SUPREME COURT OF THE UNITED STATES

No. 01–1444

BEN CHAVEZ, PETITIONER *v.* OLIVERIO MARTINEZ

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

[May 27, 2003]

JUSTICE SCALIA, concurring in part in the judgment.

I agree with the Court's rejection of Martinez's Fifth Amendment claim, that is, his claim that Chavez violated his right not to be compelled in any criminal case to be a witness against himself.[1] See *ante*, at 4–5 (plurality opinion); *ante*, at 1–2 (SOUTER, J., concurring in judgment). And without a violation of the right protected by the text of the Self-Incrimination Clause, (what the plurality and JUSTICE SOUTER call the Fifth Amendment's "core"), Martinez's 42 U. S. C. §1983 action is doomed. Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), as the Court today holds, see *ante*, at 10–11 (plurality opinion); *post*, at 1–2 (KENNEDY, J., concurring in part and dissenting in part); nor is it concerned with "extensions" of constitutional provisions designed to safeguard actual constitutional rights, cf. *ante*, at 1–2 (SOUTER, J., concurring in judg-

[1] While occasionally referring to this as a "Fifth Amendment claim," a convention commonly followed, JUSTICE THOMAS and JUSTICE SOUTER acknowledge that technically it is a Fourteenth Amendment claim, since it is only *through* the Fourteenth Amendment that the Fifth is "made applicable to the States," *ante*, at 4 (opinion of THOMAS, J.), citing *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

ment).[2] Rather, a plaintiff seeking redress through §1983 must establish the violation of a federal constitutional or statutory *right*. See *Blessing* v. *Freestone*, 520 U. S. 329, 340 (1997); *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 106 (1989).

My reasons for rejecting Martinez's Fifth Amendment claim are those set forth in JUSTICE THOMAS's opinion. I join Parts I and II of that opinion, including Part II–B, which deals with substantive due process. Consideration and rejection of that constitutional claim is absolutely necessary to support reversal of the Ninth Circuit's judgment. For after discussing (and erroneously deciding) Martinez's Fifth Amendment claim, the Ninth Circuit continued as follows:

> "Likewise, a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial. 'The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is *complete with the coercive behavior itself. . . . The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution*.' *Cooper v. Dupnik*, 963 F. 2d at 1244–45 (emphasis added). Mr. Martinez has thus stated a *prima facie* case that Sergeant Chavez violated his Fifth and Fourteenth Amendment rights to be free from police coercion in pursuit of a confession." 270 F. 3d 852, 857 (2001).

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[2] Still less does §1983 provide a remedy for actions inconsistent with the perceived "purpose" of a constitutional provision. Cf. *Martinez* v. *Oxnard*, 270 F. 3d 852, 857 (CA9 2001) ("[T]he Fifth Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity" (internal quotations marks omitted)).

It seems to me impossible to interpret this passage as anything other than an invocation of the doctrine of "substantive due process," which makes unlawful certain government conduct, regardless of whether the procedural guarantees of the Fifth Amendment (or the guarantees of any of the other provisions of the Bill of Rights) have been violated. See *Washington* v. *Glucksberg*, 521 U. S. 702 (1997). To be sure, the term "substantive due process" is not used in the quoted passage, but the passage's technically false dichotomy between Fifth Amendment and Fourteenth Amendment rights uses "Fourteenth Amendment rights" as a stand-in for *that aspect* of the Fourteenth Amendment which consists of the doctrine of substantive due process. (JUSTICE THOMAS uses similar shorthand in the concluding sentence of his analysis: "[O]ur views on the proper scope of the Fifth Amendment's Self-Incrimination Clause, do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases." *Ante*, at 12.) What other *possible meaning* could the passage possess? Surely the Ninth Circuit was not expending a paragraph to make the utterly useless observation that, in addition to violating the Fifth Amendment (because that is incorporated in the Fourteenth) Chavez violated the Fourteenth Amendment (because that incorporates the Fifth). That *substantive due process* was the point is confirmed by the fact that the sole authority cited to support violation of "the Fourteenth Amendment" is *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1244–245 (1992), a Ninth Circuit case that explicitly recognized a substantive-due-process right to be free from coercive police questioning. See *id.*, at 1244–1250.

Since the Ninth Circuit's Fourteenth Amendment hold-

ing rested upon substantive due process, we are without authority to disturb that court's judgment solely because of our disagreement with its Fifth Amendment (Self-Incrimination Clause) analysis; the substantive-due-process holding provides an independent ground supporting the decision that Chavez was not entitled to qualified immunity. While JUSTICE SOUTER declines to address that independent ground—even though the parties extensively briefed the issue, Brief for Petitioner 21–36; Brief for Respondent 29–40; Reply Brief for Petitioner 8–12; Brief for United States as *Amicus Curiae* 17–23, and even though JUSTICE STEVENS discusses it in dissent, *post*, at 4–6 (opinion concurring in part and dissenting in part)—I believe that addressing it, and resolving it against respondent, is essential to the Court's disposition, which reverses the Ninth Circuit's judgment in its entirety.

I therefore see no basis for a remand to determine "[w]hether Martinez may pursue a claim of liability for a substantive due process violation." *Ante*, at 4 (majority opinion). That question has already been decided by the Ninth Circuit, and we today reverse its decision. My disagreement with the Court, however, is of little consequence, because Martinez will not be able to prevail on remand by raising anew his substantive-due-process claim. Not only is the claim meritless, as JUSTICE THOMAS demonstrates, *ante*, at 12–15, but Martinez already had his chance to press a substantive-due-process theory in the Court of Appeals and chose not to, even though Ninth Circuit precedent clearly established substantive due process (including—contrary to the Government's assertion at oral argument, see Tr. of Oral Arg. 26—a "shocks the conscience" criterion) as an available theory of liability under the Fourteenth Amendment. See *Cooper*, *supra*, at 1248. ("There is a second Fourteenth Amendment substantive due process yardstick available to Cooper as a theory of §1983 liability. The test is whether the Task

Force's conduct 'shocks the conscience'"). Nowhere did respondent's appellate brief mention the words "substantive due process"; the only rights it asserted were the right against self-incrimination and the right to warnings under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Appellees' Responding Brief in No. 00–56520 (CA9), pp. 28–32, 36–43. If, as JUSTICE SOUTER apparently believes, the opinion below did not address respondent's "substantive due process" claim, that claim has been forfeited.