1991

Section 1983 and the Parratt Doctrine after Zinermon v. Burch: Ensuring Due Process Rights or Turning the Fourteenth Amendment into a Font of Tort Law

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I. INTRODUCTION .................................................. 445

Section 1983 was one of six sections enacted as the Ku Klux Klan Act of 1871. Congress passed the statute during the post-Civil War Reconstruction era. Despite the earlier enactment of the Fourteenth Amendment, southern states were still reluctant to safeguard the newly-granted rights of black citizens. In fact, many states passed "Black Codes" that largely ignored the liberated status of blacks. The Ku Klux Klan itself was often free to terrorize black citizens while law enforcement officials

* The author wishes to dedicate this Note to the memory of Carol Ann and Donald Robert Wingenfeld.


The Act provides that:

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

Section 1983.
in many parts of the South did little to discourage, and often encouraged, such activities.\(^2\)

The major purpose of section 1983 was to guarantee the protections of the Fourteenth Amendment. It was intended by Congress to "interpose the federal courts between the States and the people, as guardians of the people's federal rights" in order to compensate for any lack of state and local law enforcement in safeguarding Fourteenth Amendment guarantees.\(^3\) In "throw[ing] open the doors of the United States courts" to those wrongfully injured under the color of state law, "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights."\(^4\)

Although the enactment of section 1983 initially provided hope for blacks and other citizens, the statute had little effect until the civil rights movement of the 1960s.\(^5\) A major reason for this ineffectiveness was the narrow construction generally given by the Supreme Court during this time to the Fourteenth Amendment's Due Process Clause.\(^6\) Likewise, protection under the statute was only afforded to victims of direct state action that stemmed from legislation which overtly deprived citizens of constitutional rights.\(^7\)

The Due Process Clause of the Fourteenth Amendment requires that a state must provide a person with a fair opportunity to be heard before the state can deprive him of a [life, liberty or property] right.\(^8\) However, under certain circumstances, the Supreme Court has allowed a state to deprive a person of such rights without providing a predeprivation hearing. The Court has recognized the need for summary seizure of property without any predeprivation hearing when unwholesome food threatened the public health,\(^9\) when incompetent bank management threatened eco-


\(^{4}\) 457 U.S. at 504.

\(^{5}\) See Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486, 1486 n.4 (1969) (U.S.C.A. notes only 19 decisions under section 1983 in its first 65 years). Monroe was the first time the Court evaluated the civil remedy available under section 1983 after 80 years as law. Id. at 1487.

\(^{6}\) See, e.g., The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (implicitly rejecting the application of the Bill of Rights to the states under the Fourteenth Amendment).

\(^{7}\) See Harv. Note, supra note 2, at 1156-69 (discussing the Fourteenth Amendment's narrow scope, including the doctrine that section 1983 only reached conduct of state officials and not of private persons).

\(^{8}\) "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1854)). See also Goldberg v. Kelly, 397 U.S. 254, 266-67 (1970) (predeprivation hearing required before terminating welfare benefits); Sniadich v. Family Fin. Corp., 395 U.S. 337, 339 (1969) (predeprivation hearing required unless situation is extraordinary).

nomic harm\(^{10}\) and when mislabelled drugs threatened the consumer-at-large.\(^ {11}\)

The recognition by the Court that the procedural due process guarantee of the Fourteenth Amendment is flexible and not subject to hard and fast rules was formally developed in the decision of *Mathews v. Eldridge*.\(^ {12}\) In fact, however, the Court has delivered variable, and often-times contradictory, opinions in the area of procedural due process. In *Fuentes v. Shevin*\(^ {13}\) the Supreme Court rejected the proposition that a state may cure a wrongful deprivation by providing the injured party with an adequate post-deprivation hearing.\(^ {14}\) But, in 1974, just two years after *Fuentes*, the Court greatly expanded the scope of allowable post-deprivation hearings. In *Mitchell v. W.T. Grant Co.*,\(^ {15}\) the Court upheld a Louisiana statute which authorized summary prejudgment writs of sequestration ordering the seizure and holding of property.\(^ {16}\) In essence, the Court in *Mitchell* discounted the interests of a debtor in a predeprivation hearing which it had earlier recognized in *Fuentes*.\(^ {17}\) Louisiana's interest in protecting creditors and preventing property waste, along with its ability to rectify any resulting damage, was deemed sufficient to warrant no predeprivation hearing, and yet still satisfy procedural due process.\(^ {18}\)

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12 424 U.S. 319 (1975). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). To determine what procedural protections the Constitution requires in a particular case, the *Mathews* test weighed several factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

13 407 U.S. 67 (1972). *Fuentes* involved a prejudgment replevin statute that allowed creditors to obtain a writ to seize property in an *ex parte* hearing. *Id.* at 69. The Supreme Court held that the statute violated due process because the debtor was not given a predeprivation hearing. *Id.* at 83-84. The Court announced the general rule that a state must provide a predeprivation hearing before it can take property unless there is an extraordinary situation in which "some valid government interest is at stake that justifies postponing the hearing until after the event." *Id.* at 82 (quoting Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971)).

14 *Fuentes*, 407 U.S. at 82. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972)).

16 *Id.* at 619.
17 See supra note 13 and accompanying text.
18 *Mitchell*, 416 U.S. at 618-19. "Here, the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss. Our conclusion is that the Louisiana standards . . . are constitutional." *Id.* But see North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975) (Court held
The Supreme Court's changing position on procedural due process rights also extends to its application of section 1983 in safeguarding Fourteenth Amendment guarantees. Over the last thirty years, the Court has decided a number of cases which illustrate an on-going struggle to find the proper place for section 1983 in the federal court system and, consequently, what ultimately qualifies as adequate procedural due process within the context of the statute.

This note will examine the history of Court decisions involving section 1983 in order to provide the proper background for examining the Court's most recent decision in Zinermon v. Burch, a case which itself has added to an already confusing field of legal study. Within this historical background, however, the Court has actually provided many of the analytical tools necessary to address and solve the theoretical and practical problems presented by section 1983 in procedural due process jurisprudence today. This note will endeavor to use these tools to construct a framework for recognizing the proper scope of section 1983 in guaranteeing due process protections. Finally, this note will examine the direction that the Supreme Court may take in the future with regards to section 1983. Special attention will be paid to the new composition of the Court, as well as to the viewpoints of its individual members.

II. THE EFFECT OF MONROE V. PAPE ON SECTION 1983

The summary seizure exception recognized by the Supreme Court in Mitchell involved circumstances in which the deprivation took place pursuant to authorized, established state procedures intended for the public good. This was still a narrow exception to the Court's general requirement that states must provide predeprivation process under the Due Process Clause of the Fourteenth Amendment. that garnishment of bank account could not be performed without prior hearing because predeprivation safeguards were not adequate; see also Sniadich v. Family Fin. Corp., 395 U.S. 337 (1969) (wages could not be garnished without notice and predeprivation hearing).


21 See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) "(the 'root requirement' of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest'"; hearing required before termination of employment (emphasis in original)).
It was not until after 1961 that a similar exception was recognized for wrongful deprivations caused by unauthorized and random acts of state officials where the state could provide adequate postdeprivation remedies. This change occurred with the 1961 Supreme Court decision, *Monroe v. Pape*. In *Monroe*, the Court rejected the distinction between authorized and unauthorized acts in section 1983 suits, holding that either could support a cause of action. Although *Monroe* did not involve a procedural due process issue per se, many lower courts later applied the Court analysis in such a manner.

*Monroe*’s broad construction of section 1983’s key phrase “under color of any [state] law” to cover even acts by state officers committed without state authorization provided new strength to the once-ineffective statute. Since the vast majority of civil rights violations are caused by officers or officials who act contrary, not only to the Constitution, but also to official state law or policy, the Court in *Monroe* reasoned that few violations would be remedied by an interpretation of section 1983 which reached only “official” deprivations. Instead, the Supreme Court ruled that section 1983 was intended to include the conduct of government officials acting without state approval and in contradiction to established law, custom and practice.

In *Monroe*, the officers had no authority under state law to enter the plaintiffs’ home without a warrant, assault the occupants, and destroy their property in the course of an illegal search. Their actions clearly violated official state law and policy. In determining that section 1983 was intended to remedy such unauthorized violations, the Court freed the statute from its prior narrow requirement that predeprivation vio-

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24 Id. at 184.
25 *Monroe* involved a Fourth Amendment claim of illegal search and seizure. Id. at 169. The complaint in *Monroe* alleged that thirteen Chicago policemen broke into the plaintiffs’ home and made them stand naked in their living room while the policemen ransacked the house. Id.
26 See, e.g., Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975) (conversion of prisoner’s radio); Kimbrough v. O’Neil, 523 F.2d 1057, 1059 (7th Cir. 1975) (prisoner’s ring not returned to prisoner after release from jail).
27 *Monroe*, 365 U.S. at 187; see infra note 32 and accompanying text. Justice Frankfurter argued instead for a limited construction of “under color of law” that would include only acts that were actually authorized by state law or custom, id. at 246 (Frankfurter, J., dissenting), or for which the state refused to provide a remedy. Id. at 242-43.
28 See supra note 7 and accompanying text. In many cases, there is “no quarrel with the state laws on the books.” Instead, the problem is the way those laws are or are not implemented by state officials in their daily routine. *Monroe*, 365 U.S. at 176.
lations had to stem from officially promulgated state law or policy.\(^{30}\) Strengthened by the Court's interpretation to impose federal civil liability for any "misuse of state power"\(^{31}\) that deprives a person of federally protected rights, regardless of the state's ability or willingness to redress such wrongs, section 1983 claims rose dramatically following the 1961 *Monroe* decision.\(^{32}\)

In *Monroe*, the Supreme Court also refused to require exhaustion of state judicial remedies as a precondition for bringing suit under section 1983.\(^{33}\) If a plaintiff was deprived of a constitutional right, the existence of a state remedy was irrelevant.\(^{34}\) The Court interpreted the intent of Congress in enacting section 1983 as providing a supplementary federal cause of action for violations of rights committed under color of state law.\(^{35}\)

In the immediate aftermath of *Monroe*, the Court also resolved important related issues regarding the statute's coverage in a manner that likewise provided wider access to the federal court system. The Supreme Court gave a broad reading to the concepts of state action and color of state law,\(^{36}\) ruled that property as well as liberty interests were protected by section 1983,\(^{37}\) and provided only limited immunities for individual

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\(^{31}\) *Monroe*, 365 U.S. at 184 (quoting United States v. Classics, 313 U.S. 299, 326 (1941)).


\(^{33}\) The Court in *Monroe* emphatically stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183. *See also Patsy*, 457 U.S. at 506-16 (affirming the *Monroe* stance that, except for a few narrow exceptions, with few exceptions, the exhaustion of state remedies is not a prerequisite to action under section 1983).

\(^{34}\) *Monroe*, 365 U.S. at 183.

\(^{35}\) See *id.* at 174-75. In an earlier decision, the Court established that intentional conduct by state officials which violated the due process protections of the Fourteenth Amendment was actionable in federal court regardless of the existence of state remedies. Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913).

\(^{36}\) *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (holding that a white plaintiff, who was denied service because she was in the company of a group of blacks, could obtain redress under section 1983 by showing that the existence of state-enforced segregationist policies motivated the defendant).

\(^{37}\) *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (recognizing that "rights in property are basic civil rights" protected by section 1983).
defendants. Later, the Court re-affirmed its ruling in *Monroe* that exhaus- tion of state remedies was not required before a section 1983 action could be commenced. Combined with the Court's expansion of substantive constitutional protections, section 1983 become the statute of choice for the litigation of constitutional tort actions.

Nevertheless, in the years that followed the *Monroe* decision, legal scholars began to appreciate its widespread ramifications. The opening of the federal courts to a flood of section 1983 actions raised practical and theoretical concerns as to the proper use of the statute. For thirty years since its watershed decision of *Monroe*, the Supreme Court and the lower federal courts have struggled with the doctrinal, political and institutional consequences of the resurrection of section 1983.

### III. POST-MONROE EFFORTS TO LIMIT SECTION 1983

#### A. Monell v. New York Department of Social Services

Ironically, one of the Supreme Court's first reconsiderations of *Monroe* and its impact on section 1983 actually expanded the scope of the statute's reach. In *Monell v. New York Department of Social Services*, the Court in 1978 overruled that part of *Monroe* which held that municipalities were not subject to suit under section 1983. Based on a fresh look at the legislative history of section 1983, the Court held that municipalities were indeed proper defendants in section 1983 cases. Along with *Monroe*,

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38 See, e.g., Pierson v. Ray, 386 U.S. 547, 553-57 (1967) (holding that judges are immune from liability stemming from unconstitutional acts committed within their judicial discretion, and that police officers who make a false arrest are likewise immune if the arrest was executed with good faith and probable cause), modified, Harlow v. Fitzgerald, 457 U.S. 800 (1982).
39 See supra note 33 and accompanying text.
41 See supra note 32.
42 See, e.g., Zagrans, supra note 2.
43 Up to the present time, the members of the Supreme Court have been and are still deeply divided on the proper interpretation of what scope to give section 1983 in the federal court system. See supra text accompanying note 24; see infra text accompanying notes 50, 81, 104, 152-54, and 175-79.
44 436 U.S. 658 (1978). *Monell* stands as a classic example of a municipal policy which caused a constitutional violation. At issue in the case was an officially promulgated city policy compelled pregnant municipal employees to take unpaid leaves of absence before such leaves were medically necessary. *Id.* at 660-61.
45 *Id.* at 663. The Court in *Monell* found that the 42nd Congress intended to include local government units among "persons" subject to section 1983 liability. *Id.* at 690.
46 *Monell*, 436 U.S. at 655, 690.
the *Monell* decision continued to transform section 1983 into a potent remedy against state, and now local, government abuse of Fourteenth Amendment guarantees.47

Nevertheless, even though *Monell* generally expanded the reach of section 1983, the Court placed limits on the interpretation of municipal government liability that are very important for analysis and understanding of proposed constrictions on the overall reach of section 1983. In *Monell*, the Court reasoned that cities and counties could be sued for damages or for declaratory or injunctive relief only if “the action that is alleged to be unconstitutional implements or executes” official government policy.48 Local governments would not be liable for damages if the official's act violated the governmental policies of the city or county.49

This reasoning is directly at odds with the Court's ruling in *Monroe*. In fact, the Court in *Monell* adopts the very limitation on municipal liability for section 1983 actions that Justice Frankfurter, in his *Monroe* dissent, had advocated to be applied to all government-level liability.50

In *Monell*, the Court made the distinction between authorized and unauthorized conduct as the appropriate boundary for local government liability,51 whereas the *Monroe* holding rejected that line as the proper limit for liability.52 In subjecting local governments to a different standard of liability, the Court was showing the first signs of inconsistency in its determination of section 1983 liability.53

By also rejecting respondent superior liability,54 the Court in *Monell* effectively limited section 1983 municipal liability to situations in which the wrongful activity could be attributed to the employer rather than the employee. In other words, the employer must be identified as the one who promulgates the decisions and policies of the municipalities that were followed by the employee.55 The deprivation of Fourteenth Amendment guarantees must have “unquestionably involved official policy as the moving force of the . . . violation.”56 Without indicating whether it was basing its conclusion on the existence of a state or local regulation, or on an administrator’s exercise of discretion, or on both, the Court in *Monell* determined that the unconstitutional, mandatory maternity leaves forced upon the plaintiffs were unquestionably a matter of official policy.57

47 *Monell*, however, has been criticized by some for construing municipal liability too narrowly. Some jurists and scholars argue that section 1983 would be more effective if the Supreme Court had allowed municipalities to be held liable on a respondent superior theory. See, e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting).

48 *Monell*, 436 U.S. at 690.

49 Id.


51 *Monell*, 436 U.S. 658.


53 See infra note 138-39 and accompanying text.

54 See supra note 47.

55 *Monell*, 436 U.S. at 695.

56 Id. at 694.

Court did say, however, that municipal policy could be inferred from the acts of officials with delegated policy-making authority. In addition, activities by low-level employees acting pursuant to the customs of local government may also implicate the government. However, the Monell Court provided little clarification on the meaning of "custom" aside from implying that liability may result from the control or direction of employees by a government employer, or from its failure to supervise them.

Thus, after Monell, a local government may be implicated in a section 1983 action by showing a breach of duty by policy-making officials or by persons acting through delegated authority. As will be discussed later in this Note, the notion of when acts of government officials are authorized has become the central focus of the Supreme Court in determining section 1983 liability. The Monell decision provides a framework that the Court can use to determine when acts are authorized through the basic principle that a local government may be liable under the statute only if it had knowledge or constructive knowledge of its agent's wrongdoing. According to the Court in Monell, a municipality with such knowledge "causes" the wrongdoing by ordering it, condoning it, or failing in its duty to prevent or contain the wrongdoing. Knowledge may also be imputed if low-level employees take action that the municipality had a responsibility to control or supervise.

However, Monell leaves some gaps in its theory of municipal liability, and ultimately, in providing an air-tight solution for determining section 1983 liability on all government levels. Beyond sketching basic principles, the Court deferred to the lower courts the task of shaping the contours of municipal liability. For example, the Court did not make clear who in fact is a policymaking official, or when a policymaker has delegated his authority to another. Even less clear are the parameters of "custom," under which a municipality may be liable for the acts of its low-level employees.

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58 Monell, 436 U.S. at 694. The Court stated that the execution of policy or custom may be accomplished by "it's lawmakers or those whose edicts or acts may fairly be said to represent official policy." Id.

59 The Court noted that it had "appeared to decide" in Rizzo v. Goode, 423 U.S. 362 (1976) that, "the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support section 1983 liability." Monell, 436 U.S. at 694 n.58.

60 See infra text accompanying notes 167-70.

61 Monell, 436 U.S. at 669. See also Tuttle, 471 U.S. at 818-24.

62 Monell, 436 U.S. at 690.

63 Id.

64 Id. at 694.

65 Id. at 691.

66 The Court in Monell found that an unconstitutional policy existed, and, therefore, did not have to address "what the full contours of municipal liability under Section 1983 may be." Id. at 696. Subsequent decisions have added little
The Supreme Court's efforts to curtail the use of the Due Process Clause as a tool for bringing common law tort actions under section 1983 actually began with its widely-criticized decision of Paul v. Davis in 1976.\(^6\) Along with the subsequent decisions of Ingraham v. Wright\(^6\) and Parratt v. Taylor,\(^6\) the Court sought to limit section 1983 access to the federal courts by promoting the availability of an adequate state tort remedy as a satisfactory alternative.\(^7\) Taken together, these cases provide the Court's reasoning as to why the state remedy should control access to section 1983 actions. Such control ultimately is based not on the grounds that all state remedies must be exhausted before a federal action under section 1983 can be pursued, a holding which would require overruling Monroe,\(^7\) but rather that the state remedy itself provides all "that process which is due."\(^7\)


\(^7\) 430 U.S. 651 (1977).

\(^7\) The Due Process Clause of the Fourteenth Amendment protects individuals from being deprived by state action of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1. State law often determines which interests are protected "liberty" or "property". See, e.g., Vitek v. Jones, 445 U.S. 480 (1980) (transfer of state prisoner to mental hospital); Merchum v. Faro, 427 U.S. 215, reh'g denied, 429 U.S. 873 (1976) (transfer of state prisoner to maximum security facility); Bishop v. Wood, 426 U.S. 341 (1976) (dismissal of city policy officer); Board of Regents v. Roth, 408 U.S. 564 (1972) (dismissal of teacher by state university). In each of these cases, state law protected certain interests with a tort remedy. Consequently, the presence of a state tort remedy may actually be an implicit factor in determining the very existence of a constitutionally protected right. See Henry Paul Monaghan, Of "Liberty" and "Property", 62 CORNELL L. REV. 405 (1977); Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 CALIF. L. REV. 146 (1983); Rodney A. Smolla, The Re-Emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 STAN. L. REV. 69 (1982). But see Baker v. McCollan, 443 U.S. 137 (1979) (wrongful imprisonment of an innocent man for three days does not violate the Fourteenth Amendment, even though a false imprisonment claim is available under state law); Paul v. Davis, 424 U.S. 693 (1976) (reputation alone is not a "liberty" or "property" interest within the meaning of the Fourteenth Amendment, even though a state defamation action may lie).

\(^7\) See supra note 33. A holding that an adequate state remedy precludes section 1983 action where otherwise available would overrule the exhaustion doctrine as stated under Monroe and Patsy.

\(^7\) This phrase was attributed to Professor Ward's "irrefutable definition of due process." Justice Lewis Powell, Bernard J. Ward, 61 TEX. L. REV. 1, 2 (1982).
Although the Court's scholarship in Paul was subject to sharp criticism, the holding of Paul has not only survived, but has flourished. Its influences continue to weigh heavily in the Court's due process jurisprudence. Paul presented an action for equitable and monetary relief brought by a Louisville newspaper photographer (Edward Davis) against the police chiefs of Louisville and Jefferson counties in Kentucky. Davis' name and picture had been circulated among local merchants by the police in a flyer that purported to identify "active shoplifters". Although the plaintiff had been arrested and charged with shoplifting, charges were subsequently dropped. Davis chose not to pursue available state tort remedies, but instead brought suit in federal court under section 1983. Davis claimed that the flyer branded him a criminal without the benefit of a trial, depriving him of his reputation, and thereby depriving him of "liberty or property" without due process of law.

The Supreme Court ruled in Paul that mere defamation by state officials was not a deprivation of a constitutionally protected interest. The Court rejected the argument that any act by a state official which might give rise to a state tort action necessarily implicated Fourteenth Amendment rights. The Court also implied that the existence of a state remedy for the resulting harm might avoid a due process violation.

Led by Justice Rehnquist, the majority in Paul did not believe that every common law tort committed by a state official would automatically
be transformed into a cause of action under section 1983 and the Due Process Clause.\textsuperscript{81} Davis' complaint, Justice Rehnquist noted, would have been "nothing more than a claim for defamation under state law" if it would have implicated a private party rather than a public official.\textsuperscript{82}

Justice Rehnquist believed the real issue is whether the Due Process Clause "should \textit{ex proprio vigore} extend to him [the plaintiff] a right to be free of injury wherever the State may be characterized as the tortfeasor."\textsuperscript{83} According to Justice Rehnquist, all torts committed by state officials are not violations of the Due Process Clause, for such reasoning would, in his words:

[M]ake of the Fourteenth Amendment a \textit{font of tort law} to be superimposed upon whatever system may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law . . .; \textit{a fortiori}, the procedural guarantees of the Due Process Clause cannot be the source for such law.\textsuperscript{84}

Despite Justice Rehnquist's attempts to separate constitutional violations from common law tort infractions, the principal outcome of \textit{Paul} is its focus on adequacy of state remedies. As will be expanded upon later in this Note, distinguishing between constitutional infractions and state common law torts is viewed by many as dangerous and likely to cut into substantive fundamental rights protected by the Due Process Clause.\textsuperscript{85} In addition, excluding procedural due process guarantees as a source of section 1983 actions without proper consideration of the adequacy of state remedies runs the risk of deprivation of liberty or property interests without sufficient available process provided at any court level.\textsuperscript{86}

In the final analysis, the result of \textit{Paul} was not justified by the reason Justice Rehnquist gave (i.e., that Kentucky law did not have to provide constitutional protection to Davis' reputation), but rather by precisely the opposite. Since Kentucky law did safeguard the reputation of Davis with tort law remedies at the state level, Kentucky had not violated the Due Process Clause. This distinction was to be elaborated upon by the Court in its next major case in this area of the law.

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\textsuperscript{82} \textit{Paul}, 424 U.S. at 698.

\textsuperscript{83} \textit{Id.} at 701.

\textsuperscript{84} \textit{Id.} (citing Griffen v. Breckenridge, 403 U.S. 88, 101-02 (1971) (emphasis added)).

\textsuperscript{85} See infra notes 130-33, 149 and 172, and accompanying text.

\textsuperscript{86} See infra text accompanying notes 134, 149.
DUE PROCESS AFTER ZINERMON

C. Ingraham v. Wright

Ingraham v. Wright\(^8\) was a class action brought on behalf of junior high school students in Florida who, without notice or an opportunity for prior hearing, were severely paddled by public school officials for alleged disciplinary violations. The students claimed they had been denied liberty interests without due process.\(^8\) The Supreme Court ruled that the state's deprivation of the protected liberty interests of the students had not been performed without due process of law since a postdeprivation damage action under state law was available for excessive or unjustified corporal punishment.\(^8\)

As was true in the facts of Paul, a state remedial scheme existed in Ingraham which provided redress for the harm that formed the basis of the alleged due process violation.\(^9\) The Court in Ingraham, however, avoided the controversy surrounding its Paul decision. In contrast to the ruling of Paul, rather than deny the existence of a constitutional issue as a way of avoiding a section 1983 claim, the Court in Ingraham conceded that the physical restraint and administration of corporal punishment to a student constituted an invasion of a constitutional liberty interest by the state which triggered appropriate analysis under the Due Process Clause.\(^9\) Nevertheless, despite the existence of a recognized liberty interest, the Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common law constraints and remedies.\(^9\)

Ingraham is important to the development of postdeprivation due process for two reasons. First, unlike the reputation issue at stake in Paul, (an interest lacking federal content, but created instead by state law),

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\(^8\) 430 U.S. 651 (1977).

\(^8\) The relevant state statute provided that corporal punishment be administered only after consultation with the principal or teacher in charge of the school, and punishment proscribed that was not “degrading or unduly severed.” Id. at 655 n.6. A local school board regulation additionally specified:

\ldots that the principal should determine the necessity for corporal punishment, that the student should understand the seriousness of the offense and the reason for the punishment, and that the punishment should be administered in the presence of another adult in circumstances not calculated to hold the student up to shame or ridicule.

Id. at 656 n.7.

\(^9\) Id. at 677. The Court also relied on “the common law privilege permitting teachers to inflict reasonable corporal punishment on children in their care” and, to a lesser extent, on the availability of criminal penalties for malicious punishment of school children. Ingraham, 430 U.S. at 674-77.

\(^9\) Florida's remedial structure included civil actions for damages if punishment is excessive, as well as criminal sanctions if malice is shown. Id. at 677 n.46.

\(^9\) “It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.” Id. at 674, (citing Rochin v. California, 342 U.S. 165 (1952)).

the liberty interest at stake in *Ingraham* (the right to be free of physical restraint and punishment) is unquestionably constitutional. The decision in *Ingraham* thus made it clear that state common law remedies could serve as an adequate replacement for due process safeguards even when constitutional rights in property or liberty are at stake. 93 Secondly, the legal challenge in *Ingraham*, unlike *Paul*, did not concern an isolated instance of misconduct by a few officials, but rather dealt with Florida’s entire school disciplinary system. Nevertheless, the Court in *Ingraham* still reasoned that an entire state program that repeatedly and systematically placed school officials in a position where they could deprive constitutional liberties if they acted unreasonably was nonetheless effectively outside the reach of section 1983 action as long as the state included within such disciplinary program its own adequate remedial structure. 94

This reasoning would come under attack in later Supreme Court cases. Jurists such as Justice Blackmun now contend that such a state program results in deprivations that are not unauthorized and not random, but are intentional and rooted in a procedure sanctioned by state law itself. 95 This kind of deprivation is arguably well within the Court’s guidelines

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93 Smolla, *supra* note 81 at 847. *But see Ingraham*, 430 U.S. at 695-96 (White, J., dissenting) (a post-beating damage remedy merely provides compensation, but cannot vitiate the harm caused by the violation, which is “final and irreparable” upon infliction). *See also supra* note 14.

94 Smolla, *supra* note 81 at 848 (citing 430 U.S. at 676-77). Oddly, Justice Blackmun joined the majority opinion in *Ingraham*, a position directly in conflict with his later stance in *Zinermon*, 110 S. Ct. 975. In *Zinermon*, he wrote that postdeprivation remedies offered by the state are not all the process that can be expected where the state has delegated broad, discretionary authority to its officials. *Id.* The Court in *Ingraham* cited Paul Monaghan’s article on the effect of state remedies in limiting section 1983 actions. *See Ingraham*, 430 U.S. at 679 n. 47; Monaghan, *supra* note 70. Monaghan had written that:

>Prior hearings might well be dispensed with in many circumstances in which the state’s conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured party in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the Fourteenth Amendment encompasses the same liberties as those protected by the common law.

Monaghan, *supra* note 70, at 451. *But see supra* note 93. The question of whether postdeprivation remedies are adequate to make the plaintiff whole, however, can also be appropriately addressed in terms of the hardship placed upon the plaintiff while waiting for the remedy. In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), for example, the Court found that predeprivation process was necessary prior to termination of public utility service because the termination of services for any appreciable period of time created an unduly severe hardship on the recipient. *See also* Irene Marker Rosenberg, *Ingraham v. Wright: The Supreme Court’s Whipping Boy*, 78 COLUM. L. REV. 75, 91 (1978) (the postdeprivation due process concept should not be applied to interest in “liberty”, but is appropriate only for deprivations of property since property can be restored or valued, making the plaintiff whole, whereas interest in “liberty”, once taken, are gone forever).

95 *See infra* note 163 and accompanying text; *but see infra* text accompanying notes 147-49.
under Monell for determining when conduct is authorized by the state. In addition, as a collateral attack on the holding in Ingraham, a post-beating damage remedy merely provides compensation. Such remedies are criticized as incapable of undoing the harm caused by the deprivation, which is "final and irreparable" upon infliction.

At the time its decision was announced, the holding in Ingraham was consistent with the Court's general movement in procedural due process cases toward initial deference to the states in establishing procedural safeguards for the entitlements that they created. This movement, however, clashed with the Court's earlier decision in Monroe which had established a broader scope for section 1983 actions and a greater role for the federal courts in guaranteeing procedural due process. Consequently, Ingraham placed federal law in a back-up role for guaranteeing due process protections, a role which is still debated at the present time. This movement toward deference to state procedures and remedies reached its zenith with the Supreme Court's decision in Parratt v. Taylor.

IV. THE PARRATT DOCTRINE

A. Parratt v. Taylor

After Monroe, thousands of section 1983 actions were brought under the Due Process Clause of the Fourteenth Amendment. A principle theory subsequently developed to limit these federal court actions reasoned that not every injury to a person's life, liberty or property caused by a government employee is a deprivation without due process of law. Instead, some of these injuries are simply state torts that raise no federal question under section 1983. As noted earlier, this theory had its ev-

See supra notes 49-65 and accompanying text.

See supra note 93.

See, e.g., Connecticut Bd. of Pardons v. Dumshat, 452 U.S. 458 (1981); Paul v. Davis, 424 U.S. 693 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972). Professor Whitman has argued that state decisionmakers be permitted to develop their own protections for civil liberties, noting that the costs of federalizing all common law torts committed by state officers would mean the replacement of common law processes with a process that is less democratic and less flexible. Perhaps even more significant, there might also be a loss of substantive contributions by state lawmakers in the creation and maintenance of entitlements that would be accorded recognition as property and liberty interests. Christina Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 30-40 (1979).


See supra note 32.

Concurring in Monroe, Justice Harlan observed that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Monroe, 365 U.S. 167, at 196 (Harlan, J., concurring). Courts and scholars have long struggled to distinguish the constitutional tort action, worthy of a federal forum, from the common law tort action, which is couched in constitutional terms simply because the defendant is a government actor. See, e.g., Whitman, supra note 98, at 14-25; Michael Wells & Thomas A. Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga. L. Rev. 201 (1984).
olutionary roots in the Court's earlier decisions in *Paul* and *Ingraham*. On the heels of these two cases, *Parratt v. Taylor* become the Supreme Court's most ambitious attempt yet to limit section 1983 actions. In *Parratt*, the Court attempted to provide a clear, workable test for distinguishing due process violations remediable under section 1983 from common law torts confined to state remedies.

Ironically, the injury in *Parratt* was rather insignificant. Bert Taylor, an inmate at a Nebraska prison, brought a section 1983 suit to recover $23.50 worth of hobby materials. Taylor alleged that his mail-order hobby kit was lost by two employees working in the prison mail center. The Supreme Court took this case as an opportunity to consider "what process is due a person when an employee of a state negligently takes his property." In writing the Court's opinion, Justice Rehnquist conceded that the state employee had acted under color of state law, thus agreeing, at least superficially, with *Monroe*’s broad definition of what conduct fell "under color of state law.”

The Court nevertheless upheld the taking of property without predeprivation process as not falling under the scope of section 1983 liability, reasoning that:

The [prior] justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random

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102 See supra text accompanying notes 67-69.
104 Id. at 543-44.
105 Id. at 529. Taylor claimed that his property was negligently lost in violation of his rights under the Fourteenth Amendment. The federal court had jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) (1988) [hereinafter section 1343], which provides in part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens of all persons within the jurisdiction of the United States.

Section 1343. Section 1343 contains no minimum dollar amount for federal jurisdiction. Id.
106 *Parratt*, 451 U.S. at 530. One of the employees was a civilian, the other an inmate. The normal procedure for handling mail, which required that the addressee sign for the package upon its arrival, was not followed in this case. Id.
107 Id. at 537. The Supreme Court partially overruled *Parratt* in 1985, holding that the “Due Process Clause [of the Fourteenth Amendment] is simply not implicated by a negligent act of [a state] official causing unintended loss of or injury to life, liberty or property.” Daniels v. Williams, 474 U.S. 327, 328 (1985).
and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the state cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. 109

In Parratt, the Court drew a Monell-type distinction between the random and unauthorized acts of the government employees who caused the deprivation and the government entity itself. 110 The government entity had no notice that the deprivation would occur in a case such as Parratt.

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109 Id. at 541. For a list of prior justifications which Justice Rehnquist noted, see supra note 20. The Court characterized plaintiff's suit as a claim of deprivation of procedural, as opposed to substantive, due process. Parratt, 451 U.S. at 537. "In particular, we must decide whether the tort remedies which the state of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." Id. There is ample room for debate on this point. The plaintiff alleged in his own pleading that "his property [had been] negligently lost by prison officials in violation of his rights under the Fourteenth Amendment" and that he had "been deprived of property without due process of law." Id. at 529. It is debatable whether his complaint was directed solely at the failure to provide adequate procedures before the wrongful deprivation. The complaint arguably is directed at the wrongfulness of the taking itself. See, e.g., Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 YALE L.J. 71, 100 (1984). If the case had instead focused on the deprivation of property, the issue then would not be whether a hearing was feasible, but whether the processes in place for receipt and delivery of mail were inadequate, and whether the inadequacy caused the deprivation. Parratt does not bar a claim in which the "procedures themselves [were] inadequate." Parratt, 451 U.S. at 543.

110 The Court in Parratt actually distinguished between deprivations that occur as a result of a "random and unauthorized act by a state employee" and those that are "a result of some established state procedure" and thus within the control of the state. Parratt, 451 U.S. at 541. Many commentators have noted that this distinction between the government and the government's official is a departure from precedent regarding state action. See, e.g., Daniel L. Buckett, Comment, Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right, 43 U. PITT. L. REV. 1035 (1982); Edward B. Foley, Note, Unauthorized Conduct of State Officials Under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrines, 85 COLUM. L. REV. 837 (1985). Both of these commentators contend that such a holding, in which a state official is not acting on behalf of the state and is not involving the state in unconstitutional activity whenever the official himself is violating state law, would require overruling years of precedent beginning with Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278, 283-84, 287 (1913). This case held that a state court decision as to the legality of the challenged conduct under state law is not necessary before the conduct be considered state action within the meaning of the Fourteenth Amendment. See Buckett, supra at 1081-82; Foley, supra at 845-46. The distinction of Parratt is also fundamentally at odds with the holding in Monroe that action "under color...
and thus could not conduct a hearing prior to the deprivation. 111 The
government's first possible chance to provide a hearing arose only after
the deprivation occurred. 112 Therefore, the provision for a postdeprivation
hearing was all the process that could be expected of the state, and all
the Due Process Clause of the Fourteenth Amendment could require. 113
In cases such as Parratt, there is no constitutional violation since all the
process that can be expected has been provided. There is instead merely
an infraction of state tort law by a state prison guard that can be remedied
in the state courts. 114 The Supreme Court in Parratt arrives at this con-
clusion by clarifying what constitutes the deprivation of a protected con-
stitutional interest. 115 The Court reasons that such deprivation is not
complete until accomplished without due process of law. 116

Under traditional due process analysis, an individual’s procedural due
process rights are violated when he or she is denied the opportunity to
protect an interest in life, liberty or property before the government action
occurred which impaired that protected interest. 117 For example, when
the government interferes with a person's First Amendment right to
speak or associate, the violation occurs at the time of the interference,
regardless of the state’s willingness to later pay damages to the wronged
individual. 118 However, a procedural due process violation of the kind
which occurred in Parratt takes longer to be completed. If a state agent,
without the authority or duty to conduct a hearing, deprives an individual
of a constitutional liberty or property interest, this depriving action is
not the final action of the State. 119 The state or local government is given
an opportunity to provide due process following the deprivation. Only
when the government fails to so provide is due process then violated. 120

of law” includes action not authorized by the law. Monroe, 365 U.S. at 184. Yet,
Parratt expressly found that the defendant's pleadings satisfied Monroe's color of
law requirement of section 1983. Parratt, 451 U.S. at 536. However, it frequently
has been observed that Parratt, by excluding from federal court those deprivations
which were contrary to state law where an adequate remedy exists, actually comes
closer to adopting Justice Frankfurter’s dissent in Monroe, 365 U.S. at 235-36
(Frankfurter, J., dissenting), in which he argued that only acts pursuant to state
law, custom, or usage should be considered to be under color of law. See infra text
accompanying notes 126-29.

111 Parratt, 451 U.S. at 541.
112 Id.
113 Id. at 539.
114 Id. at 544.
115 Id. at 537, 543-44.
116 The Supreme Court also suggests that the burden on the federal courts could
have been somewhat relieved had Congress added a minimum dollar limitation
on section 1343, the predicate for federal court jurisdiction in this matter. Parratt,
451 U.S. at 529.
117 Exceptions to this rule were noted by the Court in its past decisions for
emergency or public health cases, specific replevin actions and for certain property
rights. Parratt, 451 U.S. at 538-40. See also supra notes 9-11, 20.
119 A hearing is just one example of the kind of due process the government
may be required to provide. See supra note 109.
120 Parratt, 451 U.S. at 541.
The ruling of Parratt, in effect, allows a postponement in providing necessary process until an adequate postdeprivation state tort remedy is made available.\textsuperscript{121}

Although Parratt has allayed the fears of some that "every alleged injury which may have been inflicted by a state official acting under 'color of law' would turn into a violation of the Fourteenth Amendment cognizable under section 1983,"\textsuperscript{122} Parratt has also generated enormous controversy.\textsuperscript{123} The decision still appears to conflict with the ruling in Monroe that the state remedy need not be sought before the federal remedy can be invoked (i.e., the exhaustion theory).\textsuperscript{124} The Court in Parratt also avoided a direct conflict with the Monroe decision by holding that, since process was ultimately provided by adequate state remedy, there was essentially no constitutional violation, which is a prerequisite for any section 1983 action.\textsuperscript{125} The Court neither reached nor overruled Monroe. It simply by-passed Monroe in holding that the state remedy provided all the process that was due.

In fact, the reasoning behind the Parratt decision is similar to the position taken by Justice Frankfurter in his Monroe dissent. However, the Court in Parratt failed to expressly adopt Frankfurter's logic, choosing instead to adopt (at least on paper) the Monroe majority's broad definition of "under color of law."\textsuperscript{126} By contrast, Justice Frankfurter reached his result by offering a different understanding of the term's meaning. He reasoned that "all the evidence converges to the conclusion that Congress by section 1983 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom or usage' sanctioned the grievance complained of."\textsuperscript{127} In essence, unless there is some affirmative state pronouncement or well-confirmed custom which caused the deprivation, the depriving action would not be under color of law, and thus would not be a proper subject for section 1983 action.\textsuperscript{128}

Justice Frankfurter's definition of "under color of law" covered only those violations which were pursuant to an established state procedure.

\begin{itemize}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 544. \textit{See also supra} text accompanying note 84.
\item \textsuperscript{124} Although the Parratt Court recognized the distinction between the two types of remedies, Parratt, 451 U.S. at 543-44, the Court did not discuss its upsetting of Monroe. In fact, it re-affirmed Monroe's exhaustion theory two years later in Patsy, 457 U.S. 496 (1982).
\item \textsuperscript{125} Id. at 545-46.
\item \textsuperscript{126} Id. at 535. \textit{See also supra} note 110.
\item \textsuperscript{127} Monroe v. Pape, 365 U.S. 167, 237 (1961) (Frankfurter, J., dissenting).
\item \textsuperscript{128} Id. at 246; \textit{see also} Monell v. New York Dep't of Social Services, 436 U.S. 658, 694-95 (1978).
\end{itemize}
All other violations were not under section 1983 action because they did not meet this definition. Parratt, on the other hand, left the broad Monroe definition intact, but instead undercut the effect of Monroe by another route. The Court defeated non-established procedure actions by altering the definition of due process itself to account for postdeprivation state remedies as adequate due process. Thus, the Parratt Court utilized a due process analysis, rather than a "color of law" analysis, in order to avoid overturning Monroe, while at the same time limiting the effect of Monroe and the definition of section 1983 actions.129

The concern with this alteration of due process analysis is that it creates potential problems when the boundaries of substantive rights under the Fourteenth Amendment are reached. Although postdeprivation remedies may be adequate to redress deprivations of constitutionally protected interests, they cannot "cure" the unconstitutional nature of an act which itself amounts to a substantive, constitutional violation.130 For this reason, Parratt should not be extended to conduct violating a substantive constitutional right.131 However, by giving due process analysis of the Fourteenth Amendment such definition under Parratt, and by setting a standard which states may meet by providing adequate tort remedies, federal judges may nonetheless be tempted to prune their dockets of pending section 1983 cases by manipulating the definition of constitutional "liberty" and "property" interests.132 If the courts were in fact to extend Parratt to deprivations of substantive due process rights, such action would remove from section 1983 any and all cases in which the constitutional deprivation was unauthorized and an adequate state remedy was available.133

Despite the controversy surrounding Parratt, it has endured as the benchmark case for controlling all section 1983 actions. The Parratt decision also has an historical basis to properly limiting the scope of this statute. In the Monroe opinion, after reviewing the legislative history of section 1983, Justice Douglas concluded that Congress had "three main aims" in passing the statute back in 1871: (1) to override invidiously discriminatory state laws; (2) to provide a remedy when state law is inadequate; and (3) to provide a federal remedy when the state remedy is adequate in theory, but not in practice.134

129 See Zagrans, supra note 2, at 518-25. Professor Zagrans argues that Parratt is an ad hoc attempt to temper the broad construction of "under color of law" which results in undermining the underlying due process right. Zagrans suggests that a better approach would be to redefine "under color of law" in accord with Justice Frankfurter's dissent. Id. See also supra note 110.
132 See generally Monaghan, supra note 70.
133 See Bruckett, supra note 110.
The Supreme Court's decision in *Parratt* to deny a procedural due process claim under section 1983 because an adequate state remedy exists is actually consistent with the aims stated by Justice Douglas in his *Monroe* opinion. The state of Nebraska did not enact any invidiously discriminatory laws that deprived Bert Taylor of his property. Likewise, the Court found Nebraska law adequate to remedy the deprivation, and there was no evidence or suspicion that the state law, although sufficient in theory, would not be enforced in practice. Consequently, *Parratt* ultimately stands for the proposition that no section 1983 action is necessary where a state has satisfactorily addressed the concerns which motivated Congress to pass the federal statute in the first place.

**B. Hudson v. Palmer**

In their concurrences to the decision in *Parratt*, Justices Blackmun and White suggested that the Court's holding was limited to random and unauthorized deprivations that were negligent, as opposed to intentional. In 1984, the Court rejected this contention in *Hudson v. Palmer*, which involved a prison guard's intentional, unauthorized "shakedown search" of plaintiff's prison cell. The Court concluded that, just as the state could not predict its officials' negligence, it could not predict and provide a predeprivation hearing for the random and unauthorized, but nonetheless deliberate, conduct of its officials. *Parratt* was invoked by the Court in *Hudson* to bar the inmate's section 1983 claim because of the availability of an adequate postdeprivation tort remedy against the guard in the state courts.

**C. Logan v. Zimmerman Brush Company**

What remained after the decisions of *Parratt* and *Hudson* was still uncertainty among the lower courts as to what exactly constituted random and unauthorized conduct. Whether the Supreme Court considered ran-

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132 *Parratt v. Taylor*, 451 U.S. 527, 545-46 (1981) (Blackmun, J., concurring). The basis for the distinction was that states institute procedures to contain and to direct deliberately inflicted harms. *See also supra* note 107.
134 *Id.* at 520. The suit also alleged the shakedown search itself violated the Fourth Amendment. That claim was rejected, however, because the Court held that a prisoner has no reasonable expectation of privacy in a prison cell. *Id.* at 524.
135 *Id.* at 524.
136 *Id.* at 534-35.
dom and unauthorized to be appropriately categorized under Monroe's analysis of "under color of law" or under Parratt's adequacy of state remedy analysis, the problem remained that the Court provided little guidance in Parratt and Hudson as to how to proceed in distinguishing between conduct that was or was not actionable under section 1983.

Nevertheless, the tools for at least a better understanding of what constitutes random and unauthorized conduct are already available through the Court's earlier decision of Monell. However, despite the existence of Monell's pronouncements on when a branch of local government may be liable under section 1983, the Court did not incorporate Monell into its treatment of what constitutes random and unauthorized conduct by state officials under Parratt and Hudson. Still, Monell can help to understand the reach of Parratt and Hudson. In effect, Monell defines those situations in which the deprivation is not random and unauthorized, but rather is chargeable to a government entity. In contrast, Parratt controls all other procedural due process claims which fail to state a federal claim because the deprivation is chargeable not to the government entity, but to the acts of its employees who are not authorized to provide due process.

Following Parratt and Hudson, the Court's next decision helped to shed further light on the surrounding confusion over what conduct could be attributed to the state as actionable under section 1983. The Supreme Court clarified and affirmed its Parratt decision one year later in Logan v. Zimmerman Brush Company. In Logan, the Court explained that the Parratt doctrine applies only in situations that require the state to act quickly, or where it could not otherwise provide predeprivation process. Distinguishing the loss in Parratt as resulting from random and unauthorized conduct, the property loss in Logan resulted instead from improper "established state procedure" which destroyed a state-created entitlement without affording the wronged party any procedural safeguards. The Court's refusal to allow Illinois to define its own state-

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141 See supra text accompanying notes 49-65.
142 A possible reason that Monell and Parratt have developed along separate tracks is that the Court wished to give continued deference to Monroe while at the same time circumventing by other means the 1961 decision which first recognized an expansive view of section 1983 liability for government actions. See supra note 110 and text accompanying note 129.
143 See supra text accompanying notes 60-65.
145 455 U.S. 422 (1982). In Logan, the Zimmerman Brush Company discharged the plaintiff purportedly because his left leg make it impossible for him to continue as a shipping clerk. Logan brought his unlawful discharge complaint to the Illinois Fair Employment Practices Commission. However, the Commission, apparently through inadvertence, scheduled the necessary conference five days after the expiration of the statutory limitation period for claims. Id.
146 Id. at 436.
147 In Logan, the Court said, "Unlike the complaint in Parratt, Logan is challenging not the Commissioner's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." Id. at 436.
created "entitlement" so as to eliminate accompanying protections under the Due Process Clause was also a marked reversal of a trend that had evolved toward state supremacy in procedural due process cases.\footnote{See supra note 81, at 835. See Logan, 455 U.S. 422. See also supra note 98 and accompanying text. The Burger Court feared that an expansion of recognized entitlements created the risk that basic transactions by state and local government would be deemed as involving liberty and property interests, and that daily, routine activities of local government would eventually be subjected to constitutional review (and the judicial system would then be inundated with due process claims). The best-known case example of the Burger Court’s effort to cut-back on the recognition of entitlements, and instead to give deference to the states in their creation of entitlements, was in \textit{Board of Regents v. Roth}, 408 U.S. 564 (1972). \textit{But see Perry v. Sindermann}, 408 U.S. 593 (1972) (recognizing that informal practices and customs may be sufficient to create a legitimate claim of entitlement to a benefit).}

When \textit{Parratt} is read together with \textit{Logan}, a tool emerges for understanding the distinction between state tort law actions and section 1983 violations. In addition to monitoring the propriety of the state established procedure itself, the postdeprivation due process doctrine allows the states to develop their own compensatory systems for the harms they inflict, but preserves to the federal courts the power to intervene and provide relief when state compensation proves inadequate.\footnote{See supra text accompanying note 134.} This is, after all, the very goal that Justice Douglas sought in his majority opinion in \textit{Monroe}.\footnote{See, \textit{e.g.}, \textit{Cohen v. City of Philadelphia}, 736 F.2d 81 (3d Cir. 1984), \textit{cert. denied}, 469 U.S. 1019 (1984). The plaintiff complained that the Philadelphia Civil Service Commission violated his right to due process by denying him back-pay to which he was entitled. The Third Circuit found the procedure inadequate, but held that the Commissioner's error was random and unauthorized because it violated state law. \textit{Id.} at 83-86.} \textit{Parratt} and \textit{Logan} forbid the frustration of attempts at full compensation through superficial definitions of entitlements or phantom procedural rules. If \textit{Parratt} and \textit{Logan} are applied correctly, federal courts are freed from the burden of a caseload top-heavy with garden-variety, “constitutionalized” tort cases, but still retain the critically important power to intervene and override state procedures when it appears that the state’s compensatory system has failed in its essential due process purpose.

However, as with \textit{Parratt}, there has been some confusion in the lower courts in applying \textit{Logan}. Although often cited as delineating the boundaries of \textit{Parratt}, interpretations of \textit{Logan} have often blurred any hoped-for borders.\footnote{State tort remedies could never oust federal courts of jurisdiction under section 1983 for cases in which the federal claim is based on some constitutional or statutory right other than the Due Process Clause, for that would turn the no-exhaustion rule on its head. See Steven H. Hazelrigg, Note, \textit{Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment}, 52 IND. L. J. 256, 275 (1976). Since the rationale of \textit{Parratt} is that deprivations of property and liberty interests are not made without due process when adequate postdeprivation relief is available, the doctrine by its terms can apply only when the essence of the alleged wrong is that some form of entitlement has been taken away unfairly. Claims based on the First Amendment, on the Equal Protection Clause, or on fundamental rights guaranteed under the Fourteenth Amendment are completely outside of the \textit{Parratt} doctrine. See infra note 172.} Such difficulties in distinguishing between \textit{Logan}’s “estab-
lished procedures” and what constitutes unauthorized conduct under Parratt were illustrated by the Supreme Court itself in its most recent decision in this area of the law.

V. ZINERMON AND ITS ATTACK ON THE PARRATT DOCTRINE

A. Zinermon and the Court’s Opinion

The holding in Zinermon v. Burch sought to distinguish and limit the reach of the Parratt decision. In Zinermon, the Court refused to apply the Parratt doctrine to the claim of a state mental hospital patient who alleged he was denied due process when admitted on a voluntary, consensual basis, even though he was overtly incompetent, and should have been afforded involuntary commitment procedures. The Supreme Court held that the conduct of the state hospital employees was actionable under section 1983.

According to Justice Blackmun, author of the majority opinion, Zinermon was not controlled by Parratt for three reasons. First, the state could not claim that the deprivation of the plaintiff’s liberty was random. Any erroneous deprivation would occur at a specific and predictable point in the admission process at the hospital. Second, unlike Parratt, where the very nature of the deprivation made predeprivation process impossible, providing predeprivation process was not impossible in Zinermon. In Zinermon, the state could have ensured predeprivation process by limiting and guiding the state actor’s power to admit patients. Third, and perhaps most important of all, “[the state employees] cannot characterize their conduct as unauthorized in the sense the term is used in Parratt and Hudson.” In Zinermon, the state had delegated to its em-

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153 Id. at 118-19.
154 Id. at 138.
155 Id. at 136. Compare this situation with the state’s predicament in Parratt, where it could anticipate that prison employees would occasionally lose property through negligence. However, the state could not “predict precisely when the loss will occur.” Parratt, 451 U.S. at 541. Or, compare with the situation in Hudson, where the state might be able to predict that guards occasionally will harass or persecute prisoners, but “cannot know when such deprivations will occur.” Hudson, 468 U.S. at 533.
156 Parratt v. Taylor, 451 U.S. 527, 541 (1981). It would do no good for the state to have a rule telling its employees not to lose mail by mistake. Id. In Hudson, the errant employee himself could anticipate the deprivation since it was he who intended to effect it, but the state itself still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intentional conduct. Hudson, 468 U.S. at 533-34. Again, a rule forbidding a prison guard from intentionally destroying an inmate’s property would do no good, and it would be ridiculous to hold a hearing to determine whether a guard should engage in such conduct prior to the depriving act. Id.
158 Id. at 138.
ployees at Florida State Hospital the power and authority to effect the very deprivation complained of, and had also delegated the "concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." 5

In writing the majority opinion in Zimmerman, Justice Blackmun relied on an expansive view of what constitutes "under color of law" from Monroe, 160 and what constitutes "authority" under Monell. Likewise, the Court in Zinermon precluded Parratt's due process analysis under the facts in Zinermon with its ruling that postdeprivation process was not all the state could have provided in order to avoid a violation of plaintiff's due process rights. 162

According to the Court in Zinermon, when the state has delegated "broad power to admit patients ... to effect what, in the absence of informed consent, is a substantial deprivation of liberty," the delegatee's decisions made pursuant to his delegated authority are the authorized acts of the government. Relying on Monroe, the Court reasoned that "the deprivation here is 'unauthorized' only in the sense that it was not on act sanctioned by state law, but, instead, was a 'deprivation of constitutional rights ... by an official's abuse of his position.'" Thus, the fact that an official's action may be directly contrary to state law is not controlling. According to the majority in Zinermon, the Parratt doctrine is inapplicable unless the decision is unauthorized, and the action taken by the hospital employees in Zinermon was with properly delegated authority. 165

The Court in Zinermon seems to stretch to the limit Monell's reasoning of what constitutes the delegation of authority from a policymaker to another. To be sure, the issue of when a government body or official possesses delegated authority is not capable of a simple resolution, as noted earlier in Monell. It is certainly clearest when a statute or other

159 Id.
160 See supra text accompanying notes 29, 36.
161 See supra text accompanying notes 60-62, 64.
162 See supra text accompanying notes 113-15.
164 Id. at 138 (quoting Monroe v. Pape, 365 U.S. 167, 172 (1981)).
165 Id. at 135. The Court stated:
  It is immaterial whether the due process violation Burch [the plaintiff] alleges is best described as arising from petitioners' [defendants'] failure to comply with state procedures for admitting involuntary patients, or from the absence of a specific requirement that petitioners determine whether a patient is competent to consent to voluntary admission. ... He [Burch] seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.
  Id. at 135-36.
166 See supra note 66 and accompanying text.
provision designates the body or official as the final authority ("policy-making official") on a particular subject. But, such is clearly not the case with officials charged in Zinermon.

In an earlier Court opinion in Pembaur v. City of Cincinnati, the Court provided no standards for determining when policymaking authority is delegated in the absence of an express statute. Lacking clear statutory authority on what constitutes delegated authority, Zinermon is no different than the numerous and varied attempts of lower courts in other cases to determine whether an official does or does not possess final, discretionary authority. The uncertainty in the lower courts existed before Zinermon and remains so in its wake.

In considering what is properly delegated authority, it is important to remember that the boundary between state court cases and those that belong in federal court should be the boundary between isolated, low-level wrongdoing and abuse of official power. If a state has abused its official power and violated the Constitution, it should not be permitted to choose whether to correct that abuse in its own courts. Placing the federal court between the citizen and the abuses of the state goes to the heart of both section 1983 and the Fourteenth Amendment.

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167 See, e.g., Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985) cert. denied, 480 U.S. 916 (1987). The Court found the county liable based on specific language in the Michigan Constitution providing that the sheriff (the tortfeasor) had the authority to make police policy for the county. Id. at 182. See also Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (Supreme Court decided that a county prosecutor was a policymaking official).


169 Part IIB of the Pembaur opinion indicates that such authority may be delegated despite the absence of a statute, but does not clarify the standard for determining when authority has been delegated. Id. at 483. In any case, Part IIB failed to command a majority of the Court. Justices Stevens and O'Connor joined the majority opinion, but did not join Part IIB. Id. at 491 (Stevens, J., concurring); Id. at 491 (O'Connor, J., concurring). Justice Stevens indicated in his concurrence that the opinion did not go far enough in defining the scope of municipal liability. Id. at 487-91. He re-affirmed his position that the respondeat superior theory should be incorporated into section 1983 jurisprudence. Pembaur, 475 U.S. at 487-91; see also supra note 47. Justice O'Connor's concurrence indicated that the opinion went too far in defining the scope of municipal liability. Pembaur, 475 U.S. at 491 (O'Connor, J., concurring). She implied the state law alone should define which officials are policymakers, and further argued that actions in violation of state law cannot constitute policy. Id. See also City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (Supreme Court holding that section 1983 liability could not be based solely on police officer's actions in a fatal shooting without further evidence of a municipal policy or custom).

170 Compare Rookard v. Health & Hosp. Corp., 710 F.2d 41, 45-46 (2d Cir. 1983) (officials had final, discretionary authority over significant matters based on their titles and whether superiors would overrule their decisions) with Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) cert. denied, 111 S.Ct. 783 (1991) (officials had no policymaking authority despite their high-ranking titles since policy was formulated by the state legislature and the commission's formal pronouncements).

171 See supra text accompanying notes 3-4.
As noted earlier, there is the danger that federal courts will lose sight of the appropriate boundary between low-level tort infractions and constitutional violations, and instead over-zealously apply the *Parratt* doctrine. This is certainly a great concern for Justice Blackmun in his *Zinermon* opinion as he emphatically restated the kinds of section 1983 claims that must be protected in federal court under the Due Process Clause of the Fourteenth Amendment, regardless of the available post-deprivation remedy.\(^\text{172}\) However, informed of these categories of protected claims, *Parratt* can serve as a useful tool for distinguishing serious abuses of state power from common law tort claims. In his opinion for the majority in *Zinermon*, Justice Blackmun seems to under-apply the *Parratt* doctrine in holding that random wrongdoings of low-level employees in the state's authority chain should be accountable under section 1983. Justice O'Connor forcefully presents this argument in her dissent of *Zinermon*.\(^\text{173}\)

**B. O'Connor's Dissent**

Similar to the Court's reasoning in *Ingraham*, Justice O'Connor concedes that the plaintiff in *Zinermon* has suffered a serious deprivation of liberty.\(^\text{174}\) Yet, Justice O'Connor contends there is no violation of the Fourteenth Amendment in *Zinermon* since the state provides adequate postdeprivation remedies for a deprivation that was random and unauthorized.\(^\text{175}\) Simply put, the precedent of *Parratt* controls.\(^\text{176}\) In her dissent, Justice O'Connor accused the majority of "transforming the allegations into a challenge of the adequacy of Florida's admissions procedures" in order to distinguish this case from *Parratt*.\(^\text{177}\)

\(^{172}\) The *Zinermon* Court stated:
First, the [Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights. . . . Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." . . . As to these two types of claims, the constitutional violation actionable under section 1983 is complete when the wrongful action is taken.


Lastly, there is the guarantee of fair procedure. A section 1983 action may be brought for a violation of procedural due process, but this violation is only complete when the state fails to provide due process in the form of a state remedy. *Id.*

\(^{173}\) *Zinermon*, 494 U.S. at 139-51 (O'Connor, J., dissenting).

\(^{174}\) *Id.* at 139. The majority in *Zinermon* in effect overruled the holding in *Ingraham* which stood for the proposition that an entire state program that repeatedly and systematically placed school officials in a position where constitutional liberties might be violated could nonetheless effectively withstand section 1983 action as long as the state included within the program its own adequate remedial scheme. See *Ingraham* and accompanying text.

\(^{175}\) *Zinermon*, 494 U.S. at 139 (O'Connor, J., dissenting).

\(^{176}\) *Id.*

\(^{177}\) *Id.* Plaintiff explicitly disavowed any challenge to the adequacy of Florida's procedural safeguards on admissions to its state mental hospitals. *Id.* at 140.
As noted by Justice O'Connor, "[c]onsistent with [plaintiff]'s disavowal of any attack upon the adequacy of the State's established procedure, Burch [the plaintiff] alleges that petitioners [state employees] flagrantly and at least recklessly contravened those requirements." Such deprivation of plaintiff's liberty must have stemmed from unauthorized actions since flagrant and reckless acts of this sort by definition contravene state law and established procedures, and could hardly be foreseen by the state.

According to Justice O'Connor, plaintiff's case boils down to one of two situations. Either the procedural safeguards established by the state are adequate or they are not. If they are adequate, and in Zinermon the procedures are not challenged by the plaintiff, then contravention of these procedures is not foreseeable by the state. The Parratt doctrine stipulates that such a plaintiff has failed to state a claim allowing recovery under section 1983 when the random and unauthorized deprivation is compensated by adequate postdeprivation state remedies.

If the established procedures are not adequate, then the state has not done all that it can to guard against the deprivation. Justice O'Connor attacked the majority's stance that the state mental hospital employees "possessed undue discretion [as] bound with, and more properly analyzed as, an aspect of the adequacy of the State's procedural safeguards." Her line of reasoning falls precisely under the rationale of Logan. Plaintiff's claim of a violation of procedural due process is actually on attack on the adequacy of the state's procedural safeguards.

In fact, Justice O'Connor contends in her closing remarks that if the Court in Zinermon had correctly assessed the adequacy of the state procedures (under Logan) rather than considered the action based on the state officials' random and unauthorized violation of the state law (under Parratt) then the application of the traditional Mathews test to the facts in Zinermon "would perhaps have yielded a result favoring respondent [plaintiff]." The Mathews test, as applied here, was designed by the Court to evaluate the competency of established procedures, such as the voluntary admission process at the state hospital in Zinermon, and whether additional safeguards would be of any value vis-a-vis any ad-

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179 Id. at 140-41.
178 Zinermon, 494 U.S. at 141-42 (O'Connor, J., dissenting).
180 Id. at 147.
181 Id. at 141.
182 Id. at 142.
183 Id.
184 Zinermon, 494 U.S. at 146 (O'Connor, J., dissenting).
185 Id. at 146.
186 The challenge is not to the state official's error, but to the "established state procedure" that destroys a liberty interest without according the plaintiff proper procedural safeguards. Logan, 455 U.S. at 436.
187 See supra note 12.
188 Zinermon, 494 U.S. at 151 (O'Connor, J., dissenting).
ditional burdens placed upon the state when implemented. Instead, the Court in Zinermon chose to avoid the proper application of the Mattheus test by ignoring the issue of the adequacy of established state procedures, while at the same time still contending that the state had not done all that it could, or as Justice O'Connor stated in her dissent, by "creating the innovation which so disrupts established law." Such avoidance was taken despite the Court's recent application of the Mattheus' test to a case with strikingly similar circumstances to the facts in Zinermon.

Adequacy of state-established procedures is in fact a basic building-block for the Parratt doctrine's distinction between deprivations that are actionable under section 1983 and those that are not. As the Parratt Court noted:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a [property] damage claim arising out of the misconduct of state officers. In the former situation, the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against "state" deprivations [of property]; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, the state action is not necessarily complete . . . the existence of an adequate state remedy to redress [property] damage inflicted by state officials avoids the conclusion that there has been any constitutional deprivation [of property] without due process of law within the meaning of the Fourteenth Amendment.

Justice O'Connor simply cannot accept the Zinermon Court's logic that the state has delegated authority to state officials to effect such a deprivation. The issue whether the defendants possessed too much power that could so readily be abused without proper safeguards simply goes to the question of the overall adequacy of the state procedures. In the view of Justice O'Connor, the Court has needlessly added an additional layer of confusing procedural safeguards to the already sufficient guarantees

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189 *Id.* at 150.
190 *Id.*
191 See Washington v. Harper, 494 U.S. 210 (1990) (the Court applied the Mattheus test rather than the approach suggested in Zinermon to evaluate the adequacy of state procedures governing administration of antipsychotic drugs to prisoners).
193 Plaintiff had no more delegated power to depart from admission procedures than the guard in Hudson did when he exceeded the limits of his authority for conducting a search of a prisoner's cell or the prison official in Parratt who wrongfully misdelivered mail by not following procedures. Zinermon, 494 U.S. at 146 (O'Connor, J., dissenting).
of Parratt, Logan and Mathews. The argument advanced by the Court in Zinermon that the state has delegated uncircumscribed discretionary authority merely distorts the already-established distinction between unauthorized acts against established procedures and laws, covered by Parratt, and credible attacks against inadequate state laws and procedures, covered by Logan (and the Mathews' test for assessing the value of providing additional safeguards).

C. Confusion in the Lower Courts

Justice O'Connor warned that Zinermon's displacing of the certain tests of Parratt, Mathews and Logan would only create further confusion over the proper test in determining violations of section 1983. This is precisely what occurred shortly after the decision of Zinermon. Without clear direction as to whether Parratt had been overruled, limited or left intact, lower courts have applied their own varied interpretations.

The U.S. Court of Appeals for the Fifth Circuit ruled in Caine v. Hardy that a physician's allegation that a public hospital suspended and later terminated his staff privileges without procedural due process stated a claim under section 1983, notwithstanding the availability of state post-deprivation remedies. The circuit court broadly applied the Zinermon decision to restrict the Parratt doctrine "to cases where it truly is impossible for the state to provide predeprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor."

The circuit court held that the physician could have been afforded adequate procedure before the suspension because there was no threat to patient safety, which would have required immediate action. The action by the state employees was not random since deprivation of staff privileges would occur as the formal proceedings moved from the suspension to the termination stage. Likewise, the action was not unauthorized since, like Zinermon, the circuit court believed the state had delegated

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194 "The Mathews test measures whether the state has sufficiently constrained discretion in the usual case, while the Parratt doctrine requires the State to provide a remedy for any wrongful abuse." Id. at 145. "State officials able to formulate safeguards must discharge the duty to establish sufficient predeprivation procedures, as well as adequate postdeprivation remedies to provide process in the event of wrongful departures from established state practice." Id. at 149 (O'Connor, J., dissenting).
195 Id. at 150; see also Mathews v. Eldridge, 424 U.S. 319, 335 (1975).
196 Zinermon, 494 U.S. at 150-51 (O'Connor, J., dissenting).
197 905 F.2d 858 (5th Cir. 1990).
198 Id.
199 Id. at 862.
200 Id.
the power to revoke staff privileges to the state officials at the hospital.\textsuperscript{201}

The dissent in \textit{Caine} again shows the wide range of interpretations left open in the wake of the \textit{Zinermon} decision. Applying the \textit{Parratt} doctrine more forcefully than the majority opinion, the dissent distinguished the facts in \textit{Caine} from those in \textit{Zinermon}. The dissent's understanding of the \textit{Mathews} test and the \textit{Parratt} doctrine suggested that the state had done all that could be expected in providing both predeprivation process and postdeprivation remedies for random and unauthorized conduct.\textsuperscript{202}

According to the dissent, there was no authorization in \textit{Caine} for the hospital officials since their "investigatory and judicial bias in implementing the regulations" did not "flow from the regulations themselves."\textsuperscript{203} The dissent was also quick to point out that plaintiff's own complaint asserted a violation of procedural provisions in nearly every paragraph.\textsuperscript{204}

In attempting to distinguish \textit{Zinermon} from \textit{Caine}, the dissent reasoned that in \textit{Zinermon} "the voluntary admission of the patient may have been an abuse of judgment by the staff authorized to admit him [plaintiff-Burch], but their exercise of judgment was specifically condoned by the regulations."\textsuperscript{205} The dissent argued that this was not the situation with the state hospital employees in \textit{Caine}.\textsuperscript{206} However, such a fine distinction is difficult to discern on a case-by-case basis, and is ultimately the root problem with \textit{Zinermon}. Such analysis sidesteps the clearer and more appropriate argument authored by Justice O'Connor in her \textit{Zinermon} dissent that the problem lies more with faulty state procedures that allow employees to contravene established law.\textsuperscript{207} Regardless of whether the state employees in both \textit{Caine} and \textit{Zinermon} were authorized by their respective policymakers to perform the steps they in fact took, a clearer test to determine section 1983 liability is whether such authorization was granted without proper safeguards to guarantee compliance with state law and policy.\textsuperscript{208} If so granted, then the state has not done all that it can to ensure predeprivation process. And, as already noted, the Court in \textit{Logan} has provided that faulty government procedures which allow such deprivations are actionable under section 1983.\textsuperscript{209}

\textsuperscript{201} Id. In \textit{Zinermon}, the state had delegated to its employees the power and authority to effect the very deprivation complained of, and also possessed the duty to initiate the procedural safeguards established by the state law to guard against the unlawful deprivation. \textit{Zinermon}, 494 U.S. at 139.

\textsuperscript{202} \textit{Caine}, 905 F.2d at 865 (Jones, J., dissenting).

\textsuperscript{203} Id. at 867 (Jones, J., dissenting) (quoting Holloway v. Walker, 784 F.2d 1287, 1292-93 (5th Cir. 1986)).

\textsuperscript{204} Id.

\textsuperscript{205} Id.

\textsuperscript{206} Id.

\textsuperscript{207} See supra text accompanying notes 180-86.

\textsuperscript{208} The \textit{Mathews} test ultimately determines whether the state has furnished all the safeguards that can be expected. See supra note 12 and text accompanying note 189.

\textsuperscript{209} See supra text accompanying notes 186-88.
In sharp contrast to Caine and the Fifth Circuit's majority opinion, the en banc U.S. Court of Appeals for the Seventh Circuit, in reconsidering an earlier ruling in light of the recently-decided Zinermon case, reasoned that Zinermon's limitation of the Parratt doctrine applies only when, by statutory oversight, government officials are granted uncircumscribed discretion that is correctable by additional procedural safeguards that could eliminate predictable deprivations of liberty or property.\textsuperscript{210}

In \textit{Easter House v. Felder},\textsuperscript{211} an Illinois adoption agency alleged that high state officials conspired with the adoption agency's former executive director to delay renewal of the agency's license.\textsuperscript{212} The circuit court reasoned that the Zinermon holding did not focus solely on the hospital officials' delegated authority, but also on the uncircumscribed nature of this authority to erroneously admit patients on a voluntary basis.\textsuperscript{213} This statutory oversight, the lack of in-place procedures to prevent abuse of such authority, was central to Zinermon, according to the circuit court.\textsuperscript{214} In contrast, Illinois licensing procedures were adequate in circumscribing such discretionary abuses. Rather, it was a blatant violation of these procedures that placed the action within the meaning of the Parratt doctrine.\textsuperscript{215}

The circuit court's interpretation of Zinermon's faulty, uncircumscribed authority places it very close to Justice O'Connor's contention that established procedures are the culprit.\textsuperscript{216} In fact, there is no discernable difference between the circuit court's preception of statutory oversight in Zinermon and the Logan standard for identifying inadequate state procedures. Yet, the circuit court, in distinguishing between the facts in \textit{Easter House} and Zinermon,\textsuperscript{217} fails to apply the very same logic that would result in recognizing the similarity between the facts in Zinermon and Logan. The court in \textit{Easter House} reasoned that the state employees' conduct and consequent failure in Logan to perform their duty did not in and of itself constitute "established state procedure."\textsuperscript{218} Instead, the state statute itself was deemed inadequate.\textsuperscript{219} Yet, the circuit court viewed the statutory oversight in Zinermon not as inadequate process. Instead, the failure of the state officials' performance of duty itself constituted "established state procedure."\textsuperscript{220}

\textsuperscript{210} Easter House v. Felder, 910 F.2d 1387, 1400-01 (7th Cir. 1990).
\textsuperscript{211} 910 F.2d 1387 (7th Cir. 1990).
\textsuperscript{212} Id. at 1390-94.
\textsuperscript{213} Id. at 1400.
\textsuperscript{214} Id. at 1401.
\textsuperscript{215} Id.
\textsuperscript{216} See supra text accompanying notes 184-86 and note 186.
\textsuperscript{217} Easter House, 910 F.2d at 1403-04.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 1404. But, when their power is uncircumscribed, such officials should be held accountable for the abuse of their uncircumscribed power. In Parratt terminology, the abuse of power is predictable since the officials were entrusted with broad, discretionary authority (a "statutory oversight" in delegating such broad authority when it turns out to be abused). Id. In effect, the officials were authorized to do the things they did. Id. at 1401-02.
\textsuperscript{220} Id. at 1401-02.
Philosophically, the majority opinion in *Easter House* clearly parallels the wishes of Justice O'Connor and others to prevent section 1983 from becoming a "font of tort law." The circuit court took note of the Supreme Court's efforts at "avoiding the use of section 1983 as just another opportunity for parties to shop between state and federal forums." The court reasoned that *Zinermon* does not appear to alter this effort. With little guidance provided by the *Zinermon* Court on how exactly to proceed, the Seventh Circuit chose to "continue to believe that *Parratt* must be read broadly. . ." In doing so, the court found a way to continue to apply the *Parratt* doctrine.

Perhaps Judge Easterbrook best summarized the prevailing confusion. In his concurrence to the majority opinion in *Easter House*, Judge Easterbrook noted that *Zinermon* is outrightly inconsistent with *Parratt*, although the Supreme Court failed to recognize any inconsistency at all. If the Supreme Court had simply overruled the *Parratt* doctrine in its *Zinermon* decision, then the majority in *Easter House* would not have had the freedom to maintain its broad application of *Parratt*, and thereby sidestep any application of *Zinermon*.

As it stands, however, the Supreme Court gave no such clear direction for the lower courts. According to Judge Easterbrook, the *Zinermon* decision only adds to "a line of precedent already resembling the path of a drunken sailor." 

**VI. THE FUTURE OF PARRATT AND SECTION 1983 AFTER ZINERMON**

*Zinermon* generated considerable confusion in just the few months after its decision was announced. The Fifth Circuit court in *Caine* expressly noted the Supreme Court's order to the Seventh Circuit to reconsider its decision in *Easter House*. In its *Caine* decision, the Fifth Circuit reasoned that the facts in *Easter House* were "significantly analogous to the facts alleged by Dr. Caine." Yet, while the *Caine* court refused to apply the *Parratt* doctrine, the Seventh Circuit sustained its earlier, pre-*Zinermon* decision in *Easter House*, and again refused to limit the applicability of *Parratt*.

It is likely that the Supreme Court will again review *Easter House* in light of the contradiction of that case to the Fifth Circuit's application of *Zinermon* in *Caine*. However, there might be a new twist if and when the

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221 See id. at 1404; *Parratt*, 451 U.S. at 544. The circuit court seems to distinguish its facts from *Zinermon* in order to avoid a confrontation with the Supreme Court's *Zinermon* holding. See infra text accompanying notes 222-24.

222 *Easter House*, 910 F.2d at 1404.

223 Id.

224 Id.

225 Id. at 1408 (Easterbrook, J., concurring).

226 Id.

227 *Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring).

228 *Caine*, 905 F.2d at 862.

229 *Easter House*, 910 F.2d at 1390.
Supreme Court moves to settle the confusion. With the addition of Justices Souter and Thomas to the bench, the mathematics of the Zinermon 4-to-3 majority could very well be reduced to a dissenting role. Any review of Easter House and Caine will likely be performed by the O'Connor-lead Zinermon minority.

The assumption that the Supreme Court will reconsider Zinermon is strengthened by the forcefulness of Justice O'Connor's position in her original dissent. The question most likely to be addressed is not whether Zinermon will be overruled or isolated, but rather how the philosophy of Parratt will be re-fortified to prevent making the Fourteenth Amendment a "font of tort law to be superimposed upon whatever systems may already be administered by the states." There are several avenues that an O'Connor-lead majority might take.

At an extreme, the Court could go well beyond Parratt and severely restrict the reach of section 1983 liability by tightening its interpretation of the Fourteenth Amendment. Such is the position advocated by Chief Justice Rehnquist in Paul where he sought to distinguish between clear-cut constitutional infractions and simple, garden-variety state tort violations. However, this approach has dangers. As noted earlier in the discussion of Paul, distinguishing between constitutional infractions and simple tort violations is likely to conflict and perhaps cut into fundamental rights protected by the Bill of Rights and substantive rights derived from the Due Process Clause. Also, excluding procedural due process guarantees from the context of section 1983 actions without considering the adequacy of state remedies risks the deprivation of liberty or property interests with no procedural safeguards provided at any court level.


231 For example, Justice Souter served as Attorney General for the State of New Hampshire from 1976 to 1978, just prior to the Supreme Court decision on Parratt. The acting Attorney General for New Hampshire at the time of the Parratt decision, Gregory H. Smith, a close friend and colleague of Justice Souter, was one of many state attorneys general to submit amici curiae briefs urging reversal of the lower court decision and instatement of tougher restrictions on section 1983 actions in federal court. Parratt, 451 U.S. at 528; see also A Retiring Yankee Judge Aims to Hang His Shingle at a New Address: The Supreme Court, PEOPLE MAGAZINE, Aug. 6, 1990, at 45.

232 See supra notes 174-95 and accompanying text.

233 See supra notes 174-95 and accompanying text; see also Justice Sandra D. O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 WM. & MARY L. REV. 801 (1981) (as an Arizona appellate court judge, Justice O'Connor advocated the exhaustion of state remedies as a prerequisite to bringing a section 1983 action).


236 See supra notes 130-33, 149 and 172 and accompanying text

237 See supra text accompanying notes 134, 149.

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Although different than Justice Rehnquist's approach under *Paul*, a second route the Court could travel would yield a similar effect in limiting the scope of section 1983 actions. This approach would re-evaluate the original intent of Congress when it enacted section 1983. According to those favoring a strict construction of the statute, Congress did not seek to punish an errant officer for the misuse or abuse of his power. Instead, Congress' purpose was to prevent the enactment of discriminatory laws by making those who promulgate such laws civilly liable to those whose rights are violated by them. To determine whether a plaintiff has a cause of action under section 1983, one would need to focus on the depriving act, not the status of the actor. The focal inquiry would be "under color of what law" was the deprivation accomplished, for the illegal law is the real target of section 1983. If such a law cannot be identified, if no state law has authorized the defendant's actions, then there is no target for section 1983 liability since the deprivation was not under color of law, and a claim for relief under the statute consequently does not lie.

However, this approach to limiting section 1983 has the same dangers as the approach of Justice Rehnquist. There is still no assurance of a safety net at the state court level for actions that do not qualify for section 1983 litigation since the adequacy of state remedies would not be considered in determining whether a federal claim exists. In addition, it is not entirely accurate that only the illegal law is the real target of section 1983. If this were the case, it would be rather simple for any state policymaker to avoid section 1983 liability by keeping the laws clean, while at the same time covertly promoting any deprivation that he or she saw fit. Such a loophole was in fact why the federal statute languished in obscurity for so many years, and why the Court in *Monroe* took such decisive action in the first place. To return to a pre-*Monroe* interpretation of section 1983 would be to ignore the intent of Congress for the statute as originally determined by Justice Douglas in his *Monroe* opinion.

As noted earlier, a re-construction of under color of law analysis, as recommended by Justice Frankfurter in his *Monroe* dissent, does avoid

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238 *But see* Imbler v. Pachtman, 424 U.S. 409 (1976) (White, J., concurring). "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which section 1983 was enacted." *Id.* at 442.

239 *See* Zagrans, *supra* note 2, at 559-60. For a good overview of the legislative debates concerning enactment of section 1983, *see generally* Zagrans, *supra* note 2, at 540-60.

240 Justice Frankfurter, the sole dissenter in *Monroe* and lone advocate at that time for a restrictive interpretation of "under color of state law" on the Supreme Court, did not offer any mitigating consideration in his *Monroe* dissent to offset the harshness for those who would be left without legal recourse for the harms they might suffer. *Monroe*, 365 U.S. at 242-46 (Frankfurter, J., dissenting).

241 *See supra* text accompanying notes 5-7, 28.

242 *See supra* text accompanying notes 28, 134.
the dangers from Paul of over-zealous application of the Parratt doctrine's due process analysis.\textsuperscript{243} It restricts section 1983 actions by reinterpreting the statute rather than altering the meaning of what constitutes due process under the Fourteenth Amendment.\textsuperscript{244} As detailed in this Note, however, such dangers are well-recognized and documented,\textsuperscript{245} and Parratt can be effectively restricted to liberty and property interests without infringing upon hard-core constitutional rights derived from the Bill of Rights or fundamental rights derived from the substantive component of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{246}

Recognizing these dangers and boundaries, the new Supreme Court might simply choose to tighten-up the application of Parratt by avoiding the excesses of Paul, while still rejecting attempts like Zinermon to undercut its authority. To accomplish this, the Court should first expressly discard the exhaustion theory of Monroe (affirmed by Patsy in 1982).\textsuperscript{247} Instead, state remedies would have to be pursued when there is a deprivation of a protected interest. The availability of a state remedy would be the key indicator that the deprivation is not\textsuperscript{248} without due process.

Likewise, the Court's ruling in Zinermon would have to be overruled as unnecessarily restricting and confusing Parratt's definition of "random and unauthorized" conduct. Instead, the heart of Parratt—its focus on what the state knows or should know based on the procedures it has established—should be restored in order to properly limit actionable section 1983 cases.

In the final analysis, it is likely that Zinermon will be recognized by the Court's new majority as an unnecessary attempt to refine the outer limits of the Parratt doctrine. Any new majority's focus on managing the overwhelming number of section 1983 cases in the federal system will likely supersede any interest in debating the finer points of distinguishing between what is and is not "random and unauthorized" conduct. Simply put, the Court will probably be more interested in getting what it considers to be the basic tort cases back to the state courts where they belong. Whether the Court does this by overruling Monroe, by restricting what is "under color of law" to just legislative enactments, or by restoring Parratt, the goal the new majority seeks is likely to be clear—to restrict section 1983 liability and re-direct the flow of tort cases to the state court system.

\textsuperscript{243} See supra text accompanying notes 130-33.
\textsuperscript{244} See supra text accompanying note 129.
\textsuperscript{245} See supra note 172 and accompanying text.
\textsuperscript{246} See Zinermon, 494 U.S. at 125.
\textsuperscript{247} See supra note 33 and accompanying text.
The Parratt doctrine can work as an effective tool in reaching the proper scope for section 1983 actions as originally intended by Congress. Properly applied, Parratt provides that legitimate actions against the state are litigated under the statute. Likewise, the doctrine ensures that lesser torts committed randomly and without authority by state officials will be remedied by adequate state measures.

The Parratt doctrine also seeks to guarantee that the state does all that it can to provide predeprivation process. Within the framework of the doctrine, other Supreme Court decisions are helpful in determining when the state or local government authority has fallen short of providing such process, and, therefore, faces section 1983 liability. Following the guidelines of Monell, if the [local] government has properly delegated authority to one of its officials to act as if he or she were the government, then a subsequent deprivation of a liberty or property interest without process is actionable under section 1983. If such authority was not delegated, then the Parratt doctrine provides that no section 1983 liability exists for random deprivations if an adequate state remedy is provided. If the delegation of authority has been made in a faulty manner, where the government has failed to ensure proper safeguards in delegating such authority, then the Logan holding provides for a section 1983 remedy to an injured party since the established government procedure effectively caused the deprivation.

The Mathews test is ultimately the measure of whether the state has done all that it can to ensure adequate predeprivation process. This test assesses the value of additional procedural safeguards that a government can provide in light of the burdens it would cause, as well as the benefits it would provide to potentially injured parties. Applying the facts from Zinermon, if the Mathews test reveals that there indeed would be value to providing additional procedural safeguards to limiting the discretionary authority of state hospital employees when admitting patients on a voluntary basis, then the failure on the part of the state to do so would allow a section 1983 action for the injured party.

Absent clear evidence of delegated authority under the guidelines of Monell, the facts of Zinermon fit better under the analysis of Logan and the Parratt doctrine. By finding the facts of Zinermon to be inapplicable to the Parratt doctrine, the Court has caused a considerable amount of confusion among lower courts. In the final analysis, it is a less confusing and more meaningful test to determine whether a state should have provided better procedural safeguards (under the test of Mathews) than to apply the analysis of Zinermon and attempt to identify properly delegated authority within a governmental bureaucracy. Whether appropriately delegated or not, a more critical issue to resolve in any potential section 1983 litigation is whether the state has provided adequate procedural safeguards to ensure against any unnecessary predeprivations of constitutionally protected liberty and property interests.

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