



2003

## Supreme Court Section 1983 Decisions: (October 2001 Term)

Martin A. Schwartz

*Touro Law Center*, [mschwartz@tourolaw.edu](mailto:mschwartz@tourolaw.edu)

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Constitutional Law Commons](#), and the [Courts Commons](#)

---

### Recommended Citation

19 Touro L. Rev. 51 (2002)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# SUPREME COURT SECTION 1983 DECISIONS: (OCTOBER 2001 TERM)

*Martin A. Schwartz*<sup>1</sup>

## INTRODUCTION

The federal Constitution creates very significant individual rights, but is conspicuously quite silent on the question of specific remedies to enforce those rights. And yet, individual constitutional rights work like any other rights; these rights are not meaningful unless they have enforcement mechanisms. Congress understood this early on. Back in 1871, just three years after the adoption of the Fourteenth Amendment,<sup>2</sup> Congress enacted what is now 42 U.S.C. Section 1983.<sup>3</sup> Section 1983 is the vehicle that authorizes

---

<sup>1</sup> B.B.A., Cum Laude, 1966, City College; J.D., Magna Cum Laude, 1968, Brooklyn Law School; LL.M., 1973, New York University. Admitted to the Bar of New York, Federal District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit, and the U.S. Supreme Court. He was Managing Attorney for the Research and Appeals Bureau of Westchester Legal Services and an Adjunct Professor at New York Law School. He has litigated cases in the United States Supreme Court. He is the author of a bi-monthly column in the New York Law Journal titled "Public Interest Law," and has lectured for the Practising Law Institute and is co-chairman of its annual Supreme Court review and Section 1983 litigation programs. He is the author of a multi-volume treatise on Section 1983 civil rights litigation titled "Section 1983 Litigation: Claims and Defenses" (3d ed. 1997), "Section 1983 Litigation: Jury Instructions" (3d ed. 1999) (co-authored with George C. Pratt), and "Section 1983 Litigation: Federal Evidence." He has also written numerous articles on civil rights issues. The author gratefully acknowledges the valuable assistance of Natasha Meyers, Brooke Lupinacci, and Marjorie Mesidor in the preparation of this article.

<sup>2</sup> U.S. CONST. amend. XIV provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>3</sup> 42 U.S.C. §1983 (2000) provides in pertinent part:

Every person who, under the color of any statute . . . of any State . . . subjects or causes to be subjected, any citizen . . . to

individuals to assert their constitutional rights claims against state and local government.

Today we see a very wide range of constitutional claims asserted under Section 1983. The most common of these claims are: large numbers of Fourth Amendment<sup>4</sup> claims challenging arrests, searches, the use of force by law enforcement officers; and continuously increasing numbers of First Amendment retaliation claims, mainly by public employees, property owners and prisoners. In addition, there are a large number of procedural due process claims, substantive due process claims, and equal protection claims. Just about any possible constitutional claim may be the subject of a Section 1983 action.

### TAKINGS CLAUSE

During the last twenty or maybe twenty-five years, we have seen an ongoing increase in the number of takings claims asserted in federal court under Section 1983.<sup>5</sup> These claims used to be filed

---

the deprivations of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, or other proper proceeding for redress. . . .

<sup>4</sup> U.S. CONST. amend. IV 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, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>5</sup> See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002) (holding that a governmental moratorium on property development does not constitute a "per se taking"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (holding that the mere fact that the land use restrictions predated acquisition of property did not preclude owner from asserting regulatory takings claim); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (finding that when an owner of real property must sacrifice all economically beneficial uses in the name of common good he has suffered a taking); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 322 (1987) (holding that a temporary taking requires just compensation); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (holding that the government regulation had not effected a taking of appellant's property; the restrictions imposed were substantially related to the

routinely in state courts. A strong motivator for litigating these claims under Section 1983 is the potential for the recovery of attorneys fees under Section 1988,<sup>6</sup> the fee shifting statute that is attached to Section 1983.

Landowners seeking to assert takings claims have to satisfy fairly stringent ripeness requirements. They have to show they obtained a final decision on the use of the property from the local authorities, and that they have sought just compensation through the state judiciary.<sup>7</sup> If the landowners satisfy these ripeness requirements, they can assert, under Section 1983, that the action of state government, or more likely the action of local government, has resulted in the taking of property requiring the government to pay the landowners just compensation.<sup>8</sup>

There are two types of governmental actions that are considered to be categorical or automatic takings of property. One is a physical appropriation or physical invasion of property by the government.<sup>9</sup> For instance, if the government decides to pave a highway over your backyard, that would be an automatic taking of property requiring just compensation. With respect to government regulation, if a court was to come to the conclusion that a governmental regulation deprived the property owner of all

---

promotion of the general welfare and allowed for reasonable beneficial use of the property).

<sup>6</sup> 42 U.S.C. §1988 (2000) states in pertinent part:

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes 42 U.S.C. §§ 1981-1983... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

<sup>7</sup> *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (concluding that respondent's claim was not ripe because respondent did not obtain a final decision for the application of zoning ordinance and subdivision regulations to the property, nor used state procedures for obtaining just compensation).

<sup>8</sup> U.S. CONST. amend. V provides in pertinent part: "private property" shall not "be taken for public use without just compensation."

<sup>9</sup> *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) (determining that New York's law requiring landlords to allow television cable companies to place cable facilities on the outside of their apartment buildings constituted a taking even though the facilities occupied at most only one and one half cubic feet of landlord's property).

economic value of the property, or all economic viable use of the property, that too would be considered an automatic or categorical taking requiring just compensation.<sup>10</sup>

But for other types of government regulation, whether the regulation constitutes a taking of property is determined on a case-by-case basis. The decisional law on this issue is vast. I am not going to make any effort to try to review that, but essentially this all occurs on a case-by-case basis requiring courts to balance the interference with the property owner's "reasonable investment backed expectations"<sup>11</sup> against the strength of the governmental interest.<sup>12</sup> This, of course, is the big bucks issue of constitutional law. If the court comes to the conclusion that all the government has done is regulate the property, the government does not have to provide just compensation.<sup>13</sup> However, if the court reaches the conclusion that the government regulation constitutes a taking of property, then the government has to provide just compensation.<sup>14</sup> This is a very sticky issue for the courts.

Even going back to the early decision law, all the Court was able to say was things like: "this is a question of degree"; "has the government gone too far?"<sup>15</sup> Not very helpful. But it describes

---

<sup>10</sup> See *Lucas*, 505 U.S. at 1015 (holding that when a state seeks to sustain a regulation that deprives the landowner of all economically beneficial use of his property, this is a "taking").

<sup>11</sup> See, e.g., *Penn Cent. Transp.*, 438 U.S. at 127 (finding that a state statute that substantially furthers important public policies may so frustrate distinct investment backed expectations as to amount to a "taking").

<sup>12</sup> See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (examining the "taking" question by engaging in factual inquiries that have identified several factors such as the economic impact of the regulation, its interference with reasonable investment backed expectations and the character of the governmental action).

<sup>13</sup> See *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (explaining that a government regulation by definition involves the adjustment of rights for the public good and that this adjustment curtails some potential for the use or economic exploitation of private property, to require compensation in all such circumstances would effectively compel the government to regulate by purchase).

<sup>14</sup> See *Kaiser Aetna*, 444 U.S. at 175 (determining that in the interest of "justice and fairness" an economic injury caused by government action must be duly compensated by the government to the landowner).

<sup>15</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)

(We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant

what the law is trying to figure out: Is this mere government regulation? And, if it is mere regulation, then all property owners will absorb the cost of the interference with their property for the greater social good.<sup>16</sup> But, if the state or municipality goes too far, then it is not fair to impose the cost on the individual property owner and the government should provide just compensation.<sup>17</sup>

All of this is background to the Supreme Court's major takings decision of last term, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>18</sup> In *Tahoe-Sierra Preservation Council*, the Supreme Court held that a thirty-two month moratorium imposed by the government on land use development did not constitute a *per se* or categorical taking of the property owner's property. The dominant rationale of the majority opinion was that this was not a total deprivation of the economic value of the property because when the moratorium is lifted, the value of the property will be revived.<sup>19</sup>

This decision received a lot of attention from the media. It was widely viewed as a setback for property owners and a major victory for land use planners and environmentalists. But, I think the view that this was a major defeat for property owners, who had, in a series of recent Supreme Court decisions won some major victories, is somewhat overstated. All the Court held in *Tahoe-Sierra Preservation Council* was that the moratorium did not constitute a categorical or automatic taking of property.<sup>20</sup> The Supreme Court did not reach the question of whether the moratorium might constitute a taking of property when applying

---

achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree -- and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court.)

<sup>16</sup> See *Williamson*, 473 U.S. at 202 (Stevens, J., concurring) (explaining that in most litigation involving a challenge to a governmental regulation, the government contends that the public interest justifies the harm to the property owner and that no compensation need be paid).

<sup>17</sup> *Id.*

<sup>18</sup> 535 U.S. 302 (2002).

<sup>19</sup> *Id.* at 351.

<sup>20</sup> *Id.* at 354.

the balancing approach.<sup>21</sup> In fact, Justice Stevens, writing for the court, used tentative language at the very end of the opinion, stating, "it may well be true that a moratorium that lasts for more than one year should be viewed by the courts with special skepticism."<sup>22</sup> So, there is ammunition here for landowners to use in future litigation when they try to argue that the moratorium does, in fact, constitute a taking of property.

## JUDICIAL ACCESS

There are a fairly sizable number of Section 1983 decisions in which plaintiffs asserted a denial of their constitutional right of access to the courts.<sup>23</sup> Sometimes these claims are of a systemic nature, for example where plaintiffs seek to challenge a fee requirement that is imposed as a precondition to commencing a lawsuit in state or federal court and the plaintiff cannot afford to pay it.<sup>24</sup> In *Christopher v. Harbury*, the Court stated the "object of

---

<sup>21</sup> *Id.* at 317; see also *Kaiser Aetna*, 444 U.S. at 175 (identifying several factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations and the character of the governmental action as factors which must be weighed in the determination of whether a "taking" has occurred).

<sup>22</sup> *Tahoe-Sierra*, 535 U.S. at 341.

<sup>23</sup> See *Christopher v. Harbury*, 536 U.S. 403, 406 (2002) (holding that no claim for denial of "access to the courts" was stated since the plaintiff failed to identify the underlying cause of action of intentional infliction of emotional distress); see, e.g., *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416 (7th Cir. 2000) (holding that an attempt to cover up police wrongdoing, hiding the facts from the plaintiffs which ultimately neither prevented the plaintiffs from pursuing relief nor reduced the value of their claim, was not actionable under §1983).

<sup>24</sup> See, e.g., *M. L. B. v. S. L. J.*, 519 U.S. 102, 106 (1996) (holding that a denial of appeal cannot be based on plaintiff's ability to pay a record fee in parental-rights termination action); *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971) (holding that the requirement of a divorce filing fee as applied to indigent who could not afford to pay the fee violated procedural due process); *Smith v. Bennett*, 365 U.S. 708, 713 (1961) (finding that the State's refusal to docket an indigent prisoner's petition for a writ of habeas corpus without the payment of a statutory filing fee denies the prisoner the equal protection of the laws); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that the government cannot require indigents to pay a fee for a direct appeal in a criminal case); *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) (holding that a transcript fee for appellate review in a criminal case was unconstitutional as applied to indigents who could not afford to pay the fee).

the denial of access suit is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed.”<sup>25</sup>

There is also a second type of claim, a sub-category of access to the courts claims. There has been somewhat of a proliferation of these second type of judicial access claims in recent years in which the plaintiff alleges that official acts impeded litigation of a claim for relief.<sup>26</sup> For instance, as a result of alleged misconduct by the government, the federal court plaintiff, asserting a violation of her constitutional right of judicial access, alleges that she has been deprived of the ability to assert a particular cause of action. Or, this is a little variation: a plaintiff may allege that she has been deprived of the ability to litigate a particular cause of action fully, again, as a result of government suppression of information or deceit.<sup>27</sup>

Last term, the Supreme Court decided *Christopher v. Harbury*<sup>28</sup> which addressed this issue. It was actually a *Bivens*<sup>29</sup> case, not a Section 1983 case, but it was the type of claim that could be asserted under Section 1983. In *Christopher*, the Court held that when a plaintiff asserts a denial of his constitutional right to judicial access, the plaintiff must, in the federal court complaint,

---

<sup>25</sup> *Christopher*, 536 U.S. at 413.

<sup>26</sup> *Id.* at 414.

<sup>27</sup> See, e.g., *Swelk v. River Rouge* 119 F.3d 1259, 1261 (6th Cir. 1997) (reasoning that because the police cover-up extended throughout the investigation, the plaintiff lost the opportunity to sue under the statute of limitations); *Foster v. Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994) (finding that although plaintiff's claim that material information had been withheld during discovery, leading them to settle for less was valid, defendants were immune from suit because plaintiffs failed to clearly establish that the right to judicial access included plaintiffs' claimed right to be free of discovery abuses); *Bell v. Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) (“The cover-up and resistance of the investigating police officers rendered hollow [the plaintiff's] right to seek redress.”).

<sup>28</sup> 536 U.S. 403 (2002).

<sup>29</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Black's Law Dictionary* defines a *Bivens* case as a name for a type of action for damages to vindicate constitutional right when federal government official has violated such right. Action is available if no equally effective remedy is available, no explicit congressional declaration precludes recovery, and no “special factors counsel hesitation”. BLACK'S LAW DICTIONARY 712 (6th ed. 1990).



assert that the government's alleged suppression of information or misrepresentation of fact in some way impeded plaintiff from asserting his particular cause of action.<sup>30</sup>

I do not think that is the difficult part of the Court's decision. I think the difficult part is the requirement that the federal court plaintiff also allege the underlying cause of action.<sup>31</sup> In addition, the plaintiff has to assert his underlying cause of action in the same way and with the same pleading requirements as if that was the claim that was being asserted in the first place.<sup>32</sup> The plaintiff's complaint must also "identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought."<sup>33</sup>

I smell a rat here. And the rat I think I smell is the "catch 22" rat. The very nature of the plaintiff's judicial access claim is: I am suing the government for denial of judicial access because the government was deceitful and I have no evidence to support my underlying cause of action and, therefore, I could not assert it. And now, the Supreme Court says that in order to bring a claim for denial of judicial access, the plaintiff must plead the underlying cause of action as well.<sup>34</sup> If the plaintiff could have properly asserted his underlying cause of action, he might not be in court now claiming a denial of judicial access. This is the "catch 22." So, I think *Christopher* is mainly a pleading requirements case that creates a serious problem for plaintiffs that seek to litigate these claims.

---

<sup>30</sup> *Christopher*, 536 U.S. 403 at 415-16.

<sup>31</sup> *Id.* at 420-21 (holding that petitioner had no claim for denial of "access to the courts" because she failed to identify the underlying cause of action of intentional infliction of emotional distress in her complaint).

<sup>32</sup> *Id.* at 416 (finding that "like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant.").

<sup>33</sup> *Id.* at 415 (explaining that when the access claim, like the case at bar, looks backward, the complaint must identify a remedy that may be awarded as recompense that is not otherwise available in some suit that may yet be brought).

<sup>34</sup> *Id.*

**EXHAUSTION REQUIREMENT OF THE PRISONER LITIGATION REFORM ACT**

Prisoners seek to make great use of Section 1983. Unlike other Section 1983 plaintiffs who are excused from the requirement of exhausting administrative remedies, the Prison Litigation Reform Act<sup>35</sup> (PLRA) requires that prisoners challenging the conditions of their confinement must first exhaust available administrative remedies. Two terms ago, the United States Supreme Court held in *Booth v. Churner*,<sup>36</sup> that the exhaustion of administrative remedies requirement applies even when the plaintiff is seeking judicial relief, such as damages, that is not available administratively.<sup>37</sup> The *Booth* decision gave the PLRA an exhaustion of administrative remedies requirement a broad interpretation. Last term in *Porter v. Nussle*,<sup>38</sup> the Supreme Court held that prisoners who assert excessive force claims against prison guards are first required to exhaust their administrative remedies.<sup>39</sup> In other words, a claim of excessive force by prisoners is considered a challenge to a condition of confinement in which the prisoners find themselves.<sup>40</sup> *Porter* extends the broad interpretation of the PLRA exhaustion requirement given in *Booth*. *Porter* was a very unsurprising decision.

---

<sup>35</sup> See 42 U.S.C. § 1997 (2000) provides in pertinent part:

no action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted;

see also, *Booth v. Churner*, 532 U.S. 731, 733-34 (2001).

<sup>36</sup> 532 U.S. 731 (2001).

<sup>37</sup> *Id.* at 736.

<sup>38</sup> 534 U.S. 516, 520 (2002) (holding that “no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 532.

**QUALIFIED IMMUNITY**

In contrast, I think the second prisoner case, *Hope v. Pelzer*,<sup>41</sup> was a surprising and important decision. The prisoner's name was Larry Hope and maybe that was the "x-factor"; maybe his last name was the magic for this Alabama prisoner.<sup>42</sup> Larry Hope alleged that while he was on work detail, a polite phrase for the chain gang in Alabama, he was cuffed to a hitching post two times to sanction him for his "disruptive conduct".<sup>43</sup> He had taken a nap during a morning bus ride to the chain gang's work site and had failed to get off the bus quickly enough. As a result, he was cuffed to a hitching post for a period of seven-hours in the hot Alabama sun, without a shirt, which caused his skin to burn, and was given only one or two water breaks. He was not allowed to have access to bathroom facilities and was taunted by the prison guards about his thirst.<sup>44</sup> The Supreme Court granted *certiorari* to determine whether the Court of Appeals for the Eleventh Circuit had applied the doctrine of qualified immunity properly to the facts of this case.<sup>45</sup> The Supreme Court agreed with the Court of Appeals in holding that this type of treatment constituted cruel and unusual punishment, violative of the Eighth Amendment.<sup>46</sup> Most significantly, however, the Supreme Court disagreed with the circuit court's analysis of qualified immunity. The Supreme Court held that the Eleventh Circuit, which found that the prison guards were protected by qualified immunity, misapplied the qualified immunity doctrine and reversed the circuit court's determination that qualified immunity protected the prison officials from liability.<sup>47</sup>

---

<sup>41</sup> 536 U.S. 730 (2002).

<sup>42</sup> *Id.* at 733.

<sup>43</sup> *Id.* ("In 1995, Alabama was the only state that followed the practice of chaining inmates to one another in work squads. It is also the only state that handcuffed prisoners to 'hitching posts' if they refused to work or otherwise disrupted work squads.").

<sup>44</sup> *Id.* at 734-35.

<sup>45</sup> *Id.* at 733.

<sup>46</sup> *Hope*, 536 U.S. at 737; U.S. CONST. amend. VIII provides in pertinent part: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>47</sup> *Id.* at 739.

So, here is a civil rights case in which the prisoner was successful in the United States Supreme Court. Think about what I just said because it is the rare case indeed in which a prisoner prevails in a civil rights suit in the U.S. Supreme Court. So, this is a rare decision, a modern miracle.

In my opinion, qualified immunity is the most important issue in Section 1983 civil rights actions. In Section 1983 actions, a high percentage of Section 1983 cases are resolved on the basis of qualified immunity, and often resolved in favor of the defendant.<sup>48</sup> The key inquiry on qualified immunity is did the defendant official violate clearly established constitutional law?<sup>49</sup> If the official acted in an unconstitutional manner, but the law on the constitutional claim was not clearly established when the official acted, the official is said to have acted in an objectively reasonable manner and qualified immunity protects the official from personal liability.<sup>50</sup> However, if the official acted in an unconstitutional manner and if, at the time the official acted, the constitutional law was clearly established the official should have known that what she did was unconstitutional. Under those circumstances, qualified immunity does not protect the official from personal monetary liability. The courts, however, have often had difficulty trying to figure out whether the constitutional law was clearly established at the time the official acted. Sometimes we have circuit court opinions where two judges say the law was clearly established, and the other judge says it was not clearly

---

<sup>48</sup> See, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Supreme Court reasoned that the initial inquiry should have been whether the facts alleged showed the officer's conduct violated a constitutional right. The next question should have been whether the right was clearly established in the context of the case. The Court found that the duty to protect the safety and security of the Vice President did not have clearly established rules prohibiting the officer from acting as he did. *Id.* See also *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (finding that petitioner was entitled to summary judgment on qualified immunity grounds if he could have established, as a matter of law, that a reasonable officer could have believed his search was lawful); *Mitchell v. Forsyth*, 472 U.S. 511, 536 (1985) (finding petitioner immune from suit for his authorization of the wiretap under the qualified immunity exception.).

<sup>49</sup> See, e.g., *Saucier*, 533 U.S. at 201; *Anderson*, 483 U.S. at 639; *Mitchell*, 472 U.S. at 517.

<sup>50</sup> See e.g., *Saucier*, 533 U.S. at 201; *Anderson*, 483 U.S. at 639; *Mitchell*,

established. Or, the district court says it was clearly established and the circuit court says it was not.

The *Hope* decision is a very significant case because the Eleventh Circuit's prior position on qualified immunity was so overly protective of officials sued under Section 1983 that the doctrine came close to being a form of absolute immunity for the officials.<sup>51</sup> The Eleventh Circuit's position was that for the constitutional law to be clearly established, the prior precedent had to be on "all fours" with the facts of the instant case. The Court of Appeals said to show that the law was clearly established "the federal law by which the government officials conduct should be [judged must be] . . . pre-existing, obvious and mandatory and established not by abstractions but by cases that are materially similar to the precedents that the plaintiff is relying upon."<sup>52</sup>

The Supreme Court in *Hope* said that the Eleventh Circuit's interpretation of qualified immunity was too rigid and was not what the Supreme Court intended.<sup>53</sup> I think we now have somewhat of a change in the application of the qualified immunity doctrine. The Supreme Court in *Hope* said the key inquiry under qualified immunity is whether, at the time the official acted, the official had fair warning, fair notice, that the official conduct was unconstitutional.<sup>54</sup> I think a fair warning or a fair notice inquiry

---

472 U.S. at 517.

<sup>51</sup> See, e.g. *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd by*, 536 U.S. 730 (2002) (stating that "when analyzing a qualified immunity defense, [the court looks] to 'whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law'" (citing *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir. 1995))).

<sup>52</sup> *Id.* at 981.

<sup>53</sup> 536 U.S. at 739. The Court found that the Eleventh Circuit's analysis, which required that the facts of previous cases be "'materially similar' to *Hope's* situation" in order to give officers notice that conduct violates a constitutional right, was too rigid. Rather, the Court held:

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

*Id.* (quoting *Anderson*, 483 U.S. at 640).

<sup>54</sup> *Id.* at 739-40.

will be the focus of the next wave of qualified immunity cases before the courts.

The Supreme Court's decision in *Hope* takes a broad, flexible approach to qualified immunity. The Supreme Court determined that the prison officials had notice that their conduct was unconstitutional based on (1) circuit court precedent, though not directly on point, (2) the fact prison officials in Alabama were violating part of a stife reputation concerning the hitching post, and (3) a report submitted by the United States Department of Justice to the Alabama Department of Corrections<sup>55</sup> finding that use of the hitching post by Alabama prison officials violated prisoner's rights in significant respects. The Supreme Court in *Hope* took this report into account,<sup>56</sup> even though there was no evidence that this report had ever been communicated to the defendant prison officials.<sup>57</sup> I am not sure that I understand this rationale, but it is definitely good for plaintiff's lawyers.

#### ENFORCEMENT OF FEDERAL STATUTES UNDER SECTION 1983

Constitutional rights are not the only rights that are enforceable under Section 1983. In some instances, federal statutes may be enforceable under Section 1983 as well.<sup>58</sup> When a lecturer or law professor says that "in some instances" the next question becomes: "well, tell us which ones", right? The answer is, it depends on congressional intent; what did Congress intend with respect to that particular federal statute? Did Congress intend that the federal statute be enforced under Section 1983? This is a tough issue because Congress has rarely actually articulated its intent as to whether a particular federal statute would be enforceable under Section 1983 or not.<sup>59</sup> So, in these cases, we are

---

<sup>55</sup> *Id.* at 741-42.

<sup>56</sup> *Id.*

<sup>57</sup> *Hope*, 536 U.S. at 759 (Thomas, J., dissenting).

<sup>58</sup> See, e.g., *Wilder v. V.I. Hosp. Ass'n*, 496 U.S. 498, 523 (1990) (holding that the reasonable rate provisions of the Medicaid Act "creates a right enforceable by health care providers under §1983"); see also *Wright v. City of Roanoke Redevelopment and Housing*, 479 U.S. 418, 429 (1987) (holding that the Brooke Amendment to the Housing Act is enforceable under §1983).

<sup>59</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). In order to determine whether a statutory violation may be enforced through §1983 requires a determination of

not talking about an actual congressional intent. Realistically, the best the courts can do (the courts never say this, but I am letting you in on a secret), is attempt to determine what Congress would have intended if Congress had thought about the issue. This is a question of "hypothetical" congressional intent.

The Supreme Court decisional law in this area, enforcement of federal statutes under Section 1983, has been very uneven.<sup>60</sup> Sometimes, we talk about decisions moving in a straight line; but this line is about as crooked as one could imagine. Not crooked in the moral sense, but this is a line that has constantly changed. It starts in 1980 with gangbusters when the Supreme Court held that all federal statutes are enforceable under Section 1983 against state and local officials.<sup>61</sup> Of course, if we stopped here, there would be nothing further to discuss. But, the very next year, the Court did a quick retreat and basically said, "wait a second, maybe we did not mean exactly what we said."<sup>62</sup> The Court held that two types of federal statutes are not enforceable under Section 1983.<sup>63</sup> There are some federal statutes intended not to create rights but only to declare policy.<sup>64</sup> Additionally, there are

---

"whether Congress *intended to create a federal right*. Thus, 'the question of whether Congress . . . intended to create a private right of action is definitively answered in the negative [where] a statute by its terms grants no private rights to any identifiable class.'" *Id.* (emphasis in original).

<sup>60</sup> *Id.* at 278 (acknowledging that the Court's opinions on the question of enforceability under §1983 have not been "models of clarity," employing inconsistent language and have created "confusion" in lower courts).

<sup>61</sup> See, *Maine v. Thiboutot*, 448 U.S. 1 (1980).

<sup>62</sup> See, e.g., *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 20 (1981) (holding that when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.").

<sup>63</sup> See, e.g., *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. \_\_\_\_ (year) (citing *Pennhurst State School & Hospital v. Haldermann*, 451 U.S. 1 (1981)); *Middlesex County Sewage Auth.*, 453 U.S. 1 (recognizing two exceptions to the application of §1983 "where Congress has foreclosed such enforcement of the statute itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of §1983.").

<sup>64</sup> See, e.g., *Pennhurst State School & Hosp. v. Haldermann*, 451 U.S. 1, 31 (1981) (finding that the Developmentally Disabled Assistance and Bill of Rights Act established a federal-state grant program whereby the government provides federal assistance to participating states to aid them in creating programs to care

federal statutes that are not enforceable under Section 1983 because they have such comprehensive enforcement mechanisms built into them that Congress must have intended that those comprehensive enforcement mechanisms would be the exclusive mode of enforcement.<sup>65</sup>

Since the Court's quick retreat, there have been a series of Supreme Court decisions dealing with enforcement of federal statutes under Section 1983.<sup>66</sup> Some of them are pro-plaintiff decisions and some are pro-defendant decisions. But clearly, the most recent decisions from the Supreme Court on this issue have taken a "stingy" view towards the enforcement of federal statutes under Section 1983 and have taken a quite pro-defendant position.<sup>67</sup>

---

for and treat the developmentally disabled. The Act is voluntary, and the states are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. The Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination and demonstration projects).

<sup>65</sup> See *supra* note 61.

<sup>66</sup> See, e.g., *Blessing v. Freestone*, 520 U.S. 329, 348 (1997) (holding that Social Security Act, Title IV-D, requiring participating states to establish a separate child support enforcement unit, does not give individuals a federal right to force a state agency to substantially comply with the statute); *Wilder*, 496 U.S. at 523 (holding that the Medicaid Act "creates a right enforceable by health care providers under § 1983"); *Wright*, 479 U.S. at 429 (holding that the Brooke Amendment to the Housing Act does not evidence Congress' intent to prevent petitioner from making a § 1983 claim).

<sup>67</sup> See, e.g., *Blessing*, 520 U.S. at 347 (finding that the Social Security Act, Title IV-D, does not allow for aggrieved persons to seek redress, either judicial or administrative. The Court noted that the "only way that Title IV-D assures that States live up to their child support plans is through the Secretary's oversight, even assuming the Secretary's authority to sue for specific performance . . . as the Government further contended, no private actor would have standing to force the Secretary to bring suit for specific performance"); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that there is no private right of action to enforce regulations that prohibit discriminatory impact of conduct by federal funding recipients under Title VI of the Civil Rights Act of 1964); *Gebster v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998) (holding that the "school district [is not] liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.").



This pro-defendant position continued last term in *Gonzaga University v. Doe*,<sup>68</sup> where the Supreme Court held that the Family Education Rights and Privacy Act,<sup>69</sup> (FERPA), was not enforceable under Section 1983.<sup>70</sup> Specifically, the statutory provision before the Supreme Court provided that federal funding shall not be made available to any educational institution that has a policy or practice of releasing student education records without parental consent.<sup>71</sup> This was a five to four decision.<sup>72</sup> The Chief Justice wrote the opinion for the Court, which Justices O'Connor, Scalia, Kennedy and Thomas joined.<sup>73</sup> That might sound a little bit familiar because that is the federalism five, the strong federalism faction of the Supreme Court. You might ask, why a federalism faction on this issue of congressional intent? Well, there is no real congressional intent, the point I made earlier. More significantly, I think that this is a federalism issue because what is at issue is the ability to enforce federal statutes, normally in federal court, against state and local government. This is an aspect of federalism.

The decision in *Gonzaga University* not only denied enforcement of this particular federal statute, but had a broader agenda as well.<sup>74</sup> I think this is an extremely important decision and is designed to send a message to lower federal court judges to be very careful before they find a particular federal statutory provision enforceable under Section 1983.

The majority in *Gonzaga University* held that a federal statute is not enforceable under Section 1983 unless the statute creates a right in unmistakably clear language.<sup>75</sup> The dissenters found that language in the majority opinion sounds like a presumption against allowing enforcement of federal statutes under Section 1983.<sup>76</sup> There is also language in the majority opinion that the Court has rarely held spending clause legislation enforceable

---

<sup>68</sup> 536 U.S. 273 (2002).

<sup>69</sup> 20 U.S.C. § 1232 (g) (b) (1) (2000).

<sup>70</sup> *Gonzaga*, 536 U.S. at 278.

<sup>71</sup> *Id.*; 20 U.S.C. § 1232 (g)(b)(1).

<sup>72</sup> *Gonzaga*, 536 U.S. at 273.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 290.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 298 (Stevens, J., dissenting).

under Section 1983.<sup>77</sup> So, this is a very important decision. It gives a lot of ammunition to attorneys that represent state and local government and I think it is going to be big trouble for plaintiffs' lawyers.

### BIVENS CLAIMS AGAINST FEDERAL OFFICIALS

When a plaintiff seeks to assert a constitutional claim, not against a state or local official, but against a federal official, the plaintiff cannot utilize Section 1983 because the federal official did not act under color of state law.<sup>78</sup> As it turns out, there is no federal statute that is the counterpart of Section 1983 for claims against federal officials. So, what the plaintiff would have to do is rely on the *Bivens* doctrine, named after the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Federal Agents of the Federal Bureau of Narcotics*<sup>79</sup>. If the agents were unknown, how is it they were named, and if they were named, how is it that they were unknown? I think this is really a way of saying that the plaintiff intended to make a claim against a known defendant but could not identify him.

In the landmark *Bivens* decision, the Supreme Court recognized a claim for damages directly under the Fourth Amendment against federal law enforcement officers.<sup>80</sup> Then, the Court recognized a *Bivens* claim in the next two cases that came before the Court. First, in *Davis v. Passman*,<sup>81</sup> the Court recognized a claim for damages under the due process clause of the Fifth Amendment.<sup>82</sup> It was actually an equal protection claim

---

<sup>77</sup> *Gonzaga*, 536 U.S. at 280.

<sup>78</sup> *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978) (finding "the injury [must] be 'under color of state law.' As such, 'any person' acting 'under color of state law' may be held liable for affirmative conduct that 'subjects, or causes to be subjected, any person . . . to the deprivation of any 'federal constitutional or statutory right.'").

<sup>79</sup> 403 U.S. 388 (1971). The *Bivens* doctrine allows suits to be brought against federal prosecutors for violating constitutional rights and recognizes a cause of action for money damages directly under the Constitution. *Id.* at 397.

<sup>80</sup> *Id.* at 389-90. The plaintiff alleged that agents of the Federal Bureau of Narcotics, without probable cause, made a warrantless search of his apartment and arrested him for possession of narcotics. *Id.*

<sup>81</sup> 442 U.S. 228 (1979).

<sup>82</sup> *Id.* at 248-49; U.S. CONST. amend. V provides in pertinent part:

based upon the due process clause of the Fifth Amendment. Next, in 1980, the Supreme Court decided *Carlson v. Green*,<sup>83</sup> where the Court again recognized a *Bivens* claim for damages directly under the Eighth Amendment.<sup>84</sup> These decisions enabled individuals to enforce their constitutional rights against federal officials.

The Court in *Bivens* and *Davis* expressed concern that for some plaintiffs; it is a damage remedy against a federal official or no remedy. It is damages or nothing because these plaintiffs often do not have standing to seek prospective relief.<sup>85</sup> Moreover, they cannot sue the federal government because the federal government has sovereign immunity protection.<sup>86</sup> So, this claim for damages against a federal official in his personal capacity is the only claim left. The Court in these early *Bivens* decisions regarded the claim for damages as an ordinary remedy for a deprivation of an interest in personal liberty.<sup>87</sup> And, the Court thought that the Supreme Court was a highly appropriate body to formulate remedies for constitutional violations.<sup>88</sup>

However, in every Supreme Court case since 1983 to the present in which a *Bivens* claim was raised, the Supreme Court has found one reason or another to reject the right to assert the *Bivens* claim. In some cases, the Court rejected the *Bivens* claim because there was something special about the subject matter of the *Bivens*

---

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

<sup>83</sup> 446 U.S. 14 (1980).

<sup>84</sup> *Id.* at 22; U.S. CONST. amend. VIII. provides in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>85</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983) (holding that plaintiff lacked standing to seek injunctive relief for unconstitutional actions of the Los Angeles police department because the plaintiff could not show a "substantial likelihood" of being injured again in the same way).

<sup>86</sup> *Bivens*, 403 U.S. at 410.

<sup>87</sup> *Id.* at 395.

<sup>88</sup> *Id.* at 396.

claim, as in cases relating to military operations.<sup>89</sup> In some of the cases, the *Bivens* claim was rejected because the Court found that Congress had created an alternative remedy, even if the alternative remedy was not as effective as the *Bivens* remedy.<sup>90</sup> The Supreme Court rejected the *Bivens* remedy in one case because the plaintiff sought to assert the claim against the federal agency rather than against the federal official.<sup>91</sup> There is a clear trend, since the year 1983, in which the United States Supreme Court has rejected plaintiff's attempts, one after another, to asserting *Bivens*' claims.

This trend continued last term in *Correctional Services Corporation v. Malesko*.<sup>92</sup> The Supreme Court held that an individual cannot assert a constitutional claim under the *Bivens* doctrine against a private entity alleged to have been involved in the government action.<sup>93</sup> The entity, the Corrections Corporation, was operating a halfway house for the federal government.<sup>94</sup> This case gave the Supreme Court the opportunity to decide whether a private prison is engaged in governmental action. The Court sidestepped that issue, indeed, did not even mention it. Instead, the Court based its holding on its determination that *Bivens* claims, when they are available, may not be asserted against entities, whether the entity is a federal agency or, as in this case, is a private entity alleged to be engaged in government action.<sup>95</sup> The Court reasoned that the dominant purpose of the *Bivens* remedy is to

---

<sup>89</sup> See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (holding that Congress did not provide a damages remedy for claims by military personnel asserting constitutional violations by their superiors and any judicial response would be inconsistent with Congress's authority in this field).

<sup>90</sup> See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 425-27 (1988) (holding a *Bivens* remedy unavailable for money damages against federal officers who administered a program for social security disability benefits as a matter of law because Congress had provided adequate remedial mechanisms for the alleged constitutional violation); *Lucas*, 462 U.S. at 377 (declining to create a *Bivens* remedy against individual government officials for First Amendment violations reasoning Congress was in a better position to do so).

<sup>91</sup> See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 472 (1994) (holding that the logic of *Bivens* does not support a cause of action directly against an agency of the federal government).

<sup>92</sup> 534 U.S. 61 (2001).

<sup>93</sup> *Id.* at 72.

<sup>94</sup> *Id.* at 63.

<sup>95</sup> *Id.*

deter constitutional violations by federal officials, not to grant relief against entities.<sup>96</sup> Well, that seems somewhat disingenuous because for the past quarter century, the Court has not been overly concerned about recognizing the *Bivens* remedy against federal officials either.<sup>97</sup> Then, what I think is the understatement of the term, for me at least, is when the Court said, "in the last thirty years we have been cautious about extending *Bivens* into new areas."<sup>98</sup> "Cautious"? For the past thirty years, not one decision by the Supreme Court has recognized the availability of the *Bivens* remedy!

The Supreme Court in the early *Bivens* cases took the position that the formulation of remedies for constitutional violations is primarily the function, and a highly appropriate function, for the United States Supreme Court.<sup>99</sup> The Supreme Court's more recent *Bivens* decisions view this issue of remedies as primarily an issue for Congress.<sup>100</sup> So, there is a separation of powers aspect to the *Bivens* decision. I think we have come full circle, or almost full circle, from an initial philosophy that the *Bivens* remedy was a presumptively available remedy for constitutional violations to where we are today, the *Bivens* remedy as a presumptively unavailable remedy.

---

<sup>96</sup> *Id.* at 69.

<sup>97</sup> See, e.g., *Lucas*, 462 U.S. at 367 (declining to create a *Bivens* remedy against individual government officials for First Amendment violations reasoning Congress was in a better position to do so).

<sup>98</sup> *Malesko*, 534 U.S. at 68.

<sup>99</sup> *Bivens*, 403 U.S. at 395-96.

<sup>100</sup> *Malesko*, 534 U.S. at 68.