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Section 1983 Litigation - Supreme Court Developments

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SECTION 1983 LITIGATION- SUPREME COURT DEVELOPMENTS

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Thank you Leon, Good morning. Section 1983[1] is the vehicle that allows individuals to enforce their federal constitutional rights against state government, municipal government, state officials, local officials and other state actors. Section 1983 litigation involves a battle; it is a battle between the individual on the one hand, and the government on the other. It is obviously a very important battle, a battle that takes place very frequently. The last statistic I saw indicated that there were some fifty thousand Section 1983 cases filed each year.[2]

I am convinced that the United States Supreme Court understands the importance of Section 1983. During the last twenty years, the Court has given an extraordinary amount of attention to the Section 1983 remedy. This was also true during the last term.

I have grouped the Section 1983 cases, decided by the Court last term, into four areas. One area dealt with the constitutional rights

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[1] 42 U.S.C. § 1983 (1994). This section provides in part that:

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

Id. See generally 1A, 1B, 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (3d ed. 1997).

[2] *See generally* Schwartz, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES at § 1.1.

that are enforceable under Section 1983. The court decided cases involving procedural due process,[3] substantive due process,[4] and the Privileges and Immunities Clause of the Fourteenth Amendment.[5]

There were also major decisions dealing with state action,[6] the right to a jury trial,[7] and an important decision dealing with qualified immunity.[8]

I. Constitutional Rights Enforceable Under Section 1983

a) Procedural Due Process

Let me start with the cases involving the constitutional rights enforceable under Section 1983. The Court decided a procedural due process case called *City of West Covina v. Perkins*.[9] In *Perkins*, the police seized property from Mr. Perkins' home in the course of executing a search warrant.[10] After seizing the property, the police left a notice.[11]

Mr. Perkins came home and got a notice, "To whom it may concern." What I am going to tell you is a bit embellished, but substantially correct. The notice in effect said, "Guess what? We had a search warrant, we were here, and we took some of your property.[12] If you want to know what we took, there is a list of property annexed, and if you don't like it, here are the names of two detectives you can call."[13]

The issue for the Court was whether the police, when they seize property pursuant to a search warrant, were required to give the

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[3] City of West Covina v. Perkins, 119 S. Ct. 678 (1999).
[4] Conn v. Gabbert, 119 S. Ct. 1292 (1999).
[5] Saenz v. Roe, 119 S. Ct. 1518 (1999).
[6] American Manufactures Mutual Ins. Co. v. Sullivan, 119 S. Ct. 977, 989 (1999).
[7] City of Monterey v. Del Monte Dunes, 119 S. Ct. 1624 (1999).
[8] Wilson v. Layne, 526 U.S. 143 (1999).
[9] 119 S. Ct. 678 (1999).
[10] *Id.* at 679.
[11] *Id.*
[12] *See id.*
[13] *Id.*

property owner notice of the available remedies for recovering that property.[14] It is a procedural due process notice issue.

The Ninth Circuit held that procedural due process did require such notice.[15] The Court granted certiorari, and statistically, you can almost tell what the result is going to be. When the Ninth Circuit rules for the individual and against the government, the United States Supreme Court almost automatically reverses. Here it was not only a reversal, but also a unanimous reversal.

The Court held that the only notice that the police were required to provide, was the notice the police provided a notification that the police had seized property.[16] In terms of the available remedies for recovering the property, the Court held that notice of the remedies was adequate because the remedies were set forth in a published source.[17]

What is a published source? It could be a statute, ordinance, a regulation, or even case law. As long as the remedies are in some type of published source, there is no requirement that the police give the individual notice of the available remedies.[18]

The theory is that the individual can simply, and I am saying that tongue in cheek, turn to these published sources and learn what the available remedies are. While the Court did not say so in many words, this must mean that the individual can figure out what his or her remedy is, what the statute of limitations might be, tolling provisions, whom to sue, in which court, what the filing fees are, and so forth.

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[14] *Id.*

[15] Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997).

[16] *City of West Covina*, 119 S. Ct. at 681-82.

[17] *Id.* The court found that the:

> [I]ndividualized notice that the officers have taken the property is necessary in a case such as the one before us because the property owner would have no other reasonable means of ascertaining who was responsible for his loss. No similar rational justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law. Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him.

Id.

[18] *Id.*

To the United States Supreme Court this is really no big deal. If property owners want to know the remedies, they simply look up the statute, ordinance, or case law and figure out what to do.

Under *Perkins*, the only time that the police have to give notice of the available remedies is when the remedies are not set forth in some published source, or if the remedies are "arcane."[19]

What if the remedies are set forth in an arcane published source? I am not really sure what the court contemplates here. I think the idea is that if you can look up the remedies, that is good enough; the government does not have to tell you about them.

In reaching this conclusion, the Court in *Perkins* relied upon a line of Supreme Court decisions known as the *Parratt v. Taylor*[20] line of cases. Under this line of cases, when the government takes your property or deprives you of a liberty interest, as a result of random and unauthorized conduct by a public official, procedural due process is satisfied if the state gives you an adequate post-deprivation judicial remedy.[21]

If the deprivation of property or liberty is brought about as a result of random or unauthorized official conduct, it is not feasible for the government to give individuals prior hearings because nobody can predict when there will be a random and unauthorized deprivation of liberty or property. So the best the government can do is give the individual a post-deprivation hearing, which may consist of a post-deprivation judicial remedy.

In *Perkins*, the Court stated that it never held in *Parratt* that the state is required to give individuals notice of available post-deprivation judicial remedies.[22]

That is true enough, but the Supreme Court never held in those cases that the state was not required to give individuals notice of available remedies. The most accurate assessment of the state of the law before *Perkins* was that this was an open issue, but it is not anymore.

I think *Perkins* might make some sense if individuals seeking to recover property, which was seized by the police, are mainly law school graduates and attorneys who can figure out what their

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[19] *Id.* at 682.
[20] 451 U.S. 527 (1981).
[21] *Id.* at 540.
[22] 119 S. Ct. at 683.

judicial remedies are. However, I do not think that is the case at all.

Perkins represents not only a very stingy view of procedural due process, but a very unrealistic view. If you think about it, are individuals who had their property seized by the police really going to be able to go to the statutes and the ordinances and look up the case law to figure out what their remedies are? That is not realistic. On the other hand, couldn't the police simply add this information to the form notice that the police already left when they seized the property?

The balancing of interests in this situation clearly favors the individual. This is a unanimous decision by the United States Supreme Court, but it is a unanimous decision that is insensitive to the actual plight of individuals who seek to recover property from the police.

b) Substantive Due Process

Let me move to substantive due process; the second type of constitutional right that the Supreme Court dealt with. The case is *Conn v. Gabbert*.[23] Remember the homicide prosecution against the Menendez brothers in California? This Section 1983 case grew out of that criminal prosecution.

The District Attorney in California had learned that Lyle Menendez had a girlfriend, Tracey Baker, and that he had written a letter to her.[24] The District Attorney suspected that Lyle Menendez wrote his girlfriend that if she were called to testify at trial, she should lie.[25] So, obviously the District Attorney wanted that letter.

The District Attorney subpoenaed Ms. Baker to testify before the grand jury and asked her to produce the letter. Ms. Baker in turn told the District Attorney that the letter had been turned over to her attorney, Paul Gabbert.[26]

Ms. Baker appeared before the grand jury to testify. While she was testifying the prosecutor, who had secured a search warrant,

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[23] 119 S. Ct. 1292 (1999).
[24] *Id.* at 1294.
[25] *Id.*
[26] *Id.*

searched attorney Mr. Gabbert in a separate room.[27] Mr. Gabbert produced the letter and subsequently brought a Section 1983 action.

Mr. Gabbert's claim was that the government search, while his client was testifying before the grand jury, prevented his client from consulting with him.[28] He argued that the search violated his substantive due process right to practice his profession.[29]

The Ninth Circuit Court of Appeals agreed with Mr. Gabbert.[30] Not only did the circuit court agree with him, but it held that the government violated Mr. Gabbert's clearly established constitutional right to practice his profession.[31]

Therefore, *Conn* is yet another Ninth Circuit decision in favor of the individual, and I bet you can figure out what happened in the United States Supreme Court. It unanimously reversed the ruling on the substantive due process claim.

One of the things that is interesting about the Supreme Court's opinion is that the Court recognized that its precedent established a generalized substantive due process right to practice a profession.[32] But the Court said that in those cases, what was at stake was a complete denial of the right to practice one's profession.[33]

Even in the context of the state saying a person can not practice a particular profession, the Court has upheld reasonable regulations of the right to practice the profession.

By contrast, *Conn* involved what the Court referred to as a brief interruption of the ability to practice one's profession.[34] The type of brief interruption that occurred in *Conn* was inevitable.[35]

Are we going to have constitutional claims every time an attorney, a doctor, or somebody else involved in a particular profession is temporarily interrupted by some type of government

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[27] *Id.*
[28] *Conn,* 119 S. Ct. at 1294.
[29] *Id.*
[30] *See* Gabbert v. Conn, 131 F.3d 792 (9th Cir. 1997).
[31] *Id.*
[32] *Gabbert,* 119 S. Ct. 1292, 1294-95 (1999); *see* Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); Trvax v. Reich, 239 U.S. 33 (1915); Dent v. West Virginia, 129 U.S. 114 (1889).
[33] *Id.*
[34] *Id.*
[35] *Id.*

action? The holding in *Conn* is that these types of temporary interruptions with one's right to practice a profession, simply are not of constitutional dimension: they do not give rise violations of substantive due process.

c) Privileges and Immunities Clause of the Fourteenth Amendment

The third right that the Court dealt with is the Privileges and Immunities Clause of the Fourteenth Amendment.[36] In teaching constitutional law, there are a lot of things that we are not always confident about. However, the one thing we were confident about is telling students, "Do not worry about the Privileges and Immunities Clause of the Fourteenth Amendment. It does not mean anything. It is a dead letter and has been relied upon by the United States Supreme Court maybe two or three times." Of all issues, this is the one thing we thought we knew. Now it turns out that even that is not so. We can not even be confident on that score anymore because last term, the Court decided *Saenz v. Roe*,[37] which, in effect, resurrected the Privileges and Immunities Clause of the Fourteenth Amendment.[38]

In *Saenz*, the Court relied upon the Privileges and Immunities Clause of the Fourteenth Amendment to invalidate a California law that provided that poor families who migrated into California were eligible to receive only the lower amount of public assistance they would have been eligible for in the state from which they came.[39] During that first year these families were not eligible for the higher amounts of public assistance that are available to long-term residents of California.[40]

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[36] U.S. CONST. art. IV, § 2 cl. 1. This section provides in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." *Id.*

[37] 119 S. Ct. 1518 (1999).

[38] *Id.* at 1526-27. The Court stated that a newly arrived citizen of a state is entitled to the "same privileges and immunities enjoyed by other citizens of the same state." *Id.* at 1526.

[39] *Id.* at 1521.

[40] *Id.* at 1522. Each of the three plaintiffs in the *Saenz* case alleged that her monthly AFDC (Aid to Families with Dependant Children) grant for the first twelve months, after moving to California to escape abusive homes, would be

The Court distinguished *Saenz* from *Shapiro v. Thompson.*[41] In *Shapiro*, the United States Supreme Court held that a state imposed one-year durational residency requirement for public assistance eligibility was unconstitutional because it violated the constitutionally protected right of interstate travel.[42] Under these state laws before the Court in *Shapiro*, families suffered a complete denial of public assistance during the one-year.[43] In *Saenz*, the California law was a little different. The family was not totally denied public assistance, but was limited to the amount it was eligible to receive in the state from which it came.

I think that the result in *Saenz* followed logically from the decision in *Shapiro*. However, what took the legal community and the media by total surprise, was the Supreme Court's reliance upon the Privileges and Immunities Clause of the Fourteenth Amendment.

Being what some of my friends have called me, a Section 1983 junkie, I looked back at the lower court decisions in the *Saenz* case. Because the Supreme Court in *Saenz* did not mention Section 1983, I was curious if this case was brought under Section 1983. The answer is that it was.[44] This raises the question whether the decision in *Saenz* will usher in a whole new era, a whole new wave of Section 1983 litigation under the Privileges and Immunities Clause of the Fourteenth Amendment. Currently, there is no way to know the answer to that question.

There is no way to know whether *Saenz* is a one-shot decision, or whether there will be a lot of litigation and developments based on the decision in *Saenz*.

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substantially lower under the new California statute. Specifically, "the former residents of Louisiana and Oklahoma would receive $190 and $341 respectively for a family of three even though the full California grant was $641; the former resident of Colorado, who had just one child, was limited to $280 a month as opposed to the full California grant of $504 for a family of two." *Id.*

[41] 394 U.S. 618 (1969).

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

[43] *Shapiro*, 394 U.S. at 623-25.

[44] Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998).

II. State Action

Let me come to the second main subject area, state action. State action is a threshold question for making out a claim under the Fourteenth Amendment: no state action means no Fourteenth Amendment claim.[45] The issue is if you have a private party who is involved with state and local government; does that involvement justify treating the private party as an arm of the state?[46] If the private party is not treated as an arm of the state, one cannot assert a Fourteenth Amendment claim against that party.[47]

The Warren Court took a very expansive view of state action.[48] When we look back on the Warren Court, its view seems quite consistent with the critical mission of the Court of eradicating: much racial discrimination in society as possible.

Since the Warren Court era came to an end, the Burger Court and the Rehnquist Court have consistently taken a narrow view of state action. This seems consistent with the mission, or one of the missions of the present Supreme Court, giving protection to big business, protection in the sense of being free of the restraints of the Fourteenth Amendment.

This is becoming more of an important issue today as we see increasing privatization of what used to be governmental services. So, the question is whether an entity involved in carrying, for example a medical assistance program or private prison, is engaged in state action.

The narrow view of state action was followed last term in *American Manufacturers Mutual Insurance Company v. Sullivan.*[49] *American Manufacturers* dealt with a Pennsylvania Workers' Compensation program that was administered partly by private insurance companies.

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[45] *See* The Civil Rights Cases, 109 U.S. 3 (1883).

[46] *See, e.g.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974).

[47] *See, e.g.* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[48] *See* Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered,* 57 MONT. LAW REV. 1 (1996). *See, e.g.* Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[49] 119 S. Ct. 977 (1999).

The Court held that when private insurance companies decide to withhold or suspend Workers' Compensation benefits for medical expenses, pending review by a utilization review committee, the decision by the insurance company to suspend payment of benefits does not constitute state action.[50] The Court unanimously found no state action.[51]

In coming to that conclusion, the Court referred to three state action doctrines. One of the doctrines is called the close-nexus document, or sufficiently close-nexus doctrine.[52] For there to be state action under this doctrine, the government must have either coerced or significantly encouraged the private party's conduct. The Supreme Court said, perhaps Pennsylvania encouraged private insurance companies to withhold payments pending review by the utilization review committees, but there was no significant encouragement, so that took care of that theory.[53]

The fact that the insurance companies took advantage of a dispute resolution mechanism established by the state, was not enough to constitute state action.[54] I think that is right because to hold otherwise would mean that there would be state action any time a private litigant used a dispute resolution mechanism established by the state. The mere fact that the private entity makes use of a government dispute resolution mechanism does not turn the private entity into an arm of the state.

The second doctrine, the public function doctrine,[55] requires a showing that the private party carried out a function that was historically, traditionally, and here is the key word, exclusively governmental in nature.[56] The function has to be not only

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[50] *American Manufacturers*, 119 S. Ct. at 985-86.

[51] *Id.*

[52] *Id.* at 986. "Whether such a 'close nexus' exists....depends on whether the state has exercised coercive power, or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Id.*

[53] *Id.*

[54] *Id.* at 987.

[55] *Id.*

[56] *Id.*

historically and traditionally governmental in nature, but it has to be exclusively a governmental function.[57]

That test is almost impossible to satisfy because how can a party ever show that a function is an exclusive governmental function? The Court had no trouble concluding that the insurance companies were not carrying out an exclusive governmental function.[58]

The third state action test, the joint participation test, sometimes referred to as the joint action test, requires some type of agreement or conspiratorial action between the government and the private sector. That was not present either.[59]

One of the interesting things about *American Manufacturers* is that there is a fourth state action test that courts commonly rely upon in analyzing state action issues called the symbiotic relationship test. That test derives from a Warren Court state action decision, *Burton v. the Wilmington Parking Society.*[60]

However, in *American Manufacturers*, Chief Justice Rehnquist cast *Burton* aside by saying that it was one of our "early state action decisions" containing "vague state action language," as if to say that precedent really does not have very much weight anymore and we are not going to trouble ourselves with that one.[61]

One of the most interesting things about *American Manufacturers*, especially since it carries forth the narrow conception of state action, is that in the course of rejecting all of the plaintiffs' state action arguments, almost as an aside, the Chief Justice said that the decision of the Utilization Review Committee would be state action.[62]

That comment took me by surprise. First of all, there was no reason for the gratuity. In addition, there was no explanation for the conclusion. I could only surmise that what the Chief Justice was thinking about was probably the public function doctrine. By

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[57] *Id.* at 988 (stating that Pennsylvania's recognition of "an insurer's traditionally private prerogative to withhold payment, then [its restriction of] it, and [current restoration], cannot constitute the delegation of a traditionally exclusive public function").

[58] *Id.*

[59] *Id.* at 988.

[60] 365 U.S. 715 (1961).

[61] American Manufacturers Mutual Insurance Co. v. Sullivan, 119 S. Ct. 977, 988 (1999).

[62] *Id.* at 987.

describing the decision of the Utilization Review Committee as being like the decision of any judicial official, it sounds like he was thinking about the public function doctrine. But how can it be said that dispute resolution is an exclusive governmental function?[63]

This is going to be an interesting issue to watch out for in the future. It may be that if this issue comes back to the United States Supreme Court, the Court might say, that its remark in *American Manufacturers* was just dictum, made off the cuff, and it certainly was not a holding.

III. Right to Trial by Jury

Let me get to the third area, the right to a jury trial in Section 1983 actions. The case before the United States Supreme Court was *City of Monterey v. Del Monte Dunes*.[64] The question was whether there is a right to trial by jury on a regulatory takings claim.[65]

In this case, the developer had submitted an application to the city to develop its property.[66] The city said that the proposed development was too big, scale it down.[67] The indication was, if the developer scaled down the proposed project and came back, the city would look more favorably upon it. So, what did the developer do? He scaled down the development and submitted another application.[68] What did the city say? Still too big, scale it down some more.[69]

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[63] *See* Flagg Brothers v. Brooks, 436 U.S. 149 (1978) (holding that dispute resolutions is not exclusively a governmental function).

[64] 119 S. Ct 1624 (1999).

[65] *Id.* at 1637.

[66] *Id.* at 1632.

[67] *Id.*

[68] *Id.*

[69] *Id.* Beginning in 1983 the landowners submitted several proposals to "develop the property in conformance with the city's zoning and general plan requirements." The landowners limited their proposal to 344 residential units for the entire parcel although the zoning requirement allowed for more than 1000 units. After complying with the city planning Commission's repeated requests to scale down the development to 263 units in 1982, 224 units in

This went on for five years and there were nineteen applications.[70] After nineteen applications in five years, there was still no permission granted to develop the property. So, the developer got the idea that the city probably was not going to allow development of the property.[71]

One of the big issues in takings law is ripeness;[72] but here the attorney for the developer concluded that this claim must be ripe. The developer, after all, made nineteen applications to develop this property. So the developer sued under Section 1983. The district judge submitted the takings claim to the jury, and that is where it gets interesting.

The jury came back with a verdict for the developer: 1.45 million dollars compensatory damages.[73] The Ninth Circuit affirmed,[74] so at that point the developer probably got pretty nervous. The case went to the United States Supreme Court, and in a very rare event, the Court, in a five-to-four decision, affirmed the decision of the Ninth Circuit Court of Appeals.[75]

The issue for the United States Supreme Court was whether there is a right to a trial by jury on a Section 1983 regulatory takings claim.[76] One of the interesting things about this issue is that the original version of Section 1983 goes back to 1871 and this is the first time the United States Supreme Court has determined that there is a right to a jury trial in a Section 1983 action.[77]

The Supreme Court could not find a right to a jury trial in the language of Section 1983.[78] Nothing in the text of Section 1983 supports a statutory right to a trial by jury. However, the Court

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1983,and 190 units in 1984, the landowner's proposals were consistently rejected. In late 1984, the council finally approved one of the site plans under a conditional permit. However, in 1986, two months before the permit was to expire, the council denied the landowners final plans for development. *Id.*

[70] *Id.* at 1633.

[71] *Id.*

[72] Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U. S. 172 (1985).

[73] *City of Monterey*, 119 S. Ct at 1634.

[74] Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996).

[75] *City of Monterey*, 119 S. Ct at1645.

[76] *Id.*

[77] *Id.* at 1643.

[78] *Id.* at 1637.

held that the Seventh Amendment guaranteed the right to a jury trial.[79] The Seventh Amendment guarantees the right to a jury trial in civil cases where the amount in controversy is at least twenty dollars. These days, it is not hard to show twenty dollars is at stake.

The Court found that a regulatory takings claim seeking just compensation is analogous to a claim for compensatory damages.[80] A claim for compensatory damages is an action at law within the meaning of the Seventh Amendment.[81]

The Court's recognition of the jury trial right is obviously an important holding in and of itself. But the next part of the decision is maybe even more important, and even more interesting. Once the Court held that there is a right to a trial by jury on a Section 1983 regulatory takings claim, the next question becomes which issues should be submitted to the jury? In other words, what are questions of law for the court and what are questions of fact for the jury?

Remember, the judge in this case submitted the regulatory takings claim to the jury.[82] The Supreme Court held that because the developer's regulatory takings claim was an essentially fact-based claim, dependent upon the resolution of disputed factual issues, there was no error in submitting it to the jury.[83]

There were actually two questions submitted to the jury. First, the jury was instructed that it could find a taking if it found that the developer was deprived of all economically viable use of the property.[84] On that issue, the United States Supreme Court did not

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[79] *Id.*

[80] *Id.* at 1639. "As the name suggests. . . just compensation is, like ordinary money damages, a compensatory remedy." *Id.*

[81] *Id.*

[82] *Id.* at 1633. The Court concluded, "The District Court determined, over the city's objections, to submit Del Monte Dunes' taking and equal protection claims to a jury but to reserve the substantive due process for decision by the court." *Id.*

[83] *Id.* at 1643. The Court held, "that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . in actions of law otherwise within the purview of the Seventh Amendment, this question is for the jury." *Id.*

[84] *Id.*; *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1083 (1992).

have much difficulty. The Court said that question is essentially a factual question, therefore, it was proper to submit it to the jury.

The other issue submitted to the jury is a little more debatable. The jury was told that it could find that there was a regulatory taking if the plaintiff demonstrated that the governmental action, denying development of the property, failed to substantially advance a legitimate governmental interest.[85]

That is a little sticky. Think about this issue, does the government action substantially advance a legitimate governmental interest? There are obviously legal aspects to that question. In fact, the Supreme Court in analyzing this, was more tentative than on the other issue submitted to the jury.

The Supreme Court said that this issue is probably best described as a mixed issue of law and fact, therefore the district court did not err in submitting it to the jury.[86]

The district court did inform the jury about the range of potentially permissible legitimate governmental interests.[87] The jury was not asked to make that type of legal evaluation, rather it was asked to determine whether the denial of development substantially advanced one of the legitimate governmental interests articulated in the instruction.[88]

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[85] *City of Monterey*, 119 S. Ct at 1634. The district court gave the following jury instruction:

> "The regulatory actions of the city or any agency substantially advance a legitimate public purpose if the action bears a reasonable relationship to that objective. Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the. . .proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public purpose,. . .its underlying motives and reasons are not to be inquired into."

Id.

[86] *Id.*

[87] *Id.* The range of permissible legitimate governmental interests are: "protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development." *Id.*

[88] *Id.*

I think that the instructions, even though they were upheld by the United States Supreme Court, are a little unusual. For one thing, they defined "substantially advanced legitimate governmental interests" by saying that the government action has to be "reasonably related" to a legitimate governmental interest. If so, is there no need for phrase "substantially advance?" I think that just confuses everything.

I also question the second part of the jury instruction. A regulatory taking comes about only if the extent of the deprivation of the property interest outweighs the government's interest.[89] Therefore, the instruction does not seem to be a correct statement of the law. But the United States Supreme Court said it is consistent with its decisional law.[90] There was not a lot of analysis there, but some things about the Court's decision maybe should not be taken at face value.

Let me make two other points about this case. Justice Scalia's concurring opinion is a very important concurring opinion, because he said that the Court should not have rendered a narrow decision dealing with the right to a trial by jury on a Section 1983 regulatory takings claim; the Court should have held that there is a right to a jury trial on any Section 1983 claim seeking monetary relief.[91]

I think Justice Scalia is right on that point, there was no reason to limit the jury trial right to a particular type of Section 1983 monetary claim. I think that this conclusion is supported by language in the majority opinion.

The second point is that the decision reflects a conservative, moderate-liberal split with the more conservative justices in the majority.

The speculation is that the conservative justices voted for a right to a jury trial in these cases because part of judicial conservatism in the United States Supreme Court is to protect property. The thinking might be that the one way to protect property is to put

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[89] *See, e.g.* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (192).

[90] *See* Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U. S. 172 (1985).

[91] *Id.*

these takings issues in the hands of jurors who are likely to award greater amounts of just compensation than judges in bench trials.

IV. Qualified Immunity

My last issue is qualified immunity. I think qualified immunity is one of the most important issues in Section 1983 litigation.

Most officials who are sued for monetary damages under Section 1983 are entitled to assert the defense of qualified immunity.[92] The key issue is, did the official violate clearly established federal law?[93] This defense gets played out, you can have a public official who acted in an unconstitutional manner, but the constitutional law was not clearly established at the time the official acted, the official will be protected against monetary liability.

Only officials who violate clearly established constitutional law are held personally liable for damages. It is a very potent defense and rather extraordinary in the sense that it is not just a defense from liability, but also a defense from the burdens of having to defend the case at all. This defense protects the official from having to go to trial, maybe even from discovery.[94] That is extraordinary! In my years as a legal services attorney, we understood that immunities were part of the ball game, part of litigation. However, immunities always were thought of as immunities from liability. We never thought that public officials would ever have an immunity that says they do not even have to defend a case. It is almost like that line from Eric Segal's *Love Story*, "Love means never have to say you are sorry." The official does not even have to defend the case on the merits.

One of the big questions under this immunity is how to figure out whether the federal law was clearly established. The Supreme Court spoke to that issue last term in *Wilson v. Layne*.[95]

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

[93] *See, e.g.* Anderson v. Creighton, 483 U.S. 635 (1987); *See also* Conn v. Gabbert, 119 S. Ct. 1292, 1295 (1999). The Court established that a court, in evaluating a claim of qualified immunity, "must first determine whether that right was clearly established at the time of the alleged violation." *Id.*

[94] Mitchell v. Forsythe, 472 U.S. 511 (1985).

[95] *Wilson*, 119 S. Ct. at 1692.

Professor Hellerstein will speak to you later about the Fourth Amendment holding in *Wilson*. *Wilson* dealt with so-called media tag-alongs, or ride-alongs, where law enforcement officers invited the television crew to come along and observe the enforcement of an arrest warrant in a home.[96] The police told the media, "Why don't you come along and observe and even make a videotape of the execution of the warrant."[97]

The United States Supreme Court held unanimously that the police action, in inviting the media into the home, constituted an unreasonable execution of the warrant in violation of the Fourth Amendment.[98] The Court went on to hold, by an eight to one vote, that since 1992, when the warrant was executed, the media ride-alongs were not clearly unconstitutional. So the plaintiff was denied a recovery.[99]

How did the court reach that conclusion? It found that in 1992, there was no decision of a "controlling jurisdiction" holding ride-alongs to be unconstitutional.[100]

What did the Court mean by "controlling jurisdiction"? No decision of the United States Supreme Court, of the particular circuit in which the case was being litigated or of the highest court of the state had held the media tag-alongs were violative of the

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[96] *Id.* at 1694.

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

[98] *Id.*

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

[100] *Id.*

Fourth Amendment.[101] The absence of such controlling precedent is a strong indicator that the law was not clearly established.

In addition, after the incident in this case, a split of authority developed in the circuits.[102] This was another strong indication that the law was not clearly established. The Court also said that the arguments put forth by the law enforcement officers to support the constitutionality of the media ride-alongs were not totally frivolous.[103] This was not an open and shut case.

The Court's analysis of qualified immunity seemed to make a good deal of sense, but not to Justice Stevens.

Justice Stevens, dissenting from the Court's immunity holding, in effect said, "Wait a second, I have been on the Court for a number of years now, and years how often has the Court found that any police action violated the Fourth Amendment? No less unanimously so, as in this case. Doesn't the unanimous holding by this Court in *Wilson* show that the law was clearly established?" That is an interesting perspective.

He went on to say that as for the lack of controlling precedent, sometimes the easiest cases involving the most egregious governmental wrongdoing are not supported by precedent because they do not always get litigated.[104]

Thank you very much.

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[101] *Id.*

[102] *Id.* at 1701.

[103] *Id.* The Court reasoned that, "the state of law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies. Given such an undeveloped state of law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'" *Id.*

[104] *Id.* at 1702