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# THE STATES AND THE SUPREME COURT\*

*A.E. Dick Howard\*\**

Anyone who thinks that debate over the values of federalism—the place of state and local interests in the affairs of the American nation—is largely a concern of academicians need only look at recent opinions of the United States Supreme Court. In April 1980, the Court ruled that municipalities being sued under 42 U.S.C. § 1983 (a civil rights statute dating back to 1871) may not plead as a defense that the governmental official who was involved in the alleged wrong had acted in “good faith” (a defense which the official, if sued personally, could assert).<sup>1</sup> Four justices dissented, complaining, among other things, that “ruinous judgments under the statute [section 1983] could imperil local governments.”<sup>2</sup>

The Court made even more news when it held in June 1980 that plaintiffs could use section 1983 to seek redress of claims based on federal statutes generally—in that case, the state of Maine had denied a family welfare benefits to which they were entitled under the federal Social Security Act.<sup>3</sup> Three dissenting justices argued unsuccessfully that section 1983’s reference to federal “laws” was in fact “a shorthand reference to equal rights legislation enacted by Congress.”<sup>4</sup> They saw the Court’s ruling as “a major new intrusion into state sovereignty under our federal system.”<sup>5</sup> The decision’s implications for state and local budgets were made the more significant by the Court’s additional holding that under a 1976 federal statute a plaintiff who prevails in a section 1983 action is entitled to recover his attorney’s fees.<sup>6</sup>

The Supreme Court’s section 1983 decisions furnish an apt vehicle for

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1. *Owen v. City of Independence*, 445 U.S. 622 (1980).

2. 445 U.S. at 670 (Powell, J., dissenting).

3. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

4. *Id.* at 33 (Powell, J., dissenting).

5. *Id.*

6. The Civil Rights Attorney’s Fees Awards Act of 1976 amended 42 U.S.C. § 1988 by providing that in any action to enforce, inter alia, § 1983, the trial court, in its discretion,

considering resolution of a central issue: what balance to strike between the impetus for federal enforcement in a federal forum of civil and other individual rights, and the enduring concern in the American polity for preserving local control of local affairs.<sup>7</sup> The Honorable Henry J. Friendly, Senior Judge of the United States Court of Appeals for the Second Circuit, admits to an ambivalence on this issue:

In approaching the subject of private litigation under the general civil rights statute, I must own a Faustian conflict. It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states. Yet we also have state courts, whose judges, like those of the federal courts, must take an oath to support the Constitution and were intended to play an important role in carrying it out.<sup>8</sup>

In an age in which government at every level has taken on an ever-increasing range of function, how this issue is resolved becomes ever more important.

Section 1983 grew out of the period of the Civil War and Reconstruction, during which antebellum assumptions about the nature of federal system were superseded by a greater emphasis on national power. In addition to launching the thirteenth, fourteenth, and fifteenth amendments to the Constitution, Congress enacted a series of civil rights acts. These were aimed at overturning the Black Codes (enacted in southern states to curtail the freedom of the former slaves), protecting voting rights, suppressing the Ku Klux Klan, and securing equal treatment in public accommodations.<sup>9</sup>

One of the statutes, section 1 of the Civil Rights Act of 1871 (the Ku Klux Klan Act), is codified today at 42 U.S.C. § 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 any other person within the jurisdiction thereof to the deprivation of

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"may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976).

7. See generally *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

8. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 90 (1973) (footnotes omitted).

9. Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866) (outlawing Southern Black Codes); Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870) (protecting voting rights); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871) (protecting voting rights); Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871) (suppressing the Ku Klux Klan); Act of March 1, 1875, ch. 114, 18 Stat. 335 (1875) (prohibiting racial discrimination in public accommodations).

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 proceedings for redress.

The statute was enacted to respond to lawlessness in many of the southern states. Conditions were vividly described in Congress' debate on the measure: "While murder is stalking abroad in disguise, while whippings and lynchings and banishments have been visited on unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."<sup>10</sup> President Grant, in his message urging adoption of the bill, stressed the need for federal power to supersede local authority: "That the power to correct these evils is beyond the control of state authorities I do not doubt."<sup>11</sup>

If one did not know something of the historical conditions that spurred Congress' action, or something of the act's legislative history, the generality of section 1983's language would give little enlightenment as to what uses might be made of the statute. Justice Frankfurter once described the statute as having been "loosely and blindly drafted."<sup>12</sup> Obviously, judicial interpretation would be required to tell just how far the act might go in enlarging federal power and displacing that of the states and localities.

The post-Civil War Supreme Court was not willing to read national power under the fourteenth amendment broadly. The Court's concern for the states was evident as early as 1869, in its statement: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."<sup>13</sup> In the *Slaughter-House Cases* (1873), the Court gave a narrow reading to the fourteenth amendment's privileges and immunities clause, and in the *Civil Rights Cases* (1883), the Court underscored the requirement of state action as a prerequisite for invoking the amendment's protection.<sup>14</sup> In such a climate, little use was made of the Civil Rights Act of 1871. Indeed, between 1871 and 1920, only twenty-one cases were

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10. CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Mr. Lowe of Kansas).

11. Message of Mar. 23, 1871, CONG. GLOBE, 42d Cong., 1st Sess. 299 (1871).

12. *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951). In *United States v. Williams*, 341 U.S. 70, 74 (1951), Justice Frankfurter observed, "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feelings caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues."

13. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

14. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (rejecting 14th amendment attack on Louisiana's state-created monopoly in slaughtering); *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875 because it sought to reach private discrimination). See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

brought under section 1983.<sup>15</sup>

For decades it appeared that section 1983 might be confined largely to cases of racial discrimination, reflecting the historical concerns surrounding its origin.<sup>16</sup> The seed of more ambitious uses for section 1983 was planted in 1939, in *Hague v. Congress of Industrial Organizations*,<sup>17</sup> in which the Court affirmed an injunction against city officials who, acting under a local ordinance, had been interfering with the organizing efforts of labor unions.

The modern milestone in section 1983's development is the Court's 1961 decision in *Monroe v. Pape*.<sup>18</sup> A Chicago family sued thirteen Chicago policemen and the city of Chicago, complaining that their constitutional right against unreasonable searches had been violated by the warrantless ransacking of their home and by Monroe's having been held incommunicado at the police station until he was released without being charged. Justice Douglas, writing for the Court, gave an expansive reading to section 1983. For an officer to be acting "under color of" state law, it is enough that the wrongdoer is clothed with state power; it does not matter that he may be acting beyond his instructions. Moreover, Justice Douglas gave section 1983 one of its most important glosses: that even though there might exist a state remedy to which an injured party could look for relief, the federal remedy "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."<sup>19</sup> Douglas did, however, place one important limitation on section 1983, concluding that a municipality could not be sued under the statute.<sup>20</sup> This ruling immunized from suit the defendant which most plaintiffs would naturally see as having "deeper pockets" than individual defendants such as policemen.

In 1960, only about 300 federal suits were filed under all the civil rights acts.<sup>21</sup> In the fewer than twenty years since *Monroe v. Pape*, section 1983 has become a staple of litigation in the federal courts. In 1973, the authors of a leading casebook on federal courts observed that *Monroe v. Pape* had

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15. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

16. See Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 282-84 (1965).

17. 307 U.S. 496 (1939).

18. 365 U.S. 167 (1961). See also *United States v. Classic*, 313 U.S. 299 (1941), and *Screws v. United States*, 325 U.S. 91 (1945), interpreting "under color of" state law for the purposes of § 1983's criminal counterparts, 18 U.S.C. §§ 241, 242 (1976).

19. 365 U.S. at 183, 184-85.

20. *Id.* at 187-92.

21. Administrative Office of the United States Courts, 1960 ANN. REP. OF THE DIRECTOR 323 (Washington, D.C., 1961) (Table C2).

led to "an impressive flood of litigation against state officers in the federal courts."<sup>22</sup> Four years later, the same authors found that flood to have reached "epic proportions."<sup>23</sup> In 1976, out of a total of 56,822 "private" (i.e., not by or against the United States or its officials) federal question cases filed in the district courts, 17,543—almost one out of every three—were civil rights suits claiming constitutional protection against state and local officials.<sup>24</sup>

Creative litigants and their lawyers have turned virtually any grievance into a constitutional claim. Some of the complaints border on the trivial; every one of the federal courts of appeals has had to worry with the question of whether school dress codes requiring high school students to cut their hair infringed a constitutional right.<sup>25</sup> Much of the section 1983 litigation, however, reaches far more substantial issues, such as racial discrimination and legislative reapportionment. Section 1983 also has been the vehicle for inquiring into areas previously largely untouched by the courts, such as conditions in mental hospitals.<sup>26</sup>

Especially burdensome for the courts has been the flood of section 1983 petitions from state prisoners—troublesome because of their sheer volume, the difficulty (given often incomprehensible drafting) of sifting meritorious cases from the unworthy ones, and sensitivity about state interests in prison security and administration.<sup>27</sup> The increase in civil rights petitions filed by state prisoners in federal courts has been remarkable—from 218 petitions in 1966, to 2,030 in 1970, to 12,397 in 1980.<sup>28</sup>

As section 1983 has increasingly become a tool of judicial activism, fears have been stirred and criticisms voiced. Some observers worry about the burden on the federal courts.<sup>29</sup> Others are concerned about the risks to which state officials are exposed. Former California Attorney General

22. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WESCHLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 950 (2d ed. 1973).

23. *Id.* at 149 (2d ed. Supp. 1977).

24. *Id.*

25. See, e.g., *Zeller v. Donegal School Dist.*, 517 F.2d 600 (3d Cir. 1975). See also Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 927-29 (1976).

26. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

27. For Supreme Court decisions on prisoners' rights, see, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979); *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1 (1979); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Wolf v. McDonnell*, 418 U.S. 539 (1974).

28. Administrative Office of the United States Courts, 1971 ANN. REP. OF THE DIRECTOR 135 (Washington, D.C., 1972); 1980 ANN. REP. OF THE DIRECTOR 62 (Washington, D.C., 1980).

29. See Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK U.L. REV. 567, 570 (1971).

Evelle J. Younger told of one state prison official who recently retired with \$200 million of section 1983 damage actions pending against him.<sup>30</sup>

Section 1983's impact on federalism is another concern. Dissenting in *Monroe v. Pape*, Justice Frankfurter argued that proper respect for "our federalism" should deter the Court from extending section 1983

beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country.<sup>31</sup>

During the era of the Warren Court, federalism often was a neglected value. Using such vehicles as the equal protection clause of the fourteenth amendment, the justices in the 1960's plunged headlong into solving social problems on many fronts—school desegregation,<sup>32</sup> legislative reapportionment,<sup>33</sup> and criminal justice,<sup>34</sup> among others. The Warren Court's jurisprudence tended heavily to enhance national power whether of the federal courts or of the other branches of the central government.

With the advent of the Burger Court, federalism seemed once again to be in fashion. Ironically, it was a veteran of the Warren bench who sounded the clearest federalistic motif as the seventies got under way. In his last year on the Court, Justice Black called for his brethren to act on the premise that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways,"<sup>35</sup> a principle which, echoing his old arch-rival Justice Frankfurter, Justice Black called "Our Federalism."<sup>36</sup> And sure enough, in the opinions of the Nixon appointees—especially Chief Justice Burger and Justices Powell and Rehnquist—one is likely to hear more said about the virtues of federalism and local control of local institutions than came from

30. *Hearings on S. 35 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 128 (1978) [hereinafter cited as *Hearings on S. 35*].

31. 365 U.S. at 242 (Frankfurter, J., dissenting).

32. *See, e.g.*, *Green v. County School Bd.*, 391 U.S. 430 (1968); *Gibbins v. County School Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

33. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynold v. Sims*, 377 U.S. 533 (1964); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

34. *See, e.g.*, *Oyler v. Boles*, 368 U.S. 448 (1962); *Smith v. Bennett*, 365 U.S. 708 (1961); *Griffin v. Illinois*, 351 U.S. 12 (1956).

35. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

36. *Id.*

the pens of those who made up the majority of the Warren Court.<sup>37</sup>

Many of the Burger Court's decisions applying section 1983 reflect this heightened sensitivity to local and state interests. The Court has found several ways to curb or at least moderate the reach of section 1983. One limitation was bequeathed to the Burger bench by the Warren Court in *Monroe v. Pape*—defining “person” in section 1983 so as to exclude states and municipalities. A second limitation inheres in notions of comity between federal and state courts—the principle that federal courts ought sometimes to defer to state tribunals before accepting jurisdiction of a dispute. This deference takes two forms: abstention by a federal court so that a state court may resolve an unclear state law (perhaps making decision on a federal question unnecessary) and refusal to permit a federal court to intervene in certain state proceedings, especially criminal trials.

A third way to curtail section 1983 is by conferring an immunity upon a public official whose conduct is the object of complaint. Some immunities are absolute, as in the case of judges or legislators. Such an immunity may not be defeated by alleging that the officer acted out of malice or other improper motive. Other immunities are qualified; they might be better thought of as defenses. The best example is a defense of good faith—the defense, for instance, that a police officer might offer in arguing that he used reasonable judgment at the time of an arrest and, the state of the relevant constitutional principles being unresolved at the time of the arrest, he should not be held accountable for failing to predict the future course of higher court rulings on the meaning of the fourth amendment.

Yet another way to limit section 1983 is in defining the underlying substantive federal right, constitutional or statutory. As section 1983 is not itself the source of substantive rights but instead provides a remedy for the enforcement of those rights, if the right claimed by a section 1983 plaintiff does not exist, then there is nothing for section 1983 to enforce.

The Supreme Court has used all these avenues—the definition of a “person,” abstention (especially as to noninterference in state proceedings), immunities, and definition of the substantive right claimed—to limit section 1983. All of these devices will be discussed below.

Civil libertarians were quick to take alarm at Burger Court decisions restricting access to federal courts. In 1976, top officers of the American Civil Liberties Union, the Consumers Union, and seven other public interest groups accused the Court of having “embarked on a dangerous and

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37. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 851-52 (1976) (Rehnquist, J.); *Stone v. Powell*, 428 U.S. 465, 493-94 (1976) (Powell, J.); *Milliken v. Bradley*, 418 U.S. 717, 741-45 (1974) (Burger, C.J.).



destructive journey designed to dilute the power of the federal judiciary to serve as the guardian of federal constitutional rights."<sup>38</sup> A few months later, the Society of American Law Teachers charged the Court with "forging a set of restrictive doctrines which will substantially reduce the availability of the federal courts for public interest litigation."<sup>39</sup>

Those who were disappointed with the Court's decisions turned to another forum—Congress. When the Court interprets the Constitution, such decisions are, of course, not subject to legislative repeal. Section 1983, however, is a statute. As such, it can be amended by Congress. In January 1977, senatorial critics of the Burger Court's section 1983 decisions introduced the Civil Rights Improvements Act of 1977.<sup>40</sup> An omnibus measure, the bill was explicitly meant to overturn judicial decisions which, in the words of one of the bill's sponsors, had "drastically altered" the scope of section 1983 and, in so doing, had "hurt those most in need of judicial relief."<sup>41</sup> Introduced as S. 35, the bill proposed, among other things, to: (1) make states, municipalities, and other governmental units and agencies liable to section 1983 suits, (2) narrow the immunity available to prosecutors, (3) make the doctrines of abstention and exhaustion of state remedies inapplicable to section 1983 suits, (4) guard against the Court's making it harder for federal courts to intervene in pending state criminal proceedings (and prevent the extension of the noninterference doctrine to state civil proceedings), (5) limit the circumstances under which the doctrine of res judicata could be used to prevent the relitigation of questions in federal courts, and (6) provide that the right to enjoy one's reputation is protected by the due process clause of the fourteenth amendment.<sup>42</sup>

Even when one recalls congressional efforts to ban court-ordered busing, to permit prayer in public schools, or to curb access to abortions, it is not likely that there has been a congressional bill which has sought to overturn so many different Supreme Court decisions in one fell swoop as S. 35. Legislative hearings in February and May 1978 attracted a parade of witnesses for and against S. 35.<sup>43</sup> The bill was introduced again in 1979 as

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38. Letter from Aryeh Neir to participants in "Pound Revisited" Conference (April 7, 1976). The letter was occasioned by the convening in St. Paul, Minnesota, of the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association.

39. Society of American Law Teachers, Statement of the Board of Governors 31 (Oct. 10, 1976). The Society describes itself as having 500 members at about 25 law schools.

40. S. 35, 95th Cong., 1st Sess., 123 CONG. REC. 554-59 (1977).

41. *Id.* at 554 (1977) (remarks of Sen. Mathias).

42. *Id.* at 557-58.

43. See generally *Hearings on S. 35, supra* note 30.

(would you believe) S. 1983. It was somewhat altered from its 1977 version; the provisions regarding the right to enjoy one's reputation and the alteration of prosecutorial immunity were dropped.<sup>44</sup> As of this writing, the bill is still pending. It is now styled the Civil Rights Improvement Act of 1981 and is numbered S. 990.<sup>45</sup>

We hear a good deal of behaviorist nonsense about the Supreme Court's reading the election returns, following public opinion, or reacting to the morning newspaper. Such notions caricature the judicial process. Nevertheless, whatever the cause, the Court does show shifts in direction. The Burger Court is no exception. The late seventies resulted in a pattern of opinions not readily predictable in the early years of the Burger era.<sup>46</sup> In section 1983 cases specifically there seem to be new initiatives. Where in the early seventies the Court had seemed bent on restricting section 1983, in the past two years the Court has manifestly enlarged opportunities for plaintiffs to recover in section 1983 actions. This article began by pointing to two such decisions, *Owen* and *Thiboutot*. An earlier breakthrough came in 1978 when, in *Monell v. New York City Department of Social Services*,<sup>47</sup> the Court overturned the holding in *Monroe v. Pape* that a municipality could not be sued under section 1983.

After *Owen* and *Thiboutot*, a more conservative group of critics of the Court's decisions introduced bills in Congress. Early in 1981, Senator Orrin Hatch introduced two bills—S. 584 and S. 585—to overturn those two decisions. S. 584, aimed at *Thiboutot*, would amend section 1983 by striking "and laws" and inserting instead "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States."<sup>48</sup> S. 585, aimed at *Owen*, would amend section 1983 by giving political subdivisions the defense that the locality had acted "in good faith with a reasonable belief"<sup>49</sup> that the actions complained of did not violate federal rights protected by the statute.

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44. For the text of S. 1983 as introduced, see 125 CONG. REC. S15994-95 (daily ed. Nov. 6, 1979).

45. For the text of S. 990 as introduced, see 127 CONG. REC. S3870 (daily ed. April 10, 1981).

46. See Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 LAW & CONTEMP. PROBS. 7 (Summer 1980).

47. 436 U.S. 658 (1978).

48. For the text of S. 584 as introduced, see 127 CONG. REC. S1628 (daily ed. Feb. 26, 1981).

49. For the text of S. 585 as introduced, see 127 CONG. REC. S1628 (daily ed. Feb. 26, 1981). S. 584 and S. 585, as well as S. 990, were the subject of hearings in May and July 1981. See *Municipal Liability under 42 U.S.C. § 1983, Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)* [hereinafter cited as *Municipal Liability Hearings*].

The Supreme Court's decisions interpreting section 1983 may be technical, but they are not academic. Civil rights groups, public interest lawyers, and ordinary citizens look to section 1983 as an important avenue for redress of federal rights denied. State and local officials, whether they make policy (as on school boards) or have day-to-day contact with citizens (as do policemen on the beat), may find their very fortunes affected by section 1983. Legislators and executives, especially budget officers, know that suits brought under section 1983 can have wrenching effects on public policy and finance. Whether they wish it well or ill, many people have reason to follow the evolution of section 1983.

Following the Court's section 1983 decisions reminds one of watching old-fashioned tableaux: each time the curtain rises, the scene has changed. As many section 1983 decisions as there are already in the reports of the Supreme Court, one may be sure that there are more evolutions to come. In the next several sections of this article, I attempt to identify important areas of interpretation:

1. Who can be sued (specifically, the liability of states and municipalities);
2. In what forum may they be sued (federal and state courts);
3. To what immunities or defenses are they subject;
4. What federal rights may be vindicated; and
5. What relief may be granted (damages having been discussed above under number 1).

#### I. STATES AND MUNICIPALITIES AS DEFENDANTS

*Municipalities.* Even as the Supreme Court, in *Monroe v. Pape*, breathed new life into section 1983, the justices put the "deepest pockets" beyond plaintiffs' reach. The Court ruled that in enacting the Civil Rights Act of 1871, Congress did not intend to bring municipalities within the statute's reach.<sup>50</sup> Thereafter, section 1983 plaintiffs sought ways of sidestepping *Monroe's* roadblock. The avenues they explored included arguing that where a municipality's immunity had been waived for purposes of state law it should be deemed waived for a section 1983 action as well, distinguishing between damages (the *Monroe* situation) and restitution, and seeking to imply a cause of action directly from the fourteenth amendment itself.<sup>51</sup> But *Monroe* continued to be a headache for civil rights plaintiffs.

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50. *Monroe*, 365 U.S. at 187-92.

51. See Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMPLE L.Q. 409, 414 (1978); LeGette, 42 U.S.C. § 1983 Claims against States for Damages, 7 FLA. ST. U.L. REV. 525, 526 (1979).

Indeed, in 1973, the Court made it clear that the conclusion that section 1983 was not meant to permit suits against municipalities applied to suits against counties as well.<sup>52</sup> In another 1973 decision, the Court held that the nature of the relief sought made no difference; section 1983 no more permitted equitable relief against a municipality than it permitted damages.<sup>53</sup>

A key provision of the Civil Rights Improvements Act of 1977 proposed to make states and cities liable to suits under section 1983 by defining "person" to include "any individual, State, municipality, or any agency or unit of government of such State or municipality."<sup>54</sup> At the hearings on S. 35, it was unmistakably the consensus of the civil rights bar that, as one witness put it, making governmental entities liable in section 1983 cases was "the single most important aspect" of the bill.<sup>55</sup> Another witness, speaking for the United States Commission on Civil Rights, did not mince words about why he wanted local governments exposed to damage suits under section 1983: "A municipality will generally have sufficient funds to pay judgments, as opposed to individual officials. A municipality, as a defendant with financial means, would probably not have the same jury sympathy as an individual defendant."<sup>56</sup> The same witness also thought that extending liability to municipalities would be a more effective deterrent to constitutional violations. Damage suits against officials, he said, "have been largely ineffective in stopping officials from violating constitutional rights."<sup>57</sup>

Opponents of making municipalities liable under section 1983 predicted financial disaster were S. 35 to become law. An Ohio prosecutor, the president-elect of the National District Attorneys Association, foresaw bankruptcy for small localities:

Even now, it is practically impossible for local governments to obtain insurance to protect themselves against such eventualities. If S. 35 were passed, it would be impossible to purchase insurance at premiums that even large jurisdictions could afford. In my own situation, the last time we tried to get malpractice insurance for me and my staff, we did not receive any bids from insurance companies. We could not even buy it, and we do not have it

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52. *Moor v. County of Alameda*, 411 U.S. 693 (1973).

53. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

54. S. 35, 95th Cong., 1st Sess. § 2(b)(2) (1977).

55. *Hearings on S. 35, supra* note 30, at 368 (testimony of Burt Neuborne, School of Law, New York University).

56. *Id.* at 134 (testimony of Louis Nunez, Acting Staff Director, U.S. Comm'n on Civil Rights).

57. *Id.* at 134. See Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 *YALE L.J.* 447 (1978).

now.<sup>58</sup>

Almost half of Ohio's counties have fewer than 40,000 people. In such counties, he said, "relatively small judgments could mean financial disaster for these governments."<sup>59</sup>

S. 35 (now S. 990) remains pending, but the Supreme Court has now provided the advocates of municipal liability what they have long sought. In *Monell v. Department of Social Services*,<sup>60</sup> the Court undertook a "fresh analysis" of the congressional debates on the Civil Rights Act of 1871 and concluded that "Congress *did* intend municipalities and other local government units to be included among those persons to whom section 1983 applies."<sup>61</sup> To the extent that *Monroe v. Pape* made municipalities *wholly* immune to section 1983 suits, that case is overruled by *Monell*. *Monell* reaffirmed *Monroe*, however, insofar as *Monroe* held that the doctrine of respondeat superior is *not* a basis for holding municipalities liable under section 1983 for the constitutional torts of their employees.<sup>62</sup> As a result of *Monell*, local governments can be sued directly under section 1983 for damages, for declaratory judgments, or for injunctive relief. The local government's action that is being challenged may take the form of an ordinance, regulation, policy statement, or any decision officially adopted and promulgated by the governing body's officers. Indeed, a section 1983 action may be brought to challenge a governmental "custom" even though that practice may not have received formal approval through the governing body's official decision-making channels. It is enough that there be found to exist some kind of de facto "policy."<sup>63</sup>

*States.* Efforts to expose states, as opposed to local governments, to suit raise more complicated problems. It was the states that came together at Philadelphia to draft the Constitution, and state by state they ratified it. Unlike localities, states enjoy explicit constitutional protection, among them the tenth amendment's reservation of certain powers to the states and the eleventh amendment's restriction on extending the "Judicial power of

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58. *Hearings on S. 35, supra* note 30, at 348 (testimony of Lee C. Falke, President-elect, National District Attorneys Association).

59. *Id.*

60. 436 U.S. 658 (1978).

61. *Id.* at 665, 690.

62. *Id.* at 691-95. S. 35, in making states and municipalities "persons" under § 1983, also would not have adopted a respondeat superior theory. S. 35 spelled out in some detail the circumstances under which governmental units would be liable for the acts of their agents. See S. 35 § 2(c)(1). See also Comment, *Section 1983 and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979).

63. *Monell*, 436 U.S. at 690-91. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970). See also Note, *Municipal Liability under Section 1983: The Meaning of "Policy or Custom"*, 79 COLUM. L. REV. 304 (1979).

the United States" to certain suits against the states.<sup>64</sup> Events of two centuries—Civil War, Reconstruction, the enactment of the fourteenth amendment, the creation of a national economy, and the massive rise of the federal government's powers—have, of course, wrought enormous changes in both theory and practice in federal-state relations. Yet, justices as unlike as Douglas and Rehnquist have reminded us that federalism remains a force to be reckoned with.<sup>65</sup> The delicacy of assessing the impact of federal legislation on the interests and functions of the states has special significance when the Supreme Court is called upon to respond to efforts to make the states defendants in private civil rights suits.

The eleventh amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." Although the amendment says nothing explicitly about suits against a state by its own citizens, the Supreme Court has construed the amendment, in light of its history, to bar such suits as well.<sup>66</sup>

The full force of the eleventh amendment has been muted by the Supreme Court's decision in *Ex parte Young*.<sup>67</sup> There, the Court ruled that a state official acting unconstitutionally is in effect stripped of his official character and can be enjoined, the eleventh amendment notwithstanding. The result of the *Young* fiction is a paradox: an unconstitutional act by a state official is state action for the purposes of the fourteenth amendment (the official may even be acting against state policy or violating state law), but an injunction against him is not an injunction against the state for the purposes of the eleventh amendment.<sup>68</sup> As a state can only act through flesh-and-blood individuals, *Young* effectively permits equitable relief such as that which might be sought in a section 1983 action.

What bar does the eleventh amendment interpose if a plaintiff seeks damages rather than an injunction or other equitable relief? The plaintiff

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64. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The eleventh amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

65. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Rehnquist, J., opinion of the Court); *United States v. Oregon*, 366 U.S. 643, 649 (1961) (Douglas, J., dissenting).

66. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

67. 209 U.S. 123 (1908).

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

may, of course, seek damages against an individual officer without concern for the eleventh amendment. But if he seeks a monetary judgment which will be satisfied out of the state treasury, an eleventh amendment issue arises.

Here, it is important to distinguish what Congress *has the power to do* from what it *has done*—or to be more precise—from how the Court goes about deciding how far Congress, in legislating, intends to go. The key to Congress' power is section 5 of the fourteenth amendment, which grants Congress authority to enforce "by appropriate legislation" the substantive guarantees of the amendment. Whatever may be Congress' power to override the states' eleventh amendment immunity by exercising an Article I power (such as the power to regulate commerce), it is now clearly established that the eleventh amendment gives way to legislation based on the power given Congress under section 5. As a result, Congress may provide for private suits against states or state officials which in other contexts might be of doubtful constitutionality. By this reasoning, the Court has upheld the power of federal courts to award money damages to individuals found to have been subjected to employment discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>69</sup> More recently, in upholding awards of attorneys' fees (to be paid from state funds) under the Civil Rights Attorney's Fees Awards Act of 1976, the Court said that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment."<sup>70</sup>

In *Edelman v. Jordan*,<sup>71</sup> however, the Court refused to allow section 1983 to be the basis for a retroactive monetary award against a state. Recipients of benefits under a welfare program, jointly administered by the federal government and the state of Illinois (Aid to the Aged, Blind, and Disabled), were successful in alleging that state officials had denied benefits the claimants were entitled to under federal regulations. The Supreme Court held that, in a suit based on section 1983, a federal court must limit itself to prospective injunctive relief "and may not include a retroactive award which requires the payment of funds from the state treasury . . . ."<sup>72</sup>

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69. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

70. *Hutto v. Finney*, 437 U.S. 678, 693 (1978).

71. 415 U.S. 651 (1974).

72. *Id.* at 677. The plaintiffs had also invoked the equal protection clause of the fourteenth amendment. Because the Court found the constitutional claim not to be "wholly insubstantial," it held that the district court was correct in exercising pendent jurisdiction over the statutory claim. This aspect of *Edelman* furnishes a good example of how a plaintiff, through artful pleading, could get a statutory question before a federal court where

Five years later, in *Quern v. Jordan*,<sup>73</sup> a sequel to *Edelman*, the Court had before it the district court's requirement that state officials send a notice to welfare applicants (*Edelman* having been a class action) explaining state administrative procedures by which they could ask the state to determine whether they might be eligible for past benefits. The Court held that the lower court's order constituted prospective relief of a kind permissible under *Edelman*.<sup>74</sup> Justice Brennan, who concurred in the result, took the occasion to argue that the Court's intervening decision in *Monell* (holding municipalities to be "persons" for purposes of section 1983) had undercut *Edelman*. Brennan submitted that both the language of section 1983 and its legislative history compelled the conclusion that Congress intended states to be reached under the statute.<sup>75</sup> The majority of the justices, however, disagreed with Brennan. Finding his evidence for any congressional intent to bring the states within section 1983 "slender," the Court reaffirmed *Edelman*.<sup>76</sup> States continue not to be "persons" for the purposes of section 1983.

As the question of state liability to private suits under federal statutes turns ultimately on Congress' intention, the question should be asked: what evidence of that intention will the Court require? Must Congress make clear in the language of the statute its intention to subject states to suit, or may that intention be inferred from the statute's legislative history? On this, the Court's decisions are unclear. In a 1964 decision,<sup>77</sup> the Court held that the Federal Employers' Liability Act applied to the state of Alabama's operation of a railroad, even though the act mentioned neither the states nor the eleventh amendment. Yet, in a 1973 case,<sup>78</sup> the Court rebuffed the claim by employees of state mental hospitals that the Fair Labor Standards Act entitled them to recover overtime pay. The statutory language ("any employer") was broad enough to include states, but the Court based its ruling on the lack of "clear language that the constitutional immunity was swept away."<sup>79</sup>

In *Hutto v. Finney*,<sup>80</sup> the majority resorted to legislative history in con-

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jurisdiction might not otherwise have lain before the Court's ruling in *Maine v. Thiboutot*, 448 U.S. 1 (1980). See *supra* notes 3 and 5 and accompanying text.

73. 440 U.S. 332 (1979).

74. *Id.*

75. *Id.* at 349-66 (Brennan, J., concurring).

76. *Id.* at 338-45.

77. *Pardon v. Terminal Ry.*, 377 U.S. 184 (1964).

78. *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973).

79. *Id.* at 285.

80. 437 U.S. 678 (1978).



cluding that Congress intended that awards under the Civil Rights Attorney's Fees Awards Act of 1976 be assessable against states.<sup>81</sup> Dissenting, Justice Powell thought that "we undermine the values of federalism served by the Eleventh Amendment by inferring from congressional silence an intent to 'place new or even enormous fiscal burdens on the States.'"<sup>82</sup> Powell thought the better rule was to require "statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation."<sup>83</sup> Nevertheless, the majority concluded that Congress could cause court costs (here, attorneys fees) to be awarded against the states "without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity."<sup>84</sup>

The reach of the *Hutto* principle remained unclear. In a footnote in *Hutto*, the Court implied that it would be more likely to infer congressional intent to abrogate the state's eleventh amendment immunity where Congress was acting under section 5 of the fourteenth amendment than where the statute was based on an Article I power (such as the commerce clause).<sup>85</sup> In *Quern v. Jordan*,<sup>86</sup> Justice Rehnquist sought to confine *Hutto* by noting that *Hutto* was concerned only with expenses incurred in litigation seeking prospective relief rather than with liability for conduct occurring before the litigation took place. Moreover, Rehnquist also read *Hutto* as saying that the Court might well require "a formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity"<sup>87</sup> if a statute imposed "enormous fiscal burdens on the States."<sup>88</sup> But Justice Rehnquist did not feel obliged to reach the question of whether express language would be required because neither the language of section 1983 nor its legislative history disclosed an intention to overturn the states' eleventh amendment immunity.<sup>89</sup>

Unless the Court changes its mind, or Congress acts, a state as such cannot be reached by section 1983. It seems unlikely that the Court will alter course. Aware of its 1978 decision in *Monell* stripping immunity from mu-

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81. *Id.* at 694.

82. *Id.* at 705 (Powell, J., concurring in part and dissenting in part).

83. *Id.* at 705.

84. *Id.* at 696.

85. *Id.* at 698 n.31.

86. 440 U.S. 332 (1979).

87. *Id.* at 698.

88. *Hutto*, 437 U.S. at 697 n.27.

89. *Quern*, 440 U.S. at 334 n.16. Likewise, Justice Brennan, concurring in the judgment, did not have to resolve the question of how explicit Congress must be, for he found that *both* the language of § 1983 and its legislative history supported his conclusion that Congress intended § 1983 to reach the states. *See id.* at 365 (Brennan, J., concurring in the judgment).

municipalities sued under section 1983, the following year the Court voted seven to two in *Quern* to reaffirm the *Edelman* holding that Congress did not intend to reach the states by way of section 1983. Justice Brennan, concurring in the result, complained that the parties in *Quern* neither briefed nor argued the question of whether a state is a "person" for purposes of section 1983.<sup>90</sup> The majority opinion's adherence to *Edelman* is too deliberate for one to suppose that they may decide, after all, to reconsider their position.

Nor is it likely that Congress will act. Although the Civil Rights Improvements Act of 1981 (S. 990) is pending in Congress, it seems fair to say that the Court's *Monell* decision, bringing municipalities within the ambit of section 1983, has removed much of the impetus for passage of this bill. Moreover, even where relief is sought at the state, rather than the local level, the scope of relief that can be had through injunctive remedies (thereby avoiding the eleventh amendment problem) has grown steadily in recent years. Especially is this true where relief of a systematic kind (as in school desegregation cases) is sought.<sup>91</sup>

## II. THE APPROPRIATE FORUM: FEDERAL COURTS V. STATE COURTS

Article III of the Constitution, which provides for the Supreme Court and authorizes Congress to create lower federal courts, extends the "judicial Power" of the United States to a wide range of subjects, among them "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ."<sup>92</sup> The judiciary article is, however, not self-executing, and when the first Congress passed the Judiciary Act of 1789,<sup>93</sup> the statute made almost no use whatever of the grant of judicial power over cases arising under the constitution or laws of the United States. For almost the first hundred years of the American republic, private litigants looked to state courts for vindication of federal rights, subject to limited review in the Supreme Court.

The spirit of nationalism associated with the Civil War and Reconstruction brought a series of acts expanding the jurisdiction of the federal courts, culminating in the Judiciary Act of 1875.<sup>94</sup> That statute gave the federal tribunals both diversity and federal question jurisdiction to the full extent authorized by Article III, limited only by the requirement that there

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90. *Id.* at 354.

91. For discussion of the scope of equitable relief available against states, see *infra* notes 284-307 and accompanying text.

92. U.S. CONST. art. III, § 2, cl. 1.

93. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789).

94. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875).

be \$500 in dispute. By virtue of the 1875 act, the federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."<sup>95</sup>

It was during this period of explosive expansion of federal judicial power that section 1 of the Civil Rights Act of 1871,<sup>96</sup> the forerunner of section 1983, came into being. In the debates on the 1871 statute, one congressman declared: "The United States courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage . . . ."<sup>97</sup>

To this day, the argument goes on between those who look to the federal courts as the primary vindicator of federal rights and those who, noting that state judges also are sworn to uphold the Constitution, would repose more trust in the state tribunals.<sup>98</sup> The primacy of federal courts in enforcing federal rights underlies Justice Douglas' view in *Monroe v. Pape*—reaffirmed in subsequent cases—that the federal remedy created by section 1983 is quite independent of any state remedies, and that a litigant need not seek or exhaust state remedies before invoking section 1983.<sup>99</sup>

The preference for a federal forum for the litigation of federal claims is often coupled with a distrust of state courts. Burt Neuborne, a law professor closely associated with the work of the ACLU, has attacked the "myth of parity" between state and federal courts as forums for enforcing federal rights. He fears that notions about parity, "at best, a dangerous myth,"<sup>100</sup> may in fact provide "a pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine."<sup>101</sup> Those who favor a federal forum advance a number of arguments, among them that federal judges are more competent, that they have more expertise in applying federal law, that the processes of selection and the fact of

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95. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928). See also Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

96. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).

97. CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871) (statement of Rep. Coburn).

98. See generally Symposium, *State Courts and Federalism in the 1980's*, 22 WM. & MARY L. REV. 599 (1981).

99. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). See also *Damico v. California*, 389 U.S. 416, 417 (1967) (per curiam); *McNeese v. Board of Educ.*, 373 U.S. 668, 672 (1963).

100. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105-06 (1977).

101. *Id.* See also Neuborne, *Towards Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981).

life tenure give federal judges an independence that most state judges do not enjoy, that resort to federal forums is likely to yield more uniform results, and that federal judges are more willing to intervene when other organs of government fail to act.<sup>102</sup>

One of the hallmarks of many of the decisions of the Burger Court has been a greater willingness to trust state courts. In 1976, Justice Powell gathered a majority of the Court to curtail the opportunity of state prisoners to use federal habeas corpus to relitigate fourth amendment claims which the state had already given the prisoner a full and fair opportunity to air in state courts. One premise of Powell's opinion was that state courts are equally competent with federal courts to hear and decide such claims.<sup>103</sup> In another case, Justice Rehnquist declared that in adjusting the boundaries between state and federal tribunals, the Supreme Court would not act on the assumption "that state judges will not be faithful to their constitutional responsibilities."<sup>104</sup>

There are several ways by which Congress or the Supreme Court could enlarge the role of the state courts in deciding issues of federal law such as those that might arise under section 1983. One would be to require plaintiffs to exhaust available state administrative remedies before resorting to federal court. The Court's refusal to require such exhaustion follows from the view (developed from Justice Douglas' *Monroe* opinion) of section 1983 as supplementary to state remedies. In 1976, Justice Powell observed that the Court

has drifted almost accidentally into rather extreme interpretations of the post-Civil War Acts. The most striking example is the proposition, now often accepted uncritically, that [section] 1983 does not require exhaustion of administrative remedies under any circumstances. This far-reaching conclusion was arrived at largely without the benefit of briefing and argument.<sup>105</sup>

In a 1973 case, the Court hinted that the scope of the no-exhaustion rule might be an open question—a suggestion from which Justices Brennan and Marshall were quick to disassociate themselves.<sup>106</sup> The Civil Rights

102. Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1356-60 (1970); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105-06 (1977).

103. *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976).

104. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

105. *Runyon v. McCrary*, 427 U.S. 160, 186 n.\* (1976) (Powell, J., concurring).

106. *Gibson v. Berryhill*, 411 U.S. 564, 574-75, 581 (1973).

In October 1981, the court granted certiorari to review a decision of the Fifth Circuit Court of Appeals requiring the exhaustion of adequate and appropriate state remedies before a § 1983 action would be permitted to proceed in federal court. *Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (5th Cir.), *cert. granted*, 102 S. Ct. 88 (1981).

Improvements Act of 1981 would codify the no-exhaustion rule.<sup>107</sup>

Judge Friendly has called attention to the advantages of initially referring private civil rights disputes to state administrative or judicial processes. Using the state procedures may avoid the need for federal court action or, at least, may significantly affect the posture of the case once in federal court. Moreover, resort to state procedures permits more direct participation by the state, which has a legitimate stake in the outcome.<sup>108</sup> Judge Friendly has recommended that Congress provide that a federal court faced with a case challenging to the constitutionality of state action, whether raised under section 1983 or otherwise, shall abstain pending exhaustion of state *administrative* remedies whenever those remedies are plain, adequate, and effective.<sup>109</sup>

The case for requiring exhaustion of state judicial remedies is less persuasive, however, in light of the burden in delay and expense such a rule would thrust upon the would-be federal plaintiff. There may be special circumstances when a federal court ought to abstain (as discussed below) to permit a state court to clarify a question of state law. But to lay down a general requirement of exhaustion of state judicial remedies would mean, in effect, trying virtually all private civil rights cases in state courts, with federal review only in the Supreme Court—an awkward and unwieldy solution. If state interests are to be accommodated in an adjustment of the no-exhaustion rule, it would seem to make more sense to give more opportunity for state administrative processes, with their attendant expertise, to be involved so long as they are demonstrably adequate and effective, with ultimate recourse to federal court if necessary.

Civil rights cases brought by state prisoners—a surging source of section 1983 litigation—present an especially appealing occasion for requiring at least some measure of exhaustion of state administrative remedies. Curiously, federal prisoners have been required to exhaust administrative requirements, while state prisoners seeking federal judicial relief have not.<sup>110</sup>

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107. No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State, territory, or the District of Columbia, or subdivision, units, or agencies thereof. S. 990, 127 CONG. REC. S3870 (daily ed. April 10, 1981).

108. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 76 (1973).

109. *Id.* at 101. At the hearings on S. 35, Edward T. Gignoux, a federal district judge testifying on behalf of the Judicial Conference of the United States, also thought Congress should move in the direction of requiring exhaustion of state administrative remedies. *Hearings on S. 35, supra* note 30, at 316. See also Comment, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206 (1968); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974).

110. Kenneth Culp Davis has criticized the dichotomy between requiring exhaustion in

Moreover, state prisoners seeking federal habeas corpus must first exhaust available state court remedies (not just administrative remedies).<sup>111</sup> Indeed, where state prisoners sought to bring a section 1983 action to challenge the state's action depriving them of good-time credits as a result of prison disciplinary proceedings, the Supreme Court held that their sole federal remedy was habeas corpus and that therefore state remedies must be exhausted first.<sup>112</sup> In requiring exhaustion, Justice Stewart emphasized the state's special interest in prison administration:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen . . . . Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.<sup>113</sup>

One might suppose that such arguments might apply to section 1983 actions by prisoners as well, but the Court has not gone so far. Judge Friendly would require exhaustion of both state administrative and judicial remedies in prisoners' section 1983 suits.<sup>114</sup> Ruggero J. Aldisert, a judge of the United States Court of Appeals for the Third Circuit, has attacked the no-exhaustion rule as "an inefficient vehicle for protecting prisoners' rights or achieving state penal reform."<sup>115</sup> Judge Aldisert relates a conversation with a federal trial judge who, in attempting to improve the lot of prisoners, was concerned that his efforts might have had the opposite

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reviewing federal administrative action and not requiring exhaustion of state administrative remedies. In his view, the no exhaustion rule exists "because of the judicial fiat. . . . The judicial fiat cuts off reasoning about exhaustion." DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES ¶ 20.02, at 452 (1976).

111. See 28 U.S.C. § 2254(b) (1976).

112. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Court reaffirmed its cases, holding that § 1983 is a proper remedy for a state prisoner who is challenging prison conditions, rather than the fact or length of his custody. *Id.* at 498-99. A complaint seeking damages for loss of good-time credits may be brought under § 1983, even though the prisoner must, under *Preiser*, use habeas corpus to seek restoration of those credits. *Wolf v. McDonnell*, 418 U.S. 539, 553-55 (1974).

113. *Preiser*, 411 U.S. at 491-92.

114. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 103-07 (1973).

115. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 LAW & SOC. ORD. 557.

result. Prison discipline had been crippled, guards were demoralized, and many prisoners were at the complete mercy of other prisoners.<sup>116</sup>

Certainly, whether the trial judge's experience was typical or not, there is ample evidence that an indiscriminating flood of state prisoners' petitions into federal court, with no thought for state remedies, carries serious risks. Not only does it undercut the states' interest in prison administration, it also creates the risk of meritorious petitions being buried in the mass of papers, some worthy of attention but many not. Some relief from this condition may result from a provision of the Civil Rights of Institutionalized Persons Act (enacted in May 1980), which states that in a section 1983 action brought by an adult prisoner, the federal court may continue the case of up to ninety days "to require exhaustion of such plain, speedy, and effective administrative remedies as are available."<sup>117</sup>

In *Parratt v. Taylor*,<sup>118</sup> Justice Rehnquist fashioned an analogue to the exhaustion of remedies requirement as a way of curbing section 1983 actions. *Parratt* was a showcase for displaying Rehnquist's concerns about opening the judicial floodgates. Taylor, a state prisoner, had ordered hobby materials valued at \$23.50. He claimed that through the negligence of prison officials, he had never received the materials. When Taylor's section 1983 action reached the Supreme Court, Rehnquist, writing for the majority, summed up his concern about permitting 1983 recovery in such a case:

To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. . . . Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983.<sup>119</sup>

In *Parratt*, as in *Paul v. Davis*,<sup>120</sup> Rehnquist was worried lest the fourteenth amendment become "a font of tort law"<sup>121</sup> superimposed upon the states. Rehnquist's response, therefore, was to hold that the state of Nebraska provided a means for redressing Taylor's loss sufficient to satisfy the requirements of due process of law. That being so, there was no depri-

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116. *Id.* at 565-66.

117. Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(a)(1) (1980).

118. 451 U.S. 527 (1981).

119. *Id.* at 544.

120. 424 U.S. 693, 701 (1976).

121. *Parratt*, 451 U.S. at 544 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

vation of property “without due process of law”—hence no basis for recovery under section 1983.<sup>122</sup>

Another occasion to test the boundaries between state and federal processes arises when a defendant, in opposition to a section 1983 proceeding, seeks to have rules of res judicata or collateral estoppel, based on a state court proceeding, bar the federal action. In *Allen v. McCurry*,<sup>123</sup> McCurry, in his criminal trial in Missouri, had sought unsuccessfully to suppress evidence he claimed had been obtained as the result of an unlawful search and seizure. Because McCurry failed to assert that the state courts had not provided him with a “full and fair opportunity” to litigate his fourth amendment claim, he was barred under the principle of *Stone v. Powell*<sup>124</sup> when he later sought federal habeas corpus. McCurry then brought a section 1983 suit against the state officers who had seized the evidence. A federal court of appeals, invoking the “special role of the federal courts in protecting civil rights,”<sup>125</sup> concluded that the 1983 suit was McCurry’s only route to a federal forum for his constitutional claim.

The Supreme Court held that the doctrine of collateral estoppel barred McCurry’s section 1983 claim. Justice Stewart, for the majority, denied the notion of a general right to a federal forum: “The actual basis of the Court of Appeals’ holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal court arises.”<sup>126</sup> Stewart found no such principle either in the Constitution or in section 1983. Here, as in *Stone v. Powell*, the Court was unwilling to indulge “a general distrust of the capacity of the state courts to render correct decisions on constitutional issues.”<sup>127</sup> According to the dissenters in *Allen v. McCurry*, the majority decision clashed with the principle that section 1983 “embodies a strong congressional policy in favor of federal courts’ acting as the primary and final arbiters of constitutional rights.”<sup>128</sup>

Abstention is another means by which to adjust the boundaries between federal and state courts. In abstaining, a federal court stays its hand pending a state court’s resolution of a question of state law. Typically, the purpose is to avoid the unnecessary decision of a federal constitutional

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122. 451 U.S. at 544.

123. 449 U.S. 90 (1980).

124. 428 U.S. 465 (1976).

125. *McCurry v. Allen*, 606 F.2d 795, 799 (8th Cir. 1979) (citations omitted).

126. 449 U.S. at 103.

127. *Id.* at 105.

128. *Id.* at 110 (Blackmun, J., dissenting) (citations omitted).



question—a form of “judicial restraint” commonly associated with the late Justice Frankfurter whose decision in *Railroad Commission v. Pullman Co.*<sup>129</sup> remains the paradigm abstention decision. Some have argued that abstention is inappropriate in civil rights cases, such as actions brought under section 1983.<sup>130</sup> However, in *Harrison v. NAACP*,<sup>131</sup> a case arising out of the troubled days of “massive resistance” to school desegregation in the South, the Court ordered a lower federal court to abstain pending proceedings in a state court. Dissenting, Justice Douglas thought the ruling clashed with the assumption underlying the Civil Rights Act of 1871 that “the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people.”<sup>132</sup>

Undoubtedly abstention serves the cause of comity, but one price paid is delay in final adjudication of a dispute. Years may elapse between a decision ordering abstention and the ultimate disposition of the cases.<sup>133</sup> Some justices have had grave doubts about the idea of abstention, and in the heyday of the Warren Court, it looked as if the doctrine might be headed for oblivion.<sup>134</sup> One observer in 1967 declared that “the retirement of Mr. Justice Frankfurter in 1962 left the abstention doctrine a judicial orphan.”<sup>135</sup> That pronouncement has proved premature. In recent years, the Supreme Court has seemed willing enough to order abstention, sometimes by unanimous vote.<sup>136</sup>

The Civil Rights Improvements Act of 1981 would rule out abstention in section 1983 cases.<sup>137</sup> Senator Mathias, the bill’s sponsor, has objected to abstention on the ground that it forces litigants “to travel a more expensive

129. 312 U.S. 496 (1941).

130. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 230 (1948).

131. 360 U.S. 167 (1959).

132. *Id.* at 180 (Douglas, J., dissenting).

133. See, e.g., *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944), in which abstention was ordered. The Court’s decision on the merits did not come until 1951, in *Spector Motor Serv., Inc. v. O’Connor*, 340 U.S. 602 (1951).

134. See, e.g., such Warren Court decisions as *Baggett v. Bullitt*, 377 U.S. 360 (1964), and *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

135. Note, *Federal-Question Abstention: Justice Frankfurter’s Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 604 (1967).

136. See, e.g., *Bellotti v. Baird*, 428 U.S. 132 (1976) (unanimous); *Carey v. Sugar*, 425 U.S. 73 (1976) (per curiam) (unanimous); *Harris County Comm’rs Court v. Moore*, 420 U.S. 77 (1975) (only Douglas, J., dissenting). On the abstention doctrine generally see Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107 (1974); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

137. S. 990, 96th Cong., 1st Sess. § (e)(1)(C) (1981). A federal court would be permitted, however, to certify a question of state law to a state’s highest court where the state’s procedures permit such certification. *Id.* § (e)(1).

and longer road"<sup>138</sup> than Congress intended when it enacted section 1983. The Justice Department, however, opposes this provision of the bill. The Department sees "no evidence that the doctrine of abstention is being abused, or that the costs of delay and expense in cases in which the Federal courts have abstained outweigh the benefits from reduction of friction between Federal and State governments and from elimination of unnecessary disruption of State policies."<sup>139</sup> On a more general note, Judge Friendly has questioned the wisdom of attempting to codify abstention; he tends to think that it is best to leave it to the courts to work out on a case-by-case basis.<sup>140</sup>

Still another way to defer to state courts is to prevent federal courts from intervening in pending or impending state proceedings, such as criminal trials. Notions of comity, as well as traditional equity principles, have led the Supreme Court to fashion a rule that federal courts should not interfere with proceedings in state courts, save in exceptional cases to prevent irreparable injury.<sup>141</sup> There are important differences between *Pullman*-style abstention and the noninterference principle. Perhaps the most important difference is that abstention simply postpones the exercise of federal jurisdiction, with a litigant free to return to federal court once a state court has passed upon an issue of state law. The point of the noninterference principle, by contrast, is that the party who as a defendant in a state criminal proceeding wants to raise a federal constitutional claim must do so in the state court. In such a case, federal jurisdiction is not merely postponed; it is not exercised at all, except by way of Supreme Court review of the state court judgment.

In the 1965 decision of *Dombrowski v. Pfister*,<sup>142</sup> the Warren Court relaxed the noninterference doctrine somewhat, making it easier to get into federal court for relief against a state proceeding. The advent of the Burger Court, however, brought a tightening of the screws on federal court interference with state proceedings. In the leading case of *Younger v. Harris*,<sup>143</sup>

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138. 123 CONG. REC. 556 (1977) (remarks of Sen. Mathias).

139. *Hearings on S. 35, supra* note 30, at 41.

140. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 94 (1973). For a proposed codification precluding application of the abstention doctrine in civil rights cases, see AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1371 (1969). In 1981, the Court held that the principle of comity bars taxpayers from bringing a § 1983 damage action to redress the allegedly unconstitutional administration of a state tax system. *Fair Assessment in Real Estate Ass'n v. McNary*, 102 S. Ct. 177 (1981).

141. *See Younger v. Harris*, 401 U.S. 37 (1971). *See also* 28 U.S.C. § 2283 (1976).

142. 380 U.S. 479 (1965). *See also* Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

143. 401 U.S. 37 (1971).

Justice Black invoked the theme of "Our Federalism" and laid down a policy of comity and respect for state institutions. Thus, where *Dombrowski* appeared to permit federal intervention upon a showing that a state law being enforced in the state proceeding was on its face vague or overbroad (and hence in violation of the first amendment), Justice Black in *Younger* concluded that the arguably "chilling effect" of such a state law did not justify prohibiting the state "from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution."<sup>144</sup> Only if there was a pattern of bad faith or harrassment in the enforcement of the law would there be irreparable injury of a kind supporting federal injunctive relief.<sup>145</sup>

In a series of cases, the Burger Court has extended the principle of *Younger*. Although *Younger* does not apply where no state prosecution is pending, the Court has held that *Younger* does stay a federal court's hand where state criminal proceedings are begun *after* the state defendants have gone into federal court but *before* any proceedings "of substance" on the merits have taken place in federal court.<sup>146</sup> In another case, the Court applied *Younger* to a state contempt proceeding, even though the state was not a party.<sup>147</sup> Finally, the *Younger* bar has been held to apply to a civil proceeding brought by the state in its sovereign capacity.<sup>148</sup>

The *Younger* line of cases calls upon the justices to accommodate competing values—the enforcement of federal rights on the one hand, and the integrity of state judicial proceedings on the other. The justices who have prevailed in the *Younger* line of cases recognize the post-Civil War role of the federal government as a guarantor of basic civil rights against state power. But, in striking a balance between federal and state interests, those justices want to leave state institutions ample breathing room. Justice Brennan, on the losing side of this line of cases, has accused the majority of pursuing the "ultimate goal of denying § 1983 plaintiffs the federal forum in any case, civil or criminal, when a pending state proceeding may hear the federal plaintiff's federal claims."<sup>149</sup> Brennan sees the Court as "eviscerating" section 1983 in decisions which operate as "deliberate and conscious floutings" of Congress' mandate.<sup>150</sup>

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144. *Id.* at 50-51.

145. *Id.* at 48, 51-52.

146. *Compare Steffel v. Thompson*, 415 U.S. 452 (1974) *with Hicks v. Miranda*, 422 U.S. 332 (1975).

147. *Juidice v. Vail*, 430 U.S. 327 (1977).

148. *Trainor v. Hernandez*, 431 U.S. 434 (1977).

149. *Juidice*, 430 U.S. at 344-45 (Brennan, J., dissenting).

150. *Id.* at 343, 346 (Brennan, J., dissenting).

Civil liberties lawyers have hotly objected to the expansion of the *Younger* doctrine. The Committee on Civil Rights of the Association of the Bar of the City of New York has characterized the cases' trend as being "unwarranted as a matter of legal principle, unhealthy in its practical consequences for those who have been deprived of their federal rights, and clearly violative of Congressional intent."<sup>151</sup> Professor Neuborne has objected in particular to the "extremely dangerous" precedent set by permitting *Younger* to come into play when the state proceeding is commenced *after* the section 1983 plaintiff has invoked the jurisdiction of a federal court—the effect being "to virtually invite retaliatory state prosecutions aimed at section 1983 plaintiffs."<sup>152</sup> Likewise, he is especially apprehensive about the Court's "disturbing tendency to expand the *Younger* bar to civil proceedings as well."<sup>153</sup>

The Civil Rights Improvements Act of 1981 would confine the *Younger* principle's expansive tendencies. The bill would codify the circumstances under which a federal court could enjoin a state proceeding. In so doing, the bill would overturn most of the Burger Court's sequels to *Younger*. For example, the legislation would require that, for the federal court to withhold injunctive relief, the state proceeding must have been commenced before suit was filed in the federal court, and the bill would confine any limitation on federal intervention to state criminal proceedings. Even *Younger* itself would be cut back, and the broader rule of *Dombrowski* revived.<sup>154</sup>

### III. INDIVIDUAL IMMUNITIES

In addition to the question of liability of municipalities and states for damages—addressed by *Monell* and *Quern*—there is the issue of the extent of potential liability of individuals who may be sued in civil rights actions.<sup>155</sup> On its face, section 1983 says nothing about immunities for any

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151. *Hearings on S. 35, supra* note 30, at 51-52.

152. *Id.* at 374.

153. *Id.* See also Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection* 5 HOFSTRA L. REV. 545 (1977). For a sampling of the extensive commentary on the *Younger* line of cases, see Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Redish, *The Doctrine of Younger v. Harris: Deference in Search of Rationale*, 63 CORNELL L. REV. 463 (1978); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975); Comment, *Post-Younger Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L.J. 523.

154. S. 990, 96th cong., 1st Sess. §§ (e)(3), (e)(4), & (e)(5) (1981).

155. See generally Cass, *Damage Suits Against Public Officials*, 129 U. PA. L. REV. 1110

class of local or state officeholder, just as the statute is silent on the extent of immunity, if any, for states or municipalities. Hence, with individuals, as with states and municipalities, one must look to judicial decisions to ascertain whether individuals can claim any immunity and, if so, in what measure.

Common law immunities, such as those for legislators and judges, were well established by the time the civil rights statutes of the Reconstruction era were enacted. The Supreme Court has reasoned that, because of those well-rooted principles, had Congress intended to abolish such immunities in passing section 1983, it would have done so explicitly.<sup>156</sup>

Some of the immunities thus recognized by the Court are absolute, that is, a plaintiff cannot defeat an official's claim of immunity by arguing that the official acted out of improper motives or otherwise in bad faith. State legislators, judges, and prosecutors (when acting in their role as state's advocate) have been accorded absolute immunity.<sup>157</sup> The rationale of these cases is that, without such immunity, officials might be deterred by the risk of lawsuits from using their unfettered and independent judgment. The Court does not suppose that these officeholders never act improperly nor that citizens may not be injured as a result; rather, the Court has concluded that, on balance, the rule of absolute immunity will better serve the public good.<sup>158</sup>

Other officers may claim only a qualified immunity. Where recognized, such an immunity (or defense) permits an official to resist a damage judgment on the ground that he acted in good faith, implementing a policy that reasonably was thought to be constitutional. The qualified immunity saves the official from running the risk that, although he acted reasonably and without malice, he incorrectly predicted the future course of constitutional law. Given the difficulty that even lower-court judges, law professors, and other students of the Supreme Court's opinions have in predicting future decisions (or often in interpreting existing decisions), it seems only fair not to hold policemen or other public officials accountable for their similar

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(1981); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281.

156. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

157. See *id.* (state legislators); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors). In November 1981, the Court granted certiorari to decide whether judicial immunity extends to a Cook County circuit court clerk sued in a § 1983 action. *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir.), *cert. granted sub nom. Finley v. Murray*, 102 S. Ct. 501 (1981).

158. The injury may be quite severe, and yet the immunity recognized. See *Stump v. Sparkman*, 435 U.S. 349 (1978), where a state judge ordered a tubal ligation on a 15-year old girl who was told that she was having an appendectomy.

lack of a crystal ball either.<sup>159</sup>

Since section 1983 is silent on the subject of immunities in general, it is by judicial gloss that the Court decides who may claim a qualified immunity, just as it decides who is entitled to an absolute immunity. The policy judgment underlying the Court's recognition of qualified immunities resembles that in the absolute immunity cases: "[I]t is better to risk some error and possible injury from such error than not to decide or act at all."<sup>160</sup> Among those who may claim qualified immunity are police officers, prison officials, state hospital superintendents, and members of school boards.<sup>161</sup>

What of state governors and other high executive officials? One might suppose that, given the tradition of the separation of powers and notions about parity among the three branches of government, on both the state and federal levels, governors or other policy-making officials in the executive branch might be accorded the same measure of protection as a judge or a legislator. They are not. In litigation arising out of the disorders on the campus of Kent State University in May 1970, the personal representatives of the estates of three students who were killed when fired upon by national guardsmen sought damages from the Governor of Ohio, the University's president, and various Ohio National Guard officers and men. The Supreme Court rejected the claim that the respondents were protected by absolute immunity.<sup>162</sup> Instead, the Court laid down a rule of qualified immunity for executive officers. The scope of that immunity varies with the discretion and responsibilities of the particular office, as well as the circumstances as they appeared at the time of the action on which a litigant seeks to base liability.<sup>163</sup>

As the existence of individual immunities, absolute or qualified, in sec-

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159. See Sowler, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions of Its Use and the Burden of Persuasion*, 55 TUL. L. REV. 326 (1981).

160. *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974).

161. See *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital superintendents); *Wood v. Strickland*, 420 U.S. 308 (1975) (members of school boards); *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers). Immunity of a different sort from § 1983 suits was recognized by the Court's holding that individual public defenders do not act "under color of state law" while performing a lawyer's traditional functions as counsel to indigent defendants in criminal proceedings, even though the public defenders are paid from public funds. *Polk County v. Dodson*, 102 S. Ct. 445 (1981).

162. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

163. *Id.* at 247. Likewise, federal executive officials are entitled only to qualified immunity of the kind recognized in *Scheuer*. See *Butz v. Economou*, 438 U.S. 478 (1978) (suit against Secretary of Agriculture and other executive officials). *Economou* acknowledges absolute immunity, however, for hearing officers or administrative law judges, agency officials who make prosecutorial decisions, and agency attorneys who present evidence in hearings.

tion 1983 suits depends ultimately on the Court's reading of congressional intent in enacting the statute, Congress has the power to modify or abolish those immunities. The Civil Rights Improvements Act of 1977 (S. 35), as introduced, would have modified a prosecutor's absolute immunity by creating liability where a prosecutor failed to disclose to a defendant any material favorable to the defendant.<sup>164</sup> This proposal created quite a stir. At the hearings on S. 35, opposition to this portion of the bill was voiced by several witnesses, including the spokesman for the Justice Department.<sup>165</sup> The president-elect of the National District Attorneys Association, himself a prosecutor, said that during the previous four years he had been sued ten times, for claims totaling almost \$6 million, by defendants he had prosecuted. While "flattered" by the amount of the claims and comfortable about the outcome under the present state of the law, he would be "very uncomfortable" were S. 35 to become law.<sup>166</sup> In the version of the bill as reintroduced in 1979 (S. 1983) and in 1981 (S. 990), the provision altering prosecutors' immunity has been deleted.

#### IV. MUNICIPALITIES' INABILITY TO INVOKE INDIVIDUAL OFFICERS' IMMUNITY

Once *Monell*, in 1978, had stripped away the immunity that municipalities had enjoyed under *Monroe v. Pape*, the question was posed as to the extent of a municipality's liability for the acts of its officials and officers. One position would be to make a municipality liable for the acts of its agents under the same circumstances as a private employer would be liable for wrongs committed by its agents—a theory of respondeat superior. Under this approach, section 1983 would become a loss-shifting device: "Thus, as between a wholly innocent plaintiff and a government entity which, while not affirmatively culpable is, at least, causally responsible for the loss, the loss should be borne by the government, not the innocent plaintiff."<sup>167</sup> In *Monell*, however, the Court explicitly refused to impose this extent of liability on municipalities. Only when the injury may be traced to governmental policy or custom will the government itself be responsible for the actions of its employees or agents.<sup>168</sup>

164. S. 35 § (d). This would have codified the position of Justice White (and two other justices), who, concurring in absolute immunity for a prosecutor, would not extend that immunity to suits charging unconstitutional suppression of evidence. See *Imbler v. Pachtman*, 424 U.S. 409, 444-45 (1976) (White, J., concurring).

165. *Hearings on S. 35, supra* note 30, at 38 (testimony of Drew S. Days, III).

166. *Id.* at 349 (testimony of Lee C. Falke).

167. *Id.* at 372 (testimony of Burt Neuborne). A like position was taken by counsel for the NAACP's Legal Defense Fund. See *id.* at 295 (testimony of Eric Schnapper).

168. 436 U.S. at 690-94.

Civil rights lawyers were, of course, delighted with *Monell*, but they were, as the NAACP's Eric Schnapper put it, concerned that issues still remaining for resolution "could readily be used to nullify *Monell*"<sup>169</sup> and to make the prospect of damage awards against governmental bodies illusory. One question that surely worried civil rights attorneys was whether the Court would hold that a government entity could plead, by way of defense, that the official who had done the injury complained of had acted in good faith—a claim of vicarious immunity in which, if the agent could escape liability, so could the government.

Those concerned about the Court's next step were relieved (and perhaps surprised) when in April 1980 it ruled, in *Owen v. City of Independence*, that a municipality sued under section 1983 may *not* assert the good faith of its officers or agents as a defense.<sup>170</sup> Justice Brennan's opinion, written for the majority in the five to four decision, reflects two basic policies. One is that if a municipality were able to assert a good faith defense, many victims of municipal wrongdoing would be left without remedy. This is essentially an appeal to fairness; since it is the public at large that benefits from government activities, it is proper that the public at large be responsible when government infringes individual rights. The second policy is deterrence and is based on the supposition that officials who realize that a municipality will be liable for injuries, whether resulting from good faith actions or not, will have an incentive to err on the side of protecting citizens' rights.<sup>171</sup>

*Owen* may prove quite costly to municipalities in two ways: through the imposition of money damages and, less obviously by its effect on public officials' conduct. In an age in which wide publicity is given to enormous jury verdicts, one can expect an increase of section 1983 suits to reach municipal "deep pockets." Caught between inflationary expenses, taxpayer revolts, and a form of strict liability under *Owen*, smaller municipalities may find the going tough.<sup>172</sup>

Hard figures on the full extent of the risk to municipalities are difficult to come by. Justice Powell, however, dissenting in *Owen*, cited a recent Alaska jury verdict of almost \$500,000, awarded to a police officer accused

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169. Schnapper, *Civil Rights Litigation after Monell*, 79 COLUM. L. REV. 213, 266 (1979).

170. 445 U.S. 622 (1980).

171. *Id.* at 650-53.

172. On the effect of *Owen*, see generally Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Governments?*, 13 URB. LAW. 1 (1981); Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*, 13 URB. LAW 407 (1981); Comment, *Owen v. City of Independence: Expanding the Scope of Municipal Liability Under Section 1983*, 47 BROOKLYN L. REV. 517 (1981).



of "racism and brutality" who was removed from duty without proper notice and an opportunity to be heard.<sup>173</sup> On the other hand, staffers on Capitol Hill, who informally surveyed section 1983 cases, have suggested that the vast majority of section 1983 recoveries are less than \$2,000. It may well be, as Professor Abernathy has said, that the spectre of 1983 judgments large enough to push municipalities to the brink of bankruptcy is "by and large a figment of the imagination of after-dinner speech-makers."<sup>174</sup> It is true that the sums demanded in complaints make better headlines than the sums finally awarded—the latter often a tiny fraction of the original figure. But even so, the sums are hardly inconsequential. The National Institute of Municipal Law Officers (NIMLO), admittedly not a disinterested party, extrapolated from a 1981 survey of 215 municipalities (who reported \$4.8 billion in pending claims) that there were claims of \$780 billion against the country's 39,000 local governments. If one percent of those claims became judgments, it would mean an outlay of \$7.8 billion (to which one must add the cost involved in defending lawsuits).<sup>175</sup> Certainly an individual locality, faced with a large judgment, can take no solace in the observation that most awards are small. Consider, for example, the danger posed to municipal budgets from judgments on behalf of corporations where large sums are at stake.<sup>176</sup> A measure of the problem, demonstrated in a report by one city attorney, is that many local governments are being forced to rely on self-insurance because they either cannot afford or cannot obtain commercial insurance coverage. He traces this phenomenon to the fact that there is no way to measure the scope or the cost of the risks that local governments now face since *Monell*, *Owens*, and *Thiboutot*.<sup>177</sup>

In 1981, the Supreme Court showed some sensitivity to litigious threats to municipal finances when it ruled that a judgment against a municipality may not include punitive damages.<sup>178</sup> In so ruling, Justice Blackmun examined both history—notably, that since 1871 American courts have been virtually unanimous in denying punitive damages against municipalities—

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173. 445 U.S. at 670 n.11 (Powell, J., dissenting) citing *Wayson v. City of Fairbanks*, No. 77-1851 (Alaska 4th Dist. Supr. Ct., Jan. 24, 1979), reported in 22 ATLA L. REP. 222 (June 1979).

174. *Municipal Liability Hearings*, *supra* note 49, at 41 (statement of Prof. Charles Abernathy).

175. *Id.* at 86-87 n.18 (statement of NIMLO).

176. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

177. *Municipal Liability Hearings*, *supra* note 49 at 302 (statement of Roger F. Cutler).

178. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981).

and public policy.<sup>179</sup> In addition to observing that municipalities cannot have malice (and thus that the rationale of punishing through punitive damages is not served), Justice Blackmun noted the expanded liability to which municipalities are subject since *Thiboutot*.<sup>180</sup> Adding the threat of punitive damages, he posited, might create "serious risk to the financial integrity"<sup>181</sup> of municipalities, straining local treasuries and services available to the public at large.

Justice Blackmun's *City of Newport* opinion creates the impression that the Court is not totally deaf to the anguish of local governments at the Court's trend of enlarging opportunities to sue under section 1983. The *City of Newport* facts justify these concerns about the municipal fisc. A musical concert promoter received permission from the city of Newport to present a series of summer concerts. When members of the city council discovered the promoters' plans to schedule the group, Blood, Sweat, and Tears, the city fathers invoked fairly transparent grounds to seek to prevent performances by what they characterized as a rock group. Arguing censorship and other claims, the promoters brought a section 1983 action. The jury awarded compensatory damages of just over \$72,000, but punitive damages of \$275,000, of which \$200,000 was awarded against the city.<sup>182</sup> Some officials have argued that *City of Newport*, in disallowing the punitive damages award, should have further restricted the power to impose punitive damages under section 1983.<sup>183</sup>

As for the conduct of public officials, Justice Brennan argued in *Owen* that one of the traditional arguments for a good faith defense, that the threat of liability may deter an official from being decisive in carrying out the duties of his office, is largely absent when it is the municipality, rather than the individual official, which is being sued.<sup>184</sup> It is hard to believe that public municipal officials, responsible either to their superiors or to the voters, would not be sensitive to the possibility of heavy damage suits. The

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179. *Id.* at 2756-62.

180. *Id.* at 2761.

181. *Id.*

182. The trial court held that the \$200,000 punitive damage award was excessive and ordered it reduced to \$75,000. *Id.* at 2753 n.8 (citing App. to Pet. for Cert. B-12 to B-13).

183. A representative of the National Association of Attorneys General, testifying at the hearings on S. 584 and S. 585, thought *City of Newport* did not go far enough. Except in the "rarest of circumstances" states and localities undertake to immunize their officers from damages by paying judgments entered against them for conduct undertaken in the official performance of their duties. Thus, it would be "small comfort" that punitive damages could not be assessed against the government itself. Hence this witness proposed that § 1983 be amended to preclude the award of punitive damages against any defendant. *Municipal Liability Hearings, supra* note 49, at 529 (statement of Kenneth O. Eikenberry).

184. 445 U.S. at 655-56.

likelihood that officials would be looking over their shoulders is, of course, one of the justifications for the majority result, to the extent that officials may be encouraged to become more attuned to the constitutional bounds on their conduct. But if large judgments against municipalities become more common, public officials will surely feel pressures of the kind that otherwise would support recognition of a good faith defense for individual defendants.

Practical consequences aside, *Owen* creates some anomalous results. First, in reading the seemingly unqualified language of section 1983, the Court has refused to find in Congress' silence an intention to abrogate the traditional qualified immunity for individual defendants; yet, from the same silence, the Court has implied an intention to deny the same defense to municipalities. Further, as Justice Powell points out in his dissent, the Court imputes to Congress a willingness to impose a higher degree of liability on municipalities than exists in the law of the vast majority of the states which recognize a qualified immunity for municipalities at least equivalent to a good faith defense.<sup>185</sup> If nothing else, *Owen* emphasizes the remarkable degree to which a brief statute such as section 1983 means what judicial gloss says it means.<sup>186</sup>

Senator Hatch's S. 585, introduced in 1981, would overturn *Owen* by amending section 1983 to give municipalities a good faith defense, provided that they have a reasonable belief that the actions complained of did not violate any right secured by the Constitution or by equal rights laws. Professor Charles Abernathy notes that the good faith immunity proposed by S. 585 "is really a very narrow immunity."<sup>187</sup> Not only does the bill require subjective good faith, but the defense would apply only where constitutional law is unsettled—and "constitutional law contains quite a few settled ideas, despite what it may appear at times."<sup>188</sup> Moreover, Professor Abernathy values "very greatly" the principle that the essential thrust of section 1983 ought to be deterrence rather than compensation.<sup>189</sup>

## V. DEFINING THE FEDERAL RIGHT

In 1939, in an effort to narrow the scope of section 1983, Justice Stone said that the civil rights statute should apply only "whenever the right or

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185. *Id.* at 678-83 (Powell, J., dissenting).

186. For an even more remarkable example, see discussion of *Maine v. Thiboutot*, *infra*, notes 222-59 and accompanying text.

187. *Municipal Liability Hearings*, *supra* note 49, at 26, 39-40 (statement of Prof. Charles Abernathy).

188. *Id.* at 26.

189. *Id.* at 27.

immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights.”<sup>190</sup> Justice Stone’s distinction flowed from two jurisdictional statutes. The first, old (pre-1980) 28 U.S.C. § 1331, gave federal district courts jurisdiction over civil action arising under the constitution, laws, or treaties of the United States where the amount in controversy (since abolished by a 1980 amendment) exceeded \$10,000. The other, 28 U.S.C. § 1343, gives district courts jurisdiction over, among certain other civil suits, those seeking to redress deprivation, under color of state law, of any right secured by the Constitution or by an act of Congress providing for “equal rights” or seeking relief under civil rights statutes. Unlike old section 1331, section 1343 requires no minimum amount in controversy.

If section 1983 were limited to nonproperty “liberty” rights, a litigant seeking redress in federal court for infringement of a property right would have had to satisfy old section 1331’s amount in controversy requirement. The Supreme Court, however, repudiated the liberty-property distinction that Justice Stone sought to draw. In 1972, a unanimous Court declared that “the dichotomy between personal liberties and property rights is a false one”<sup>191</sup>—one, moreover, not intended by Congress in enacting either section 1983 or the jurisdictional statutes.

Some questioned the Court’s conclusion. Judge Friendly opined that Justice Stone “came closer to capturing the spirit of the Civil Rights Act” that the Court, and that its framers, concerned with the rights of the emancipated slaves in the South, “would have been no end surprised” to find section 1983 being used to attack a state’s garnishment statute or being applied to a creditor’s claim of the impairment of the obligation of a contract.<sup>192</sup> Judge Aldisert was even more acerbic: the Supreme Court, he charged, “has made the federal court a nickel and dime court. A litigant now has a passport to federal court if he has a 5-dollar property claim and can find some state action.”<sup>193</sup> Such complaints notwithstanding, Congress mooted the issue by eliminating altogether the amount in controversy requirement with regard to federal question jurisdiction. Although this requirement might have offered a means of narrowing section 1983, the 1980 amendment of section 1331 has foreclosed this option.

In *Paul v. Davis*,<sup>194</sup> Justice Rehnquist, writing for the majority, illus-

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190. *Hague v. CIO*, 307 U.S. 496, 531 (1939) (opinion of Stone, J.).

191. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Three justices dissented on another point, but not on the liberty-property issue. *See id.* at 556 (White, J., dissenting). Two justices took no part in the case.

192. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 91 (1973).

193. Aldisert, *supra* note 115, at 569.

194. 424 U.S. 693 (1976).

trated how a civil rights action under section 1983 can be foreclosed by holding that neither "liberty" nor "property" has been infringed. In *Paul*, police officials had distributed five pages of "mug" shots of "active shoplifters to local merchants." Davis, whose picture was among those included in the flyer, had been arrested for shoplifting, but the charges had not been resolved. Indeed, soon after the flyer's circulation, the charges were dropped.

Davis filed a section 1983 action, claiming that by labeling him an "active shoplifter," the police had deprived him of an interest protected by the fourteenth amendment. Justice Rehnquist disagreed. Canvassing the interplay between state law and the Constitution, he held that "the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law."<sup>195</sup>

The key to Justice Rehnquist's opinion lies in his concern that, if "liberty" and "property" be read too expansively, federal civil rights statutes would swallow up state law. As he observed, Davis' complaint "would appear to state a classical claim for defamation actionable in the courts of virtually every State."<sup>196</sup> Rehnquist was not willing to see traditional state tort law converted so easily into a claim of federal right:

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment.<sup>197</sup>

In short, Justice Rehnquist refused to permit the due process clause to be used to transform the civil rights statutes into "a body of general federal tort law."<sup>198</sup>

*Paul v. Davis* shows how to narrow the reach of section 1983 by refusing to recognize that any substantive federal rights are involved. A restrictive view of the fourteenth amendment's protection of "liberty" or "property" carries with it a concomitant narrowing of what may be done by way of section 1983.<sup>199</sup> This vexed Justice Brennan, who, dissenting in *Paul*, com-

195. *Id.* at 712. Justice Rehnquist also rejected the argument that a right of "privacy" had been violated. *Id.* at 712-13.

196. *Id.* at 697.

197. *Id.* at 698-99.

198. *Id.* at 701. For incisive discussion of the overlap between state tort law remedies and remedies under § 1983, see Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980). Among the concerns voiced by Professor Whitman is that a result of extending the sphere of the Constitution through § 1983 actions is "a dramatic increase in the workload of the federal courts, and substantial encroachment on the authority of the states." *Id.* at 10.

199. For another example of defeating § 1983 relief by finding that there is no constitu-

plained that rather than balancing the individual's interest in reputation against the needs of law enforcement, the majority "by mere fiat and with no analysis wholly excludes personal interest in reputation" from the ambit of the fourteenth amendment.<sup>200</sup>

Civil libertarians were outraged at *Paul v. Davis*. When S. 35 (the Civil Rights Improvements Act of 1977) was drafted, a provision was included explicitly stating that the "right to enjoy one's reputation is a right secured by the due process clause" of the fourteenth amendment.<sup>201</sup> As the sponsor's remarks made clear, this provision was aimed directly at overruling *Paul v. Davis*.<sup>202</sup>

From the standpoint of Congress' proper role vis-à-vis Supreme Court opinions, the effort to overturn *Paul v. Davis* legislatively was the most dubious feature of S. 35. The other provisions of the bill, most of them tied quite directly to adjusting the reach of section 1983 as such, fell safely within Congress' legitimate concern. The anti-*Paul* provision, however, edged nearer to dangerous terrain because it would have engaged Congress in defining the substantive constitutional equivalent of conservatives' efforts to overturn reapportionment, busing, school prayer, and other judicial decisions by using Congress' powers to define the jurisdiction of the federal courts. All such efforts are fraught with danger, for if Congress can confer more due process, it may be able to require less. The safest course is for Congress, however much it may dislike a judicial opinion, to stay out of the business of redefining constitutional rights.

Reintroduced as S. 990, the Civil Rights Improvements Act's current version omits any provision dealing with *Paul v. Davis*. Perhaps the sponsors were concerned about the dubious propriety of Congress' attempting to redefine constitutional rights. Or it may be that, in the process of legislative drafting and political compromise, the anti-*Paul* provision was simply a bargaining point which could be dropped from the measure in the interests of other provisions far more central to the sponsors' concerns. In any

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tional right involved, see *Ingraham v. Wright*, 430 U.S. 651 (1977), in which the Court rejected the argument of public school students who had been paddled that corporal punishment raised an issue under the cruel and unusual punishment clause of the eighth amendment. Justice Stewart, concurring in *Parratt v. Taylor*, 451 U.S. 527, 544-45 (1981), argued that, where a state prisoner brought a § 1983 action complaining that prison officials had negligently lost hobby materials he had ordered through the mail, it was not the kind of property deprivation to which the fourteenth amendment was addressed. Even if Nebraska had deprived him of property in the constitutional sense, it had not done so without due process of law (on this point, he agreed with the rationale of Justice Rehnquist's majority opinion).

200. 424 U.S. at 721 (Brennan, J., dissenting).

201. S. 35, 95th Cong., 1st Sess. § 2(2)(b)(2) (1977).

202. See 123 CONG. REC. 556 (1977) (remarks of Sen. Mathias).

event, the further evolution of the *Paul v. Davis* issue is wisely left to the Court.

Another route to narrow section 1983 might be found in an interpretation of the statute's use of the word "deprivation." When the statute provides that persons acting under color of state law shall be liable if they subject others to the "deprivation" of rights secured by the Constitution and laws of the United States, does that provision require that the action resulting in a deprivation be an intentional one? Or may section 1983 liability be founded upon an actor's negligence? A state of mind requirement would obviously be another avenue to limiting the occasions when section 1983 could be invoked.

An eye-catching 1981 case illustrates the relevance of this question. In *Parratt v. Taylor*,<sup>203</sup> a state prisoner brought a section 1983 action complaining that prison officials had negligently lost hobby materials, valued at \$23.50, which he had ordered by mail. Justice Powell would have ruled that a negligent act, causing an unintended loss or injury to property, does not result in a "deprivation" in the constitutional sense.<sup>204</sup> Powell's underlying concern was that to permit negligence to be the basis for a section 1983 action would furnish yet one more impetus to using the statute far beyond its intended purposes:

The present case, involving a \$23 loss, illustrates the extent to which constitutional law has been trivialized, and federal courts often have been converted into small-claims tribunals. There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of right to a court of appeals, and potentially, consideration of a petition for certiorari in this Court.<sup>205</sup>

Justice Powell wound up, however, on the losing side of this question. A majority of the Court ruled that section 1983 does *not* contain a state of mind requirement: that the statute's remedies are not limited to intentional deprivations of constitutional rights.<sup>206</sup> One might have expected this conclusion to have come from the pen of Justice Brennan, but, oddly enough, it was Justice Rehnquist who wrote for the majority—the same Justice Rehnquist who fashioned *Paul v. Davis* out of a concern that the Court's section 1983 decisions might otherwise "make of the Fourteenth Amendment a font of tort law."<sup>207</sup> Obviously, Justice Rehnquist thought this dan-

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203. 451 U.S. 527 (1981).

204. *Id.* at 546 (Powell, J., concurring).

205. *Id.* at 554-55 n.13.

206. *Id.* at 534.

207. *Paul*, 424 U.S. 693, 701 (1976).

ger sufficiently averted by his further conclusion in *Parratt* that the state of Nebraska had made available state remedies that were adequate to satisfy the requirements of due process of law.<sup>208</sup> Powell, however, thought this safety valve might not suffice to shut off a flood of potential section 1983 suits; he would prefer the more direct and certain barrier of precluding all actions based on allegations of official negligence.<sup>209</sup>

The federal rights which may be vindicated by invoking section 1983 are those, in the words of the statute, "secured by the Constitution and laws."<sup>210</sup> On the statute's face, the word "laws" is unqualified. Does this mean that a claim based upon any federal statute may be the basis for a section 1983 action?

One might suppose that the meaning of "laws" might be found in the historical circumstances that gave rise to the enactment of the Civil Rights Act of 1871—Congress' concern to protect the rights of the freedmen. It has been commonly thought, therefore, that "laws" in section 1983 means laws enacted to protect civil rights or rights of equality.

Support for this conclusion is found in the language of the jurisdictional statute, 28 U.S.C. § 1343(a). That statute gives federal district courts jurisdiction over civil actions claiming a deprivation, under color of state law, of rights secured by the Constitution "or by any Act of Congress providing for equal rights."<sup>211</sup> It also gives district courts jurisdiction over actions seeking relief under "any Act of Congress providing for the protection of civil rights, including the right to vote."<sup>212</sup>

Both section 1983 and section 1343(a) derive from section 1 of the Civil Rights Act of 1871. When enacted, the statute only protected rights secured "by the Constitution."<sup>213</sup> In 1874, the statute underwent a comprehensive revision, and section 1 of the Civil Rights Act of 1871 was divided into a remedial section and into two jurisdictional sections, one for district courts and one for circuit courts. In the remedial statute, the phrase "secured by the Constitution" (the language of the 1871 statute) became "secured by the Constitution and laws."<sup>214</sup> Oddly enough, the wording of the two jurisdictional sections varied. District courts were given jurisdiction over actions brought to redress deprivations of rights secured by the Con-

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208. 451 U.S. at 543-44.

209. *Id.* (Powell, J., concurring in the result).

210. 42 U.S.C. § 1983 (Supp. III 1979).

211. 28 U.S.C. § 1342(a)(3) (Supp. III 1979).

212. *Id.* § 1343(a)(4).

213. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871).

214. 18 Stat. 347 (1874) (codified as amended at 42 U.S.C. § 1983 (Supp. III 1979)).



stitution or "by any law of the United States."<sup>215</sup> The comparable phrase in the statute conferring jurisdiction on the circuit courts was "by any law providing for equal rights."<sup>216</sup>

In 1911, when the original jurisdiction of the circuit courts was abolished, the Judicial Code of 1911 used the more restrictive language—laws providing for "equal rights"—in describing the jurisdiction of the district courts.<sup>217</sup> This is the language of today's section 1343(a)(3).

In 1979, in *Chapman v. Houston Welfare Rights Organization*,<sup>218</sup> the Supreme Court held that section 1343 does not confer jurisdiction upon a federal district court to hear claims based on the Social Security Act. The Act is neither a statute securing "equal rights" within section 1343(a)(3) nor a statute securing "civil rights" within section 1343(a)(4).<sup>219</sup> Justice Stevens, writing for the majority, observed that the "Congress that enacted section 1343(3) was primarily concerned with . . . cases dealing with racial equality, [and] the Congress that enacted 1343(4) was primarily concerned with . . . civil rights . . . notably the right to vote."<sup>220</sup> Justice Stevens thought it "inappropriate to read the jurisdictional provisions to encompass new claims which fall well outside the common understanding of their terms."<sup>221</sup>

After *Chapman*, the Supreme Court's decision in *Maine v. Thiboutot*<sup>222</sup> one year later is nothing short of remarkable. The case overturned the conventional wisdom that "laws" in section 1983 means laws securing equal rights. In *Thiboutot*, recipients of Aid to Families with Dependent Children (AFDC) benefits invoked section 1983, claiming that state officials had denied them benefits to which they were entitled under the Social Security Act. Justice Brennan concluded that the "plain language" of section 1983 ("and laws") permitted using section 1983 to bring a claim based on the Social Security Act.<sup>223</sup>

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215. 18 Stat. 96 (1874) (codified as amended at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)). See Act of Mar. 3, 1911, ch. 23, § 24(14), 36 Stat. 1087, 1092 (1911) (codified as amended at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)), where Congress merged the jurisdiction of the circuit courts with that of the district courts.

216. 18 Stat. 112 (1874).

217. Act of Mar. 3, 1911, ch. 23, § 24(14), 36 Stat. 1087, 1092 (1911) (codified as amended 28 U.S.C. § 1343(a)(3) (Supp. III 1979)).

218. 441 U.S. 600 (1979). See generally Note, *Jurisdiction under 28 U.S.C. § 1343 Does Not Include Statutorily Based Claims of Welfare Rights Deprivation*, 29 DEPAUL L. REV. 883 (1980).

219. 441 U.S. at 620.

220. *Id.* at 621.

221. *Id.*

222. 448 U.S. 1 (1980).

223. *Id.* at 4.

Scanty as the legislative history of section 1983 is, one has to turn a blind eye to the historical context which gave birth to the statute to conclude that its reference to "and laws" is to be read without qualification. On the historical evidence, Justice Powell, who dissented in *Thiboutot*, has by far the better argument.<sup>224</sup>

The Court having ruled, however, the immediate question is: what will be the effect of *Thiboutot*? How important a decision is it? What will be the implications for the states and their officials now that section 1983 is to be read so broadly?

In his *Thiboutot* dissent, Justice Powell summed up the decision's practical effect: "that state and local governments, officers, and employees now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program, whether or not that program is related to equal or civil rights."<sup>225</sup> In an appendix to his opinion, Justice Powell listed twenty-eight federal statutes—he called it a "small sample"<sup>226</sup>—that arguably could give rise to section 1983 actions after *Thiboutot*.

His list included federal-state regulatory efforts (such as those involving forest lands and water projects) and grant programs (such as welfare, unemployment, and medical assistance programs). Altogether, Powell thought that "literally hundreds" of cooperative regulatory and social welfare laws might be the basis for section 1983 suits.<sup>227</sup>

It is not inconceivable that *Thiboutot* might present a municipality with a Catch-22 problem. Many of the actions taken by local government officials in administering a cooperative program are taken pursuant to federal regulations. Federal officials, of course, cannot be sued under section 1983. Therefore, it is conceivable that, even though a federal agency had issued directives which local officials felt obliged to follow, a court might give damages against the locality in a section 1983 suit. However, the local officials would have the benefit of a good faith defense, denied the local government under *Owen*.<sup>228</sup>

It may be that *Thiboutot*'s reach will not be limited to federal-state coop-

224. See 448 U.S. at 12-22 (Powell, J., dissenting). Justice Powell developed the historical record in greater detail in *Chapman*. See 441 U.S. at 623-44 (Powell, J., concurring).

225. 448 U.S. at 22 (Powell, J., dissenting) (emphasis in original).

226. *Id.* at 34.

227. *Id.* at 34-37. See Peters, *supra* note 172; *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 223-231 (1980); Note, *Maine v. Thiboutot: Has the Supreme Court Opened the Floodgates for Section 1983 Claims?*, 20 J. FAM. L. 127 (1981).

228. Witnesses at the hearings on S. 584 gave, as examples, suits that might be brought under the Clean Air Act or under the State and Local Fiscal Assistance Act of 1972. See *Municipal Liability Hearings*, *supra* note 49, at 96-97 (statement of NIMLO).

erative programs. Just as one can attack a state law on the ground that it burdens a federal constitutional right (even though it does not by its terms intend to do so), a plaintiff might argue that section 1983 gives relief against a state action alleged to burden rights secured by a federal statute—any federal statute.<sup>229</sup>

In practical effect, *Thiboutot*'s impact may be less dramatic than it seems on its face in light of the ways litigants had succeeded even before *Thiboutot* in bringing federal statutes unrelated to civil rights into a section 1983 action. It was not difficult for a plaintiff's lawyer to fashion a section 1983 complaint which contained, in addition to a statutory claim, an allegation of the deprivation of a constitutional right (commonly an equal protection claim). Then, even if the constitutional claim was dropped from the suit, the court could proceed by way of pendent jurisdiction to decide the statutory claim.<sup>230</sup>

There is little doubt that, legislative history aside, the federal courts well before *Thiboutot* had fallen increasingly into the practice of permitting section 1983 actions to be brought to vindicate statutory claims. Even Justice Powell admitted that there are Supreme Court decisions "premised upon the assumption that § 1983 cover a broad range of federal statutory claims."<sup>231</sup> But, he submitted that the assumption had been made "uncritically"<sup>232</sup> and that, until *Chapman* in 1979, no justice of the Court had undertaken a close and thorough examination of the question, including the legislative history.<sup>233</sup> Indeed, in two recent cases, the Court reserved the question decided in *Thiboutot*.<sup>234</sup> Nevertheless, in assessing *Thiboutot*'s practical impact, it may be more a ratification of an evolving practice than a green light for district courts to embark on an entirely new course. This may be especially true in section 1983 actions brought to challenge state interpretation of the Social Security Act, which had become common practice in the lower courts.<sup>235</sup> Viewed from this perspective, *Thiboutot* may be important insofar as it resolves any doubt judges might have had about permitting statutory claims to be based directly on section 1983 and, further, insofar as it encourages litigants to look to yet other federal statutes as a basis for section 1983 lawsuits—the fear voiced by Justice Powell.

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229. See 448 U.S. at 22, 23 n.12 (Powell, J., dissenting).

230. See, e.g., *Rosado v. Wyman*, 397 U.S. 397 (1970).

231. *Chapman*, 441 U.S. at 644 (Powell, J., concurring).

232. *Id.*

233. *Id.*

234. See *Southeastern Community College v. Davis*, 442 U.S. 397, 405 n.5 (1979); *Hagens v. Lavine*, 415 U.S. 528, 533 n.5 (1974).

235. Lower court cases are collected in the ACLU's amicus brief in *Thiboutot* at 33-36.

Although *Thiboutot* gives new breadth to section 1983, it does not expand the jurisdiction of the federal courts. In its 1979 *Chapman* decision, the Court held that the jurisdiction of the federal district courts under 28 U.S.C. §§ 1343(a)(3) and (4) does not encompass a claim that a state welfare regulation is invalid because it conflicts with the Social Security Act.<sup>236</sup> *Thiboutot* permits such a claim to be brought under section 1983, but it does not disturb the holding in *Chapman*. The result, of course, is an anomaly: that the remedial section (1983) is read more broadly than the jurisdictional sections.

As a result, claims of the *Thiboutot* type will be brought in state courts, as was *Thiboutot* itself. Because the Supreme Court has never decided whether state courts *must* hear section 1983 claims, that is an open question. The Court has held, however, that state courts *may* hear such cases.<sup>237</sup> *Thiboutot* may pose other concerns for the states, but, to the extent that it results in cases being brought in state rather than federal courts, it does not give rise to the problems associated with federal court supervision of state programs and institutions.

It is states and localities, not the United States, which must worry about the impact of *Thiboutot*. Section 1983 grants no right of action against the United States. A federal statute may, of course, provide explicitly for private actions to enforce the statute's terms; otherwise, the private litigant must attempt to persuade a court to imply a private cause of action against the government, with no help from section 1983.<sup>238</sup>

Even where the Court has already implied a cause of action under a federal statute, or would be willing to do so, *Thiboutot* has particular importance in making damages available as a remedy. It is one thing to decide that a private party may invoke a federal statute as the basis for injunctive relief, e.g., to demand admission to a university alleged to have discriminated on the basis of sex. It is quite another thing to be able to seek both injunctive relief and damages, as is possible under section 1983.

Because of *Quern v. Jordan*,<sup>239</sup> states do not face retrospective damages under section 1983 and at least have the comfort of being able to offer, as a defense, that they acted in good faith. Municipalities, however, have particular reason to be concerned about the reach of the Supreme Court's section 1983 decisions. *Monell* makes them liable for damages in a section 1983 suit, *Thiboutot* expands the categories of federal statutes which they

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236. 441 U.S. at 620.

237. See *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980).

238. See 448 U.S. at 23-24 (Powell, J., dissenting).

239. 440 U.S. 332 (1979).

may be charged with violating, and *Owen* precludes their pleading the good faith of their agents and employees as a defense.

*Thiboutot* is also important for its holding regarding the award of attorneys' fees. The Civil Rights Attorney's Fees Awards Act of 1976 permits a court, in its discretion, to award reasonable attorney's fees as part of the costs allowed the prevailing party.<sup>240</sup> In *Thiboutot*, the Court ruled that awards under the 1976 Act may be given to the prevailing party in a section 1983 action.<sup>241</sup>

For civil rights and other public interest lawyers, this aspect of *Thiboutot* is of unquestioned importance. The concept of private citizens bringing lawsuits as "private attorneys general" is now a familiar one. There is an obvious public interest in the outcome of such litigation, and the public interest bar has come to depend heavily on the award of fees in civil rights, environmental, and other such litigation.<sup>242</sup> In 1976, the Supreme Court dealt a harsh blow to public interest lawyers when, in *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>243</sup> it overturned a lower court's award of attorneys' fees to the environmentalists who had prevailed in the litigation. The Court reasoned that fees could not be awarded without statutory authorization.<sup>244</sup> Congress moved quickly to undo the damage wrought by *Alyeska*, and the result was described as being a "fee-shifting mechanism" aimed at enforcing federal law "by enlisting private citizens as law enforcement officials."<sup>245</sup>

With *Thiboutot*, the 1976 Act becomes all the more important, because an award under the act may be made to the prevailing party in any section 1983 action—and *Thiboutot* holds that section 1983 may be used to bring a claim based upon federal laws generally, not just those providing for equal rights. The attorneys' fees aspect of *Thiboutot* is as important to states as to municipalities. Even though *Quern* protects states as such from damage awards in section 1983 actions, the Court held in *Hutto v. Finney*,<sup>246</sup> that when Congress passed the 1976 statute it "undoubtedly" intended to set

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240. Pub. L. No. 94-559, codified in 42 U.S.C. § 1988 (1976). See Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. CHI. L. REV. 332 (1980), Note, *Promoting the Vindication of Civil Rights through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980).

241. 448 U.S. at 9.

242. See Leventhal, *Attorneys' Fees for Public Interest Representation*, 62 A.B.A.J. 1134 (1976); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973).

243. 421 U.S. 240 (1975).

244. *Id.* at 271.

245. 122 CONG. REC. 33,314 (1976) (statement of Sen. Abourezk).

246. 437 U.S. 678 (1978).

aside states' immunity from retroactive relief. Both the act's language and its legislative history support the conclusion that the statute authorized "fee awards payable by the States when their officials are sued in their official capacities."<sup>247</sup> Moreover, an award of attorneys' fees under the 1976 Act requires no finding of bad faith on the part of the state officials.<sup>248</sup>

Professor George D. Brown has suggested that the availability of attorneys' fees in grant litigation "may well be the most significant result of *Thiboutot*."<sup>249</sup> The Washington State Attorney General believes that the Civil Rights Attorneys' Fees Act costs the states and municipalities "more money in attorneys' fees than § 1983 costs us in actual damages."<sup>250</sup> In individual cases, the award of attorneys' fees can far outstrip the amount at issue in the litigation.<sup>251</sup>

The question of standing—the ability of an individual plaintiff to base a cause of action on a particular federal statute—may be important in testing how far *Thiboutot* will reach. Congress may, of course, explicitly provide a civil remedy.<sup>252</sup> More often, however, a statute is silent on the question of whether private parties have the right to seek enforcement of their rights in court. In such a case, if a plaintiff cannot look to section 1983 as his passport into court, he must hope that the court will be willing to imply a private right of action from the statute.

The Supreme Court has charted an uneven course in responding to litigants' efforts to have private causes of action implied from federal statutes. Before the advent of the Warren Court, there was no consistent pattern of support or opposition in this area.<sup>253</sup> In a 1964 case,<sup>254</sup> the Court handed down a decision which marked the beginning of a decade characterized by a greater willingness to imply a private right of action.<sup>255</sup>

247. *Id.* at 693-94.

248. *Id.* at 699 n.32.

249. *Municipal Liability Hearings*, *supra* note 49, at 335-36 (statement of Prof. George D. Brown).

250. *Id.* at 531 (statement of Kenneth O. Eikenberry, representing the National Ass'n of Attorneys General).

251. *See, e.g.*, *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc) (award of \$160,000 attorneys' fees for obtaining \$33,000 backpay).

252. *See, e.g.*, provisions for private actions under Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f), (g) (1976).

253. For example, *compare* *Virginia Ry. Co. v. System Fed'n No. 40 Ry. Employees*, 300 U.S. 515 (1937) (implying a judicial remedy) *with* *General Committee v. Southern Pac. Co.*, 320 U.S. 338 (1943) (refusing to imply a private cause of action).

254. *J.I. Case v. Borak*, 377 U.S. 426 (1964).

255. *See, e.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

In 1975, the Court in *Cort v. Ash* outlined a four part test to consider when deciding whether to imply a private right of action.<sup>256</sup> Since that decision, the Court has followed a stricter approach to implying private actions and has denied attempts to create them.<sup>257</sup> Yet not every effort has been rebuffed; in 1979, the Court was willing to imply a private right of action from Title IX of the Education Amendments of 1972, thus permitting a plaintiff to sue a medical school for denying her admission on the basis of sex.<sup>258</sup> In the several years since *Cort v. Ash*, it appears that the lower courts, unlike the Supreme Court, have been fairly receptive to litigants' attempts to imply a private cause of action from a variety of federal statutes.<sup>259</sup>

One reading of *Thiboutot* would solve such plaintiffs' standing problems. Under this analysis, a plaintiff would not need to explore Congress' intent to create private rights of action under a given federal statute nor otherwise satisfy *Cort v. Ash*. The expanded interpretation of section 1983 would bypass that problem nicely.

It may be, however, that the Court will use the principle of *Cort v. Ash* to limit the impact of *Thiboutot*. If the Court wishes to avoid the open invitation to section 1983 litigation described by Justice Powell in his *Thiboutot* dissent, it could simply hold that, unless a private cause of action can be implied under the statute sought to be vindicated, the plaintiff lacks standing to invoke section 1983. This approach would provide a way to distinguish between Social Security claims, where it is easier to conceive an individual's right to sue, and joint federal-state regulatory programs, where the notion of individual entitlement is less obvious. From a civil rights lawyer's standpoint, however, this approach would make *Thiboutot* something of a Barmecide feast—a great deal less than meets the eye.

In the October 1980 Term, it appeared that the justices would have occasion to expand the reach of *Thiboutot*. The Court of Appeals for the Third Circuit had upheld a lower court's grant of relief to persons complaining of conditions at a Pennsylvania state hospital for the mentally retarded.<sup>260</sup> Among other things, the Third Circuit, applying *Cort v. Ash* standards, implied a private right of action for mentally retarded persons under the

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256. 422 U.S. 66, 78 (1975).

257. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1 (1977). In *Cannon v. University of Chicago*, 441 U.S. 677, 698 (1979), even while implying a private cause of action in that case, Justice Stevens characterized the Court's post-*Cort* standard as a "strict" approach.

258. *Cannon v. University of Chicago*, 441 U.S. at 680.

259. In his *Cannon* dissent, Justice Powell lists no fewer than 20 such opinions by courts of appeals in the four years between *Cort* and *Cannon*. *Id.* at 741-42 (Powell, J., dissenting).

260. *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979).

Developmentally Disabled Assistance and Bill of Rights Act of 1975.<sup>261</sup> Because *Thiboutot* had been handed down after the petition for certiorari had been filed in the Pennsylvania case, the Court, in granting certiorari in the latter case, requested counsel to brief and argue an additional question: "Does 42 U.S.C. § 1983 provide a private remedy to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act . . . ?"<sup>262</sup>

The Supreme Court's ultimate decision in *Pennhurst State School & Hospital v. Halderman*<sup>263</sup> failed to supply the anticipated gloss on *Thiboutot*. The Court reversed the Third Circuit, concluding that the 1975 statute did not create a substantive right in favor of the mentally retarded to "appropriate treatment" in the "least restrictive" setting.<sup>264</sup> Hence, the Court had no need to reach the question of whether, there being such a substantive right, there might be a private right of action under section 1983 to enforce it.<sup>265</sup>

*Pennhurst* nevertheless sparked a debate among the justices revealing their sharp differences on the reach of *Thiboutot*. Counsel for the mentally retarded patients in *Pennhurst* argued that they should be able to bring suit to compel compliance with the requirements of the 1975 statute that each state, as a condition of receiving federal funds under the act, furnish certain assurances to the Secretary of Health and Human Services.<sup>266</sup> This issue was remanded for further consideration by the Third Circuit, but Justice Rehnquist, writing for the majority, said that it was "at least an open question" whether an individual's interest in having the state provide those assurances is a "right secured" by laws of the United States within the meaning of section 1983.<sup>267</sup> Moreover, it was "unclear" whether the express remedy contained in the 1975 Act—termination of funding by the Federal Government in the event of state noncompliance with federally imposed conditions—was exclusive.<sup>268</sup>

Justice Rehnquist's *Pennhurst* opinion seems to contain clear hints that he, for one, wishes to contain the expansive potential of *Thiboutot*. He impliedly states that an individual's effort to enforce the statutory requirement of state assurances to the federal government does not rise to the

261. *Id.* at 97-100.

262. *Pennhurst Parents-Staff Ass'n v. Halderman*, 447 U.S. 904 (1980).

263. 451 U.S. 1 (1981).

264. *Id.* at 18.

265. *Id.* at 28 n.21.

266. *See* 42 U.S.C. §§ 6011, 6063(b)(5)(C) (1976).

267. 451 U.S. at 28.

268. *Id.*



level of the individual beneficiary's claim in *Thiboutot* that state law prevented him from receiving federal funds to which he was entitled.<sup>269</sup> Additionally, Rehnquist's lightly veiled suggestion that the 1975 Act's "express" remedy surely must be "exclusive" draws directly upon Justice Powell's suggestion, in his *Thiboutot* dissent, that section 1983 would not be available where the governing statute provides an exclusive remedy.<sup>270</sup>

Some of the Rehnquist's colleagues were distinctly unsettled by his efforts to curb *Thiboutot*'s implicit ambit. Justice Blackmun, concurring in *Pennhurst*, refused to join what he styled the "advisory" portion of Justice Rehnquist's opinion.<sup>271</sup> He was unhappy with the Court's appearing "strongly to intimate that it will not view kindly any future positive holding" permitting private parties to enforce sections of the 1975 Act.<sup>272</sup> Justice White, who, contrary to the majority, read the statute to create substantive rights in behalf of the mentally retarded, made his understanding of *Thiboutot* even more explicit: "In essence, *Thiboutot* creates a presumption that a federal statute creating federal rights may be enforced in a § 1983 action."<sup>273</sup>

The debate in *Pennhurst* suggests the lines along which future battles over *Thiboutot* type issues will be fought. Some justices, like Brennan and Marshall (who joined White's opinion in *Pennhurst*), will, in this context and others, push for ready access by individuals to a federal remedy to vindicate federal laws. Others, following the interpretation of Justices Rehnquist and Powell that the Court has gone too far already, will seek ways of checking section 1983. The rear guard action will be fought on at least two fronts. One is to find that there is no "right" under federal law, hence nothing to which section 1983 can be attached. The other is to read a governing statute to provide an exclusive remedy, thus preempting a section 1983 remedy.

Two months after *Pennhurst*, the Court decided *Middlesex County Sewerage Authority v. National Sea Clammers Association*.<sup>274</sup> The *Middlesex* case is a crisp example of using the "exclusive remedy" avenue to limit section 1983 suits. Two federal statutes—the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act—expressly authorize private persons to bring citizen suits to enjoin statutory

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269. *Id.*

270. *Id.*

271. *Id.* at 32 (Blackmun, J., concurring in part and concurring in judgment).

272. *Id.*

273. *Id.* at 51 (White, J., dissenting in part).

274. 101 S. Ct. 2615 (1981).

violations.<sup>275</sup> In *Middlesex*, Justice Powell, writing for the majority, held that those statutes do not implicitly create a private right of action for damages or for injunctive relief in addition to the statutes' express remedies.<sup>276</sup> As to the private parties' efforts to invoke section 1983, Powell concluded that the two acts' comprehensive enforcement mechanisms supplanted remedies otherwise available under section 1983.<sup>277</sup>

The water pollution and marine protection statutes at issue in *Middlesex* did not explicitly rule out recourse to section 1983 remedies. Justice Powell reached his conclusion about the exclusivity of the two statutes' remedies by fashioning a rule that "[w]hen the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."<sup>278</sup> Upon examining the two governing statutes in *Middlesex*, Justice Powell found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies"<sup>279</sup> in those statutes.

The importance of *Middlesex* as a sequel to *Thiboutot* and *Pennhurst* lies, among other things, in emphasizing how much turns on where one perceives the status quo: Does one presume section 1983 relief to be available unless a convincing case is made that Congress intended the remedies in another statute to be exclusive, or does one presume that Congress, having passed another statute, intended to supplant the section 1983 remedy? The issue may be decided according to who has the burden of proof. In *Middlesex*, Justice Stevens, who dissented in part, complained that the majority was putting the burden on the section 1983 plaintiff to show Congress' explicit intention to permit violations of the substantive statute to be redressed by way of section 1983. Stevens thought the burden should be "on the defendant to show that Congress intended to foreclose access to the § 1983 remedy as a means of enforcing the substantive statute."<sup>280</sup> In short, for Stevens, a section 1983 remedy should be the norm, with the burden upon the defendant to show otherwise.

Justice Stevens' interpretation notwithstanding, Justice Powell's opinion does not in fact put the burden on the plaintiff to show that Congress in-

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275. 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979); 33 U.S.C. §§ 1401-1444 (1976 & Supp. III 1979).

276. 101 S. Ct. at 2625.

277. *Id.* at 2627.

278. *Id.* at 2626.

279. *Id.*

280. *Id.* at 2630 n.11 (Stevens, J., concurring in the judgment in part and dissenting in part).

tended, in enacting a substantive statute, to preserve recourse to section 1983. Justice Powell's conclusion of exclusivity in *Middlesex* turns on his view of the comprehensive nature of the remedies provided in the water pollution and marine protection statutes. Implicit in the opinion is the requirement that a section 1983 defendant demonstrate sufficient comprehensiveness for the Court to conclude that Congress intended an exclusive remedy. Burden of proof language aside, however, there is a difference of temperament in these two interpretations of section 1983 opinions. At the outset of Justice Stevens' opinion, there is the telling declaration that it is "the business of courts to fashion remedies for wrongs."<sup>281</sup> Obviously, he will resolve doubts about access to section 1983—and about implying a private right of action from federal statutes in general—in favor of permitting the private action. Justice Powell, the dissenter in *Thiboutot*, is more reluctant about permitting such easy access to the courts. He does not deny Congress' power to create remedies, through section 1983 or otherwise, but he is inclined to resolve doubts against private actions.

The course of the Court's post-*Thiboutot* decisions is likely to be as uncertain and episodic as its case-by-case determination as to whether private rights of action may be implied from federal statutes generally. The results in given cases will turn heavily upon underlying philosophies about the desirability of easy access to court—Justice Brennan's liberality with Justice Powell's caution—and upon presumptions indulged, such as by White in *Pennhurst*, as to whether the ability to invoke section 1983 should be taken as the norm.

These musings on *Thiboutot* and its sequels become academic if Congress enacts Senator Hatch's S. 584. That bill would strike at the heart of the controversy by deleting section 1983's reference to "and laws" and substituting "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States."<sup>282</sup> An ACLU critic of S. 584 has argued that *Middlesex* has in effect done most of what the bill would do: that *Middlesex* cuts back so sharply on *Thiboutot* that the earlier case's effect "is really in a very limited area and may be limited to Social Security Act cases alone."<sup>283</sup> One understands, from the standpoint of tactics, why this argument would be advanced as part of an effort to head off S 584's passage. But one suspects that most people reading *Middlesex* and the other relevant cases in this area would find the question of *Thiboutot*'s present meaning far from clearly resolved.

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281. *Id.* at 2628.

282. *See supra* note 46 and accompanying text.

283. *Municipal Liability Hearings, supra* note 49, at 405 (statement of Prof. Leon Friedman).

## VI. SYSTEMATIC RELIEF

Public law litigation has increasingly taken on a systematic character. The paradigm lawsuit over constitutional issues today is not the action by a lone individual for damages; it is the class action seeking injunctive relief to significantly alter the way government carries out some function. The model was set in the school desegregation cases where federal courts undertook the job of redesigning school systems. The example set by the school cases soon spread to cases in which litigants were asking courts to reapportion legislatures, reform jails and prisons, clean up mental hospitals, oversee police departments, and make policy for various other state and local functions.

In 1908, the first Justice Harlan, dissenting in *Ex parte Young*,<sup>284</sup> feared a "radical change in our governmental system," in which federal courts would "supervise and control the official action of the States as if they were 'dependencies' or provinces."<sup>285</sup> Perhaps Justice Harlan had been reading Jules Verne. Today, federal judges act as school superintendents, prison wardens, and superintendents of state hospitals. In Boston, because of the local school committee's resistance to desegregation orders, Judge Garrity finally took the step of placing South Boston High School under federal court receivership.<sup>286</sup> The battles between Judge Frank M. Johnson, Jr., and officials in Alabama are legendary. His decision in *Wyatt v. Stickney*,<sup>287</sup> ordering reforms in Alabama's mental hospitals, is a well-known example of the new brand of institutional litigation.

It is not hard to understand how judges get drawn into presiding over systematic reform of a state institution. Frequently, the conditions complained of, as in the mental hospital cases, are wretched in the extreme. Moreover, local leadership, as in the Boston case, may be bitterly opposed

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284. *Ex parte Young*, 209 U.S. 123 (1908).

285. *Id.* at 175 (Harlan, J., dissenting).

286. *Morgan v. Kerrigan*, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom. Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). This was one in a series of orders in the Boston school desegregation controversy. See *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1236-39 (1977). See also Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55 (1976); Roberts, *The Supreme Court Gambles in Allowing the Continuation of Federal Court Control Over a Local High School*, 12 NEW ENG. L. REV. 577 (1977).

287. See *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala.), *further hearing*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala.); 344 F. Supp. 387 (M.D. Ala.), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (affirmed in part; remanded in part and decision reserved in part). See Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). On Judge Johnson, see R. KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.* (1978).

to the court's intervention and do all it can to frustrate the court's rulings, leading the judge to displace the state or local body and lay down the details of change himself.

Professor Abram Chayes has described this "public law model" of litigation:

The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before this court and require the judge's continuing involvement in administration and implementation.<sup>288</sup>

Sweeping use of federal equity power has obvious implications for federalism. When a judge undertakes systematic relief, he displaces the elected and appointed officials who normally supervise the state or local function that is the object of that litigation. Systematic relief typically goes beyond the traditional negative prohibition of telling an official not to do something and imposes affirmative obligations upon state or local officials. There is a genuine danger of a judge's "tunnel vision"; concerned with the problem placed before him in the particular lawsuit, for example, appalling conditions in a mental hospital, he has no occasion to be concerned about the impact of his ruling on limited state or local financial resources. Understandably, the judge is likely to say that constitutional rights cannot be denied by an appeal to budget difficulties.<sup>289</sup> As a result, public resources may fund a function or service which is the subject of litigation at the expense of other valuable services not before the court. This is not intended to insinuate that a judge does not act out of felt necessity and on the basis of a demonstrated need, but it does call attention to the extent to which systematic reforms, undertaken through the federal courts' equity powers, displace the normal democratic and political process.<sup>290</sup>

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288. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

289. *See, e.g.*, *Rhem v. Malcolm*, 527 F.2d 1041 (2d Cir. 1975) (per curiam): "More importantly, an individual's constitutional rights may not be sacrificed on the ground that the city has other and more pressing priorities." *Id.* at 1043-44.

290. There is a growing body of literature on the implications of institutional litigation. A selective list would include D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Chayes, *supra* note 288; Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institu-*

There are signs that at least some of the justices on the Burger Court are concerned about the activist role of federal courts in undertaking supervision of state and local functions. This concern is manifested in *Rizzo v. Goode*.<sup>291</sup> Alleging police abuses against minority citizens, the plaintiffs in *Rizzo* brought a class action seeking broad injunctive relief against Philadelphia's mayor and commissioner of police. The district judge found numerous violations of citizens' rights and ordered the defendants to submit a plan for handling citizens' complaints and revising police training procedures.<sup>292</sup>

The Supreme Court reversed. As Justice Rehnquist framed the question which the case raised: "We granted certiorari to consider petitioner's claims that the judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions."<sup>293</sup> Justice Rehnquist based his conclusion that injunctive relief was unwarranted on several factors, among them that the record did not show a pervasive pattern of discriminatory acts by police officers.<sup>294</sup> Federalism was another factor, and he emphasized that the principles of federalism governing the relationship between federal courts and state governments might have their greatest force where injunctive relief is sought against pending state criminal proceedings<sup>295</sup> (the *Younger* line of cases discussed above). He found those principles also applicable, however, where relief is sought against an official of a state or local government.<sup>296</sup>

For those who look to federal courts as primary forums for the enforcement of federal rights, *Rizzo* was an unwelcome decision. Archibald Cox thought that *Rizzo* gave "extraordinary weight" to official action and that its approach reflected too rigid a barrier against the effective protection of

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*tional Litigation*, 93 HARV. L. REV. 465 (1980); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Symposium, *Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267 (1981). The Alabama symposium includes an article by Judge Frank M. Johnson, Jr., perhaps the best known of all federal judges for his institutional reform decrees. See Johnson, *The Role of Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981).

291. 423 U.S. 362 (1976).

292. 357 F. Supp. 1289 (E.D. Pa. 1973).

293. 423 U.S. at 366.

294. *Id.* at 375.

295. *Id.* at 379.

296. *Id.* For a critical review of *Rizzo*, see Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

constitutional rights.<sup>297</sup>

*Rizzo* represents the Court's groping for some way to accommodate the two interests which furnish the central theme of this paper: federalism, particularly a concern for local control of local institutions, and individual rights, including the principle of a federal forum for the vindication of federal rights. Because several factors formed the foundation for Justice Rehnquist's opinion, however, it is difficult to measure what applications the decision may have in other contexts. Some observers have suggested that, in fact, *Rizzo* is not likely to foreshadow a significant curtailing of institutional litigation in the federal courts.<sup>298</sup>

One reason why *Rizzo* seems not to have spawned a string of sequels is that, except in the area of school desegregation, the Supreme Court has not been notably active in reviewing lower court decisions undertaking institutional reforms. Moreover, concerning the school cases, the Court's decisions have been marked by a largely generous attitude toward federal courts' equity powers. For a time, beginning about 1976, it appeared as if the Court would begin to rein in the lower courts in desegregation cases. For example, in a case from Pasadena, California, the Court overruled a federal judge who had ordered annual reassignment of students so that there would never be a majority of minority students in any of the city's schools.<sup>299</sup> In other cases, the Court has drawn a line between de facto and de jure segregation, requiring that remedial decrees turn on a de jure showing.<sup>300</sup>

Two 1979 cases, however, suggest a permissive attitude to lower court findings offered in support of system-wide desegregation orders. Reviewing cases from Columbus and Dayton, Ohio, the Court upheld comprehensive orders in a way that reflected a far greater tolerance for the fashioning of systematic relief than the Court showed in *Rizzo*.<sup>301</sup> Justice Rehnquist, dissenting in the Columbus case, said that the remedy affirmed in that case was "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system"<sup>302</sup>—the reassignment of 42,000 of the system's 96,000 students along with the reassignment of

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297. Cox, *Federalism and Individual Rights under the Burger Court*, 73 Nw. U.L. REV. 1, 18 (1978).

298. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-41, at 154-56 (1978). See also Eisenberg & Yeazell, *supra* note 290, at 504-05.

299. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

300. See Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

301. See Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

302. 443 U.S. at 489 (Rehnquist, J., dissenting).

teachers and administrators, a complete reorganization of the grade schools, the closing of thirty-three schools, and increased busing of 37,000 students. Justice Powell, also a dissenter, complained that "the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country."<sup>303</sup>

A striking example of the Court's tolerance in permitting federal courts to exercise their equity powers in school cases, where there is sufficient basis for a finding of de jure segregation, is found in the Court's 1977 decision in *Milliken v. Bradley*.<sup>304</sup> In *Milliken I*,<sup>305</sup> the Court had ruled, in a five to four decision, that a federal judge had exceeded his powers by ordering that Detroit's schools, heavily black, be combined with the surrounding suburban districts, which were predominantly white. There being no basis for a finding of constitutional violations in the suburban districts, the judge could not include them in his order.

*Milliken I* turns on the principle that the scope of the remedy must be determined by the scope of the violation. But once a violation has been proven, *Milliken II* shows how sweeping the federal court's remedial powers can be. In *Milliken II*, the Court upheld the district court's ordering compensatory or remedial education programs for Detroit school children who had been subjected to past acts of de jure segregation. Moreover, rejecting arguments based on the eleventh amendment, the Court approved the lower court's requiring the state of Michigan to pay about half the additional cost of those programs—almost \$6 million from the state.<sup>306</sup> *Milliken II* demonstrates that federal injunctive relief can not only be comprehensive, but expensive as well.

In short, Burger Court opinions, especially *Rizzo* and some of the school desegregation cases, reflect a restlessness about the sweep of federal court injunctive power, especially where it is used to undertake systematic reform of state and local institutions. In those opinions, federalism becomes a factor to weigh in reviewing the legitimacy and propriety of remedies ordered by lower courts. Yet, when one looks at the overall thrust of Burger Court opinions, it is difficult to conclude that the federal courts have been swayed in any fundamental way from their pattern in exercising equity powers.<sup>307</sup>

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303. *Id.* (Powell, J., dissenting).

304. 443 U.S. 267 (1977).

305. 418 U.S. 717 (1974).

306. See 433 U.S. at 292-93 (Powell, J., concurring).

307. For a fuller discussion, see Howard, *The Supreme Court and Federalism in the Courts: The Pendulum of Federalism* 49 (Annual Report of Chief Justice Earl Warren



## VII. FEDERALISM AND THE SUPREME COURT

In tracing the Supreme Court's interpretations of the civil rights statutes, one finds the Court constantly making judgments about federalism. Like other constitutional values, federalism is not a static concept. The framers of the Constitution brought their ideas about the federal system to bear on their work, and subsequent generations have added insights drawn from the evolving nature of American society. Yet, for all the changes that two hundred years have brought, federalism remains one of the important forces in constitutional interpretation.

Interpreting section 1983 and other civil rights statutes is just one of the ways in which the Supreme Court makes judgments about federalism. Other examples include the following:

1. *Imposing national standards.* The Warren Court succeeded in using the fourteenth amendment to apply nearly all the requirements of the Bill of Rights to the states.<sup>308</sup> On the present Court, Justice Powell has questioned whether such "jot for jot and case for case" application of federal standards to state criminal procedures does not derogate principles of federalism and deprive the states of the opportunity to experiment with useful innovations.<sup>309</sup> A majority of the court, however, has stood by the standards of "incorporation" laid down by the Warren Court.

In obscenity cases, by contrast, the Burger Court has rejected the notion of a national standard. The Court has ruled that "community standards" applied by juries in obscenity cases need not be national standards. Chief Justice Burger does not interpret the first amendment "as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."<sup>310</sup>

2. *Reviewing state criminal convictions.* A constant on the Supreme Court's docket is the review of state criminal cases. One way in which the Court can give the states more breathing room is to relax the substantive standards that apply in those cases. Much has been written about whether the Burger Court is more "conservative" than was the Warren Court,<sup>311</sup> and the record on this score is a mixed one. The Court has moved in new

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Conference on Advocacy in the United States, Roscoe Pound-American Trial Lawyers Foundation; Wash. D.C., 1979).

308. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial in criminal cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

309. *Apodaca v. Oregon*, 406 U.S. 375-76, 404 (1972) (Powell, J., concurring) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting)).

310. *Miller v. California*, 413 U.S. 15, 32 (1973).

311. See Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 LAW & CONTEMP. PROBS. 7 (Summer 1980).

directions since the departure of Earl Warren, and this is especially obvious in criminal law. Much of the change can be attributed to a greater sensitivity to the needs of law enforcement, but a concern for federalism is an additional factor.

Substantive standards aside, the Court can also make institutional judgments, grounded in considerations of federalism, about the relationship between state and federal courts. The Warren Court made it much easier for state prisoners to use federal habeas corpus to collaterally attack their state convictions in federal courts.<sup>312</sup> Justice Powell argued in 1973 that the Supreme Court had gone too far: "In my view, this Court has few more pressing responsibilities than to restore the mutual respect and balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate."<sup>313</sup> In 1976, the Court moved in Justice Powell's direction by holding that federal habeas corpus is not available to review a state prisoner's fourth amendment claim where there has been a full and fair opportunity to adjudicate that claim in the state courts.<sup>314</sup>

3. *Reconciling state and federal law.* The Constitution spells out the respective competence of the states and the federal government in very general terms; therefore, the Supreme Court is regularly called upon to act as an arbiter of the federal system. One of the Court's roles is to see that state measures do not unduly impinge on federal interests. Sometimes, a state law is invalidated because it conflicts with a federal statute: the doctrine of federal preemption. In other cases, a state's action may be found to burden or impinge upon a national interest, such as free flow of commerce, even though Congress has not acted.

The Court's readiness to strike down a state law for conflicting with a federal statute or impinging upon a national interest is the subject of ongoing debate among the justice. Justice Black complained that his brethren acted as a "super-legislature" in reviewing the merits of state laws that allegedly burdened interstate commerce.<sup>315</sup> In fact, whether one looks at the cases in which state law is measured against national statutes or regulations, or at cases in which state acts are weighed against the Constitution itself, such as the commerce clause, it is hard to trace any consistent course in the Court's opinions. Some decisions seem to lean toward state interests, for example, Chief Justice Burger's opinion upholding the states' power to prohibit record piracy and concluding that neither the Constitu-

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312. *See, e.g.,* *Fay v. Noia*, 372 U.S. 391 (1963).

313. *Schneckoeth v. Bustamonte*, 412 U.S. 218, 265 (1973) (Powell, J., concurring).

314. *Stone v. Powell*, 428 U.S. 465 (1976).

315. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 788 (1945) (Black, J., dissenting).

tion's copyright clause nor federal law preempted the state law.<sup>316</sup> Other cases give preference to national interests, such as the holding that the Federal Aviation Act preempted a locality's ordinance regulating the hours of a jet takeoff at a local airport.<sup>317</sup>

4. *Limiting national power.* Symmetry would suggest that a Court able to protect national interests from impingement by the states would also protect the states' interests from invasion by the federal government. During the early period of this century, just such a notion of "dual federalism" permeated the Court's opinions. In the famous *Child Labor Case*,<sup>318</sup> the Court struck down a federal statute banning the interstate shipment of goods produced by child labor. The Constitution's grant of the power to regulate commerce to Congress did not, the Court held, include the authority to "control the States in their exercise of the police power over local trade and manufacture."<sup>319</sup>

This constricted reading of the commerce clause died with the constitutional revolution of 1937. After initial skirmishes over the New Deal, which provoked President Roosevelt's famous "Court-packing" plan, the justices retreated. In modern times, generations of law students have been taught that there appeared to be no limits to Congress' commerce power—certainly none that the Court would declare.

This was the understanding of the commerce power until the Court's decision in *National League of Cities v. Usery*—in 1976.<sup>320</sup> Conventional wisdom about the Court and the commerce clause was confounded when a majority of five justices ruled that Congress had exceeded its constitutional authority by subjecting state and local government employees to federal minimum wage and maximum hour requirements. Justice Rehnquist's rationale was that the federal law displaced the states' freedom to structure "traditional government functions" and that, therefore, it interfered with functions essential to the states' "separate and independent existence."<sup>321</sup>

*National League of Cities* is the first case since 1937 in which the Court has used the concept of federalism to limit Congress' commerce power. The decision does not question Congress' power to regulate *private* activities,<sup>322</sup> as settled in post-1937 cases, but where Congress seeks to place

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316. *Goldstein v. California*, 412 U.S. 546, 571 (1973).

317. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

318. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

319. *Id.* at 273-74.

320. 426 U.S. 833 (1976).

321. *Id.* at 851-52.

322. The Court's narrow holding only considers the impact of the federal law or the "traditional governmental functions" of the state, not whether the law could be applied to private individuals. *See id.* at 852.

mandates directly upon states as states, *National League of Cities* reveals that the tenth amendment has not, as many had thought, been stripped of all meaning.

The importance of *National League of Cities* is unclear. As an interpretation of Congress' Article I powers, the decision's rationale does not carry over to cases involving statutes based upon Congress' power under section 5 of the fourteenth amendment—an amendment whose substantive provisions expressly operate upon the states.<sup>323</sup> Even so, a decision by only a one-vote margin, with no solid majority on any one theory of the case, may be an unstable precedent. The six years since its pronouncement have added little gloss to *National League of Cities*, at least in the Supreme Court.<sup>324</sup> In 1981, the Court reversed a district court's ruling that the Surface Mining Control and Reclamation Act of 1977 violated the tenth amendment by interfering with the states' traditional governmental function of regulating land use. In so doing, the Court wrote a decision seeming to lay down a rather narrow reading of *National League of Cities*.<sup>325</sup>

*National League of Cities* does, nevertheless, stir the coals of the debate

323. *Id.*

324. A challenge in the Supreme Court to EPA regulations commandeering state legislative processes by requiring the states to enact vehicle inspection and emission monitoring controls was aborted when EPA's administrator conceded that he lacked statutory authority to promulgate the regulations. *See Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975), *all vacated and remanded sub nom. EPA v. Brown*, 431 U.S. 99 (1977).

325. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 101 S. Ct. 2352 (1981). Justice Marshall said that, for a claim based on *National League of Cities* to succeed, each of three distinct requirements must be satisfied: (1) that the challenged statute regulates the "States as States," (2) that the federal regulation addresses matters that are indisputably "attributes of state sovereignty," and (3) "that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'" *Id.* at 2366. Going even further, Justice Marshall added, in a footnote, that even if the three requirements are satisfied, the federal interest involved may be sufficient to overcome the tenth amendment objection. *Id.* at 4660 n.29 (citing *Fry v. United States*, 421 U.S. 542 (1975), and Justice Blackmun's concurrence in *National League of Cities*, 426 U.S. at 856).

In January 1982, the Court heard oral argument in two cases raising *National League of Cities*-type issues. In *United Transp. Union v. Long Island R.R.*, 50 U.S.L.W. 4315 (Mar. 24, 1982) (No. 80-1925), the Court heard arguments in reviewing a decision of the Second Circuit, 634 F.2d 19 (2d Cir. 1980), that the Federal Railway Labor Act (which permits strikes) violates New York's Taylor Act (which prohibits strikes by public employees), as applied to the state-owned Long Island Railroad. In *Federal Energy Regulatory Comm'n v. Mississippi* (No. 80-1749), the Court reviewed a decision by federal district judge Harold Cox, 49 U.S.L.W. 2553 (D. Miss. 1981), invalidating as "a clear usurpation of power" a provision of the Public Utilities Regulatory Policies Act of 1978 requiring state utility commissions to oblige utility companies to deal on fair terms with producers of small and non-traditional power sources.

over what role, if any, the Supreme Court ought to play in limiting national powers in the name of federalism. Some academicians have argued that the Court should stay out of this business: that states ought to look to the political process if they want protection from national power.<sup>326</sup> *National League of Cities* tells us that, for the present at least, the Court thinks it does have a legitimate role in this aspect of balancing state and federal interests.

#### VIII. REPRESENTING THE STATES' INTERESTS BEFORE THE SUPREME COURT

Those who care about the health and vitality of American federalism know that what happens in Washington is as important to the states' interests as what happens in the state capitals. With the growth of national power in recent decades, this truth is most evident in legislative corridors and presidential councils. Perhaps the recitation of events described in this article will make it evident that what the Supreme Court does has just as much bearing on the states and their business as anything done by the nation's executive and legislative branches.

The greater pity is that, with so much at stake, the states may well fare the poorest of any class of litigants when it comes to getting their interests fully and adequately represented in the work of the Supreme Court. Several factors are involved.

1. The quality of briefs and arguments by those who argue a state's case before the Supreme Court is too often inadequate. This is a judgment one often hears from those who are the most intimately familiar with Supreme Court practice. Justice Powell, in a speech to the Fifth Circuit Judicial Conference, lamented that some of the "weakest briefs and arguments" come from the state's lawyer—frequently an assistant from the attorney general's office.<sup>327</sup>

Sometimes, of course, the state's case is superbly argued. Slade Gordon, former Attorney General for the State of Washington, has appeared fourteen times in the Supreme Court, and he is generally thought to be an outstanding advocate. A legal newspaper commented that Virginia's Attorney General, Marshall Coleman, was "well prepared and articulate" in

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326. See Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a contrary view, see Howard, *The Supreme Court and Federalism*, *supra* note 307, at 66-71.

327. Address before Fifth Circuit Judicial Conference 3 (May 27, 1974).

arguing the recent *Consumers Union* case before the Supreme Court.<sup>328</sup> The same paper complimented an associate city counselor for his "sophisticated and notably competent" argument in *Owen*.<sup>329</sup> But, by and large, the states do not fare as well in the Supreme Court as they should.

2. Supreme Court advocacy, especially where complicated constitutional issues are involved, calls for unusual skills. In the early decades of the nineteenth century, there was a specialized Supreme Court bar where a small number of lawyers, like Daniel Webster, appeared with regularity before the Court. Today, Chief Justice Burger estimates that two-thirds of the lawyers who appear before the Court have never argued there before.<sup>330</sup> A constitutional argument is not like a nickel-and-dime case in the small claims court. The Advisory Commission on Intergovernmental Relations has commented that "virtually none" of the state and local governments "possess the highly specialized legal expertise for Constitutional tests."<sup>331</sup>

3. Cost is a factor. Carrying a case to the Supreme Court can be an expensive undertaking. The states might well have adequate resources collectively to see that the best representation is had, but a single state or locality may not. As the Advisory Commission has noted, "[t]oo many state and local governments simply lack the financial capacity to pursue expensive litigation, sometimes to the highest level, where the costs are likely to run into the hundreds of thousands of dollars."<sup>332</sup>

4. Another disadvantage suffered by the states in the Supreme Court is that, in a case involving important issues of public policy, they are likely to oppose the best lawyers from the private bar. Public interest groups involved in such litigation realize the impact that one precedent-setting Supreme Court decision can have and are likely to marshal their resources accordingly.

5. Sometimes the state that is a nominal party to a case lacks any real interest in seeing the adversary positions fully developed. In one argument before the Supreme Court, a deputy attorney general conceded the unconstitutionality of the state statute being challenged. During colloquy between counsel and the bench, several justices admitted their confusion about the lawyer's conception of his role before the Court. Justice Stewart commented that, at the national level, he understood it to be the obligation

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328. *The American Lawyer*, April 1980, at 38.

329. *The American Lawyer*, March 1980, at 35.

330. *The Special Skills of Advocacy* 7 n.7 (John F. Sennett Memorial Lecture, Fordham University Law School, Nov. 26, 1973).

331. ACIR, Docket Book, 70th Meeting 126 (June 19-20, 1980).

332. *Id.*

of the Attorney General to defend the constitutionality of a statute enacted by Congress, and yet this was the third time that this state's lawyer had come before the Court and confessed the unconstitutionality of a statute.<sup>333</sup>

One federal court of appeals judge has commented that "state's attorneys have abandoned adversary roles so often that there is at least grounds to suspect that some litigation has been brought on feigned issues."<sup>334</sup> He wondered whether state officials were not "'copping out,' ducking the hard questions themselves, and relying on the federal judiciary to make tough, unpopular decisions."<sup>335</sup> There is no doubt that most cases are vigorously defended on the state's behalf, but the thought that at least some cases are defended only halfheartedly or may not be truly adversary is worth pondering. If the interests of a private party were at stake, there would be less occasion for concern, but where decisions are being shaped affecting the interests of states other than the one at bar, it is important that every legitimate dimension of the controversy be fully and carefully presented.

6. There appears to be little formal coordination among the states in monitoring and being heard in Supreme Court litigation. Federal interests are well represented, whether the United States is a party to a Supreme Court case or not; the Solicitor General's office follows the Court's calendar with great care. Amicus briefs filed by the Solicitor General are often influential in shaping the issues in a case.

One attorney general indicated that when an attorney general thinks a case is important enough to attract the interest of other states, he simply writes a letter to the attorneys general of the other states, asking whether they would like to join the brief he is filing in the Supreme Court. There seems to be no formal mechanism at the state level for the kind of systematic representation which the more active public interest groups achieve in the processes of the Court.

The result is the lack of any "early warning system" by which the states can identify cases coming to the Court's docket and decide which ones are likely to have particular impact on the interests of the states. If such a system existed, the states could decide whether to seek leave to file an amicus brief. As Justice Powell has commented, "[o]ften the import of these cases apparently is not identified in time or possibly not even comprehended by state authorities or by some of the private interest groups

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333. 12 CRIM L. REP. (BNA) 4111 (Dec. 13, 1972), reporting colloquy in *Goosby v. Osser*, 409 U.S. 512 (1973).

334. Aldisert, *supra* note 115, at 562.

335. *Id.*

affected.”<sup>336</sup>

In pointing to the weakness in the representation of the states' interests before the Supreme Court, I am not arguing that any particular case that a state has lost before that tribunal ought to have been decided the other way. Many decisions against particular states have brought essential reforms, for example, in the administration of criminal justice. Surely the Court was right to declare that a criminal defendant too poor to hire a lawyer is entitled to have one appointed for him. *Gideon v. Wainwright*<sup>337</sup> ought not to have been decided differently, no matter how brilliant the argument on the state's side. I do not suppose, therefore, that had the level of briefs and arguments submitted by the states in modern Supreme Court cases been uniformly outstanding, the main course of constitutional development would have been markedly different. I do urge that, with high quality advocacy, cases will be more thoughtfully reviewed, and decisions will be more carefully crafted. Constitutional law generally, not just the states, will be the better for that.

Anyone who supposes that briefs and oral arguments do not affect the outcome of cases before the Supreme Court is ignorant of the Court's processes. Some observers think that the justices decide how they will vote and then fashion reasons to support that result: that the Court's conference is like a mark-up session on Capitol Hill. This is a caricature of the Court's deliberations. A Supreme Court decision is the product of a complicated process of argument, drafting, negotiation, compromise, and persuasion. Even votes cast in conference are tentative, and justices often change their minds after hearing what is said in oral argument or after reading a colleague's draft of an opinion. Only a fool would recommend that the states, or anyone else, sit back and let the Court do what it will, on the assumption that the result is foretold. The Supreme Court is constantly adjusting the contours of the law. Values, seemingly submerged, can reappear again—federalism is one good example. Surely the work of the nation's highest tribunal deserves the best insights that interested parties, the states included, can give it.

At long last, there are signs of genuine steps toward more effective state representation in the Supreme Court. The National Institute of Municipal Law Officers (NIMLO) has created a Legal Advocacy Committee, which, upon receiving cases from NIMLO headquarters for consideration, can recommend any one of six “action choices,” including litigation or appeals

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336. Address before Fifth Circuit Judicial Conference 6 (May 27, 1974).

337. 372 U.S. 335 (1963).



at all levels as well as the Supreme Court.<sup>338</sup> In 1980, the National Governors' Association received a recommendation that the governors create a Legal Affairs Committee, a step that the governors agreed to at that year's annual meeting.<sup>339</sup> The Advisory Commission on Intergovernmental Relations has added the weight of its prestige by urging the creation of a mutual "legal defense fund" for state and local governments patterned after the techniques used so successfully by civil rights and environmental groups.<sup>340</sup> The most promising development toward an effective voice for the states and their interests is the proposal by Stewart Baker and others for the creation and funding of a Center for State and Local Legal Advocacy, a project which gathered impetus in January 1982 when the Board of Trustees of the Academy for Contemporary Problems voted unanimously to commit \$150,000 over a two-year period to establish such a center.<sup>341</sup>

Martin Diamond once declared that the American people "understand in their bones that decentralist-federalism is the constitutional matrix of the American way of life . . . ."<sup>342</sup> Having a federalist, rather than a unitary, system entails its frustrations and costs, as many chapters in American history reveal. But, the genius of the American polity depends in good part on a continuing effort to accommodate viable self-government at the local level with a national ability to protect individual liberties and other interests of nationwide importance. As the Supreme Court pursues that essential accommodation, the process of adjudication will be healthier if the states' have an articulate voice in the Court's deciding issues of individual liberties, federalism, and other issues of great moment.

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338. The first two reports of the NIMLO committee evaluated six cases and thirteen cases respectively. Report 80-1 (Feb. 6, 1980); Report 80-2 (April 27, 1980).

339. See Howard, *I'LL SEE YOU IN COURT: THE STATES AND THE SUPREME COURT* (Nat'l Governors' Ass'n, 1980), at 51-52.

340. ACIR, *Docket Book, 70th Meeting* (June 19-20, 1980), at 126.

341. See Baker & Asperger, *Afterword: Toward a Center for State and Local Legal Advocacy*, 31 CATH. U.L. REV. 505 (1982).

342. Diamond, *The Ends of Federalism*, 3 PUBLIUS 129, 152 (1973).