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Robert Guild

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ment's interest in protecting CIA operations without providing the executive branch with means of restricting fundamental rights.

Although the decision to revoke respondent's passport may be politically appealing, the Supreme Court's cursory examination of the attendant constitutional issues set a dangerous precedent. The Court was correct in characterizing the freedom of international travel as something other than a fundamental right. Indeed, if the instant situation had been similar to *Zemel* in that travel of all citizens was restricted equally, then the methodology employed in the instant case would also have been proper. However, where the basis for the passport revocation is the exercise of free speech, a higher standard of review should be employed. The instant Court's refusal to recognize this dichotomy has given the Secretary of State the power to restrict passports for any rational reason. Accordingly, the instant case unreasonably extends the proper scope of executive authority.

RICHARD ANSBACHER

CIVIL RIGHTS: THE SUPREME COURT FINDS NEW WAYS TO LIMIT SECTION 1983

Parratt v. Taylor, 101 S. Ct. 1908 (1981)

Respondent, a Nebraska prison inmate,¹ brought suit in federal district court under 42 U.S.C. §1983² to recover damages for hobby materials negligently lost by prison officials.³ Respondent alleged the negligence of the prison officials deprived him of property without due process of law in violation of the fourteenth amendment. The district court granted summary judgment for respondent⁴ and the court of appeals affirmed without opinion.⁵ On certiorari, the United States Supreme Court reversed and HELD, although section 1983 remedies apply to negligent deprivation of property, the existence of a state tort remedy adequate to redress the respondent's loss precluded the finding of a due process violation.⁶

1. 101 S. Ct. 1908 (1981).

2. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any 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).

3. 101 S. Ct. at 1909, 1910 (1981). The respondent lost hobby materials valued at \$23.50. *Id.* Under normal prison procedures the addressee is required to sign for all parcels upon receipt. Respondent was in solitary confinement at the time the parcels were delivered to the prison. Upon his release from solitary confinement, he contacted several prison officials to obtain his mail. The officials were unable to locate the parcels or to determine the cause of their disappearance. *Id.*

4. *Id.* at 1909.

5. *Taylor v. Parratt*, 620 F.2d 307 (8th Cir. 1980), *per curiam*, (decided without published without opinion), *rev'd*, 101 S. Ct. 1908 (1981).

6. 101 S. Ct. at 1917. Justice Rehnquist authored the opinion of the Court in which

Section 1983 was enacted originally in response to conditions existing during the post-Civil War reconstruction era.⁷ The provision was intended to ensure a federal remedy for violations of fourteenth amendment rights occurring under color of state law.⁸ Despite its broad objectives, there were few cases brought under section 1983 for almost a century.⁹ A primary reason for the inefficacy of section 1983 was that courts construed it to require proof of an intentional invasion of a constitutional right.¹⁰

The dormant state of section 1983 was, however, ended by the Supreme Court's 1961 decision in *Monroe v. Pape*.¹¹ In *Monroe*, the petitioner alleged Chicago police officers had violated his fourth amendment right to be free from an unreasonable search and seizure.¹² In delineating the requirements to sustain a civil cause of action under section 1983, the Court determined that petitioner need not prove respondent "willfully" violated his constitutional rights as had been required in the prior cases construing the criminal penalties provision of section 1983.¹³ Rather, the Court determined that section 1983

Justices Brennan and Stevens joined. Justices White, Stewart, and Blackmun entered concurring opinions. Justice Powell filed an opinion concurring only with the result. Justice Marshall filed an opinion concurring in part and dissenting in part.

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

8. *Monroe v. Pape*, 365 U.S. 167, 180 (1961). The *Monroe* Court interpreted the legislative history of §1983 and found: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.* at 180.

9. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1156-69 (1977) [hereinafter cited as *Developments*]. Immediately following its passage, §1983 was rendered relatively ineffective by restrictive interpretations of the fourteenth amendment which recognized the 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). During the 1920's and 1930's the scope of §1983 was 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). In 1941 the Court broadened the scope of §1983 to encompass violations of state laws. See, e.g., *United States v. Classic*, 313 U.S. 299 (1941).

10. See Landholm, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. L. REV. 277 (1965); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

11. 365 U.S. 167 (1961).

12. *Id.* at 169. The complaint alleged that the police officers had broken into petitioner's home without search warrant or warrant for arrest while acting under color of state law. The police thereafter subjected petitioner and his family to mental and physical abuse. After petitioner had been detained at police headquarters for ten hours, without the benefit of an attorney or being allowed to make a phone call, he was released without charges. *Id.*

13. *Id.* at 187. The *Monroe* Court distinguished §1983 from its criminal law analogue, 28 U.S.C. §242 (1976), by relying on an explanation of §242 provided in *Screws v. United States*, 325 U.S. 91 (1945): "In the *Screws* case we dealt with a statute that imposed criminal penalties for acts 'willfully' done. We construed that work in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right' We do not think that gloss should be placed on [§1983] which we have here. The word 'willfully' does not appear in [§1983]. Moreover, [§1983] provides a civil remedy while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be

should be evaluated within the framework of traditional tort principles which create liability for the natural consequences of one's actions.¹⁴ Thus, liability was not dependent on the state of mind of the actor, but upon the result of the act.¹⁵

In *Monroe*, the Supreme Court, by declaring that no specific state of mind is required to sustain a civil action under section 1983, broadened significantly the provision's scope.¹⁶ Nonetheless, in interpreting *Monroe* lower courts continued to require culpability to establish a section 1983 cause of action.¹⁷ This

read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187.

14. 365 U.S. at 180. See note 13 *supra*.

15. 365 U.S. at 180. Both the Court's literal reading of §1983 and its references to the tort liability and liability for the natural consequences of one's acts, support the conclusion that the central issue in a §1983 action is whether the act results in a deprivation of a constitutional right. See Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 CUN. L. REV. 45 (1977). Professor Kirkpatrick discussed the distinction between the state-of-mind requirement necessary to state a cause of action under the statutory language of §1983, and the state of mind necessary to effect a constitutional deprivation and thus to impose liability. According to Kirkpatrick, *Monroe* only addressed the first of these issues and the failure to distinguish between the two types of state-of-mind has led to much of the confusion regarding the proper interpretation of *Monroe*. *Id.* at 47-48. 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.

16. Note, *supra* note 10, at 1486-87. The *Monroe* decision opened §1983 to increased litigation for three reasons. First, the Court's denial that §1983 required a specific showing of intent apparently allowed a plaintiff to seek federal protection from a state's negligent deprivation of a federal right. See, e.g., *Whirl v. Kern*, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). Second, the Court's holding that §1983 provided a supplementary remedy removed the requirement that a plaintiff first exhaust available state remedies. See Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968). Finally, *Monroe* extended the potential application of the statute by holding that the actions of a state official may be found to be "under color of state law" within the meaning of §1983 despite the illegality of such actions under state law. 365 U.S. at 183-87.

17. The federal circuit courts have adopted a myriad of state-of-mind requirements for actionability under §1983. For example, in *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976), *en banc*, *cert. denied*, 435 U.S. 932 (1978), the court was faced with the question of whether the negligence of state prison guards, which resulted in a loss of the plaintiff's property, was actionable under §1983. The plaintiff alleged that he had been deprived of property without due process of law. In denying the plaintiff's action, the Seventh Circuit relied on two theories. First, the negligent loss was not a deprivation of property without due process of law under the fourteenth amendment. Secondly, the negligent conduct of the guards was not considered to be action "under color of state law." The court therefore concluded that no "constitutional tort" had been alleged. *Id.* at 567.

In *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), the issue before the court was whether gross or culpable negligence could provide the basis for a claim under §1983. The plaintiff alleged that the defendant police officer's reckless use of excessive force, which caused personal injury to plaintiff amounted to a deprivation of his constitutional right to be free from arbitrarily inflicted injuries. The Fourth Circuit held that the defendant's grossly negligent conduct was sufficiently arbitrary to satisfy the "supposed requirement of intent" of §1983. *Id.* at 1231-32.

diversity has been attributed to a combination of factors including the broad and ambiguous language of the *Monroe* decision,¹⁸ fear of federal intervention into traditional state court matters,¹⁹ and a desire to limit the caseloads of federal courts.²⁰

The Supreme Court, faced with the spectre of a flood of litigation under section 1983, has also failed to adhere strictly to *Monroe*.²¹ The Court has ex-

The court in *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969), allowed negligence to support a cause of action under §1983. The case involved an error in communications within a sheriff's office which resulted in plaintiff's continued imprisonment for nine months following the dismissal of his indictment. Although the court noted that the sheriff had not acted with a motive, it nonetheless held that plaintiff had been deprived of liberty without due process. The Fifth Circuit concluded that because §1983 did not require an improper motive, the sheriff was liable for the deprivation. *Id.* at 786-88.

An improper motive was required under §1983 in *Kent v. Prasse*, 385 F.2d 406 (3d Cir. 1967). The plaintiff in *Kent* sought compensation under §1983 for the injuries he received when prison officials forced him to operate a faulty machine. Holding that the plaintiff had failed to state a cause of action under §1983, the Third Circuit stated that the commission of a tort by a state official was not, in and of itself, sufficient to demonstrate a violation of a person's right for purposes of §1983. Rather, a showing of bad intent was required to create liability under the Act. *Id.* at 407.

18. Landholm, *supra* note 10, at 875. The author noted the ambiguity of Justice Douglas' language in *Monroe*: "The phrases '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 the one hand, 'background of tort liability' can be interpreted to refer to tort principle of fault, where liability exists only for damages caused through the fault of the actor. On the other hand, 'responsible for the natural consequences of his actions' would appear to refer to a standard of strict liability." *Id.* Nevertheless, the language may also be interpreted as suggesting that the state of mind of the actor is irrelevant. *Id.*

19. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1 (1974); Whitman, *Constitutional Torts, Part I*, 79 MICH. L. REV. 5, 30-40 (1980); Note, *supra* note 10, at 1487 (footnotes omitted), in which the author states: "[f]ederal jurisdiction has been extended to many kinds of cases previously left to states, cases which are often minor enough to raise doubts whether they belong in federal court yet which may simultaneously involve important state interests." See also Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904 (1976). The above author claims that the primary concern with the proliferation of §1983 suits is the issue of federalism. Suits involving state officials and state policies are being litigated in federal courts to the exclusion of state judicial and administrative procedures. This in combination with the burden increased litigation imposes on federal courts leads the author to conclude that the scope of §1983 requires clarification and reduction. *Id.*

20. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 L. & SOC. ORDER 557. Judge Aldisert is concerned that the expansion of §1983 has substantially broadened federal jurisdiction. The resulting burden on federal courts warrants an examination of the present construction of §1983. In conclusion, he claims that the state courts should be required to assume part of the additional burden that the expansion of §1983 has placed on the federal courts. *Id.* at 573.

21. The Supreme Court has attempted to limit the scope of §1983 ever since *Monroe* opened the area to an increasing volume of litigation. In its attempt to curtail the permissible reach of §1983 the Court has applied several different methods of analysis to preclude certain claims from being litigated in federal court.

In *Martínez v. California*, 444 U.S. 277 (1980), the Court applied a "foreseeability" analysis to determine that the appellant's decedent had not been deprived of her life without due process of law. Holding that the chance of a parole officer's decision to release a prisoner

pressed concern that *Monroe*, if read literally, would lead to a "font of tort law."²² In order to limit the scope of section 1983, the Court has delineated a number of state of mind standards which vary according to the constitutional right involved. For example, intent has been required to prove a violation of equal protection under section 1983.²³ The standards of culpability for due process violations, however, have varied within the panoply of rights encompassed by the term due process.

In *Estelle v. Gamble*,²⁴ the Court held negligent failure to provide a prisoner with adequate medical care insufficient to establish a section 1983 cause of action for violation of the eighth amendment prohibition of cruel and unusual punishment.²⁵ The Court ruled the eighth amendment would be violated only by an action rising to the standard of deliberate indifference.²⁶ Because intent was a necessary element of an eighth amendment violation, a section 1983 suit predicated on that amendment also required a showing of intent.²⁷

would result in the decedent's death was too remote a consequence, the Court refused to hold the officer liable. *Id.* at 285.

The Court allowed a good faith immunity to preclude liability under §1983 in *Wood v. Strickland*, 420 U.S. 308 (1975). In *Wood*, respondents claimed that their rights to due process had been violated when they were expelled from school. The Court relied upon common law and strong policy considerations to justify its extension of a qualified immunity to good-faith, non-malicious acts undertaken in the fulfillment of official duties. *Id.* at 318. Such immunity, however, would not be extended where the actor knew or reasonably should have known that his action would violate a constitutional right. *Id.* at 322. *See also* *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (holding a qualified immunity for executive officers for acts performed in the course of official conduct where the official had acted in good faith); *Pierson v. Ray*, 386 U.S. 547 (1967) (extending a good-faith immunity to policemen against charges of false arrest). *But see* *Owen v. City of Independence*, 445 U.S. 622 (1980) (municipal defendant not entitled to immunity based on good faith in section 1983 suit). *See* Comment, *Strict Liability Under Section 1893 For Municipal Deprivations of Federal Rights?: Owen v. City of Independence*, 55 ST. JOHN'S L. REV. 153 (1980).

22. *Paul v. Davis*, 424 U.S. 693, 701 (1975). In *Paul* a §1983 action was brought against police chiefs who had allegedly deprived the petitioner of his liberty or property rights to reputation without due process. The Court denied relief under §1983 holding that one's reputation alone did not implicate liberty or property interests sufficient to invoke due process protection. In disallowing the plaintiff's claim, the Court implied that a negligent action would not be actionable under §1983. Thus, the *Paul* Court attempted to limit the scope of §1983 and avoid federal displacement of state lawmaking authority. *Id.* at 698-701.

23. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976); *Snowden v. Hughes*, 321 U.S. 1 (1944).

24. 429 U.S. 97 (1976).

25. *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.*

26. *Id.* The Court held that only such indifference could offend the "evolving standards of decency" in violation of the eighth amendment. *See also* *Jones v. Lockhart*, 484 F.2d 1192, 1193 (8th Cir. 1973) (absent a claim of exceptional circumstances, allegations of simple negligence in medical treatment of prisoner's condition did not raise constitutional issues); *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (warden's action in ordering a prisoner moved, against surgeon's orders, was more than mere negligence and may support a §1983 action claiming cruel and unusual punishment).

27. 429 U.S. at 106. The Court relied on an interpretation of the constitutional right at issue in finding that mere negligence was not sufficient and that deliberate indifference must

In *Ingraham v. Wright*,²⁸ the Supreme Court shifted its focus from the standard for culpable official action to the nature of the constitutional right infringed. Enunciating a *de minimis* level of injury which must be surpassed before a constitutional issue is raised,²⁹ the Court rejected the idea that any grievous loss caused by the state automatically triggered the procedural due process protections of section 1983. Rather, the Court determined that the nature of the interest infringed must be examined to determine whether the due process protections of section 1983 are necessary.³⁰ On this basis, the Court decided that severe corporal punishment inflicted by a school official upon the plaintiff was insufficient to establish a section 1983 cause of action.³¹ Describing the risk of error in cases of corporal punishment as low due to the "openness" of schools and because of the availability of common law remedies, the Court concluded that the additional due process protection of section 1983 would cause more harm than good.³²

Focusing on the nature of the constitutional injury is important because before the issue of the appropriate standard of actionable official conduct can be reached, there must be a constitutional violation. For example, in *Baker v. McCollan*³³ the Supreme Court granted certiorari for the express purpose of deciding whether mere negligence was sufficient to establish a cause of action under section 1983.³⁴ Although the case was decided on another issue,³⁵ the

be shown before a violation of the eighth amendment would ensue. *Id.* By looking at the amendment to determine that "evolving standards of decency" must be offended to violate the amendment, the Court established that deliberate indifference was sufficient to satisfy the intent requirement. *Id.* See also Kirkpatrick, *supra* note 15, at 58-59.

28. 430 U.S. 651 (1977).

29. 430 U.S. at 674. The Court held that there existed a *de minimis* degree of infringement upon the constitutionally protected liberty interest with which the Court is not concerned. The corporal punishment inflicted by school officials upon the petitioners was determined not to have surpassed this level. *Id.*

30. *Id.* at 675. The Court provided a framework within which to analyze whether the common-law remedies for excessive corporal punishment satisfied due process of law. The proposed analysis required consideration of the private interest involved; here that interest was the constitutionally protected liberty interest to be free from bodily restraint and punishment. *Id.* at 674-75.

31. *Id.* at 676. The Court stated that: "In any deliberate infliction of corporal punishment on a child who is restrained for that purpose, there is some risk that the intrusion on the child's liberty will be unjustified and therefore unlawful. In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification. *Id.*

32. *Id.* at 682. The Court stated that the imposition of additional constitutional safeguards would marginally reduce the risk, but would also intrude significantly into areas of primary educational responsibility. *Id.* But see Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978). Professor Rosenberg, in criticizing the Court's holding that common-law remedies suffice for procedural due process purposes, reached the conclusion that a post-deprivation remedy may not always satisfy due process. She stated that where, as in this case, a liberty interest is deprived, a belated award of damages is not likely to remedy the loss. *Id.* at 90-91.

33. 443 U.S. 137 (1979).

34. *Id.* at 138. The question of whether negligence may state a cause of action under §1983 had already been before the Court, in *Procunier v. Navarette*, 434 U.S. 555 (1978). Before addressing this issue, however, the *Procunier* Court dismissed the claim for failure to

Court addressed the negligence question in dicta.³⁶ Recognizing the varied approaches of past cases, the Court stated that whether negligence established a section 1983 cause of action would vary depending on the particular constitutional violation alleged.³⁷ In retreat from *Monroe*, the Court suggested that the state of mind of the actor may be relevant in determining the occurrence of a constitutional violation as well as in determining the liability of the actor.³⁸ Thus, the Court retreated further from *Monroe's* elimination of a state of mind requirement in civil actions under section 1983 by recognizing that the state of mind of the defendant is an appropriate consideration in determining whether a constitutional right has been abridged.

The apparent conflict between the standard set forth in *Monroe* and the subsequent consideration of the state of mind requirement in cases such as *Baker* has compounded the confusion concerning the proper scope of section 1983.³⁹ Lacking clear guidelines, federal courts, in applying section 1983, have adopted a variety of state of mind standards in an attempt to restrain a seemingly irrepressible remedy.⁴⁰

The Court's intent in the instant case was to determine whether negligence would support a claim for relief under section 1983.⁴¹ Specifically, the Court sought to eliminate the confusion existing in the lower courts when they encountered circumstances that were traditionally thought to be the proper subject matter of state tort remedies.⁴² Further, the Court sought to provide lower courts with a workable standard for section 1983 claims.⁴³

In analyzing the negligence issue, the Court reaffirmed *Monroe* stating that neither the statutory language nor the legislative history of the Civil Rights Act required the existence of any particular intent to sustain a section 1983

state a constitutional violation. *Id.* at 565. In *Baker*, the Court was once again faced with the negligence issue. Specifically, the question before the Court was whether respondent had been negligently deprived of liberty without due process. 443 U.S. at 138-39.

35. 443 U.S. at 146. It was determined that the respondent had not suffered a deprivation of a constitutional right and that he had therefore failed to state a cognizable claim under §1983. *Id.*

36. *Id.* at 139-40.

37. *Id.*

38. *Id.* *Baker* was interpreted as continuing the federal judiciary's intent to limit the scope of §1983. *Id.* See Comment, *Baker v. McCollan: §1983 and the Closing Door*, 7 OHIO U.L. REV. 297 (1980).

39. See, e.g., *Beard v. Mitchell*, 604 F.2d 385 (7th Cir. 1979); *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565 (1976); *Kimbrough v. O'neil*, 523 F.2d 1057 (7th Cir. 1975); *Carter v. Estelle*, 519 F.2d 1136 (5th Cir. 1975); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969).

40. See Note, *supra* note 19, at 915. In discussing the increasing federal caseload burden, the author states that between 1871 and 1939, only 19 §1983 cases were reported. In 1960 there were 280 cases filed, 3,586 in 1970 and approximately 8,000 in 1973. *Id.*

41. 101 S. Ct. at 1911.

42. *Id.* The Court hoped to "determine the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation and relief is sought under §1983." *Id.*

43. *Id.* at 1911.

cause of action.⁴⁴ Further, the Court interpreted *Baker* as suggesting that section 1983 may provide an appropriate remedy for a negligent deprivation of federal rights.⁴⁵ Therefore, it was assumed that a cause of action based on negligence could be asserted under section 1983.⁴⁶

The Court next considered whether respondent's complaint met the other requirements of section 1983.⁴⁷ The respondent claimed a deprivation of property without due process of law.⁴⁸ In evaluating this allegation, the Court conceded that the respondent's hobby kit met the definition of property and that the loss of the kit by prison officials constituted a deprivation.⁴⁹ The Court then focused its inquiry on whether this deprivation was without due process of law.⁵⁰

In determining the specific requirements of the due process standard, the Court reviewed a myriad of procedural due process cases⁵¹ concluding that the

44. *Id.* at 1912. The Court stated that: "[B]oth *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.*

45. *Id.* The *Baker* Court had found that the negligence question was not susceptible of a single answer for all possible constitutional deprivations, 443 U.S. at 139. This language was interpreted as possibly allowing a negligent wrong to be brought under §1983. 101 S. Ct. at 1912.

46. 101 S. Ct. at 1912-13. The Court proceeded directly from the conclusion that *Baker* and *Monroe* suggest a §1983 remedy for negligent acts to an enunciation of the two essential elements of a §1983 action. *Id.*

47. *Id.* at 1913. The essential elements of a §1983 action are whether a person acting under color of state law was engaged in the challenged conduct and whether that conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Id.* The Court conceded that, in view of the *Monroe* decision, the petitioners had clearly acted under color of state law. See note 16 *supra*. Therefore, the Court focused its inquiry on whether the deprivation issue.

48. *Id.*

49. *Id.*

50. *Id.* at 1913-14. The Court stated that the three prerequisites of a due process claim had been satisfied by respondent's allegation: the officials had acted under color of state law; the hobby materials satisfied the definition of property; and the negligent loss of the materials was a deprivation. *Id.* The Court, however, emphasized that these three elements were not sufficient to constitute a violation of the fourteenth amendment. Because the amendment only protects against deprivations without due process, the Court focused its inquiry on whether the petitioner's loss had been suffered without due process of law. *Id.*

51. *Id.* at 1914-15. The Court first addressed situations in which a pre-deprivation hearing is required before a state may interfere with a liberty or property interest. Generally, a pre-deprivation hearing has been required in cases where the deprivation occurred as a result of an established state procedure. *Id.* 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). In these cases, all cited by the Court, due process required a pre-deprivation hearing since the deprivation was authorized by an established state procedure. This was to protect against a wrongful deprivation at the hands of the state. 101 S. Ct. at 1914-15.

The Court next considered cases in which it had been held that a post-deprivation remedy provided by the state would satisfy due process requirements. In cases of public health emergency, the necessity of immediate action justified a deprivation without a pre-deprivation hearing as long as a remedy was provided after the deprivation to redress the loss. *Id.* See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). The Court explained the

essence of due process was an opportunity to be heard at a meaningful time.⁵² Relying on the reasoning of a lower court opinion,⁵³ the Court held the availability of a state tort remedy could fulfill due process requirements.⁵⁴ Emphasizing that the deprivation of property had not occurred as a result of state procedure but instead resulted from the failure of the prison officials to follow established state procedure, the Court found the availability of a tort remedy in Nebraska satisfied due process.⁵⁵ Therefore, the Court held that respondent had failed to state an actionable section 1983 violation.⁵⁶

In concurring opinions, five justices disagreed with some part of the rationale presented in the majority opinion. Justices Stewart⁵⁷ and Powell⁵⁸ indicated that intentional, rather than negligent, behavior was the touchstone of a due process violation.⁵⁹ Accordingly, they concluded that respondent's property loss did not amount to a deprivation within the meaning of the fourteenth amendment. Nonetheless, both Justices endorsed the idea that, if the loss of the hobby kit was a deprivation, the state procedure would fulfill the requirements of due process.⁶⁰

Justice Blackmun, joined by Justice White, sought to emphasize the narrowness of the instant decision.⁶¹ Justice Blackmun stressed that the majority's equation of state tort remedies with due process should not be extended to situations other than negligent deprivation of property.⁶² According to Justice

rationale to be that, in cases requiring immediate state action or where it is impractical to provide a pre-deprivation hearing, the availability of a post-deprivation process to redress the loss may satisfy due process. 101 S. Ct. at 1914-15. See *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Coffin Brothers v. Bennett*, 277 U.S. 29 (1928) (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974)). The Court stated that, in cases of property deprivation, the postponement of a judicial inquiry into the deprivation does not violate due process when adequate opportunity for that inquiry is ultimately available. 101 S. Ct. 1914-15.

52. 101 S. Ct. 1914-15.

53. *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *mod. en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) (holding existence of an adequate state procedure to redress a property loss inflicted by state officials precluded a finding of a due process violation). See note 18 *supra*.

54. 101 S. Ct. at 1917.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1918-20.

59. Justice Stewart stated that if negligence was allowed to be an actionable cause of property deprivation it would make the fourteenth amendment trivial and "grossly . . . distort the meaning and intent of the Constitution." *Id.* at 1917. Expressing his belief that negligent acts may not create a deprivation of property in the constitutional sense, Justice Powell stated that the Court should look to the nature of the allegedly deprived constitutional right to determine whether intent is an essential element of a violation. *Id.* at 1918-19.

60. *Id.* at 1919 n.1.

61. *Id.* at 1918. Justice Blackmun read the majority opinion as only applying to cases concerning the deprivation of property. He considered the deprivation of life or liberty to be outside the reach of this decision. *Id.*

62. *Id.* Justice Blackmun argued that where it is possible for a state to develop procedures to curtail intentional acts, due process requires that such procedures be instituted. *Id.* As authority for this proposition, Justice Blackmun cited *Fuentes v. Shevin*, 407 U.S. 67

Blackmun, such an approach is never appropriate where an intentional deprivation of rights is involved.⁶³

The Court's concern for certainty and expediency may have produced a decision that will weaken significantly the effectiveness of section 1983. This is particularly problematic because the plurality's opinion was based on questionable precedent. While the Court interpreted some cases very narrowly, it simply ignored other relevant cases.

The two cases upon which the Court relied for its state of mind holding, *Monroe* and *Baker*, are not as unequivocal as the Court indicated. Both cases implied that the determination of the standard of official conduct necessary to establish a section 1983 cause of action depends upon the nature of the alleged deprivation. In *Monroe*, the Court reasoned that tort law theory, in which the nature of the injury determines the culpable standard of conduct,⁶⁴ provides an adequate model for section 1983 analysis. In *Baker*, a case involving a due process question, the Court stated explicitly that the state of mind of the defendant may be relevant in deciding whether a constitutional violation has occurred.⁶⁵ Thus, neither case relied upon by the Court supports a negligence standard independent of reference to a constitutional right.⁶⁶

(1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

63. 101 S. Ct. at 1918. Justice Blackmun was also concerned that the majority opinion ignored the substantive dictates of due process. *Id.*

64. 365 U.S. at 180. The language of *Monroe* that expressed the Court's interpretation of the legislative history of §1983 stated that the Act was passed in order to provide a federal remedy for a state deprivation of a federal right "by reason of prejudice, passion, neglect, intolerance or otherwise." *Id.* See note 8 *supra*. This language has been interpreted as inferring that the state of mind of the actor is of no relevance in determining whether a claim is actionable under §1983. Landholm, *supra* note 10, at 875. This conclusion was also reached in *Whirl v. Kern*, 407 F.2d 781, 788 (5th Cir. 1968), where the court stated: "Such language suggests that a federal forum is no less desirable for the inadvertent than for the malicious violation of constitutionally protected rights." *But see Striker v. Pancher*, 317 F.2d 780 (6th Cir. 1963) (§1983 is limited to cases involving "reprehensible" conduct).

At least one commentator supports the position that the language of *Monroe* suggests that no specific state of mind is necessary to state a claim under §1983. See Kirkpatrick, *supra* note 11. Professor Kirkpatrick states that the lack of a specific state of mind only applies to the requirements for stating a valid claim under §1983 and not necessarily to the criteria for attaching liability under §1983. *Id.* at 48.

By following this reasoning and looking specifically to the *Monroe* Court's reference to tort principles for determining liability, it can be argued that the elements of the infringed right determine the intent necessary to cause a deprivation of that right. For example, the tort concept of unavoidable accident precludes liability when the accident is not the result of a lack of proper care of negligence. W. PROSSER, *LAW OF TORTS*, 140-41 (4th ed. 1971). Thus, an interpretation of §1983 by which liability is imposed without regard to the state of mind may be incongruous with concepts of tort liability. A similar conclusion may be reached by analyzing the torts of defamation, assault, nuisance, malicious prosecution and alienation of affections which require a determination of the actor's state of mind prior to the attachment of liability. *Id.* at 25.

65. 443 U.S. at 140 n.1.

66. Both *Monro* and *Baker* may be read as indicating that the actor's state of mind must be considered in determining when an action has caused a deprivation in the constitutional sense. Justice Powell's concurrence in the instant case also made reference to the importance of the actor's state of mind in determining when liability will attach. 101 S. Ct. at 1919-20.

Although *Monroe* and *Baker*, which lent some support to the Court's reasoning, received superficial treatment, cases such as *Estelle*, which expressly required a finding of intent, were ignored.⁶⁷ Similar to *Monroe* and *Baker*, the Court in *Estelle* examined the constitutional right infringed in order to determine the requisite state of mind standard.⁶⁸ Therefore, *Estelle* clearly demonstrated the method of analysis previously employed by the Court in section 1983 suits,⁶⁹ a method which the instant Court failed to follow.⁷⁰ Moreover, *Estelle* cannot be meaningfully distinguished on the grounds that it involved the eighth amendment.⁷¹

The instant Court's failure to discuss fully the relevant precedent and its failure to follow the analysis of that precedent raises questions concerning the Court's unexpressed motivations. Upon initial examination, the establishment of a negligence standard appears to enlarge the scope of section 1983.⁷² This is surprising in light of the Supreme Court's current hostility toward section 1983.⁷³ The Court, however, while sanctioning the broad negligence standard has simultaneously restricted the scope of section 1983 by holding that a state tort remedy may satisfy due process.⁷⁴ Because tort law has traditionally provided a cause of action for negligently inflicted harm, whenever a section 1983 claim is based on negligence there will probably be a state tort remedy available.⁷⁵

Section 1983 was designed to establish a federal remedy for violations of constitutional right under color of state law.⁷⁶ The statute does not distinguish

67. See notes 24-27 and accompanying text, *supra*.

68. 429 U.S. 97. *Estelle* interpreted the eighth amendment to require an allegation of at least deliberate indifference in order to sustain a claim that it had been violated. *Id.* at 106.

69. See note 26 *supra*.

70. In the past, the Court has used a similar analysis in cases involving other constitutional rights. See, e.g., *United States v. Lovasco*, 431 U.S. 783, 796-97 (1977) (holding that a pre-indictment delay resulting in prejudice to the defendant is not sufficient, without a consideration of the reasons for the delay, to violate due process); *Washington v. Davis*, 426 U.S. 229 (1976) (alleged violation of the Equal Protection clause of the fourteenth amendment on the grounds of racial discrimination must be supported by evidence of an incidious discriminatory purpose).

71. The method of analysis applied in *Estelle* is relevant for the purposes of this discussion. It is not the particular right that is important, but rather how the court looked to the elements of that right to determine what degree of culpability was necessary to violate that right.

72. The instant Court's affirmation of the *Monroe* standard concerning the degree of culpability necessary to state a cause of action under §1983 would seem to elicit the same objections that were voiced subsequent to the *Monroe* decision. The primary objection was that *Monroe* made the scope of §1983 too broad. See, e.g., Aldisert, *supra* note 20; *Developments*, *supra* note 9, at 1204-17; Note, *supra* note 10, at 1486-87.

73. This approach seems contrary in light of the Court's recent decisions which have attempted to limit the scope of §1983 through various devices. See Aldisert, *supra* note 20.

74. See notes text accompanying notes 54-59 *supra*.

75. By allowing the state tort remedy to satisfy the requirements of due process, and thereby preclude the finding of a constitutional violation, the Court has relegated §1983 relief to only those circumstances where there is no adequate state tort remedy available.

76. *Monroe v. Pape*, 365 U.S. at 183. The *Monroe* Court stated that §1983 was enacted to provide a remedy supplementary to state tort laws. *Id.*

between rights violated through negligence and those violated by intentional behavior.⁷⁷ The instant Court, however, has effectively relegated those rights infringed by negligent behavior to the state courts.⁷⁸ The only possible justification for this arbitrary result is expediency.

The instant decision has far-reaching ramifications. The holding in the instant case, combined with *Ingraham*,⁷⁹ which involved intentional acts, supports the proposition that due process may be satisfied by state tort remedies even when constitutional rights have been invaded intentionally.⁸⁰ Furthermore, allowing a section 1983 action only where no state tort remedy exists subverts the congressional intent of providing a supplementary federal remedy.⁸¹

Although the Court attained its goal of articulating a definitive standard for the lower courts, it did so at the expense of confusing past precedent and ignoring congressional policy. Limited to its narrow facts, the denial of the respondent's section 1983 claim is not troubling; a litigant less deserving of a federal remedy is hard to imagine.⁸² The presence of a plethora of concurrences, however, indicates concern among some members of the Court that the decision was intended as the starting point for further narrowing of the scope of section 1983.

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77. See note 11 *supra*.

78. 101 S. Ct. at 1917. The Court expressed opposition to permitting a "party . . . involved in nothing more than an automobile accident with a state official . . . [to] . . . allege a constitutional violation under §1983." *Id.* This dicta, the Court's express desire to draw a line for actionability and the Court's dismissal of the respondent's claim on the grounds that the state procedure had satisfied due process requirements, indicates that claims of negligent deprivation of constitutional rights which can be redressed in state courts are beyond §1983. According to Justice Powell's concurrence, however, "the fact is that this rule would 'make of the fourteenth amendment a font of tort law' whenever a state has failed to provide a remedy for negligent invasions of liberty or property interests." *Id.* at 1920.

79. 430 U.S. 651 (1977). See notes 30-36 and accompanying text, *supra*.

80. In *Ingraham*, the Court relied on the existence of common law remedies as one justification to find that there was no violation of due process. 430 U.S. at 659-63. The instant case reinforced the notion that common law remedies would satisfy due process. Moreover, the *Parratt* Court's emphasis that no specific state of mind is required under §1983 allows the decision to be easily construed to cover intentional as well as negligent deprivations.

81. See note 76 *supra*.

82. Respondent's hobby materials were worth only \$23.50. This is exactly the type of trivial litigation that commentators have feared will overburden the federal courts. See Burger, *Report on the Federal Judicial Branch — 1973*, 59 A.B.A.J. 1125, 1128 (1973).