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Supreme Court Section 1983 Developments: October 1998 Term

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PROF. SCHWARTZ: Good morning. In *Monell v. NYC Department of Social Services*,[1] the Supreme Court of the United States held for the first time that municipalities are liable under Section 1983.[2] Vast decisional law has developed since 1978 on issues like municipal liability, qualified immunity, and a range of other issues. The Supreme Court has devoted an extraordinary amount of its decision making resources to Section 1983 cases. There is no question in my mind that the United States Supreme Court understands the vital nature of Section 1983 litigation and regards it as a vital part of American law. Section 1983 is the vehicle that allows individuals to enforce their constitutional rights against state government, municipal government, state officials, local officials and other state actors.

The big issue today in the United States Supreme Court is Federalism. Section 1983 raises, if not always on the surface, certainly below the surface, federalism issues. Section 1983 is a

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[1] 463 U.S. 658 (1978).

[2] 42 U.S.C. § 1983. This section provides in part that:

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

federal congressional remedy authorizing claims for relief against state and local government. In a very high percentage of the cases, the Section 1983 battle takes place in the federal courts.

In addition, the Eleventh Amendment[3] often plays a critical role in Section 1983 litigation. Certainly, the United States Supreme Court views the Eleventh Amendment as an important federalism component of the federal Constitution.

Section 1983 cases have also raised a very wide range of potential issues. Putting aside federalism concerns; questions of federal statutory interpretation, the meaning of Section 1983, constitutional interpretation, and sometimes the interplay between federal law and state law. If you put that whole picture together, there is certainly a lot that can go on in a Section 1983 action.

Last term, the Supreme Court, rendered a number of important decisions involving Section 1983 litigation. In terms of the major Section 1983 cases, I have grouped the cases into four areas. First, the constitutional rights enforceable under Section 1983. The Court dealt with cases involving procedural due process,[4] substantive due process,[5] and the Privileges and Immunities Clause of the Fourteenth Amendment.[6] The Court also dealt with a major case involving state action,[7] and a case dealing with the right to trial by jury.[8] Finally, the Court rendered an important decision involving the application of qualified immunity.[9]

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[3] U.S. CONST. amend. XI. This section provides in pertinent part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state . . .." *Id.*

[4] City of West Covina v. Perkins, 119 S. Ct. 678 (1999).

[5] Conn v. Gabbert, 119 S. Ct. 1292 (1999).

[6] Saenz v. Roe, 119 S. Ct. 1518 (1999).

[7] American Manufactures Mutual Ins. Co. v. Sullivan, 119 S. Ct. 977, 989 (1999).

[8] City of Monterey v. Del Monte Dunes, 119 S. Ct. 162 (1999).

[9] Wilson v. Layne, 119 S. Ct. 1692 (1999).

I. Constitutional Rights Enforceable Under § 1983

a) Procedural Due Process

Let me come back to the first area, the constitutional rights that are enforceable under Section 1983. The Court decided a procedural due process case called *City of West Covina v. Perkins*.[10] This case dealt with the question of what is adequate notice as a matter of procedural due process. The case arose from a police search of a home owned by a Californian, Mr. Perkins.[11] The police searched Mr. Perkins' home and seized a revolver and cash from a boarder staying in his home.[12] When the police were finished, they left a notice.[13] Mr. Perkins came home and found a notice, which I will paraphrase, "To whom it may concern we were here. We had a warrant and we took some property from your home. There is a list of the property that we took, and if you have any questions, here are the names of some detectives that you might try to reach."[14]

The procedural due process issue was whether, when the police seize a person's property, they are required as a matter of procedural notice to give the individual information about the available remedies for recovering the property.[15] The Ninth Circuit held that the police did have an obligation to provide notice of the available state law remedies.[16] The United States Supreme Court unanimously reversed the Ninth Circuit. The Court held that the police are not obligated as a matter of procedural due process to give the individual notice of available remedies for recovering the property, as long as those remedies are set forth in some published source.[17] What is a published source? It could be a statute or ordinance or, the Court indicated, even decisional law.[18]

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[10] *Perkins*, 119 S. Ct. at 678.
[11] *Id.* at 679.
[12] *Id.*
[13] *Id.* at 679-80.
[14] *Id.* at 680.
[15] *Id.* at 681.
[16] *See* Perkins v. City of West Covina, 113 F.3d 1004, 1011 (9th Cir. 1997).
[17] *Perkins*, 116 S. Ct. at 682.
[18] *Id.*

The theory is that the owner of the property can simply, and I am saying that tongue and cheek, look up the statute, ordinance or check out the cases, and turn to these public sources and figure out what the available remedies are.[19] While the Court did not say it in so in many words, this presumably includes not only what the remedies are, but the statute of limitations, tolling rules, what you have to plead, who you have to sue, the filing fee and so on. The Supreme Court was invoking the "no big deal" theory. It is "no big deal" for the owner of the property to simply look up the remedies, turn to the published sources and figure out what the remedies are. The Court said that the only proviso to that principle, is that if the available remedies are "arcane," the police would have to provide notice of available remedies. This got me to thinking, what if the remedies are in an "arcane" published source?[20] I suppose if it is in a published source and you can find the source, then the police do not have to give notice of the remedies.

In reaching its decision in *Perkins*, the Court implicitly, or maybe even explicitly, resolved another procedural due process issue. If you go back to the doctrine of *Parratt v. Taylor*,[21] the Supreme Court held that when there is deprivation of property or liberty that comes about as a result of random and unauthorized official conduct, the availability of an adequate post-deprivation judicial remedy satisfies procedural due process.[22] The Supreme Court in *Perkins* said, almost in a self-righteous tone, "We never held in that line of cases that the state is obligated to provide information about the available judicial remedies."[23] I would say that the Court never said the state did not have to provide notice of the available remedies. The most accurate characterization is that under the *Parratt* line of cases this had been an open issue, but that issue is not open anymore. That issue has been resolved in effect by the *Perkins* case.

The decision in *Perkins* might make some sense if individuals who seek to recover their property from the police are by and large

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[19] *Id.*
[20] *Id.*
[21] 451 U.S. 527 (1981).
[22] *Parratt*, 451 U.S. at 540.
[23] *Id.* at 681.

individuals who have law school degrees and can figure out their remedies. However, I do not think that is likely the case. *Perkins* represents a very stingy and unrealistic view of procedural due process. After all, isn't the lay individual likely to have a great deal of difficulty trying to figure out what the available remedies are and what they mean? On the other side of the equation, wouldn't it be very easy for the police to add information to the form notice that they are already required to leave with the property owner describing the property that has been taken? To me, the balance of interests clearly favors the individual. It is somewhat baffling that not one of the nine Justices on the Supreme Court even thought to weigh the competing interests in this manner.

b) Substantive Due Process

The second constitutional right is substantive due process, which was at issue in *Conn v. Gabbert.*[24] This case arose out of the Menendez brothers' criminal prosecution in California. The District Attorney who was prosecuting the Menendez brothers learned that Lyle Menendez had written a letter to his girlfriend, Tracy Baker.[25] The police suspected that in this letter, Lyle Menendez wrote, "If you are called to testify at my criminal trial, lie."[26] The District Attorney wanted to get this letter, so he subpoenaed Tracy Baker to appear before the grand jury.[27] The District Attorney directed her to produce the letter, but Ms. Baker informed the District Attorney that she had turned the letter over to her attorney, Paul Gabbert.[28] When Tracy Baker appeared before the grand jury, the prosecutor, who had secured a search warrant, arranged to have Paul Gabbert searched in a room in the courthouse.[29] Upon being searched, Mr. Gabbert produced the letter and turned it over to the prosecutor.[30] Ms. Baker claimed that

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[24] 119 S. Ct. 1292 (1999).
[25] *Conn*, 119 S. Ct. at 1294.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Conn*, 119 S. Ct. at 1294.

the timing of the search of her attorney, Mr. Gabbert, prevented her from consulting with him during the grand jury proceeding.[31]

Mr. Gabbert brought suit under Section 1983, alleging that subjecting him to a search, while his client was testifying, violated his substantive due process right to practice his profession.[32] The Ninth Circuit agreed with him and held that the action of the prosecutor, in having him searched, did violate his substantive due practice right to practice law.[33] In fact, the Ninth Circuit said that because the search violated his clearly established substantive due process right to practice law, the defendants were not even protected by qualified immunity.[34] What do you think the United States Supreme Court held? It unanimously reversed the Ninth Circuit decision and held that the search did not violate Mr. Gabbert's substantive due process right to practice his profession.[35] In addition, there was a Fourth Amendment claim in the case, but the Supreme Court said the Fourth Amendment claim was not properly before them.[36]

One of the interesting aspects in *Conn,* is that the Court did acknowledge that there are Supreme Court precedents that have established a substantive due process right to practice one's trade or profession, but the Court said that those cases were distinguishable.[37] In those cases, the individual was complaining about a complete prohibition of the right to practice a trade or profession, and even in the context of a complete prohibition, the Court said that could be justified if the government had a legitimate governmental interest.[38]

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[31] *Id.*

[32] *Id.*

[33] *Conn,* 119 S. Ct. at 1294. (*citing* Gabbert v. Conn, 131 F.3d 792 (9th Cir. 1997)).

[34] *Id.*

[35] *Conn,* 131 F.3d at 1295-96.

[36] *Id.* at 1297. (Stevens, concurring) (stating that the question of "whether petitioners may have violated the Fourth Amendment because their method of conducting the search was arguably unreasonable" is not "squarely presented and argued by petitioners in this court). *Id.*

[37] *Id.* at 1294-95. *See* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Trvax v. Reich, 239 U.S. 33 (1915); Dent v. West Virginia, 129 U.S. 114 (1889).

[38] *Conn,* 119 S. Ct. at 1294-95.

In *Conn*,[39] Mr. Gabbert complained about what the Supreme Court described as a brief interruption of his right to practice his profession, his right to practice law.[40] The Court said that in the scheme of things, because this type of brief interruption by government is inevitable, it does not implicate substantive due process.[41] If the timing of the search was intended to interfere with the ability of the client to consult with her attorney,[42] I think that the thinking here by the Supreme Court is that it is inevitable that the government is going to engage in action which might briefly or temporarily interrupt one's practice of a profession, and these brief interruptions cannot be turned into substantive due process claims every time they happen.

Mr. Gabbert also argued that the search was conducted in an unreasonable manner. The Court held that such a claim must be based on the Fourth Amendment, not upon substantive due process.[43] This is a theme that the Court has played out a number of times over the last ten years or so. I think of it as a type of constitutional preemption theory. In effect, what the Supreme Court is saying is, where an individual is given protection under a textually explicit part of the Constitution, like the Fourth Amendment the individual can only look to that part of the Constitution for protection, and can not rely upon the more general doctrine of substantive due process.[44]

c) Privileges and Immunities Clause

The third right that the Court dealt with is the Privileges and Immunities Clause of the Fourteenth Amendment.[45] The Supreme Court has almost never applied this Clause. It has not been

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[39] *Id.* at 1292.

[40] *Id.* at 1295-96.

[41] *Id.*

[42] *Id.* at 1296. (holding that the "Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant whether calculated to annoy or even to prevent consultation with a grand jury witness").

[43] *Id.*

[44] *See, e.g.* Graham v. Conner, 490 U.S. 786 (1989).

[45] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in pertinent part: "No State shall make or employ any law which shall abridge the privileges or immunities of citizens of the United States." *Id.*

invoked in a hundred years, and it has only been mentioned in two or three Supreme Court cases. In *Saenz v. Roe*,[46] the Court resurrected the Privileges and Immunities Clause of the Fourteenth Amendment.[47] The Court invalidated a California law that provided for a lower level of public assistance benefits for families who recently moved into the State of California.[48] In its first year of residence in California, the family was limited to receiving only the amount of assistance that the family was eligible to receive in the state from which the family came. This was typically a lower amount of assistance than was available to the long-term residents of California.[49]

If we go back to *Shapiro v. Thompson*,[50] the Court held that a one-year durational residency requirement for public assistance eligibility violated the constitutionally protected right of interstate travel.[51] Under a one-year durational residency requirement, the family does not receive any benefits during that first year in residence.[52] The result in the *Saenz* case, holding the California lower level of benefits provision to be unconstitutional, follows rather logically from the Supreme Court's decision in *Shapiro v. Thompson*.[53] What took the legal community and the media by complete surprise was the Supreme Court's reliance on the Privileges and Immunities Clause of the Fourteenth Amendment.

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[46] 119 S. Ct. 1518 (1999).

[47] *Saenz*, 119 S. Ct. at 1521.

[48] *Id.*

[49] *Id.* at 1522. Each of the three plaintiffs in the *Saenz* case alleged that her monthly AFDC (Aid to Families with Dependant Children) grant for the first twelve months, after moving to California to escape abusive homes, would be substantially lower under the new California statute. Specifically, "the former residents of Louisiana and Oklahoma would receive $190 and $341 respectively for a family of three even though the full California grant was $641; the former resident of Colorado, who had just one child, was limited to $280 a month as opposed to the full California grant of $504 for a family of two." *Id.*

[50] 394 U.S. 618 (1969).

[51] *Shapiro*, 394 U.S. at 634. *See also* U.S. v. Guest, 383 U.S. 745, 757-58. "The constitutional right to travel from one state to another...occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *Id.* at 630.

[52] *Saenz*, 119 S. Ct. at 1522.

[53] 394 U.S. 618 (1969).

The decision in the *Saenz* case does not mention Section 1983, but I went back and traced the lower court decisions, and sure enough, this case was brought under Section 1983.[54] This raised a question in my mind: is *Saenz* now a one-shot deal where we have this decision under the Privileges and Immunities Clause of the Fourteenth Amendment, or are we going to see a new wave of Section 1983 litigation under the Privileges and Immunities Clause of the Fourteenth Amendment? At present there is no way to know the answer to that question.

II. State Action

The second area where the Supreme Court made an important Section 1983 decision was the area of state action. State action is a threshold question for making a claim under the Fourteenth Amendment; no state action means no Fourteenth Amendment claim.[55] I'm going to be exceedingly brief on this issue, because we have a whole segment on state action later this morning.

In *American Manufacturers Mutual Insurance Company v. Sullivan*[56] a Pennsylvania Workers' Compensation program was administered partly by private insurance companies.[57] The Court held that when private insurance companies decide to withhold or suspend Workers' Compensation benefits for medical expenses, pending review by a utilization review committee, the decision by the insurance company to suspend payment of benefits does not constitute state action.[58] Of course, no state action means that the insurance companies do not have to comply with the Fourteenth Amendment.[59]

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[54] Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998).
[55] *See* The Civil Rights Cases, 109 U.S. 3 (1883).
[56] 119 S. Ct. 977 (1999).
[57] *Sullivan*, 119 S Ct. at 977.
[58] *Id.* at 985-86.
[59] *See* The Civil Rights Cases, 109 U.S. at 3.

III. Right to Trial by Jury

The third subject area is right to a jury trial on a regulatory takings claim. In *City of Monterey v. Del Monte Dunes*,[60] a developer in the City of Monterey applied to the city for permission to develop its property, but the city said, "Your proposal is too big, scale it down."[61] The developer scaled down the proposal and submitted a second application.[62] What did the city say? Still too big, scale it down some more.[63] Well, this went on for five years, nineteen applications, each of which was denied. So, after five years and nineteen applications, the developer sued under a regulatory takings claim.[64]

The action was brought in the district court, and the district judge not only impaneled a jury, but submitted the regulatory takings claim to the jury. The jury came back with a verdict of one and a half million dollars compensatory damage for the developer. The Ninth Circuit affirmed.[65] What did the Supreme Court do? Do not jump to conclusions. The Supreme Court affirmed the decision of the Ninth Circuit.[66] The main issue for the Supreme Court was whether there is a right to a jury trial on a Section 1983

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[60] 119 S. Ct. 1624 (1999).

[61] *City of Monterey*, 119 S. Ct. at 1632.

[62] *Id.*

[63] *Id.* Beginning in 1983 the landowners submitted several proposals to "develop the property in conformance with the city's zoning and general plan requirements." *Id.* The landowners limited their proposal to 344 residential units for the entire parcel although the zoning requirement allowed for more than 1000 units. After complying with the city planning commission's repeated requests to scale down the development to 263 units in 1982, 224 units in 1983, and 190 units in 1984, the landowner's proposals were consistently rejected. In late 1984, the council finally approved one of the site plans under a conditional permit. However, in 1986, two months before the permit was to expire, the council denied the landowners' final plans for development. *Id.*

[64] *See* Williamson County Regional Planning Commission. v. Hamilton Bank of Johnson City, 473 U. S. 172 (1985). (ripeness of regulatory takings claims).

[65] *Id.* at 1634.

[66] *Id.* at 1645.

regulatory takings claim.[67] By a five to four decision, the Supreme Court held that there was a right to a jury trial.[68]

One of the interesting things to me about this decision is that although the original version of Section 1983 goes back to 1871 and this is the first time, as far as I have been able to figure out, the United States Supreme Court has recognized that there is a right to a jury trial in a federal court Section 1983 action. The Supreme Court reasoned that although Section 1983 itself does not authorize jury trials, the Seventh Amendment grants a right to jury trial in civil cases where the amount and controversy is at least $20.

The court in *City of Monterey* reasoned that a regulatory takings claim seeking just compensation is roughly analogous to a claim for compensatory damages.[69] An action for compensatory damages is an action at law within the meaning of the Seventh Amendment.[70] Once the United States Supreme Court held that there was a right to a jury trial on plaintiff's Section 1983 regulatory takings claim, the next question was what issues were properly submitted to the jury?

Judge Pratt mentioned the research we have been doing on jury instructions, and in doing this research, it struck me that this may be somewhat of a neglected area of constitutional law: which issues should the judge give to the jury? We could currently say that the jury should get questions of fact, the judge should retain questions of law, but it is not always obvious what is a question of law for the Court and what is a question of fact for the jury.

For example, in public employee free speech retaliation cases, the question of whether the employer acted with a retaliatory motive is clearly a factual question for the jury. However, one of the issues in these cases is the *Pickering*[71] balancing test. It involves balancing the employee's free speech interest and the government's interest in efficient governmental operations.[72] There obviously can be factual issues surrounding this *Pickering*

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[67] *Id.*

[68] *Id.* at 1637.

[69] *Williamson,* 473 U.S at 1639. "As the name suggests . . . just compensation is, like ordinary money damages, a compensatory remedy." *Id.*

[70] *Id.*

[71] Pickering v. Board of Education, 391 U.S. 563 (1968).

[72] *Id.* at 568.

balancing test, especially with respect to the effect of the employee's speech on efficient governmental operations.[73] The question then becomes, who decides these factual questions? The lower courts are split on this issue. Some courts say it is a factual issue, so what should happen here is that the judge should ask the jury to decide the factual issue, and then the judge would actually do the balancing of the competing interests. Other courts have held that these factual issues are issues for the judge, because they are questions of what the Fourth Circuit called "constitutional facts."[74]

Coming back to *City of Monterey*,[75] the Supreme Court held that, because the developer's regulatory takings claim was rather fact specific, there was no error in submitting that claim to the jury.[76] Actually, there were two separate issues submitted to the jury. One issue submitted to the jury was whether the developer was deprived of all economically viable use of the property. That comes out of the *Lucas*[77] case. The Court said whether the developer was deprived of all economically viable use of the property is a predominantly factual issue.[78] There was no problem in submitting that question to the jury. The second question submitted to the jury was a closer call. The jury was asked to decide whether the city's land use decision denying the developer the right to develop its property substantially advanced a legitimate governmental interest; the instructions gave the jury a definition of substantial governmental interest.[79] The Supreme Court was a little

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[73] *Id.* at 568-69.

[74] *See, e.g.*, Joyner v. Lancaster, 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987).

[75] *City of Monterey*, 119 S. Ct. at 1624.

[76] *Id.* at 1643.

[77] Lucas v. South Carolina Coastal Council, 505 U.S. 1083 (1992).

[78] *City of Monterey,* 119 S. Ct. at 1643.

[79] *Id.* at 1634. The district court gave the following jury instruction:

> The regulatory actions of the city or any agency substantially advance a legitimate public purpose if the action bears a reasonable relationship to that objective. Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city

more tentative here and said this issue is probably best described as a mixed question of law and fact. This was a tougher call because there is a legal aspect to this particular issue, but the Supreme Court said that because the developer's claim was so heavily dependent upon the facts, there was no error submitting it to the jury.[80]

Let me make two points about *City of Monterey*. First, I think that Justice Scalia's concurring opinion is very important because he urged the Court to find a right to a jury trial, not just with respect to a Section 1983 regulatory takings claim, but on any claim that seeks compensatory damages.[81] I think that the language of the majority opinion supports the recognition of the Seventh Amendment right to a jury trial in any federal court action under Section 1983 seeking compensatory damages. The other point is the lineup of the Justices, which is interesting. On one level this case is about what the Seventh Amendment means, but then how is it that all the conservative justices lined up in the majority and voted to find a right to a jury trial? So the speculation among legal analysts and the media was that the more conservative members of the Supreme Court, the so-called vigilant protectors of property, believe that juries are probably likely to award greater amounts of compensation on regulatory takings claims than judges in bench trials.

IV. Qualified Immunity

Let me come to the last issue: qualified immunity. Most officials who are sued for damages under Section 1983 and can assert the defense of qualified immunity. I think that this is the most important issue in Section 1983 litigation. This issue resolves a very high proportion of Section 1983 claims, and I would go further and say that it resolves a quite high proportion of Section 1983 claims in favor of the defendant. The critical issue when this defense is asserted, is whether the defendant violated

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> substantially advances their legitimate public purpose . . . its underlying motives and reasons are not to be inquired into.

Id.

[80] *Id.*

[81] *Id.* at 1650.

clearly established federal law. As long as the plaintiff's constitutional rights were not clearly established, the official will be immunized from personal liability.[82] This is a very potent defense, and sometimes plaintiffs' lawyers do not appreciate how potent this defense is. Remember this is not just a defense from liability, but also an immunity from suit.[83] This is an immunity from the burdens of even having to defend the action, even having to go to trial and maybe even having to participate in discovery. That's rather extraordinary if you think about it. We understand immunity from liability, but immunity from discovery, immunity from trial, that's somewhat of a new concept. I was thinking of the Eric Segal line in "Love Story:" Love means never having to say you're sorry. The analogy in qualified immunity is never having to defend the merits of the case.

The question is how do courts determine whether the federal law was clearly established? The Supreme Court spoke to this issue in *Wilson v. Layne*.[84] You might remember that this was a highly publicized case in which the Court rendered a unanimous Fourth Amendment ruling that police action that invites the media along to observe and to record the execution of a warrant in the home violated the Fourth Amendment.[85] The Court held that the police action violated the Fourth Amendment because the manner in which the warrant was executed was unreasonable. When it came to the issue of liability and the defense of qualified immunity, the Court, by an eight to one vote, held that the defendant officials were protected from personal liability by qualified immunity. The

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[82] Anderson v. Creighton, 84 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[83] Mitchell v. Forsyth, 472 U.S. 511 (1985).

[84] 119 S. Ct. 1692 (1999).

[85] *Wilson*, 119 S. Ct. at 1694. The Court held that the Fourth Amendment rights of homeowners were violated when police brought third parties or members of the media "into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of a warrant execution." *Id.* The Fourth Amendment is the embodiment of "centuries-old principles of respect for the privacy of the home, which apply where . . . police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant. It does not necessarily follow from the fact that the officers were entitled to bring a reporter and a photographer with them. The Fourth Amendment requires that police actions in execution of a warrant be related to the objectives of the authorized intrusion." *Id.*

Court reasoned that in 1992, when the warrant was executed, Fourth Amendment law did not clearly prohibit the so-called media tag-alongs or media ride-alongs.[86]

The Court in *Wilson* provided us guidance about how to evaluate whether federal law was clearly established. The Supreme Court has been talking about the standard of clearly established federal law since the 1982 decision in *Harlow v. Fitzgerald*,[87] but has said preciously little about how courts should go about making the evaluation as to whether the federal law was clearly established.

A few points that I think are of particular interest. The Court said in *Wilson* that when this incident took place, there was no precedent of what the Supreme Court called a "controlling jurisdiction" holding this type of police action violative of the Fourth Amendment.[88] Controlling jurisdiction means a decision of either the United States Supreme Court, of the particular Circuit, or of the highest court in the state. The Court said that absent such precedent, the likelihood is that the federal law is not clearly established.[89] It is not set forth as an absolute rule, but a high likelihood. The Supreme Court also stated that after the incident in this case, a split developed in the Circuit Courts over the constitutionality of these media ride-alongs.[90] The Supreme Court said that a split in the Circuit Courts is a very strong indicator that the federal law was not clearly established.[91] After all, if federal judges can not agree on what the Fourth Amendment means, why should a court impose the liability on the poor law enforcement official who also cannot figure out what the Fourth Amendment means.[92] In addition, the Supreme Court looked at the strength of

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[86] *Id.* at 1700. "Accurate media coverage of police activities serves an important public purpose, and it is not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment . . . although media ride-alongs of one sort or another had apparently become a common police practice, in 1992 there were no judicial opinions holding that this practice became unlawful when it entered a home." *Id.*

[87] 457 U.S. 800 (1982). (rejecting a claim that high presidential aides are entitled to absolute presidential immunity).

[88] *Wilson*, 119 S. Ct. at 1700.

[89] *Id.*

[90] *Id.* at 1701.

[91] *Id.*

[92] *Id.*

the argument on the merits made by the defendants.[93] The Court said there was some substance to the arguments being made by the law enforcement officers, and that the result was not obvious. This too becomes a factor in the evaluation as to whether the federal law was clearly established.[94]

Justice Stevens dissented on this point, questioning that, in all the years that he had been on the Court, how many times has the United States Supreme Court held that police action violates the Fourth Amendment?[95] Furthermore, how many times has the Supreme Court held unanimously, that the police action violates the Fourth Amendment?[96] The fact that this was a unanimous decision upholding a Fourth Amendment claim demonstrated that the federal law in fact was clearly established. As for the lack of controlling precedent, he pointed out that the most obvious cases, involving the most egregious government wrongdoing, do not even arise.[97]

Thank you very much.

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[93] *Wilson*, 119 S. Ct. at 1700-01.

[94] *Id.* at 1699.

[95] *Id.* at 1702. Justice Stevens concurred in part and dissented in part with the Court's holding, stating that "in its decision today the Court has not announced a new rule of constitutional law. Rather, it has refused to recognize an entirely unprecedented request for an exception to a well-established principle." *Id.*

[96] *Id.*

[97] *Id.* at 1702.