

SECTION 1983 LITIGATION: SUPREME COURT REVIEW

A Roundtable Dialogue

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With comments by:
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PROFESSOR SCHWARTZ: Good morning. Erwin and I have grouped the cases of last term into five categories. Let me just spell those out. First is the enforcement of constitutional rights under § 1983; second is qualified immunity; third is enforcement

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of federal statutes under § 1983; fourth is pleading issues, and the fifth topic is *Bivens*³ claims.

Erwin and I are going to attempt not to just describe the holdings from last term, but to put those holdings in a broader context and try to figure out the litigation significance of the decisions. We may have some disagreement from time to time; it is strictly professional. We are good friends, so I do not want you to get upset if you hear disagreement.

Let me start with the first subject, the enforcement of federal constitutional rights under § 1983.⁴ At this point in the development of § 1983 law, we see in the decisional law a very wide range of constitutional rights that are asserted by plaintiffs under § 1983. I would say the most common are Fourth Amendment challenges to arrests, searches, and uses of force; and

³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). An action for damages to vindicate constitutional rights that have been violated by an individual federal government official has been dubbed a *Bivens* claim. *Id.* at 396-97.

⁴ 42 U.S.C. § 1983 (2003) provides in pertinent part:

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

certainly large numbers of First Amendment claims, especially retaliation claims; procedural due process claims; and equal protection claims. In addition to these are some of the lesser utilized constitutional rights from time to time, such as a Bill of Attainder claim asserted under § 1983, Ex Post Facto Clause claims, and Dormant Commerce Clause claims.

That leads me to the Supreme Court's decision of last term dealing with takings claims. Takings claims may be asserted under § 1983 if the plaintiff can satisfy the fairly stringent ripeness requirements articulated by the Supreme Court.⁵ The plaintiff has to show a final decision as to the use of the property obtained from the local authorities, and an attempt to obtain just compensation from the state courts.⁶ These ripeness requirements may be hard to satisfy. Further, when the plaintiff tries to satisfy the ripeness requirements and goes to state court, the plaintiff often runs into preclusion problems in returning to the federal court. I am just

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id.

⁵ See, e.g., *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-33 (1998); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

⁶ See, e.g., *Williamson County*, 473 U.S. at 186 n.13.

wondering why plaintiffs continue to file these takings claims in federal court under § 1983. I am interested to hear Erwin's take on this. Takings claims were traditionally the type of claim asserted in state courts; land use is traditionally a matter of state concern. And yet, I think over the past twenty-five years there has been a tremendous increase in the volume of takings claims filed in the federal courts. I am wondering, is it the fee awards in federal court do you think, or something else?

PROFESSOR CHEMERINSKY: I think it is many things. The Supreme Court has made it clear that § 1983 can be used for takings claims. In the *City of Monterey v. Del Monte Dunes*⁷ case two years ago, the Supreme Court said there can be these claims.⁸ If it is brought as a § 1983 claim and the plaintiff is successful, fees are recoverable under § 1988,⁹ which is different than if it was just a takings claim in the state court. Also, often civil rights

⁷ 526 U.S. 687 (1999).

⁸ *Id.* at 725-26.

⁹ 42 U.S.C. § 1988(b) (1994) provides in pertinent part:

In any action or proceeding to enforce a provision of [§ 1983] . . . the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

Id.

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plaintiffs in particular states perceive the federal courts as more hospitable to civil rights claims or just takings claims than state courts. So, I think for a variety of reasons, most important that the Supreme Court said they can be brought in federal court, these cases are increasingly brought in federal court.

PROFESSOR SCHWARTZ: I still think it is somewhat unusual that you have this large volume of takings claims, yet probably statistically a fairly small percentage of them succeed. That is my observation. Many get knocked out procedurally on ripeness grounds. And in terms of trying to establish a taking of property, that is not all that easy.

PROFESSOR CHEMERINSKY: The other thing is that the Supreme Court has, in some cases, opened the door wider to takings claims. For example, in *Palazzolo v. Rhode Island*,¹⁰ the Court said a property owner can bring a takings claim even as to

Id.
¹⁰ 533 U.S. 606 (2001).

regulations that were in place at the time the property was acquired.¹¹

So, imagine a person who knows that there are environmental or zoning restrictions on a property; a person could buy the property with the goal of then bringing a takings challenge. I think that the Supreme Court, though inconsistent, has been, in some cases, more receptive to challenges than the lower federal courts.

PROFESSOR SCHWARTZ: And maybe there have been some indications of loosening up the ripeness requirements, which brings us to last term's case, *Tahoe-Sierra Preservation Council*.¹² I think to put the case in context, there are two types of government actions that will lead a court to automatically find a categorical or per se taking of property. One is the physical occupation of property by the government.¹³ The example that I

¹¹ *Id.* at 627 (“Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”).

¹² *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

¹³ *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

use in class sometimes is, what if the state decided to put its capital in your backyard; the state would be physically invading your property and would have to give the landowner just compensation. The other type of per se taking would be a government regulation depriving the landowner of all economic value of the property.¹⁴ I think that does not happen too often. And then for other types of challenges where the government regulation is claimed to constitute a taking, there is this balancing that occurs.¹⁵ The court looks at the extent of the interference with “reasonable investment backed expectations,” which is a phrase used over and over again but never defined. That gets balanced against the government interest.

The issue in *Tahoe-Sierra* was whether a thirty-two month moratorium on development of the property constituted a per se taking of property.¹⁶ The Supreme Court, in a six to three decision, held that it did not.¹⁷ The reasoning was there was no physical occupation or invasion by the government, and there was no denial

¹⁴ See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

¹⁵ See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

¹⁶ *Tahoe-Sierra*, 535 U.S. at 306.

¹⁷ *Id.* at 342.

of all economically viable use of the property because when the moratorium is lifted, the value of the property would then revert to the owner.¹⁸ The landowner was not deprived of all economically viable use of the property. I think that when this case was decided, landowners were very upset. They had won a recent victory in the Supreme Court¹⁹ and they thought this trend would continue. There is always the celebration group and the sad group. In this case, the celebrators were the environmentalists and the land use planners. Do you think this is an overreaction by property owners?

PROFESSOR CHEMERINSKY: I do think the case is an enormous victory for local governments as well as environmentalists. I want to start by saying that I characterize the holding a bit differently than you do. The issue here is whether the thirty-two month delay in development is a taking. You rightly point out that Justice Stevens says it is not a possessory or per se taking.²⁰ He also says it is not a per se regulatory taking.²¹ He says

¹⁸ *Id.* at 341 (“In fact, there is reason to believe property values often will continue to increase despite a moratorium.”).

¹⁹ *Palazzolo*, 533 U.S. at 606.

²⁰ *Tahoe-Sierra*, 535 U.S. at 324-25.

²¹ *Id.* at 325.

that the Court is not saying that moratoria are never regulatory takings, nor is the Court saying that moratoria are always regulatory takings.²² Rather, he says that deciding whether a particular moratorium is a regulatory taking requires that kind of balancing that you alluded to.²³

Justice Stevens gives guidance to lawyers and judges. He says to consider the length of the moratorium relative to the life span of the property and the cost to the owner of the property relative to the investment backed expectations.²⁴ He emphasizes the benefit to the local government in terms of moratoria.²⁵ His words strongly say that there is a need for local governments to have delays in the development of property for environmental and permit reviews.²⁶ The attorney for the developer said that even a one day delay in development should be regarded as a taking, and

²² *Id.* at 321.

²³ *Id.* at 335 (“[W]e are persuaded that the better approach to claims that a regulation has effected a temporary taking ‘requires careful examination and weighing of all the relevant circumstances.’”) (quoting *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring)).

²⁴ *Id.* at 338.

²⁵ *Tahoe-Sierra*, 535 U.S. at 337-38 (“[M]oratoria . . . are used widely among land use planners to preserve the status quo while formulating a more permanent development strategy.”).

²⁶ *Id.* at 329.

the government should have to compensate to spread the loss.²⁷ Had the Supreme Court adopted that position, it would tremendously limit the ability of local governments to engage in land use planning and the environmental protection process. But, I think that the Court's rejection of that position gives guidance to those of you who represent local governments. The label that is used seems to matter enormously. Here, the local government called what it was doing a moratorium.²⁸ The Supreme Court spoke of the need for moratoria. Consider this case with one from a decade ago, *Lucas v. South Carolina Coastal Council*.²⁹ David Lucas bought a piece of beachfront property in South Carolina for almost a million dollars.³⁰ Subsequent to purchase, the state adopted a coastal protection law that prevented any development of Lucas' property.³¹ He sued, and ultimately won, with the Court saying it was a regulatory taking because any development of the

²⁷ *Id.* at 320.

²⁸ *Id.* at 311-12 (describing the two moratoria at issue as the combination of ordinance and resolution which effectively prohibited all development on sensitive lands in California and on other lands in the Basin for thirty-two months, and on sensitive lands in Nevada for eight months).

²⁹ 505 U.S. 1003 (1992).

³⁰ *Id.* at 1006.

³¹ *Id.* at 1007.

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property was prevented.³² It turns out that the prohibition on development of Lucas' property was repealed two years later.³³ Lucas was kept from developing his property for two years, but he won; it was a taking. In the *Tahoe* case, it was thirty-two months, a longer period of time where no development was allowed; yet there the landowner lost.³⁴ What explains that seeming anomaly? : the label. If it is called a moratorium, then it is seen as temporary and the Court is going to balance the competing interests to determine its reasonableness. If it is labeled by the local government so that it seems permanent, then the court is willing to find it a regulatory taking. If I were advising local governments, I would encourage them to use the word "moratorium" when possible and articulate reasons why it is a moratorium (i.e.: for purposes of study and review). That label alone would make a lot of difference.

PROFESSOR SCHWARTZ: The other thing I would point out in *Tahoe-Sierra* is language from Justice Stevens that a

³² *Id.* at 1031-32.

³³ *Id.* at 1010-11.

³⁴ *Tahoe-Sierra*, 535 U.S. at 342.

moratorium of over one year should be viewed with a special skepticism.³⁵ I would say that this language is ammunition for landowners to use in special cases. Staying with the topic of enforcement of the constitutional rights under § 1983, I think one of the toughest challenges is governmental action that looks like it is wrong and trying to translate that conduct into a constitutional violation. I find that no matter how many years I study constitutional law and read Erwin's treatises, I still cannot always come up with a confident answer to that question. I think part of the answer is that not all government wrongdoing translates into a constitutional violation. The other answer, I suppose, is that when nothing is left, plaintiff's attorneys turn to the substantive due process "shocks the conscience" standard. But, anybody who does this work for even a relatively short period of time finds out that federal judges' consciences do not get shocked too easily.

I was trying to think of reasons for that. Maybe they see too much bad stuff so that in time their consciences get numbed instead of shocked; I do not know. Maybe this is due to the fact that judges think of substantive due process as the claim of last

³⁵ *Id.* at 341.

resort, or maybe the due process standards are just too tough. It got me thinking that maybe plaintiff's lawyers should try to be somewhat more creative and see if there is some other theory to rely upon. That got me, in turn, thinking about the Supreme Court's decision of last term in *Christopher v. Harbury*,³⁶ dealing with the constitutionally protected right of judicial access.

In this case, the plaintiff, attorney Jennifer K. Harbury, argued her own case in the Supreme Court. She claimed that federal governmental officials deceived her and concealed information about the whereabouts and circumstances of her husband in Guatemala. She alleged her husband was being detained and tortured at the hands of Army officials in Guatemala who were being paid by the CIA. This deception, she claims, denied her access to the courts.³⁷

There has been somewhat of a proliferation of these judicial access claims. The plaintiff comes into federal court claiming that the government has either suppressed the information or deceived her in some way, and as a result, claims that she has

³⁶ 536 U.S. 403 (2002).

³⁷ *Id.* at 405.

been unable to assert a particular cause of action. Or alternatively, the plaintiff claims that she has been able to assert the cause of action but has not been able to litigate the claim fully because of this misrepresentation by the government.

I think that last term's decision in the *Harbury* case is somewhat of a mixture in my mind of good news and bad news for plaintiffs' lawyers. It is definitely bad news for Jennifer Harbury because her claim was rejected unanimously.³⁸ I think that in terms of the constitutional right of judicial access, there is somewhat good and bad news; this is a mixed opinion. For one thing, I see this decision as being the first time that the United States Supreme Court has recognized this particular type of constitutional denial of judicial access claim. The types of judicial access claims that the Supreme Court has dealt with in the past concerned more systemic issues, normally a fee requirement in, for example, a divorce proceeding.³⁹ *Harbury* is different. This is a particular instance of deceit or concealment. As I read the opinion, the Supreme Court does recognize that the plaintiff could allege that this type of

³⁸ *Id.*

³⁹ *See, e.g.,* *Boddie v. Connecticut*, 401 U.S. 371 (1971).

wrongdoing by the government constitutes a violation of the constitutionally protected right of judicial access.

There is a footnote in the opinion that says prior decisions have found a right of judicial access grounded on the privileges and immunities clause of Article IV,⁴⁰ the petition clause⁴¹ and the due process clause.⁴² So, I think that there is potential here to use this decision in future cases. I think the negative here is that the Supreme Court's decision requires the federal court plaintiff asserting this type of denial of judicial access claim to allege in the complaint the underlying cause of action that was interfered with as if that cause of action was before the court.⁴³

For example, if you have a federal court plaintiff that says the government's concealment prevented her from asserting a common law negligence claim, that plaintiff would have to assert the negligence claim as if that negligence claim was before the court. I smell a type of Catch-22 there. The plaintiff's claim is that

⁴⁰ *Harbury*, 536 U.S. at 415 n.12 (citing *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U.S. 142, 148 (1907); *Blake v. McClung*, 172 U.S. 239, 249 (1898); *The Slaughter-House Cases*, 16 Wall. 36, 79 (1873)).

⁴¹ *Id.* (citing *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

⁴² *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974); *Boddie*, 401 U.S. at 380-81).

⁴³ *Id.* at 416.

the concealment or the deception prevented her from having all of the information needed to litigate the claim. I think that the court's pleading requirement is unrealistic. The other thing the Court says must be alleged in the complaint is the remedy that the plaintiff is seeking for denial of the right of judicial access.⁴⁴ I think that this should not be such a big deal. The plaintiff can just say, "I want money damages for the denial of my constitutionally protected right."

I want to hear Erwin's take on this because when we spoke about this the other day, he did not think this decision was as important as I did. I do think it is important because it provides ammunition for plaintiffs to take the type of government wrongdoing and assert a denial of judicial access claim instead of relying on substantive due process.

PROFESSOR CHEMERINSKY: I think the definition of optimism tends to be that civil rights lawyers can find something good in a nine-to-nothing loss in the claim of a civil rights plaintiff. Let me offer three quick thoughts on this. First, it is

⁴⁴ *Id.*

important to remember that § 1983 creates a cause of action for violations of the Constitution or federal laws by those acting under color of law, but it does not create a substantive right itself. The right has to be found in the Constitution or in the federal statutes. Justice Rehnquist said twenty years ago that § 1983 is not a “font of tort law,” but rather a means for affording a civil remedy for deprivations of federally protected rights.⁴⁵ I think the reason due process becomes so important is that absent a specific constitutional provision, the plaintiff needs to turn to the words “liberty” or “property” in the due process clause as the basis for the claim.

Second, it is important to remember that *Harbury* comes up as a *Bivens* suit, the Federal counterpart to a § 1983 suit. This is a situation where it was not a suit against a state or local officer, but against the federal Secretary of State; therefore, it has to be presented as a *Bivens* suit.⁴⁶ Not only does it matter in presenting the underlying constitutional right, but it certainly fits into a theme

⁴⁵ *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

⁴⁶ *Harbury*, 536 U.S. at 408.

we have been talking about of how *Bivens* plaintiffs lose in the Supreme Court so consistently.

Finally, I find relatively little encouragement from a plaintiff's perspective about the decision regarding right of access to courts. I would tie this to a Supreme Court case about six years ago, *Lewis v. Casey*,⁴⁷ involving the rights of prisoners to have access to the courts. There was an earlier Supreme Court case, *Bounds v. Smith*,⁴⁸ that also spoke of a fundamental right of access to the courts and the rights of prisoners to have access to prison libraries.⁴⁹ Justice Scalia, writing for the Court in *Lewis*, states that there is no such fundamental right of access to the court or to prison libraries. He says that in order for a prisoner to bring a claim of denial of access to the court, the prisoner would have to show that he or she would win the case if only he or she had access to the prison library.⁵⁰

PROFESSOR SCHWARTZ: That is a Catch-22; I cannot show I can win the case because the prison will not let me use the law

⁴⁷ 518 U.S. 343 (1996).

⁴⁸ 430 U.S. 817 (1977).

⁴⁹ *Id.* at 828.

⁵⁰ *Lewis*, 518 U.S. at 351.

books or the prison library.

PROFESSOR CHEMERINSKY: Justice Scalia phrases that as a standing requirement.⁵¹ I think that this case, *Harbury*, is also a rejection of a right of access to the courts. I would phrase the key part of Justice Souter's majority opinion a bit differently than you do. I see what the majority is saying as there is only a claim of denial of access to the courts if it can provide some remedy that could not be gained in another lawsuit. Here, the Supreme Court says that Jennifer Harbury can bring a claim against former Secretary of State Warren Christopher for intentional infliction of emotional distress.⁵² Anything that she could get in a suit for denial of access to the courts she could also get in a separate lawsuit for intentional infliction of emotional distress. Therefore, there is not a separate claim for denial of access to the courts. There must be something that a cause of action for denial of access to the courts would provide that could not be gained in any other lawsuit for any other cause of action. That seems a very difficult

⁵¹ *Id.* at 349.

⁵² *Harbury*, 536 U.S. at 421.

burden to meet. It does not seem to leave many claims for denial of access to the courts.

PROFESSOR SCHWARTZ: It seems like a long route to say maybe this type of claim does not exist, but the Court leaves open the potential for asserting it. The Court says you just have to allege A and you allege B, and you can make out a violation of this right.

PROFESSOR CHEMERINSKY: It is possible to prevail so long as it can be shown that something can be gained through the claim of denial of access to the courts that could not be gained through the cause of action that you are now able to bring.

PROFESSOR SCHWARTZ: How about the information that has been suppressed? I think there is a 9/11 issue here because we are talking about government actions, suppressing information, deceit, and access to the courts. There is an undertone to this decision that indicates there could be some important context here.

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PROFESSOR CHEMERINSKY: It also says that in an area like this, where we are dealing with foreign policy, we have to be very deferential to the government. This is about a woman whose husband was killed in Guatemala. She said she repeatedly made requests for information about his whereabouts and she was lied to. She argued that if she was given the accurate information she could have taken steps in court to protect him, but she was not able to do that because she was deceived. The Court does not seem sympathetic to that claim.

PROFESSOR SCHWARTZ: Let me point out that this right of judicial access could be the basis of a retaliation claim. There are a fair number of cases brought sometimes by prisoners, sometimes by landowners, and sometimes by public employees.⁵³ They allege that the government took negative action against them because they had the gall to bring a lawsuit against it.⁵⁴ The lower court decisions are in conflict on the question of whether such a right of

⁵³ See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977); *Johnson v. Avery*, 393 U.S. 483 (1969); *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995).

⁵⁴ *Bounds*, 430 U.S. at 824; *Johnson*, 393 U.S. at 485; *San Filippo*, 30 F.3d at 427.

judicial access exists for any assertion of a legal claim in court, or conversely only when the plaintiff has asserted a legal claim that is a matter of public concern. The lower courts disagree on that. I see Supreme Court decisional law as indicating that any attempt to resolve a grievance judicially is protected by this constitutional right of judicial access, whether it is under the free speech clause or the petition clause. I think that it is another potential avenue for plaintiffs.

Our next area is prisoners' suits under § 1983. Prisoners certainly attempt to use § 1983 to vindicate constitutional rights, but they are not successful too often. One reason they are not successful is because the Prison Litigation Reform Act⁵⁵ (PLRA) has an exhaustion of administrative remedies requirement for prisoner actions that challenge the conditions of confinement.⁵⁶ I am seeing fairly large numbers of decisions in which prisoners' constitutional claims are dismissed for failure to exhaust administrative remedies.

⁵⁵ 42 U.S.C. § 1997 (2003).

⁵⁶ 42 U.S.C. § 1997e(a) (2003).

I think the Supreme Court's decision in *Porter v. Nussle*⁵⁷ gets the award for being the most predictable decision of the term, with maybe a few condolences to John Williams who argued the case for the plaintiff. He won it in the Second Circuit,⁵⁸ but the Supreme Court in the unanimous decision held that prisoners who assert excessive force claims against prison guards must first exhaust their administrative remedies.⁵⁹ The Court stated that it is a type of claim that is within the category of conditions of confinement.⁶⁰ I think it is a follow-up to the decision of a year ago in which the Supreme Court held that prisoners have to exhaust their administrative remedies, even if they are only seeking monetary relief that is not available administratively.⁶¹ I think the Supreme Court is intent on giving an expansive reading to the PLRA exhaustion of administrative remedies requirement for prisoners.

⁵⁷ 534 U.S. 516 (2002).

⁵⁸ *Nussle v. Willette*, 224 F.3d 95, 97 (2d Cir. 2000).

⁵⁹ *Porter*, 534 U.S. at 520.

⁶⁰ *Id.* at 532.

⁶¹ *Booth v. Churner*, 532 U.S. 731, 734, 740-41 (2001) (“Congress’ imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms.”).

The award for the most surprising decision goes to *Hope v. Pelzer*.⁶² We have done this program for nineteen years, and I do not know how many times we have been able to say, “here is a case in which a prisoner won a § 1983 case,” but here is the case. Maybe there was something magical in the plaintiff’s name, Hope, but the claim succeeded. This is the Alabama chain gang decision. The prisoners were on work detail and the guards thought that prisoner Hope was disruptive. As a result, he was hitched to the hitching post for seven hours, shirtless out in the Alabama sun, and allowed only one or two water breaks.⁶³ Even for a majority of the United States Supreme Court, this was found to be a violation of the Eighth Amendment Cruel and Unusual Punishment Clause.⁶⁴ It is notable in terms of it being a prisoner victory.

PROFESSOR CHEMERINSKY: I think it is a huge victory for civil rights plaintiffs for two reasons. One is because of the way in which the Court talks about how it determines whether there is

⁶² 536 U.S. 730 (2002).

⁶³ *Id.* at 734-35.

⁶⁴ *Id.* at 745. “[T]he obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope’s constitutional protection against cruel and unusual punishment.” *Id.*

clearly established law that a reasonable officer should know.⁶⁵ Prior to this case, I saw two lines of decisions from both the Supreme Court and lower courts about how to determine if there is clearly established law that a reasonable officer should know. The test under *Harlow v. Fitzgerald*⁶⁶ for determining whether an officer had qualified immunity is whether the officer violated a clearly established right that a reasonable officer should know.⁶⁷ One line of cases said there is only clearly established law if there is a case already on point. I can point to some Supreme Court cases and some lower court cases that seem to take that approach.⁶⁸ The other approach seemed to be that if the officers had fair notice or fair warning that their conduct was an unconstitutional violation of federal law, then they were denied qualified immunity even if there were no cases on point. I can point to Supreme Court decisions and lower court decisions that took that approach.⁶⁹

⁶⁵ *Id.* at 739.

⁶⁶ 457 U.S. 800 (1982).

⁶⁷ *Id.* at 817-18.

⁶⁸ *See, e.g.,* *Wilson v. Layne*, 526 U.S. 603 (1999); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Davis v. Scherer*, 468 U.S. 183 (1984); *Johnson v. Clifton*, 74 F.3d 1087 (11th Cir. 1996); *Mouille v. City of Live Oak Texas*, 977 F.2d 924 (5th Cir. 1992).

⁶⁹ *See, e.g.,* *United States v. Lanier*, 520 U.S. 259, 271-72 (1997); *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966); *Johnson v. Wright*, 234 F. Supp.

The Supreme Court in *Hope v. Pelzer* emphatically adopts the latter approach.⁷⁰ The Supreme Court says in Justice Stevens' majority opinion that there is clearly established law that a reasonable officer should know if the officer had fair warning or fair notice.⁷¹ Justice Stevens said a case on point would be sufficient to give fair warning and fair notice, but he says it is not necessary.⁷² He says there are many ways of showing there is fair warning and fair notice.⁷³ He goes through, for example, federal guidance to prisoners; state manuals; existing instructions; as well as what one of my students calls the knucklehead rule, any officer should know that chaining a prisoner to a hitching post for six or seven hours in the hot sun without water and bathroom breaks is just wrong.⁷⁴ I think the most obvious reason that this is a victory for plaintiffs is that it says there does not have to be a case on point.⁷⁵

2d 352, 367 (S.D.N.Y. 2002); *Konop v. N.W. Sch. Dist.*, 26 F. Supp. 2d 1189, 1195 (D.S.D. 1998).

⁷⁰ *Hope*, 536 U.S. at 747-48.

⁷¹ *Id.* at 745-46.

⁷² *Id.* at 746.

⁷³ *Id.* at 740-41.

⁷⁴ *Id.* at 738. ("As the facts are alleged by *Hope*, the Eighth Amendment violation is obvious.")

⁷⁵ *Hope*, 536 U.S. at 746-48.

There is a second, subtler reason why this is important to plaintiffs. I think it is much easier to go to the jury on this question after *Hope v. Pelzer*. It is easier to withstand summary judgment on the question of whether there is fair warning or fair notice than would be the issue of whether there is a case on point. If the court had taken the former approach (i.e. there must be a case already on point), it would be easy for judges to determine qualified immunity at the motion to dismiss or summary judgment stage. The Supreme Court often says it wants qualified immunity determined at that stage.⁷⁶ If the question is whether there was fair warning or fair notice to the officer, that seems much more quintessentially a jury question, and a reasonable jury can often go either way. I think it will be easier for plaintiffs, in light of what Justice Stevens said, to withstand summary judgment and get to the jury.

PROFESSOR SCHWARTZ: I think we should spell out that we have moved into the second category of cases, qualified immunity. Erwin, there are some parts of this decision that I do not think

⁷⁶ See, e.g., *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (explaining that a ruling on the issue of qualified immunity should be made early in the

make a lot of sense. For example, the idea that the court is going to take into account a state regulation being violated by the state officials.⁷⁷ I am having trouble logically figuring out how that shows that the constitutional law was clearly established; how that put officials on notice; and how it gave them fair warning that what they were doing was unconstitutional. I do not see the logic of it. The other part that does not make sense is the United States Department of Justice transmittal to the Alabama Department of Corrections in which the federal government told the state that the way it was using the hitching post was unconstitutional.⁷⁸ How does that give fair notice to the officials when there was no evidence in the record that the transmittal came to the attention of the officials? I think that there are some potential logical flaws in the decision. On the other hand, I agree with you; this could be a very helpful decision to plaintiffs because it indicates a flexible approach to qualified immunity that we have not seen for twenty years.

proceedings in order to avoid costs and expenses of trial when the defense is dispositive). *See also* *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

⁷⁷ *Hope*, 536 U.S. at 739.

⁷⁸ *Id.* at 737.

Another problem is that every Supreme Court qualified immunity decision seems to potentially bring a new approach. That is why we can do this program every year. The Supreme Court said fair warning a couple of years back,⁷⁹ albeit in a criminal prosecution, but it was referring to § 1983 cases. I have to say, I have grave doubts about whether the Supreme Court intends at all that qualified immunity be a jury question. One thing that the Court wants with respect to qualified immunity is that the issue be decided early in the litigation. I think you are giving plaintiffs good ideas to push the case to settlement, but I am dubious.

PROFESSOR BLUM: Just a couple of words. I think *Hope v. Pelzer* is, of course, a good case for plaintiffs; there is nothing bad in it, but there is nothing new in it. I see *Hope* as a distinct message to the Eleventh Circuit, which was the only circuit “over the edge” in the qualified immunity area, to pull back and join the crowd. The Eleventh Circuit, in that case, found that there is a constitutional violation when you hang somebody out in the heat

⁷⁹ See, e.g., *Lanier*, 520 U.S. at 259.

for seven hours with no water, but qualified immunity attached because there was no case right on point.⁸⁰ There is no other circuit in the country that would have held that. After *Hope*, the Supreme Court granted *certiorari* to three other Eleventh Circuit cases,⁸¹ vacated the opinions, and remanded in light of *Hope*. They were all the same type of opinions, where the court recognized a jury could find a constitutional violation but, because there was no case exactly on point, the court granted qualified immunity.⁸² *Hope* is great for the plaintiffs, but it is reinforcing things the Supreme Court said in *Lanier*⁸³ and *Wilson v. Layne*,⁸⁴ and I believe it was a message, particularly to the Eleventh Circuit.

The state regulations, violations of those regulations, and the Justice Department report that had been sent to the Mississippi

⁸⁰ *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

⁸¹ *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001), *vacated* by 537 U.S. 801 (2002); *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001), *vacated* by 536 U.S. 953 (2002); *Thomas v. Roberts*, 261 F.3d 1160, 1177 (11th Cir. 2001), *vacated* by 536 U.S. 953 (2002).

⁸² *Willingham*, 261 F.3d at 1188; *Vaughan*, 264 F.3d at 1037; *Thomas*, 261 F.3d at 1177. On remand, the Eleventh Circuit initially reinstated all three opinions. See *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003); *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003); *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003). Subsequently, in a surprise turnabout, the court, in a rehearing sua sponte, reversed its grant of qualified immunity in *Vaughan*. See *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003).

⁸³ 520 U.S. at 529.

⁸⁴ 526 U.S. 603 (1999).

prison were all icing on the cake. The Supreme Court told the Eleventh Circuit that its own precedent was close enough.⁸⁵ It was not shackling to a hitching post, but rather shackling to a cell bar, and the Court did not see a big difference there; not a difference for constitutional purposes or for qualified immunity purposes.⁸⁶ So, there was a case that was close enough to give fair warning under anybody's standards.

Finally, I know the Second Circuit tells you to give the case to the jury when there is a dispute about the facts, and that, in such cases, the ultimate question of reasonableness goes to the jury,⁸⁷ but the Second Circuit is a little out of tune with the other circuits on that issue. I think the Supreme Court makes it clear that this is a question of law to be decided by the judge, not the jury.

PROFESSOR CHEMERINSKY: First, there was no doubt in this case that there was an Eighth Amendment violation. The

⁸⁵ *Hope*, 536 U.S. at 742. The Court noted *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), which is binding precedent in the Eleventh Circuit through application of *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981). *Hope*, 536 U.S. at 742.

⁸⁶ *Id.* at 742.

⁸⁷ *See, e.g., Oliveira v. Mayer*, 23 F.3d 642, 649-50 (2d Cir. 1994). *But see Stephenson v. Doe*, 332 F.3d 68, 78-81 n.16 (2d Cir. 2003) (suggesting better approach is to reserve qualified immunity issue for judge).

Eleventh Circuit said there was a constitutional violation, but the officers had qualified immunity because there was no law on point.⁸⁸ Second, as to whether this case adds something new, I think it is the clearest statement ever by the Supreme Court on the test for determining whether there is clearly established law that should give a reasonable officer fair warning and fair notice. I contrast this to, for example, *Wilson v. Layne*.⁸⁹ That was a situation where federal agents brought reporters with them when they executed a warrant.⁹⁰ The Supreme Court decided unanimously that this was a violation of the Fourth Amendment, but then ruled eight-to-one that qualified immunity existed.⁹¹ The decision stated that there was no case on point yet,⁹² even though every court that did rule on it to that point stated it was a Fourth Amendment violation.⁹³ I do think there is a difference in phrasing

⁸⁸ *Hope*, 240 F.3d at 982.

⁸⁹ 526 U.S. 603 (1999).

⁹⁰ *Id.* at 605.

⁹¹ *Id.* at 605-06.

⁹² *Id.* at 616.

⁹³ *See, e.g., Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (referring to 18 U.S.C. § 3105, which expressly limits the presence of third parties in the execution of a search warrant to those occasions when necessary to aid an officer in its execution); *Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995) (noting that core Fourth Amendment protection includes an individual's right to be free from a search of one's residence); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997) (noting that the court was unable to find any circuit decision

here, at least of clarity. Third, there is the question of how it is determined whether there is fair warning or fair notice. I think Marty is right. The narrow question should be, was there fair notice or fair warning that their conduct violated the Constitution or federal statutes? The Department of Justice transmittal or state regulations do not really go to that issue. The fact that Justice Stevens was willing to say that this is part of what gives fair warning or notice opens the door to plaintiffs to use things like that to show fair warning and fair notice. It may be icing on the cake, but that is not how Justice Stevens describes it.

Finally, maybe most important in terms of judge versus jury, obviously Karen is right; the Supreme Court repeatedly says it wants qualified immunity to be decided when possible by the judge rather than the jury.⁹⁴ Think of the test as phrased by Justice Stevens here; did the officers have fair warning or fair notice? That seems to have a very factual nature to it. There are not only

upholding the constitutionality of the presence of broadcast media for non-law enforcement purposes during the execution of a search warrant). *See also* Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) (stating that officers in command of a dwelling violate the trust of their authority by allowing the presence of third parties who have no connection to the search warrant).

⁹⁴ Elder v. Holloway, 510 U.S. 510, 516 (1994) (citing Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

Second Circuit decisions,⁹⁵ but a series of decisions from Judge Posner in the Seventh Circuit,⁹⁶ and Ninth Circuit decisions⁹⁷ that would say that the determination of reasonableness is for the jury, not the judge. I argued a case in the Ninth Circuit a couple of weeks ago where a prisoner was denied a kosher diet.⁹⁸ I tried to emphasize to the court that after *Hope v. Pelzer*, the issue is not whether I can persuade them that the officer acted unreasonably, but rather whether a reasonable jury could believe that the officers had fair notice, and therefore summary judgment was inappropriate. So, I do not think this is revolutionary about judge versus jury, but I do think it is beneficial.

PROFESSOR SCHWARTZ: Erwin, I do not think it is a new test. I think it is a different way to look at the same test. If the federal law were clearly established, then we would conclude that the officer had fair warning or fair notice. If the federal law was not clearly established, then we would say the officer did not have

⁹⁵ See, e.g., *Vann v. City of New York*, 72 F.3d 1040, 1051 (2d Cir. 1995).

⁹⁶ See, e.g., *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993).

⁹⁷ See, e.g., *Wallis v. Spencer*, 202 F.3d 1126, 1140 (9th Cir. 2000); *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994).

⁹⁸ *Resnick v. Adams*, 348 F.3d 763 (9th Cir. 2003).

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fair warning. I think these just become alternative ways of describing the same test.

We will move ahead to the third area, which is enforcement of federal statutes under § 1983. I think this issue should be a question of congressional intent: Did the Congress intend that a particular federal statute would be enforceable under § 1983? I think even in the world of legal academia that is maybe too much theory to swallow because it is rare when there is any actual congressional intent on the issue. If you accept that hypothesis, the question would become, “How does the court deal with this issue of whether a federal statute is enforceable under § 1983?” The issue would become: “If Congress had thought about this issue, would it have intended that the federal statute be enforceable under § 1983?” This is then, at best, a question of hypothetical congressional intent.

This is an area which has kept this program in business for many years. It is a tough topic not only because of the issues, but also because the audiences do not get overexcited when they hear about the subject. It is an important subject because you have a tremendously wide range of federal statutes which might not have

enforcement mechanisms within them, so perhaps the only way to enforce the federal statute is against the state or local official under § 1983. The case law from the Supreme Court is, in my opinion, very uneven. It starts out with absolute gangbusters going back to 1980 when the Supreme Court stated that all federal statutes are enforceable under § 1983 against state and local officials.⁹⁹ The next year, the Supreme Court does a very quick retreat and says it didn't mean that literally, and there are some federal statutes not enforceable under § 1983.¹⁰⁰

Federal statutes that only declare congressional policy do not create rights and are not enforceable under § 1983. Federal statutes that have comprehensive enforcement mechanisms indicate an intent by Congress that those mechanisms be exclusive and that the statute not be enforceable under § 1983. Over the last twenty years, some of the decisions could be characterized as pro-plaintiff decisions, some of them pro-defendant decisions. Very significant is that the most recent decisions from the Supreme

⁹⁹ *See* *Maine v. Thiboutot*, 448 U.S. 1 (1980).

¹⁰⁰ *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

Court, in my opinion, including the decision last term in *Gonzaga University v. Doe*,¹⁰¹ are decidedly pro-defendant decisions.

Gonzaga dealt with a provision of the Family Education Rights and Privacy Act (FERPA).¹⁰² FERPA provides that federal funds should not be distributed to educational institutions that have a policy or practice of releasing educational records without parental consent.¹⁰³ In a five to four decision, the Supreme Court held that this provision of FERPA is not enforceable under § 1983.¹⁰⁴ Now, I do not think we should spend a long time trying to guess who the five are. These are the five Justices who have been so forceful in the federalism area, the Federalism Five: the Chief Justice, Justices O'Connor, Scalia, Kennedy, and Thomas.

And, you might ask, what does this have to do with federalism? I think it has everything to do with federalism. The issue in this case involves the enforcement of federal statutes, normally in federal court, against state and local government. I think this is very much a federalism issue. The *Gonzaga* decision

¹⁰¹ 536 U.S. 273 (2002).

¹⁰² 20 U.S.C. § 1232(g) (2000).

¹⁰³ 20 U.S.C. § 1232(b)(1).

¹⁰⁴ *Gonzaga*, 536 U.S. at 290.

is a very important decision, not only because of its specific holding that FERPA is not enforceable under § 1983, but also because I think that the way the majority opinion is written by the Chief Justice is going to make it more difficult for plaintiffs' lawyers to enforce federal statutes under § 1983. At one point, he goes out of his way to say a federal statute will not be enforceable under § 1983 unless it creates a right on the part of the plaintiff in unambiguous terms.¹⁰⁵ The dissenters read that as creating a type of presumption that federal statutes are not enforceable under § 1983,¹⁰⁶ which is the complete opposite presumption from the way this area of the law originated. He also goes out of his way to say that it is unlikely that federal legislation enacted under the spending power, such as FERPA, will be found to be enforceable under § 1983.¹⁰⁷ He says there are only two cases in which spending power legislation has been found to be enforceable under § 1983.¹⁰⁸

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 293.

¹⁰⁷ *Id.* at 279.

¹⁰⁸ *Id.* at 279-80 (citing *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987) (tenants living in low-income housing projects sued under § 1983 claiming respondent violated provisions of the Housing Act of 1937)); *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498 (1990) (health care providers sought to enforce a provision of the Medicaid Act under § 1983).

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I do not want to be overly pessimistic, but I think what is going to happen in future cases is that defendants' attorneys are going to say to the district court judge, "The plaintiff's burden is to show that this federal statute created a right in 'unambiguous terms.'" And, if it is spending power legislation, I think defendants' attorneys are also going to harp on that part of the decision. Erwin, you thought maybe not, that perhaps it could be read narrower?

PROFESSOR CHEMERINSKY: I think it is an enormously important case and an important victory for defendants' lawyers. Chief Justice Rehnquist is the circuit justice for the Fourth Circuit, and when he spoke there this summer he described this as his sleeper case of the term because of its significance. To put it in context, since coming on the Court, Chief Justice Rehnquist has repeatedly urged narrowing of the ability to use § 1983 to enforce federal statutes. He wrote an opinion several years ago which held that § 1983 cannot be used to enforce a federal law requiring state

and local governments to develop a plan.¹⁰⁹ Congress then adopted a statute to overrule that decision.¹¹⁰ However, Rehnquist has repeatedly tried to narrow the availability of § 1983.

PROFESSOR SCHWARTZ: Nobody followed that statute, or almost nobody, right?

PROFESSOR CHEMERINSKY: I will take a minute to tell how the statute was written. There was a hearing before the Senate Finance Committee in 1992. Senator Moynihan was chairing. There were four witnesses at the hearing; someone from the Attorney General's Office in Illinois, someone from the Attorney General's Office in Florida, Jim Wyles from the Children's Defense Fund, and I was there as a witness. We are in the middle of the testimony and a bell went off, and Senator Moynihan said we now

¹⁰⁹ *Suter v. Artist M.*, 503 U.S. 347, 358-59 (1992). The Court held that the Adoption Assistance and Child Welfare Act of 1980 did not provide a private right of action for respondent to seek enforcement of the provisions of the Act under § 1983. It noted that a provision under the Act requiring states to submit a plan for eligibility to participate in a federal program created by the Act does not create a requirement that the terms of the plan must be enforced. *Id.* at 363-64.

¹¹⁰ 42 U.S.C. § 1320a-2 (2003). The statute does not foreclose plaintiffs from seeking to enforce provisions of the Social Security Act (42 U.S.C. § 301) requiring state plans or development of plans. However, it expressly precludes

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have to adjourn to go vote on the floor of the Senate. He asked each of us when we were flying home. If you read the transcript of the hearing, right there we are talking about our flight schedule. He said, "Good, being that each of you have an hour or two, I want you to come into this back room with my staff and try to draft some language to overrule *Suter v. Artist M.*" The other witnesses and I sat around a table, and lobbyists from the Association of Attorney Generals and States sat at the outer ring. At one point, on a piece of yellow paper I wrote, "How about this?" and wrote out a couple of sentences. With only a minor change, it was adopted in a bill that the first President Bush vetoed and then President Clinton signed, and that is the language that overruled *Suter v. Artist M.* That is the only time I can say I really know the legislative history behind a federal statutory provision.

JUDGE PRATT: Is that the statute that Marty says nobody pays any attention to?

plaintiffs from seeking to enforce the provisions of the specific section of the statute challenged in *Suter*.

PROFESSOR CHEMERINSKY: Exactly. The only thing I want to say about *Gonzaga* is that dissenting Justices Stevens and Breyer described the majority opinion very broadly. If you read it this broadly, then it really can have a devastating effect on a lot of § 1983 litigation. There are many federal statutes that do not create a cause of action. For example, many laws adopted in spending programs, like the provisions of the Social Security Act and the Medicaid law, do not create a cause of action. If you read Chief Justice Rehnquist's opinion most broadly, what it says is that there only can be a 1983 action to enforce a law adopted by Congress under its spending power if that is a law under which there would be a private right of action. You would have to meet the restrictive test for private right of action, and that is extremely difficult to do. For plaintiffs' lawyers, I think there are reasons to narrowly interpret what the majority is doing. When you look at the federal statute at issue in *Gonzaga*, there is reason to believe it did not create enforceable rights, and subsequently everything else in Chief Rehnquist's decision is dicta.

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The circuits are starting to split on the significance of *Gonzaga*.¹¹¹ I think the Supreme Court will have to clarify whether the majority opinion was to be read broadly. Is it that you cannot use 1983 to enforce a law adopted under the spending power unless a private right of action to enforce that statute exists, or is this really a much narrower question about no private rights of action under this particular statute?

PROFESSOR SCHWARTZ: The problem is that it is not just this decision. This follows what I see as a recent trend, and I think that is something that lower court judges are likely to be looking at. The courts will ask, what has the Supreme Court been doing recently, and I think there are negative messages.

PROFESSOR CHEMERINSKY: The Supreme Court, in a 1997 case called *Blessing v. Freestone*,¹¹² did rule in favor of the

¹¹¹ See, e.g., *Nat'l. Home Equity Mortgage Ass'n v. Face*, 322 F.3d 802 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 152 (2003); *accord Taylor v. Vermont Dep't. of Educ.*, 313 F.3d 768 (2d Cir. 2002); *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058 (10th Cir. 2002); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034 (8th Cir. 2002).

¹¹² 520 U.S. 329 (1997).

plaintiffs in terms of the availability of § 1983 to enforce a provision of the Social Security Act.¹¹³ So, though there are cases like *Gonzaga* and *Suter* that go against plaintiffs, there is also *Virginia Hospital Association v. Wilder*,¹¹⁴ which allowed 1983 to be used to enforce laws adopted under the spending power. I think plaintiffs and defendants each have cases on point, but I do not mean to disagree with your overall characterization about the likely significance of this case.

PROFESSOR SCHWARTZ: Let us move to the fourth area, pleadings in a civil rights case. The decision is *Swierkiewicz v. Sorema*,¹¹⁵ actually a Title VII Age Discrimination and Employment Act Case which adopts the notice pleadings standard

¹¹³ *Id.* at 332. The specific section the Court referenced, 42 U.S.C §§ 651-669(b), requires states to establish a comprehensive plan for enforcing the payment of child support in order for children to be eligible for welfare benefits under the Aid to Families With Dependent Children Program. The plaintiffs, mothers residing within the state of Arizona, claimed they had individual rights for the state program to substantially comply with the statutory requirements. They sought to enforce those rights pursuant to § 1983. *Id.*

¹¹⁴ 496 U.S. 498 (1990) (holding health care providers could challenge the methods by which they are reimbursed by the states under provisions of the Medicare Act).

¹¹⁵ 534 U.S. 506 (2002).

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for this type of discrimination claim.¹¹⁶ Erwin, you were telling me that you think this decision would be important to § 1983 cases.

PROFESSOR CHEMERINSKY: I think so. In 1993, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,¹¹⁷ the Supreme Court, in a brief opinion, held that there was no heightened pleading requirement for § 1983 suits against local governments.¹¹⁸ Interestingly, in the *Leatherman* case, the Supreme Court left open the question of whether there would be heightened pleading in qualified immunity cases. Well, in *Swierkiewicz*, Justice Thomas, writing for the Court, emphatically says there is no heightened pleading ever in federal court unless the Federal Rules of Civil Procedure provide for it, as in cases of fraud and mistake.¹¹⁹ I think the courts could not be clearer here that the federal rules are about notice pleading, and heightened pleading is inconsistent with those rules. I think the

¹¹⁶ *Id.* at 512. The Court held that in cases alleging employment discrimination, plaintiffs need only provide notice of alleged discriminatory conduct pursuant to FED. R. CIV. P. 8(a) which requires a short, plain statement of the claim entitling the plaintiff to relief. *Id.*

¹¹⁷ 507 U.S. 163 (1993).

¹¹⁸ *Id.* at 164.

¹¹⁹ *Swierkiewicz*, 534 U.S. at 513.

issue that comes up is whether a federal court can require, in a qualified immunity case, a responsive pleading on the part of the plaintiff once the defendant raises qualified immunity as an affirmative defense.

PROFESSOR BLUM: I agree with that. In all non-prisoner § 1983 cases since *Swierkiewicz*, every circuit except the First and the Eleventh has rejected the heightened pleading requirements.¹²⁰ The reply that Erwin referred to in the *Schultea*¹²¹ case in the Fifth Circuit says that when government officials raise the defense of qualified immunity in their answer, the plaintiff may be required to reply with particularity as to why the immunity defense cannot be raised.¹²² I think that is still okay because the *Crawford El*¹²³ case referred to both the reply under Rule 7(a) and the Rule 12(e)

¹²⁰ See, e.g., *Gonzalez v. Reno*, 325 F.3d 1228, 1234-36 (11th Cir. 2003) (insisting on heightened pleading in civil rights cases); *Judge v. City of Lowell*, 160 F.3d 67, 72-74 (1st Cir. 1998) (Circuit's heightened pleading requirement survives *Crawford-El*). But see *Torres-Ocasio v. Melendez*, 283 F. Supp. 2d 505, 512 (D.P.R. 2003) (“[T]here is some disagreement in this Circuit on whether the standard set in *Judge* has been abrogated by the recent U.S. Supreme Court decision in *Swierkiewicz*.”).

¹²¹ *Schultea v. Wood*, 27 F.3d 1112 (5th Cir. 1994).

¹²² *Id.* at 1116 n.2 (citing *Colle v. Brazos County*, 981 F.2d 237, 246 (5th Cir. 1993)).

¹²³ *Crawford-El v. Britton*, 523 U.S. 574 (1998).

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motion for a more definite statement as techniques that were still acceptable to use when more specificity is needed to resolve the immunity issue.¹²⁴

PROFESSOR SCHWARTZ: The only thing that I would be cautious about if I am a plaintiff's lawyer, and I think defendants' lawyers should be thinking about this also, everything Erwin said about *Swierkiewicz* is right, but people said the same thing after *Leatherman* was decided. The problem is that the reality of litigation being what it is, there are going to be some district court judges who may be hostile to § 1983 claims, or particular types of civil rights claims, and there are plaintiffs' lawyers who may be too conclusory in thinking notice pleading is sufficient under *Swierkiewicz*. The ammunition is there, because in *Swierkiewicz*, Justice Thomas referred to the form complaints in the Federal Rules of Civil Procedure.¹²⁵ If you look at the form complaint with respect to negligence, it is about as conclusory as it can be; it is about two sentences.

¹²⁴ *Id.* at 598.

¹²⁵ *Swierkiewicz*, 534 U.S. at 513 n.4 (noting that the forms "are intended to indicate the simplicity and brevity of statements which the rules contemplate").

After *Leatherman*, there are still circuit court decisions holding that the plaintiff has to identify the policy that is alleged to provide a basis for municipal liability, allege facts supporting the existence of that policy, and allege causation between the policy and the constitutionally protected rights.¹²⁶ I would say that just as judges can disagree over whether complaint allegations are sufficient to satisfy a heightened pleading standard, they could well disagree over whether the allegations of a complaint are sufficient to satisfy notice pleading. For example, what if there was an allegation in the complaint asserting that, as a result of a municipal policy or custom, the plaintiff's Fourth Amendment right to be free of arrest without probable cause was violated. Would that be sufficient? Under a strict reading of notice pleading, you can say the defendant now is on notice in this municipal liability claim. However, I could see many federal district court judges saying

¹²⁶ See, e.g., *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 605 (5th Cir. 2001) (holding plaintiff failed to show causal connection between her employment termination and motives of the defendant's administrative personnel); *Lanigan v. Vill. of E. Hazel Crest*, 110 F.3d 467, 479 (7th Cir. 1997) (arguing that factual support and direct causal link are required to support allegations that municipal policy caused constitutional deprivation); accord *Donovan v. City of Milwaukee*, 17 F.3d 944, 954 (7th Cir. 1994). See also *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir. 1999) (reasoning that plaintiffs failed to provide evidence from which a jury could find that City maintained policy authorizing unlawful entry or excessive force during arrest).

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they want the plaintiff to identify the policy, and maybe even identify the factual basis for the policy. I would be careful if I were a plaintiff's lawyer and not over rely on *Swierkiewicz*.

JUDGE PRATT: Before you leave that, Marty, I think you may be a little unfair in saying there may be judges out there that do this because they are hostile to civil rights claims. Judges are overworked. The problem is they have to get the lawsuit over with. They see something come up, a typical broad claim, and they want to zero in and find out if there is anything really to this claim. And many judges would like to see a heightened pleading requirement with special kinds of claims that are easily pled. That has been done in the case of fraud. Qualified immunity is one area that is inflicted on the lower courts by a Supreme Court that says it wants summary judgment on qualified immunity as close to the filing of the complaint as possible; and the judges want to get to it.

PROFESSOR SCHWARTZ: The question then becomes, why single out § 1983 claims? That is how this got started.

JUDGE PRATT: It is fifteen percent of the docket.

PROFESSOR SCHWARTZ: The heightened pleading rule for 1983 claims started like a virus; one court did it, and a second court did it, and pretty soon all of the circuits in the country were doing it. These last two decisions attempt to put a stop to some of it.

JUDGE PRATT: Only because it works.

PROFESSOR SCHWARTZ: There was a decision last term in *Correctional Services Corporation v. Malesko*;¹²⁷ it is a *Bivens* case against a private entity that was alleged to be involved in federal government action.¹²⁸ There is an underlying issue here that never gets resolved, and that is whether a private prison entity is involved in government action for purposes of the Fifth and Fourteenth Amendments. Putting that aside, the holding in the case is that a *Bivens* claim cannot be asserted against an entity.¹²⁹ The Supreme

¹²⁷ 534 U.S. 61 (2001).

¹²⁸ *Id.* at 66.

¹²⁹ *Id.* at 61.

Court previously held that a *Bivens* claim could not be asserted against a government entity, and now the Court is holding that it cannot be asserted against any entity. When the *Bivens* claim exists, it is a remedy that lies only against the particular federal official.¹³⁰ What the Supreme Court said in *Malesko* was that the purpose of the *Bivens* doctrine is to deter constitutional violations by federal officials, not to provide a remedy against entities.¹³¹ I have to say, I find that a little disingenuous because I do not think that the Court has been particularly concerned about deterring constitutional violations by federal officials for a very long time.

I think we have a very dramatic turn of events under the *Bivens* doctrine. Initially, the Supreme Court held in the first three cases that came before it (*Bivens* being the first), that a claim could be asserted for violation of a federal right directly under the Constitution against a federal official.¹³² You cannot use § 1983 in

¹³⁰ *Id.* at 67-68. The Court has extended the holding in *Bivens* only twice in thirty years. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court extended *Bivens* to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct. The Court also extended *Bivens* to permit a plaintiff to pursue an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally. *Carlson v. Green*, 446 U.S. 14 (1980).

¹³¹ *Malesko*, 534 U.S. at 70.

¹³² *Bivens*, 403 U.S. 388, 397; *Davis*, 442 U.S. at 248; *Carlson*, 446 U.S. at 18.

these cases, so the choice is a *Bivens* remedy or no remedy at all. During the past almost twenty years, the Court has rejected every attempt by plaintiffs to assert a claim under the *Bivens* doctrine.¹³³

The award I would give for the understatement of the term is the Court's statement that since 1980, "our decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts,"¹³⁴ and "we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."¹³⁵ Cautious is really the understatement. The Court has found one reason or another to reject the *Bivens* claim for some very fundamental reasons, and it is a very different judicial philosophy that exists now as compared to the period in the 1970s and the early 1980s. At the time the *Bivens* doctrine was formulated, the Supreme Court stated that plaintiffs were entitled

¹³³ See *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining respondent's claim for damages based on claim of due process violation for denial of social security benefits); *Bush v. Lucas*, 462 U.S. 367 (1983) (declining to extend cause of action for damages for retaliatory demotion under employment relationship governed by the Civil Service Commission regulations). See also *Chappell v. Wallace*, 462 U.S. 296 (1983) (unanimously rejecting a *Bivens* claim for damages to enlisted military personnel for injuries caused by unconstitutional actions of superior officers).

¹³⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (quoting *Schweiker*, 487 U.S. at 421).

¹³⁵ *Id.* at 68.

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to money damages for violations of their constitutional rights.¹³⁶ Now the Court is saying the opposite. The Court is saying things like, this issue about remedies for constitutional violations is for Congress.¹³⁷ So, there is a separation of powers issue. I think we have come from a fairly strong presumption in favor of the *Bivens* doctrine to a fairly strong presumption against it.

PROFESSOR CHEMERINSKY: I agree with what you are saying. An example is the Court's continual willingness to assume that private prisons are state actors. You might remember a case called *Richardson v. McKnight*,¹³⁸ which dealt with whether private prison guards are entitled to qualified immunity. Justice Breyer's opinion assumes that private prisons are state actors.¹³⁹ The lower courts are going in that continual direction, saying that private prisons are performing a public function.¹⁴⁰

¹³⁶ *Bivens*, 403 U. S. at 397.

¹³⁷ See generally *Malesko*, 534 U.S. at 61; *Carlson*, 446 U.S. at 14.

¹³⁸ 521 U.S. 399 (1997).

¹³⁹ *Id.* at 406 (discussing the historical role played by private parties in administering correctional functions for the state which does not provide any conclusive evidence that private parties were entitled to immunity in performing prison management functions).

¹⁴⁰ See *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991); *Gabriel v. Corr. Corp. of Am.*, 211 F. Supp. 2d 132, 137-38 (D.D.C. 2002); *Blumel v. Mylander*, 919 F. Supp. 423, 426-27 (M.D. Fla. 1996).

The second point that I would make is that although the Court is continuing to narrow *Bivens*, it is not overruling or signaling an overruling of *Bivens*. The core of *Bivens* is that if a federal officer violates a constitutional right, there is generally a remedy available. That has not been overturned. Now what the Court says in *Malesko*, like it did in *FDIC v. Meyer*¹⁴¹ a few years earlier, is that you cannot bring a *Bivens* suit against an agency.¹⁴² In *Bush v. Lucas*¹⁴³ and *Schweiker v. Chilicky*,¹⁴⁴ the Court has said that if Congress has provided an alternative remedy, you do not have a *Bivens* scheme.¹⁴⁵ Although those are important narrowings, and I agree with you about what they reflect, it is important to emphasize that *Bivens* is still there and used every day whenever someone has a damage claim for a constitutional violation against a federal officer.

¹⁴¹ 510 U.S. 471 (1994).

¹⁴² *Malesko*, 534 U.S. at 68.

¹⁴³ 462 U.S. 367 (1983).

¹⁴⁴ 487 U.S. 412 (1988).

¹⁴⁵ See *Bush*, 462 U.S. at 392; *Schweiker*, 487 U.S. at 423.