

2005

## Supreme Court 2003-2004 Term: The § 1983 Decisions

Martin A. Schwartz

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

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### Recommended Citation

Schwartz, Martin A. (2005) "Supreme Court 2003-2004 Term: The § 1983 Decisions," *Touro Law Review*. Vol. 20: No. 4, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol20/iss4/5>

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# SUPREME COURT 2003-2004 TERM: THE § 1983 DECISIONS

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

Section 1983 plays a very powerful role in the enforcement of constitutional rights. This is a federal statute that authorizes individuals to recover monetary and prospective relief against state and local governmental officials and in some cases against municipalities.<sup>2</sup> The United States Supreme Court set forth two elements that a plaintiff has to satisfy in order to state a claim under this section. First, the plaintiff has to allege a deprivation of a federally protected right, usually a federal constitutional right.<sup>3</sup> However, in some cases the plaintiff may assert a violation of a federal statutory right.<sup>4</sup> Second, the plaintiff has to allege that the defendant acted under the color of state law.<sup>5</sup> For most § 1983

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<sup>1</sup> Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things, authored leading treatises entitled *Section 1983 Litigation: Claims and Defenses* (3d ed. 1997) and *Section 1983 Litigation: Jury Instructions* (1999). In addition, Professor Schwartz is the author of a bi-monthly column in the *New York Law Journal*, entitled “Public Interest Law.” This article is based on a transcript of remarks from the Sixteenth Annual Supreme Court Review Program presented at the Touro Law Center, Huntington, New York.

<sup>2</sup> See *Monell v. Dep’t Soc. Servs.*, 436 U.S. 658 (1978) (municipalities subject to suit under § 1983 but not on basis of respondeat superior).

<sup>3</sup> *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (holding that in a § 1983 action it must be determined whether the conduct “deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States”).

<sup>4</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002). “[Section] 1983 actions may be brought against state actors to enforce rights created by federal statutes as well as by the Constitution.” *Id.*

<sup>5</sup> *Parratt*, 451 U.S. at 535 (holding that in a § 1983 violation the court must also determine “whether the conduct complained of was committed by a person acting under color of state law”).

cases, that means conduct by a state or local official.<sup>6</sup> I think that while those two requirements are essential elements of a § 1983 claim, they are insufficient to establish § 1983 liability.

There are other requisites in order to establish a claim under § 1983. For example, there is a causation requirement in § 1983 fairly analogous to proximate cause with which we are familiar in common law tort cases.<sup>7</sup> If a § 1983 plaintiff is seeking relief against a municipality, the plaintiff would be required to show that the enforcement of a municipal policy or custom caused the violation of the plaintiff's federally protected right.<sup>8</sup> But one should not assume that just because the plaintiff has alleged a proper claim under § 1983, the plaintiff will be able to obtain relief. Section 1983 law is filled with a rather large array of defenses and doctrines.<sup>9</sup> You might want to think of them as obstacles that can prevent the plaintiff from recovering relief even

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<sup>6</sup> See, e.g., *Lujan v. G & G Fire Sprinklers, Inc.* 532 U.S. 189 (2001) (action against petitioner who was the Labor Commissioner of California); *Blessing v. Freestone*, 520 U.S. 329 (1997) (action against petitioner who was the Arizona Director of Economic Security); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990) (action against petitioner who was the governor of Virginia).

<sup>7</sup> *Monell*, 436 U.S. at 692. "Congress did not intend § 1983 liability to attach where . . . causation was absent." *Id.*

<sup>8</sup> *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 405 (1997). "[P]roof that a municipality's legislative body or authorized decision maker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." *Id.*; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 471 (1986). "[M]unicipal liability under 42 U.S.C. § 1983 is limited to deprivations of federally protected rights caused by action taken 'pursuant to official municipal policy of some nature . . .'" *Id.*

<sup>9</sup> See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001) (explaining that there is a qualified immunity defense for state officials sued under § 1983); *Howlett v. Rose*, 496 U.S. 356, 376 (1990) (holding that a federal or state court may not entertain a § 1983 action against a state.); *Wis. Dep't of Corr. v. Schacht*, 524

in a case where the plaintiff is able to demonstrate that a state or local official violated his or her constitutionally protected right.

During the last thirty years or so, the Supreme Court has rendered an unusual number of decisions on virtually every aspect of § 1983 litigation. The Supreme Court decisional law itself is staggering in terms of its quantity. There is a decision from the Supreme Court that resolves virtually every fundamental issue which governs § 1983 litigation. But incredibly there is always a new issue on the horizon, and it continues from term to term. New issues come before the Supreme Court and the Court is very aware of the significance of these issues, even though some of the issues might be thought of as nuances.

I have grouped the decisions of last term into the following categories: the right of prisoners to sue under § 1983; the right of taxpayers to sue under § 1983; qualified immunity; and Eleventh Amendment immunity.

### **A. Prisoners' Rights Suits**

The first category is the right of prisoners to sue under § 1983. Section 1983 litigation in this country is voluminous. I saw a few years back a figure of some 50,000 cases being filed every year in federal district court under § 1983.<sup>10</sup> Prisoners file quite a

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U.S. 381, 384 (concluding that a suit for damages against a state officer acting in his official capacity is barred by the Eleventh Amendment).

<sup>10</sup> MARTIN A. SCHWARTZ, SECTION 1983: CLAIMS AND DEFENSES § 1.01[B] (4th ed. 2003).

large percentage of those cases.<sup>11</sup> They have the time, the energy, and the motivation. Many of the prisoners who file suits under § 1983 are repeaters.<sup>12</sup> The federal judges have become quite familiar with many of these prisoners and have referred to them as “frequent filers.”<sup>13</sup> These “frequent filers” are prisoners who use § 1983 regularly, for example, to challenge the constitutionality of prison conditions.<sup>14</sup>

One issue that has occupied the attention of the Supreme Court, going back to the early 1970s, is when prisoners may file a

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at § 1.06[B][2]. Congress enacted the Prison Litigation Reform Act (“PLRA”) because it was concerned that frequent filing was used as a recreational activity for prisoners. The Prison Litigation Reform Act’s provision precludes filing of in forma pauperis civil actions by a prisoner who has had similar petitions dismissed as frivolous on three or more occasions. *Id.*; *see also* 28 U.S.C. § 1915(a)(12); *Wilson v. Yaklich*, 148 F.3d 596, 605 (6th Cir. 1998) (holding the provision does not deprive prisoner of due process or equal protection rights, of access to court, nor is it ex post facto or bill of attainder violation).

<sup>13</sup> *Rivera v. Allin*, 144 F.3d 719, 723 (11th Cir. 1998) (opining on whether the “three strikes” provision of the Prison Litigation Reform Act (PLRA), which requires frequent filer prisoners to prepay the entire filing fee before federal courts may consider their lawsuits and appeals is constitutional); *Jennings v. Natrona County Detention Ctr.*, 175 F.3d 775, 778 (10th Cir. 1999) (referring to prisoners who file three or more actions or appeals as “frequent filers”); *Luedtke v. Bertrand*, 32 F. Supp. 2d 1074, 1076 (E.D. Wis. 1999) (same).

<sup>14</sup> *See Lawrence v. Goord*, 238 F.3d 182, 183 (2d Cir. 2001) (hearing an action brought by the plaintiff, Lawrence, an inmate at Otisville State Penitentiary, who alleged defendant Corrections Officer Kimble issued him a series of unwarranted misbehavior reports in retaliation for Lawrence complaining to prison authorities about alleged misconduct by Kimble); *see also Gibson v. Goord*, 280 F.3d 221 (2d Cir. 2002). Prisoner Hanton challenged the constitutionality of his prison conditions and alleged “(a) that he injured his back when he fell from his bunk, (b) that he was reassigned to a cell that had water on the floor, (c) that he fell again as a result of the water and injured his neck, and (d) that he received inadequate medical care for his injuries.” Prisoner Gibson challenged the constitutionality of his prison conditions and alleged, “that he had been exposed to environmental tobacco smoke, more commonly called ‘second-hand smoke.’ ” *Id.* at 222-23.

claim under § 1983 as compared to when a prisoner must assert the claim in a federal habeas corpus proceeding.<sup>15</sup> It is an issue because a prisoner's claim might literally come within both federal statutes. It might be that the claim meets the two elements of the § 1983 claim for relief, and it also might be a claim that meets the requirements of a federal habeas corpus proceeding.<sup>16</sup> This potential conflict has been a major issue for the lower federal courts and a major source of difficulty for the United States Supreme Court. The story in the Supreme Court goes back to the 1973 case *Preiser v. Rodriguez*.<sup>17</sup>

One might question why this issue is so important. Let me explain. From the perspective of the prisoner, § 1983 is a far more attractive remedy. For one thing, the stringent exhaustion of state remedies requirement that applies in federal habeas corpus proceedings is generally not applicable to § 1983 actions. There is

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<sup>15</sup> SCHWARTZ, *supra* note 10, § 10.5, at 574. "Because of this potential overlap in federal remedies, a question that arises with great frequency is whether a state prisoner's constitutional claim may be asserted under § 1983 or only in a federal habeas corpus proceeding after state remedies have been exhausted." *Id.* See *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (holding that habeas petitions are the sole remedy for state prisoners challenging the fact or duration of physical confinement); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (stating "the demarcation line between civil rights actions and habeas petitions is not always clear.").

<sup>16</sup> See *Lumbert v. Finley*, 735 F.2d 239 (7th Cir. 1984). The court stated:

*Preiser* establishes that although challenges to conditions of confinement may be brought as either section 1983 or habeas corpus actions, challenges to the fact or duration of confinement may be brought only as habeas corpus actions. Admittedly, the distinction between challenges to the 'conditions of confinement' and to the 'fact or duration of confinement' may, in some cases, be difficult to draw . . . .

*Id.* at 242.

<sup>17</sup> *Preiser*, 411 U.S. at 475.

an exhaustion of administrative remedies that prisoners have to satisfy in order to bring suit under § 1983, but there is no requirement that state judicial remedies be exhausted.<sup>18</sup> Thus, the exhaustion requirement for § 1983 is not as rigorous as the exhaustion requirement in the federal habeas corpus proceeding.<sup>19</sup> Also, statutory attorneys' fees, which are available in § 1983 actions, are not available in federal habeas corpus proceedings.<sup>20</sup> There are other differences as well. In an article that I wrote, I included a long chart of all the differences.<sup>21</sup> For example, jury trial rights in a § 1983 action for damages are not available in a federal habeas corpus proceeding.<sup>22</sup> For that matter, damages are not recoverable in a habeas corpus proceeding. So, this is an issue of quite some significance.

One of the things that the Supreme Court has sought to accomplish is to prevent prisoners from making a pleading that would seem to present a claim that is within the heart of federal habeas corpus, and avoid the federal habeas corpus restrictions and

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<sup>18</sup> SCHWARTZ, *supra* note 10, § 10.5, at 574. "[T]here is no general requirement that state judicial or administrative remedies be exhausted in order to commence a § 1983 action." *Id.*

<sup>19</sup> *Id.* at 574-75. "The only exhaustion provision applicable to § 1983 actions is CRIPA's [Civil Rights of Institutionalized Persons Act's] mandate that suit not be brought challenging prison conditions until available administrative remedies are exhausted." *Id.* (citing 42 U.S.C. § 1997e(a)).

<sup>20</sup> *Id.* "The Civil Rights Attorney's Fees Awards Act of 1976 authorizes fee awards to prevailing parties in actions brought under, inter alia, § 1983." *Id.* (citing 42 U.S.C. § 1988 (b) (1976)).

<sup>21</sup> See Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 88-111 (1988).

<sup>22</sup> *Id.* at 107.

limitations by simply putting a § 1983 label on the pleading.<sup>23</sup> When these conflicts have come up, the Supreme Court has said that the more specific federal habeas corpus remedy will normally prevail over the more general § 1983 remedy.<sup>24</sup> Again, that is another way of saying that we do not want prisoners to simply get around the federal habeas corpus restrictions by calling the claim a § 1983 claim.

There were two cases in the United States Supreme Court last term raising these issues. *Nelson v. Campbell* involved a § 1983 claim filed by a death row inmate who was scheduled to be executed by lethal injection.<sup>25</sup> The prisoner alleged in his § 1983 complaint that the medical procedure the state was going to use to bring about the lethal injection was medically unnecessary.<sup>26</sup> The plaintiff was not challenging — and you have to be very careful with this — the lethal injection itself. He was challenging the medical procedure leading up to the lethal injection.<sup>27</sup> Specifically, the prisoner was challenging the method that the state was going to use to cut into his veins.<sup>28</sup> The prisoner alleged this procedure was medically unnecessary and constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>29</sup> The prisoner sought injunctive relief under § 1983.<sup>30</sup> The state argued that this

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<sup>23</sup> *Preiser*, 411 U.S. at 489.

<sup>24</sup> *Id.* at 490.

<sup>25</sup> 124 S. Ct. 2117, 2120 (2004).

<sup>26</sup> *Id.* at 2124.

<sup>27</sup> *Id.* at 2125.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2121.

<sup>30</sup> *Nelson*, 124 S. Ct. at 2121.



type of claim must be brought in a federal habeas corpus proceeding after the exhaustion of state remedies.<sup>31</sup> The Supreme Court held unanimously that the claim could be filed under § 1983.<sup>32</sup> The Court viewed the claim as being a type of prisoner medical treatment claim.<sup>33</sup> However, the Court said that its decision in *Nelson* was exceedingly narrow.<sup>34</sup> It was limited to a challenge to an allegedly unnecessary medical procedure that was a precursor to the execution.

The open question after *Nelson* would be whether § 1983 could be used to allege that the use of lethal injection itself is unconstitutional.<sup>35</sup> The Court described this issue as a difficult one. I think it is unlikely that the United States Supreme Court is going to allow death row inmates to use § 1983 to get around the stringent limitations and requirements of federal habeas corpus proceedings to challenge the method of execution. Given the severe federal habeas corpus restrictions that have been imposed by both the Congress and by the Supreme Court it seems to me this is not likely to occur.

There was another important issue in the *Nelson* case. The plaintiff, I think quite understandably, requested not only an injunction against the use of the medical procedure but also a stay

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<sup>31</sup> *Id.* at 2123.

<sup>32</sup> *Id.* at 2120.

<sup>33</sup> *Id.* at 2123 (explaining that this is a claim involving a prisoner who complains about the type of medical treatment he is receiving or is about to receive). See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>34</sup> *Id.* at 2125.

<sup>35</sup> *Nelson*, 124 S. Ct. at 2122.

of the execution.<sup>36</sup> The Court explained that if a court has the power to grant injunctive relief, it also has the power to grant a stay or temporary injunction.<sup>37</sup> Of course, that does not mean there is an absolute right to a stay.<sup>38</sup> The *Nelson* case was complicated by the fact that the injunctive relief that was sought was injunctive relief against the precursor medical procedure, while the stay that was sought was a stay against the execution itself.<sup>39</sup> Of course, seeking the stay against the execution itself made a lot of sense because, obviously, if the plaintiff is executed, the § 1983 case will not mean anything. The Court refused to decide the difficult question of whether or not the plaintiff was entitled to a stay of execution and sent the case back to the lower court for that determination.<sup>40</sup>

The other § 1983 case brought by a prisoner was *Muhammad v. Close*.<sup>41</sup> The background to *Muhammad* was the Supreme Court decision in *Edwards v. Balisok*<sup>42</sup> that when a prisoner contests the constitutionality of some aspect of a prison disciplinary proceeding and the constitutional claim implicates the validity of a prison disciplinary sanction, the claim is not cognizable under § 1983 unless and until the prison disciplinary

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<sup>36</sup> *Id.* at 2120.

<sup>37</sup> *Id.* at 2125-26 (citing *Gomez v. United States Dist. Court for N. Dist. of Cal.*, 503 U.S. 653 (1992)) (implying that the Court has the power to grant injunctive relief in § 1983 claims).

<sup>38</sup> *Id.* at 2125-26.

<sup>39</sup> *Id.* at 2125.

<sup>40</sup> *Nelson*, 124 S. Ct. at 2126.

<sup>41</sup> 540 U.S. 749 (2004) (*per curiam*).

<sup>42</sup> 520 U.S. 641 (1997).

sanction has been overturned, either administratively or in state court.<sup>43</sup> That rule is even more stringent than an exhaustion requirement because in some cases the prisoner may have done everything possible to get the disciplinary sanction overturned, but was unable to do so. In these circumstances, the Supreme Court holds that the prisoner cannot assert the constitutional claim under § 1983 because the claim is not cognizable under § 1983.

One of the open issues in this area involves a prisoner who is no longer in custody. A prisoner who is no longer in custody cannot utilize federal habeas corpus.<sup>44</sup> If the prisoner cannot make use of federal habeas corpus and cannot make use of § 1983,<sup>45</sup> the prisoner is left without a federal remedy. Whether § 1983 is available in these circumstances even though the disciplinary sanction has not been overturned is an issue on which the lower courts have been split.<sup>46</sup> It was expected that the Supreme Court granted certiorari in the *Muhammad* case to resolve that issue. Instead, the Supreme Court left the issue unresolved and rendered a narrow decision which holds that when a prisoner asserts a constitutional challenge to some aspect of a prison disciplinary proceeding, but the prisoner's claim does not bring into question

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<sup>43</sup> *Id.* at 648.

<sup>44</sup> *Gonzales v. Stover*, 575 F.2d 827 (10th Cir. 1978).

<sup>45</sup> *Muhammad*, 540 U.S. at 751.

<sup>46</sup> *Compare* *Rivera v. Ashcroft*, 387 F.3d 835 (9th Cir. 2004) (holding that the writ of habeas corpus must be granted although petitioner was deemed no longer in custody); *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004) (same) *with* *Grullon v. Ashcroft*, 374 F.3d 137 (2d Cir. 2004) (holding that when petitioner is no longer in custody pursuant to a federal conviction, he is no longer eligible for habeas relief); *Obado v. New Jersey*, 328 F.3d 716 (3d Cir. 2003) (same).

the validity of the disciplinary sanction that was imposed, the prisoner may sue under § 1983.<sup>47</sup>

However, while the lower courts are struggling with those issues, help may be on the way. The Court has granted certiorari in still another case to be heard this term which raises the question of whether a prisoner who challenges the procedures used to determine parole release, where the only relief the plaintiff can obtain is a new parole release hearing, may assert his claim under § 1983.<sup>48</sup> The prisoner will contend that this is not the type of claim that fits within federal habeas corpus.<sup>49</sup> The argument is that the prisoner is not asking for immediate or speedier release from confinement, but is only asking for relief of a procedural nature; i.e., the procedural due process challenge to the parole release procedures.<sup>50</sup>

## B. Taxpayer Suits

The second category of this term's § 1983 cases involved

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<sup>47</sup> *Muhammad*, 540 U.S. at 754-55.

<sup>48</sup> *Dotson v. Wilkinson*, 329 F.3d 463 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 1652 (2004). The Supreme Court subsequently held that state prisoners could challenge procedures used to determine parole eligibility and parole suitability under § 1983. *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005).

<sup>49</sup> *Dotson*, 329 F.3d at 472. “[P]rocedural challenges to parole eligibility and parole suitability determinations such as those made by [the plaintiffs] do not ‘necessarily imply’ the invalidity of the prisoner’s conviction or sentence and, therefore, may appropriately be brought as civil rights actions, under 42 U.S.C. § 1983, rather than pursuant to an application for habeas corpus.” *Id.*

<sup>50</sup> *Id.* at 471 (stating that the prisoner “claims that the Parole Board violated due process when it failed to follow Ohio law governing parole determinations by,

the right of state taxpayers to sue under § 1983. If the state taxpayer asserts that a state tax policy is unconstitutional, the state taxpayer would satisfy the two elements of a § 1983 claim for relief. The claim would be the violation of a federally protected right and would be asserted against state tax officials who acted under color of state law. But here we run into a problem. The Tax Injunction Act provides that the federal district courts “shall not enjoin, suspend or restrain the assessment, levy or collection” of any state tax as long as the state has available an adequate state law remedy for contesting the tax.<sup>51</sup> The Supreme Court consistently has taken the position that this Tax Injunction Act reflects a broad congressional policy that federal courts not interfere with state tax administration.<sup>52</sup> It is a federalism issue, the relationship of the federal judiciary to state taxing authorities.<sup>53</sup>

Prior to the decision in *Hibbs v. Winn*,<sup>54</sup> the Supreme Court generally gave the Tax Injunction Act a very broad interpretation. For example, the Supreme Court has held that even though the Tax Injunction Act uses the language, “[t]he district court shall not

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among other things, having an insufficient number of Parole Board members at [the prisoner’s] hearing and not giving [the prisoner] an opportunity to speak”).

<sup>51</sup> 28 U.S.C. § 1341 (1993).

<sup>52</sup> See *Fair Assessment Real Estate Ass’n v. McNary*, 454 U.S. 100, 116 (1981); see also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719 (1996).

<sup>53</sup> See *Hibbs v. Winn*, 124 S. Ct. 2276 (2004); *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (holding that “Congress’ intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, . . . [and] that the Act prohibits declaratory as well as injunctive relief.”); *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 522 (1981) (recognizing that the principle purpose behind the Tax Injunction Act was to limit federal court jurisdiction and interference with local concerns such as the collection of taxes).

<sup>54</sup> *Hibbs*, 124 S. Ct. at 2276.

enjoin, suspend or restrain a state tax,” the act also prohibits attempts in federal court to obtain a declaratory judgment against a state tax policy.<sup>55</sup> Also, the policies of the Tax Injunction Act have been held by the Supreme Court to preclude a claim for damages when the claim for damages has the potential for interfering with state tax administration.<sup>56</sup> Further, the Supreme Court has made clear that it is very difficult to demonstrate that the state has not provided an adequate state remedy for collecting the tax.<sup>57</sup> However, in *Hibbs*, the Court, in a five-to-four decision, held that the Tax Injunction Act did not preclude the § 1983 claim asserted by the particular state taxpayers who were before the Court.<sup>58</sup>

The state taxpayers in the *Hibbs* case alleged that Arizona had a policy of granting tax credits to individuals who made contributions to organizations which then turned around and gave scholarships and tuition grants to private schools, including parochial schools.<sup>59</sup> The taxpayers alleged that the state tax credit policy violated the Establishment Clause. Arizona argued that the Tax Injunction Act protected state tax policies.<sup>60</sup> A majority of the Justices held that the Tax Injunction Act was not a bar. The Court said that the Tax Injunction Act does not prohibit federal courts from granting relief in all cases involving challenges to state tax

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<sup>55</sup> See *Grace Brethren Church*, 457 U.S. at 411.

<sup>56</sup> See *McNary*, 454 U.S. at 101-02 (holding that the “principle of comity” bars a taxpayer’s action for damages in federal court under 42 U.S.C. § 1983 to redress the unconstitutionality of the administration of a state tax system).

<sup>57</sup> See *Rosewell*, 450 U.S. at 522.

<sup>58</sup> *Hibbs*, 124 S. Ct. at 2281.

<sup>59</sup> *Id.* at 2284.

<sup>60</sup> *Id.*

policies, but only when the plaintiff's claim seeks to interfere with state tax collection.<sup>61</sup> The majority held that in this case the plaintiffs' claims did not seek to interfere with state tax collection, but were an attempt to have the state tax credit policy held unconstitutional.<sup>62</sup> In fact, should the plaintiffs prevail in this case on the merits, the result might be even greater state tax collection than if the state tax credit was still available.<sup>63</sup>

The most interesting part of the decision in *Hibbs* is the majority pointing out that post *Brown v. Board of Education*,<sup>64</sup> some of the southern states used state tax credit policies and state tuition policies to attempt avoidance of the mandate of *Brown*.<sup>65</sup> By granting state tax credits to parents who sent their children to private school, the state made it more difficult to integrate the public schools.<sup>66</sup> The Court in *Hibbs* said that it was assumed that when these post-*Brown* constitutional challenges were brought against these state tax credit policies, § 1983 authorized the claim and the Tax Injunction Act was not a bar.<sup>67</sup>

In my opinion, the significance of *Hibbs* extends beyond the technical meaning of the Tax Injunction Act. The decision in *Hibbs* facilitates the ability of the federal courts to enforce the

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<sup>61</sup> *Id.* at 2289.

<sup>62</sup> *Id.* at 2289.

<sup>63</sup> *Hibbs*, 124 S. Ct. at 2283 (citing *Winn v. Killian*, 307 F.3d 1011, 1017-18 (9th Cir. 2002)).

<sup>64</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that it is unconstitutional to segregate schools).

<sup>65</sup> *Hibbs*, 124 S. Ct. at 2281.

<sup>66</sup> *Id.* (citing *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964)) (granting tax credits to private segregated schools).

<sup>67</sup> *Id.*

Establishment Clause. *Hibbs* operated in a similar way as the Supreme Court's landmark standing decision in *Flast v. Cohen*.<sup>68</sup> *Flast* was decided during the Warren Court era, and the Supreme Court held that federal taxpayers had standing to claim that congressional spending violated the Establishment Clause.<sup>69</sup> The decision reads like a technical standing decision and from one perspective, it is. But from a different perspective, it is a decision that helps enable the federal courts to enforce the Establishment Clause.

The United States Supreme Court has treated state taxpayers, from a standing perspective, the same way as federal taxpayers.<sup>70</sup> That is another way of saying that while state taxpayers generally do not have standing to contest the constitutionality of state governmental spending, they do have standing when they claim that the state governmental spending violates the Establishment Clause.<sup>71</sup> Just as *Flaust* removed standing as an obstacle, *Hibbs* removes the Tax Injunction Act as a potential barrier preventing the federal court from reaching the merits of an Establishment Clause challenge.<sup>72</sup> You heard the discussions this morning about the decision of the Supreme Court that Michael Newdow did not have standing to contest the

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<sup>68</sup> 392 U.S. 83 (1968).

<sup>69</sup> *Id.* at 105-06.

<sup>70</sup> *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613-614 (1989) (treating state and federal taxpayers alike).

<sup>71</sup> *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 744 (1976) (holding that Maryland citizens and taxpayers had standing to challenge a state statute on Establishment Clause grounds).

<sup>72</sup> *Hibbs*, 124 S. Ct. at 2292.



constitutionality of the Pledge of Allegiance.<sup>73</sup> Every time the Supreme Court renders a decision like that, it means that the merits of a constitutional claim are not reached.<sup>74</sup> So these are very important decisions.

The final two categories of § 1983 decisions rendered by the Supreme Court deal with § 1983 immunity defenses. When the plaintiff seeks monetary relief against a state or local official in his individual capacity, the official may assert the defense of qualified immunity.<sup>75</sup> If the plaintiff is seeking relief against state government, Eleventh Amendment immunity is asserted.<sup>76</sup> The Supreme Court last term dealt with each of these two types of immunities. One decision dealt with qualified immunity<sup>77</sup> and the other dealt with the Eleventh Amendment immunity.<sup>78</sup>

### C. Qualified Immunity

The qualified immunity decision of last term was *Groh v. Ramirez*.<sup>79</sup> In my opinion, perhaps other than the question of what constitutes a violation of a constitutionally protected right, qualified immunity is the most important issue in § 1983 litigation. In the last twenty years, there have been approximately twenty

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<sup>73</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2305 (2004).

<sup>74</sup> *Id.* at 2312 (Rehnquist, J., concurring).

<sup>75</sup> *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001).

<sup>76</sup> *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

<sup>77</sup> *Groh v. Ramirez*, 540 U.S. 551 (2004).

<sup>78</sup> *Frew*, 540 U.S. at 431.

<sup>79</sup> 540 U.S. at 551.

decisions from the Supreme Court dealing with the defense of qualified immunity.<sup>80</sup> That number shows the importance of the issue.

Let me explain why, pragmatically, it is such an important issue. The great percentage of § 1983 claims seek monetary relief against a state or local official in her individual capacity, i.e., payable out of the official's personal funds.<sup>81</sup> When a personal capacity claim is asserted, the official has a potential immunity defense.<sup>82</sup> Some officials are given absolute immunity.<sup>83</sup> For example, a claim for damages against a judge or a prosecutor or a legislator normally would be defeated by absolute immunity.<sup>84</sup> Perhaps it is not so surprising that judges have absolute immunity, after all these are common law immunities.<sup>85</sup> Most § 1983 damage claims are against officials who carried out executive or administrative functions.<sup>86</sup> These officials are not entitled to

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<sup>80</sup> See SCHWARTZ, *supra* note 10, § 9A: 1-16.

<sup>81</sup> See, e.g., *McMillian v. Monroe Co.*, 520 U.S. 781, 783-84 (1997); *Hafer v. Melo*, 502 U.S. 21, 23 (1991).

<sup>82</sup> *Hafer*, 502 U.S. at 25.

<sup>83</sup> See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (stating that “judges are absolutely immune from liability for their judicial acts” and that “state prosecutors have absolute immunity from liability for their actions in initiating prosecutions”); *Stump v. Sparkman*, 435 U.S. 439 (1978); *Butz v. Economou*, 438 U.S. 478, 515 (1978). “[A]gency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts.” *Id.*

<sup>84</sup> See *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983) (citing *Peirson v. Ray*, 386 U.S. 547 (1967)); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>85</sup> One of my colleagues at NYU, Professor Newborn, is fond of saying that if we put dentists in charge of immunities, maybe we would have absolute dental immunity.

<sup>86</sup> See, e.g., *Saucier*, 533 U.S. at 194 (police officer).

absolute immunity, but are entitled to qualified immunity.<sup>87</sup> This means that the official will be protected from monetary liability as long as the official acted in an objectively reasonable fashion,<sup>88</sup> which means that the official will be protected from liability as long as she did not violate clearly established federal law.<sup>89</sup> Some Supreme Court decisions phrase the inquiry in terms of whether the official had “fair warning” or “fair notice” that what the official was doing was unconstitutional.<sup>90</sup> It is another way of saying that a § 1983 plaintiff who has established a violation of a federal constitutional right may be without a remedy if the defendant official did not violate a clearly established constitutional right.<sup>91</sup> The courts, including the United States Supreme Court, often have a difficult time determining whether a constitutional right was or was not clearly established at the time the official acted. The Justices themselves sometimes disagree. That is what happened last term in the *Groh v. Ramirez* five-to-four decision.<sup>92</sup>

Here are the facts of that case. A law enforcement officer applied for a search warrant.<sup>93</sup> On the portion of the warrant describing the things to be seized, the officer mistakenly gave a

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<sup>87</sup> *Id.* at 209.

<sup>88</sup> *Id.* at 214 (Ginsburg, J., concurring).

<sup>89</sup> *Id.* at 207-08.

<sup>90</sup> *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004) (stating that “the focus is on whether the officer had fair notice that her conduct was unlawful”).

<sup>91</sup> *Id.* “Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.” *Id.* (citing *Saucier*, 533 U.S. at 206).

<sup>92</sup> 540 U.S. 551 (2004).

<sup>93</sup> *Id.* at 554.

description of the place to be searched.<sup>94</sup> The proposed warrant was presented to a magistrate, who did not notice the error.<sup>95</sup> The magistrate signed the warrant and the officer conducted the search.<sup>96</sup> The individual whose home was searched later asserted a claim for damages based on a violation of his Fourth Amendment rights.<sup>97</sup> The officer asserted the defense of qualified immunity.<sup>98</sup> In a five-to-four decision, the majority held that the officer was not protected by qualified immunity because there was a clear violation of the Fourth Amendment, which contains language that requires the search warrant to particularly describe the place to be searched and the items to be seized.<sup>99</sup> The majority stated that even a cursory or casual reading of the warrant would reveal that it was not in conformity with the Fourth Amendment.<sup>100</sup> However, four Justices disagreed.<sup>101</sup> Four Justices stated that the officer should be protected by qualified immunity because the officer made a reasonable mistake and should have been able to rely on the judge's issuance of the warrant.<sup>102</sup> Justice Thomas stated that the majority's holding imposes a proofreading requirement on law enforcement officers.<sup>103</sup> Justice Kennedy's dissent stated that

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<sup>94</sup> *Id.* at 554, 555 n.2.

<sup>95</sup> *Id.* at 555.

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

<sup>97</sup> *Groh*, 540 U.S. at 555.

<sup>98</sup> *Id.* at 563.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 564.

<sup>101</sup> *Id.* at 568-69 (Kennedy, J., dissenting), 578-79 (Thomas, J., dissenting).

<sup>102</sup> *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

<sup>103</sup> *Id.* at 580 (Thomas, J., dissenting).

experienced judges and lawyers can point to instances where documents have been read and reread and proofread over and over again and errors still occurred.<sup>104</sup> The dissenters believe that this was simply a reasonable mistake and the officer should have been protected by qualified immunity.<sup>105</sup>

#### D. Eleventh Amendment

The last area is Eleventh Amendment immunity. The case is *Frew v. Hawkins*.<sup>106</sup> The federal court complaint alleged that the state was acting in violation of federal Medicaid statutes.<sup>107</sup> The state and the plaintiffs resolved the case by a very detailed, 81-page consent decree.<sup>108</sup> After the consent decree was entered in federal court, the plaintiffs went back to the federal district court judge and alleged that the state acted in violation of the terms of the decree.<sup>109</sup> The plaintiffs sought enforcement of the decree and monetary relief as part of the enforcement.<sup>110</sup> The state asserted the Eleventh Amendment as a defense.<sup>111</sup> The question was whether the Eleventh Amendment barred the attempts by the plaintiffs to enforce the consent decree against the state.<sup>112</sup> The Supreme Court

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<sup>104</sup> *Id.* at 568 (Kennedy, J., dissenting).

<sup>105</sup> *Id.* at 568 (Kennedy, J., dissenting), 573 (Thomas, J., dissenting).

<sup>106</sup> 540 U.S. 431 (2004).

<sup>107</sup> *Id.* at 434.

<sup>108</sup> *Id.* at 435.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 435.

<sup>111</sup> *Frew*, 540 U.S. at 434.

<sup>112</sup> *Id.* at 433.

unanimously held that the Eleventh Amendment was not a bar.<sup>113</sup> The Court stated that if the federal court had the authority to enter the consent decree, it had power to enforce the decree, including by monetary sanctions. The Court reasoned that federal court consent decrees must be meaningful and are meaningful only if they are enforceable.<sup>114</sup> So, unanimously, the Supreme Court held that the Eleventh Amendment was not a bar.<sup>115</sup> The state had argued that the violations of the decree that the plaintiffs were complaining about were actually violations of state law, not violations of the federal statute, because the decree was much more detailed than the federal statute.<sup>116</sup> The Court responded that the consent decree fairly implemented the pertinent federal statute, and that it is fairly routine for consent decrees to be much more detailed than the particular federal statute that is involved in the case.<sup>117</sup>

I raise a question that I think could be difficult in a particular case. Could there be a point at which there is a very serious argument that the alleged violations by the state go so far beyond what is required by the federal statute that those violations are not violations of federal law and can only be violations of state law? In that case, perhaps the Eleventh Amendment would be a

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<sup>113</sup> *Id.* at 439.

<sup>114</sup> *Id.* at 437.

<sup>115</sup> *Id.* at 439.

<sup>116</sup> *Frew*, 540 U.S. at 438.

<sup>117</sup> *Id.* at 439.

bar to federal court enforcement of the decree.<sup>118</sup>

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<sup>118</sup> See *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (claims for prospective relief requiring state officials to comply with state law are barred by the Eleventh Amendment).