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THE 2000-2001 SUPREME COURT TERM: SECTION 1983 CASES

*Martin A. Schwartz*¹

INTRODUCTION

Section 1983² is the federal statute that allows us to enforce our federal constitutional rights against state and local government. The significance of Section 1983 cannot be overstated. Without Section 1983, a Constitutional Law symposium would be almost irrelevant. The United States Supreme Court well understands the importance of Section 1983. Over the past two decades, the Supreme Court has rendered an unusually large number of decisions fleshing out the meaning and intricacies of Section 1983.³ It seems however, that no matter how extensive the Supreme Court's involvement, there is always another Section 1983 issue.

For example, recently I came across a Seventh Circuit case that raised the question of whether "Frei" was a suable

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² 42 U.S.C. §1983 (2001), provides in pertinent part:
Every person who, under color of any statute . . . of any State . . . subjects or causes to be subjected, any citizen . . . to 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.

³ See, e.g., *Bd. of County Comm'r v. Brown*; *Suter v. Artist M.*, 503 U.S. 347 (1992); *Hafer v. Melo*, 502 U.S. 21 (1991).

defendant under Section 1983.⁴ Frei is a police dog, and the plaintiff named Frei as a defendant in his 1983 suit.⁵ The argument advanced by the plaintiff was: If a municipality can be considered a person within the meaning of Section 1983, then why not a police dog?⁶ The Seventh Circuit rejected the argument analogizing a dog to a municipality.⁷ The court relied in part on a case holding that a cat is not a person.⁸

The court stated that in addition to the statutory interpretation of the term “person,” there would be many difficulties in allowing a dog to be a named defendant.⁹ One such problem would be with service of process.¹⁰ Another difficult question that could be raised is whether Frei had a valid retainer agreement with defense counsel.¹¹ Additionally, there could be questions under the Fair Labor Standards Act.¹² If Frei had worked overtime, would he be entitled to overtime pay? Then there is the problem with qualified immunity.¹³ If the rule of qualified immunity is applied to the conduct of a police dog, does the question become whether a reasonable dog in Frei’s position would have understood that what he did was unconstitutional?¹⁴ The court raised these questions, but obviously did not explore all of the ramifications. Just the other day in my Evidence course, I raised the issue of whether a police dog’s bark constitutes hearsay. The police officer states, “I searched the valise because the dog’s barking gave me probable cause to believe there was

⁴ See *Dye v. Wargo*, 253 F.3d 296 (7th Cir. 2001).

⁵ *Id.* at 297.

⁶ *Id.* at 299.

⁷ *Id.*

⁸ *Id.* (citing *Miles v. City Council of Augusta*, 710 F.2d 1542, 1544 (11th Cir. 1983)).

⁹ *Id.*

¹⁰ *Dye*, 253 F.3d at 299.

¹¹ *Id.* (stating “did he retain as his lawyer Lynn E. Kalamaros, who purports to represent all three defendants? Was Frei offered the right of self-representation . . .”).

¹² 29 U.S.C. § 202 *et. seq.* (2001).

¹³ *Dye*, 253 F.3d at 299.

¹⁴ *Id.*

marijuana in the valise.” Did the dog make an out-of-court statement.¹⁵ The questions and possibilities are endless.

The United States Supreme Court decided a broad range of questions dealing with Section 1983 last term. I will list the issues in the order I am going to discuss them. First, I will discuss the threshold question of state action. Next, I will move to the issue of due process requirements when disputes arise out of governmental contracts. I will then discuss the exhaustion of state remedies requirements in prisoner litigation, followed by a discussion of qualified immunity in excessive force cases. The final issue I will discuss, which many attorneys think is most paramount, is the right to recover statutory attorney’s fees.

I. STATE ACTION

State action is a threshold issue because without state action there can be no Fourteenth Amendment¹⁶ violation. And, without state action the defendant cannot be said to have acted under the color of state law.¹⁷ If the defendant did not act under color of state law, there can be no claim for relief under Section 1983.¹⁸ The difficult state action question is whether a private party’s involvement with state and local government justifies treating that party as having engaged in state action, rather than in private action.¹⁹ *Brentwood Academy v. The Tennessee Secondary School Athletic Association* is the Supreme Court case from last term that dealt with this issue.²⁰ In *Brentwood*

¹⁵ This statement would not be hearsay because under the Federal Rules of Evidence, an out-of-court declarant must be a “person.” See FED. R. EVID. 801.

¹⁶ 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.

¹⁷ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 288.

Academy, the Supreme Court held that the defendant athletic association was engaged state action because it was an interscholastic athletic association whose members consisted of virtually all of the public schools in the state of Tennessee.²¹ More specifically, the association was engaged in state action when it enforced its rules dealing with the recruitment of student athletes.²² *Brentwood Academy* was a five-to-four decision with Justice Souter writing for the Court.²³ Justice Souter explained that since almost all of the public schools in Tennessee were members of the association, and made up approximately 84% of the association membership there was a largely overlapping identity between the state public schools and the association.²⁴ This association carried out a regulatory function that otherwise would have been carried out by the state itself,²⁵ and because the members of the association were overwhelmingly public schools, this regulatory function was carried out primarily by public school officials.²⁶ The dominant rationale of the decision was that state action was present because of the state's pervasive entwinement with the operations of the association.²⁷

In finding state action in *Brentwood Academy*, the Court distinguished its prior decision, in *National Collegiate Athletic Association v. Tarkanian*.²⁸ In *Tarkanian*, state action was not found because the National Collegiate Athletic Association was a national organization made up of large numbers of private

²¹ *Id.* at 290-91.

²² *Id.* at 290.

²³ *Brentwood Acad.*, 531 U.S. at 288 (Souter, J., delivered the opinion of the Court, in which Stevens, O'Connor, Ginsburg, and Breyer joined. Thomas, J., filed a dissenting opinion in which Rehnquist, Scalia and Kennedy joined).

²⁴ *Id.* at 298 (Under the bylaws of the association, each school was represented by their respective principals. Each representative had a single vote in selecting the governing legislative counsel.).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 302 (the Court concluded that the facts justify the conclusion that state action was present under criterion of entwinement).

²⁸ 488 U.S. 179, 193 (1988) (concluding that state action was not present as the association was substantially composed of private institutions, a vast majority of which were located in other states).

colleges and universities.²⁹ Conversely, in *Brentwood Academy*, the Tennessee Athletic Association was a statewide association with a large percentage of its members consisting of the public schools of Tennessee.³⁰ I believe the result in *Brentwood Academy* was proper, as the athletic association was very close to being a governmental agency, despite not actually being one. It is logical that a private entity with overwhelmingly governmental entities as its member should be treated as a governmental agency for Fourteenth Amendment purposes.

Even though I believe the result in *Brentwood Academy* was correct, there are difficulties with several aspects of the Court's opinion. I think some of these difficulties will create problems in the future. First, it is troubling that, given these facts, four justices were willing to vote that there was no state action. It is troubling because the Tennessee Association appeared very close to being a governmental agency. Secondly, there were very serious analytical problems with the way the decision was drafted. Early in the opinion Justice Souter stated that state action was not a question that could be decided based upon any type of rigid criteria, but rather calls for an essentially *ad hoc* determination.³¹ The Court said it looks to all of the facts and circumstances of the state's involvement with the entity to determine state action status.³² However, just a year earlier in *American Manufacturers Mutual Insurance Company v. Sullivan*, the Chief Justice, writing for the Court, tested the state action issue by reference to two state action doctrines.³³ In *American Manufacturers*, the Court stated that the pertinent issues are: (1) whether the entity carried out a public function, i.e., a function that has been "traditionally, exclusively and historically" governmental in nature,³⁴ and (2) whether the state has either "ordered, coerced, or significantly encouraged" the activity of

²⁹ *Id.* at 193.

³⁰ *Brentwood Acad.*, 531 U.S. at 298.

³¹ *Id.* at 295.

³² *Id.*

³³ *Am. Mfrs.*, 526 U.S. at 49.

³⁴ *Id.* at 50.

the private entity which is being challenged.³⁵ The Court held that these are the two state action tests used to determine whether a private entity is engaged in state action.³⁶ Additionally, an analysis of Supreme Court state action decisional law reveals two other tests, a symbiotic relationship test, and perhaps a joint action test as well.³⁷

There is another analytical problem with the *Brentwood Academy* decision. After stating early on in the decision that there is no singular test to determine whether state action is present, it is all *ad hoc*,³⁸ the Court used what appears to be a test to determine state action. After all the facts and circumstances were examined, Justice Souter ultimately determined that state action existed because of the state's "pervasive entwinement" with the athletic association.³⁹ It appears that "pervasive entwinement" is a test. In this respect, the opinion seems to be somewhat internally inconsistent. In addition, the Court did not elaborate or define what is meant by "pervasive entwinement". It appears to be a type of vague, open-ended standard that may well create difficulties in the future.

If one surveys the Supreme Court state action decisional law, the reality is that there are two lines of state action decisions⁴⁰ and each takes a different approach to the state action question. In one line of decisions, which most of the cases follow, the Court takes a structured approach.⁴¹ In a structured

³⁵ *Id.*

³⁶ *Id.*

³⁷ See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722-24 (1961) (The Court held that given the facts and circumstance of the Delaware law, under the symbiotic relationship test the restaurant's conduct constituted state action.), *Adikes v. S & H Kress Co.*, 398 U.S. 144, 152 (The Court held that the petitioner could maintain an action under Section 1983 by showing that a private restaurant and state official acted jointly together for the purposes of establishing a state action.).

³⁸ *Brentwood Acad.*, 531 U.S. at 295.

³⁹ *Id.* at 291.

⁴⁰ *Id.* at 290.

⁴¹ See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (The Court, applying a more rigid and structured test, held that a private entity's actions will only be deemed state action when the state has either exercised coercive

approach case, the Court evaluates whether the private entity was engaged in state action by reference to particular tests.⁴² Alternatively, there is a second line of state action decisions, like the *Brentwood Academy* case, which are more open-ended.⁴³ Instead of utilizing specific tests, these decisions look to all of the facts and circumstances of the case.⁴⁴ The problem is that, given these two lines of decisions, when a state action issue arises in the lower courts, it is uncertain how the trial court judge or a group of appellate judges will evaluate the state action question. When the state action issue is not governed by some precedent directly on point, should a court utilize the wide-open approach of *Brentwood Academy*, or the more structured approach?

II. PROCEDURAL DUE PROCESS

The issue of procedural due process presents an interesting question when a dispute arises between the government and a governmental contractor.⁴⁵ *Lujan v. G & G Fire Sprinklers* is the Supreme Court case that was decided on this issue this term, which came out of the Ninth Circuit in California.⁴⁶ *Lujan* involved a contract between the state and a contractor, and another contract between the contractor and the subcontractor.⁴⁷ The pertinent California statute states that if the subcontractor did not meet the state's minimum wage requirements, the contractor may forfeit up to fifty dollars per day for each underpaid worker.⁴⁸ The State of California may

power over the entity or provided such significant encouragement. The Court in utilizing this test does not differentiate between overt or cover actions, so long as the choice of the private entity to act can be deemed the state's desire).

⁴² *Id.*

⁴³ *Brentwood Acad.*, 531 U.S. at 295; *See, e.g., West v. Atkins*, 487 U.S. 42 (1988).

⁴⁴ *Id.*

⁴⁵ *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001).

⁴⁶ 204 F.3d 941 (9th Cir. 2000).

⁴⁷ *Id.*

⁴⁸ Cal. Lab. Code § 1775(a) (2001), provides in pertinent part:

The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or

withhold payments under the contract that are due and owing to the contractor, and the contractor in turn can withhold payments that are due and owing to the subcontractor.⁴⁹ The subcontractor in this case raised an interesting objection, namely, that its payments were being withheld by the contractor without an opportunity to be heard.⁵⁰ The subcontractor's argument was that this practice violates procedural due process.⁵¹ The Ninth Circuit agreed with the subcontractor.⁵² Here is a useful rule of thumb: If the Ninth Circuit rules for the plaintiff in a civil rights case, and the Supreme Court grants *certiorari*, overwhelmingly, the Ninth Circuit is going to be reversed. True to form, that is exactly what happened in this case.

This is a fairly short decision, and it is a model of issue avoidance. I am not going to assign this case in my Constitutional law class because I do not want the students to learn how to write an essay that avoids all of the important issues in a case. For example, there is an issue in the case as to whether the conduct by the contractor who withheld the payments due to the subcontractor is a state action.⁵³ What did the Supreme Court say on this issue? It said it does "not decide the issue."⁵⁴ Then there was a question as to whether the subcontractor was deprived of a property interest under the due process clause. What did the Supreme Court say on this issue?

We assume, without deciding, that the withholding of money due respondent under its contracts occurred under color of state law, and as the Court

awarded, forfeit not more than fifty dollars (\$ 50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates . . .

⁴⁹ Cal. Lab. Code § 1742(b), the statute provides in pertinent part that "The contractor or subcontractor under § 1742(b) is entitled to a hearing before the Director of Industrial Relations, who shall appoint an impartial hearing officer."

⁵⁰ *Lujan*, 532 U.S. at 193-94.

⁵¹ *Id.* at 194.

⁵² *Id.*

⁵³ *Id.* at 195.

⁵⁴ *Id.*

of Appeals concluded, respondent has a property interest of the kind we considered in *Logan v. Zimmerman Brush Co.*,⁵⁵ in its claim for payment under its contracts.⁵⁶

The decision ultimately held that, assuming without deciding that the conduct by the contractor constituted state action, and assuming further that the subcontractor was deprived of a protected property interest, there was no violation of procedural due process.⁵⁷

The Court was not concerned with the seeming lack of due process protection afforded the subcontractor because the subcontractor could always bring suit in the California state court, either against the State of California or against the contractor based upon a breach of contract theory.⁵⁸ An action for breach of contract would provide an adequate remedy, and thus satisfy procedural due process. The subcontractor was not satisfied with this remedy because a contract action in state court would likely to take a very long time to litigate. The Supreme Court said, it didn't care about the delay.⁵⁹ That is normal. Litigation takes a long time, and a breach of contract claim is the normal remedy for this type of contractual dispute.

⁵⁵ 455 U.S. 422 (1982). The Court held that the time limitation in FEPA deprived appellant of a property right, and that appellant was entitled to have the commission consider the merits of his charge based upon the substantiality of the available evidence, before deciding whether to terminate his claim.

⁵⁶ *Lujan*, 532 U.S. at 195.

⁵⁷ *Id.* at 197-99.

⁵⁸ *Id.* at 196.

⁵⁹ *Id.* at 196-97. (The Court reasoned that because the California law affords the respondent sufficient opportunity to be heard and to pursue a claim in the state courts, "the statutory scheme does not deprive G & G of its claim for payment without due process." In relying on a prior decision, *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), the Court reasoned that, "the very nature of due process negates any concept of inflexibility procedures universally applicable to every imaginable situation. Due Process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions . . .").

At one point in its opinion, in trying to support its conclusion that the availability of a breach of contract action was a remedy that satisfies procedure of due process, the Court said “the subcontractor is not denied a present entitlement, but was only denied payment he contended was due under the contract.”⁶⁰ I have to tell you, I have thought about that sentence for a long time. I have absolutely no idea what it means. I have asked Professor Erwin Chemerinsky,⁶¹ with whom I recently co-chaired a Supreme Court Review program, and he was similarly puzzled. I think the true rationale of the decision, which is not articulated by the Supreme Court, but has been articulated in lower courts decisions, is that the Court did not want ordinary breach of contract claims turned into a Section 1983 constitutional law claims. The Court essentially stated that this is a breach of contract claim, so let the subcontractor bring suit in state court under state law for breach of contract.

III. EXHAUSTION REQUIREMENT OF THE PRISONER LITIGATION REFORM ACT

The third issue I will discuss concerns a prisoner’s claims for damages for constitutional violations. The prisoners’ probability of success in these cases is not good. The Court decided a case this term *Booth v. Churner*⁶², dealt with the exhaustion of administrative remedies requirement under the Prison Litigation Reform Act.⁶³ This exhaustive rule requires exhaustion of administrative remedies in Federal court cases,

⁶⁰ *Lujan*, 532 U.S. at 198-99.

⁶¹ Erwin Chemerinsky is a Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California Law School. He is also the Director of the Center for Communication Law and Policy at the University of Southern California.

⁶² *Booth v. Churner*, 532 U.S. 731 (2001).

⁶³ 42 U.S.C. § 1997(e) (2001) (The Act 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.”).

including Section 1983 cases, where the prisoner contests the validity of the conditions of confinement.⁶⁴ An interesting question arises when a prisoner seeks monetary damages for conditions on confinement that violate a constitutionally protected right, but the administrative remedy that is available does not authorize monetary relief. Prisoners around the country argued that they should not have to exhaust administrative remedies when the administrative remedy does not authorize the remedy the prisoner seeks.⁶⁵ The Supreme Court was unmoved by that argument.⁶⁶ The Supreme Court held that the prisoner must exhaust administrative remedies under the Prison Litigation Reform Act,⁶⁷ even if the remedy does not authorize the type of relief that the prisoner is seeking judicially.⁶⁸

There is a follow up Prisoner Litigation Reform Act exhaustion case before the Supreme Court this term that comes out of the Second Circuit,⁶⁹ *Porter v. Nussle*.⁷⁰ The case involves an excessive force claim, a prisoner claimed the guards used excessive force that was unconstitutional.⁷¹ The Second Circuit held that the Prisoner Litigation Reform Act exhaustion of administrative remedies requirement did not apply because a single prisoner's claim that prison guards used excessive force was not a challenge to prison conditions as a whole.⁷² The

⁶⁴ *Booth v. Churner*, 532 U.S. at 733-34. (Under 42 U.S.C. § 1997 (e)(a) as amended by the Prison Reform Act of 1995, requires prisoners to exhaust "such administrative remedies as are available" before commencing a lawsuit involving prison conditions. A prisoner who seeks only money damages must complete prison administrative processes even though the process has no provision for recovery of money damages).

⁶⁵ *Booth*, 532 U.S. at 735.

⁶⁶ *Id.*

⁶⁷ 42 U.S.C. § 1997e. The Act in pertinent part provides the basis for applicability of actions in administrative actions, as well as the basis for dismissal of actions by the court. Further it provides for attorney's fees, and limitations on recovery.

⁶⁸ *Booth*, 532 U.S. at 736.

⁶⁹ *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), *cert. granted*, *Porter v. Nussle*, 532 U.S. 1065 (2001).

⁷⁰ *Porter*, 532 U.S. 1065.

⁷¹ *Nussle*, 224 F.3d at 97.

⁷² *Id.* at 100.

Supreme Court granted *certiorari* in this case.⁷³ In all of the years I have been lecturing on Section 1983 litigation, I have very rarely made predictions. However, in this case I think the Second Circuit is going to be overturned. The Supreme Court in *Booth* gave a broad reading to the Prison Litigation Reform Act exhaustion of administrative remedies requirement, and the Court is likely to hold that the exhaustion requirement applies to all prisoner excessive force claims. Thus, I predict that the Court will hold that the prisoner's challenge to the conditions of confinement is inappropriate under the Prisoner Litigation Reform Act because the exhaustion requirement was not satisfied.⁷⁴

IV. QUALIFIED IMMUNITY

The fourth issue is the application of qualified immunity to excessive force claims. In *Saucier v. Katz* the United States Supreme Court held that a police officer charged with using excessive force, either in making an arrest or conducting an investigatory stop, in violation of the Fourth Amendment is entitled to qualified immunity as a defense to the claim.⁷⁵ There are a couple of pieces to this puzzle to look at in order to evaluate the significance of the Supreme Court decision. The first part of the puzzle is that when a plaintiff alleges that a law enforcement officer used excessive force, either in effectuating an arrest or conducting an investigatory stop, the test under the Fourth Amendment is whether the police officer's use of force was objectively reasonable.⁷⁶ Was the use of force a type of force that, under the circumstances, an objectively reasonable police officer could have used? As long as it is objectively reasonable, there is no Fourth Amendment violation.⁷⁷ This test gives the benefit of the doubt to the police officer, the rationale being that

⁷³ *Porter*, 532 U.S. 1065.

⁷⁴ *Porter v. Nussle*, 122 S. Ct. 983, 991-92 (2002).

⁷⁵ *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001).

⁷⁶ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁷⁷ *Id.*

police officers often have to make split-second decisions of what type of force to use when trying to bring an individual within the physical control of the officer.⁷⁸

The other part of the puzzle is qualified immunity, which is a defense that is generally entitled to be asserted by state and local officials who carry out executive and administrative functions. Qualified immunity is also a test which asks whether the officer who carried out the executive function acted in an objectively reasonable fashion.⁷⁹ An officer who violated an individual's constitutionally-protected right, but who did not violate a clearly established constitutional right, acted in an objectively reasonable fashion, and is therefore protected against monetary liability by the defense of qualified immunity.⁸⁰ Putting these two parts of the puzzle together, the question for the United States Supreme Court in *Saucier v. Katz* then became: Is it possible for a police officer who used force that violated the Fourth Amendment because it was objectively unreasonable, to have acted objectively reasonably for qualified immunity purposes?⁸¹ Can an officer act reasonably for qualified immunity purposes even though the officer acted unreasonably for Fourth Amendment purposes? This question can certainly cause headaches, and for that I apologize. The Supreme Court said yes, it is possible.⁸² Accordingly, law enforcement officers who are sued for excessive force have the right to assert qualified immunity as a defense.⁸³

Think about it. If you had a dispute with a loved one or a close friend, and you felt that this individual treated you in an unreasonable fashion, would you likely say: "I really do not hate your guts because I know, even though you treated me unreasonably, you reasonably treated me unreasonably?" Would you normally resolve things that way? Yet, that is exactly what the United States Supreme Court held. Essentially, a police

⁷⁸ *Id.*

⁷⁹ *Saucier*, 533 U.S. 194 at 205

⁸⁰ *Id.* at 206.

⁸¹ *Id.* at 206-07.

⁸² *Id.* at 206.

⁸³ *Id.*

officer can be protected by qualified immunity even though the officer acted in an objectively unreasonable fashion under the Fourth Amendment.⁸⁴ What this means is that the law enforcement officer has two levels of “objectively reasonable” protection: one level of protection under the Fourth Amendment, and then a second layer level of protection under qualified immunity.⁸⁵ The rationale is that a law enforcement officer may have used unreasonable force within the meaning of the Fourth Amendment, but may have made a reasonable mistake,⁸⁶ either in assessing the facts, or in evaluating the Fourth Amendment decisional law, which is not always crystal clear as to the type of force that is unreasonable.⁸⁷

I think the *Saucier* decision is not likely to have a tremendous impact. In the truly egregious excessive force cases, the extreme brutality cases where police officers brutalized an individual without legitimate justification, the plaintiffs are going to win. They are going to win despite the added level of objective reasonableness protection, for that matter, no matter how many levels of objective reasonableness protection was given to the police officer. On the other hand, in the great majority of close call cases where it is unclear whether the police officer’s use of force violated the Fourth Amendment, whether it was objectively reasonable or not within the meaning of the Fourth Amendment, the police officer is going to prevail anyway, because the Fourth Amendment standard gives the benefit of the doubt to the police officer.⁸⁸ The Supreme Court in *Graham* instructed lower courts to give deference to police officers who make difficult decisions concerning the appropriate use of force.

I think that the real motivation behind the Supreme Court’s decision that qualified immunity applies to Fourth Amendment excessive force claims was to allow trial judges to resolve excessive force claims early in the litigation when the

⁸⁴ *Id.*

⁸⁵ *Saucier*, 533 U.S. at 206.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 207.

police officer's counsel makes a summary judgment motion based upon qualified immunity. The Supreme Court has said over and over again, qualified immunity is not only a defense from liability, it is also a defense from the burden of litigation, and trial judges whenever possible should decide the immunity issue early in the litigation.⁸⁹ But I think that philosophy does not work too well in excessive force cases, because these cases are usually fact-specific with material facts in dispute.⁹⁰ The plaintiff will undoubtedly submit an affidavit that swears, "I was just minding my own business, whistling a patriotic tune and the police officer shot me in the leg." While the officer will swear that "the plaintiff was cursing, threatening, and lunged at me, and it was only then that I shot the plaintiff in the leg." The qualified immunity defense cannot be resolved in such a case until the material facts are found.

On the other hand, the Supreme Court's decision may impose pressure, and the lower court judges may feel that pressure, to try to resolve excessive force cases on the basis of qualified immunity early in the litigation. If that happens, then the *Saucier* decision will have significant impact.

V. ATTORNEY'S FEES

The last issue I am going to discuss concerns statutory attorney's fees. In *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Services*,⁹¹ the Supreme Court held that to be a prevailing party eligible for an award of statutory attorney's fees under Federal civil rights fee shifting statutes, the plaintiff must obtain either a favorable

⁸⁹ See *Hunter v. Bryant*, 502 U.S. 224 (1991); See also *Crawford v. Britton*, 523 U.S. 574, 598 (1998) (Qualified immunity operates as a shield to police officers and prevents them from being subject to liability for acting when such action is deemed objectively reasonable). See also *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (The qualified immunity defense is an early procedural protection against unwarranted and disruptive pretrial litigation).

⁹⁰ *Harlow*, 457 U.S. at 815.

⁹¹ 532 U.S. 598 (2000).

judgment on the merits or a consent decree.⁹² This means that a showing by the plaintiff that the lawsuit served as a catalyst that prompted the defendant to take some type of corrective action, giving the plaintiff what the plaintiff was seeking, will not qualify the plaintiff as a prevailing party.⁹³ For example, if the government defendant granted the plaintiff a public benefit or some type of license this will not suffice to qualify the plaintiff as a prevailing party, even though the lawsuit established its goal.

The *Buckhannon* case was brought under the Fair Housing Act⁹⁴ and the Americans with Disabilities Act.⁹⁵ However, the Supreme Court's decision made clear that its rejection of the catalyst doctrine applies to civil rights fee shifting statutes across the board,⁹⁶ including the fee shifting statute that applies to Section 1983 cases.⁹⁷

The precise question in *Buckhannon* was whether the plaintiff is a prevailing party if the plaintiff shows that the lawsuit served as a catalyst to prompt the defendant to give the plaintiff what the plaintiff was seeking. This should be strictly a matter of statutory interpretation, namely, the meaning of prevailing party. But if you look at the lineup of the justices, and if you contrast the majority and dissenting opinions, it seems there is more going on here than just an effort by the justices to figure out what Congress intended.⁹⁸

The Chief Justice wrote the opinion of the Court, and was joined by Justices O'Connor, Scalia, Kennedy and Thomas. These five justices are normally regarded as the most conservative members of the Court.⁹⁹ The more moderate members of the Court were in the dissent: Justice Ginsburg, joined by Justices Stevens, Souter and Breyer.¹⁰⁰ That is the

⁹² *Id.* at 1838.

⁹³ *Id.*

⁹⁴ 42 U.S.C. § 3613(2) (1988).

⁹⁵ 42 U.S.C. § 12205 (2001).

⁹⁶ *Buckhannon*, 532 U.S. 605.

⁹⁷ *Id.* at 607-08.

⁹⁸ *Id.* at 608.

⁹⁹ *Id.* at 598.

¹⁰⁰ *Id.*

same alignment we have so often seen in the Federalism cases.¹⁰¹ Further, it is the same alignment we saw in *Bush v. Gore*.¹⁰² Perhaps the particular alignment of the justices was mere coincidence, but one has to wonder: was the *Buckhannon* decision truly based upon Congressional intent? Further the decision effectively reversed the holdings of no less than eleven circuits.¹⁰³ Eleven circuits held that a plaintiff is entitled to fees under the so-called “catalyst option.”¹⁰⁴ The only circuit which was consistent with the Court’s decision was the Fourth Circuit, which is widely regarded as the most conservative in the country.¹⁰⁵ You can draw your own conclusions as to whether the majority decision in *Buckhannon* was purely and strictly based upon an attempt to figure out true Congressional intent about the meaning of “prevailing party.”

The *Buckhannon* decision is a very damaging decision for civil rights plaintiffs. Civil rights plaintiffs may litigate a case very hard for many years, and on the eve of trial, the attorney for the municipality or the state can simply provide the relief sought

¹⁰¹ See, e.g., *Bd. of Tr. v. Garrett*, 531 U.S. 356 (2001); *U.S. v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Printz v. U.S.*, 521 U.S. 898 (1997); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996); *U.S. v. Lopez*, 514 U.S. 549 (1995); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

¹⁰² *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁰³ See *Stanton v. S. Berkshire Reg’l Sch. Dist.*, 197 F.3d 574, 577 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1992); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 548 (3d Cir. 1994); *Associated Builders and Contractors of La., Inc., v. Orleans Parish Sch.*, 919 F.2d 374 (5th Cir. 1990); *Payne v. Bd. of Ed.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 274 -76 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski Cty. Sch. Dist.*, 17 F.3d 260, 263 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 950-52 (10th Cir. 1994); *Morris v. City of W. Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986).

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., *S-1 and S-2 v. State Bd. of Ed. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (The court held that attorney’s fees will only be awarded if the party obtains an enforceable judgment. The court specifically rejected the “catalyst theory” as the basis for seeking attorney’s fees).

by the plaintiff, and the plaintiff will be unable to recover attorney's fees.¹⁰⁶ In addition, if the complaint alleges, for example, that an ordinance is unconstitutional, the municipality can escape the statutory obligation of attorney's fees by repealing the offensive ordinance prior to the court's determination of the merits.¹⁰⁷ Even though the plaintiff expended large resources in litigating the case, and the case established the goal of the litigation, the plaintiff will not be entitled to attorney's fees.

Moreover, the Court made it clear that even if the case culminates in a settlement, if that settlement is not memorialized in a consent decree, the plaintiff is not a "prevailing party" eligible for attorney's fees under a federal fee shifting statute.¹⁰⁸ I think *Buckhannon* is very bad interpretation of federal fee shifting statutes. The dominant purpose of the civil rights fee shifting statutes was to encourage private individuals to act as private attorney generals in enforcing the nation's civil rights laws. *Buckhannon* retards that goal. It is not clear why a plaintiff who has obtained the object of the litigation, like a public benefit or a license, is somehow less worthy of a fee award than a plaintiff who is awarded a judgment. I suppose there is an argument if the state just voluntarily gives the plaintiff what she sought, the state could choose to take it away. On the other hand, when courts issue judgments they are not always complied with, and certainly not immediately. I also think the decision is a setback for the administration of justice, because civil rights plaintiffs will be less inclined to settle cases.

In sum, I think the case is bad law, bad logic, and bad for the administration of justice. While Congress is free to overturn the decision, it seems as though Congress has better things to do these days.

¹⁰⁶ *Buckhannon*, 532 U.S. at 603-04.

¹⁰⁷ *Id.* at 604.

¹⁰⁸ *Id.* at 603.