

1986

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Recommended Citation

Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979 (1986).

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COMMENT

STATE LAW WRONGS, STATE LAW REMEDIES, AND THE FOURTEENTH AMENDMENT

Henry Paul Monaghan*

*Parratt v. Taylor*¹ is among the most puzzling Supreme Court decisions of the last decade, and the lower federal courts have been thrown into considerable confusion in their efforts to implement it.² In large part, this confusion stems from the fact that *Parratt* decided two independent points: first, the negligent loss or destruction of property by state officials could constitute a "deprivation" thereof for purposes of the due process clause³ of the fourteenth amendment;⁴ and second, the existence of an adequate state remedy to redress the wrong meant that the deprivation was not "without due process of law."⁵ In this Comment, I hope to show that this second, or "state action," holding contradicts long-embedded understandings of when a denial of due process occurs for fourteenth amendment purposes.

The state action issue remains important even after this term's decision in *Daniels v. Williams*.⁶ *Daniels* expressly overruled *Parratt*'s first holding. In *Daniels*, the Court held that, ordinarily, negligently inflicted injuries to "liberty" and "property" are not the kind of "deprivations" with which the due process clause is concerned.⁷ But *Daniels* left undisturbed *Parratt*'s state action theory. Indeed, the *Daniels* Court cited with approval⁸ *Hudson v. Palmer*,⁹ which had extended *Parratt*'s state action holding to intentional deprivations of property by state officials.¹⁰

Parratt's state action theory is best seen in a larger context. *Parratt*

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1. 451 U.S. 527 (1981).

2. For a recent collection of the cases, see Moore, *Parratt*, Liberty, and the Devolution of Due Process: A Time for Reflection, 13 W. St. U.L. Rev. 201 (1985).

3. "[N]or shall any State deprive any person of Life, Liberty, or Property, without due process of law . . ." U.S. Const., amend. XIV, § 1.

4. *Parratt*, 451 U.S. at 536-37.

5. *Id.* at 543-44.

6. 106 S. Ct. 662 (1986); *Davidson v. Cannon*, 106 S. Ct. 668 (1986); see also *Whitley v. Albers*, 106 S. Ct. 1078 (1986) (eighth amendment).

7. 106 S. Ct. at 664.

8. 106 S. Ct. at 665.

9. 468 U.S. 517 (1984). That *Parratt*'s state action theory remains viable after *Daniels* has already been recognized. See *Holloway v. Walker*, 790 F.2d 1170 (5th Cir. 1986); *Mann v. City of Tucson*, 782 F.2d 790, 799 (9th Cir. 1986) (Snead, J., concurring).

10. 468 U.S. at 530-34.

is one part of an ongoing effort by the Supreme Court, particularly Justice Rehnquist, to reorient fourteenth amendment jurisprudence. The goal is to keep the lower federal courts out of the business of monitoring the routine day-to-day administration of state government in areas that only marginally implicate constitutional values.¹¹ Philosophically, this development embodies a belief that a clear distinction can be drawn between constitutional violations and state law wrongs.¹² Linguistically, it stresses a close parsing of section 1983¹³ and the due process clause. Analytically, it generates two decisional lines: cases like *Board of Regents v. Roth*¹⁴ and *Paul v. Davis*¹⁵ narrow the domain of constitutionally protected "liberty" and "property,"¹⁶ while decisions like *Daniels v. Williams* and *Parratt v. Taylor* limit the state action that constitutes a "deprivation" or a "denial of due process" of interests admittedly entitled to constitutional protection.

The vagaries and gossamer distinctions of *Roth* and its progeny have been examined by numerous commentators.¹⁷ The important point here is that in denying the presence of a "liberty" or "property" interest, these decisions suggest that the state need not justify some state-inflicted injuries to important interests of individuals.¹⁸ So far, however, this line of authority is limited in reach and is largely confined to the area of public entitlements.¹⁹ Unlike *Roth*, *Parratt* deals with "property" interests concededly entitled to constitutional protection. As limited by *Daniels*, *Parratt* concerns one category of intentional interferences with such interests:²⁰ the conduct challenged under the fourteenth amendment is also misconduct under state law, and the state

11. See Monaghan, *The Burger Court and "Our Federalism,"* 43 *Law & Contemp. Probs.* 39, 44-50 (1980).

12. See Monaghan, *Of "Liberty" and "Property,"* 62 *Cornell L. Rev.* 405, 427-28 (1977).

13. 42 U.S.C. § 1983 (1982).

14. 408 U.S. 564, 573, 578 (1972).

15. 424 U.S. 693 (1976). *Paul* rejected a claim that the distribution of a police circular to local merchants containing defamatory material violated plaintiff's right to procedural due process because of the lack of a prior hearing. For criticism, see, e.g., Monaghan, *supra* note 12. The *Paul* Court said that official defamation did not deprive its victim of "liberty" or "property" because no fundamental constitutional right was involved, and the defamation did not result in the imposition of a new legal disability on the plaintiff. *Paul*, 424 U.S. at 701-02.

16. See Monaghan, *supra* note 12, at 423-29.

17. See, e.g., Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 *Calif. L. Rev.* 146 (1983).

18. Ordinarily, the state must make a twofold justification for injuries that it inflicts: procedural—the harm may be imposed only in the context of certain procedural safeguards—and substantive—the harm must be based on an adequate reason. I recognize that *Roth* and its progeny can be confined to procedural due process, although the logic of the confinement escapes me. See Monaghan, *supra* note 12, at 421.

19. See Monaghan, *supra* note 11, at 41-43.

20. *Parratt*, 451 U.S. at 536.

provides an adequate remedy for the wrong. The crucial question is the constitutional relevance of either of these facts.

In the past, these facts have been irrelevant. The landmark decision in *Home Telephone and Telegraph Co. v. City of Los Angeles*²¹ established that any intentional conduct of state officials that, prima facie, contravened the fourteenth amendment is open to challenge in the district courts without regard to whether that conduct also violates state law or whether the state provides adequate corrective process.²² *Monroe v. Pape*²³ confirmed *Home Telephone*, and as a matter of statutory construction, also held "that section 1983 presently occupies and exploits all of the constitutional space that *Home Telephone* permits."²⁴ In *Monroe*, the Court held that section 1983's "under color of [state law]" requirement embraces conduct by state officials that violated state law,²⁵ and that the section 1983 remedy is "supplementary" to any state judicial remedy.²⁶

Despite the apparent sweep of *Home Telephone* and *Monroe*,²⁷ *Parratt*'s state action holding is designed to exclude one form of intentional misuse of state authority from the federal trial courts: misconduct that, unlike the conduct in *Home Telephone*, is "random and unauthorized," and that, unlike the conduct in *Monroe*, does not infringe upon a "fundamental" constitutional right. As yet, this exclusion applies only if the state provides adequate corrective process.

Parratt's limited compass does not diminish its practical importance. With the exception of police brutality cases, *Parratt* excludes from the federal courts all low-level intentional official misconduct resulting in losses of property or nonfundamental liberties where state law provides a remedy. *Hudson v. Palmer*²⁸ is the paradigmatic illustration. In *Hudson*, a prison officer, acting without authority, intentionally

21. 227 U.S. 278 (1913).

22. *Id.* at 288.

23. 365 U.S. 167 (1961).

24. Zagrans, "Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 514 (1985).

25. *Monroe*, 365 U.S. at 171-85.

26. *Id.* at 183; see also *Wilson v. Garcia*, 105 S. Ct. 1938, 1949 (1985) (Congress intended a § 1983 claim to be "independently enforceable whether or not it duplicates a parallel state remedy." (citing *Monroe*)). *Monroe*'s under color of law holding is sharply criticized in Zagrans, *supra* note 24. However, Professor Zagrans agrees with the Court that when § 1983 is triggered, the existence of a state remedy is irrelevant. *Id.*

27. In addition, *Patsy v. Board of Regents*, 457 U.S. 496 (1982), confirmed that a plaintiff need not exhaust administrative remedies before bringing a § 1983 action. *Id.* at 516. Finally, *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909), sustained the district court's pendent jurisdiction over any state-created rights to relief, *id.* at 191, although relief on this score is qualified by the eleventh amendment. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984); see also *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718 (recent case imposing important limits on *Patsy*).

28. 468 U.S. 517 (1984).

destroyed an inmate's property during a shakedown search.²⁹ After denying that any fundamental right was implicated, the Court characterized the officer's conduct as "random and unauthorized."³⁰ *Parratt* was then invoked to bar the inmate's section 1983 due process claim because the inmate had an adequate remedy in the state courts.³¹

This Comment contends that *Parratt* is ultimately grounded in a theory of "state action" that cannot be reconciled with the more general constitutional understandings contained in *Home Telephone and Monroe*. Moreover, *Parratt* has consequences that arguably are beyond the power of Congress to alter. These results are unfortunate and unnecessary. Either the remaining aspects of *Parratt* should be overruled, or the decision should be recast. The Court's goals—which are certainly defensible—can be achieved by viewing *Parratt* as abstention doctrine, or alternatively, by statutory construction: by limiting the scope of section 1983 so that its requirement of "under color of [state law]" does not include random and unauthorized wrongs for which the state provides adequate corrective process.

I. *PARRATT V. TAYLOR*

While *Parratt* arose in a prison setting, it presented a common problem: low-level misconduct in the routine administration of state government that results in the loss or destruction of the plaintiff's property. The conduct violates state law, and the state law provides a remedy for the wrong. But the plaintiff also insists that this conduct also violates the due process clause of the fourteenth amendment, and he brings a section 1983 action in federal court.³² More specifically, in *Parratt* the plaintiff alleged that he had ordered by mail a hobby kit worth \$23.50. Upon its receipt at the prison, the kit was not processed according to established mail procedure and was negligently lost by prison officials. As a result, the plaintiff claimed a "deprivation" of his property "without due process of law."³³ The district court gave summary judgment for the plaintiff; the court of appeals affirmed.³⁴

The Supreme Court reversed in an opinion by Justice Rehnquist.³⁵ The Court began by setting out the language of section 1983:

29. *Id.* at 520.

30. *Id.* at 532.

31. *Id.* at 534-35.

32. *Parratt v. Taylor*, 451 U.S. 527, 530 (1981). Efforts to cast these official misconduct cases as equal protection violations are foreclosed by *Snowden v. Hughes*, 321 U.S. 1, 7-13 (1944).

33. 451 U.S. at 529.

34. *Id.* at 529-30.

35. *Id.* at 529. Justice Rehnquist's opinion was for the Court on all the points in the case. In view of the reservations expressed in several concurring opinions, some commentators have asserted that it represented only a plurality on the topic of this paper. See, e.g., Note, Due Process and Section 1983: Limiting *Parratt v. Taylor* to Negligent Conduct, 71 Calif. L. Rev. 253, 255-58 (1983).

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 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.³⁶

After concluding that the defendant's conduct satisfied section 1983's "under color of [state law]" requirement,³⁷ the Court decided two very different points.

First, the Court held that defendants' negligence could work a "deprivation" of "property" within the meaning of section 1983 and the fourteenth amendment.³⁸ On this point, *Daniels v. Williams*³⁹ explicitly overrules *Parratt*. *Daniels* held that while section 1983 has no state of mind requirement, at least some parts of the fourteenth amendment do. The Court insisted that negligent injuries are far removed from the evils of arbitrary governmental oppression that are the concern of the due process clause.⁴⁰ Strong federalism principles, reflecting a belief in a distinction between ordinary state law wrongs and constitutional violations, drove the holding:

Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"⁴¹

Second, the *Parratt* Court held that the "deprivation" did not infringe upon any "rights . . . secured by the Constitution" within the meaning of section 1983,⁴² because the deprivation was not without due process of law.⁴³ *Daniels*' approving citation of *Hudson v. Palmer* seemingly confirms that *Parratt*'s state action holding remains good law for some forms of intentional official misconduct.⁴⁴ Thus, *Parratt*'s reasoning requires careful attention.

36. *Parratt*, 451 U.S. at 532 (quoting 42 U.S.C. § 1983 (1982)) (emphasis added).

37. *Id.* at 535.

38. *Id.* at 537.

39. 106 S. Ct. 662 (1986).

40. *Id.* at 665.

41. *Id.* at 666 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)); see also *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986) (a careful opinion by Judge Easterbrook on the relationship between due process and due care).

42. 451 U.S. at 535.

43. *Id.* at 543.

44. 106 S. Ct. at 665.

II. FALSE STARTS: PROCEDURAL AND JURISDICTIONAL ACCOUNTS OF *PARRATT*

Several quite different accounts of *Parratt* can be given, each of which has significantly different implications for the principles of federal jurisdiction and, more importantly, for substantive constitutional law. In order to understand *Parratt*, it seems helpful to discuss first what the case is not about.

A. *Parratt as Procedural Due Process*

In *Parratt*, the Court concluded that the plaintiff had received all the process that was due.⁴⁵ Postdeprivation process was constitutionally sufficient where, as here: (1) the plaintiff did not challenge the established procedures for processing mail; (2) the defendants' conduct was "random and unauthorized," and thus predeprivation process was impracticable; and (3) state law provided adequate postdeprivation corrective process.⁴⁶ Focusing on this aspect of *Parratt*, several federal appellate courts have understood the case to be simply a procedural due process decision, concerned only with the timing of any constitutionally required process. Recently, the Second, Eighth, and Ninth Circuits have taken this position, and after *Daniels* other courts might be encouraged to so view the case.⁴⁷ In a categorical manner these courts insist that *Parratt* has no applicability to *any* substantive due process challenge, and that such challenges can be brought immediately in the federal courts. This is an attractive position. A procedural due process interpretation accords with the great bulk of the *Parratt* opinion, which is quite plainly concerned with the constitutional sufficiency of postdeprivation process, and with the views expressed in several concurring opinions.⁴⁸

But this limited conception of *Parratt* will not work. This becomes

45. 451 U.S. at 543-44.

46. See *id.* at 541, 543-44. While the Court's procedural due process holding is plainly correct as applied to negligence, it is less obviously so as applied to the intentional misconduct in *Hudson v. Palmer*. See, e.g., Note, Unauthorized Conduct of State Officials Under the Fourteenth Amendment: *Hudson v. Palmer* and the Resurrection of Dead Doctrines, 85 Colum. L. Rev. 837, 863-65 (1985).

47. See *Shah v. County of Los Angeles*, 797 F.2d 743, 746 (9th Cir. 1986); *McClary v. O'Hare*, 786 F.2d 83, 86 n.3 (2d Cir. 1986); *Williams v. City of St. Louis*, 783 F.2d 114, 118 (8th Cir. 1985); *De Pew v. City of St. Mary's*, 787 F.2d 1496, 1499-1500 (11th Cir. 1986); *Nahmod, Due Process, State Remedies, and Section 1983*, 34 Kansas L. Rev. 217, 233 (1985) (arguing that *Parratt* should not apply to incorporated Bill of Rights provisions or substantive due process claims). At times, the line between procedural and substantive claims becomes blurred. See *Holloway v. Walker*, 784 F.2d 1287, 1293-94 (5th Cir. 1986).

48. Moreover, it can explain *Hudson v. Palmer*, 468 U.S. 517 (1984), which unanimously extended *Parratt* to the random and unauthorized but intentional deprivations of an inmate's property. It can also explain *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a case, which arose in the state courts, in which the Supreme Court sustained a procedural due process challenge to a state forfeiture rule.

apparent once the concept of "substantive due process" is unpacked. Insofar as the concept refers to fundamental rights, such as those contained in the Bill of Rights or those accorded fundamental status under the *Roe v. Wade*⁴⁹ line of cases, *Parratt* has no relevance.⁵⁰ But insofar as substantive due process refers simply to the general substantive freedom from arbitrary and unreasonable restraints on "liberty" and "property," *Parratt* is relevant.

My conclusion rests on two grounds. First, if *Parratt* has no substantive import, why was the judgment for plaintiff reversed? One would have expected that, having rejected the procedural due process claim, the Court would then address the plaintiff's substantive constitutional claim. And here the result appeared clear: the facts were not in dispute; the Court had already decided that the defendants' conduct had worked a "deprivation" of the plaintiff's property,⁵¹ and no immunity rule shielded the defendants from damages.⁵² Accordingly, unless the plaintiff had asserted *only* a procedural due process claim—a point nowhere suggested in the Court's opinion⁵³—the judgment below should have been affirmed, not reversed.

Second, a procedural due process interpretation cannot plausibly account for *Parratt*'s final paragraphs. The Court does not say that the judgment for damages was reversed because the plaintiff had alleged only an unsound procedural due process claim.⁵⁴ Rather, reversal seems premised on the belief that the plaintiff was in the wrong forum. In concluding that the plaintiff "has not alleged a violation of the Due Process Clause,"⁵⁵ the Court abandons its prior discussion of due pro-

49. 410 U.S. 113 (1973).

50. The one arguable exception to *Parratt*'s inapplicability to "fundamental" right claims is the takings clause insofar as it secures protection against "regulatory" takings. See *infra* notes 67–78 and accompanying text.

51. The *Parratt* Court did not address the substantive character of the plaintiff's claim. But it recognized that plaintiff possessed a "property" interest originating in state law, 451 U.S. at 529 n.1, an interest that it assumed was entitled to some substantive fourteenth amendment protection. One would expect consideration of whether defendants' negligence constituted a "taking"—that term sometimes appears in the opinion—or simply a loss of property that, while technically not amounting to a taking, nonetheless constituted such a "deprivation" that substantive due process required appropriate redress. See *infra* notes 76–77 and accompanying text. As we shall see, the Court's analysis makes this the wrong inquiry.

52. *Malley v. Briggs*, 106 S. Ct. 1092 (1986); *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

53. *Nahmod*, *supra* note 47, at 225–26. Even if one assumes that the Supreme Court considered the plaintiffs in *Parratt* and *Hudson* to be raising only procedural due process claims, the Court's reasoning in those two cases still must be understood as adopting a state action doctrine contrary to *Home Telephone*. See Note, *supra* note 46, at 845–61.

54. Nor can the Court be understood as saying that plaintiff was making a substantive constitutional claim wholly out of the defendants' violations of state law. See *Snowden v. Hughes*, 321 U.S. 1 (1944).

55. *Parratt*, 451 U.S. at 543.

cess in a plainly procedural sense. Instead, the traditional distinction between substantive and procedural due process is collapsed,⁵⁶ and due process is discussed as though it were a unitary concept:

Although he has been deprived of property under color of state law, . . . there is no contention that the [established state] procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing This [state] procedure was in existence at the time of the loss here in question but respondent did not use it [Even though not identical to § 1983, the state] 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.

Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment . . . "would make of the Fourteenth Amendment a font of tort law" ⁵⁷

During *Parratt*'s heyday—when negligence could constitute a "deprivation" of property—these paragraphs were widely understood to require that a plaintiff vindicate any substantive damage claim in the state courts.⁵⁸

56. *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985), reaffirms that distinction in very strong terms. Significantly, Justice Rehnquist dissented. See *id.* at 1502 (Rehnquist, J., dissenting).

57. *Parratt*, 451 U.S. at 543-44.

58. See Moore, *supra* note 2, at 203 n.18 (collecting cases). In her dissent from the denial of certiorari in *Gregory v. Pittsfield*, 105 S. Ct. 1380, 1382-83 (1985), Justice O'Connor focused upon the procedural due process aspects of *Parratt*, but earlier she had also recognized its substantive import. See *Hudson v. Palmer*, 468 U.S. 517, 537 (1984) (O'Connor, J., concurring). The substantive understanding of *Parratt* underpins the Court's frequent efforts to show that the state remedy is constitutionally adequate, even though not quite so generous as § 1983. At least indirectly, *Daniels* reinforces *Parratt*'s forum-allocating significance. The petition raised only a substantive due process claim; the Court acknowledged that due process not only secures procedural fairness, it "bar[s] certain government actions regardless of the procedures used to implement them." *Daniels v. Williams*, 106 S. Ct. 662, 665 (1986). This statement came after the Court had lumped together several procedural and substantive due process cases. Justice Stevens' concurring opinion in *Daniels* underscores this point, though inadvertently. He asserts that *Parratt* applies only to procedural due process claims, *id.* at 678, and that the existence vel non of a state remedy is a matter of procedural due process. *Id.* at 679. This latter categorization seems wrong but understandable. Two concepts, substance and procedure, are asked to order three bodies of law: substantive law, remedial law, and procedural rules. In this framework, both the nature of the substantive duties imposed on state officials by the fourteenth amendment and the extent to which the state must provide remedies for their violation are matters of substantive due process. Compare P. Bator, P. Mishkin, D. Shapiro & M. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 17-25 (2d ed. 1973) (failure of state law to provide a remedy or an inadequate state ground) [hereinafter *Hart & Wechsler*] with *id.* at 26 (inadequate "procedural" state ground).

B. Parratt as *Abstention Doctrine*

As modified by *Daniels*, *Parratt* might be viewed as a special abstention doctrine applicable to certain cases in which plaintiffs seek damages for "deprivations" of constitutionally protected "property" or "liberty" resulting from intentional official conduct that also violates state law and for which the state provides corrective process. Official misconduct can come in different forms. For example, in *Home Telephone*, the officials were enforcing a municipal rate ordinance, but if the ordinance constituted a deprivation of property without due process of law, it also would have conflicted with the state constitution.⁵⁹ *Monroe v. Pape* involved a constitutionally offensive search and seizure⁶⁰ that was unauthorized by any level of state law. The conduct in *Parratt* was not authorized by state law, and it did not impinge upon any specific "fundamental" right.⁶¹ Excluding cases like *Parratt* from the federal trial courts is certainly a defensible policy. Those courts seem ill-used if their task is to superintend the routine administration of state government where the states are themselves willing to correct abuses and no fundamental rights are involved.⁶²

Treating *Parratt* as a special abstention doctrine for this narrow category of federal claims would be a bold move. The Court has often spoken of the district courts' "virtually unflagging obligation"⁶³ to exercise their statutory jurisdiction. Surely, the propriety of such a massive, judicially fashioned curtailment of statutorily mandated jurisdiction is open to doubt.⁶⁴ Yet, employed here and in other areas of "routine" state administration,⁶⁵ abstention doctrine has the considerable advantage of recognizing that the point in time at which a substantive constitutional violation takes place is not necessarily determinative of the point in time at which entry to the federal courthouse is obtained. On the latter point, the existence vel non of state corrective process is a relevant consideration.⁶⁶

59. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 282 (1913).

60. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

61. *Paul v. Davis*, 424 U.S. 693, 700 (1976), an opinion by Justice Rehnquist, distinguishes *Monroe* on that ground. See *infra* notes 80-86 and accompanying text.

62. See *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); *Monaghan*, *supra* note 11, at 44-46.

63. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (citation omitted).

64. Compare Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale L.J.* 71 (1984) (arguing against use of abstention doctrine) with Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543 (1985) (discretion to hear cases within federal courts' jurisdiction is necessary to permit courts to protect themselves).

65. See *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); *Monaghan*, *supra* note 11, at 43-49.

66. See Hart & Wechsler, *supra* note 58, at 946. In *Mann v. City of Tucson*, 782 F.2d 790, 794-95 (9th Cir. 1986) (Snead, J., concurring), Judge Snead's thoughtful concurring opinion notes the relationship between *Parratt* and abstention doctrine. Viewing

But *Parratt*'s reasoning is not captured by abstention doctrine. For the Court, something quite different underlies the decision.

C. *Parratt as Ripeness or Exhaustion of Remedies*

The Court has also suggested that *Parratt* rests on principles akin to ripeness,⁶⁷ a doctrine that concerns the timing of access to the federal courts. Ripeness principles require that controversies be sufficiently focused to ensure a clear presentation of the issues.⁶⁸

In *Williamson County Regional Planning Commission v. Hamilton Bank*,⁶⁹ a landowner filed a regulatory taking challenge in the district court.⁷⁰ The Court gave two reasons for its conclusion that the challenge was "premature." First, the Court found that further administrative relief to the landowner was possible by way of variance.⁷¹ Second, the Court held: "The taking claim is not yet ripe [because the landowner] did not seek compensation through the [judicial] procedures the State has provided for doing so."⁷² This second ground is of concern to us, for here the Court shuts the federal courthouse door even if all state administrative remedies have been exhausted.

From the settled premise that the takings clause itself does not require pre-taking process or pre-taking compensation, the Court somehow generated another conclusion: any substantive takings claim is "premature" until the landowner "has used the [state provided judicial] procedure and been denied just compensation."⁷³ The Court believed that this result was "analogous to the Court's holding in *Parratt*," and added:

In . . . a situation [such as *Parratt*], the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provi-

Parratt in abstention terms would expose its links to other explicit forum-allocating doctrines, such as that in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), which emphasized standing and equitable constraints on granting prospective relief against official policies.

67. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985).

68. See *Pacific Gas & Elec. Co. v. State Elec. Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983).

69. 105 S. Ct. 3108 (1985).

70. *Id.* at 3110.

71. *Id.* at 3120. This conclusion rested upon an unclear distinction between what ripeness principles required and the settled rule that in § 1983 actions exhaustion of administrative remedies is not required. *Id.* at 3121. The Court's conclusion seems sensible, however, at least in the special context of challenges to land use controls. The precise nature of what the developer is permitted has an important bearing on whether there has been a regulatory taking. See *MacDonald v. Yolo County*, 106 S. Ct. 2561, 2566-67 (1986).

72. 105 S. Ct. at 3121.

73. *Id.*

sion of meaningful postdeprivation process. . . . Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." Likewise . . . the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.⁷⁴

This passage indiscriminately mixes jurisdictional, procedural due process, and substantive taking concepts. The Court is quite wrong in thinking that the point in time at which a substantive deprivation occurs is a function of the point in time at which the state can reasonably provide corrective process. The relationship runs the other way: discussion about the timing of any process due presupposes independent criteria for specifying the point at which the substantive deprivation has occurred.⁷⁵ Moreover, the Court's reliance on ripeness concepts is in error. No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked.

Hamilton Bank might be defended, as a footnote in the opinion suggests, as a special rule for takings cases—a rule grounded in the perception that it is not the taking but the refusal to compensate that constitutes the violation.⁷⁶ The difficulty here is that the argument cannot be so limited. Assuming that some intentional property deprivations are not to be viewed as takings, these "non-taking" property "deprivations" cannot be accorded readier access to the district courts for substantive relief than are takings claims. Thus, it would seem that all substantive property claims, whether takings or not, must be pursued in the state courts, so long as an adequate corrective process exists. While this analysis yields a distinction between claims of liberty and of property,⁷⁷ the distinction is not consistent with *Hamilton Bank's* general ripeness, which posits that the constitutionally relevant state action is not "complete" until the state court acts. That view of ripe-

74. *Id.* at 3121–22 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984) (citation omitted)).

75. If a police officer, acting in a random and unauthorized manner, hauls a speaker from a platform or breaks into a home without a warrant, the impracticability of predeprivation process does not mean that no substantive deprivation has occurred.

76. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108, 3122 n.14 (1985). There is no constitutional imperative that the amount of compensation initially be determined by a judicial tribunal. *Thomas v. Union Carbide Agricultural Prods.*, 105 S. Ct. 3325, 3334 (1985). *Home Telephone* and other utility confiscation cases could be analyzed as instances where it was conceded that no compensation was intended if the rates were adjudged to be confiscatory.

77. See Moore, *supra* note 2, at 221–58 (collecting cases and advocating this position). Apparently, this distinction reflects Justice Blackmun's understanding at one time. See Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1 (1985). But see Davidson v. Cannon, 106 S. Ct. 668, 676 (1986) (Blackmun, J., dissenting) (assuming that *Parratt* and *Hudson* apply to deprivations of liberty interests).

ness seems equally applicable to deprivations of "liberty" and of "property." In any event, *Hamilton Bank's* ripeness rhetoric fails to capture *Parratt's* basic premise. Ripeness is concerned only with the timing of access to the district courts; but *Parratt* completely bars access, if the state corrective process is adjudged "adequate."⁷⁸

III. EXPLAINING *PARRATT*

Parratt is concerned with interests that owe their existence to state law but that constitute "property" for due process purposes. *Parratt* seeks to distinguish sharply between injuries to this category of constitutionally protected interests and injuries to "fundamental" constitutional rights. While hard to capture in a phrase, this distinction seems best expressed in "state action" terms. The heart of the distinction is the moment in time at which the constitutionally decisive state action is thought to occur.

With respect to fundamental rights, the Court continues to assert, as it did in *Monroe v. Pape*,⁷⁹ that section 1983 "makes a deprivation . . . actionable independently of state law."⁸⁰ The injured plaintiff has immediate access to federal courts whether or not the complained of conduct contravenes state law and whether or not the state provides corrective process. Thus, in fundamental rights cases, the constitutionally offensive state action occurs when the state official acts or threatens to act.

But where only a "property" interest is involved, as in *Parratt*, the analysis is more complex. If the deprivation is pursuant to some official policy, then the *Monroe v. Pape* approach is followed. However, if the official conduct is "random and unauthorized," the crucial constitution-

78. *Hamilton Bank* is not implicated if the state courts cannot give damages. See *Furey v. City of Sacramento*, 780 F.2d 1448, 1450 n.1 (9th Cir. 1986). *Hamilton Bank* will create enormous problems, however, where the state courts can grant damages. Suppose that, after *Hamilton Bank*, plaintiff brings suit in the state court and loses on the merits or on amount of "just compensation." Can he now resort to the federal district court on the theory that his § 1983 rights did not arise until the entry of an "inadequate" state court judgment? The plaintiff will assert that in the state court he had only a state law claim for damages, and that was all that was decided. In the federal court, the plaintiff will insist that the constitutional violation was not "complete" until the state court acted, at which point the dissatisfied litigant could bring a proceeding in the federal court. If so, the whole matter is relitigated in the federal court with the state law serving only to provide the precise dimensions of plaintiff's state law rights. A major difficulty for the plaintiff is, of course, that any such litigation will be met by issue and claim preclusion defenses. See *University of Tenn. v. Elliott*, 106 S. Ct. 3220 (1986). On the general problems generated by *Hamilton Bank*, see Symposium, 29 Wash. U.J. Urb. & Contemp. L. 3 (1986).

79. 365 U.S. 167 (1961).

80. *Wilson v. Garcia*, 105 S. Ct. 1938, 1943-44 (1985); *Paul v. Davis*, 424 U.S. 693, 710-11 n.5 (1976). The federal appellate courts have recognized that *Parratt* does not apply to fundamental right cases. See, e.g., *Steinglass, Wrongful Death Actions and Section 1983*, 60 Ind. L.J. 559, 562 n.10 (1985) (collecting cases).

ally offensive state action *may* shift. This is because the focus is not on the specific official act, but on the overall design of the legislative scheme.⁸¹ If adequate corrective process exists, the conduct of the state official is not of constitutional dimension; it is only a state law wrong. If adequate corrective process does not exist, anyone injured as a result of *that* omission has suffered a constitutional deprivation. The specific act that causes the loss is not of constitutional significance except to create standing to complain.⁸²

On this analysis, *Parratt*'s premises seem as applicable to "liberty" as to "property." If that is true, *Parratt* will require that intentional but random and unauthorized state misconduct be sorted into two categories: injuries to fundamental rights and "straight" substantive due process claims, which involve challenges to state conduct that "arbitrarily" or "unreasonably" interferes with liberty or property. The need to classify certain actions, such as police brutality, will present some boundary uncertainty.⁸³ At first glance, the category of "fundamental" rights seems coterminous with those provisions of the Bill of Rights held applicable to the states, as well as any judicially-created fundamental rights.⁸⁴ But this line may not quite capture the distinctions made in

81. *Parratt* considered, and this Comment discusses, the issue in the context of legislatively prescribed remedies. But the discussion is equally applicable to a legislative scheme coupled with common law remedies. It may be that in the *Parratt* scheme the crucial time is the time of suit: if adequate remedies do not exist at the time of the act, but do at the time of the suit, there may be no violation. In any case, for us the crucial point is not when the actual injury is sustained.

82. This interpretation departs from settled understanding, because concrete injury has always been the essence of the violation, not simply a pre-condition to suit. See Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1389-92 (1973).

83. Does excessive use of force by police officers constitute a fundamental right case, under *Rochin v. California*, 342 U.S. 165, 172 (1952), as Judge Friendly believed? See *Johnson v. Glick*, 481 F.2d 1028, 1032-33 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). Or has *Rochin* been effectively rejected, with police brutality now treated as a fourth amendment case on the theory of *Tennessee v. Garner*, 105 S. Ct. 1694 (1985), as Judge Easterbrook thinks? See *Gumz v. Morrissette*, 772 F.2d 1395, 1404-09 (7th Cir. 1985) (concurring opinion). Or is police brutality simply an interference with the citizen's general "liberty" and thus governed by *Parratt*? See *id.* at 1399-1400 n.3 (citing cases). *Rochin* was cited with apparent approval in *Daniels*, 106 S. Ct. at 665, and *Whitley v. Albers*, 106 S. Ct. 1078, 1088 (1986), and discussed with apparent approval in *Moran v. Burbine*, 106 S. Ct. 1135, 1147 (1986). *Johnson* was cited with approval in *Davidson v. Cannon*, 106 S. Ct. 668, 670-71 (1986).

There are other illustrations of boundary uncertainty. For example, to what extent does an inmate confined by state authority possess a fundamental right to safe custody, or only a general "liberty" interest to such protection? That issue remains only partially clarified by *Daniels* and its companion case, *Davidson v. Cannon*, 106 S. Ct. 668 (1986). See *Whitley*, 106 S. Ct. at 1088 (overlap of due process and eighth amendment protections in prison context). For a discussion of this issue see *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986).

84. This is the sex-marriage-privacy category symbolized by *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny.

the cases, particularly in the opinions of Justice Rehnquist. Seemingly, he distinguishes between rights, such as first and fourth amendment rights, whose sole origin is in the Constitution, and rights with origins in state law and which are simply protected by the Constitution.⁸⁵ This distinction subjects at least some takings claims to the *Parratt* regime, even though protection against uncompensated takings is a specific textual guarantee. On the other hand, for Justice Rehnquist the federal content of "liberty" includes a root freedom from the imposition of new legal disabilities, even though that "liberty" cannot be fitted into a Bill of Rights mold.⁸⁶

The complex distinctions spawned by *Parratt* reflect the Court's deep-seated belief that a sufficiently stable line exists between constitutional torts and simple state law wrongs.⁸⁷ But in fact, many state-caused constitutional violations necessarily retain much of the substance of common law torts.⁸⁸ In any area where a "specific" constitu-

85. See Monaghan, *supra* note 12, at 424-29; *Baker v. McCollan*, 443 U.S. 137, 143-46 (1979), in which Justice Rehnquist emphasized the same theme in the context of a suit by a person mistakenly arrested and held for three days under a facially valid warrant. There was no violation of substantive due process; at best, plaintiff possessed a tort claim for false imprisonment. See also *Toney El v. Franzen*, 777 F.2d 1224, 1227 (7th Cir. 1985) (no liberty or property right involved in delayed release from prison).

86. See Monaghan, *supra* note 12, at 424-25.

87. In *Paul*, the Court seemingly assumed that some injuries that would be tortious if unjustified could not constitute constitutional violations. *Paul*, 424 U.S. at 698-99. See Monaghan, *supra* note 12, at 427-28.

In *Daniels*, the Court said that it is "no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels*, 106 S. Ct. at 666. During much of our constitutional history, the only apparent difference between a public officer and a common law tortfeasor was that the officers asserted a defense of official authorization. Once the Constitution operated to negate that defense, the public official was simply a tortfeasor and as such could be sued in federal court. The restrictive view that this was the *only* occasion on which federal intervention was constitutionally appropriate was eroded in cases like *Ex parte Young*, 209 U.S. 123, 159-60 (1908), where the alleged state wrong lacked a clear common law analogue. The view was abandoned completely when judicial review of administrative action became commonplace. See Monaghan, *supra* note 82, at 1386-90.

88. See Monaghan, *supra* note 12, at 427-28; see also *Wilson v. Garcia*, 105 S. Ct. 1938, 1945 (1985) (claims under § 1983 are best characterized as personal injury actions for limitations purposes). As the Second Circuit recently noted, "[I]n this case a finding of liability for either false arrest or malicious prosecution would also require a finding of liability under section 1983." *Raysor v. Port Authority*, 768 F.2d 34, 40 (2d Cir. 1985), cert. denied, 106 S. Ct. 1227 (1986); cf. *Lewis v. Downs*, 774 F.2d 711, 713-14 (6th Cir. 1985) (conduct constituting tort also violates § 1983 if it "shocks the conscience of the court"). I recognize that injuries inflicted by public officers can be thought to differ significantly from injuries inflicted by private persons. Backed by state power and apparent authority, such officials threaten core societal notions of human dignity through their misconduct. See Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga. L. Rev. 201, 221-32 (1984). Moreover, the interests protected by the common law may not be congruent with those protected by constitutional analogues, particularly given the current expansive readings of most constitutional provi-

tional provision has a common law tort counterpart, any effort at positing a strong distinction between constitutional and non-constitutional torts is not likely to succeed. In these situations, a section 1983 litigant will allege the substance of a common law tort and perhaps some additional aggravating circumstances.⁸⁹

The Court's recent efforts to fashion a general theory of state wrongs under the fourteenth amendment is incomplete. Indeed, as *Daniels* shows, this project is open to continuous revision. But at present, we have a rather complicated three-tiered structure:

1. *Fundamental rights*. This category includes most of the Bill of Rights plus judicially posited fundamental rights.⁹⁰ The focus here is on the specific act of official misconduct, which gives rise to an immediate right under section 1983 to sue in the federal court for damages and injunctive relief. This section 1983 claim stands whether the defendant's conduct is authorized or unauthorized under state law or whether the state provides adequate corrective process. *Monroe v. Pape*⁹¹ is the classic illustration.

2. *Liberty or property invasions*. The focus here is on intentional (and perhaps reckless) interference with interests that originate in state law but that amount to "liberty" or "property" within the meaning of the fourteenth amendment. So long as the challenge is not to an official state policy, but only to random and unauthorized misconduct, the state wrong is not in the interference but only in the denial of the corrective process. *Parratt v. Taylor*⁹² provides the theoretical underpinning for this model, although *Hudson v. Palmer*⁹³ is the best illustration.

3. *Other injuries*. The focus here is on a set of state harms to specific individuals that do not implicate either "liberty" or "property." In principle, such harms do not seem to require any justification under the due process clause. So far this is a quite limited area, largely involving public sector entitlements such as welfare and jobs. Moreover, the Court has spoken only of the lack of need for predeprivation process, and it has hinted that the availability of some state law remedies is important. *Board of Regents v. Roth*⁹⁴ is the standard bearer here.

sions. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971) ("The interests protected by state laws regulating trespass and invasion of privacy, and those protected by the Fourth Amendment's guarantee . . . may be inconsistent or even hostile.").

89. See *Cameron v. IRS*, 773 F.2d 126, 129 (7th Cir. 1985); *Gumz v. Morrisette*, 772 F.2d 1395, 1399-1440 (7th Cir. 1985). I agree with Judge Posner in *Cameron* that some technically tortious activity might be de minimis for constitutional purposes.

90. See *supra* note 84 and accompanying text.

91. 365 U.S. 167 (1961).

92. 451 U.S. 527 (1981).

93. 468 U.S. 517 (1984).

94. 408 U.S. 564 (1972).

IV. UNDERSTANDING *PARRATT*

Parratt's state action theory is a deeply problematic aspect of the Court's complex three-fold classification. My submission is that *Parratt* is not tenable, and it should be either overruled or recast.

A. *Of Intentional Injuries*

The line between "random and unauthorized" official conduct and "authorized" conduct is unstable, as the recent decision in *Regents of the University of Michigan v. Ewing*⁹⁵ illustrates. There, the Court rejected on the merits a substantive due process challenge to the dismissal of a student from a special medical degree program. The student alleged that his dismissal was contrary to both the announced policies and the actual practices of the university for students experiencing academic difficulty in this program. The complaint alleged state law contract and estoppel theories, and a section 1983 claim.⁹⁶ The Court did not consider *Parratt*, but the case can be understood in those terms: the heart of the student's complaint was that he was dismissed as a result of the "unauthorized" conduct of state officials. Perhaps, however, the dismissal was not "random" because it was made at a high enough administrative level.⁹⁷ If that be the explanation, "random" is a term of art, and *Parratt* collapses into little more than a distinction between acts of "lower echelon state employees . . . and high ranking officials."⁹⁸ If, however, *Ewing* holds that a plaintiff can *always* make a substantive due process challenge for arbitrariness, *Parratt* and *Hudson v. Palmer* are overruled completely.

But difficulties in understanding what constitutes "random and unauthorized" conduct are not the heart of my concern. *Parratt's* asymmetric treatment of different kinds of official conduct cannot be adequately rationalized in state action terms. No distinction can turn on the adequacy of state corrective process, because that factor can be held constant in all situations.⁹⁹ *Parratt* provides no basis for a distinction between injuries to fundamental rights and injuries to other constitutional interests. As commentators have noted, *Monroe* and *Parratt*

95. 106 S. Ct. 507 (1985).

96. *Id.* at 509. Attempts to formulate the alleged official misconduct in equal protection terms is foreclosed by *Snowden v. Hughes*, 321 U.S. 1, 7-13 (1944).

97. 106 S. Ct. at 509.

98. *Dwyer v. Regan*, 777 F.2d 825, 832 (2d Cir. 1985). *Contra* *Holloway v. Walker*, 790 F.2d 1170, 1173 (5th Cir. 1986); *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952 (11th Cir. 1986). The distinction between low and high level officials also has relevance in determining municipal liability under § 1983. See *Pembauer v. City of Cincinnati*, 106 S. Ct. 1292, 1300 (1986).

99. Indeed, from one perspective the adequacy argument cuts against the lines drawn by the Court. The Supreme Court can police the state courts through appellate review of challenges to rules and practices but not of fact-dependent challenges to official misconduct. See H. Wechsler, *The Nationalization of Civil Liberties and Civil Rights* 18-19 (1969).

have the same structure: state officials have interfered with a constitutionally protected interest under circumstances in which their conduct is illegal under state law and for which state law provides adequate corrective process.¹⁰⁰

More fundamentally, as a means for determining the time when a constitutional violation occurs, *Parratt's* state action theory is in direct conflict with principles thought to be settled by *Home Telephone and Telegraph Co. v. City of Los Angeles*.¹⁰¹ There, the company filed a bill to enjoin the enforcement of a city rate ordinance, alleging that the rates were confiscatory and thus the ordinance contravened the due process clause of the fourteenth amendment. The district court dismissed the bill, reasoning that, if confiscatory, the rates were also illegal under the state constitution, and since the state law provided corrective process, the "state" could not be said to have deprived the company of property without due process of law.¹⁰² The Supreme Court unanimously reversed, rejecting the view that the fourteenth amendment applied to the state only in its collective capacity and reached only wrongs "authorized" by the state.¹⁰³ "[I]n truth," the amendment "contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment."¹⁰⁴ Stressing the amendment's "completeness" and "comprehensive inclusiveness," the Court continued:

[W]here a state officer, under an assertion of power from the State, is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power . . . [W]hen it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done prima facie would violate the Amendment, *the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority*.¹⁰⁵

100. See, e.g., Bator, *Some Thoughts on Applied Federalism*, 6 Harv. J. L. & Pub. Pol'y 51, 56-58 (1982). Of course, in the exercise of its power to specify the jurisdiction of the federal courts, Congress might distinguish between the two contexts. It could conclude that only "fundamental" rights need or deserve the special protection of a federal trial forum. Perhaps the Court could do the same under the rubric of abstention doctrine, but it has not done so.

101. 227 U.S. 278 (1913). *Home Telephone* is generally understood to have confirmed the constitutional principles announced in *Ex Parte Virginia*, 100 U.S. 339, 346-48 (1880). But see Zagrans, *supra* note 24, at 536-38 (*Home Telephone* interpreted only the reach of the fourteenth amendment, not the meaning of § 1983's phrase "under color of [state] law.")

102. See *Home Telephone*, 227 U.S. at 283.

103. See *id.* at 284.

104. *Id.* at 288.

105. *Id.* at 288-89 (emphasis added).

Under *Home Telephone*, the fourteenth amendment reaches any executive or administrative conduct that contravenes the fourteenth amendment. It makes no difference whether the state provides corrective process.¹⁰⁶ More importantly, it makes no difference whether the state official is using or misusing state power.¹⁰⁷ Under *Home Telephone*, the constitutionally offensive state action occurs at the point at which the state official acts. This has been the standard understanding in constitutional law for many decades.¹⁰⁸ Yet, under *Parratt*, some forms of intentional conduct that "prima facie" would violate the amendment, standing alone, cannot constitute constitutional violations.

Parratt makes no effort to reconcile its conclusion with *Home Telephone* or *Monroe v. Pape*. Without reflection, the Court simply assumes that the situations are different. There are plausible differences between fundamental rights and other rights, between challenges to state and local policies and challenges to unadorned official misconduct, and between situations in which the state provides adequate corrective process and those in which it does not. These factors have relevance in legislative and judicial determinations as to the appropriate point at which federal trial court intervention should occur. But they are not relevant in determining the point at which a substantive violation has occurred. *Parratt's* state action theory is fundamentally wrong, at least so long as *Home Telephone* and *Monroe v. Pape* are thought to be sound.

B. *Of Adequate Corrective Process*

Additional difficulties emerge once we focus on *Parratt's* apparent premise that access to the federal courts is available if the state does not provide some "adequate" corrective process for an intentional interference with a constitutionally protected "liberty" or "property" interest. Does this mean that the state cannot abolish or sharply modify its common law of torts so as to create a special immunity from damages for state officials? If the general fourteenth amendment standard of reasonableness is the test, a plausible argument can be advanced for at least some such immunities.¹⁰⁹ Both *Daniels* and *Davidson* presented this issue, but the Court's disposition of both cases left it unresolved. Perhaps eventually the Court will hold that *Parratt* does not require actual relief.¹¹⁰ But then what would *Parratt* mean?¹¹¹

106. See *id.* at 282-83.

107. See *Id.* at 287.

108. See *Snowden v. Hughes*, 321 U.S. 1, 11 (1944).

109. *Martinez v. California*, 444 U.S. 277 (1980), recognizes that much, sustaining against fourteenth amendment attack a challenge to an immunity defense for public officials in the context of a state-created wrongful death action. The Court rejected a "separate" § 1983 claim because of insufficient causation. *Id.* at 285.

110. See, e.g., *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1457-59 (11th Cir. 1985), cert. denied, 106 S. Ct. 1193 (1986). This conclusion draws support from the fact that, for some unexplained reason, the Court has posed the adequacy question in terms of a comparison with § 1983, asking whether the state law gave "about" as much

C. *Congress and Parratt*

Parratt's potential is quite startling once Congress is brought into the picture. Consider an example suggested by *Hudson v. Palmer*,¹¹² which extended *Parratt* to bar a section 1983 challenge to the intentional misconduct of state officials who destroyed an inmate's property. As in *Parratt*, the Court seems to have assumed that no substantive violation had been made out so long as the state court provided adequate corrective process. Suppose that, after *Hudson*, the United States indicted the offending officials under a criminal statute that proscribed the "intentional deprivation of rights secured by the Constitution of the United States." Seemingly, *Parratt*'s logic requires dismissal: the random and unauthorized official misconduct does not constitute a violation given the existence of adequate state corrective process. This result runs strongly against our intuitions.

Could Congress overrule *Parratt*?¹¹³ With a single arguable exception,¹¹⁴ no Supreme Court decision has departed from the understanding of the *Civil Rights Cases*¹¹⁵ that section five of the fourteenth amendment authorizes "remedial" legislation only—that is, legislation designed to correct state wrongdoing.¹¹⁶ To be sure, in the race area the remedial conception has been given such an expansive gloss that any distinction between remedial and primary legislation has been drained of substance.¹¹⁷ But this development has evoked strong dis-

relief as § 1983. *Hudson v. Palmer*, 468 U.S. 517 (1984). Yet § 1983 itself recognizes a substantial measure of official immunity in damage actions, see *supra* note 51, and it is unlikely that the Court could insist that the state provide more generous relief than what is now required by § 1983 for the rights that fall within its ambit. See generally Note, *Parratt v. Taylor* Revisited: Defining the Adequate Remedy Requirement, 65 B.U.L. Rev. 607 (1985) (collecting cases and arguing that the state must provide a remedy).

111. If, however, the Court insists on a meaningful requirement of adequate state corrective process, the Court must not only superintend state tort law, it must distinguish further between state-caused injuries to "liberty" or "property" and other kinds of state injuries to specific individuals. Specifically, it must determine whether the "no liberty," "no property" approach of *Roth* and *Paul v. Davis* to the due process clause should extend to matters of substantive due process, with the result that an important range of state conduct would escape the need to satisfy a substantive "rationality" requirement. See *supra* note 18 and accompanying text. This problem, however, may have more theoretical than practical consequences. A substantive rationality demand can be required by recasting the claim as an equal protection challenge, a challenge that does not require the existence of any antecedent liberty or property interest. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438–39 (1982) (Blackmun, J., separate opinion); *id.* at 443–44 (Powell, J., concurring).

112. 468 U.S. 517 (1984).

113. Herbert Wechsler called this problem to my attention.

114. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (alterative holding).

115. 109 U.S. 3, 11 (1883).

116. See G. Gunther, *Cases and Materials on Constitutional Law* 968–71 (11th ed. 1985).

117. See *Rome v. United States*, 446 U.S. 156, 176 (1980).

sents¹¹⁸ and is not likely to be pressed beyond the race area. If that is true, it is doubtful that Congress could overrule *Parratt*: there would be nothing to "remedy" since the official misconduct is not itself a violation where the state legislative scheme has adequate corrective process. Of course, one can readily imagine the countermoves. Congress could "find" that, though fair on its face, the state remedial scheme will not work in practice and that a federal cause of action is therefore necessary to vindicate fourteenth amendment rights.¹¹⁹ Whether this "prophylactic" argument would prevail outside the race area, or whether congressional power under article I, section 8 might support federal legislation, is not important for my purposes. The difficulties cast doubt on *Parratt* simply because the decision makes so complex our understanding of the fourteenth amendment. In constitutional law, as elsewhere, needless complexity should be eschewed.

V. OVERRULING OR RECASTING *PARRATT*

The appropriate role of the federal courts in cases of misuse of authority by state officials is a problem with a very long history. Leaving aside differing conceptions of what amounts to "authorization," the view that only "authorized" state conduct can offend the fourteenth amendment has been espoused before.¹²⁰ As a theory of "state action" it was categorically rejected in *Home Telephone*.¹²¹ However, in Justice Frankfurter's dissenting opinion in *Monroe v. Pape*,¹²² it resurfaced, this time as a theory of statutory construction. Justice Frankfurter insisted that an unreasonable search and seizure by police officers did not occur "under color of [state] law" for purposes of section 1983 where the conduct violated state law unless it was in fact supported by some custom or usage.¹²³

Parratt resurrects this tradition. *Parratt* asserts that some forms of official misconduct do not fall within the ambit of the fourteenth amendment so long as the state provides corrective process. *Parratt's* push to embrace some such position is understandable—indeed, in

118. E.g., *id.* at 206 (Rehnquist, J., dissenting).

119. See *Oregon v. Mitchell*, 400 U.S. 229, 235–36 (Brennan, J., concurring and dissenting).

120. It appears in several opinions of Justice Field in the late nineteenth century. See *Virginia v. Rives*, 100 U.S. 313, 333 (1879) (separate opinion of Field, J.); *Ex Parte Virginia*, 100 U.S. 339, 349–70 (1879) (Field, J., dissenting). It is arguably the Court's holding in *Barney v. New York*, 193 U.S. 430, 437 (1904), and reappears in Justice Frankfurter's concurring opinion in *Snowden v. Hughes*, 321 U.S. 1, 13–17 (1944) (Frankfurter, J., concurring).

121. 227 U.S. 278, 287 (1913).

122. 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting in part).

123. See *id.* at 245–46 (Frankfurter, J., dissenting in part). The position is equivalent to the Court's position in *Virginia v. Rives*, 100 U.S. 313 (1879), because Justice Frankfurter recognized that Congress had power to reach unauthorized state conduct. *Monroe*, 365 U.S. at 211–12.

practical terms, imperative—if negligence could amount to a “deprivation.” But, after *Daniels*, the practical need for this remaining aspect of *Parratt* is far less clear, particularly given the difficulty of its application.

But my real concern is at the level of theory. The lines drawn by *Parratt*, however defensible they may be when viewed as a sensible use of the federal trial courts, render the decision incoherent as a theory of state action. That result is quite unnecessary, even accepting the Court’s policy objectives. The Court could find a far less controversial basis for its results in abstention doctrine. This would be my preference. But, alternatively, the Court might, as Justice Rehnquist has suggested, re-examine *Monroe*’s holding that section 1983’s reach is coextensive with the reach of the fourteenth amendment.¹²⁴ Of course, the two can be read as perfectly congruent, but such a reading is not necessary.¹²⁵ *Parratt* could be rationalized as a construction of section 1983 under which wholly unauthorized official misconduct with respect to interests whose origins are in state law and where adequate state corrective process exists does not occur “under color of [state law]” within the meaning of section 1983.¹²⁶ Whether this reading comports comfortably with the language or the original intention of section 1983 is another matter.¹²⁷ For me, the decisive point is that if *Parratt* is not overruled, it is far better to charge its narrowing results to abstention principles or to section 1983 than to the fourteenth amendment.¹²⁸

124. See, e.g., *City of Columbus v. Leonard*, 443 U.S. 905, 910–11 (Rehnquist, J., dissenting) (suggesting that where state proceedings have already been initiated by plaintiff, § 1983, unlike the fourteenth amendment, may require exhaustion of state remedies before plaintiff may have recourse to a federal court).

125. Statutes tracking constitutional language need not be read to embrace all that the Constitution embraces. See *Merrell Dow Pharmaceuticals v. Thompson*, 106 S. Ct. 3231, 3232 (1986).

126. This move will not work if the plaintiff can turn around and assert a *Bivens* claim under the fourteenth amendment. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Regardless of whether *Bivens* applies to fourteenth amendment claims, it seems inapplicable where an alternative adequate remedial scheme is in place. See *Bush v. Lucas*, 462 U.S. 367 (1983).

Perhaps one could go further and limit *Parratt* to property claims. But § 1983 does not readily admit the distinction, and it is a hard one to maintain in principle. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972).

127. See Zagrans, *supra* note 24, at 525–60. Professor Zagrans believes that, while the existence of state corrective process is irrelevant, § 1983 “was meant to create liability only for acts done with state authority.” *Id.* at 559.

128. I recognize that adherence to *stare decisis* in matters of statutory interpretation is important. See *Square D. Co. v. Niagra Frontier Tariff Bureau*, 106 S. Ct. 1922, 1930 n.34 (1986). But here, abandoning *stare decisis* seems to me a lesser evil than unnecessary distortions of the Constitution. See *Monnell v. Department of Social Servs.*, 436 U.S. 658, 695–701 (1978) (court will not apply *stare decisis* “mechanically” to uphold prior statutory holding).