, when is an official who has been sued for damages in a personal capacity protected from liability by the defense of qualified immunity? Fourth, what is the relationship between the federal Section 1983 remedy and state remedies?

Significantly, the United States Supreme Court rendered decisions last term dealing with each of these significant issues.

¹ 42 U.S.C. § 1983 (1994). Section 1983 provides in pertinent part:

Every person who, under color of any state 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 proceeding for redress”

Id.

² *Id.*

³ See, e.g., *Graham v. Connor*, 390 U.S. 386 (1989) (police use of excessive force); *City of Canton, Ohio v. Harris*, 489 U.S. 412 (1989) (holding inadequate police training may serve as a basis for a § 1983 action); see also *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (validity of release – dismissal agreement).

⁴ 42 U.S.C. § 1983 (1994); see generally 1A, 1B & 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983: CLAIMS AND DEFENSES (3d ed. 1997).

If one looks at the array of these decisions, they are a mixed bag in the sense that some of the decisions were pro-plaintiff and some were pro-defendant.⁵ This mixture is typical of the decisions rendered in any term of the Supreme Court over the last fifteen years or so. But, in my opinion, the most important Section 1983 rulings from the Supreme Court last term were pro-defendant.⁶ These rulings were in favor of state and local government, which raises the question of whether the present Court is perhaps embarked on cutting back on the Section 1983 remedy. I think that is an issue that we will have to watch during the next several years.

Let me start with the first question, the rights that are enforceable under Section 1983. Most Section 1983 cases assert violations of federal constitutional rights. We are familiar with those cases- Fourth Amendment Rights,⁷ First Amendment rights,⁸ Equal Protection,⁹ and so forth. But Section 1983 also authorizes the enforcement of federal statutory rights.¹⁰

⁵ See, e.g., *Richardson v. McKnight*, 117 S. Ct. 2100 (1997). In *Richardson*, the Court held that prison guards, who were employed by a private prison management firm, were not entitled to qualified immunity. *Id.* at 2107-08. See also *Board of County Commissioners of Bryan County v. Brown*, 117 S. Ct. 1382 (1997). In *Brown*, the County was not held liable for an alleged careless hiring decision. *Id.* at 1394.

⁶ See, e.g., *Brown*, 117 S. Ct. at 1382; *Blessing v. Freestone*, 117 S. Ct. 1353 (1997); *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997).

⁷ U.S. CONST. amend. IV. This amendment provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." *Id.*

⁸ U.S. CONST. amend. I. This amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." *Id.*

⁹ U.S. CONST. amend. XIV, § 1. This section provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

¹⁰ 42 U.S.C. § 1983 (1994). Section 1983 protects a plaintiff's federally protected rights by allowing the plaintiff to seek redress in the form of

The big issue in the Supreme Court over the last few years has been which federal statutes are in fact enforceable under Section 1983? If one goes back to 1980, the Supreme Court decided *Maine v. Thiboutot*.¹¹ The Court held that any federal statute claimed to be violated by a state or local official is enforceable under Section 1983.¹² But, in later cases, the Supreme Court cut back on that ruling; subsequent decisions held that there were two types of federal statutes that are not enforceable under Section 1983.¹³ First, there are federal statutes that do not create enforceable rights, but only declare Congressional policy.¹⁴ Those statutes are not enforceable under Section 1983.¹⁵ Then there are federal statutes that have such a comprehensive remedial scheme that the Supreme Court finding that they evince an intention that the comprehensive remedies be the exclusive modes of enforcement, thereby precluding resort to Section 1983.¹⁶ It is a type of implied repeal of the Section 1983 remedy.

damages for an alleged violation of the "laws" of the United States by a state or local official. *Id.*

¹¹ 448 U.S. 1 (1980).

¹² *Id.* at 4. Respondents brought suit alleging that the State of Maine and its Commissioner of Human Services violated a federal right by depriving respondents of welfare benefits under the federal Social Security Act. *Id.* at 3.

¹³ *See, e.g., Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) (holding that a claimed violation of a federal statute is not enforceable under § 1983 when it confers no substantive rights, but merely constitutes a congressional declaration of policy); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (holding that a claimed violation of a federal statute is not enforceable when Congress has foreclosed the § 1983 remedy in the particular statutory scheme).

¹⁴ *See, e.g., Pennhurst*, 451 U.S. at 18 (finding particular provisions of the Development Disabled Assistance & Bill of Rights Act did not create enforceable rights); *but see Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). In *Wright*, the Court held that a federal regulation may create enforceable rights under § 1983 when the statute itself has created enforceable rights, when the regulation is within the scope of the statute and when the regulation was intended to create enforceable rights. *Id.* at 432.

¹⁵ *See Schwartz, supra* note 4 at § 4.2.

¹⁶ *See, e.g., Middlesex*, 453 U.S. at 18 (finding two environmental statutes unenforceable under § 1983 because the existence of express remedies "demonstrate not only that Congress intended to foreclose implied private

This question of which federal statutes are enforceable under Section 1983 is quite an important issue. It comes before the federal courts on a regular basis, and I think it typically presents very difficult questions, both for litigators who litigate these claims and for federal judges who have to resolve them.

I say that for a number of reasons. First of all, we are not dealing with just the Congressional intent with respect to a particular federal statute. We are dealing with the Congressional intent concerning the interplay of the federal statute that the plaintiff is seeking to enforce, and Section 1983. Of course, that creates difficulties. What did Congress intend with respect to this interplay of the two statutes? What makes this especially difficult is that typically, and this understates the matter, Congress did not actually consider this issue. It enacts federal statutory schemes without regard to the question of whether the federal statutes are enforceable under Section 1983. When the issue arises in litigation, what does the federal court have to decide? What does the United States Supreme Court have to decide?

The issue comes down to this -- what would Congress have intended if the Congress had in fact considered the issue? It is a type of hypothetical inquiry. Because the Supreme Court knows that there is rarely actual Congressional intent with regard to the issue, the Court has created a type of analytical framework, a series of principles and doctrines that help the federal courts to deal with this issue. They have come up with a series of rules. For example, for a federal statute to be enforceable under Section 1983, the federal statute has to create rights and binding obligations;¹⁷ it must have been enacted for the benefit of the plaintiffs who are bringing the lawsuit;¹⁸ and the federal statute has to be fairly definite.¹⁹

actions but also intended to supplant any remedy that otherwise would be available under § 1983.").

¹⁷ *Pennhurst*, 451 U.S. at 18.

¹⁸ *Wright v. Roanoke Development & Housing Authority*, 479 U.S. 418 (1987).

¹⁹ *Artist M. v. Suter*, 503 U.S. 347 (1992).

I think that there is further difficulty in this area stemming from the fact that United States Supreme Court decisions themselves have not always run a straight line. There have been some “relatively broad” pro-plaintiff decisions.²⁰ On the other hand, there have been some decisions that have been rather narrow in terms of what type of federal statutes are enforceable under Section 1983.²¹

This has been a tough area in the Supreme Court and a tough area for anybody that litigates one of these claims. Last term the Supreme Court decided a case called *Blessing v. Freestone*.²² In that case the Court unanimously ruled²³ that the plaintiffs could not enforce a federal statutory scheme that is known as Title IV-D of the federal Social Security Act.²⁴ The federal statute at issue in this case was the child support provisions of the AFDC Chapter of the Social Security Act.²⁵ In fact, one of my theories is that it is very often less exciting Supreme Court decisions that wind up becoming the most important in the day-to-day practice of Section 1983 litigation.

Now, what was the issue in this case? This federal statutory scheme, this Title IV-D, was a federal funding scheme, and it channeled funds to the states.²⁶ The funds were channeled to the states for the purpose of having them make efforts to establish

²⁰ See, e.g., *Johnson v. Fankell*, 117 S. Ct. 1800 (1997) (holding officials had no right to interlocutory appeal in state court when denied qualified immunity).

²¹ See *Blessing v. Freestone*, 117 S. Ct. 1353, 1354 (1997) (holding that the plaintiff has to show he is “an intended beneficiary of the statute, his interests are not vague, and the statute imposes a binding obligation on the state.”).

²² *Id.*

²³ *Id.* at 1363.

²⁴ 42 U.S.C. § 651-669(b) (1996). “Title IV-D generally requires each participant State to establish a separate child support enforcement unit ‘which meets such staffing and organizational requirements as the Secretary may by regulation prescribe.’” *Blessing*, 117 S. Ct. at 1356 (quoting 42 U.S.C. § 654(3) (1996)).

²⁵ *Id.*

²⁶ *Id.*

paternity, to locate absent parents, and to help families obtain and enforce support orders.²⁷

The plaintiffs in this case were families from Arizona who were eligible for these services.²⁸ They alleged, in broad terms, that Arizona was doing a poor job complying with the federal statutory scheme.²⁹ Their claim was that they had a right to have Arizona substantially comply with this federal statute.³⁰ They did not invent this "substantial compliance" standard. That phrase was in the federal statutes and regulations.³¹ It was the standard that would place a state at risk of losing federal funds if, in fact, it was not in "substantial compliance" with the federal statutes.³²

The plaintiffs claimed that Arizona's record of performance under this federal statute was very poor as a result of caseworkers' high case loads, staffing inadequacies and backlogs, poor record keeping, and so forth.³³ But the Supreme Court unanimously held that Title IV-D did not give the plaintiffs enforceable rights to compel substantial compliance by state government.³⁴

²⁷ *Id.* The Court stated that in order to qualify for federal funds, the state was required to certify that it would operate a child enforcement program that conformed to the requirements set forth in Title IV-D. *Id.* The State was required "to do so pursuant to a detailed plan that has been approved by the Secretary of Health and Human Services." *Id.* Moreover, the State was required "to do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders." *Id.*

²⁸ *Id.* at 1357.

²⁹ *Id.* at 1358.

³⁰ *Id.*

³¹ See 42 U.S.C. § 609(a)(8) (1996) (authorizing the Secretary of Health & Human Services to reduce a state's grant by up to 5% if the state does not "substantially comply" with the requirements of Title IV-D).

³² *Id.* *Blessing*, 117 S. Ct. at 1357.

³³ *Id.* at 1358. See 42 U.S.C. § 654(3) (1996). Section 654(3) provides "A state plan for child and spousal support must . . . provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan." *Id.*

³⁴ *Blessing*, 117 S. Ct. at 1361.

I think that this decision is important for two reasons. The first one might strike you as being a little on the ironic side. I think this decision is important because it didn't make any changes in the principles or doctrines utilized by the Supreme Court to determine the enforceability of federal statutes under Section 1983. In other words, the Supreme Court analytical framework remains the same. Now, why is that significant? Well, in this area, which I would term an area of "legal instability," we have had Supreme Court decisions going in different directions, every single term seems to bring a new mode of approach from the Supreme Court. It thus seems significant that stability reigns, at least for the moment.

Why do I say "at least for the moment?" Because in footnote 3 of the Court's opinion³⁵ we learn that the State of Arizona had asked the United States Supreme Court to overturn its 1980 decision in *Maine v. Thiboutot*.³⁶ That was the case that started the development of the law in this area. It was *Thiboutot* that held that federal statutes, and not just federal civil rights statutes, are generally enforceable under Section 1983.³⁷ The Supreme Court in *Blessing* said that the continuing validity of *Blessing* had not been dealt with by the lower courts.³⁸ Because of that, the Supreme Court refuse to address this issue.³⁹ That means that this issue may be on the horizon in the future, and that is something to look for.

I think the decision in *Blessing v. Freestone* is also important for the attorneys actually involved in litigating these issues. The Supreme Court in *Blessing* stressed that a Section 1983 plaintiff who seeks to enforce a federal statute under Section 1983 must show that the particular federal statutory provision meets the test

³⁵ *Id.* at 1359 n.3 (stating that petitioners asked the Court to overrule *Thiboutot*, where the Court held that § 1983 provides a remedy for violations of any federal statutes).

³⁶ 448 U.S. 1 (1980).

³⁷ *Id.* at 4 (holding that the Section 1983 remedy "broadly encompasses violations of federal statutory as well as constitutional law.").

³⁸ *Blessing*, 117 S. Ct. at 1359.

³⁹ *Id.* at 1361.

of enforceability.⁴⁰ It is not sufficient for plaintiffs to talk about the federal statutory scheme in general. So when plaintiffs go into federal court and allege that Arizona has not been operating its Title IV-D program in “substantial compliance” with the Social Security Act AFDC child support provisions, the Supreme Court responded by saying that the plaintiff’s claim was much too general.⁴¹ The plaintiffs painted with too broad of a brush. Plaintiffs have an obligation to point to particular provisions in that particular federal statutory scheme, and then demonstrate that those particular federal statutory provisions are enforceable under Section 1983.⁴²

The Court did say that these may be some particular federal statutory provisions in Title IV-D that are enforceable under Section 1983.⁴³ That issue, however, had not been presented to the Supreme Court. What are we going to do with that? So the Court remanded that issue to some unlucky federal district court judge who will have to deal with that question.⁴⁴

Let us move to the second question, the question of municipal liability. When is a municipality liable under Section 1983 for the wrongs of its employees? Starting with the landmark decision

⁴⁰ *Id.* at 1359. The Court looks at three factors when determining whether a statutory provision gives rise to a federal right. *Id.* “First, Congress must have intended that the provision in question benefits the plaintiff.” *Id.* “Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence.” *Id.* “Third, the statute must unambiguously impose a binding obligation on the States.” *Id.*

⁴¹ *Id.* at 1362. The Court specifically stated that “it is not at all apparent that respondents sought any relief more specific than a declaration that their ‘rights’ were being violated and an injunction forcing Arizona’s child support agency to ‘substantially comply’ with all of the provisions of Title IV D.” *Id.*

⁴² *Id.*

⁴³ *Id.* The Court discussed three principles that determine whether a particular statutory provision gives rise to a federal right that may be enforceable under § 1983. *Id.* (1) Congress intended that the provision in question benefit the plaintiff; (2) plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; (3) the statute must unambiguously impose a binding obligation on the state. *Id.* at 1359.

⁴⁴ *Id.*

in *Monell v. Dep't of Social Services*,⁴⁵ what we learn is that, unlike the normal common law tort principle of vicarious liability, there is no vicarious liability, no respondeat superior liability in Section 1983 law.⁴⁶ That winds up meaning that a municipality can only be held liable under Section 1983 for its own wrongs. What do we mean by "its own wrongs?" That means that the municipality can only be held liable when the violation of the plaintiff's federally protected rights is attributable to the enforcement of some type or municipal policy or practice.

But the big issue that the Supreme Court and lower courts have been struggling with since the decision in *Monell*⁴⁷ is what type of municipal policies and practices give rise to Section 1983 liability? Let me suggest that if we tried to figure out what the present Supreme Court decision of law is, there are four potential types of municipal policies or practices. Let me run through them to have a framework in order to understand the Supreme Court's municipal liability decisions of last term.

First of all, there could be a formally promulgated written policy. For example, it could be an ordinance adopted by the city council. That is the easy case. Second, which actually turns out to be a lot more difficult, is that it is possible for the municipal liability to be based on the final decision of a municipal policymaker.⁴⁸ Third, even though unwritten, we might have a municipal practice or custom that could serve as a basis for municipal liability.⁴⁹ Finally, the Supreme Court has held specifically that municipal liability can be based upon a showing

⁴⁵ 436 U.S. 658 (1978). This case involved a class action suit brought by "female employees of the Department of Social Services and the Board of Education of the City of New York." *Id.* at 660. The complaint alleged that pregnant employees were forced to "take unpaid leaves of absence before such leaves were required for medical reasons." *Id.* at 661. The Court held that local governments are not wholly immune from suit under § 1983. *Id.* at 690.

⁴⁶ *Id.* at 691. The Court stated that "[w]e conclude that a municipality cannot be held liable solely because it employs a tortfeasor, or . . . a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.*

⁴⁷ *Id.* at 658.

⁴⁸ See Schwartz, *supra* note 4 at § 7.15. .

⁴⁹ See Schwartz, *supra* note 4 at § 7.16.

that the municipality was deliberately indifferent in the way that it trained its employees.⁵⁰ So these are the four potential modes of establishing municipal liability.

Last term, there were two Section 1983 municipal liability cases decided by the Supreme Court. The first is *Board of County Commissioners of Bryan County v. Brown*⁵¹ and the second is *McMillian v. Monroe County*.⁵² They are both five to four decisions;⁵³ I think it is significant that both of these decisions were rendered in favor of the municipalities.⁵⁴

Let me discuss the *Brown* case first.⁵⁵ *Brown* came about as a result of a confrontation between Jill Brown and deputy sheriff Burns.⁵⁶ Burns was involved in pursuing an automobile that was driven by Jill Brown's husband.⁵⁷ Jill Brown was a passenger in the car.⁵⁸ They came to a stop point and Deputy Burns said to Jill Brown, "out of the car."⁵⁹ When she did not get out of the car right away, the deputy grabbed her and put an "arm bar" hold on

⁵⁰ See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that "inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact."). See Schwartz, *supra* note 4 at § 7.17.

⁵¹ 117 S. Ct. 1382 (1997).

⁵² 117 S. Ct. 1734 (1997).

⁵³ *Brown*, 117 S. Ct. at 1382. Justice Souter, Justice Stevens, Justice Breyer, and Justice Ginsburg dissented. *Id.* at 1386. The same four justices dissented in *McMillian*. See *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997).

⁵⁴ *Brown*, 117 S. Ct. at 1382. See also *McMillian*, 117 S. Ct. at 1736.

⁵⁵ *Brown*, 117 S. Ct. at 1382.

⁵⁶ *Id.* at 1386.

⁵⁷ *Id.*

⁵⁸ *Id.* Jill Brown and her husband were driving from Texas to their home in Oklahoma. *Id.* In order to avoid a checkpoint in Oklahoma, the Brown's turned away and drove back to Texas. *Id.* After seeing the Brown's truck drive away, the County Deputy and Reserve Deputy pursued the Brown's truck. *Id.*

⁵⁹ *Id.*

her.⁶⁰ He threw her out of the car and spun her to the ground, and she was seriously injured.⁶¹

Jill Brown then brought a Section 1983 action in federal court and sought to establish liability on the part of Deputy Burns.⁶² That is a personal capacity claim. But the issue before the Supreme Court came about because she also sought to establish liability on the part of the county that hired deputy Burns.⁶³ How did the deputy get hired? Well, the deputy was hired by the sheriff, Sheriff Moore, and the county stipulated in the Supreme Court that, for the purpose of running the Sheriff's Department, the sheriff is the policymaker of the county.⁶⁴ There wasn't an issue on that score, but what was the plaintiff's theory of municipal liability?

The plaintiff argued that that when Deputy Burns was hired, the sheriff did a type of deficient background check.⁶⁵ It turns out the deputy was the son of the sheriff's nephew.⁶⁶ You might have a hard time figuring out what the relationship was there, but there was a little nepotism. And maybe as a result of this little nepotism, I don't think we know for sure, the sheriff in fact obtained the deputy's criminal record, but hired him anyway.⁶⁷ It is not the greatest thing for a law enforcement officer to have a criminal record. He had a series of traffic infractions and misdemeanor convictions for assault and battery, resisting arrest, and public drunkenness.⁶⁸ That was the deputy's record. The sheriff who hired him acknowledged that he obtained the criminal record, but really didn't look at it very carefully.⁶⁹ The county

⁶⁰ *Id.*

⁶¹ *Id.* at 1386-87. The "arm bar" technique involved grabbing Jill Brown's arm at the elbow and wrist, pulling her from the truck and then spinning her to the ground. *Id.*

⁶² *Id.* at 1387

⁶³ *Id.*

⁶⁴ *Id.* at 1389.

⁶⁵ *Id.* at 1387.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1393.

⁶⁹ *Id.*

must have had some suspicion about deputy Burns because, while they did hire him and gave him the authority to make arrests, it would not let him have a gun, nor would they let him have a patrol car.⁷⁰ Some law enforcement officer! The county must have had its doubts about this fellow, right?⁷¹

The plaintiff's theory of liability went something like this: Didn't the Supreme Court hold in *City of Canton v. Harris*⁷² that deliberately indifferent training could give rise to municipal liability?⁷³ Of course, the answer to that is "yes." If that is so, how about deliberately indifferent hiring or deliberate indifference in the screening process?⁷⁴

Let me say a word about these inadequate training cases. There are huge numbers of inadequate training municipal liability claims asserted under *Harris*. I didn't do a statistical work-up, but I can tell you that the plaintiffs prevail in a very tiny percentage of these cases. It is very difficult for the plaintiffs to prevail. I would say that it is under one percent, and that is being generous to the plaintiffs.

Why is it tough for the plaintiffs to prevail? Well, first of all, deliberate indifference is a tough standard to satisfy. That is for starters. The other reason is that it is very hard for plaintiffs to show direct causation between what the plaintiff claims is inadequate training and the plaintiff's deprivation of a federally protected right. For those two reasons, inadequate training claims are the type of claims on which plaintiffs very infrequently prevail.

The Supreme Court in the *Brown* case said, in effect, "You think training claims are tough?"⁷⁵ Screening claims are even tougher."⁷⁶ It is going to be tougher for the plaintiff to prevail on

⁷⁰ *Id.* at 1387.

⁷¹ *Id.*

⁷² 489 U.S. 378 (1989).

⁷³ *Id.* at 387. The Court stated that inadequacy of police training may serve as a basis for § 1983 liability in "limited circumstances." *Id.*

⁷⁴ *Brown*, 117 S. Ct. at 1389-90.

⁷⁵ *Id.* at 1390-91.

⁷⁶ *Id.* The Court reasoned "[W]here a plaintiff presents a § 1983 claim premised upon the inadequacy of an official's review of a prospective

a claim of deficient hiring because the plaintiff has to show not that the hiring authorities were deliberately indifferent to the applicant's employment record, but rather that they were deliberately indifferent to the plaintiff's federally protected rights.⁷⁷ Again, the levels of culpability and of causation are very stringent.

The way the Supreme Court spelled it out is that a plaintiff who presents such a case has to show a strong likelihood that this employee, the employee who was hired, would engage in this particular type of constitutional wrongdoing.⁷⁸ I think that, if this is not an impossible standard for plaintiffs to satisfy, it is pretty close to impossible. It makes me wonder whether the Supreme Court might have done everybody a better service by just rejecting this theory of liability altogether. Once you have a standard and leave the theory of liability open, plaintiffs are going to assert these claims, and they are typically fact-laden claims that are very time-consuming. But the reality is, how many plaintiffs are going to be able to meet this standard? The language that the Court used is that the plaintiff has to show that the particular employee who was hired- and here is the language- "would inflict this particular injury suffered by the plaintiff."⁷⁹ Go ahead and try to prove it.

In theory, the *Brown* decision is a case involving an interpretation of Section 1983.⁸⁰ But my own view is that realistically, this case has very little to do with the meaning of Section 1983. Why do I say that? This was a five-to-four

applicant's record . . . there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself." *Id.* at 1391.

⁷⁷ *Id.* at 1393.

⁷⁸ *Id.* at 1392. The Court inquired as to whether a review of Burn's record would have revealed that the sheriff should have known that Burns use of excessive force would have been a "plainly and obvious consequence of the decision to hire him." *Id.* The Court concluded that there was insufficient evidence to find that the sheriff's hiring decision reflected a "conscious disregard of an obvious risk that a use of excessive force would follow." *Id.* at 1393.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1387-88.

decision.⁸¹ Who is in the majority? Well, the more conservative members of the Supreme Court are in the majority: the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas, with the more liberal and moderate justices in the dissent.⁸² I don't think that is just an accident. I don't think that is one of those funny coincidences.

I think that, underlying the specific issue in the *Brown* case, is the issue of federalism.⁸³ To what extent should the federal courts review municipal hiring decisions? Do you think that it is just another funny coincidence that this is the same five-member majority that held the Brady handgun bill unconstitutional,⁸⁴ has given us a broad interpretation of the Eleventh Amendment protecting states' rights,⁸⁵ and has cut back on the Congressional commerce power.⁸⁶ I doubt it. I think that this decision is in line with those cases that are cutting back on federal power and returning power to state and local government.⁸⁷ I think that is going to be one of the themes of the conference today.

To the extent that this case is about the meaning of Section 1983, I think that one way to look at the *Brown* decision is that municipal liability claims just get too close to the forbidden *respondeat superior* law basis of liability.⁸⁸ What do I mean?

⁸¹ *Id.* at 1386.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Printz v. U.S.*, 117 S. Ct. 2365 (1997). Justices Souter, Breyer, Stevens, and Ginsburg dissented. *Id.* The act at issue established a "federal scheme governing the distribution of firearms." *Id.* at 2368. The court held that Congress does not have an implied power to "impress the state executive into succession." *Id.* at 2365.

⁸⁵ U.S. CONST. amend. XI. This amendment states: "The Judicial power of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.* See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996).

⁸⁶ See *U.S. v. Lopez*, 514 U.S. 549 (1995) (holding that The Gun Free School Zone Act, a statute making it a federal offense to knowingly possess a firearm in a school zone, did not have a substantial impact on interstate commerce, and thus, was an improper exercise of Congressional power under the Commerce Clause).

⁸⁷ *Brown*, 117 S. Ct. at 1386.

⁸⁸ *Id.*

Certainly in the *Brown* case, the plaintiff can't go into court and say that Bryan County should be held liable because it hired this deputy and made a bad choice -- because it hired a deputy who turned out to be a constitutional wrongdoer. The plaintiff can't make that claim. Why not? Because that is "*respondeat superior*" liability.

So what does the plaintiff say to the Supreme Court? What does Jill Brown say? Jill Brown argues, "well, that is not my claim. My claim is not just that they hired this person that they should not have hired, but that when they hired Deputy Burns, the county was deficient with respect to perusal of Burn's criminal record."⁸⁹ Well, I think that the Court may well be saying that that is just too close to *respondeat superior* liability.

The other municipality liability decision, *McMillian v. Monroe County*, deals with a different type of municipal liability claim.⁹⁰ The Supreme Court has held that municipal liability can be based on a single decision of a municipal policymaker.⁹¹ The key issue in these cases is whether the municipal official has final decision-making authority.⁹² The Supreme Court holds that this is an issue that is to be resolved as a matter of state law.⁹³ An issue is

⁸⁹ *Id.* at 1387.

⁹⁰ 117 S. Ct. 1734 (1997). *McMillian's* capital murder conviction was reversed on the grounds that the State of Alabama had concealed evidence of *McMillian's* innocence. *Id.* at 1736. Thereafter, *McMillian* brought a § 1983 lawsuit against Monroe County, Alabama, and other officials, including the Sheriff of Monroe County. *Id.* In his complaint, *McMillian* alleged that the Sheriff, acting in his official capacity as an official of Monroe County, violated *McMillian's* constitutional rights by intimidating a witness into making false statements and suppressing exculpatory evidence. *Id.*

⁹¹ *Id.* The Court concluded that "a local government is liable under § 1983 for its policies that cause constitutional torts. These policies may be set by the government's lawmakers, 'or by those edicts or acts may be fairly said to represent official policy.'" *Id.* (quoting *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978)).

⁹² *Id.*

⁹³ *Id.* at 1737. The Court stated that "[o]ur inquiry is dependent on an analysis of state law." *Id.* The Court reasoned that "our understanding of the actual function of a governmental official, in a particular area, will necessary be dependant on the definition of the official's function under relevant state law." *Id.*

whether the municipal official is a municipal policymaker or state policymaker. That has come up, for example, with respect to district attorneys for the various counties of New York. The Second Circuit decisional law holds that even though they work within the county, when they prosecute crimes they are not municipal policymakers, but are state policymakers.⁹⁴ In the *McMillian* case, the Supreme Court, by a five-to-four vote,⁹⁵ the same alignment as in the *Brown* case,⁹⁶ held that Alabama sheriffs are state policymakers, not county policymakers.⁹⁷ If an official is a state policymaker, there is no basis for imposing municipal liability. And, presumably, if the official is a state policymaker, that means the Eleventh Amendment comes into play. Now, if I were giving out awards for different types of decisions, maybe *Brown* would get last terms "most important Section 1983 decision" award, *McMillian* would get the award for "the most unusual Section 1983 case for last term.

Why do I say that? Because if one compares the majority and dissenting opinions in *McMillian*, there is no disagreement among the justices as to the meaning of Section 1983. There is not even a disagreement as to the methodology for approaching the policymaking issue.⁹⁸ The majority and the dissent agree that the issue should be resolved by reference to state law.⁹⁹ So here you have a five-member majority and four-member dissent in the Supreme Court disagreeing about what Alabama state law is.¹⁰⁰ That is strange.

⁹⁴ See, e.g., *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992); *Eisenberg v. District Attorney of County of Kings*, 1996 WL 406542 (E.D.N.Y.); *Covington v. City of New York*, 916 F. Supp. 282 (E.D.N.Y. 1996); *Baez v. Hennessy*, 853 F.2d 73 (2d Cir. 1988); *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991).

⁹⁵ *McMillian*, 117 S. Ct. at 1735. Justices Ginsburg, Stevens, Souter, and Breyer dissented. *Id.*

⁹⁶ 117 S. Ct. 1382 (1997)

⁹⁷ *McMillian*, 117 S. Ct. at 1739 (stating Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1742 (Ginsburg, J., dissenting).

¹⁰⁰ *Id.*

Five members of the Supreme Court say, “well, you know the Alabama Constitution and Alabama Supreme Court decisional law, and the Eleventh Circuit decisional law, all treat Alabama sheriffs as state policymakers as a matter of state law.”¹⁰¹ The majority took a formalistic approach, while the dissenters took a more real-life pragmatic approach. They said, “wait a second. Sheriffs in Alabama are hired by the county, are paid by the county, and have their equipment furnished by the county. And they only have jurisdiction within the county.”¹⁰² As a colleague of mine at Suffolk Law School, Karen Blum,¹⁰³ said, the dissent’s position is – if it looks like a duck, walks like a duck, and quacks like a duck, it should be a duck. But not for the majority. The majority held that they are state officials.¹⁰⁴

There is an important dissenting opinion written by Justice Breyer in *Brown* in which he stated that the whole subject of Section 1983 municipal liability has become so convoluted and so refined that it is impossible to apply.¹⁰⁵ In his view the court should rethink this whole issue. I would say that if you can’t follow analysis of the municipal liability decisions, you would probably agree with Justice Breyer, because this has become a very difficult area. Now, we have the distinction between training claims and hiring claims. We have decisions in which

¹⁰¹ *Id.* at 1740.

¹⁰² *Id.* at 1743 (Ginsberg, J., dissenting) (stating that “Alabama has 67 county sheriffs, each elected, paid, and equipped locally, each with countywide, not statewide, authority.”).

¹⁰³ Karen Blum is a professor at Suffolk Law School in Massachusetts, who made this statement at the Federal Center Section 1983 Training program for Federal District Court Judges, and Magistrates in Denver, Colorado in August 1997.

¹⁰⁴ *McMillian*, 117 S. Ct. at 1740. In rendering its decision the Court relied on among other things, the State of Alabama’s Constitutional provisions regarding Sheriff’s, the historical development of these constitutional provisions and the State Supreme Court’s interpretation of these provisions. *Id.* The Court concluded that the Sheriff’s represent the State, not the county, when acting in their official capacity. *Id.*

¹⁰⁵ *Brown*, 117 S. Ct. at 1401 (Breyer, J., dissenting) (stating that the decisional law has created a set of such complicated guidelines that “the law has become difficult to apply.”).

the Supreme Court wrestles five-to-four as to whether the official is a state policymaker or a county policymaker?¹⁰⁶ Four justices are indicating that perhaps we should now adopt vicarious liability.¹⁰⁷

Let me go to the third issue - qualified immunity. Qualified immunity is clearly, I think, the most prevalent issue in Section 1983 litigation. It protects officials who are sued for monetary liability under Section 1983, so long as the official did not violate clearly established federal law.¹⁰⁸ An official who violates clearly established federal law is not protected by qualified immunity.¹⁰⁹ It is called "*Harlow-Anderson* immunity," after the leading cases.¹¹⁰ But, if you violated the plaintiff's federal rights and the federal law wasn't clearly established, then the official is protected from personal liability by this immunity.¹¹¹

This immunity is special in two ways. First, the Supreme Court holds that qualified immunity gives the official not only immunity from liability, but also immunity from having to defend the lawsuit at all.¹¹² When I first heard this, it seemed very aberrant. Immunity normally meant protection from liability, but the official would have to defend the lawsuit. But, qualified immunity is an immunity from the burdens of litigation, not just from liability. And it is unique in a second way. If a federal district court denies qualified immunity raised on a motion for summary judgment, the official normally has the right to take an immediate appeal from the denial of immunity to the circuit court of appeals.¹¹³ It is an exception to the final judgment rule.¹¹⁴

¹⁰⁶ See *McMillian*, 117 S. Ct. at 1736.

¹⁰⁷ *Id.* at 1743.

¹⁰⁸ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court held "officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. See also *Anderson v. Creighton*, 483 U.S. 635 (1987).

¹⁰⁹ See 42 U.S.C. § 1983 (1994).

¹¹⁰ See *Harlow*, 457 U.S. at 818. See also *Anderson*, 483 U.S. at 646.

¹¹¹ *Harlow*, 457 U.S. at 818.

¹¹² *Id.* at 808. See also *Mitchell v. Forsyth*, 472 US 511 (1985).

¹¹³ See *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

There were three cases decided by the Supreme Court last term that could be called “qualified immunity” cases. One is *Clinton v. Jones*, but I don’t really believe that it raises recurring issues for Section 1983 cases.¹¹⁵ As much as I would like to talk about Paula Jones and President Clinton, I’m going to resist and turn my attention to the immunity decisions that raise more recurring Section 1983 issues.

The first is *Richardson v. McKnight*,¹¹⁶ and it arose out of the fact that prisons in different parts of this country are now being privatized. The Prison Corporation of America, for example, runs many of the prisons in Tennessee.¹¹⁷ In *Richardson*, the Supreme Court held that private prison guards who are sued under Section 1983 for constitutional violations cannot assert the *Harlow* qualified immunity defense. This was yet another five to four decision.¹¹⁸

The broad issue that underlies *Richardson* is, what happens when the private party defendant is found to be a state actor?¹¹⁹

¹¹⁴ See Fed. R. Civ. P. 60. See also *Blessing v. Freestone*, 117 S. Ct. 1353 (1997).

¹¹⁵ 117 S. Ct. 1636 (1997). The respondent brought a § 1983 action to recover damages from the President based on allegations of certain sexual advancements, which allegedly led to retribution by her supervisors in her state job. *Id.* at 1637. The Court held that “[d]eferral of this litigation until petitioner’s Presidency ended was not constitutionally required.” *Id.* at 1638.

¹¹⁶ 117 S. Ct. 2100 (1997). In *Richardson*, an inmate at a Tennessee Correctional Center, brought a § 1983 action against prison guards, who were employees of a private prison management corporation, for physical injuries inflicted by the guards. *Id.* at 2102. The prison guards asserted a qualified immunity defense to the prisoner’s claim. *Id.* The Court held that prison guards employed by a private corporation, are not entitled to the qualified immunity from a §1983 claim. *Id.*

¹¹⁷ *Id.* at 2102. The Court reasoned that “history does not reveal a ‘firmly rooted’ tradition of immunity applicable to privately employed prison guards.” *Id.* at 2104. Moreover, the court stated that the purpose of the immunity doctrine does not warrant qualified immunity for prison guards who are privately employed. *Id.* at 2106.

¹¹⁸ *Id.* Justices Breyer, Stevens, O’Connor, Souter, and Ginsburg formed the majority. *Id.* Justices Scalia, Rehnquist, and Thomas dissented. *Id.*

¹¹⁹ *Id.* at 2103.

Can the defendant raise the qualified immunity defense?¹²⁰ The defendant would argue that: “you are treating me as a state actor, why don’t you give me the same immunity defense that you give to public official state actors.”¹²¹ That is, “if I have the burdens of litigation, why don’t I get some of the benefits of it?”¹²² The Supreme Court in *Richardson* did not deal with that broad issue.¹²³ This is a limited holding, in the sense that the Supreme Court made clear that it applies only to private prison guards.¹²⁴ So the broad issue remains on the table.

The decision reads like it comes from the school of law and economics. Justice Breyer’s focus is upon the economic aspects of the way private prison companies and private prison guards operate.¹²⁵ The decision leaves a number of issues open. Let me explain. The Prison Corporation of America, which hired the private guards in *Richardson*, was clearly a for-profit organization.¹²⁶ One issue that is left open is the immunity of private party state actors who work for not-for-profit organizations which perform services for state or local government?

Secondly, there was in *Richardson* very limited supervision of these private guards by the government.¹²⁷ That leaves open the question, as to whether the issue would come out differently if these prison guards were carefully supervised by the government?¹²⁸ Another issue was left open: The Court held that private prison guards cannot assert qualified immunity,¹²⁹ but maybe they are entitled to assert some other type of good faith

¹²⁰ *Id.*

¹²¹ *Id.* at 2106.

¹²² *Id.*

¹²³ *Id.* at 2102. The Court framed the issue as follows: “[W]hether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983.” *Id.*

¹²⁴ *Id.* at 2108.

¹²⁵ *Id.* at 2104-06.

¹²⁶ *Id.* at 2106.

¹²⁷ *Id.* at 2108.

¹²⁸ *Id.*

¹²⁹ *Id.*

defense.¹³⁰ That is an open issue too. These issues are all open. Remember, this is a five-to-four decision.¹³¹ The presence of any of these factors might tip the holding in the other direction.

The most important issue left open in the *Richardson* case is whether private prison guards are engaged in state action.¹³² The Supreme Court said, for purposes of this litigation, we are going to assume that private prison guards are engaged in state action, but we are not resolving the issue.¹³³ So, this issue is an open issue as well.

The other immunity case is *Johnson v. Fankell*.¹³⁴ Remember that in federal court an official who is denied qualified immunity normally can take an immediate appeal to the Court of Appeals.¹³⁵ Well, in *Johnson*, the Supreme Court said that the right of immediate appeal does not exist in a state court 1983 action.¹³⁶ Why is this significant? In all prior decisions that the Supreme Court has rendered in dealing with state court Section 1983 action, the Court has taken the position that the very same rules that apply in a federal court Section 1983 action should also apply in a state court Section 1983 action.¹³⁷

There was a principle of parity that was developing. *Johnson* marks the first time that the United States Supreme Court has

¹³⁰ See also *Wyatt v. Cole*, 928 F.2d 718 (5th Cir. 1991).

¹³¹ *Richardson*, 117 S. Ct. at 2102.

¹³² *Id.* at 2108.

¹³³ *Id.* The Court specifically stated that it would not determine whether the “defendants acted under color of state law.” *Id.*

¹³⁴ 117 S. Ct. 1800 (1997). In *Johnson* a liquor store clerk brought a §1983 action for damages, alleging deprivation of property “without due process of law in violation of the Fourteenth Amendment” when officials of the Idaho Liquor Dispensary fired her. *Id.* at 1802.

¹³⁵ See *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (holding that “a Federal District Court order rejecting a qualified immunity defense on the grounds that defendant’s actions would have violated clearly established law may be appealed immediately.”).

¹³⁶ *Johnson*, 117 S. Ct. at 1807. In *Johnson*, state officials claimed they were entitled to qualified immunity. *Id.* at 1802. After the trial court rejected their defense, the officials argued that they were entitled to an interlocutory appeal. *Id.*

¹³⁷ See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Felder v. Casey*, 487 U.S. 131 (1988); *Howlett v. Rose*, 496 U.S. 356 (1990).

held that a different rule may apply in a state court Section 1983 action as compared to a federal court Section 1983 action.¹³⁸ The specific holding was that in a state court Section 1983 action there is no federal right to an interlocutory appeal from the denial of qualified immunity.¹³⁹ Of course, if the state chooses to give a right of interlocutory appeal, there is nothing wrong with that, but there is no federal right to take the interlocutory appeal.¹⁴⁰ This might prompt some plaintiffs to file their Section 1983 claims in state rather than a federal court. On the other hand, it also might prompt some defendants in state court Section 1983 actions to attempt to remove the action to federal court. If an official in a state court Section 1983 action doesn't have the right of interlocutory appeal, she might try to remove to federal court where she has the right to an interlocutory appeal.

I'm up to my last area, the fourth area, which is the relationship between the Section 1983 federal and state remedies. This is an area where the Supreme Court decided two cases last term.¹⁴¹ Let me give you a little background first. The Supreme Court has consistently told us since the decision in *Monroe v. Pape* that one does not have to exhaust state remedies in order to file suit under Section 1983.¹⁴² The Court, in keeping with that principle, has

¹³⁸ *Johnson*, 117 S. Ct. at 1807. The Court held that "when preemption of state law is at issue, we must respect the principles of federalism" and respect the State's application of its procedural rules. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). This case involved an allegation of a "regulatory taking" of property. *Id.* at 1662. The issue to be decided was whether the claim of a constitutional violation was ripe for judicial review. *Id.* at 1664. The Court held that the claimant had obtained a "final judgment" sufficient to meet the *Williamson* ripeness test. *Id.* at 1670. See also *Edwards v. Balisok*, 117 S. Ct. 1584 (1997). This case involved an alleged § 1983 violation for deprivation of due process during the course of a disciplinary proceeding that resulted in a state prisoner's loss of his good time credits. *Id.* at 1586. The Court held that the claim was "not cognizable under the Section." *Id.* at 1589.

¹⁴² 365 U.S. 167 (1961) (holding that the "federal remedy is supplementary to the state remedy, and the later need not be first sought and refused before the federal one is invoked.").

consistently held that the federal Section 1983 remedy is independent of any available state remedies.¹⁴³ But I think, little by little, the Supreme Court and the Congress have been cutting into this principle.¹⁴⁴ Certainly, they have been paying more attention to the issue.

One of the useful roles of a law professor is to take seemingly isolated Supreme Court decisions and attempt to put them together. Maybe the busy practitioner doesn't have time to do that. So here I do succumb to temptation. Let me try to put those pieces together as quickly as possible.

In 1981, the Supreme Court decided *Parrat v. Taylor*,¹⁴⁵ holding that a procedural due process claim arising out of random and unauthorized state action could be defeated by the availability of a post-deprivation state judicial remedy.¹⁴⁶ The availability of an adequate post-deprivation state judicial remedy thus can defeat the Section 1983 due process claim.¹⁴⁷ This is not an exhaustion rule, but a principle of procedural due process, yet *Parrat* is a doctrine under which the state judicial remedy can wind up defeating the federal Section 1983 claim.¹⁴⁸

Similarly, in 1985, the Court decided a major case dealing with regulatory takings claims. In *Williamson Regional Planning v.*

¹⁴³ See, e.g., *Heck v. Humphrey*, 512 U.S. 477, 489 (1994) (holding "we do not engraft an exhaustion requirement upon § 1983.").

¹⁴⁴ *Id.* The Court in *Heck* held that a prisoner challenged the constitutionality of her conviction or sentence § 1983 if the conviction or sentence is first overturned.

¹⁴⁵ 451 U.S. 527 (1981) (presenting the question of whether a state prisoner can recover for damages under § 1983, alleging a violation of due process when hobby materials that the prisoner ordered had been lost as a result of the prison officials negligence).

¹⁴⁶ *Id.* at 544. The Court held "[A]lthough the state remedies may not provide respondent with all of the relief which may have been available. . . that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id.*

¹⁴⁷ *Id.* The State of Nebraska had a torts claim procedure by which a person who suffered a tortious loss at the hands of the State can seek redress for the deprivation. *Id.* at 543.

¹⁴⁸ *Id.*

Hamilton,¹⁴⁹ the Court held that when the plaintiff files a Section 1983 regulatory takings claim, the plaintiff has to show that she sought just compensation through state procedures.¹⁵⁰ In addition, he or she must show an attempt to obtain a final decision concerning the permissible uses of the property.¹⁵¹ This decision too is not couched in exhaustive terms; it is couched in ripeness terms.¹⁵² But the availability of state remedies can serve to defeat Section 1983 takings claims. In a very high percentage of cases, the Section 1983 plaintiff is not able to meet the *Williamson* ripeness test.

There was a case on this issue last term from the Supreme Court, *Suitum v. Tahoe Regional Planning Agency*.¹⁵³ The Court held that a plaintiff who asserts a regulatory takings claim does not have to show that, if he or she has, a what are called "transferable development rights," that the agency approved the sale of those rights.¹⁵⁴

Now, maybe I should backtrack just a bit. The landowner in the case did obtain a final decision denying her application for a building permit.¹⁵⁵ In a final decision denying her application for a building permit, the local authorities made a decision that her property fell into an environmental zone that did not allow for

¹⁴⁹ 473 U.S. 172 (1985).

¹⁵⁰ *Id.* at 200. In *Williamson*, a land developer brought a § 1983 action, alleging that the Planning Commission had taken its property without just compensation by refusing to approve the developer's proposed developments of a tract of land. *Id.* at 175. The Court held that "[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not yet ripe." *Id.* at 186

¹⁵¹ *Id.* at 191 (holding that until the Planning Commission decides that the requested variances will not be granted, it is impossible for the jury to determine whether the respondent "will be unable to derive economic benefit" from the tract of land).

¹⁵² *Id.* (stating that effect cannot be measured until a final decision has been made as to how the regulations will be applied to respondent's property).

¹⁵³ 117 S. Ct. 1659 (1997)

¹⁵⁴ *Id.* at 1661.

¹⁵⁵ *Id.* at 1663.

development.¹⁵⁶ The Court held that this was a final decision concerning her right to use the property.¹⁵⁷ She had been given, under state law, transferable development rights.¹⁵⁸ She had the right to transfer those rights, but she had to get agency approval for the transfer.¹⁵⁹ I think the main point of the decision was that those transferable development rights are something valuable. Whether a particular transfer or sale is approved or not, she still has them,¹⁶⁰ and they are something of value.¹⁶¹ My reading of this decision is that, it is limited to this specific issue dealing with transferable development rights. I don't think that it seriously diminishes the *Williamson* ripeness rules.

Let me come to the third way in which state remedies are playing important roles in Section 1983 litigation. In 1994, the Supreme Court decided *Heck v. Humphrey*,¹⁶² which was an exceedingly important decision. *Heck* holds that any time the plaintiff asserts a claim that necessarily implicates the constitutionality of a conviction or sentence, the claim is not cognizable, unless the plaintiff shows the federal court that the conviction or sentence has been overturned in some way.¹⁶³ It could be overturned either on appeal in state court, or by habeas

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1667. The Court held that "it is undisputed that the agency has finally determined that petitioner's land lies entirely within an SEZ (Stream Environment Zone)." *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1670. The Court held "her only challenge to TDR's [transferable development rights] raises a question about their value . . ." *Id.*

¹⁶¹ *Id.*

¹⁶² 512 U.S. 477 (1994). In *Heck*, Roy Heck was convicted of voluntary manslaughter and sentenced to a 15-year prison sentence. *Id.* at 478. While his appeal was pending, he filed suit under § 1983 against the Dearborn County prosecutors and Indiana State police investigators, alleging that the defendants "acting under state law" engaged in unlawful acts which led to his arrest and conviction. *Id.* at 499.

¹⁶³ *Id.* at 486-87 (holding "the plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.").

corpus proceeding, or by executive order.¹⁶⁴ I think that this is a type of exhaustion requirement.

Last term, in *Edwards v. Balisok*,¹⁶⁵ the Supreme Court extended *Heck* to prison disciplinary sanctions, specifically, to challenges by prisoners who assert that the sanction violates procedural due process rights.¹⁶⁶ The Heck doctrine applies, and this is an important proviso, if the plaintiff's procedural due process claim, if successful, would necessarily lead to the invalidation of the disciplinary sanction.¹⁶⁷ The prisoner in *Edwards* claimed that the hearing officer was biased and deceitful and didn't allow the prisoner to put on a defense.¹⁶⁸ The Court said that the claim was not cognizable in federal court under Section 1983, unless the prisoner first showed that the disciplinary sanction had been overturned.¹⁶⁹ It is a type of exhaustion requirement, and to me, this is the Section 1983 sleeper of the year. You heard it here first.

This decision is going to lead to the dismissal of large numbers of prisoner Section 1983 cases. It is also going to create a lot of difficulty for federal judges, because they are going to have to sort out which procedural due process claims necessarily implicate the validity of the disciplinary sanction and which do not.

Now for the last piece of the puzzle in the relationship between the federal Section 1983 remedy and state remedies. Congress has gotten into the act too. Congress now says that a prisoner who seeks to contest the conditions of confinement must first exhaust available administrative remedies.¹⁷⁰ So, I think, when you look at this whole picture, I do not think it is now safe to say

¹⁶⁴ *Id.*

¹⁶⁵ 117 S. Ct. 1584 (1997).

¹⁶⁶ *Id.* at 1589 (holding "respondent's claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983.").

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 42 U.S.C. § 1997(e) (1994).