SUPREME COURT OF THE UNITED STATES

No. 97–1235

CITY OF MONTEREY, PETITIONER *v.* DEL MONTE DUNES AT MONTEREY, LTD., AND MONTEREY-DEL MONTE DUNES CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 24, 1999]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join all except Part IV–A–2 of JUSTICE KENNEDY's opinion. In my view, all §1983 actions must be treated alike insofar as the Seventh Amendment right to jury trial is concerned; that right exists when monetary damages are sought; and the issues submitted to the jury in the present case were properly sent there.

I

Rev. Stat. §1979, 42 U. S. C. §1983, creates a duty to refrain from interference with the federal rights of others, and provides money damages and injunctive relief for violation of that duty. Since the statute itself confers no right to jury trial, such a right is to be found, if at all, in the application to §1983 of the Seventh Amendment, which guarantees a jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." In determining whether a particular cause of action is a "[s]ui[t] at common law" within the meaning of this provision, we must examine whether it was tried at law in 1791 or is analogous to such a cause, see, *e.g.*, *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989), and whether it

seeks relief that is legal or equitable in nature, see, *e.g.*, *Tull* v. *United States*, 481 U. S. 412, 421 (1987).

The fundamental difference between my view of this case and JUSTICE SOUTER's is that I believe §1983 establishes a unique, or at least distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim-creating statute itself, but by an extrinsic body of law to which the statute refers, namely "federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U. S. 137, 144, n. 3 (1979). In this respect §1983 is, so to speak, a prism through which many different lights may pass. Unlike JUSTICE SOUTER, I believe that, in analyzing this cause of action for Seventh Amendment purposes, the proper focus is on the prism itself, not on the particular ray that happens to be passing through in the present case.

The Seventh Amendment inquiry looks first to the "nature of the statutory action." *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 348 (1998). The only "statutory action" here is a §1983 suit. The question before us, therefore, is not what common-law action is most analogous to some generic suit seeking compensation for a Fifth Amendment taking, but what common-law action is most analogous *to a §1983 claim*. The fact that the breach of duty which underlies the particular §1983 claim at issue here– a Fifth Amendment takings violation– may give rise to *another* cause of action besides a §1983 claim, namely a so-called inverse condemnation suit, which is (according to Part IV–A–2 of JUSTICE KENNEDY's opinion) or is not (according to JUSTICE SOUTER's opinion) entitled to be tried before a jury, seems to me irrelevant. The central question remains whether a *§1983 suit* is entitled to a jury. The fortuitous existence of an inverse-condemnation cause of action is surely not essential to the existence of the §1983 claim. Indeed, for almost all §1983 claims arising out of constitutional viola-

tions, no alternative private cause of action *does* exist—which makes it practically useful, in addition to being theoretically sound, to focus on the prism instead of the refracted light.

This is exactly the approach we took in *Wilson* v. *Garcia*, 471 U. S. 261 (1985)—an opinion whose analysis is so precisely in point that it gives this case a distinct quality of *déjà vu*. *Wilson* required us to analogize §1983 actions to common-law suits for a different purpose: not to determine applicability of the jury-trial right, but to identify the relevant statute of limitations. Since no federal limitations period was provided, the Court had to apply 42 U. S. C. §1988(a), which stated that, in the event a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the [federal] courts in the trial and disposition of the cause . . . ." In applying this provision, the Court identified as one of the steps necessary for its analysis resolution of precisely the question I have been discussing here: "[W]e must . . . decide whether all §1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." 471 U. S., at 268. The Court concluded (as I do here) that all §1983 claims should be characterized in the same way. It said (as I have) that §1983 was "a uniquely federal remedy," and that it is "the purest coincidence . . . when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Id*., at 271–272 (citations, footnotes, and internal quotation marks

omitted). And the Court was affected (as I am here) by the practical difficulties of the other course, which it described as follows:

> "Almost every §1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . .
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> "A catalog of . . . constitutional claims that have been alleged under §1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard– to identify only a few." *Id.*, at 272–273 (footnotes omitted).

For these reasons the Court concluded that *all* §1983 actions should be characterized as "tort action[s] for the recovery of damages for personal injuries." *Id.*, at 276.

To be sure, §1988 is not the Seventh Amendment. It is entirely possible to analogize §1983 to the "common law" in one fashion for purposes of that statute, and in another fashion for purposes of the constitutional guarantee. But I cannot imagine why one would want to do that. For both purposes it is a "unique federal remedy" whose character is determined by the federal cause of action, and not by the innumerable constitutional and statutory violations upon which that cause of action is dependent. And for both purposes the search for (often nonexistent) common-law analogues to remedies for those particular violations is a major headache. Surely, the burden should be upon JUSTICE SOUTER to explain why a different approach is appropriate in the present context. I adhere to the ap-

proach of *Wilson*, reaffirmed and refined in *Owens* v. *Okure*, 488 U. S. 235 (1989), that a §1983 action is a §1983 action.[1]

II

To apply this methodology to the present case: There is no doubt that the cause of action created by §1983 is, and was always regarded as, a tort claim. Thomas Cooley's treatise on tort law, which was published roughly contemporaneously with the enactment of §1983, tracked Blackstone's view, see 3 W. Blackstone, Commentaries on the Laws of England 115–119 (1768), that torts are remedies for invasions of certain rights, such as the rights to personal security, personal liberty, and property. T. Cooley, Law of Torts 2–3 (1880). Section 1983 assuredly fits that

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[1] JUSTICE SOUTER properly notes that "trial by jury is not a uniform feature of §1983 actions." *Post*, at 20. This does not lead, however, to his desired conclusion that all §1983 actions can therefore not properly be analogized to tort claims. *Post*, at 9, 20–21. Before the merger of law and equity, a contested right would have to be established at law before relief could be obtained in equity. Thus, a suit in equity to enjoin an alleged nuisance could not be brought until a tort action at law established the right to relief. See 1 J. High, Law of Injunctions 476–477 (2d ed. 1880). Since the merger of law and equity, any type of relief, including purely equitable relief, can be sought in a tort suit– so that I can file a tort action seeking only an injunction against a nuisance. If I should do so, the fact that I seek only equitable relief would disentitle me to a jury, see, *e.g.*, *Curtis* v. *Loether*, 415 U. S. 189, 198 (1974); *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 471 (1962); *Parsons* v. *Bedford*, 3 Pet. 433, 446–447 (1830); E. Re & J. Re, Cases and Materials on Remedies 46 (4th ed. 1996)– but that would not render the nuisance suit any less a *tort* suit, so that if damages *were* sought a jury *would* be required. So also here: Some §1983 suits do not require a jury because only equitable relief is sought. But since they are *tort* suits, when damages are requested, as they are in the present case, a jury must be provided. Thus, the relief sought is an important consideration in the Seventh Amendment inquiry, but contrary to JUSTICE SOUTER's belief it is a consideration separate from the determination of the analogous common-law cause of action.

description. Like other tort causes of action, it is designed to provide compensation for injuries arising from the violation of legal duties, see *Carey* v. *Piphus*, 435 U. S. 247, 254 (1978), and thereby, of course, to deter future violations.

This Court has confirmed in countless cases that a §1983 cause of action sounds in tort. We have stated repeatedly that §1983 "creates a species of tort liability," *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976); see also *Heck* v. *Humphrey*, 512 U. S. 477, 483 (1994); *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 305 (1986); *Smith* v. *Wade*, 461 U. S. 30, 34 (1983); *Carey*, *supra*, at 253; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 507 (1939) (opinion of Roberts, J.) (describing a claim brought under a predecessor of §1983 as seeking relief for "tortious invasions of alleged civil rights by persons acting under color of state authority"). We have commonly described it as creating a "constitutional tort," since violations of constitutional rights have been the most frequently litigated claims. See *Crawford-El* v. *Britton*, 523 U. S. 574, 600–601 (1998); *Jefferson* v. *City of Tarrant*, 522 U. S. 75, 78–79 (1997); *McMillian* v. *Monroe County*, 520 U. S. 781, 784 (1997); *Richardson* v. *McKnight*, 521 U. S. 399, 401 (1997); *Johnson* v. *Jones*, 515 U. S. 304, 307 (1995); *Albright* v. *Oliver*, 510 U. S. 266, 269 (1994); *Siegert* v. *Gilley*, 500 U. S. 226, 231 (1991); *St. Louis* v. *Praprotnik*, 485 U. S. 112, 121 (1988); *Daniels* v. *Williams*, 474 U. S. 327, 329 (1986); *Memphis Community School Dist.*, *supra*, at 307; *Smith*, *supra*, at 35; *Monell* v. *New York City Dept. of Social Servs.* 436 U. S. 658, 691 (1978). In *Wilson* v. *Garcia*, we explicitly identified §1983 as a personal-injury tort, stating that "[a] violation of [§1983] is an injury to the individual rights of the person," and that "Congress unquestionably would have considered the remedies established in the Civil Rights Act [of 1871] to be more analogous to tort claims for personal injury

than, for example, to claims for damages to property or breach of contract." 471 U. S., at 277.

As described earlier, in *Wilson*, *supra*, and *Okure*, *supra*, we used §1983's identity as a personal-injury tort to determine the relevant statute of limitations under 42 U. S. C. §1988(a). We have also used §1983's character as a tort cause of action to determine the scope of immunity, *Kalina* v. *Fletcher*, 522 U. S. 118, 124–125 (1997), the recoverable damages, *Heck*, *supra*, at 483; *Memphis Community School Dist.*, *supra*, at 305–306, and the scope of liability, *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961). In *Owen* v. *City of Independence*, 445 U. S. 622, 657 (1980), we even asserted that the attributes of §1983 could change to keep up with modern developments in the law of torts: "Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. . . . [T]he principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."

The Seventh Amendment's right to jury trial attaches to a statutory cause of action that, although unknown at common law, is analogous to common-law causes that were tried before juries. See, *e.g.*, *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 347–348 (1998). The initial Seventh Amendment question before us, therefore, is whether a tort action seeking money damages was a "suit at common law" for which a jury trial was provided. The answer is obviously yes. Common-law tort actions were brought under the writs of trespass and trespass on the case. See generally S. F. C. Milsom, Historical Foundations of the Common Law 283–313 (2d ed. 1981). Trespass remedied direct, forcible tortious injuries, while the later developed trespass on the case remedied indirect or consequential harms. See, *e.g.*, Dix, Origins of the Action of Trespass on the Case, 46 Yale L. J. 1142, 1163 (1937); Krauss, Tort Law and Private Ordering, 35 St. Louis

U. L. J. 623, 637, and n. 66 (1991). Claims brought pursuant to these writs and seeking money damages were triable to juries at common law. See, *e.g.*, T. Plucknett, A Concise History of the Common Law 125, 348 (4th ed. 1948); J. Baker, An Introduction to English Legal History 59 (2d ed. 1979). It is clear from our cases that a tort action for money damages is entitled to jury trial under the Seventh Amendment. See *Curtis* v. *Loether*, 415 U. S. 189, 195 (1974) (according jury trial because "[a] damages action under [Title VIII of the Civil Rights Act of 1968] sounds basically in tort– the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach"); *Pernell* v. *Southall Realty*, 416 U. S. 363, 370 (1974) ("This Court has long assumed that . . . actions for damages to a person or property . . . are actions at law triable to a jury"); *Ross* v. *Bernhard*, 396 U. S. 531, 533 (1970) ("The Seventh Amendment . . . entitle[s] the parties to a jury trial in actions for damages to a person or property . . . ").

A number of lower courts have held that a §1983 damages action– without reference to what might have been the most analogous common-law remedy for violation of the particular federal right at issue– must be tried to a jury. See, *e.g.*, *Caban-Wheeler* v. *Elsea*, 71 F. 3d 837, 844 (CA11 1996); *Perez-Serrano* v. *DeLeon-Velez*, 868 F. 2d 30, 32–33 (CA1 1989); *Laskaris* v. *Thornburgh*, 733 F. 2d 260, 264 (CA3 1984); *Segarra* v. *McDade*, 706 F. 2d 1301, 1304 (CA4 1983); *Dolence* v. *Flynn*, 628 F. 2d 1280, 1282 (CA10 1980); *Amburgey* v. *Cassady*, 507 F. 2d 728, 730 (CA6 1974); *Brisk* v. *Miami Beach*, 726 F. Supp. 1305, 1311–1312 (SD Fla. 1989); *Ruth Anne M.* v. *Alvin Independent School Dist.*, 532 F. Supp. 460, 475 (SD Tex. 1982); *Mason* v. *Melendez*, 525 F. Supp. 270, 282 (WD Wis. 1981); *Cook* v. *Cox*, 357 F. Supp. 120, 124–125, and n. 4 (ED Va. 1973).

In sum, it seems to me entirely clear that a §1983 cause of action for damages is a tort action for which jury trial would have been provided at common law. The right of jury trial is not eliminated, of course, by virtue of the fact that, under our modern unified system, the equitable relief of an injunction is also sought. See, *e.g.*, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 479 (1962); *Scott* v. *Neely*, 140 U. S. 106, 109–110 (1891). Nor— to revert to the point made in Part I of this discussion— is the tort nature of the cause of action, and its entitlement to jury trial, altered by the fact that another cause of action was available (an inverse condemnation suit) to obtain the same relief. Even if that were an equitable cause of action— or, as JUSTICE SOUTER asserts, a peculiar legal cause of action to which the right to jury trial did not attach— the nature of the §1983 suit would no more be transformed by it than, for example, a common-law fraud action would be deprived of the right to jury trial by the fact that the defendant was a trustee who could, instead, have been sued for an equitable accounting.

III

To say that respondents had the right to a jury trial on their §1983 claim is not to say that they were entitled to have the jury decide every issue. The precise scope of the jury's function is the second Seventh Amendment issue before us here— and there again, as we stated in *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 377 (1996), history is our guide. I agree with the Court's methodology, see *ante*, at 27, 29, which, in the absence of a precise historical analogue, recognizes the historical preference for juries to make primarily factual determinations and for judges to resolve legal questions. See *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935). That fact-law dichotomy is routinely applied by the lower courts in deciding §1983 cases. For instance, in cases alleging

retaliatory discharge of a public employee in violation of the First Amendment, judges determine whether the speech that motivated the termination was constitutionally protected speech, while juries find whether the discharge was caused by that speech. See, *e.g.*, *Horstkoetter* v. *Department of Public Safety*, 159 F. 3d 1265, 1271 (CA10 1998). And in cases asserting municipal liability for harm caused by unconstitutional policies, judges determine whether the alleged policies were unconstitutional, while juries find whether the policies in fact existed and whether they harmed the plaintiff. See, *e.g.*, *Myers* v. *County of Orange*, 157 F. 3d 66, 74–76 (CA2 1998), cert. denied, 525 U. S. ___ (1999).

In the present case, the question of liability for a Takings Clause violation was given to the jury to determine by answering two questions: (1) whether respondents were deprived of "all economically viable use" of their property, and (2) whether petitioner's 1986 rejection of respondents' building plans "substantially advance[d] [a] legitimate public interes[t]." I concur in the Court's assessment that the "economically viable use" issue presents primarily a question of fact appropriate for consideration by a jury. *Ante*, at 29–30. The second question– whether the taking "substantially advance[s] [a] legitimate public interes[t]"[2] – seems to me to break down (insofar as is relevant to the instructions here) into two subquestions: (1) Whether the government's asserted basis for its challenged action represents a legitimate state interest. That was a question of law for the court. (2) Whether that legitimate state interest is substantially furthered by the challenged government action. I agree with the Court that at least in the highly particularized context of the present case, involving

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[2] As the Court explains, petitioner forfeited any objection to this standard, see *ante*, at 12, and I express no view as to its propriety.

the denial of a single application for stated reasons, that was a question of fact for the jury. As the matter was put to the jury in the present case, the first subquestion was properly removed from the jury's cognizance: the court instructed that "'legitimate public interest[s] can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development.'" App. 304. These included the only public interests asserted in the case. The second subquestion, on the other hand, was properly left to the jury: "'[O]ne of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.'" *Ibid.;* see *ante*, at 30.

* * *

I conclude that the Seventh Amendment provides respondents with a right to a jury trial on their §1983 claim, and that the trial court properly submitted the particular issues raised by that §1983 claim to the jury. For these reasons, I concur in the judgment and join all but Part IV–A–2 of JUSTICE KENNEDY's opinion.