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SECTION 1983 LITIGATION

Hon. Leon D. Lazer:

Thank you. As we proceed this morning, we will hear from Professor Martin A. Schwartz, who will be our next speaker, and after that we will hear Professor Hellerstein on criminal law. Another speaker, Professor Gora of Brooklyn Law School, an authority on the First Amendment, will discuss the First Amendment. As you know, there is a rather full plate of cases from the Supreme Court dealing with First Amendment issues. We are going to have Professor Gershman speak on the term limits case, a matter of great interest.

A real great star of Touro Law School, the Honorable George C. Pratt, is going to talk to us about the section 1983 cases as they appeared and were decided in the Second Circuit. Professor Kaufman, of our law school, is going to talk about a rather important employment discrimination case. Finally, I will talk about an environmental law case and a zoning law case that I think is significant.

Our first speaker this morning is an authority who has been recognized by the United States Supreme Court, which cited his book in one of its recent decisions. Professor Martin A. Schwartz of Touro Law School is a regular columnist for the *New York Law Journal* on issues relating to section 1983. He is a co-author of a leading treatise entitled *Section 1983 Litigation: Claims, Defenses, and Fees*.

There were some interesting section 1983 cases that came out of the 1994-95 term of the United States Supreme Court. To discuss them with you, it is now my very great pleasure to introduce to you Professor Martin A. Schwartz.

*Professor Martin A. Schwartz:**

INTRODUCTION

Good morning. The Supreme Court last term provided us with a rather rich array of important decisions dealing with section 1983¹ litigation. In fact, five awards have been given out for these decisions. They are in this sealed envelope. As you know, sealed envelopes seem to be in vogue these days.

I. QUALIFIED IMMUNITY APPEALS - *JOHNSON v. JONES*

The first award goes to the most important section 1983 decision of last term, and that award goes to the Supreme Court's

* Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things, co-authors, with John E. Kirklin, a leading treatise entitled *Section 1983 Litigation: Claims, Defenses, and Fees* (2d ed. 1991 & Supp. 1995) and is the author of *Section 1983: Litigation Federal Evidence* (2d ed. 1995). In addition, Professor Schwartz is the author of a monthly column in the *New York Law Journal*, "Public Interest Law." Professor Schwartz has also been the co-chair of the Practicing Law Institute Program on § 1983 litigation for over ten years. The author acknowledges the valuable assistance provided by Daniel J. Tucker of the Touro Law Review.

1. 42 U.S.C. § 1983 (1994). This section provides:

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

decision in *Johnson v. Jones*.² In *Johnson*, in an opinion by Justice Breyer, the Court ruled that when a district court denies a public official qualified immunity because the district court finds a disputed issue of material fact, the official may not take an interlocutory appeal to the court of appeals.³ Now, that probably does not sound all that exciting, so let me backtrack and explain why I think *Johnson* is such an important case.

Executive and administrative officials who are sued for damages under section 1983 may assert the defense of qualified immunity.⁴ The controlling issue is the “objective test,” did the official violate clearly established federal law?⁵ The idea is that this would be an issue of law that the district court can normally decide and should decide as early in the litigation as possible.

Id.

2. 115 S. Ct. 2151 (1995). Police officers found Houston Jones, a diabetic, on the street while he was having an insulin seizure. *Id.* at 2153. The officers thought Jones was drunk, arrested him and took him to the police station. *Id.* Jones later woke up in the hospital with several broken ribs. *Id.* He subsequently brought an action against five police officers claiming the officers used excessive force when arresting him and beat him at the police station. *Id.* Three of the officers moved for summary judgment, arguing that Jones had no evidence implicating them. *Id.* Jones’ deposition asserted that the police officers (whom he did not name) used excessive force when arresting him at the station. *Id.* According to the officers’ depositions, they were present at the arrest and in or near the booking room when Jones was there. *Id.* at 2154. The officers’ motion for summary judgment was denied and they appealed on the grounds that the denial was incorrect due to lack of evidence. *Id.*

3. *Id.* at 2156. The Court reasoned that the summary judgment order was not appealable because “the District Court’s determination that the summary judgment record in this case raised a genuine issue of fact concerning [the public officials’] involvement in the alleged beating of respondent was not a ‘final decision’ within the meaning of the relevant statute.” *Id.*

4. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (holding that law enforcement officers who conducted warrantless searches were protected by qualified immunity).

5. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court held that “[p]ublic officials performing discretionary functions are generally protected from personal monetary liability insofar as their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” This test turns “on the *objective legal reasonableness* of an official’s acts.” *Id.* at 819 (emphasis added).

The problem in implementing this qualified immunity defense is that factual issues that are in dispute frequently must be resolved in order for the court to make a final determination of the official's claim of qualified immunity. For example, in a typical excessive force case against the police officer, the constitutional standard is established,⁶ but the plaintiff and the police officer have very different versions as to what took place. How can we decide whether the official violated the clearly established Fourth Amendment constitutional standard unless we know what transpired between the plaintiff and the police officer?

In 1985, the Supreme Court, in *Mitchell v. Forsythe*,⁷ held that if the district court denied an official's motion for summary judgment, the official can take an immediate appeal to the court of appeals, so long as the qualified immunity defense can be resolved as a matter of law.⁸ This decision is an exception to the rule that, normally, only final judgments are appealable in federal court.⁹ However, the *Cohen*¹⁰ collateral order doctrine allows for

6. See *Graham v. Connor*, 490 U.S. 386, 399 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry.").

7. 472 U.S. 511 (1985).

8. *Id.* at 528. The Court in *Mitchell* stated that:

An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Id.

9. 28 U.S.C. § 1291 (1993). This section provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the

interlocutory appeals from district court orders that are (1) conclusive of the issue; (2) resolve important questions separate from the merits; and (3) are effectively unreviewable on appeal from the final judgment.¹¹

The Supreme Court considers qualified immunity not simply a defense to liability, but an entitlement not to defend a claim at trial or face the other burdens of litigation.¹² It is what the Supreme Court calls an *immunity from suit*.¹³ In order to vindicate this immunity from the burdens of litigation, an official, who has been denied qualified immunity by the district judge, must be able to secure immediate appellate review from the denial of qualified immunity.¹⁴

Justice Brennan, who dissented in the *Mitchell* case, realized the importance of giving public officials the right to take an

United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Id.

10. *See* Cohen v. Beneficial Indus. Loan, 337 U.S. 541 (1949).

11. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (holding that a district court's denial of a public official's qualified immunity claim falls within the collateral order doctrine "to the extent that it turns on an issue of law . . .").

12. *Id.* at 526. The Court noted that an "essential attribute" of the qualified immunity is that it is "an entitlement not to stand trial under certain circumstances." *Id.* at 525.

13. *Id.* at 526. The Court stated:

Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Id. at 526-27 (emphasis in original).

14. *Id.*

immediate appeal from a denial of qualified immunity.¹⁵ However, he noted that this right of immediate appeal gave officials "a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory [qualified immunity] appeals."¹⁶ In fact, in the ten years since *Mitchell* was decided, officials have been pursuing interlocutory immunity appeals in record numbers.¹⁷

These interlocutory immunity appeals result in stays of the district court proceedings and, therefore, can substantially delay the litigation, forcing civil rights plaintiffs to incur the burdens and expense of multiple appeals.¹⁸ All of this, in turn, impacts upon the economic feasibility of litigating a civil rights case in the federal courts.¹⁹

15. *Id.* at 543.

16. *Id.* at 556 (Brennan, J., dissenting). Justice Brennan stated that "[e]ven if there were some benefits to be gained by granting officials a right to immediate appeal, a rule allowing immediate appeal imposes enormous costs on plaintiffs and on the judicial system as a whole. Most claims entitled to immediate appeal have a self-limiting quality." *Id.* at 555 (Brennan, J., dissenting).

17. See MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 9.26, at 580 (2d ed. 1991 and Supp. 1995).

18. See *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir.), *cert. denied*, 492 U.S. 906 (1989). Judge Posner held that an immediate appeal from denials of qualified immunity operates automatically to stay proceedings in the district court. *Id.* at 1339.

19. *Id.* at 1338-39. Judge Posner stated:

During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will be unnecessary. The majority of *Forsyth* appeals—like the bulk of all appeals—end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as *Forsyth* appeals but in fact not presenting genuine claims of immunity create still further problems.

Id.

It has not always been clear whether the immunity defense presents an issue of law. Some circuit courts took the position that if the district court denies the official's summary judgment motion and there are disputed issues of material fact, the official could take an immediate appeal and argue that the district court's determination was wrong as a matter of law.²⁰

Johnson holds that the right to an immediate appeal does not lie in these circumstances.²¹ Rather, under *Johnson*, an official only has the right to take an immediate appeal from the denial of qualified immunity when the appeal presents, what the Supreme Court characterized, "neat abstract issues of law,"²² namely, whether the federal law was clearly established as of the time of the alleged wrong.²³

The rationale behind the *Johnson* decision is that the Supreme Court does not want circuit court judges burdened by having to comb through extensive factual records in order to determine if the district court correctly found disputed issues of material fact.²⁴ Rather, circuit court judges should be able to focus their resources on the issues that they have expertise on, namely, questions of law.²⁵

Now, I think that when you look at this whole picture, *Johnson* is a very important decision. It clarifies when an official may pursue an interlocutory appeal from the denial of qualified immunity. Moreover, *Johnson* has placed an important limitation upon the official's right to pursue an immediate immunity appeal.²⁶

20. See, e.g., *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991); *Wright v. South Ark. Regional Health Ctr.*, 800 F.2d 199 (8th Cir. 1986).

21. *Johnson*, 115 S. Ct. at 2159.

22. *Id.* at 2158.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

II. *SWINT* v. *CHAMBERS COUNTY COMMISSION*

My next award goes to the best supporting actor or actress, and the winner of that award is the Supreme Court decision in *Swint v. Chambers County Commission*.²⁷ In *Swint*, the Court ruled that when a public official takes an immediate interlocutory appeal from the denial of qualified immunity, a municipal entity may not tag along and take an interlocutory appeal on the issue of municipal liability.²⁸

The Supreme Court in *Swint* told us that in these circumstances there is no pendent party appellate jurisdiction.²⁹ Although the Supreme Court stopped short of rejecting the doctrine of pending appellate jurisdiction altogether, it took a highly negative view of the doctrine.³⁰ Why? Because the doctrine both undercuts the final judgment rule in the federal courts³¹ and the congressionally created exceptions to that rule.³²

27. 115 S. Ct. 1203 (1995). *Swint*, owner of a nightclub known as the Capri Club, and his patrons brought a civil rights action against three law enforcement officers in their personal capacities (the County Sheriff, Police Chief and a County Police Officer) and the Chambers County Commission. The case arose out of warrantless raids. The officer and Chambers County Commission moved for summary judgment. The officers asserted qualified immunity while the Chambers County Commission argued that the County Sheriff, "who authorized the raids, was not a policymaker for the County." *Id.* at 1206.

28. *Id.* at 1211. The *Swint* Court also held that the order denying the Chambers County Commission's summary judgment motion did not fall within the *Cohen* collateral order doctrine. "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Id.* at 1207-08 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994)).

29. *Id.* at 1212.

30. *Id.* at 1209.

31. 28 U.S.C. § 1291 (1993).

32. 28 U.S.C. § 1292(a) (1993). Subsection (a) provides in pertinent part:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or

III. THE AMTRAK DECISION - *LEBRON v. NATIONAL RAILROAD PASSENGER CORP.*

My next award goes to the best documentary of the term, and that award goes to the Supreme Court's decision in *Lebron v. National Railroad Passenger Corp.*,³³ which we all better know as "Amtrak."

The controversy in this case arose out of Amtrak's refusal to allow Michael Lebron to display a parity of Coors beer advertisements at Penn Station.³⁴ The parity stated that Coors "Is it the Right's Beer Now?" and proclaims Coors "The Silver Bullet that aims The Far Right's political agenda at the heart of America."³⁵

In an opinion by Justice Scalia -- this is a not too subtle advertisement for his upcoming appearance at Touro³⁶ -- Justice Scalia reasoned that even though the federal statute declared that Amtrak was not an agency or establishment of the United States,

refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

- (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
- (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Id.

33. 115 S. Ct. 961 (1995).

34. *Id.* at 964. Michael Lebron creates billboard displays that comment on public issues. *Id.* at 963. Lebron contracted with Transportation Displays Incorporated, which manages the leasing of billboards in Amtrak's Pennsylvania Station in New York City, to display an advertisement on a well known New York City billboard, known as the "Spectacular." *Id.* Amtrak's Vice President disapproved of the advertisement, invoking Amtrak's policy barring political advertising on the Spectacular advertising sign. *Id.* at 964.

35. *Id.*

36. United States Supreme Court Justice Antonin Scalia, visited Touro College Jacob D. Fuchsberg Law Center on October 18th and 19th 1995. Justice Scalia taught several classes and delivered a public lecture.

it is part of the Federal Government for First Amendment purposes.³⁷ Why? Because, the Court said, Amtrak was established by Congress to carry out a governmental purpose,³⁸ namely, improving railroad passenger service and, also, because the government, through congressional legislation, retained the power to appoint a majority of Amtrak's board of directors.³⁹

Amtrak argued that it was not subject to the First Amendment because it is a for-profit corporation engaged in a commercial enterprise.⁴⁰ Further, it claimed it was not an agency or an establishment of the United States.⁴¹ Well, the Court said that whether an entity is part of the Federal Government for constitutional purposes, here for purposes of the Bill of Rights, is a question for the United States Supreme Court, and not for the Congress.⁴² The Court said if the rule was otherwise, it would mean, for example, that the Congress could enact a statute declaring that the Federal Bureau of Investigation was not an instrumentality of the United States Government and exempt the Federal Bureau of Investigation from the Fourth Amendment.⁴³

Well, in reaching its decision, Justice Scalia documented -- and I use the word advisedly, because remember, this case got the

37. *Lebron*, 115 S. Ct at 974-75. Justice Scalia stated that:

[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. See also Garrett Epps "Must Amtrak Observe the First Amendment in Leasing Advertising Space," 2 PREVIEW 73 (Oct. 21, 1994).

38. *Lebron*, 115 S. Ct. at 973.

39. *Id.* The Court stated that "six of the corporation's eight externally named directors (the ninth is named by a majority of the board itself) are appointed directly by the President of the United States—four of them (including the Secretary of Transportation) with the advice and consent of the Senate." *Id.*

40. *Id.* at 970.

41. *Id.* Amtrak argued that its authorizing statute declares that it "will not be an agency or establishment of the United States government." *Id.* (citations omitted).

42. *Id.* at 971.

43. *Id.*

award for the best documentary of the year -- a long list of corporations that have been created by the Federal Government going all the way back to 1791, when Congress created the First Bank of the United States, other congressionally created corporations such as the Federal Deposit Insurance Corporation, and more recently the Corporation for Public Broadcasting and the Legal Services Corporation.⁴⁴

What does any of this have to do with section 1983 litigation? Well, let me explain. I think it is quite clear that the ruling in the *Lebron* case applies fully to corporations created by state government to carry out public purposes.⁴⁵ In fact, to support that position, I would point to Justice Scalia's reference to the fact that if the Court had determined that Amtrak was not part of the Federal Government, that would mean that state government could avoid its most basic constitutional obligations.⁴⁶ For example, he noted that if the rule was otherwise, states could return to *Plessy v. Ferguson*⁴⁷ by the simple expedient of creating a state corporation that would be designed to run segregated trains through a state owned Amtrak.⁴⁸

Now, let me stress one thing about the *Lebron* decision. This is not a state action decision as the state action doctrine has been developed in constitutional jurisprudence. The United States Supreme Court did not hold that Amtrak is a private entity that was involved in governmental action. Rather, this is a holding

44. *Id.* at 968-70.

45. *Id.* at 974.

46. *Id.* at 973. Justice Scalia stated that "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.*

47. 163 U.S. 537, 550-51 (1896) (holding that state railway company policy of separate but equal for white and colored races was not in conflict with the United States Constitution).

48. 115 S. Ct. at 973 (noting that "*Plessy v. Ferguson* . . . can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak."). See also *Pennsylvania v. Board of Directors of City Trusts of Phila.*, 353 U.S. 230 (1957). The Court held that Girard College, which was privately funded, was still a government actor because its board of trustees was itself "an agency of the State of Pennsylvania." *Id.* at 231.

that says Amtrak is part of the Federal Government itself. In that respect, it is really a unique decision.

Normally, we know what constitutes the Government and what constitutes the private sector, even though, from time to time, there are difficult questions as to whether parts of the private sector should be treated as the Government for Fifth or Fourteenth Amendment purposes. Here is the unusual situation where there was real controversy as to whether Amtrak was part of the Federal Government. Significantly, the United States Supreme Court said yes, it is part of the Federal Government even though the Congress had said no, it is not.

IV. RESTRICTION ON PRISONERS' LIBERTY INTERESTS - *SANDIN* v. *CONNER*

My next award is the Scrooge-of-the-term award, and that award goes, hands down, to the Supreme Court's decision in *Sandin v. Conner*.⁴⁹

In *Sandin*, a prisoner had been placed in disciplinary segregation for thirty days and was required to spend each one of those thirty days in isolated segregation alone in his cell except for one fifty minute period that was set aside for the prisoner to exercise and shower and, just to make sure that nothing went wrong during that fifty minute period, the prisoner was held by leg irons and waist chains.⁵⁰ The Supreme Court held that the

49. 115 S. Ct. 2293 (1995). The defendant, Demot Conner, was convicted of murder, kidnapping, robbery and burglary for which he was sentenced to thirty years to life in a Hawaii prison. *Id.* at 2295. While serving time, Conner was subjected to a strip search complete with an inspection of his rectal area. *Id.* at 2296. As a result of the search, Conner used foul language toward the officer and was subsequently charged with disciplinary infractions for both "high" and "low moderate" misconduct. *Id.* At his hearing, Conner was denied the opportunity to present witnesses and was found guilty and sentenced to 30 days of disciplinary segregation in the Special Holding Unit on the high misconduct charge. *Id.* He received a "concurrent" sentence of disciplinary segregation on the "low moderate" charges. *Id.*

50. *Id.* at 2305 (Breyer, J., dissenting).

prisoner was not deprived of a protected liberty interest under the Due Process Clause.⁵¹

Now, my awards committee had decided that the decision in this case by itself was sufficient to qualify the *Sandin* decision for special Scrooge status, or as we in the awards trade refer to it, "SSS." But the award is based upon more than the result in the case. To backtrack, prior to the decision in *Sandin*, prisoners had a very tough time trying to establish protected liberty interests under the Due Process Clause.⁵²

Prisoners had two potential sources of law they could rely upon.⁵³ First, they could seek to rely upon the Constitution itself, but constitutional liberty, the Supreme Court has said, is largely extinguished by the conviction and sentence.⁵⁴ The only constitutional definition of liberty that remains for prisoners is for post-conviction restraints imposed upon prisoners that exceed the sentence in what the Supreme Court says is an unexpected manner.⁵⁵ The reality is that there are not that many restraints imposed by prison officials on prisoners that the Supreme Court

51. *Id.* at 2302.

52. *See Morrissey v. Breyer*, 408 U.S. 471 (1972). The Court held that revocation of parole works a deprivation of liberty triggering procedural due process protection. The Court explained that whether "any procedural protections are due 'depends upon the extent to which an individual will be condemned to suffer grievous loss.'" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

53. *See Olim v. Wakinekona*, 461 U.S. 238, 251 (1983) (interstate prison transfers did not deprive the inmate of a liberty interest in either the constitutional or state law senses); *Greenholz v. Inmates of Neb.*, 442 U.S. 1, 15-16 (1979) (holding that a state parole system does not automatically create a constitutional liberty interest but the Nebraska state law governing parole release creates a protected liberty interest); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976) (holding that the intrastate transfers of inmates from a Massachusetts medium security prison to a maximum security prison with substantially less favorable conditions did not deprive the inmate of a protected liberty interest from the Due Process Clause itself and from state law); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (stating that "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State").

54. *Sandin*, 115 S. Ct. at 2300.

55. *Id.*

says wow, that is unexpected, we just did not think anything like that would ever happen. So constitutional liberty is very difficult for a prisoner to establish.

Second, the Supreme Court has held that prisoners can also rely on state-created liberty interests, but only if the state law creates objective mandatory criteria.⁵⁶ If the state law is discretionary in nature, and not objective or mandatory, then there is no protected state-created liberty interest. The problem there, if you think about it, is that it makes a prisoner's potential liberty interest controllable by state law, either by the state legislature or by regulations of the Department of Corrections.

The Supreme Court, in an opinion by Chief Justice Rehnquist, said, well, those are tough standards, but, they are not tough enough. We are, the Court said, disenchanted with all of these frivolous prisoner liberty interest claims that are being asserted.

The Court cited lower court decisions in which state-created liberty interests have been found. For example, in one lower court case the prisoner claimed he had a liberty interest in receiving a tray lunch rather than a sack lunch.⁵⁷ In another case, the prisoner claimed a deprivation of a liberty interest after being transferred to a smaller cell that was without an electrical outlet suitable for television.⁵⁸

So taking these incidents -- what I think are quite extreme examples -- into consideration, the Supreme Court said that we cannot allow these types of liberty interests to be created.⁵⁹ What we are going to do is toughen up the doctrine of prisoner state-created liberty interests, as if it was not tough enough before. So how are we going to toughen it up? Well, we are going to say to prisoners, in addition to convincing a court that the state law establishes mandatory objective criteria, they have to show something else. Under *Sandin*, state prison rules can create

56. See *Hewitt v. Helms*, 459 U.S. 460 (1980). The Court held that "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." *Id.* at 472.

57. See *Burgin v. Nix*, 899 F.2d 733 (8th Cir. 1990).

58. See *Lyon v. Farrier*, 727 F.2d 766 (8th Cir. 1984).

59. *Sandin*, 115 S. Ct. at 2299-2300.

liberty interests, but only when they impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”⁶⁰

Well, in my view, *Sandin* effectively abolishes the notion of state-created prisoner liberty interests. Let me explain to you how I come to that conclusion. I do not think there is a meaningful distinction between the standard that the Supreme Court has used for constitutional liberty interests that the restraint imposed by prison officials was imposed in an “unexpected manner,”⁶¹ and that used for state-created liberty interests, namely, that the restraint must impose an “atypical and significant hardship on the inmate.”⁶²

Now, it is true the Supreme Court said in *Sandin* that it has retained this two-tiered liberty interest approach.⁶³ The liberty interest for prisoners can still come from the Constitution itself or from state law. But, it seems to me that the new *Sandin* state law standard is redundant because if the prisoner does not have a liberty interest under the Due Process Clause itself, I find it exceedingly unlikely to believe that the Court will find a state-created liberty interest.

I think it is pretty clear, despite what Justice Breyer says in his dissenting opinion about how some of the lower courts may interpret the *Sandin* decision as giving prisoners greater constitutional protection,⁶⁴ that this is just hopeful thinking of a dissenting justice. If you look at who the justices were in the majority of this case, and consider the whole tenor of the majority opinion, this decision is clearly intended to cut back on prisoner liberty interests.

60. *Id.* at 2300.

61. *Id.*

62. *Id.*

63. *See* *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (stating that “[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States”).

64. *Id.* at 2307.

V. SECTION 1983 TAX CASES - *NATIONAL PRIVATE TRUCK COUNCIL v. OKLAHOMA TAX COMMISSION*

The last award that the committee gave out, now called the no-sweat award, previously called the piece-of-cake award when the award had been funded by the Entenmann company, goes to the Supreme Court's decision in *National Private Truck Council v. Oklahoma Tax Commission*.⁶⁵

In *National Private Truck Council*, the Court held that section 1983 tax challenges may not be brought in a state court as long as the state provides an adequate state remedy to test the constitutionality of a tax.⁶⁶ If you are wondering why one would care about challenging the constitutionality of a tax in a section 1983 state court action, well, the answer is, the right of a prevailing party to recover attorney's fees⁶⁷ which is usually not available under a state law remedy.

Now, the state courts around the country have struggled with this issue for some time. I have been following these cases for some time. In fact, I argued one of them in the New Hampshire Supreme Court a few years ago, but that court did not want to deal with this issue.

The issue seemed complicated because the Tax Injunction Act, 28 U.S.C. § 1341,⁶⁸ by its terms is limited to the federal district

65. 115 S. Ct. 2351 (1995). The state of Oklahoma imposed certain state taxes against motor carriers with vehicles registered in any of 25 states. This was done in retaliation against states that imposed discriminatory taxes against Oklahoma's registered trucks. The National Private Truck Counsel claimed that the Oklahoma taxes violated the dormant commerce clause. *Id.* at 2353.

66. *Id.* at 2355 ("[W]e hold that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists."). *Id.*

67. See 42 U.S.C. § 1988 (1994). Subsection (b) of this statute provides in pertinent part that "[i]n any action or proceeding to enforce . . . [§ 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." *Id.*

68. 28 U.S.C. § 1341 (1988). This section provides that "[the] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.* See also *Rosewell v. LaSalle Nat'l Bank*, 450

courts and “does not apply in state courts”⁶⁹ Section 1341 does not pertain to the jurisdiction of the state courts; it only deprives the federal courts of power to interfere with state and local tax collection. As a result, many litigants asserted their section 1983 tax claims in state court.

However, Justice Thomas, speaking for a unanimous Court, in effect, said, this issue is really a piece of cake, hence, the last award. The Court held that, although the Tax Injunction Act is inapplicable to the state courts, principles of federalism prevent the state courts from utilizing the section 1983 remedy in a way that disrupts state tax collections.⁷⁰ Now, to me, this is a new concept of federalism.

Normally, when we think of federalism as a legal doctrine, its principles are invoked to prevent federal court interference with the operations of state and local government. In contrast, in *National Private Truck Council*, the Court held that it violates principles of federalism for a *state* court to use a federal remedy in a way that disrupts state functions.⁷¹ I think that is a type of extension of the doctrine of federalism, but to the Court, no sweat. Thank you very much.

U.S. 503, 528 (1981) (holding that an Illinois refund procedure established “a plain, speedy and efficient remedy” within the meaning of the Tax Injunction Act).

69. *Id.* at 2354.

70. *Id.* at 2356.

71. *Id.*

