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The Supreme Court Continues Its Journey Down the Ever Narrowing Paths of Section 1983 and the Due Process Clause: An Analysis of Parratt v. Taylor

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The Supreme Court Continues Its Journey Down the Ever Narrowing Paths of Section 1983 and the Due Process Clause: An Analysis of *Parratt v. Taylor*

After nearly a century of quiet slumber, the Supreme Court awoke the sleeping giant. In the past two decades, 42 U.S.C. § 1983 has evolved into a judicial Frankenstein monster. Unable to control the beast, the Court has attempted to restrict the creature's movements by unnecessarily limiting its constitutional source. If followed to its logical conclusion, the Court's narrow reading of the Constitution may ultimately demote all due process violations to state tort remedies. This note traces the legislative and judicial evolution of section 1983 as well as the statute's present interaction with the due process clause. The vehicle for this examination will be Parratt v. Taylor, *a recent Supreme Court decision which presents both dubious ramifications for section 1983 actions involving negligent deprivations of life, liberty, and property, and an opportunity to examine the changing course of the Court. More specifically, the inquiry will focus upon the state of mind requirement of section 1983, the legislative mandate for a supplemental remedy, and an examination of present distortions of the spirit and purpose of section 1983.*

I. FACTUAL HISTORY

Bert Taylor, Jr., an inmate in the Nebraska Penal and Correctional Complex, mail ordered hobby materials valued at $23.50.[1] Packages received by mail were normally delivered directly to each prisoner or the prisoner was notified to pick up the package at the central mail room. However, before his packages arrived,[2] Taylor was placed in the Adjustment Center and consequently was unable to receive his order because packages were not allowed in the restricted area.[3]

Upon his release from the Adjustment Center, Taylor requested his hobby materials. After a failure by prison officials to respond to his requests for the packages, Taylor contacted the grievance supervisor about the matter. The supervisor was unable to locate the packages and Taylor never received his order.[4]

After repeated correspondence with the United States District

1. Taylor v. Parratt, No. 76-L-57, slip op. at 1 (D. Neb. Oct. 25, 1978).
2. Respondent's Brief on the Merits at 5, Parratt v. Taylor, 451 U.S. 527 (1981).
3. Taylor v. Parratt, No. 76-L-57, slip op. at 1 (D. Neb. Oct. 25, 1978).
4. Respondent's Brief on the Merits at 5, Parratt v. Taylor, 451 US. 527 (1981).

Court for the District of Nebraska, Taylor commenced an action under 42 U.S.C. § 1983[5] by filing a handwritten *pro se* complaint. Taylor contended "that his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law."[6] He prayed for a declaration that the acts of the prison warden and hobby manager violated his civil rights; for compensatory damages of $1,000 from each petitioner; and for punitive damages of $1,000 from hobby manager Lugenbill.[7]

The district court held that the prison officials' negligent conduct violated Taylor's fourteenth amendment due process rights and granted summary judgment for respondent.[8] The court of appeals affirmed without opinion.[9] The United States Supreme Court granted certiorari[10] and subsequently reversed the lower court's decision.[11] In an opinion written by Justice Rehnquist, the Court held that although section 1983 provides a remedy for a negligent deprivation of property, the existence of state tort remedies to redress losses similar to respondent's precluded a finding of a due process violation.[12]

II. HISTORICAL BACKGROUND

A. Legislative History: Origins in the Ku Klux Klan Act

Section 1983 first came onto the books as section one of the Ku Klux Klan Act of April 20, 1871.[13] It was one means by which Congress exercised the power vested in it by section five of the fourteenth amendment to enforce the provisions of that amendment.[14] The purpose of the legislation was plainly evidenced by

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5. Section 1983 provides:

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

42 U.S.C. § 1983 (1976).

6. Respondent's Brief on the Merits at 6, Parratt v. Taylor, 451 U.S. 527 (1981).

7. *Id.* The petitioners were Robert Parratt, the warden, and Francis Lugenbill, the hobby manager of the prison.

8. *See* 451 U.S. at 529.

9. Taylor v. Parratt, 620 F.2d 307 (8th Cir. 1980), *per curiam* (decided without published opinion), *rev'd,* 451 U.S. 527 (1981).

10. 449 U.S. 917 (1980).

11. 451 U.S. at 544.

12. *Id.*

13. The Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1976)).

14. *See* CONG. GLOBE, 42d Cong., 1st Sess., App. 68, 80, 83-85 (1871). [Citations

its title: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[15]

The Ku Klux Klan Act evolved out of a message sent to the Congress by President Grant on March 23, 1871, which read in part:

> A condition of affairs now exists in some States of the Union rendering life and property insecure. . . . That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . .[16]

A compelling concern of the proponents for legislation was the increasing depredations of the Ku Klux Klan. Congressman Cobb of North Carolina spoke of the "social and political disability" imposed on Negroes and the White Republicans protested the "violence and lawlessness."[17]

The Congressional debates "were replete with references to the lawless conditions" of the South in 1871. The racial tensions of the era were exacerbated by the relative inaction of state and local governments.[18] Senator Pool stated that no member of the Klan has ever "feared any punishment for a crime committed in pursuance of the orders of the Klan."[19] Because of the strength and secrecy of the Klan, member's actions went virtually unchallenged.[20] In short, the statute was aimed at correcting a situation bordering on anarchy.

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from the CONGRESSIONAL GLOBE hereinafter cited as GLOBE; materials in the GLOBE APPENDIX hereinafter cited as GLOBE APP.].

15. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).

16. GLOBE, *supra* note 14, at 244 (quoted in Monroe v. Pape, 365 U.S. 167, 172-73 (1961)).

17. GLOBE, *supra* note 14, at 439. For treatment of the Klan era, *see generally* J.G. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 682-84 (2d ed. 1961); E. COULTER, THE SOUTH DURING RECONSTRUCTION 165-71 (1947).

18. 365 U.S. at 174.

19. GLOBE APP., *supra* note 14, at 172.

20. Senator Nye, commenting on the recent outbreaks of violence, emphasized his desire that:

> these crimes must be stopped everywhere. I would have a law that would protect the citizen of the lowliest character upon the farthest frontier, a law that should make him safe, sitting under his own vine and fig tree, with no one and no combination to molest him or make him afraid; and until that time comes this nation has not performed its duty.

GLOBE, *supra* note 14, at 659.

The importance of the statute should not be underestimated. The scope of power granted by the bill was forcefully objected to by its opponents.[21] Although the legislation had several purposes, a reading of the entire section indicates three primary aims.[22] First, it had the potential to override certain kinds of state laws.[23] However, as noted by Mr. Sloss of Alabama, this feature was irrelevant because contrary state legislation did not exist.[24] "Second, it provided a remedy where state laws were inadequate."[25] Finally, "it was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[26] The main opposition to this final feature was that "[i]t overrides the reserved powers of the States."[27]

Despite the fears expressed by legislators concerning the implications of the bill, it was nonetheless passed by the Forty-Second Congress and has subsequently been codified at 42 U.S.C. § 1983.[28] An examination of the debates surrounding the Act indicate that its framers obviously contemplated a bill of tremendous scope. They intended to significantly expand federal jurisdiction into areas previously viewed as strictly local concerns. Against this backdrop of apparent expansionism, it is necessary to balance the specific evil at which the bill was aimed — the ever increasing political and social power of the Klan. The South was in a state of near anarchy; it was a time of lawlessness, senseless brutality, and an ever increasing inability of the government to protect the

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21. Senator Thurman, an opponent of the bill, described the proposed act at the time it was passed:

> [This section's] whole effect is to give to the federal judiciary that which now does not belong to it — a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and without any limit whatsoever as to the amount in controversy [which] may be of the slightest conceivable character, the damages . . . may be . . . merely nominal damages; and yet . . . this section . . . in effect may transfer the hearing of all such cases into the Federal courts.

GLOBE, *supra* note 14, at 216-17.

22. 365 U.S. at 173.

23. *Id.*

24. GLOBE APP., *supra* note 14, at 268.

25. 365 U.S. at 173.

26. *Id.* at 174.

27. GLOBE APP., *supra* note 14, at 365. The speaker, Mr. Arthur of Kentucky, did not have any doubts as to the scope of § 1: "[I]f the sheriff[s] levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a *mere error of judgment,* [he is liable] . . . ." *Id.* (quoted in Monroe v. Pape, 365 U.S. at 174 n.10).

28. *See* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 NW. U. L. REV. 277, 277-82 (1965).

rights granted to its citizens.[29]

B. Judicial Interpretation

1. Pre-1961: Ninety Years of Dormancy

a. *Limited Judicial Application of Section 1983*

Despite the broad implications of section 1983, few cases were brought under the section for nearly a century.[30] A narrow reading of the fourteenth amendment's privileges and immunities clause,[31] a similar reading of section 1983's jurisdictional counterpart,[32] and the Supreme Court's refusal to fully incorporate the provisions of the Bill of Rights[33] were all jointly responsible for the dormancy of section 1983 from the time of its enactment until 1961. Additionally, and of particular importance to this examination, a primary reason for the inefficacy of section 1983 was that courts interpreted it to require an intentional invasion of a constitutional right.[34]

The first noticeable arousal of section 1983 involved the use of the section to redress violations of the voting rights of Blacks.[35] Dating back to 1915, the Supreme Court had upheld judgments for Black plaintiffs against Maryland election officials who had denied them the right to vote pursuant to the grandfather provision

29. *See* 42 U.S.C. § 1983 (1976).

30. *Developments in the Law — Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1156-69 (1977) [hereinafter cited as *Developments*]. Immediately following the passage of § 1983, it was rendered ineffective by restrictive interpretations of the fourteenth amendment recognizing traditional notions of dual federalism. *See, e.g.,* United States v. Cruikshank, 92 U.S. 542 (1876); the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Between 1920 and 1940, § 1983 actions were largely confined to discrimination and voting rights cases. *See, e.g.,* Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927).

31. *See* Slaughter-House Cases, *supra* note 30. The Court limited the scope of the fourteenth amendment's privileges and immunities clause to privileges and immunities of national, not state citizenship. *See also* Twining v. New Jersey, 211 U.S. 78 (1908) (Bill of Rights not among the privileges and immunities of national citizenship).

32. Hague v. C.I.O., 307 U.S. 496 (1939); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert denied,* 400 U.S. 841 (1971). The jurisdictional counterpart to § 1983 is found at 28 U.S.C. § 1343(3) (1976).

33. *E.g.,* Adamson v. California, 332 U.S. 46 (1947). Subsequently, through selective incorporation, most of the Bill of Rights has been held applicable to the states.

34. *See* Landholm, *The Evolution of the State of Mind Requirement of Section 1983,* 47 TUL. L. REV. 870 (1973); Shapo, *supra* note 28.

35. *See infra* notes 36-38.

of a state statute.[36] Similarly, twelve years later, the Court upheld a damage action brought against election judges who, in compliance with a Texas statute, refused to allow Blacks the right to vote in a Democratic primary.[37] After another twelve year interval, the Court upheld the right of Blacks to sue for damages suffered as a result of a deprivation of the right to vote under an Oklahoma statute.[38]

b. *The State of Mind Requirement*

Neither the statutory language nor the legislative history of section 1983 contain any indication that a defendant must act with a particular state of mind before being subject to liability under the Act.[39] Nevertheless, many courts focused on the purpose or motive of the defendant in determining whether a section 1983 action existed. By 1954, one court was able to summarize the prevailing view of section 1983's judicially formulated state of mind requirement.[40] The court stated that a literal reading of the statute would "reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation."[41] The results feared by the court were both an unnecessary intervention by federal courts into an area traditionally left to state court remedies and a flood of trivial litigation into the federal courts.[42]

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36. Myers v. Anderson, 238 U.S. 368 (1915). A grandfather clause is a provision in a new law or regulation which exempts individuals already in or a part of an existing system which is being regulated. Maryland's attempt at basing an individual's voting qualifications upon the right of the citizen or his ancestors' ability to vote at a date prior to the adoption of the fifteenth amendment was found unconstitutional.

37. Nixon v. Herndon, 273 U.S. 536 (1927) (a state statute barring Blacks from participation in Democratic party primary elections was held to violate the fourteenth amendment).

38. Lane v. Wilson, 309 U.S. 268 (1939). The legislation purported to reform a grandfather clause, yet it gave Blacks only a 12 day period in which to register. The effect was that white people who were on the voting lists in 1914 were entitled to vote, whereas Blacks who failed to register in the 12 day period were permanently disenfranchised. The statute was held repugnant to the fifteenth amendment. The original grandfather clause had been at issue in Guinn v. United States, 238 U.S. 347 (1915), involving the criminal conspiracy section of 1870 civil rights legislation. This case was the companion case to Myers v. Anderson, *supra* note 36.

39. *See* GLOBE, *supra* note 14, at 365-66, 385, 390.

40. Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954) (plaintiff alleged a deprivation of his constitutional rights after he had, allegedly without notice or hearing, been committed to a state reformatory as a delinquent. The Commissioner of Corrections and the other defendants were not liable under § 1983).

41. *Id.* at 587.

42. Landholm, *supra* note 34, at 871. *See also* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969); Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352 (1970).

Extending the state of mind requirement even further, the First Circuit in *Cobb v. City of Maiden*[43] indicated that liability under section 1983 would exist only for harm intentionally inflicted under color of official authority "which the defendants *subjectively realized* would result in depriving the plaintiff of a right or privilege secured by the Constitution of the United States. . . ."[44] The subjective factor was presumably created to limit the number of trivial actions brought under section 1983. Consequently, it became common practice for plaintiffs to allege that not only had their constitutional rights been violated, but also that the defendant had acted with a specific intent to violate those rights.[45]

In contrast to the quandary surrounding a number of early section 1983 interpretations, the state of mind requirement involving administrative denials of equal protection has been clearly formulated since the decision of *Snowden v. Hughes,*[46] and has remained unchanged in this area. *Snowden* held that the unlawful administration of a statute which resulted in an unequal application of the law to a group of persons similarly situated was not a denial of equal protection under section 1983 "unless there is shown to be present . . . an element of intentional or purposeful discrimination. . . ."[47]

Evidently, the state of mind requirement, requiring proof of purpose or motive, in a section 1983 action was the result of the influence of a similar requirement for actions based on the section's criminal counterpart, 18 U.S.C. § 242.[48] To impose liability under section 242, the government was required to establish that the defendant had acted "willfully." Consequently, the Supreme Court reversed a conviction under the predecessor of section 242

43. 202 F.2d 701 (1st Cir. 1953).

44. *Id.* at 707 (emphasis added).

45. A plaintiff was forced to allege an intentional deprivation or have his action dismissed. *See supra* notes 39-44 and accompanying text.

46. 321 U.S. 1 (1943). The plaintiff alleged that a refusal by the state election board to certify the results of a state primary denied him equal protection of the law.

47. *Id.* at 8.

48. 18 U.S.C. § 242 (1976) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or . . . subject to imprisonment.

Id. (emphasis added).

in *Screws v. United States*[49] because the trial judge failed to instruct the jury to examine whether the defendant had actually intended to violate the victim's constitutional rights.

With the sole exception of the voting rights area,[50] only one early decision deviated from the intentional state of mind requirement. In *Pickering v. Pennsylvania Railroad,*[51] the Court distinguished section 1983 from its criminal counterpart,[52] which contained the "willful" state of mind requirement, on the grounds that section 1983 created civil rather than criminal liability. Accordingly, section 1983 could not be found unconstitutionally vague simply because it did not refer to the tortfeasor's state of mind.[53] By eliminating the state of mind requirement, the court greatly increased a plaintiff's chances of recovering for a deprivation of his rights. However, as a result of the twin fears of changing the balance of federalism and the potential flood of litigation into the already sufficiently filled docket of the federal courts, other jurisdictions chose not to follow *Pickering*'s lead.

The foundation was thus laid for *Monroe v. Pape.*[54]

2. The Judicial Awakening: *Monroe v. Pape*

The more things change the more they remain the same. An illustrative example was drawn by one commentator who compared two similar incidents separated by a span of ninety years.[55] When Congress was debating the Ku Klux Klan Act in 1871, Congressman Niblack of Indiana read into the Congressional record a story told by a South Carolina black man named Joshua Wardlaw. Wardlaw stated that late one evening the white man with whom he was living awakened him and his family, forced them outside, and that,

> Blackwell kicked one of my little children that was in the bed. They took my brother-in-law's gun and broke it against a tree in the yard. They laid me down on the ground, after stripping me as naked as when I came into the world, and struck me five times with a strap before I got away from them. After escaping they fired four shots at me, but did not hit me. I was so frightened I laid out in the woods all night, naked as I was, and suffered from the exposure. Mr. Richardson afterward told me that he was very

49. 325 U.S. 91 (1945). The case involved the conviction of a Georgia sheriff for the arrest and subseqent fatal beating of a black youth.

50. *See* earlier discussion in this section, *supra* notes 36-38 and accompanying text.

51. 151 F.2d 240 (3d Cir. 1945).

52. 18 U.S.C. § 242 (1968). *See supra* note 48 for the full text of the statute.

53. 151 F.2d at 249.

54. 365 U.S. 167 (1961). It is worth noting that the state of mind requirement had not been carefully analyzed to any great extent in the pre-*Monroe* era. The effects of varying degrees of negligence as sustaining a cause of action under section 1983 were an open book yet to be authored.

55. Shapo, *supra* note 28, at 277-78.

> sorry that I had escaped from them. My brother-in-law died from the beating he got. . . .[56]

Ninety years later, an almost identical nightmare was stated in the allegations of a complaint filed in the Federal District Court for Northern Illinois. A black Chicago man, James Monroe, alleged that thirteen city policeman broke through the doors of his apartment, woke both his wife and him with flashlights and,

> forced them at gunpoint to leave their bed and stand naked in the center of the living room . . . roused the six Monroe children and herded them into the living room . . . Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy" . . . another officer pushed Mrs. Monroe . . . other officers hit and kicked several of the children and pushed them to the floor . . . the police ransacked every room. . . . Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours . . . he was not advised of his procedural rights . . . he was not permitted to call his family or an attorney . . . he was subsequently released without criminal charges having been filed against him.[57]

Monroe's complaint was dismissed by the district court and the decision was affirmed by the court of appeals.[58] On certiorari, the Supreme Court held that James Monroe had stated a federal cause of action.[59] Monroe's claim for relief was allowed because section 1983, codifying in part the legislation of 1871,[60] was passed with the intent of eliminating stories like that of Joshua Wardlaw.

The *Monroe* decision is significant primarily for three reasons. First, it affirmed the view that individual actors, who carry a badge of authority for a state and represent it in some capacity,

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56. GLOBE, *supra* note 14, at 390 (quoting from the record of the South Carolina legislative investigating committee).

57. Monroe v. Pape, 365 U.S. 167, 203 (1961) (narrated in the dissenting opinion by Frankfurter, J.).

58. 272 F.2d 365 (7th Cir. 1959).

59. 365 U.S. 167 (as regarding the claim against the City of Chicago, the Court held that a municipal corporation was not within the ambit of the statute). Justice Douglas' finding of municipal immunity has been severely criticized. Courts have diligently sought to either limit or sidestep the municipal immunity precedent. The doctrine of municipal immunity was overruled by the Supreme Court in Monell v. Department of Soc. Serv. of City of N.Y., 436 U.S. 658 (1978) (the Court found municipalities to be within the group of "persons" to whom § 1983 applied). *See* Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act,* 45 S. CAL. L. REV. 131, 144 (1972), where the author concludes that the only policy consideration favoring the municipal immunity concept is the anachronistic idea that "the king can do no wrong." *See also,* Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961); Sherry, *The Myth That the King Can Do No Wrong: A Comprehensive Study of the Sovereign Immunity Doctrine in the United States and the New York Court of Claims,* 22 AD. L. REV. 39, 58 (1969).

60. The Ku Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (the Ku Klux Klan Act was also referred to as "the Third Civil Rights Act").

may be liable under the statute for the deprivation of a constitutional right of another whether they act in accordance with their authority or misuse it.[61] Second, plaintiffs need not exhaust state remedies as a prerequisite to pursuit of the federal remedy.[62] Finally, the Court held that a specific intent to deprive a person of a federal right was unnecessary to state a section 1983 claim.[63]

The Court found its first proposition easily supportable. Beginning with a general inquiry, the Court held that Congress had the power to enforce the provisions of the fourteenth amendment against persons who carry a badge of authority for a state and represent the state in some capacity, whether acting pursuant to that authority or acting in abuse of it.[64] The Court then focused upon the narrower issue of whether Congress, in enacting section 1983, intended to provide a remedy to parties deprived of constitutional rights by an official's abuse of his position.[65] The Court concluded that Congress had intended such a remedy.[66] Justice Douglas reasoned that the Court had previously interpreted the identical provisions in section 1983's criminal counterpart, section 242, to provide such a remedy and that the same construction should apply equally to both statutes.[67]

Justice Douglas stated what he believed to be the three purposes to section 1983: to "override certain kinds of state laws," to provide "a remedy where state law [is] inadequate," and "to provide a federal remedy where the state remedy, though adequate in theory, [is] not available in practice."[68] He found that the purpose of the statute was to provide a separate federal remedy independent of state laws:

> It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.* Hence the fact that Illinois by its constitution and laws outlaws unreason-

61. 365 U.S. at 184 (quoting from United States v. Classic, 313 U.S. 299, 325 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action 'taken under color' of state law." *Id.*).

62. 365 U.S. at 183.

63. *Id.* at 187.

64. *Id.* at 171-72.

65. *Cf.* Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

66. 365 U.S. at 172.

67. 365 U.S. at 185. "Thus, it is beyond doubt that this phrase should be accorded the same construction in both statutes . . . ." *Id.* Justice Douglas went on to note that the Court was dealing with statutory interpretations, not constitutional interpretations. Secondly, in examining the legislative history of the statute, not one word of criticism had appeared over the Court's previous construction of the phrase "under color of state law." Finally, "if [the Court] states a rule undesirable in its consequences, Congress can change it." *Id.*

68. 365 U.S. at 173-74.

able searches and seizures is no barrier to the present suit in the federal court.[69]

The Supreme Court clearly adopted the attitude that section 1983 was a supplemental remedy. Such a determination is consistent with the spirit and purpose surrounding both the birth and evolution of the statute.

It was the Court's third proposition which created the most controversy. Justice Douglas read section 1983 literally and asserted: "Section 1979 [42 U.S.C. § 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[70] Applying tort concepts to the facts in *Monroe* would probably result in a finding that the Chicago police officers had committed the intentional torts of assault, battery, false imprisonment, intentional infliction of mental distress, and invasion of privacy.[71] To what extent section 1983 actions should apply the "background of tort liability" remains uncertain. However, it appears that the decision of *Monroe* intended to abolish, at least in some instances, the specific intent requirement. Liability, therefore, appears to depend partially upon the consequences of the act, rather than simply upon the state of mind of the actor.[72]

69. 365 U.S. at 183 (emphasis added). Respondents had argued that Illinois provided an ample remedy for petitioner's claim. The breaking into petitioner's apartment violated the Constitution and laws of Illinois. It was pointed out that state law provided a simple remedy for the violation and that full redress could have been obtained under the common law. The Court stated that no "statute, ordinance, regulation, custom or usage" of Illinois had barred that redress. 365 U.S. at 172.

70. 365 U.S. at 187. Even Justice Frankfurter's dissent was in accord with the majority's position regarding a possible state of mind requisite. *Id.* at 207 (Frankfurter, J., dissenting).

71. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L. J. 5, 6 (1974). *See also* Restatement (Second) of Torts §§ 18, 35 (1965).

72. The literal reading of § 1983, along with the references to tort liability, supports the conclusion that the determining factor in a § 1983 action is whether the act results in the deprivation of a constitutional right. *See* Kirkpatrick, *Defining A Constitutional Tort Under Section 1983: The State of Mind Requirement,* 40 CIN. L. REV. 45 (1977). *See also* Bristow, *Section 1983: An Analysis and Suggested Approach,* 29 ARK. L. REV. 255 (1975). "[T]he real focus becomes whether or not a plaintiff's federal rights have been violated, not whether the violation was caused by an act or a failure to act. Judicial differentiation between intent and negligence in regard to such causation is meaningless obfuscation." *Id.* at 318.

4. The Progeny of *Monroe v. Pape*

a. *A Lack of Uniformity Among the Federal Courts*

Monroe's declaration that a specific state of mind was not required to maintain a successful 1983 action — thereby expanding the scope of the section in the direction of common law tort principles — was not uniformly adopted by the lower federal courts. The lower courts' approach varied from a narrow pre-*Monroe* specific intent requirement, to a middle ground of tort-based fault analysis, and possibly as far as strict liability.[73] *McCray v. Maryland*[74] was one of the few cases which upheld a section 1983 action based on negligent conduct.[75] The plaintiff alleged that the Clerk of the Baltimore City Court had negligently impeded the filing of his petition for state post-conviction relief. The district court dismissed the complaint and the court of appeals reversed, holding that the plaintiff's constitutional right of access to the courts had been violated and that his complaint, therefore, stated a negligence claim actionable under section 1983.[76]

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73. One author noted the ambiguity of Justice Douglas' language in *Monroe:*

> The phrase "background of tort liability" and "responsible for the natural consequences of his actions" can be read to refer to different concepts within the law of torts. On one hand, "responsible for the natural consequences of his actions" would appear to refer to a standard of strict liability.

Landholm, *supra* note 34, at 875. On the other hand, the language may also be interpreted as suggesting that the state of mind of the actor is irrelevant. *Id.*

74. 456 F.2d 1 (4th Cir. 1974).

75. *See* Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) (the court characterized the defendant police officer's conduct as a breach of a duty through inaction and therefore such inaction constituted negligence). While intentional torts ordinarily require affirmative conduct, occasionally an intentional failure to act serves as the basis for liability for an intentional tort.

Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds,* 409 U.S. 418 (1972) (argued in dictum that the superiors of a police officer were negligent in not properly training and controlling the officer). For articles pertaining to judicial treatment of § 1983 actions, *see* Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983,* 51 S. CAL. L. REV. 355 (1978); *Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1 (1974); Nahmod, *supra* note 71; Shapo, *supra* note 28; Note, *supra* note 42.

76. 456 F.2d at 5-6. The court relied upon three decisions for the proposition that a § 1983 action may be based on negligence: Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds,* 409 U.S. 418 (1972) (liability for negligent supervision and training of a police officer); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (police officer's reckless use of force); and Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969) (plaintiff's continued imprisonment for nine months after the dismissal of his indictment due to a communication breakdown). However, *Averett* involved *gross negligence,* as opposed to *ordinary negligence;* and *Whirl* involved a false imprisonment.

On the other hand, in Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc) *cert. denied,* 435 U.S. 932 (1978), the court concluded that no "constitutional tort" had been alleged by plaintiff's claim that the negligence of prison guards resulted in the loss of plaintiff's property. 545 F.2d at 567. The court first held that the neg-

In *Whirl v. Kern,*[77] a communication failure between a clerk's office and a sheriff's office caused the plaintiff to remain in jail for nearly nine months after his indictment had been dismissed. The sheriff was not found to have acted out of improper motives, and, furthermore, the jury found that he had not even been negligent. The court recounted Justice Douglas' belief that the section 1983 remedy was available when the constitutional deprivations stemmed from "prejudice, passion, neglect, intolerance . . . or otherwise,"[78] and concluded that "[s]uch language suggests that a federal forum is no less desirable for the inadvertent than for the malicious violation of constitutionally protected rights."[79] Although not expressly stating that strict liability was a viable approach to establishing liability under section 1983, *Whirl* implied that there was no state of mind prerequisite.[80]

Even after the *Monroe* decision, aiming toward either a tort or strict liability approach to section 1983 actions, some federal courts continued to cling to versions of the intent requirement. In *Beauregard v. Wingard,*[81] the court held that although specific intent was no longer a prerequisite to liability where police action was involved, " 'motive' should and does bear heavily in cases under section 1983. . . ."[82] Other federal courts have also refused to apply the tort liability concept to section 1983 actions.[83]

b. *The Retreat of the Supreme Court*

The Supreme Court, fearing that a literal reading of *Monroe*

ligent loss was not a deprivation of property without due process of law under the fourteenth amendment. The court then proceeded to conclude that the negligent conduct of the guards was not an action "under color of state law." Therefore, no cause of action under § 1983 had been alleged. *Id.*

77. 407 F.2d 781 (5th Cir. 1969).

78. Other federal courts have reached the same conclusion. *See, e.g.,* Johnson v. Crumlish, 224 F. Supp. 22, 25 (E.D. Pa. 1963), where the court noted that "[t]he Supreme Court has made 'neglect' a ground for bringing a federally derived claim as well as 'prejudice,' 'passion,' and 'intolerance.' " *Id.*

79. 407 F.2d at 788.

80. *Id.* First, *Whirl* held that the district court had erred in allowing the negligence issue to be considered by the jury. 407 F.2d at 793. Secondly, the court noted that the facts of the case illustrated a deprivation of constitutional rights capable of occurring even in the absence of malice or negligence. *Id.* at 788 n.7.

81. 230 F. Supp. 167 (S.D. Cal. 1964).

82. *Id.* at 183.

83. Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963) (limiting liability to cases involving at least "reprehensible action on the part of the defendant."). *See* Tyree v. Smith, 289 F. Supp. 174, 176 (E.D. Tenn. 1968); Bargainer v. Michal, 233 F. Supp. 270 (N.D. Ohio 1964).

would lead to a "font of tort law,"[84] began to search for its own methods of limiting the scope of section 1983. Only a year after the decision, the Court held that *Monroe* had not changed the requirement of purposeful discrimination as a prerequisite for establishing an equal protection deprivation.[85] Thirteen years later, the Court managed to curtail section 1983's scope by limiting the interests protectable under the Constitution. In *Paul v. Davis,*[86] the Court concluded that a personal reputation was not a constitutionally protected interest. Justice Rehnquist's opinion indicated a fear of creating general federal tort law.[87] Thus, by limiting the scope of section 1983, the Court attempted to avoid federal displacement of state authority.[88]

In *Wood v. Strickland,*[89] the Court held that a good faith immunity precluded liability under section 1983. The plaintiffs had alleged that their due process rights had been violated when they were expelled from school.[90] Relying upon common law and policy considerations, the Court extended a qualified immunity to good faith actions undertaken by school officials in fulfilling their official duties.[91] The immunity, however, was not absolute. Liability would be imposed if the actor knew or reasonably should have known that his actions would violate a constitutional right.[92]

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84. Paul v. Davis, 424 U.S. 693, 701 (1975).

85. Oyler v. Boles, 368 U.S. 448 (1962). The precedent of Snowden v. Hughes, 321 U.S. 1 (1944), was upheld. *Oyler* made it quite clear that an equal protection deprivation required a showing of deliberate discrimination.

86. 424 U.S. 693 (1975). *Paul* involved an action where police officials distributed a flyer containing photographs of persons described as "active shoplifters." Davis was charged with shoplifting, but was never convicted. The flyer was distributed to approximately 800 local merchants and Davis alleged that the listing of his name and inclusion of his photograph on the flyer had inhibited him from entering these establishments and had damaged his employment opportunities. He subsequently brought a § 1983 action alleging a deprivation of his liberty without due process of law. *Id.* at 696-97.

87. *Id.* at 698-99.

88. 424 U.S. at 698-701. *Paul* is one of the most heavily criticized decisions in a number of years. Justice Rehnquist was forced to cope with a number of decisions to reach his conclusion; most notably, Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting the names of excessive drinkers in public). Justice Rehnquist distinguished the *Constantineau* case on the grounds that the petitioner was actually deprived of the previously granted right to purchase liquor. Such a distinction can hardly be taken seriously. There is no indication anywhere in the opinion that the loss of the ability to purchase liquor had anything to do with the result. Rather, the Court had chosen to focus upon the damage to the petitioner's reputation, noting that: "[C]ertainly where the State attaches a 'badge of infamy' to the citizen, due process comes into play. . . ." 400 U.S. at 437. The only possible distinction is the difference between the type of stigma imposed, i.e., a morally reprehensible drunk as opposed to a common thief.

89. 420 U.S. 308 (1975).

90. *Id.* at 309-10.

91. *Id.* at 318.

92. 420 U.S. at 322.

Continuing to limit the scope of section 1983, the Court, in *Estelle v. Gamble,*[93] held that the negligent failure to provide adequate medical care for a prisoner was insufficient to establish a section 1983 cause of action for a violation of the eighth amendment's prohibition of cruel and unusual punishment.[94] The Court stated that since intent was a necessary prerequisite of an eighth amendment violation, a section 1983 suit based upon the amendment required a showing of some form of intent, or at least deliberate indifference.[95]

In *Ingraham v. Wright,*[96] an action involving disciplinary corporal punishment, the Court changed its field of fire by focusing on the nature of the constitutional right infringed. Thus, a *de minimis* level of inquiry had to be hurdled before a constitutional issue was ever raised.[97] In its two-step analysis, the Court concluded that the nature of the interest had to be examined first.[98] If a constitutionally protectible interest were found, the inquiry would then shift to a determination of whether the due process protections of section 1983 had been satisfied. Under this analysis, the Court concluded that the corporal punishment inflicted by school officials upon the plaintiff was insufficient to state an actionable section 1983 claim.[99]

In *Baker v. McCollan,*[100] the Court granted certiorari specifically for the purpose of determining whether negligence was sufficient to establish a section 1983 action.[101] The Court

93. 429 U.S. 97 (1976).

94. *Id.* at 105.

95. *Id.* at 105-06. "[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' " *Id.*

In his dissent, Justice Stevens chose to take an arguably more realistic approach to the instant problem: "Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." 479 U.S. at 116 (Stevens, J., dissenting).

96. 430 U.S. 651 (1977); *see infra* notes 153-55 and accompanying text.

97. 430 U.S. at 674.

98. *Id.* at 672.

99. *Id.* at 676.

100. 443 U.S. 137 (1979).

101. This question had previously been before the Court in Procunier v. Navarette, 434 U.S. 555 (1978) (a state prisoner brought an action against prison officials alleging, *inter alia,* a negligent interference with his outgoing mail in violation of his constitutional rights under the fourteenth amendment. The action was resolved on the basis of the prison officials, qualified immunity from damages under

subsequently avoided the negligence issue and decided the case on the grounds that the respondent had not suffered a deprivation of a constitutional right.[102] However, the Court did address the negligence issue in dicta.[103] The Court noted that the requisite intent requirement would vary depending upon the particular constitutional interest allegedly violated.[104]

As a final prelude to *Parratt,* the Supreme Court placed a narrow construction on the word "deprived," within the meaning of that word as contained in the due process clause and section 1983. In *Martinez v. California,*[105] the parents of a fifteen-year-old girl, murdered by a recently paroled inmate, brought an action against the state officials responsible for the parole decision.[106] They based their action on two theories. First, that the granting of absolute immunity to the state officers who had made the parole decision deprived their daughter of her life without due process because it left the parents without a cause of action against the state officials.[107] Second, that the action of the parole officers also provided a cause of action under section 1983, which provided an additional remedy.[108]

The Supreme Court held that the state statute granting absolute immunity was constitutional because the girl had not been "deprived" of her life within the framework of the due process clause and section 1983.[109] Justice Stevens' opinion stated that the death of the girl was simply "too remote a consequence of the parole officers' action" to have violated the due process clause.[110] Again, as in *Monroe,* the Court apparently had shifted its inquiry to tort law concepts. However, the definition of "deprived" was limited by the tort concepts of "proximate cause"[111] and "foreseeability."[112] The Court apparently intended that liability should not be extended to consequences which are simply too remote.

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§ 1983). The Court failed to address the negligence issue and dismissed the claim for failure to state a constitutional violation. *Id.* at 565.

102. 443 U.S. at 146-47. Therefore, the plaintiff failed to state an actionable claim under § 1983. *Id.*

103. *Id.* at 139-40.

104. *Id.*

105. 444 U.S. 277 (1980). For an analysis of the decision, *see* Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis,* 70 GEO. L.J. 861, 918-23 (1982).

106. 444 U.S. at 279-80.

107. *Id.* at 280-81.

108. *Id.* at 279, 280-81, 283.

109. *Id.* at 281, 283.

110. *Id.* at 285.

111. Proximate cause itself is an extremely complex concept. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 41-56, 236-90 (4th ed. 1971).

112. Foreseeability is also a nebulous concept. Generally, the concept entails the ability to see or know in advance. The *reasonable* anticipation is that harm or

III. PARRATT V. TAYLOR

The Court granted certiorari for the express purpose of determining whether negligent conduct would be sufficient to sustain a claim for relief under section 1983.[113] Specifically, the Court intended to eliminate the confusion existing in the lower federal courts by providing a workable standard for section 1983 claims.[114]

In his majority opinion, Justice Rehnquist perfunctorily stated that neither the statutory language of section 1983 nor the legislative history of the Civil Rights Act required any form of intent in order to sustain a section 1983 cause of action.[115] Therefore, a negligence-based cause of action could be asserted under section 1983.[116]

The Court next examined whether the respondent had suffered a deprivation of property without due process of law. With little difficulty, the Court concluded that the respondent's hobby kit was in fact "property" and that the negligent loss of that property by prison officials constituted a deprivation.[117] The final inquiry shifted to the issue that became the nucleus of the opinion: whether the deprivation of respondent's property was without due process of law.[118] The Court found the essence of due process to be an opportunity to be heard at a meaningful time.[119]

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injury is a likely result of acts or omissions. Emery v. Thompson, 347 Mo. 494, 148 S.W.2d 479 (1941). *See generally* RESTATEMENT (SECOND) OF TORTS § 435 (1965).

113. 451 U.S. at 532-34.

114. *Id.* at 533-34. "We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Id.*

115. *Id.* at 532-35. "Both *Baker* . . . and *Monroe* . . . suggest that §1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." *Id.* at 535. The *Baker* Court actually found that whether negligence was sufficient to state a § 1983 claim was not susceptible to a single answer, but would depend upon the particular constitutional right allegedly deprived. 443 U.S. at 139-40.

116. 451 U.S. at 535.

117. *Id.* at 536-37. The Court stated the two essential elements of a § 1983 action to be: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether the conduct deprived a person of his rights, privileges, or immumities secured by the Constitution or laws of the United States." 451 U.S. at 535.

118. 451 U.S. at 535-43. The three requirements of a due process claim had been alleged by the respondent: 1.) the prison officials had acted under color of state law; 2.) the hobby kit satisfied the constitutional definition of property; and 3.) the negligent loss of respondent's property constituted a deprivation. *Id.* at 536-37.

119. 451 U.S. at 540 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

The availability of a state tort remedy to redress the respondent's claim was considered an adequate means of fulfilling the due process requirements.[120] Accordingly, the Court held that respondent had failed to state a claim for relief under section 1983.[121]

Five justices were dissatisfied with some aspect of the majority opinion. Justices Stewart and Powell believed that intentional behavior was a necessary prerequisite to a due process violation.[122] Therefore, the mere negligent loss of respondent's property did not amount to a deprivation within the context of the fourteenth amendment.[123] Justice Blackmun, followed by Justice White, expressed his belief that the majority's holding that state tort remedies were sufficient to satisfy due process should not be extended beyond actions other than negligent deprivations of property.[124] Apparently, such an approach would be inappropriate for a situation involving an intentional deprivation under Justice Blackmun's reasoning. Finally, Justice Marshall expressed the view that negligence was sufficient to state a section 1983 violation; a state remedy may preclude a finding of a violation of the fourteenth amendment; but because the state prison officials had not informed respondent of his rights under state law the state remedy was itself inadequate.[125]

IV. Analysis of Parratt

A. *Whether a Section 1983 Complaint Framed in Terms of Negligence States a Cause of Action*

One aspect of Justice Rehnquist's treatment of the negligence issue is immediately apparent. It is surprisingly brief. In five paragraphs he disposes of the "legion" of conflicting views of vari-

120. 451 U.S. at 543-44. This reasoning appears to have been borrowed from Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), *modified en banc,* 545 F.2d 565 (1976), *cert. denied,* 435 U.S. 932 (1978) (the court held that the existence of adequate state procedures to redress a property loss caused by state officials precluded a finding of a due process violation).

121. 451 U.S. at 543.

122. *Id.* at 544-45 (Stewart, J., concurring) and *id.* at 545-554 (Powell, J., concurring).

123. Justice Stewart stated: "It seems to me extremely doubtful that the property loss here, even though presumably caused by the negligence of state agents, is the kind of deprivation of property to which the Fourteenth Amendment is addressed." 451 U.S. at 544 (Stewart, J., concurring).

124. 451 U.S. at 545-46 (Blackmun, J., concurring). "The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks." *Id.* at 546.

125. 451 U.S. at 554-56 (Marshall, J., concurring in part and dissenting in part). Justice Marshall would impose an affirmative obligation on the part of prison officials to inform a prisoner of the state remedies available to him.

ous courts to announce that, in contrast to its criminal counterpart,[126] section 1983 does not require intentional conduct or any other particular state of mind as a prerequisite to recovery.[127] Accordingly, all that is required by the statute is: (1) conduct "committed by a person acting under color of state law [that has] . . . (2) deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States."[128]

Although conceivably not a quantum leap, the shift from Justice Douglas' statement that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[129] to Justice Rehnquist's view that "[u]nquestionably, respondent's claim satisfies three prerequisites of a valid due process claim . . . and the alleged loss, even though negligently caused, amounted to a deprivation"[130] certainly deserves more than token analysis.[131] The Court based its opinion on a narrow interpretation of a few cases while simply ignoring other relevant authority.

The opinion of Justice Rehnquist relies primarily upon two cases, *Monroe* and *Baker*. However, *Monroe's* tort law analysis[132] does not express the view that negligence would be a sufficient prerequisite for a section 1983 action in all cases. On the contrary, *Monroe's* tort-based analysis suggests that the specific nature of the wrong is the basis for determining the culpable standard of conduct.[133] Additionally, *Baker*, which involved due process, stated in dicta that the state of mind of the defendant may be a relevant factor in determining whether a constitutional violation

126. 18 U.S.C. § 242 (1976).

127. 451 U.S. at 532-35.

128. *Id.* at 535.

129. 365 U.S. at 187.

130. 451 U.S. at 536-37.

131. The state of mind requirement for a § 1983 action has been one of the most perplexing problems facing the district courts in the last twenty years. To provide significant guidance, the analysis of the Supreme Court requires more than a passing explanation. For a critical analysis of Justice Rehnquist's opinions in due process cases *see* Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293 (1976).

132. 365 U.S. at 180. The Court interpreted the legislative history of § 1983 as evidencing an intent to provide a federal remedy for a state deprivation of a federal right "by reason of prejudice, passion, neglect, intolerance or otherwise." *Id.* At least one commentator supports the position that this language eliminates the state of mind requirement under § 1983. *See* Kirkpatrick, *supra* note 72.

133. 365 U.S. at 187.

had occurred.[134] Accordingly, neither case directly supports the conclusion that a negligent action is sufficient to support a cognizable constitutional violation.[135]

The lack of analysis is further evidenced by the failure to recognize and distinguish recent decisions which expressly required a finding of intent as a necessary prerequisite to a constitutional violation. In *Estelle v. Gamble,*[136] the Court held that a mere negligent failure to provide adequate medical care for a prisoner was insufficient to establish a section 1983 claim.[137] Consistent with *Monroe* and *Baker, Estelle* focused on the constitutional right allegedly infringed to determine the proper state of mind standard sufficient to constitute a constitutional deprivation.[138] In *Parratt,* apparently relying on *Monroe* and *Baker,* the Court rejected this line of analysis.

The conclusion that negligence can be a basis for a section 1983 action[139] is not particularly troublesome. The state of mind requirement is a child of judicial nativity. Neither the legislative history nor the language of the statute itself requires any form of intent as a prerequisite for a statutory violation.[140] Nonetheless, one cannot escape the feeling that some form of judicial sleight of hand is occurring in *Parratt.* Why would the Supreme Court, an institution historically unfriendly toward section 1983 actions,[141]

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134. 443 U.S. at 140 n.1.

135. Justice Powell's concurrence in *Parratt* reiterates the position that the actor's state of mind is of importance in determining whether a constitutional violation has occurred. "In my view, this question requires the Court to determine whether *intent is an essential element of a due process claim,* just as we have done in cases applying the Equal Protection Clause and the Eighth Amendment's prohibition of 'cruel and unusual punishment.' " 451 U.S. at 547 (Powell, J., concurring) (emphasis added).

For further comment on this matter, *see* Guild, *Civil Rights: The Supreme Court Finds New Ways to Limit Section 1983,* 33 U. FLA. L. REV. 776 (1981).

136. 429 U.S. 97 (1976). "[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' " *Id.* at 105-06. The Court required a deliberate indifference to be present in order to constitute an eighth amendment violation.

137. 429 U.S. at 105-06.

138. Because certain constitutional violations require a specified state of mind requirement, it is logical to require § 1983 actions to parallel the separate constitutional intent requirements.

139. 451 U.S. at 544.

140. *See supra* notes 5, 69-72 and accompanying text.

141. This line of analysis is inconsistent with the Court's recent decisions limiting the scope of § 1983 in a constant retreat from *Monroe.* A primary concern of the federal courts is the ever increasing caseload. One author has noted that between 1871 and 1939, only 19 § 1983 cases were reported. In 1960 there were 280 cases filed, 3,586 in 1970, and nearly 8,000 in 1973. Note, *Section 1983 and Federalism: The Burger Court's New Direction,* 28 U. FLA. L. REV. 904, 915 (1976). The author also states that federalism is a primary concern in the proliferation of § 1983

provide a negligence standard which would appear to greatly enlarge the scope of section 1983 actions? The answer may well be in the Court's unexpressed motivations. In addition to broadening the potential scope of section 1983, the Court simultaneously held that where an adequate state remedy exists, the requirements of due process are satisfied.[142] Therefore, because tort remedies traditionally encompass negligently inflicted harm, the Court has effectively demoted a constitutional deprivation to a simple violation of state tort law.[143]

B. The Need for a Supplemental Remedy

1. The Doctrine of Exhaustion

Until recently, it had been considered well settled law that a plaintiff was able to maintain a section 1983 action in federal court without regard to the possible availability of adequate state remedies.[144] *Monroe* clearly established the principle that a party seeking redress for a constitutional violation need not exhaust state tort remedies as a prerequisite to maintaining a claim in federal court.[145] However, the no-exhaustion rule became the subject of critical attack. Criticism was particularly severe in the context of administrative remedies.[146] Judge Friendly, for example, urged that exhaustion of state administrative remedies should be a precondition to access to the federal courts.[147] The theory behind exhaustion is judicial economy; requiring adminis-

actions. Actions involving state officials and state policies are being displaced by the federal courts, leading to an unnecessary burden of the federal caseload.

142. 451 U.S. at 544.

143. *See* Guild, *supra* note 135.

144. Monroe v. Pape, 365 U.S. 167 (1961). *See, e.g.,* Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352 (1970); Note, *Exhaustion of State Remedies Under the Civil Rights Act,* 68 COLUM. L. REV. 1201 (1968); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 YALE L.J. 143 (1969).

145. In *Monroe,* Justice Douglas stated that: "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.

146. The Second Circuit, for example, consistently resisted excluding § 1983 cases from an administrative exhaustion requirement. *See* Plano v. Baker, 504 F.2d 595 (2d Cir. 1974); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973)

147. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 100-01 (1973); *see also* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 LAW & SOC. ORDER 557, 575-78 (1973).

trative agencies to first attempt to resolve the conflict.[148] Additionally, there is a salient interest in permitting the states to design and administer state remedies concerning state actions.[149]

Although not expressly overruling the no-exhaustion precedent, the Supreme Court began to escalate the importance of available state remedies in *Paul v. Davis*[150] and *Ingraham v. Wright.*[151] In *Paul,* the scope of section 1983's jurisdictional authority was curtailed.[152] The rhetoric of Justice Rehnquist's majority opinion focused on the availability of a state tort remedy which could have provided a parallel remedy to the plaintiff's section 1983 claim.[153]

In *Ingraham,* the Court advanced even further toward overturning the no-exhaustion doctrine. The Court rejected a challenge to the constitutionality of a state statute authorizing disciplinary corporal punishment.[154] Justice Powell's majority opinion repeatedly relied upon the common law background surrounding the use of reasonable corporal punishment. Again, the opinion referred to the existence of adequate common law concepts in disposing with the plaintiff's due process allegations.[155] Although the Court found corporal punishment to be an interest protected by the "liberty" safeguard of the fourteenth amendment, it nevertheless found the state common law remedies to afford adequate due process protections.[156]

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148. *See* Parisi v. Davidson, 405 U.S. 34, 37 (1972) ("the basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence." *Id.*); J. LANDIS, THE ADMINISTRATIVE PROCESS 153 (1938).

149. *See Developments, supra* note 30, at 1179-83.

150. 424 U.S. 693 (1976); *see supra* note 86.

151. 430 U.S. 651 (1977); *see infra* notes 154-56 and accompanying text.

152. *See supra* notes 86-88 and accompanying text.

153. Justice Rehnquist noted that it appeared the plaintiff had stated "a classical claim for defamation" which *could* have been brought in state court. 424 U.S. at 697 (notice that Justice Rehnquist has changed the word could, as in *Paul,* to must, in *Parratt*). Fearing further expansion of § 1983, Justice Rehnquist stated that providing a federal remedy for such an invasion would "almost necessarily" convert any tort committed by a state official under color of state law, into a violation of the fourteenth amendment. 424 U.S. at 699. *See generally* Shapiro, *supra* note 131, at 324-28.

154. 430 U.S. at 674. The Court held that there existed a mere *de minimis* degree of infringement upon the constitutionally protected liberty interest to be free from physical punishment with which the Court is not concerned. The corporal punishment inflicted upon the school children in this situation was determined not to surpass that level. *Id.*

155. The Court found that a role was played by "[t]raditional concepts" concerning allegations of cruel and unusual punishment. 430 U.S. at 659 (citing Powell v. Texas, 392 U.S. 514, 535 (1968)).

156. 430 U.S. at 670.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law.

In light of the ever burgeoning federal docket and the availability of adequate state tort remedies, a logical inquiry would be whether there is a valid justification for burdening the federal courts with section 1983 actions. Justice Harlan, in his concurring opinion in *Monroe,* suggests a justification for providing a "supplementary" remedy under section 1983.[157] Quite simply, the federal remedy is provided because the interest asserted by the plaintiff is important enough to warrant protection by the federal Constitution.[158] When the state remedy is "fully appropriate to redress those injuries . . . against which the Constitution provides protection," it is simply a matter of "the purest coincidence."[159]

Reduced to its simplest form, the argument is that the federal courts are the most appropriate forum to redress the violation of federal rights.[160] As noted by one commentator, the open federal door symbolizes the importance of those rights.[161] Beyond theoretical justification, an obvious reason for providing a federal judiciary for section 1983 actions exists because Congress has mandated the federal forum. The federal government created the Constitution, the Congress enacted section 1983, and the federal courts were intended to construe the implications of the statute. Since the federal government has chosen to impose these rights and remedies, that same government should bear the cost of their enforcement. Although arguments calling for judicial economy are appealing,[162] they become irrelevant in light of the protections granted by the Constitution and section 1983—and the corresponding choice to bear the costs of protecting these interests. Accordingly, fiscal judicial concerns are inadequate justifications for releasing this protection to state courts.

Id.

157. *See* 365 U.S. at 196. Through the federal courts, the federal government is able to participate in the process of defining these core values.

158. *Id.*

159. 365 U.S. at 196 n.5.

160. *See* H. FRIENDLY, *supra* note 147, at 90.

161. Whitman, *Constitutional Torts,* 79 MICH. L. REV. 5, 22 (1980).

162. One of Chief Justice Burger's major concerns is the state of affairs in the federal courts: the bench is understaffed, overworked, and the situation is consistently growing worse. *See, e.g.,* Burger, *Annual Report on the State of the Judiciary,* 66 A.B.A. J. 295, 297 (1980); Burger, *Chief Justice's Yearend Report, 1977,* 64 A.B.A. J. 211 (1978); Burger, *Chief Justice Burger's 1977 Report to the American Bar Association,* 63 A.B.A. J. 504 (1977); Burger, *Agenda for 2000 A.D. - A Need for Systematic Anticipation,* 70 F.R.D. 83 (1976).

Additional considerations dictate the need for a supplemental remedy. In the case of uncertain state law, the plaintiff may be compelled to first bring the state action to clarify the state remedy.[163] If unsuccessful, his costs would be duplicated by subsequent federal litigation. Where a state remedy existed, the plaintiff would have to resort to that forum initially. At best, he may only be forced to duplicate his costs by subsequently resorting to a federal forum if unsuccessful in state court.[164] On the other hand, based upon principles of comity and the growing need for judicial economy, he could be barred from relitigating his claim in a federal forum under the doctrines of res judicata.[165]

As noted by Justice Douglas, one of the primary purposes of section 1983 was that "it provided a remedy when state law was inadequate."[166] The inadequacy of state law was one of respondent's primary contentions in *Parratt.* Four deficiencies were noted.[167] First, the state remedy provided only for an action against the state, and not individual defendants.[168] Second, the state remedy did not allow for punitive damages.[169] Third, the state remedy did not grant the right to a jury trial.[170] Finally, the existence of a cause of action was dependent both upon underlying state tort law and upon specific statutory exclusions.[171] The Court rejected respondent's contentions holding that, although he may have been denied relief which would have been available under section 1983, the limited state remedies were sufficient to "satisfy the requirements of due process."[172]

The Court laid to rest the no-exhaustion doctrine. In doing so, the Court overruled *Monroe,* relying only on limited dicta in *Paul*[173] to justify its conclusion, and still had the confidence to

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163. *See Developments, supra* note 30, at 1254-57. *See generally Developments, supra* note 30, at 1164-74.

164. *Cf.* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (allowing a procedure for reserving federal claims for federal court determination in abstention cases).

165. Allen v. McCurry, 449 U.S. 90 (1980). The Court held that the decision of a state court on a federal constitutional claim raised in a state criminal proceeding was assertable as a collateral estoppel defense to a subsequent action for damages under a § 1983 action. *Id.* This result seems to be another device to narrow the scope of § 1983 actions.

166. 365 U.S. at 173.

167. Respondent's Brief on the Merits at 25-26, Parratt v. Taylor, 451 U.S. 527 (1981).

168. NEB. REV. STAT. §§ 81-8,215, 81-8,223 (Reissue 1976).

169. *Id.*

170. NEB. REV. STAT. § 81-8,214 (Reissue 1976).

171. NEB. REV. STAT. § 81-8,215 (Reissue 1976).

172. 451 U.S. 543-44.

173. 451 U.S. at 544. "Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already

state that "[o]ur decision today is fully consistent with our prior cases."[174] The Court has apparently shifted the responsibility of formulating the rights and remedies provided by the federal Constitution and a federal statute to the state courts.

2. The Examination of Due Process

Having found that the officials had acted under color of state law,[175] the Court proceeded to examine whether respondent had suffered a deprivation of property without due process of law. Unquestionably respondent's hobby kit satisfied the definition of property.[176] Additionally, as previously discussed, even a negligent loss of property constituted a deprivation.[177] Therefore, the definitive issue became that of due process.[178] Justice Rehnquist found that the availability of state tort remedies satisfied due process.[179]

The Court initially examined situations where a pre-deprivation hearing was required prior to state interference with a liberty or property interest. The Court determined that pre-deprivation hearings were required to satisfy due process only where the deprivations were a result of an established state procedure.[180] The Court proceeded to examine cases where a post-deprivation remedy was found to have satisfied the requirements of due process. The Court stated that, in cases involving inadvertent deprivations of property, as long as an adequate opportunity for a judicial inquiry was ultimately available, the mere postponement

be administered by the States.'" *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

174. 451 U.S. at 544.

175. *Id.* at 535-36. "[I]t can no longer be questioned that the alleged conduct by the petitioners in this case satisfies the 'under color of state law' requirement. Petitioners were, after all, state employees in positions of considerable authority." *Id.*

176. 451 U.S. at 536.

177. *Id.* at 536-37.

178. "Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'" 451 U.S. at 537.

179. Having found the state remedy to provide adequate constitutional protection, Justice Rehnquist held that "the respondent [has] not alleged a violation of the Due Process Clause of the Fourteenth Amendment." 451 U.S. at 543.

180. In these situations, due process was held to require a pre-deprivation hearing because the deprivation was authorized by an established state procedure. 451 U.S. at 537-38. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

of that inquiry did not violate due process.[181] Consequently, even though the original acts of the state employees may have amounted to a constitutional deprivation, the availability of a tort remedy in Nebraska precluded a finding of a due process violation—Taylor had merely been deprived of his property, not due process.[182]

This conclusion is beyond a procedural determination. The Court is not merely holding that state remedies must first be exhausted before a plaintiff can file a section 1983 action. Rather, Justice Rehnquist made a substantive decision that because a post-deprivation state remedy was available, the prison officials' misconduct did not violate the fourteenth amendment.[183] The analysis is troubling. Presumably, if the state fails to provide an adequate tort remedy, the constitutional deprivation would be the work of the state, and not of the original wrongdoers—who should not be the ones held liable for a failure of the state to enact appropriate legislation.[184]

Elaborating on his analytical process, Justice Rehnquist subsequently made a curious remark about the nature of due process itself: "[a]lthough [respondent] has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established State procedure."[185] The statement would appear to imply that various degrees of due process ex-

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181. The Court found in certain cases that either the necessity for immediate action by the state or the impracticality of providing a meaningful pre-deprivation process can, when coupled with a subsequent inquiry into the propriety of the state's action, satisfy the requirements of procedural due process. 451 U.S. at 539. *See* Mitchell v. W.T. Grant Co., 416 U.S. 606 (1974).

182. 451 U.S. at 537-44. Consequently, the respondent's § 1983 claim was unfounded. *Id.* at 544.

183. *See* Kirby, *Demoting 14th Amendment Claims to State Torts,* 68 A.B.A. J. 167, 167-71 (1982).

184. The problem with this analysis was pointed out in Kent v. Prasse, 385 F.2d 406 (3rd Cir. 1967). The court faced an identical claim of a deprivation of procedural due process by prison officials because the state failed to provide a remedy for official negligence. The court stated that "[i]n any event, such a deprivation would be the work of the state, not these defendants." 385 F.2d at 407. This dilemma was noted by Justice Powell in his concurring opinion in *Parratt. See* Tenney v. Brandhove, 341 U.S. 367 (1951) (immunity for legislators); Edelman v. Jordan, 415 U.S. 651 (1974) (the eleventh amendment bars suits against the states in federal court).

185. 451 U.S. at 543. Justice Rehnquist assumes that the due process clause and section 1983 are virtually co-extensive and interchangeable. However, upon examination of the legislative history of § 1983, it would appear that Congress intended more than a mere codification of the fourteenth amendment. *See* notes 13-38 and accompanying text.

ist:[186] a sliding scale of due process.[187] Justice Rehnquist notes the difference between an occasional deviation and an ongoing, repetitive state action, the former being a lesser degree of deprivation requiring a correspondingly lesser form of due process to satisfy constitutional protections. Under such an analysis the state tort remedies were found sufficient to satisfy this limited invasion of the respondent's due process.[188]

The Court stated that "[t]he fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' "[189] Thereafter, the presence of a state remedy is found to satisfy these requirements.[190] A question worth begging is, can a state statute, unnoticed by a federal district judge and his clerks, the staff of the state attorney general's office, the staff of the Nebraska Correctional Complex, private counsel, and the judges and clerks of the court of appeals be considered as granting respondent an opportunity to be heard "at a meaningful time and in a meaningful manner" after five years of litigation seeking the return of $23.50?[191]

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186. *See* Terrell, *supra* note 105, at 924-26.

187. Justice Marshall is the strongest advocate of a sliding scale approach to due process. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting).

188. 451 U.S. at 543-44. "The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." *Id.* at 544.

Perhaps what is most disturbing is that the opinion appears to be equally applicable to intentional as well as negligent misconduct. The Court's analysis refers to cases "such as the present one which allege facts that are commonly thought to state a claim for a common law tort normally dealt with by state courts. . . ." 451 U.S. at 533. Common law torts encompass intentional as well as negligent acts. Additionally, the Court noted that the deprivation was not pursuant to established state procedures, but rather involved an unauthorized failure to adhere to standards. Such a deviation could not have been practically restricted in advance; therefore, it only required post-deprivation remedies. 451 U.S. 537-44. This situation could apply equally to unauthorized intentional or negligent actions.

The possible application of *Parratt* to intentional acts draws additional support from the recent Supreme Court decision in *Ingraham* which also involved intentional acts. The analysis of both cases would indicate that due process may be satisfied by state common law remedies even when constitutional rights have been invaded intentionally.

189. 451 U.S. at 540 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

190. 451 U.S. at 544.

191. Although found to be the determinative factor in denying a due process violation, the petitioner failed to raise the issue of the availability of a state law remedy in either the district court or the court of appeals. As noted by Justice Marshall, "[t]he issue was first presented in the petition for rehearing filed in the

In *Monroe,* Justice Douglas stated that the third function of section 1983 was to provide a federal remedy where a state remedy, though adequate in theory, was not available in practice.[192] Arguably, *Parratt* presents such a situation. Justice Marshall placed significance on the fact that the "respondent [was] a state prisoner whose access to information about his legal rights [was] necessarily limited by his confinement."[193] The prisoner pursued his complaint concerning the missing hobby kit through the prisoner's grievance procedures, but was never informed about the remedies available under state law. Justice Marshall states that if prison officials fail to inform a prisoner of the available state remedies "they should not be permitted to rely on the existence of such remedies as adequate alternatives to a section 1983 action for wrongful deprivation of property."[194]

Additional aspects of Justice Rehnquist's opinion are disturbing. First, the decision revolves primarily around the Constitution and ignores the statute, the vehicle under which the action was commenced. The statute, as well as the Constitution itself, by its terms, embodies a clear choice to bear the burden of the costs to vindicate certain fundamental rights.[195] Second, the Court's reasoning places the proper analysis backwards; to start with the common law and give the remains to the Constitution. The grant of power from the supremacy clause makes the Constitution the highest source of law in the land.[196] The states may always go beyond the Constitution, but they may not provide less.[197] Accordingly, the Constitution should dictate the requirements of state laws, not vice versa.[198]

Court of Appeals." 451 U.S. at 556 n.2 (Marshall, J., concurring in part, dissenting in part). Respondent noted that it was the Attorney General's office that was charged with responsibility for the investigation, evaluation, and settlement of claims made under the state act. "Since the Attorney General's office had actual knowledge of respondent's claim since the service of his complaint in April of 1976, raising the applicability of the State Act for the first time four years later is disingenuous at best." Respondent's Brief on the Merits at 24 n.7, Parratt v. Taylor, 451 U.S. 527 (1981).

192. 365 U.S. at 174; *see supra* notes 54-71 and accompanying text.

193. 451 U.S. at 555.

194. Justice Marshall would place an affirmative obligation on prison officials to inform an inmate of any available state remedies. If prison officials failed to do so, Justice Marshall would hold that the requirements of due process had not been satisfied. *Id.* at 556.

195. *See supra* notes 13-38, 144-73 and accompanying text; Whitman, *supra* note 161, at 21-32.

196. U.S. CONST. art. VI.

197. *See supra* note 179.

198. However, the preclusion of section 1983 actions was limited to situations where adequate state remedies exist. Therefore, the Court's decision has a built-in "safety valve." Kirby, *supra* note 183, at 171. Accordingly, a plaintiff who is wrongfully deprived of his property by a person acting under color of state law

On the other hand, is there anything wrong with this practice? Consistent with the emergence of the new federalism, the federal government is diverting a constant stream of authority to the state level. Judicial deference is merely another facet. The final determination inevitably depends on the manner in which one perceives the interactions of the state and federal governments.

3. What is a $23.50 Claim Doing in the Supreme Court of the United States?

In his opening paragraph, Justice Rehnquist states that "[a]t first blush one might well inquire why respondent brought an action in federal court to recover damages of such a small amount for a negligent loss of property. . . ."[199] The inquiry is answered by the latter half of the same sentence. "[B]ecause 28 U.S.C. §1343,[200] the predicate for the jurisdiction of the United States District Court, contains no minimum dollar limitation, he was authorized by Congress to bring his action under that section if he met its requirements and if he stated a claim for relief under 42 U.S.C. §1983."[201]

Applying about $23.50 worth of analysis, the Court disposed of one of the most controversial issues facing federal courts today: whether apparently trivial claims justify the time and expense of federal litigation. Persuasive arguments have been extended from both sides of the dispute. Dating back to 1871, the Congress contemplated that section 1983 actions would encompass monetarily trivial claims. The language from the original congressional debates was quoted in both *Monroe v. Pape*[202] and *Carey v. Piphus:*[203]

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may still seek a federal remedy under section 1983 if state remedies are inadequate. This conclusion will inevitably result in considerable differences of opinion concerning judicial line drawing between what constitutes adequate and inadequate state remedies.

199. 451 U.S. at 529.

200. The jurisdictional counterpart of § 1983 is 28 U.S.C. § 1343(3) (1976). Like § 1983, the statute was originally part of the Civil Rights Act of 1871, 17 Stat. 13, § 1 (1871). It provides that federal district courts shall have original jurisdiction, without regard to the amount in controversy, over civil actions brought "[t]o redress the deprivation, under color of any State law . . ." of any constitutional right, and of any right "secured . . . by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C. § 1343(3) (1976).

201. 451 U.S. at 529.

202. 365 U.S. at 180.

203. 435 U.S. 247, 255 n.9 (1978) (action by public school students pursuant to

> The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.[204]

Apparently Congress must have concluded that cases which raise constitutional issues deserve special attention—a special forum. Although the conditions in this country have changed dramatically since 1871,[205] the fact that Congress has chosen to leave the statute intact evidences a continuing congressional expression that a supplemental remedy is still required today. A straightforward justification for the federal remedy is that because the interests being asserted are significantly different from a state right and have been granted the protection of the federal Constitution they accordingly deserve a federal forum.[206]

But every coin has two sides. If one justification were labeled symbolic, the turn of the coin would reveal the practical side. The desire to reduce, or at least stabilize, the federal case load is an extremely serious practical problem.[207] As noted by Justice Powell:

> The present case [*Parratt v. Taylor*], involving a $23 loss, illustrates the extent to which *constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals.* There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of right to a court of appeals, and potentially, consideration of petition for certiorari in this Court. It is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an overburdened

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§ 1983 against school officials, where the students had been suspended from school without procedural due process).

204. GLOBE APP., *supra* note 14, at 216.

205. *See supra* notes 13-28 and accompanying text.

206. *See* 365 U.S. at 196 (comments by Justice Harlan).

207. The burden of the federal caseload is Chief Justice Burger's most consistent complaint. *See supra* note 162. A recent A.B.A. Journal article indicated the ever increasing pressures of the Court's case load:

> In surprisingly frank remarks, three Supreme Court justices told annual meeting sessions that their workloads are becoming too burdensome and may even be affecting the administration of justice. Already facing a docket full through February, "what this means is that we shall not be current in our work" said Justice Byron White. "Cases will be ready for argument, and we shall not be ready for them."
>
> Speaking before the American Judicature Society, Justice John Paul Stevens said the court is "too busy to decide whether there was anything we could do about the problem of being too busy . . . ."
>
> Powell pointed to the thousands of state prisoners' suits, both civil rights and habeas corpus cases, now in the federal district courts, and declared that "the time has come for considering means of limiting collateral review by federal courts of state convictions to cases of manifest injustice where the issue is guilt or innocence."

Middleton, *High Court's Case Load Too Heavy: Three Justices,* 68 A.B.A. J. 1201 (1982).

federal system that never was designed to be utilized in this way.[208]

One major factor which has contributed to the ever increasing burden of the federal caseload is the unique situation surrounding prisoner litigation. One restraint on unwarranted litigation is expense. Litigants limited by the realities of time and expense are deterred from bringing a suit when the chances of ultimate success are slight. However, such is not the case in the field of prisoner litigation, because most civil rights actions are brought *in forma pauperis.*[209] Undeterred by financial constraints, a prisoner has nothing to lose by commencing frivolous actions. Consequently, the resulting proliferation of prisoner litigation.

The proliferation has a detrimental effect upon the entire process. Damage to the system occurs because the sheer quantity of section 1983 actions, regardless of their respective merit, ultimately must denigrate all rights, simply because the judiciary is incapable of sympathetically responding to each and every claim. The curiosity and wonderment experienced at the sight of the initial snowflake soon dissipates upon the arrival of the blizzard. As a matter of self-preservation, judges may begin to read complaints from a less than sympathetic standpoint, searching for narrow resolutions to avoid complex constitutional issues.[210] Such an outlook is not the fault of the judiciary, but rather a natural reaction to an impossible situation. The ultimate result may demote judging to an onerous and boring administrative chore.[211]

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208. 451 U.S. at 554 n.13 (Powell, J., concurring) (emphasis added).

209. *In forma pauperis* is a procedure whereby a court grants permission to an indigent to proceed without liability for court fees or costs.

However, under 28 U.S.C. § 1915(d) (1976), a court may dismiss a complaint in a *forma pauperis* proceeding if the court is satisfied that the suit is "frivolous" or "malicious." 28 U.S.C. § 1915(d) provides in part that "[t]he court . . . may dismiss a case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." *Id.* Despite this device, its infrequent use has failed to significantly reduce the federal caseload. *Cf.* Foster v. Jacob, 297 F. Supp. 299 (C.D. Cal. 1969):

> This does not mean that we must review every diagnosis by a prison doctor or vindicate every prisoner who gets into an insolvent "your another" type of argument with a guard and receives a punch in the process. The action is frivolous and it accordingly is dismissed, under authority of 28 U.S.C. § 1915(d).

Id. at 300. The problem involving property actions is determining what constitutes a frivolous monetary amount, especially when considering that § 1983 requires no minimum jurisdictional dollar value. Additionally, a deprivation of five dollars or less may constitute a loss of all the money an indigent prisoner has.

210. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Court,* 92 HARV. L. REV. 610, 638 n.144 (1979).

211. *See* Whitman, *supra* note 161, at 27.

Regardless of which side of the coin one chooses, reality cries out for a remedy. The obvious solution to reducing the caseload would involve congressional action. Section 1983 could be reworded in a narrower, more carefully articulated fashion, or a jurisdictional amount requirement could be imposed for property cases.[212] Absent such legislation, the courts will continue to search for narrowing devices. Unable to question the clear meaning of section 1983, an almost irrepressible remedy, the Court has chosen to limit the protections granted by the Constitution itself.

V. Impact of the Case

Parratt v. Taylor is not an earthshaking decision. Regardless of the Court's determination, the republic will not fall. However, like the individual pieces of an intricate puzzle, the decision has a separate and important function. While readily stating that negligent conduct can constitute a constitutional deprivation,[213] like any great prestidigitator, Justice Rehnquist appears more concerned with limiting the jurisdiction of the federal courts. Apparently, by allowing a negligence based cause of action under section 1983 the Court has expanded the scope of its jurisdiction. But the Court goes on. Having found a negligence based claim to exist, the Court decides that the appropriate forum for such an action is a state court—where state negligence concepts are clearly defined. The Court has decided that: (1) a negligent action is sufficient to state a federal cause of action under section 1983, and (2) the violation of this federal right should be remedied in the state courts. Therefore, the Court has finally succeeded in diverting federal section 1983 actions to the state courts.

The impact of the decision is not so much what it says but what it does. First, the decision not only fails to recognize or distinguish relevant precedent, but it does so without any contrary authority or analysis.[214] Under the guise of articulating a working standard for the lower courts,[215] the Court may have created a larger theoretical gap than the one which it sought to close. Such

212. In *Parratt,* Justice Powell stated the need for congressional reform: "[P]erhaps the time has come for a revision of this century-old statute—a revision that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action." 451 U.S. at 555 n.13.

213. 451 U.S. at 534-37.

214. *Monroe* and *Baker,* the two cases relied on by the Court in reaching its state of mind requirement, appear to imply that the standard of conduct necessary to establish a § 1983 action depends upon the nature of the alleged deprivation. Furthermore, *Estell* cannot be meaningfully distinguished simply because it involved the eighth amendment.

215. 451 U.S. at 533-34.

a decision can only serve to denigrate the authority and esteem of the Supreme Court.

Second, Justice Rehnquist ostensibly assumes that section 1983 and the due process clause are coextensive.[216] The analysis of the deprivation argument operates interchangeably between the due process clause and section 1983. Section 1983 was not enacted for the purpose of codifying the fourteenth amendment. Rather, it was intended as a broad remedial act to provide remedies which were not currently available under the Constitution.[217] To regard the two as co-extensive is to misconstrue the function of section 1983.

The more interesting inquiry is why the Court has chosen to regard the separate provisions as interchangeable. The answer must exist somewhere in the Court's unexpressed intentions. The following possible answer is presented for consideration. The Court finds itself faced with a seemingly irrepressible remedy, section 1983. Precedent, the broad language of the statute, and a clear legislative history make a supportable narrowing of the statute itself impossible. The Constitution, on the other hand, is a two hundred year old, ambiguously drafted, constantly interpreted document. Therefore, by construing the two as co-extensive, a limiting of the due process clause—traditionally regarded as a judicially evolving creature—by necessary inference also limits section 1983. A determination that no fourteenth amendment violation exists simultaneously removes any predicate for a section 1983 action. Judicial sleight of hand masterfully performed.

The final piece of the puzzle has yet to be positioned. The Court has apparently left a safety valve in its holding; that if the state fails to provide an adequate remedy, the plaintiff is theoretically allowed to bring his section 1983 action in federal court.[218] However, there is a problem when theory is transformed into reality.

Let us assume, arguendo, that subsequent to the decision in *Parratt,* the State of Nebraska chooses to repeal the state based post-deprivation remedy. Additionally, let us imagine that Taylor orders another hobby kit which is shipped to him and is again lost by unidentified individuals. Unable to identify the wrongdoer, the

216. *Id.* at 532-39.
217. *See supra* notes 13-29 and accompanying text.
218. 451 U.S. at 543-44.

prisoner is without a defendant. Assuming the prison supervisors have acted in good faith and without sufficient knowledge of such actions, the negligent actions of the prison personnel could not be imputed to them.[219] The doctrine of respondeat superior is not an available remedy because it is generally held inapplicable to section 1983 actions.[220] Therefore, no state remedy exists.

Although the deprivation was committed by prison officials, it is the lack of a post-deprivation remedy which the Court finds to constitute a violation of due process. Thus, the true party who has deprived the prisoner of due process is the state, for it has failed to provide the remedy, not the original wrongdoer. Faced with no other alternative, the prisoner commences a federal action against the state and its legislators for a violation of his due process. However, both are immune from suit in federal court.[221] The prisoner is without a remedy. What happened to his due process?

Consequently, although the Court states that a federal remedy is open under section 1983 when the state fails to provide a remedy, in fact, the Court has finally found a way to preclude such actions in the federal courts.

VI. Conclusion

Parratt v. Taylor raises serious questions concerning the unexpressed motivations of the Supreme Court. Recent developments appear to suggest that the Court, in searching for methods to relieve its congested docket, has chosen to substantially curtail federal jurisdiction: limiting federal habeas corpus review of state decisions on fourth amendment claims;[222] holding that state judgments are entitled to full res judicata effect in federal civil rights litigation;[223] and its ruling that the federal courts may not con-

219. *See* Rizzo v. Goode, 423 U.S. 362 (1976). The mere "failure to act [even] in the face of a statistical pattern" of incidents of misconduct was held to be insufficient as a basis of liability. *Id.* at 376; Hayes v. Jefferson County, Ky., 668 F.2d 869 (6th Cir. 1982).

220. *See Developments, supra* note 30, at 1207.

221. *See supra* note 184.

222. Stone v. Powell, 428 U.S. 465 (1976). The respondent was convicted of murder in state court, based in part upon testimony concerning a revolver found on his person when he was arrested because of a violation of a vagrancy ordinance. The trial court rejected the petitioner's contentions that the arrest was illegal because the ordinance was unconstitutional. The appellate court affirmed. Respondent subsequently applied for habeas corpus relief in the federal district court. The Supreme Court held that where the state has provided a full and fair opportunity for litigation of a fourteenth amendment claim, a prisoner will not be granted federal habeas corpus relief on the grounds that the evidence seized was unconstitutional.

223. Allen v. McCurry, 449 U.S. 90 (1980). Respondent, following a denial to suppress certain evidence on fourth and fourteenth amendment grounds, was con-

sider fourteenth amendment challenges to state taxing practices so long as adequate state remedies exist.[224]

Perhaps more disturbing than the end which the Court is pursuing is the means chosen to effectuate the policy. Initially, the Court failed in its analysis to distinguish relevant precedent as well as to justify its current position. Second, the Court chose to do indirectly what it could not have done directly, namely, narrow the scope and remedies of section 1983. The Court did so by equating statutory provisions and the Constitution. The process not only disregards the intent of Congress, but unnecessarily limits the protections available under the fourteenth amendment. Third, while implying federal judicial expansion of section 1983, by finding negligence actionable, the Court actually demoted constitutional violations to the state courts.

There are two possible solutions to the burden of section 1983 actions which have yet to be attempted. The first and most obvious remedy would be legislative reform. The present case demonstrates the extent to which the Constitution has been trivialized. There is little justification for the time and expense devoted to this $23.50 controversy except for the statute itself. Clearly the framers of the Ku Klux Klan Act never intended such a distortion of the Act's purpose. The statute should be amended to more carefully parallel the original purpose of the statute.

Nonetheless, an additional avenue is available. The Court could make an honest reexamination of the statute itself. Should Congress fail to amend the statute, the Court could redefine the purpose and limitations of the statute. A *de minimis* threshold, already recognized in 28 U.S.C. § 1915 (d),[225] could be more stringently judicially enforced to prevent the flood of unnecessary and trivial litigation which currently clogs the federal docket. This is not to suggest that a certain dollar value should be required to reach a constitutional level. However, the federal bench, particularly at the district court level, could dismiss actions which simply

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victed in state court. Nevertheless, he sought federal court redress and commenced a § 1983 action against the officers who had seized the evidence. The Court held that collateral estoppel prevented the respondent from relitigating the evidence question already decided against him at the state court level.

224. Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100 (1981). The Court based its decision upon the principle of comity which was held to bar the taxpayer's damage action brought in the federal courts under § 1983 to redress the allegedly unconstitutional administration of a state tax system.

225. *See supra* note 209.

do not require federal consideration. Such an honest examination of the one hundred and twenty two year old statute would be preferable to the methods currently employed by the Court.

However, until Congress decides to limit section 1983—which may never occur—the Court appears determined to further limit the scope of section 1983 and by implication, based on *Parratt,* to limit the scope of the Constitution itself.[226] How far the Court intends to pursue its course remains to be seen.[227]

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226. *Parratt* has been cited by over one hundred federal courts in the last year. The lower federal courts appear to be using the case as a limiting device on federal jurisdiction where other adequate remedies exist. *See* Steffen v. Housewright, 665 F.2d 245 (8th Cir. 1981) (the Arkansas claims statute precluded a finding of a deprivation without due process of law); Cline v. U.S. Dept. of Justice, 525 F. Supp. 825 (D.S.D. 1981) (the availability of the Federal Tort Claims Act precluded a violation of due process).

227. After the expenditure of massive amounts of legal services, the prisoner still did not receive his $23.50. Parratt's $23.50 was returned to him by private donations.