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## Section 1983 Symposium: The Supreme Court and Local Government Law: The 1989-90 Term

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## SECTION 1983

*Judge Leon Lazer:*

I would like to introduce you to the moderator of the first two sections of this program dealing with section 1983 and dealing as well with the fourth, fifth, and sixth amendment cases that relate to local government law. Judge George Pratt of the United States Court of Appeals for the Second Circuit is certainly one of the outstanding judges in the American judicial system today. We are proud that he is a Long Islander and even more proud that he was a municipal lawyer. He has served as Village Attorney of Westbury, Roslyn Harbor, and Brookville as well as Special Counsel to the Board of Supervisors of Nassau County in the towns of Hempstead, North Hempstead and Babylon. He is a graduate of Yale Law School, and he was Law Clerk to Judge Froessel of the New York State Court of Appeals.

*Judge George Pratt:*

My function as moderator is most moderate. The first segment is labeled "Section 1983,"<sup>1</sup> and it is something of a misnomer. The whole program could be called "Section 1983" with a minor exception of some of the criminal aspects because most of the litigation that we are talking about throughout the day are cases that are brought up under that strange section of Title 42 of the United States Code. In this segment, we are focusing upon essentially those cases that do not fall into the

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1. 42 U.S.C. § 1983 (1988) provides:

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

*Id.*

other segments loosely called "Civil Rights," however they are labeled or categorized, but which are nonetheless an extremely important part of litigation, not only in the Supreme Court, but also certainly in the lower federal courts, which includes my own.

Last Term, roughly, depending on how you categorize them, there were thirteen, fourteen, or fifteen opinions out of the Supreme Court that fall into this general area.<sup>2</sup> They present a smorgasbord of issues. It is almost as if the Supreme Court, in granting their certioraries, lined up the various key issues under section 1983 litigation and said, all right, we will have one from column "A," one from column "B," "C," right down through "J." It presents a wide range of matters for discussion. Due to the limitations of time this morning, obviously all of them cannot be discussed. Our two speakers in this area will do their best to focus on the important ones.

Last year, when I was introducing this part of the program, I passed out a word of advice, and I cannot do anything to improve on it, but read it to you.

One cannot help but wonder where the Supreme Court is going. Do we have a Reagan-appointed Court that is hell-bent on turning back the clock on civil rights or is that too simplistic a view of what is happening? As we work through the cases today, I ask you to think not only of what the Supreme Court did in these cases, but think also of what they could have done but did not do.<sup>3</sup>

Apply that same kind of analysis to what we have here.

Taking a very simplistic view of last Term, out of the dozen or so cases, as I look at them, the plaintiff was successful in eight,<sup>4</sup> the defendant was successful in one,<sup>5</sup> and in the remain-

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2. See, e.g., *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510 (1990); *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Ngiraingas v. Sanchez*, 110 S. Ct. 1737 (1990); *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990); *Zinermon v. Burch*, 110 S. Ct. 975 (1990).

3. Pratt, *Section 1983, The Supreme Court and Local Government Law*, 6 TOURO L. REV. 5, 6 (1989).

4. *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729 (1990) (use of political patronage considerations in hiring, transfer and other employment decisions violated plaintiffs first amendment rights); *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2518-19 (1990) ("Boren Amendment imposes a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and that this obligation is enforceable under section 1983"); *Howlett v. Rose*, 110 S. Ct.

ing three or four, possibly five, it is hard to tell who really won the case.<sup>6</sup> Sometimes when the plaintiff wins, that only may mean that the individual plaintiff wins and all future plaintiffs are dead, but the simplistic view is about two to one in favor of the plaintiffs in the overall score here.

In this big smorgasbord of issues, there are two that I think stand out — two cases that are extremely important. One is *Zinerman v. Burch*,<sup>7</sup> where the Court seemed like it was going to come to grips with many of the issues raised by the enigmatic decision of *Parratt v. Taylor*,<sup>8</sup> and Leon Friedman is going to discuss that in some detail with you. The other decision

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2430, 2442 (1990) ("Florida court's refusal to entertain one discreet category of section 1983 claims, when the court entertains similar state court actions against state defendants, violates the Supremacy Clause"); *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868 (1990) (bi-state compact's venue provision deemed to constitute waiver of eleventh amendment immunity from suit); *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990) (contingent-fee contracts requiring prevailing plaintiffs to pay more than the statutory award amount are valid); *Lytle v. Household Mfg.*, 110 S. Ct. 1331 (1990) (Court refused to apply collateral estoppel to bar plaintiff's right to jury trial where district court erroneously dismissed plaintiff's legal claim); *Zinerman v. Burch*, 110 S. Ct. 975 (1990) (plaintiff's complaint, alleging confinement in mental hospital without valid consent or involuntary confinement hearing, stated a section 1983 cause of action since liberty deprivations of this type were foreseeable); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989) (defendant city violated plaintiff's right to use economic tactics in collective bargaining process by refusing to renew plaintiff's franchise agreement, and was therefore liable for damages under section 1983).

5. *Ngiraningas v. Sanchez*, 110 S. Ct. 1737 (1990) (plaintiffs' claims against territory of Guam and its officials dismissed in that they are not "persons" within the meaning of section 1983).

6. *See Spallone v. United States*, 110 S. Ct. 625 (1990) (Court reached neither petitioners' claims that the order imposing contempt sanctions upon them violated their first amendment right to freedom of speech, nor the claim that they were absolutely immune for their legislative actions, but did reverse the order, holding that the district court should have implemented contempt fines against the city alone, before resorting to fining individual legislators); *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990) (Court found that the district court had abused its discretion in imposing a direct property tax increase to fund a desegregation remedy, but upheld an order of the court of appeals which required the local legislators to implement this tax increase themselves); *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990) (Court found that plaintiff's dormant commerce clause claim had been rendered moot, but remanded to determine whether the plaintiff was entitled to section 1988 attorneys' fees as a "prevailing party" at the district court level).

7. 110 S. Ct. 975 (1990).

8. 451 U.S. 527 (1981).

which should be of particular interest to town attorneys, village attorneys, and so forth, is *Missouri v. Jenkins*,<sup>9</sup> where the Supreme Court held that a district judge should not directly levy a tax on the residents of a municipality,<sup>10</sup> but that it can order the municipality to levy a tax for purposes of implementing a desegregation remedy.<sup>11</sup> That, combined with the *Yonkers*<sup>12</sup> case, to be discussed by Professor Schwartz, which emphasize the power of the remedies that are available to a district court that, in my view, border on the revolutionary. Trained as a municipal lawyer to think that a court can tell a municipal legislator how he must vote on pain of contempt, or ordering him to directly levy taxes which may be in excess of state constitutional limits, is revolutionary. The Court docketed a number of these issues, but nevertheless sustained the underlying validity of the remedy.

At the risk of sounding like a commercial for next year's program, the real interest in this area of litigation is to be found beginning the second Monday in October. Judge Souter's committee is supposed to vote on his appointment. It seems rather clear that he is going to be confirmed,<sup>13</sup> although you never know what is going to happen. The significant factor is that Brennan is no longer on the Court.<sup>14</sup> Justice Brennan has written many of the key decisions over the last twenty years in this area. He has always been identified with the liberal group in the Court, and most of the key decisions that he has written have been five-to-four decisions.<sup>15</sup>

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9. 110 S. Ct. 1651 (1990).

10. *Id.* at 1663.

11. *Id.* at 1665 ("[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of the Federal court"); see *infra* note 86-95 and accompanying text.

12. *Spallone v. United States*, 110 S. Ct. 625 (1990); see *infra* notes 78-85 and accompanying text.

13. David H. Souter was confirmed as the 105th Justice of the United States Supreme Court on October 2, 1990. The Senate affirmed President George Bush's nomination of Justice Souter by a 90-9 vote. N.Y. Times, Oct. 3, 1990, at A1, col. 4.

14. Justice William J. Brennan, Jr., a member of the Court for 34 years, resigned as an Associate Justice on July 20, 1990. N.Y. Times, July 21, 1990, at A1, col. 6.

15. See *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2518-19 (1990) (violation of Boren Amendment is actionable under section 1983); *Smith v. Wade*, 461

In my Civil Rights Seminar that I am now teaching here at Touro, I have two students who are working on a project to analyze all of the decisions of the last ten years in the section 1983 area, where Justice Brennan was in the majority and it was a five to four vote. They are going to figure out what is going to happen if you replace somebody of a liberal bent with somebody of a conservative bent and what reasonably might be done to restructure the picture, the framework, the effect on section 1983 litigation. It is a fascinating study. Compound that with the Civil Rights Act of 1990<sup>16</sup> which is still kicking around in Congress, but which has gone farther than any bill has in the last fifteen years, and we may find that the picture next year at this time, when we address it, is going to be much different than what it looks like today.

The formal presentations, as I have indicated, will be by Professors Schwartz and Friedman. They are both distinguished teachers, authors and lecturers on the subject of constitutional litigation in general, and section 1983 in particular. Professor Martin A. Schwartz will speak to you first. He is a professor here at Touro Law School. He has been engaged in this field for some twenty years. He is the co-author of what, in my opinion, is the best book in the field, which is entitled, very simply, *Section 1983 Litigation: Claims, Defenses and Fees*.<sup>17</sup> He writes a column in the New York Law Journal entitled "Public Interest Law," which usually discusses cases that are brought up under section 1983. Professor Schwartz will discuss the larger number of cases in this smorgasbord, leaving for Professor Friedman primarily his target of *Zinerman v. Burch*.<sup>18</sup>

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U.S. 30, 56 (1983) ("[A] jury may be permitted to assess punitive damages in an action under section 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (municipality may not assert the good faith of its officers or agents as a defense to liability under section 1983).

16. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. 9944-46 (1990).

17. M. SCHWARTZ & J. KIRKLIN, *SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES* (1986 & Supp. 1990).

18. 110 S. Ct. 975 (1990).

*Professor Martin Schwartz:*

Over the past several terms, the Supreme Court has been very actively involved in shaping the contours of the law of section 1983<sup>19</sup> and section 1988<sup>20</sup> attorneys' fees.<sup>21</sup> It seems noteworthy that in an era, particularly the last two or three terms of the Court, in which the Court has been widely criticized for cutting back on civil rights,<sup>22</sup> especially in employment discrimination cases under Title VII<sup>23</sup> and section 1981,<sup>24</sup> that the Court has continued to give a generally pro-plaintiff interpretation to section 1983.<sup>25</sup> For the most part, the Court's work last

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19. 42 U.S.C. § 1983 (1988), *see supra* note 1 and accompanying text.

20. 42 U.S.C. § 1988 (1988).

21. *See Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510 (1990); *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Ngiraingas v. Sanchez*, 110 S. Ct. 1737 (1990); *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990); *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990); *Zinerman v. Burch*, 110 S. Ct. 975 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989); *Hardin v. Straub*, 109 S. Ct. 1998 (1989); *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989); *Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Owens v. Okure*, 488 U.S. 235 (1989); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Felder v. Casey*, 487 U.S. 131 (1988); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Forrester v. White*, 484 U.S. 219 (1988); *Deakins v. Monaghan*, 484 U.S. 193 (1988).

22. *See* 136 CONG. REC. S968 (daily ed. Feb. 7, 1990) (statement of Sen. Gore); 136 CONG. REC. S1018-19 (daily ed. Feb. 7, 1990) (statement of Sen. Kennedy); 136 CONG. REC. S1021-22 (daily ed. Feb. 7, 1990) (statement of Sen. Jeffords); 136 CONG. REC. S1022-23 (daily ed. Feb. 7, 1990) (statement of Sen. Metzenbaum); 136 CONG. REC. S1023 (daily ed. Feb. 7, 1990) (statement of Sen. Hatfield); 136 CONG. REC. S1023-24 (daily ed. Feb. 7, 1990) (statement of Sen. Simon); 136 CONG. REC. S1024-25 (daily ed. Feb. 7, 1990) (statement of Sen. Packwood); 136 CONG. REC. S1025 (daily ed. Feb. 7, 1990) (statement of Sen. Cranston).

23. 42 U.S.C. § 2000e (1988); *see, e.g.,* Belton, *Causation and Burden-shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL. L. REV. 1359, 1364, 1405 (1990); Freeman, *Anti-discrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1407 (1990); Getman, *The Changing Role of Courts and the Potential Role of Unions in Overcoming Employment Discrimination*, 64 TUL. L. REV. 1477, 1478 (1990); Greene, *Race in the Twenty-First Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1515 (1990).

24. 42 U.S.C. § 1983 (1988); *see* *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

25. *See Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510 (1990); *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990); *Zinerman v. Burch*, 110 S. Ct. 975 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Felder v. Casey*, 487 U.S. 131 (1988).

Term involved not the breaking of new ground but rather the refining of areas that the Court had been previously involved in.<sup>26</sup>

Let me start by giving you an example: In 1989, the Court decided a case called *Will v. Michigan Department of State Police*.<sup>27</sup> In the *Will* case, the Supreme Court ruled that states and state agencies are not "persons" within the meaning of section 1983<sup>28</sup> that can be sued for monetary relief.<sup>29</sup> Now, last Term the Court had a case before it called *Ngiraingas v. Sanchez*<sup>30</sup> in which it was asked to decide whether the territory of Guam was a "person" within the meaning of section 1983.<sup>31</sup> At the Practicing Law Institute's annual program on section 1983 litigation, which was held last year before the *Ngiraingas* decision came down from the Supreme Court, an attorney who attended that program informed us that in his view it was a very easy issue. What he said was that if no man is an island, it must follow that no island is a person. Indeed the United States Supreme Court in *Ngiraingas* agreed with this result,<sup>32</sup> although it did not agree with the reasoning of the Practicing Law Institute participant.<sup>33</sup> The Court, in *Ngiraingas*, held that, like states, a territory such as the territory of Guam is not a person subject to suit under section 1983.<sup>34</sup>

Now, you might be saying to yourself "who cares" and I think that would be a legitimate question because I assume that most of you are New York practitioners and that you do not have a very heavy caseload of Guam cases. The decision, however, does raise a question, and that is; does the holding in *Ngiraingas* preclude the present ongoing constitutional challenge to Guam's abortion law which has been highly publicized

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26. Compare *Zinerman v. Burch*, 110 S. Ct. 975 (1990) with *Parratt v. Taylor*, 451 U.S. 527 (1981).

27. 109 S. Ct. 2304 (1989).

28. *Id.* at 2312.

29. *See id.*

30. 110 S. Ct. 1737 (1990).

31. *Id.* at 1738.

32. *Id.* at 1743.

33. *Id.* at 1742. (Court based its decision on statutory construction and congressional intent).

34. *Id.* at 1743.



by the media? The answer is, it does not for these reasons: the only thing precluded by the decision in *Ngiraingas* is a claim for monetary relief against Guam itself.<sup>35</sup> What is not precluded is prospective relief against an official of Guam in an official's capacity,<sup>36</sup> nor is monetary relief against the Guam official in an individual capacity precluded.<sup>37</sup> Thus, the decision in *Ngiraingas* will not preclude the present constitutional challenge to the Guam abortion statute from going forward.

I believe that the Court's other section 1983 decisions that were rendered last Term are likely to have a more pertinent impact on New York practitioners and, as Judge Pratt said, they do represent a rather wide range of decisions. I have grouped them into the following categories and I am going to go through the categories one by one.

First, the doctrine of *Parratt v. Taylor*;<sup>38</sup> second, the question of enforcement of federal statutes under section 1983; third, state court section 1983 actions and specifically the application of state law sovereign immunity to a section 1983 claim brought in state court; fourth, the question of the remedies that a federal court may award in a section 1983 action; and, finally, the issue I am sure is near and dear to the heart of all section 1983 practitioners, statutory attorneys' fees.

To turn to the first question, in my opinion, the most important section 1983 decision that was rendered by the United States Supreme Court last Term was its decision in *Zinermon v. Burch*<sup>39</sup> which fleshed out or, I should say, attempted to flesh out, the contours of the doctrine of *Parratt v. Taylor*.<sup>40</sup> Viewed broadly, what the *Parratt v. Taylor* doctrine brings into play is the relationship between state law remedies and the federal section 1983 remedy.<sup>41</sup>

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35. Plaintiffs sought monetary damages only. *Id.* at 1738.

36. *See id.*

37. *See id.*

38. 451 U.S. 527 (1981) (Plaintiff's deprivation did not occur as the result of some established state procedure, but rather as a result of the unauthorized failure of state agents to follow established state procedure).

39. 110 S. Ct. 975 (1990).

40. *Id.* at 985-87.

41. *Parratt*, 451 U.S. 527 (1981) (plaintiff did not suffer a violation of a constitutional right even though he was deprived of his property under the color of state

In *Zinermon*, the Court did have an opportunity to revamp entirely the law of section 1983 and it seems to me highly significant that given this opportunity, the Court chose not to do so. I think the *Zinermon* case is significant for three reasons that are related to each other.

First of all, what *Zinermon* does is to reaffirm the uniquely independent nature of the federal section 1983 remedy.<sup>42</sup> When I say that, I mean that by recognizing the independent nature of the section 1983 remedy, the Court has rendered available state law remedies generally irrelevant to the propriety of a section 1983 claim to a relief.<sup>43</sup> The Court also reaffirmed the fact that state remedies are generally irrelevant on the question of whether the section 1983 plaintiff has suffered a deprivation of federal constitutionally protected rights.<sup>44</sup> Third, and related to the first two, the Court has made clear that the available state judicial remedies are only pertinent in a rather narrow class of procedural due process claims that are litigated under section 1983.<sup>45</sup>

Now, to understand the whole *Parratt v. Taylor* doctrine, and the decision in *Zinermon* and why it is so important, requires a great deal of detail about both *Parratt* itself and the follow-up decisions, and the decision in *Zinermon*. I am leaving all of that to Professor Leon Friedman. He is truly an expert not only on section 1983 generally, but also particularly on this question of *Parratt v. Taylor*. I know that he is going to give both the *Parratt* doctrine and the particular decision in *Zinermon* the full in-depth analysis that they deserve.

I will now move to the second area, the enforcement of federal statutory rights under section 1983. Section 1983 authorizes not only the enforcement of federal constitutionally pro-

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law because the loss of property was due to the negligence of a state official and not because of established procedures; these procedures were not challenged, it was not possible to give plaintiff a pre-deprivation hearing and the state provided a post-deprivation remedy in tort). *Id.* at 543; see *infra* note 123-40 and accompanying text.

42. See *Zinermon*, 110 S. Ct. at 982-83 (citing *Monroe v. Pape*, 365 U.S. 167, 176 (1961)).

43. *Id.* at 982.

44. *Id.* at 983.

45. *Id.*

tected rights,<sup>46</sup> but also authorizes the enforcement of federal statutory rights.<sup>47</sup> The process in the United States Supreme Court from the standpoint of Supreme Court decisionmaking has been one of starts and stops and perhaps restarts.<sup>48</sup> A logical starting point is the Court's 1980 decision in *Maine v. Thiboutot*,<sup>49</sup> where the Supreme Court, in an opinion by Justice Brennan, held that *any* federal statute may be enforced under section 1983 against a state or local official.<sup>50</sup> The decision provoked an angry dissent from the normally mild-mannered Justice Lewis Powell. Justice Powell annexed to that dissenting opinion what he labeled a sampling of a rather large number of federal statutes which he said were now enforceable against state and local government as a result of the decision reached by the majority.<sup>51</sup> At the time that *Thiboutot* was decided, the public interest bar was duly grateful to Justice Powell for sharing his research with them. As it turned out, they should not have been so appreciative because the dissenting opinion by Justice Powell later proved to be influential to the point where in subsequent decisions the Court created two exceptions to the rule of *Maine v. Thiboutot*.<sup>52</sup> That is to say, it recognized that there are two types of federal statutes which, in fact, are not enforceable under section 1983.

The first is the situation where the federal statute is found by the Court to not be the source of a federally protected right, but only represents a declaration of congressional policy.<sup>53</sup>

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46. 42 U.S.C. § 1983 (1988); see *supra* note 1.

47. *Id.*

48. The Court cut back in *Maine v. Thiboutot*, 448 U.S. 1 (1980), in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28-9 (1981). However, the last three Supreme Court decisions to deal with this issue have upheld the enforcement of federal statutes under section 1983. See *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Wright v. City of Roanoke Redevelop. & Hous. Auth.*, 479 U.S. 418 (1987).

49. 448 U.S. 1 (1980).

50. *Id.* at 4-5.

51. *Id.* at 34-37 (Powell, J., dissenting).

52. *Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981).

53. *Pennhurst*, 451 U.S. at 28-29.

There are times, the Supreme Court says, when the Congress seeks not to hit state and local government over the head by imposing binding obligations, but rather seeks only to nudge - nudge is the word of the Court - nudge state and local government in Congress's preferred direction.<sup>54</sup>

The second situation is where the federal statute has created its own enforcement remedies. The Court finds that Congress intended to have the exclusive enforcement remedies, thereby precluding resort to section 1983.<sup>55</sup> The whole area depends upon congressional intent.<sup>56</sup> I say that somewhat tongue in cheek because often in this area, as in other areas with congressional intent, the congressional intent is unclear. In fact, sometimes it is non-existent, requiring federal courts to make guesses about what Congress intended about an issue that Congress perhaps did not even think about at all. The issue is further complicated by the fact that here we are really dealing with two federal statutes and their inter-relationship with one another, the federal statute that is at issue and its relationship to section 1983.<sup>57</sup>

Last Term, in *Golden State Transit Corp. v. City of Los Angeles*,<sup>58</sup> the Court held that the National Labor Relations Act<sup>59</sup> created a federal statutory right enforceable under section 1983 requiring the collective bargaining process be free of state interference.<sup>60</sup> The second case that the Court dealt with in this area last Term, a more highly publicized decision, is a case called *Wilder v. Virginia Hospital Association*.<sup>61</sup> The Court held that health care providers could bring suit under section 1983 to enforce their right to the reasonable reimburse-

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54. *Id.* at 19; *See also* *Rosado v. Wyman*, 397 U.S. 397, 413 (1970).

55. *Smith v. Robinson*, 468 U.S. 992, 1013 (1984).

56. *Id.* at 1012.

57. *See, e.g., id.*; *see also* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 27-31 (1981) (Stevens, J., concurring in part).

58. 110 S. Ct. 444 (1989).

59. 29 U.S.C. §§ 151-169 (1988).

60. *Golden State*, 110 S. Ct. at 450.

61. 110 S. Ct. 2510 (1990).

ment rates that the Court found were guaranteed by the Boren Amendment to the Federal Medicaid Act.<sup>62</sup>

In my opinion, these decisions have significance beyond the specific holdings. I think that they reflect a philosophy that the enforcement of federal statutes against state and local officials under section 1983 is the norm and that nonenforcement, pursuant to the two exceptions that the Court has delineated, is to be reserved for somewhat exceptional or special circumstances.

Now, I would like to address the third area, state court section 1983 actions. There has been a substantial increase in the number and types of section 1983 claims that have been litigated in the state courts over the past decade.<sup>63</sup> During the same period, the United States Supreme Court has become increasingly involved with the entire subject of state court section 1983 claims.<sup>64</sup> In 1980, the Court held that a section 1983 claim may be brought in the state courts.<sup>65</sup> Since that ruling in 1980, the Court has been attempting to determine the extent to which state law may be applied in state court section 1983 actions.<sup>66</sup> The dominant theme of this series of United States Supreme Court decisions is that a section 1983 claim that is litigated in a state court should be litigated pursuant to the same fundamental rules that would govern the litigation of a section 1983 claim in a federal court.<sup>67</sup>

To give three examples: The Court has held that, just as state notice of claim rules are inapplicable in federal court section 1983 actions, so too are they inapplicable in state court section 1983 actions.<sup>68</sup> Just as, to give a second example, retrospective monetary relief may not be awarded by a federal court against state government because of the application of the eleventh amendment,<sup>69</sup> so too, in a state court section 1983 action,

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62. *Id.* at 2517, *see supra* note 4.

63. S. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS 1 (1990).

64. *See, e.g.,* *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989); *Felder v. Casey*, 487 U.S. 131 (1988); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

65. *Martinez v. California*, 444 U.S. 277 (1980).

66. *See, e.g.,* *Howlett*, 110 S. Ct. 2430; *Felder*, 487 U.S. 131.

67. *See supra* note 64.

68. *Felder*, 487 U.S. at 141.

69. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

retrospective monetary relief may not be awarded against state government. The latter is not because of the eleventh amendment which is inapplicable in state court, but rather because of the Supreme Court's definition of "person" under section 1983 as not including states and their agencies.<sup>70</sup>

The third example is that the Court has made clear that the attorneys' fee statute,<sup>71</sup> section 1988, which pertains to section 1983 claims, is equally applicable in federal and state court section 1983 actions.<sup>72</sup>

Last Term's decision in *Howlett v. Rose*<sup>73</sup> continues this theme of parity of treatment of section 1983 claims in state and federal court.<sup>74</sup> Since municipal entities are subject to liability in federal court section 1983 actions, *Howlett* holds that they are also subject to liability in state court section 1983 actions.<sup>75</sup> This means that state sovereign immunity law may not be applied so as to immunize a municipal entity from section 1983 liability in a state court action. The Court, in *Howlett*, relied upon the fact that the elements of the section 1983 claim for relief and defenses are matters of federal law.<sup>76</sup> Under the supremacy clause, state rules, including state defenses like state law sovereign immunity, that are inconsistent with or in some basic way clash with the elements or defenses of the federal section 1983 claim, must give way to the overriding or dominant section 1983 interest.<sup>77</sup>

I am turning now to the fourth area, which is the question of remedies in section 1983 actions. The Court rendered two decisions in highly publicized cases last Term.<sup>78</sup> The decisions broadly deal with the remedial powers of the federal courts to rectify systemic constitutional violations, specifically in in-

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70. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989).

71. 42 U.S.C. § 1988 (1988).

72. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980).

73. 110 S. Ct. 2430 (1990).

74. *See id.* at 2442-43.

75. *Id.*

76. *Id.* at 2442.

77. *Id.* at 2438, 2443 (citing *Owen v. City of Independence*, 445 U.S. 622, 647, n.30 (1980) and *Martinez v. California*, 444 U.S. 277, 284 (1980)).

78. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990); *Spallone v. United States*, 110 S. Ct. 625 (1990).

stances in which public officials have failed to comply with a mandate of the federal court. In one, the Yonkers housing discrimination suit, *Spallone v. United States*,<sup>79</sup> the specific issue was whether it was proper for the federal district court to impose sanctions, monetary fines on the members of the Yonkers City Council, where they had refused to adopt legislation authorizing housing construction that had been mandated by a consent decree entered into by the City of Yonkers.<sup>80</sup>

There were two major issues presented to the Supreme Court in the *Spallone* case. The first was whether a legislative official's vote on local legislation constituted protected speech within the meaning of the first amendment.<sup>81</sup> The second question before the Court was whether absolute legislative immunity that protects state legislative officials from any type of federal court relief should also be extended to protect local legislative officials.<sup>82</sup> This is an issue which, oddly enough, the United States Supreme Court has never resolved. Well, neither of these issues were reached by the Supreme Court in the *Spallone* case.<sup>83</sup> Instead, the Court rendered what I view as being a rather narrow decision, holding that, under the particular circumstances of the case, the district court abused its discretion in imposing civil contempt sanctions on the council members without first attempting to bring about compliance by the city by imposing sanctions against the city itself.<sup>84</sup> The Court in *Spallone* was concerned that sanctions against the local council members could improperly interfere with the local legislative process by perhaps prompting those legislative officials to act in their own self-interest with their personal liability at the forefront, rather than the interest of the city, and the interest of their constituents, being a primary concern.<sup>85</sup>

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79. 110 S. Ct. 625 (1990).

80. *Id.* at 628.

81. *Id.* at 631.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 634.

In the Missouri school desegregation case,<sup>86</sup> which Judge Pratt described to you, the Court discussed an order to finance a school desegregation remedy, whereby the particular remedy was the imposition of a magnet school,<sup>87</sup> and I might say that it was a rather elaborate magnet school.<sup>88</sup> However, the concurrence went to some lengths to ridicule the magnet school's<sup>89</sup> agricultural farm, the fact that each room was to be air conditioned and so forth.<sup>90</sup> Well, the Court held that in order to finance the school desegregation remedy, federal courts do have the power to order local officials to increase property taxes even if the increase in property taxes is violative of state law.<sup>91</sup> The vote in the case was five to four.<sup>92</sup> The concurrence was in agreement with the majority that the district court could not itself increase the taxes.<sup>93</sup> However, the majority took the position that the district court did have the power to order local officials to increase taxes to a point, to an extent,

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86. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990). Justice White delivered the opinion, in which Justices Brennan, Marshall, Blackmun, and Stevens joined. Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which Chief Justice Rehnquist, Justices O'Connor and Scalia joined.

87. *Id.* at 1657 (citing *Jenkins v. Missouri*, 639 F. Supp. 19, 34-35 (W.D. Mo. 1985)). Magnet schools are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality programs. *Id.* at 1657 n.6.

88. *Id.* at 1657 n.7. The district court authorized \$12,972,727 for operation of the six magnet schools and \$12,877,330 for further capital improvements at those schools. *Id.*

89. *Id.* at 1676-77 (Kennedy, J., Rehnquist, C.J., O'Connor and Scalia, JJ., concurring in part and concurring in the judgment). The concurrence noted that "[t]his Court has never approved a remedy of the type adopted by the District Court. There are strong arguments against the validity of such a plan." *Id.* at 1676. The Court stated that "[p]erhaps it is a good educational policy to provide a school district with the items included in the KCMSD capital improvement plan, for example: high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums. . . ." *Id.* "But these items are part of legitimate political debate over educational policy and spending priorities, not the Constitution's command of racial equality." *Id.* at 1677.

90. *Id.*

91. *Id.* at 1666.

92. *See infra* note 104.

93. 110 S. Ct. at 1667 (Kennedy, J., Rehnquist, C.J., O'Connor and Scalia, JJ., concurring in part and concurring in the judgment).



necessary to finance this school desegregation remedy.<sup>94</sup> The concurring Justices saw no meaningful distinction between the district court itself increasing the taxes, on the one hand, and the district court ordering local officials to increase taxes, on the other.<sup>95</sup>

In my view, the majority has the better argument. It seems elementary to me that for school desegregation remedies to be meaningful they must be complied with, they must be enforced and enforcement means one thing clearly. It means coming up with the funds to finance the remedy. If the responsible government officials do not on their own come up with the funds to finance the remedy, it seems to me that the district court must be in a position, must have the power, to compel those officials to do so. I think that compelling officials to raise revenues is not quite the same thing as a district court imposing the tax increase itself because when a district court compels officials to raise revenue, those officials are still left with the leeway, the discretionary power, to determine how to structure the tax increase.

The last area to discuss is the question of attorneys' fees. In 1989, with *Blanchard v. Bergeron*,<sup>96</sup> the Court held that attorneys' fees which are recovered by plaintiffs' counsel under a contingent fee agreement are not the maximum fees that a court may award to plaintiffs' counsel under the federal civil rights attorneys' fees statute,<sup>97</sup> that is, section 1988.<sup>98</sup> Last Term, the Court, in *Venegas v. Mitchell*<sup>99</sup> dealt with the opposite issue; namely whether the fees that are awarded to the plaintiff under the fee statute, section 1988, are the maximum fees that plaintiffs' counsel may receive pursuant to a contingent fee agreement.<sup>100</sup>

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94. *Id.* at 1666.

95. *Id.* at 1669-70 (Kennedy, J., Rehnquist, C.J., O'Connor and Scalia, JJ., concurring in part and concurring in the judgment).

96. 489 U.S. 87 (1989).

97. *Id.* at 96.

98. 42 U.S.C. § 1988 (1988).

99. 110 S. Ct. 1679 (1990).

100. *Id.* at 1680-81.

Again, the Court answered that question in the negative.<sup>101</sup> If you put the two cases together, it means that the contingent fee is not viewed as establishing the outer limit of the federal statutory section 1988 fee award,<sup>102</sup> and, by the same token, the section 1988 fee award is not viewed as establishing the outer limit of the contingency recovery.<sup>103</sup> Whether or not one agrees with the results in these two cases, its hard not to marvel at this rare display of legal symmetry.

*Judge George Pratt:*

I was just doing some analysis of the cases that are included in the materials as to the position of Justice Brennan. I see that *Missouri v. Jenkins*,<sup>104</sup> the ordering of taxation case, *Wilder*,<sup>105</sup> the more important one of the statutory interpretation cases, and *Zinerman*,<sup>106</sup> are all five to four decisions with Justice Brennan in the majority. This raises questions as to what happens next. For our purposes, what happens next is a deeper look at *Zinerman* and *Parratt v. Taylor*.<sup>107</sup>

Professor Leon Friedman is, as you probably know, outstanding in this field. He is a graduate of Harvard Law School. He teaches at Hofstra Law School; he writes, and perhaps, most importantly, he actively litigates in the field, so he is not one of those ivory tower-type professors who really does not know what is going on out there. Perhaps of more significance to me than to the rest of you, he is also one of those few people around the country outside of the judiciary who is called upon

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101. *Id.* at 1684. The Court stated that:

[Section] 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract.

*Id.*

102. *See Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989).

103. *Venegas*, 110 S. Ct. at 1684.

104. 110 S. Ct. 1651 (1990).

105. *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510 (1990).

106. *Zinerman v. Burch*, 110 S. Ct. 975 (1990).

107. 451 U.S. 527 (1981).

by the Federal Judicial Center to teach judges about problems in this area of law.

*Professor Leon Friedman:*

Since several people have promised you that I would speak on *Parratt v. Taylor*, I guess I had better do so at this point. The issue is really an older one, regarding the parallel scheme of state and federal enforcement of individual rights. Thirty years ago, in 1960, when some of you were practicing — if a policeman beat you up; or a school board fired you; or a city deprived you of a building permit — you would not go into federal court. You would go into state court, sue for trespass, false imprisonment, assault, or breach of contract. Or you would go into state court under Article 78,<sup>108</sup> because you did not get your permit. You would state that the local licensing agent acted in an arbitrary and capricious manner by refusing you a permit. You can still go into state court pursuant to an Article 78 proceeding. Nothing in the development of section 1983<sup>109</sup> law precludes an individual from seeking traditional common law and statutory remedies that are available under state law when government does something to you that is not to your liking.

What the Supreme Court did in *Monroe v. Pape*<sup>110</sup> was to say that the availability of these state remedies does not preclude federal constitutional remedy at the same time.<sup>111</sup> The famous debate at that time, which Justice Frankfurter stated in his long dissent,<sup>112</sup> centered on whether the act that you were complaining of was required by state law, not simply authorized by state law. If that act was in effect compelled by state law, according to Justice Frankfurter, then you could go into federal court on section 1983.<sup>113</sup> But if the act that you

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108. N.Y. CIV. PRAC. L. & R. art. 78 (McKinney 1981).

109. 42 U.S.C. § 1983 (1988); see *supra* note 1.

110. 365 U.S. 167 (1961). In *Monroe*, the petitioners claimed that the invasion of their home, the subsequent illegal search, as well as Mr. Monroe's arrest and detention without a warrant constituted a deprivation of their rights, privileges, or immunities secured by the Constitution. *Id.* at 170.

111. *Id.* at 183.

112. *Id.* at 202 (Frankfurter, J., dissenting).

113. *Id.* at 246.

are complaining of was somehow against state law, then you should go into state court and get your remedy there.<sup>114</sup>

In 1961, in *Monroe v. Pape*,<sup>115</sup> the Supreme Court said no, that is not the law. If you could parse a federal constitutional claim, then you may come into federal court right away. It was not an exhaustion issue; it was not a preclusion issue, but rather that the federal courts were open for your remedy.<sup>116</sup>

It was *Monroe v. Pape*, and the last point that Professor Schwartz talked about, 1976 Civil Rights Attorneys' Fee Award Act and the Counsel Fees Cases,<sup>117</sup> that really carried the ball and has been the reason for this explosion in section 1983 case law. If you go into state court and win your assault and battery case against a policeman, you are not going to get your counsel fees. You can also go into state court with a section 1983 claim as well, but for a variety of reasons it still is assumed that the federal forum is the preferable one. If you go into federal court, and turn it into a constitutional case, you will get your counsel fees.

It was *Monroe v. Pape* and the Counsel Fees Law of 1976<sup>118</sup> that really created the explosion of litigation. For those of you in local government, much litigation that was formerly brought in an Article 78 proceedings are coming into federal court more and more for exactly the reasons that I mentioned.

There is an enormous overlap of actions that can be brought both as state court common law or statutory actions and as federal statutory actions. By the way, just as an aside, there are some that can only be brought as one rather than the other; there are some actions which are not constitutional actions although they may be actions against state and local officers. The prime example, of course, is *Paul v. Davis*,<sup>119</sup> in

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114. *Id.*

115. 365 U.S. 167 (1961).

116. *Id.*

117. *See, e.g.*, 42 U.S.C. § 1988 (1988); *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990), *Blanchard v. Bergeron*, 489 U.S. 75 (1989), *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989).

118. 42 U.S.C. § 1988 (1988).

119. 424 U.S. 693 (1976). A flyer was distributed to approximately 800 merchants with a picture and name of the respondent in which respondent was identified as an "active shoplifter." After the charges were dismissed, respondent insti-

which the Court held that defamation claims against governmental officials could never be brought as federal constitutional claims.<sup>120</sup> There are some causes of action which are of such a low level of deprivation that they do not rise to the constitutional level.<sup>121</sup> Therefore, they may only be brought in state court. On the other hand, there are some claims which are purely federal constitutional actions; namely, those actions which consist of true procedural due process issues, and therefore, do not have a common law or statutory analog. But those are very fringe areas. I think that every one of the constitutional cases that the Supreme Court heard last year, which were brought under section 1983, have a state common law statutory analog.<sup>122</sup>

Well, which kinds of cases should be kept in state court? The Supreme Court keeps grappling with that issue. Are there any group of cases that can be brought in state court and that should stay there? Well, the negligence cases are clearly one category. After *Daniels v. Williams*,<sup>123</sup> and *O'Connor v. Donaldson*,<sup>124</sup> such cases must be kept in state court. That is one area the Supreme Court has agreed upon. The category of cases where the underlying conduct is negligent rather than intentional should be kept out of federal court.<sup>125</sup>

There is a greater category of cases, however, where the state will really give you a remedy; where they will put money

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tuted an action under 42 U.S.C. § 1983 against the police chief, who actually distributed these flyers, alleging the petitioner's action under the color of law deprived him of his constitutional rights. *Id.* at 693.

120. *Id.* at 710.

121. *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979).

122. *See, e.g., Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510 (1990); *Howlett v. Rose*, 110 S. Ct. 2430 (1990).

123. 474 U.S. 327 (1986). Petitioner brought a section 1983 claim in federal district court, alleging that the respondents' negligence deprived him of his "liberty" interest in freedom from bodily injury "without due process of law." *Id.* Petitioner sought to recover damages for injuries sustained when he slipped on a pillow negligently left on the stairs by respondent sheriff's deputy. At the time of the accident, petitioner was an inmate in a Richmond, Virginia jail. *Id.*

124. 422 U.S. 563 (1975). Donaldson brought a lawsuit under 42 U.S.C. § 1983 in which he alleged that O'Connor and other staff members of a Florida State mental hospital intentionally and maliciously deprived him of his constitutional right to liberty when they confined him against his will for nearly 15 years. *Id.* at 564-65.

125. *Daniels*, 474 U.S. at 328.

in the pocket of the victim; where they will give him whatever the remedy in federal court would be. Is there some other way to parse out, to carve out, some area of cases that really belong in state court? That is how the *Parratt v. Taylor*<sup>126</sup> doctrine began—involving the twenty-three dollar hobby kit that was lost while the prisoner was in isolation.<sup>127</sup> Should we assume that one of the ways of punishing people is not to give them a hobby kit while they are in isolation? Of course, if they were permitted to have their hobby kit with them while in isolation, they might actually enjoy the experience. As a result, when the hobby kit arrived, they did not give it to the prisoner.<sup>128</sup> When he came out of isolation, he asked for it and found out that it was lost.<sup>129</sup> Who does he sue? He sues the warden and he sues the hobby kit manager.<sup>130</sup> Did you know there is a hobby kit manager in every prison, or at least in prisons in Nebraska? At any rate, he sues them for the lost hobby kit, for the value of the lost hobby kit.<sup>131</sup>

The Supreme Court held — first, he only lost property; second, the loss was a result of a negligent act; third, it was really a procedural due process violation.<sup>132</sup> If you focus on the constitutional right that was lost, the right was the deprivation of his property, *i.e.*, the loss of the hobby kit without a hearing before the actual occurrence.<sup>133</sup> That is an odd way to characterize the constitutional right, but that is how the Supreme Court approached it. Fourth, the act was random and unauthorized, in the sense that there were no state procedures that really dealt with this issue. The state, which we now separate from the individual who was responsible, could not anticipate that this sort of situation would arise and more important, as we see, they could not anticipate at what point this situation would arise.<sup>134</sup> In other words, he was in isolation for sixty

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126. 451 U.S. 527 (1981).

127. *Id.* at 529.

128. *Id.* at 530.

129. *Id.*

130. *Id.*

131. *Id.* at 543.

132. *Id.*

133. *Id.*

134. *Parratt v. Taylor*, 451 U.S. 527, 541 (1981).

days; the hobby kit came at some point during that sixty day period; there was no single point at which the state was able to tell the officer to give the prisoner a meaningful pre-deprivation hearing before the actual disappearance of the hobby kit.<sup>135</sup> They could not anticipate that event happening. Fifth, there was an adequate state remedy down the line.<sup>136</sup> There was a Nebraska tort claims procedure under which the prisoner could get his twenty-three dollars back.<sup>137</sup> When you put all five of these issues together, you are really talking about the lack of a pre-deprivation hearing before the property and the procedural due process right was lost.<sup>138</sup> But there is a post-deprivation hearing.<sup>139</sup>

The Court in *Parratt* plugged into another line of cases that the Supreme Court had decided.<sup>140</sup> Even though the state may do something wrong initially, a prompt or post-deprivation hearing would be a sufficient remedy.<sup>141</sup> Since this entire situation is viewed as a procedural due process problem, the Court indicated that by giving the individual a post-deprivation hearing, the state gave you whatever the Constitution required.<sup>142</sup> In other words, you have not been deprived of property without due process of the law.<sup>143</sup> You may have been deprived of property, but the post-deprivation hearing was sufficient to meet the due process of law requirement. Therefore, the Nebraska tort claims procedure<sup>144</sup> would be a sufficient remedy which would put twenty-three dollars back in your pocket.

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135. *Id.* at 543.

136. *Id.*

137. *Id.* at 541.

138. *Id.* at 543.

139. *Id.*

140. *See, e.g.,* *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (Court upheld, under the fifth amendment due process clause, the summary seizure and destruction of drugs without a pre-seizure hearing); *Bowles v. Willingham*, 321 U.S. 503 (1944) (Court upheld the authority of an administrative body to issue rent control orders without providing a hearing to landlords before the regulation fixing rents became effective).

141. *Parratt v. Taylor*, 451 U.S. 527, 538 (1981).

142. *Id.* at 539.

143. *Id.* at 540 (quoting *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified*, 54 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978)).

144. *See* NEB. REV. STAT. §§ 81-88, 209 (1976).

Everyone squinted at that decision. What happens in a case in which a policeman assaults you without affording you a hearing before that incident? The state could not anticipate such an assault. Further, the state could never anticipate the whole range of encounters between the police and a citizen. Should the citizen be given a hearing before any one of these encounters? If that is the way you look at the process, you would always have a remedy later on, *i.e.*, you could sue him for assault and battery. Which part of that Supreme Court decision really counts? What are the real elements that count in the *Parratt v. Taylor* situation? Those of us who thought that section 1983 meant something believed that *Parratt* should be narrowly interpreted: you had to have negligent deprivation of property, a procedural due process violation, and a random unauthorized act. If you try to keep *Parratt* to the twenty-three dollar hobby kit case, then nothing else would fall into that category. Of course, it took a little while for the Supreme Court to deal with the true issues.

The next case that came along was *Logan v. Zimmerman Brush Co.*,<sup>145</sup> in which it was held that the deprivation of property was by an established state procedure.<sup>146</sup> In this case, the individual lost his capacity to challenge a hearing of an Illinois board if the challenge was not presented to the state court within a set period of time.<sup>147</sup> It was precisely that very established state procedure which did not give him the time to take advantage of the statute.<sup>148</sup> In a unanimous decision, the Court stated clearly that *Parratt v. Taylor* does not apply when there is an established state procedure that created the deprivation.<sup>149</sup> That, indeed, was exactly what Justice Frankfurter stated in his dissent.<sup>150</sup> So even Frankfurter would not have had any problem with that theory.

If the state requires something to happen that is constitutionally defective, surely you should be able to come into fed-

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145. 455 U.S. 422 (1982).

146. *Id.* at 431.

147. *Id.* at 426.

148. *Id.*

149. *Id.* at 435-36.

150. *Monroe v. Pape*, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting).



eral court to rectify that situation. Therefore, *Logan* did not really add very much to that doctrine.

The next case was *Hudson v. Palmer*.<sup>151</sup> *Hudson* starts to deal with some of the distinctions made in *Parratt*. Among the factors to consider as to when the state procedure would supply due process and therefore preclude a section 1983 case, were whether intentional versus negligent conduct was involved; property versus liberty; random and unauthorized conduct on the one hand versus established state procedure on the other. The Court started to deal with those kinds of issues in *Hudson v. Palmer*, which compared intentional versus negligent acts on the part of a prison official.<sup>152</sup> It is very much like the situation in *Parratt*, but instead of losing his hobby kit because of the prison official's negligence, in *Hudson v. Palmer* the inmate lost his legal papers because of the intentional conduct of the prison official.<sup>153</sup> Still the case involved a low level guard who had no authority of any kind to deal with that property. Therefore, the other issue of *Parratt* came into play in that the deprivation was random and unauthorized. At no time in the continuum when the guard was dealing with the inmate could the state anticipate that something would go wrong. Therefore, the state could not assume or anticipate that it would have to come in and do something to protect the prisoner's rights.<sup>154</sup>

In *Hudson v. Palmer*, the Supreme Court stated that the alternate state remedy rationale of *Parratt v. Taylor*<sup>155</sup> applied to both intentional and negligent conduct. At least one of the five things I mentioned was settled; namely, that *Parratt* applies to intentional as well as negligent conduct.<sup>156</sup>

But the other issues — property versus liberty, does *Parratt* apply only to a procedural due process right, or does it also apply to a substantive right, a right under the first, fourth or

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151. 468 U.S. 517 (1984).

152. *Id.* at 534. The respondent, an inmate at a Virginia penal institution, filed an action in federal district court under 42 U.S.C. § 1983 alleging that petitioner, an officer at the institution, had intentionally destroyed some of respondent's personal property during an unreasonable search. *Id.* at 519-20.

153. *Id.* at 520.

154. *Id.* at 534.

155. *Id.*

156. *Id.* at 533.

eighth amendment. What is the difference between substantive due process and procedural due process? Well, in law school, your very first day you are usually asked what the difference is between procedure and substance. I still do not know. I know a little more now than I knew then, but that same issue came up in *Lochner v. New York*,<sup>157</sup> and resurrects itself in the *Parratt v. Taylor* line of cases as well.

Does *Parratt v. Taylor*<sup>158</sup> apply only to procedural due process violations? Does it apply to liberty versus property rights? What is the difference between random and authorized on the one hand and established state procedure on the other? What is an adequate state remedy? The lower courts grappled for about five years with those issues because the Supreme Court did not deal with any of those issues until it decided *Zinermon v. Burch*.<sup>159</sup>

*Zinermon* was a mental health case. Burch, the plaintiff, had a few mental problems. He was picked up while wandering along some highway late at night.<sup>160</sup> He was brought in by some local official, diagnosed on the spot as hallucinatory, schizophrenic and psychotic. He was sent to the Florida State Hospital and, to show you how bad he was, he thought he was in heaven.<sup>161</sup> He confused the Florida State Hospital with heaven! Under Florida law, there were only two ways to keep a person involuntarily in the local hospital. First, you could hold a hearing to invoke the emergency hearing provisions of Florida law.<sup>162</sup> At that time, a lawyer would be appointed to represent the defendant at a hearing which would be held within seven to ten days.<sup>163</sup> His mental condition would be examined and certain pre-conditions would have to be found, namely that the defendant was either a danger to himself or that he could not fend for himself.<sup>164</sup>

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157. 198 U.S. 45 (1905).

158. 451 U.S. 527 (1981).

159. 110 S. Ct. 975 (1990).

160. *Id.* at 979.

161. *Id.*

162. *Id.* at 981 (citing FLA. STAT. § 394.463(1)(a) (1981)).

163. *Id.* at 982.

164. *Id.*

The second procedure dealt with a voluntary consent form.<sup>165</sup> In Burch's case, the doctors who diagnosed the patient as psychotic and schizophrenic presented him with a form to sign under which he consented to be held in the facility. He was then required to remain there for one hundred eighty days.<sup>166</sup> A hearing was never held to determine whether he should be committed. During that time, they involuntarily administered psychotropic drugs, and then finally after one-hundred-eighty days, he was released.<sup>167</sup>

He then sued for deprivation of his liberty without due process of law.<sup>168</sup> Now, the district court dismissed the entire case on *Parratt* grounds. It went through the factors that we talked about.<sup>169</sup> First, the court said *Parratt* applies to liberty as well as property.<sup>170</sup> Second, the district court judge stated that this action was random and unauthorized.<sup>171</sup> The court agreed that the doctors should have given this person a hearing. The case then went to the Supreme Court after the Eleventh Circuit reversed the dismissal.<sup>172</sup> By the way, I wrote the amicus brief.<sup>173</sup> The state not only admitted but proclaimed that the doctors' actions were illegal under state law.<sup>174</sup> Therefore, the state declared that since such an action was illegal under state law, the individual should have been given a hearing under state law, and he could now sue for false imprisonment.<sup>175</sup> But such an act was characterized as random and unauthorized.<sup>176</sup> The State of Florida could not anticipate that these doctors would not give him the hearing. This procedure was therefore not re-

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165. *Id.*

166. *Id.* at 980.

167. *Zinermon v. Burch*, 110 S. Ct. 975, 980 (1990).

168. *Id.* at 982.

169. *Id.* at 978.

170. *Id.*

171. *Id.*

172. *Zinermon v. Burch*, 110 S. Ct. 975 (1990), *aff'g*, *Burch v. Apalachee Community Mental Health Serv., Inc.*, 840 F.2d 1339 (11th Cir. 1987).

173. Brief for Respondent, *Zinermon v. Burch*, 110 S. Ct. 975 (1990) (No. 87-1965) (Brief *Amicus Curiae* of the American Civil Liberties Union and the ACLU of Florida in Support of Respondent on file at the offices of the *Touro Law Review*).

174. *Id.* at 977.

175. *Id.* at 978.

176. *Id.* at 977.

quired by state law.<sup>177</sup> Under *Logan*,<sup>178</sup> such a deprivation could not be remedied in federal court unless it was caused by an established state procedure. This state procedure was not an established state procedure. It was the contrary. It was random and unauthorized.<sup>179</sup> Therefore, *Parratt*<sup>180</sup> applies, and as a result, this case does not belong in federal court. Plaintiff must seek his remedy in state court.<sup>181</sup>

The Eleventh Circuit, in a split decision, focused on a different phase of the *Parratt* rationale.<sup>182</sup> The case finally arrives in the Supreme Court. The Court must now return to those issues that it had dismissed in *Parratt* and *Hudson*. They reexamined all of the issues. Burch wins five to four. He has stated a good cause of action, according to the majority. As Professor Schwartz said, what is most significant is that the dog did not bark in this case.<sup>183</sup> The Supreme Court did not take the opportunity to really cut back on section 1983. They held in *Zinerman* that number one, it does apply to liberty against property.<sup>184</sup> *Zinerman* holds for the first time at the Supreme Court level that the *Parratt v. Taylor*<sup>185</sup> rationale applies no matter what the interest is.<sup>186</sup> Number two, *Parratt v. Taylor* does not apply to substantive violations, first or fourth amendment violations, or for that matter substantive due process violations.<sup>187</sup> The Court does not define the difference between a procedural or substantive violation. I was there at oral argument. There was a debate between Justices Stevens and Scalia

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177. *Id.* at 978.

178. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

179. *Zinerman v. Burch*, 110 S. Ct. 975, 975 (1990).

180. *Parratt v. Taylor*, 451 U.S. 527 (1981).

181. *Id.* at 541.

182. *Burch v. Apalachee Community Mental Health Serv., Inc.*, 840 F.2d 797 (11th Cir. 1988).

183. Schwartz, *Section 1983, The Supreme Court and Local Government Law*, 7 *TOURO L. REV.* 5, 8-9 (1991).

184. *Zinerman v. Burch*, 110 S. Ct. 975, 986 (1990).

185. 451 U.S. 527 (1981).

186. *Zinerman*, 110 S. Ct. at 986. The Court determined that in special cases such as *Parratt*, the tort remedy which the state provided was sufficient. The very nature of the negligent loss of property made it impossible for the state to predict such deprivations and, therefore, provide pre-deprivation process. *Id.* at 985.

187. *Id.* at 990.

on the difference between substantive due process violations and procedural due process violations. It was a fascinating debate.

The Supreme Court determined that the rationale in *Parratt v. Taylor*, which was concerned with the availability of an alternate state remedy, is irrelevant if the plaintiff is alleging a substantive or substantial due process violation.<sup>188</sup> The key issue in the case turns on the meaning of random and unauthorized. We know that *Logan*<sup>189</sup> says if it is part of an established state procedure, *Parratt* does not apply.<sup>190</sup> The real issue is whether there is a logical dividing line between random, unauthorized acts on the one hand, and established state procedure on the other, in which *Parratt v. Taylor* applies, and there is. The key question is whether the person who is doing the deprivation is in a position to give you a hearing.<sup>191</sup> The Supreme Court stated that the really operative language was that the petitioners could not claim that the deprivation of Burch's liberty was unpredictable.<sup>192</sup> Under Florida's statutory scheme, only a person competent to give informed consent may be admitted as a voluntary patient.<sup>193</sup> There is no specified way of determining before a patient is asked to sign admission forms whether he is incompetent.<sup>194</sup>

It is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value, and not initiate involuntary placement procedures.

Thus, any erroneous deprivation will occur at a specific predictable point in the process.<sup>195</sup> In *Hudson v. Palmer*,<sup>196</sup> and *Parratt v. Taylor*,<sup>197</sup> it was not known when the guard would

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188. *Id.*

189. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

190. *Id.* at 435.

191. *Zinermon v. Burch*, 110 S. Ct. 975, 990 (1990).

192. *Id.* at 989.

193. *Id.*

194. *Id.*

195. *Id.* at 990.

196. 468 U.S. 517 (1984).

197. 451 U.S. 527 (1981).

deprive the individual of property. The state, which in this instance is a separate entity from its officials, never knew when the official could grab the prisoner's property. There is nothing the state can do because officials deal with these people at so many points in the process that the state can never know when one of its officials is in a position to do something bad.<sup>198</sup> In the admission process, there is a predictable point where the state can ensure that proper procedures will be performed.<sup>199</sup>

It is the predictability that something can go wrong during that particular process and the fact that the state can protect against such a wrong, that makes the state responsible for what happened.<sup>200</sup> It is not only that the state can predict that something can go wrong, but also that the state can predict at what point it can go wrong.<sup>201</sup> Since the state has the ability to come in and ensure that a hearing happens at that point, and if they do not, it can truly be said that someone's constitutional rights were violated.<sup>202</sup> It is not random and unauthorized. At that point, *Parratt v. Taylor* cannot be applied.<sup>203</sup> Therefore, you have a section 1983 case available.

I am trying to make some sense out of that. There have been two cases that have applied *Zinermon*. I must read to you a section from Judge Easterbrook's concurring opinion in *Easter House v. Felder*.<sup>204</sup> Judge Easterbrook tried to reconcile *Parratt v. Taylor* with *Zinermon*. Easterbrook stated, "*Zinermon v. Burch* is inconsistent with the foundations of *Parratt v. Taylor* and *Hudson v. Palmer*."<sup>205</sup> That is it.

*Zinermon* said that if errors in the implementation of a state's scheme for civil commitment are foreseeable, then process after the fact is inadequate, and it distinguished *Parratt* and *Hudson* on the ground that the wrongs committed in those cases were not foreseeable. This is no distinction at all. It is always foreseeable that there will be some errors in the implementation of any administrative system, and it is never foreseeable which occasions will give rise to these errors. It was

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198. *Id.* at 541.

199. *Zinermon v. Burch*, 110 S. Ct. 975, 990 (1990).

200. *Id.*

201. *Id.* (emphasis in original).

202. *Id.*

203. *Id.*

204. 910 F.2d 1387 (7th Cir. 1990).

205. *Id.* at 1408 (Easterbrook, J., concurring).

foreseeable that some prison guards would lose the prisoner's property (*Parratt*), just as it was foreseeable that some person would be committed without proper authorization (*Zinermon*); in neither case could the state or a court know in advance just when the errors would occur. If foreseeability of the *category* of blunders require process in advance, then *Parratt* and *Hudson* were wrongly decided; if the inability to foresee the *particular* blunder makes subsequent remedies all the process that is "due," then *Zinermon* was wrongly decided. The cases cannot coexist. . . .<sup>206</sup>

There must be more of a rationale in *Parratt* and *Zinermon* than we realize.

Let me just illustrate one other case decided after *Zinermon* that might throw a little light on the issue. It is a case called *Matthias v. Bingley*.<sup>207</sup> City and local governments are going to get more and more of these cases. In *Matthias*, the city had a procedure for selling property seized in a criminal investigation.<sup>208</sup> No one made a claim on certain property and no procedures were established to find the owner. The question is — what should they do with the property? Under their procedures, an officer is supposed to investigate and then authorize the sale. A city officer is supposed to, once he is in possession of the property, and after the completion of the criminal investigation, make a few phone calls, see if there is someone who raised some claim to it, and then authorize its sale. What happened in that case was that the local officer did not authorize the sale according to normal city procedure. The property was simply sold. The real owner appears later, requesting his property.<sup>209</sup> There was no notice. You cannot sell property without notice.<sup>210</sup> Now if you focus on *Parratt v. Taylor*,<sup>211</sup> you would conclude that it is the officer's fault, since he did not sign the authorization form when he was supposed to. His failure to sign the authorization form was a random, unauthorized act. Therefore, you cannot come into federal court, you must go into state court and sue for replevin or trover in order to get your property back.

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206. *Id.*

207. 906 F.2d 1047 (5th Cir. 1990).

208. *Id.* at 1048-49.

209. *Id.* at 1049-50.

210. *Id.* at 1058.

211. 451 U.S. 527 (1981).

Indeed, Judge Edith Jones, who was on the panel on that case, concurred that an opposite result was required by *Zinermon*.<sup>212</sup> You can no longer look at the problem that way. You do not look at what the individual officer did or did not do. You have to look at the bigger picture. One should look at whether the city as a whole really followed or gave the proper procedures. Could the city, as a whole, anticipate that in a particular case the authorization form would not be filled out? There really was a predictable point in the process where you could see the city procedure falling apart, in which proper procedure would not be followed. What *Zinermon* requires is for a local government to look at the bigger picture and see whether the entire procedure was proper from start to finish. There was a predictable point where proper procedures would not be made available. In *Matthias*, the Court held that after a careful review, this case falls under *Logan* rather than *Parratt* and therefore a section 1983 case was available.<sup>213</sup>

The issue is whether the city or local government could anticipate that at some point in the process some sort of hearing is required. The state must make sure that the people in a position to give that pre-deprivation process comply with that necessity. It is necessary and it is predictable that someone might make a mistake and not give a hearing. Such an act is not going to be considered random and unauthorized, because the city could have come in and made sure that process is complied with. That is exactly what happened in *Zinermon*.<sup>214</sup>

You could have anticipated a contrary decision from the Supreme Court, and indeed the four dissenters stated,<sup>215</sup> that there is nothing between established state procedure on the one hand, and everything else, which must be considered random and unauthorized.<sup>216</sup> That really could have been the result if Justice White had gone that way. That result would have taken us right back to Justice Frankfurter's dissent in *Monroe*

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212. *Matthias*, 906 F.2d at 1058 (Jones, J., concurring).

213. *Id.* at 1056.

214. *Zinermon v. Burch*, 110 S. Ct. 975 (1990).

215. *Id.* at 990 (O'Connor, J., filed a dissenting opinion, in which Rehnquist, C.J., Scalia, and Kennedy, JJ., joined).

216. *Id.*



*v. Pape*.<sup>217</sup> You cannot come into federal court on section 1983 unless the constitutional deprivation is something that is the direct product of state law.<sup>218</sup> But the Court did not do that. What we now have are three categories, not just two. One category being an established state procedure; a second category being anticipatable and predictable failures to give process by a state or local officer at a predictable point in the process, in which case *Parratt* does not apply; and third, true random and unauthorized acts at the far end, which may be very limited now. In the last category are cases where the person who actually did the deprivation is a state actor, but his actions could not have been stopped by the state at any predictable point in the process because he did not have any power to give any process at the point where the action occurred.

Now, that is where we are. After *Zinermon*, all of these issues have to be refined. We still have section 1983 and now we just have some new words to define in later cases.

*Judge George Pratt:*

I think *Parratt* is still up for grabs. As you can see, it is an extremely complicated problem. *Zinermon*, of course, is one of those cases, five-to-four, in which Justice Brennan is in the majority. Would somebody like to ask Judge Souter how he stands on the *Parratt v. Taylor* issue, which really is a fundamental problem of substantive versus procedural due process. This is what cost Robert Bork the Supreme Court judgeship,<sup>219</sup> his outspoken position on it. Abortion is only one side issue of that larger problem. Where Judge Souter comes down on that, maybe we will know next year by this time, and maybe we will not.

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217. 365 U.S. 167, 202 (Frankfurter, J., dissenting); see *supra* note 113 and accompanying text.

218. *Id.*

219. Robert Bork takes the "position that the due process clause of the fourteenth amendment should be denied any substantive content apart from its incorporation of the Bill of Rights." Book Note, *The Priest Who Kept His Faith but Lost His Job*, 103 HARV. L. REV. 2074, 2077 (1990); see R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

*Professor Gary Shaw:*

I believe that the results in *Zinerman* are consistent with much of what Professor Schwartz said about a trend, in this last Term, towards a predominance of federal law over state law. Whenever this trend occurs, it introduces a wild card. For me, that wild card is the tenth amendment.<sup>220</sup> In *National League of Cities v. Usery*,<sup>221</sup> the court held that the tenth amendment should be an affirmative shield against improper federal powers that were going towards core functions of the State.<sup>222</sup> Soon thereafter, *Garcia v. San Antonio Metropolitan Transit Authority*<sup>223</sup> reversed *National League of Cities* with the Court returning to its original position, one vigorously opposed by Justice Rehnquist, that the tenth amendment is no more than a truism.<sup>224</sup> Given the fact that Justice Rehnquist is interested in overruling *Garcia*,<sup>225</sup> that Judge Souter will now be coming onto the Court, and that there may be some backlash towards this increased predominance of federal power, my question is if the tenth amendment were resurrected, for example, if *Garcia* were overruled and *National League of Cities v. Usery* or something similar to it came back into effect, what effect do you think this would have on section 1983?

*Professor Leon Friedman:*

I have an easy answer. The easy answer is if a state deprives you of life, liberty, or property, that is not a function protected by the tenth amendment. All section 1983 does is to ensure

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220. U.S. CONST. amend. X, provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

221. 426 U.S. 833 (1976), *overruled by*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

222. *Id.* at 851-52.

223. 469 U.S. 528 (1985), *overruling*, *National League of Cities v. Usery*, 426 U.S. 833 (1976).

224. *United States v. Darby*, 312 U.S. 100, 124 (1940) (explaining that "[t]he amendment states but a truism that all is retained which has not been surrendered").

225. In his dissenting opinion, Justice Rehnquist implied that he would be inclined to overrule *Garcia* and return to the holding of *National League of Cities*, when the principles set forth in that case once "again command the support of a majority of th[e] Court." *Id.* at 580 (Rehnquist, J., dissenting).

that the states, as states, using those governmental powers, do not violate the constitutional rights of their citizens. I just do not see a tenth amendment wild card. I do not see the *Garcia* and *National League of Cities* cases as a problem. I do think that if Souter were on the Court last year, and *Zinnermon* went the other way, that you would go back to a *Monroe v. Pape*<sup>226</sup> situation. I think that is the danger. I do not think it is the tenth amendment.

*Professor Martin Schwartz:*

I have a somewhat different perspective in terms of the predominance of the federal law over the state law. To some extent, the pro-plaintiff section 1983 interpretation that Judge Pratt referred to<sup>227</sup> and which I agreed with, has to be understood in a much broader context, and the broader context is one which acknowledges a basic principle that section 1983 itself does not create any federal rights at all. Section 1983 is only there for the enforcement of federal rights that the Supreme Court has recognized under the federal constitution or under federal statutory law. This predominance then in federal interest, which is reflective in this line of pro-plaintiff section 1983 decisions, only becomes meaningful to civil rights plaintiffs if the Court will continue to be vigilant in the recognition of, for example, a constitutionally protected right of privacy, and in giving individuals meaningful rights under the equal protection and due process clauses, because without the recognition of those federally protected rights, there is in actuality no meaning that is of significance to the pro-plaintiff section 1983 decisions.

The tenth amendment has not to this point, as Professor Friedman states, and I think he is right, played any kind of important role in section 1983 litigation. And in terms of what the tenth amendment means, nobody has figured it out yet, and I do not know that we are in any better a position to figure it out.

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226. 365 U.S. 167 (1961).

227. See *supra* notes 4-5 and accompanying text.