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IS THE SECTION 1983 CIVIL RIGHTS STATUTE OVERWORKED? EXPANDED USE OF MAGISTRATES— AN ALTERNATIVE TO EXHAUSTION

Forty-two U.S.C. Section 1983 provides a federal remedy for persons whose civil rights have been violated under color of state law.¹ Although passed in 1871, section 1983 was used infrequently until the civil rights movement of the 1960's. The expansion of the fourteenth amendment in that decade increased the use and effectiveness of section 1983 as a remedy for deprivation of civil rights.² In addition, the Supreme Court's actions, such as holding that section 1983 does not require exhaustion of state remedies,³ spurred the growth of the remedy.

Since the 1960's, the number of claims based on the statute has grown substantially. Justice Powell recently warned that this growth has imposed a "heavy burden on the federal courts to the detriment of all federal court litigants"⁴ The caseload problem may lead federal judges to adopt unsystematic devices to control their dockets, possibly resulting in the disintegration of a principled and unified approach to the enforcement of civil rights.

Part I of this Note discusses the history and purpose of section 1983 and identifies the danger unmanaged growth of 1983 suits poses to civil rights. Part II examines several judicial responses to the 1983 caseload problem and concludes that congressional action is more appropriate. Parts III and IV explore two areas of possible legislative action. Part III questions the efficacy of a legislatively imposed requirement that the claimant exhaust state administrative remedies as a prerequisite to a 1983 suit in federal court. Part IV proposes an alternative congressional response to the 1983 caseload problem: a carefully tailored use of the existing magistracy apparatus. The Note concludes that magistrates can handle many of the issues in 1983 suits that strain judicial resources, and no other measure, short of a substantial increase in the number of federal judges, can effectively manage

1. Section 1983 extends liability to "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" 42 U.S.C. § 1983 (Supp. V 1981).

2. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending sixth amendment's right to counsel to state criminal proceedings); *Robinson v. California*, 370 U.S. 660 (1962) (extending eighth amendment's prohibition of cruel and unusual punishments to state criminal proceedings).

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

4. *Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting).

the 1983 caseload problem, while at the same time preserving section 1983's central purpose of providing a federal forum to civil rights litigants.

I. CURRENT STATUS OF SECTION 1983

Congress enacted section 1983 during the post-Civil War Reconstruction era. Recalcitrant southern states had passed "black codes" that largely ignored the liberated status of blacks. Local authorities did not discourage the activities of groups like the Ku Klux Klan. In 1871, President Grant exhorted Congress to pass legislation that would bring this conduct under control. Congress responded by enacting the Civil Rights Act of 1871.⁵ Once passed, however, the statute was not often used until the advent of the civil rights movement in the 1960's. The modern status of section 1983 had its genesis in a 1961 case, *Monroe v. Pape*.⁶ Although there is some debate today over just how broadly *Monroe* should be read, the Supreme Court's recent decision in *Patsy v. Board of Regents*⁷ seems to hold in no uncertain terms that there is no exhaustion requirement for section 1983 claims.

The primary purpose of section 1983 is to protect fourteenth amendment guarantees. It does so by "throw[ing] open the doors of the United States courts" to those wronged under color of state law.⁸ In opening these doors, "Congress clearly conceived that it was altering the rela-

5. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (Supp. V 1981)).

6. 365 U.S. 157 (1961). *Monroe* ushered in the new era of § 1983. The case involved an action by a black man whose home had been invaded by 13 Chicago police officers in the middle of the night. The man and his family were rousted from their beds and forced to stand nude in the living room for several hours. In allowing the plaintiff's 1983 claim, the Court held that: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal are invoked." *Id.* at 181. Since *Monroe*, § 1983 cases have been exempt from the traditional rule requiring exhaustion of local remedies before a litigant is entitled to judicial relief. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 (1958); *McKart v. United States*, 395 U.S. 185, 193 (1969). A series of cases after *Monroe* illustrated the Supreme Court's adherence to the no-exhaustion rule for 1983 cases. In *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), the Court explicitly extended the *Monroe* rule to state administrative remedies; see also *Damico v. California*, 389 U.S. 416 (1967). Throughout the period leading up to *Patsy v. Board of Regents*, the courts generally adhered to the *Monroe* no-exhaustion rule. As caseload pressures began to build, however, certain courts began to fashion flexible exhaustion requirements. See *Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (1981) (holding that adequate and appropriate state administrative remedies must be exhausted), *rev'd sub nom Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978) (requiring prisoner to exhaust his state administrative remedies as a prerequisite to § 1983); *Canton v. Spokane School Dist. #81*, 498 F.2d 840 (9th Cir. 1974) (requiring exhaustion of adequate administrative remedies). In *Patsy*, the Court settled any doubts about the status of the no-exhaustion rule, holding that a court may not impose an exhaustion requirement for § 1983 claims. See generally *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Developments*].

7. 457 U.S. 496 (1982).

8. *Mitchum v. Foster*, 407 U.S. 225, 242 (1971).

tionship between the States and the Nation with regard to the protection of federally protected rights.”⁹ At its core, then, the purpose of section 1983 is to allow civil rights litigants the untrammelled choice whether to bring claims initially in federal court or before state tribunals.

This untrammelled choice, however, has resulted in a strong preference by civil rights litigants for federal courts as the forum of first resort for pressing their claims.¹⁰ As a result, the number of civil rights claims has risen dramatically in the past two decades. When *Monroe* came down in 1961, only 296 private civil rights actions were brought in federal district courts.¹¹ By 1972, with the widespread use of section 1983 in civil rights actions, 6,133 nonprisoner claims were filed.¹² By 1983, that number had grown to 18,406¹³. This increase shows no sign of reversal. In fact, after *Maine v. Thiboutot*¹⁴ held that denial of any right guaranteed by a federally mandated statute involving federal-state participation may violate section 1983, one commentator noted that 1983 actions can arise in thousands of different state and local agencies that jointly administer federal programs.¹⁵

To adjust to the increasingly unmanageable caseload, courts have begun to adopt expedient means of clearing their dockets of civil rights cases.¹⁶ For instance, some of these courts have recently attempted to limit section 1983's scope by invoking concepts of federalism and comity, expanding the doctrine of abstention, and narrowing the protections afforded by the fourteenth amendment. Others have foreclosed section 1983 actions on the basis of supplementary statutory remedies.¹⁷ As a result of this judicial activity, the present scope of 1983 is unclear. This lack of clarity, combined with the growing 1983 caseload problem,

9. *Id.*

10. The incorporation of most of the Bill of Rights into the fourteenth amendment, and the publicity attending the civil rights movement caused an increase in the popular awareness of the protections afforded by the Constitution.

11. DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS, 1972 ANNUAL REPORT, *printed in* 1972-73 REPORT OF JUDICIAL CONFERENCE OF U.S. 115 (1973).

12. *Id.*

13. STATISTICAL ANALYSIS & REPORTS DIVISION, ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS A-9 (for the 12 months ending Sept. 30, 1983; these statistics state the number of civil rights claims, not the number of § 1983 claims). Additionally, the magnitude of the problem is also demonstrated by noting that as of March 31, 1982, there were 19,911 such private civil rights cases pending. By March 1983, 24,137 cases were pending. *Id.* at A-13.

14. 448 U.S. 1 (1980).

15. Kupfer, *Restructuring the Monroe Doctrine: Current Litigation Under Section 1983*, 9 HASTINGS CONST. L.Q. 463, 477 n.77 (1982). Justice Powell, in his *Thiboutot* dissent, stated that “[t]he Court’s opinion does not consider the nature or scope of the litigation it has authorized.” 448 U.S. at 22.

16. *Cf.* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 25 (1980) (“[I]ndividual judges, as a matter of self-preservation may begin to read complaints in a grudging manner and to look for narrow resolutions that avoid the most difficult issues.”).

17. See Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1192-95 nn.9-11, 1203 (1977); see also Kupfer, *supra* note 15, at 465 n.8.

has led some members of the Supreme Court to suggest that the principles underlying section 1983 should be reconsidered,¹⁸ even though Congress has expressed no intent to limit the coverage of 1983.¹⁹

II. JUDICIAL LIMITATIONS ON SECTION 1983

Since 1971, the Supreme Court has alternately expanded and restricted the scope of section 1983.²⁰ Decisions restricting section 1983 have invoked three concepts: "Our Federalism," a narrow concept of the fourteenth amendment, and the primacy of statute-based rights.²¹

A. "Our Federalism"

In *Younger v. Harris*²² the Supreme Court announced a concept called "Our Federalism,"²³ described as a system in which the federal govern-

18. Two members of the Court have recently linked the growing number of § 1983 actions to the desirability of revising the section. In *Parratt v. Taylor*, 451 U.S. 527, 555 n.13 (1981) Justice Powell, in a concurring opinion stated that because of increasing § 1983 litigation and "the inability of courts to identify principles that can be applied consistently, perhaps the time has come for a revision of this century-old statute . . . that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action." Similarly, in a recent law review article, then Judge, now Justice, O'Connor asserted that "[i]n view of the great caseload increase in the federal courts . . . one would think that congressional action might be taken to limit [the] use of the section 1983 [remedy]." O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 810 (1981). For a critical treatment of this position, see Kupfer, *supra* note 15.

19. In 1980, Congress passed a statute requiring that state prisoners exhaust state grievance mechanisms as a prerequisite to litigation of § 1983 claims in federal courts. 42 U.S.C. § 1997c (Supp. V 1981). Even though fully apprised of the 1983 caseload problem, see *Patsy v. Board of Regents*, 457 U.S. 496, 509 (1982), Congress declined to impose an exhaustion requirement on nonprisoner claims. Indeed, there was some reluctance to adopt an exhaustion requirement even for prisoner cases. *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 26 (1979) (statement by Rep. Kastenmaier). Congress's failure to take affirmative steps to redefine or restrict § 1983, especially in light of the growing caseload burden, suggests that Congress has no intention of retreating from the broad coverage of 1983.

20. See generally Kupfer, *supra* note 15, at 463 ("[E]ach term in different contexts the court provokes the question: To what extent will opportunities to pursue initial relief for deprivation of constitutional rights continue to be available in the federal courts?").

21. There are other means of restricting § 1983. The eleventh amendment, giving states sovereign immunity in federal courts, has been invoked in civil rights cases. *Edelman v. Jordan*, 415 U.S. 651 (1974). Certain immunities have been recognized as barring § 1983 claims. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (recognizing absolute immunity for state prosecutors acting within the scope of their official discretion); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (recognizing good faith immunity for state hospital officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (recognizing good faith immunity for school officials). Access to federal courts has also been limited by the increase of procedural burdens to litigants in class action claims. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (holding that notice in class action for damages must be sent at plaintiff's expense to all reasonably identifiable class members).

22. 401 U.S. 37 (1971).

23. *Id.* at 44.

ment "will not unduly interfere with the legitimate activities of the States."²⁴ The *Younger* Court invoked this concept to reverse a district court that, before and during state prosecutions under a criminal syndicalism statute, had ruled the syndicalism statute void for vagueness and overbreadth. Nonetheless, subsequent cases cited *Younger's* "Our Federalism" concept for the broad purpose of limiting the general scope of section 1983.²⁵

The Court began expanding *Younger* abstention in *Huffman v. Pursue*.²⁶ In *Huffman*, the Supreme Court held that the rationale of the *Younger* doctrine mandated the exhaustion of state appellate remedies in civil nuisance actions.²⁷ In 1975, the Supreme Court further extended the reach of *Younger* abstention in *Hicks v. Miranda*.²⁸ In *Hicks*, the Court applied abstention to a 1983 suit, even though no state proceedings had commenced at the time the suit was filed. The Court extended the concept of pendency beyond *Huffman's* appellate exhaustion requirement, holding that "the principles of *Younger* should apply in full force where state criminal proceedings have begun, but no proceedings on the substance of the merits have taken place in the Federal court."²⁹ Recent cases have even further extended

24. *Id.* Professors Wright, Miller, and Cooper explain that the doctrine "teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts." C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4251, at 533 (1978). For an extended discussion of *Younger* and its progeny, see Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

25. See *Huffman v. Pursue*, 420 U.S. 529, 617 (1975) (Brennan, J., dissenting) (the extension of *Younger* could "drastically undercut [] *Monroe v. Pape*[, 365 U.S. 167 (1961)] and its numerous progeny."); see also generally, Soifer & Macgill, *supra* note 24; Note, *Applying the Doctrine of Younger v. Harris to State Administrative Proceedings: Federal Rights Further Jeopardized*, 8 OHIO N.U.L. REV. 126 (1981). For remarks warning of two long-run dangers, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 283 (2d ed. Supp. 1981) ("The generalized language of 'comity and federalism' which fills the opinions in the *Younger* line is, however, vague and suggestive enough to create a danger that *Younger* will be transmitted into an all-purpose discretionary device for limiting federal jurisdiction.") [hereinafter cited as HART & WECHSLER]; Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841 (1972).

26. 420 U.S. 592 (1975). Two commentators have described *Huffman* as "Our Federalism's" "great leap forward." Soifer & Macgill, *supra* note 24, at 1173.

27. Justice Rehnquist in *Huffman* said that "[t]he component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding . . . quite as much as it is to a criminal proceeding." 420 U.S. at 604.

28. 422 U.S. 332 (1975).

29. *Id.* at 349; see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (holding injunctions against state proceeding barred by *Younger* when criminal summons filed only days after federal complaint and "federal litigation was in an embryonic state"). But see *Ex parte Young*, 209 U.S. 123, 161-62 (1908). Two other cases demonstrate the gradual elimination of the original *Younger* pendency requirement. In *Juidice v. Vail*, 430 U.S. 327 (1977), the Supreme Court extended *Younger* to reach a civil proceeding and bar a § 1983 suit alleging the unconstitutionality of a state contempt statute.

The court had two reasons for applying *Younger*. First, comity demanded that the federal

Younger's "Our Federalism" to section 1983 damage actions,³⁰ and to such nonjudicial settings as activities of state executive officials³¹ and state administrative agencies.³² Thus, courts have invoked the originally narrow *Younger* doctrine in order to restrict the traditionally expansive scope of section 1983.

B. Limiting Protected Interests Within the Fourteenth Amendment

Another judicial doctrine with potential for limiting the access of section 1983 claimants to federal court arises from a line of cases restrictively construing the due process clause of the fourteenth amendment.

court not intervene in state contempt proceedings because they lie "at the core of a state's judicial system." 430 U.S. at 335. Second, the Court ruled that the § 1983 plaintiffs had had an opportunity to present their federal claims in the state proceedings and were therefore barred by *Younger* abstention. 430 U.S. at 337.

Trainor v. Hernandez, 431 U.S. 434 (1977), decided the following term, may represent the Court's furthest extension of *Younger* in civil proceedings. See Soifer & Macgill, *supra* note 24, at 1209. In *Trainor*, the Court, applying *Younger* and *Huffman*, held that a writ of attachment that had been issued by a clerk of court rendered a suit "pending" for *Younger* purposes and precluded federal intervention.

These cases are important for three reasons: First, these cases collectively suggest that a state proceeding is pending, for the purposes of *Younger*, if there is any act by an agent of a state court; second, the *Judice* notion that the availability of an opportunity to raise federal claims in a state forum is a permanent part of "Our Federalism," a result which may be irreconcilable with *Monroe v. Pape*; third, after *Trainor*, "Our Federalism" may reach any civil proceeding, possibly restraining a number of § 1983 civil rights claims.

30. See *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976). *Martin* involved a § 1983 damage action against a state prosecutor in which the court said it would "offend the principle of comity for a district court to inquire into plaintiffs' ability to secure a fair trial in a pending state prosecution." *Id.* at 194-95.

Although the Supreme Court has not explicitly held that *Younger* bars damages in § 1983 cases, in *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981), it did hold that comity barred state taxpayers' § 1983 suit seeking damages for the alleged unconstitutional administration of the state tax system. In dicta, the Court noted the "Our Federalism" concept. *Id.* at 179.

31. See *Rizzo v. Goode*, 423 U.S. 362 (1976). *Rizzo* involved a § 1983 class action on behalf of the citizens of Philadelphia against the mayor and police commissioner, alleging a pattern of unconstitutional police mistreatment of minorities. On appeal from a trial court order that the Philadelphia police department comply with existing statutory duties of supervision of its officers, the Supreme Court reversed, asserting that the principles of federalism blocked federal injunctions not only against state proceedings, but against state executive officials as well. *Rizzo's* expansive treatment of "Our Federalism", and its failure to analyze *Younger* in terms of its rationale rather than its rhetoric, has led one commentator to conclude that it establishes a rule capable of "an unacceptable degree of destruction" to civil rights. Weinberg, *supra* note 17, at 1194-95.

32. See *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1028 (3d Cir. 1981) (invoking *Younger* to bar a § 1983 suit seeking injunctive relief against a tenure termination proceeding in a state administrative tribunal); *McCune v. Frank*, 521 F.2d 1152 (2d Cir. 1975) (holding that the existence of an ongoing state administrative proceeding triggers *Younger* abstention); *Grandco Corp. v. Rochford*, 536 F.2d 197 (7th Cir. 1976) (barring § 1983 suit because of pending state administrative proceeding to revoke a license). See generally Note, *supra* note 25; Note, *Supreme Court Extends Younger Comity Doctrine*, 46 *FORDHAM L. REV.* 176 (1977).

For example, in *Paul v. Davis*,³³ the Supreme Court barred a 1983 claim for damages to remedy an injury to a plaintiff's reputation and privacy. The Court held that the plaintiff had not been deprived of any "liberty" or "property" rights secured against state deprivation by the due process clause, and that state tort law provided an adequate remedy.³⁴ Similarly, in *Parratt v. Taylor*,³⁵ the Supreme Court held that negligent deprivation of property could be remedied under section 1983, but barred the claim because state law remedies satisfied the fourteenth amendment's due process requirement.³⁶ Thus, *Paul* and *Parratt* together stand for the proposition that state action does not deprive a claimant due process in a way section 1983 can redress until the claimant has exhausted state remedies and can prove the violation of a specific constitutional right.³⁷ In effect, *Paul* and *Parratt* substitute procedural for substantive due process.³⁸ By giving the fourteenth amendment this

33. 424 U.S. 693 (1976).

34. In arriving at this conclusion, the Court distinguished *Monroe v. Pape*, 365 U.S. 167 (1961) on the basis that in *Monroe* the complaint had pointed to a specific constitutional guarantee that had been violated. In *Paul*, the Court said the complaint pointed to no such guarantee. "Rather," the Court stated, "[the plaintiff] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend him a right to be free of injury wherever the State may be characterized as a tortfeasor." *Paul v. Davis*, 242 U.S. 693, 701 (1976). The Court's distinction fails to raise this point in relation to the complainant's allegation that he was denied a constitutional right of privacy arising from the first, fourth, fifth, ninth and fourteenth amendments. *Id.* at 712.

Two fundamental difficulties are presented by the *Paul* decision. First, the Court made no attempt to delineate precisely which interests would rise to the level of "liberty" or "property." In view of the growth in § 1983 caseload, this failure leaves trial judges, who may be operating under great caseload pressures, a substantial power to curtail § 1983 by narrowly defining "liberty" and "property." Nonetheless, courts have not yet expanded the *Paul* rationale beyond the holding that defamation does not involve "liberty" or "property" rights. See *Ray v. Tennessee Valley Authority*, 677 F.2d 818, 824 (11th Cir. 1982); *Bradford v. Bronner*, 665 F.2d 680, 682 (5th Cir. 1982); *Margoles v. Tormey*, 643 F.2d 1292, 1297 (7th Cir. 1981). The second difficulty presented by *Paul* is that the existence of a cognizable constitutional right may turn on whether state tort law provides adequate compensation for an injured interest.

35. 451 U.S. 527 (1981). *Parratt* involved the negligent loss by prison guards of a \$23.50 model kit the plaintiff had sent for from a mail-order company.

36. *Id.* at 544.

37. *Id.* at 542 (citing *Bonner v. Coughlin*, 517 F.2d 1131 (7th Cir. 1979), *cert. denied*, 435 U.S. 932 (1978)). The Court in *Parratt* also pointed to *Ingraham v. Wright*, 430 U.S. 651 (1977), which held that common law standards were sufficient to protect a school child's eighth amendment interests in receiving corporal punishment. Thus, there is a strong argument that *Parratt*, though on its face restricting the scope of § 1983, actually may restrict the meaning of the fourteenth amendment. Writing about *Parratt*, one commentator, in part commenting on *Paul*, 424 U.S. 693 (1976), said: "[T]he cases are capable of broader mischief . . . They are capable of generating doctrine and results that are inconsistent with the long-standing conceptions about the meaning of 'liberty' and 'property' . . ." Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 443-44 (1977).

38. An example of what the *Parratt* decision may mean in future cases is provided by *Shepard v. Moore*, 514 F. Supp. 1372 (M.D.N.C. 1981), in which the court, relying on *Parratt*, dismissed a § 1983 claim alleging an unconstitutional intentional deprivation of plaintiff's property by county officials following a criminal investigation.

scope, and by setting a standard states may meet by providing any kind of tort remedy, judges may be able to control their dockets by manipulating the concepts of "liberty" and "property."³⁹

C. *Limitation of the Section 1983 Remedy for Violation of Statute-Based Rights*

In *Maine v. Thiboutot*,⁴⁰ the Supreme Court broadly interpreted section 1983 to extend its protection to violations of rights created by *any* federal statute. The Court held that by remedying the deprivation "of any rights, privileges, or immunities secured by the Constitution *and laws*," section 1983 could remedy government violation of any federal law.⁴¹ Since *Thiboutot*, however, the Supreme Court has decided two cases that undermine this expanded approach to the protection of statutory rights under section 1983. In *Pennhurst State School & Hospital v. Halderman*,⁴² the Court held that the Developmentally Disabled Assistance and Bill of Rights Act⁴³ created no enforceable rights on behalf of the developmentally disabled, and suggested on remand that the Act's fund termination clause might provide an exclusive remedy that would preclude a section 1983 suit.⁴⁴ Similarly, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,⁴⁵ the Court held that two antisewage statutes precluded an action based on section 1983.⁴⁶

Thus, subsequent cases have limited — and almost eliminated — *Thiboutot's* protection of federal statutory rights under section 1983. Although the plain meaning of section 1983, as recognized in *Thiboutot*, established the availability of the remedy for all statutory violations, subsequent decisions have recognized exceptions only when it appears the statute violated provides an exclusive remedy or when the statute violated did not create enforceable rights, privileges, or immunities.⁴⁷ These exceptions give a wider berth to judicial discretion for docket control in section 1983 suits.

39. See generally Monaghan, *supra* note 37.

40. 448 U.S. 1 (1980).

41. *Id.* at 4-8. The Court held the "and laws" clause of § 1983 to mean all federal laws.

42. 451 U.S. 1 (1981).

43. 42 U.S.C. § 6000 (1976 & Supp. V 1981).

44. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 27-28 (1981).

45. 453 U.S. 1 (1981).

46. Before *Maine v. Thiboutot*, 448 U.S. 1 (1980), this would not have been a question, because the "and laws" language had not been taken to comprehend federal statute-based rights.

47. See *Middlesex*, 453 U.S. 1, 19-21; *Pennhurst*, 451 U.S. 1, 28 (1981). The *Middlesex* majority classified the two exceptions, originating in *Pennhurst*, as "(i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue was the kind that created enforceable 'rights' under § 1983." 453 U.S. at 19.

D. *The Need for Congressional Action*

The burgeoning section 1983 caseload, and the potential for abuse of the new doctrines of limitation, argue the need for congressional action. Indeed, both legislators and courts have urged Congress to act.⁴⁸ Congressional inaction may lead federal judges, facing an unmanageable docket of 1983 cases, to invoke these doctrines out of a sense of self-preservation.⁴⁹ Nevertheless, "[t]he solution to crowded dockets should not be careless judicial redefinition of a constitutional standard."⁵⁰ Thus, the relevant question regarding the section 1983 problem is not whether Congress should act, but rather what form its action should take.

III. A CONGRESSIONALLY IMPOSED EXHAUSTION REQUIREMENT

Congress could attempt to solve the section 1983 caseload problem by statutorily requiring the exhaustion of state administrative remedies as a prerequisite for federal court jurisdiction over 1983 claims. Indeed, section 1997e,⁵¹ the exhaustion requirement for prisoner claims under section 1983, could serve as a model for a nonprisoner section 1983 exhaustion requirement. But such a requirement could prove an unworkable and inappropriate solution to the 1983 caseload problem.

A. *Section 1997e — A Model for a General Section 1983 Exhaustion Requirement*

Section 1997e dictates that state prisoners, in order to bring section 1983 claims, must first exhaust the remedies available through their state's prison grievance system. The section, however, requires exhaustion only if the Attorney General of the United States has certified the grievance system as being "in compliance with . . . minimum acceptable standards [of due process] according to criteria set forth in

48. In *Patsy v. Board of Regents*, 457 U.S. 496, 513-17 (1982), the Court urged Congress to act. Even before the decision, two members of the Court testified before a congressional budget committee, suggesting that Congress impose a state administrative exhaustion requirement. *2 Justices' Budget Testimony Seen as Hint to Key Decision*, N.Y. Times, Mar. 10, 1982, at B8, col. 4. In criminal cases, Congress has passed a statutory requirement that state prisoners exhaust federally approved state prison remedies before bringing § 1983 claims if the trial court finds that the requirement serves the interests of justice in the particular case. 42 U.S.C. § 1997e (Supp. V 1981).

49. See *supra* notes 15-16; see also Weinberg, *supra* note 17, at 1203 ("It is difficult to resist the conclusion that much of this federal door closing is not so much a function of enlightened federalism or even an evolving political environment as of crowded dockets.').

50. See Kupfer, *supra* note 15, at 473; see also *id.* at 464 ("Development of new restrictions on the availability and applicability of the section 1983 remedy may be a response to this [caseload] pressure.'').

51. 42 U.S.C. § 1997e (Supp. V 1981).

the statute."⁵² Congress believed that section 1997e would encourage states to develop better internal prison grievance procedures⁵³ to resolve disputes finally and fairly.

Congress could fashion a similar exhaustion requirement and certification method of nonprisoner claims under section 1983.⁵⁴ Because nonprisoner 1983 claims reflect a wider range of possible issues than the narrow category of prison grievances, a general certification mechanism would have to contain additional criteria different from those applicable to section 1997e.⁵⁵ Moreover, the volume of claims would require standards for a large number of state agencies, rather than for a single state grievance system.

B. Difficulties With a Statutory Exhaustion Requirement

1. *Federalism and an exhaustion scheme*— Although a section 1983 exhaustion requirement may seem in accordance with the notions of

52. Under § 1997e(2), the following minimum standards are established: (a) an advisory role for employees or inmates in system formulation, implementation, and operation, (b) time limits for replies to written grievances, (c) priority processing of emergency grievances, (d) safeguards against reprisals, and (e) independent review of grievance resolution. 42 U.S.C. § 1997e (Supp. V 1981).

53. See H.R. REP. NO. 80, 96th Cong., 1st Sess. 4 (1979); 124 CONG. REC. 11,974 (1978) ("[Section 1997e] would encourage states to develop meaningful grievance procedures . . ."); *id.* at 11,982 (remarks of Rep. Railsback); *id.* at 15,441 (remarks of Rep. Kastenmaier); *Patsy v. Board of Regents*, 457 U.S. 496 (1982); see also *infra* note 63.

54. It seems unlikely that a nonprisoner § 1983 exhaustion scheme would differ greatly from § 1997e. Section 1997e guarantees a high level of protection by requiring certification of the grievance system that prisoners must exhaust. Congress would probably not extend a lower level of protection to nonprisoners. As one commentator said, "Can it seriously be said that policy dictates the exhaustion of any state remedy as an improvement over immediate access to federal courts? Congress has determined a comprehensive scheme for cases involving certain prisoners; only such a carefully tailored scheme would suffice were an exhaustion requirement [for nonprisoners] imposed." Kupfer, *supra* note 15, at 477 & n.79 (arguing that legislative history surrounding the enactment of § 1997e suggests the care and determination Congress applied in drafting the limited exhaustion requirement for prisoners).

55. Congress could formulate two types of exhaustion requirement standards for § 1983 cases: (1) a broad, unitary standard against which all state agencies could be judged, or (2) a multiplicity of standards reflecting the diversity of state agencies. As a starting point for a unitary standard, Congress might follow the lower court's majority opinion in *Patsy*, 634 F.2d 900 (5th Cir. 1981). In *Patsy*, the court stated that exhaustion of state administrative remedies could be required only if certain minimum conditions had been met. Among these conditions were an orderly system of review of agency decisions and the availability of interim relief. On the latter point, for instance, the federal district court could retain jurisdiction while the agency deliberates, thereby ensuring the protection of the federal right at issue. Section 1997e similarly allows the court to continue the case for 90 days while the agency acts. See 42 U.S.C. § 1997d(a). Nonetheless, the effective operation of such an exhaustion requirement depends on the extent to which it induces states to bring their administrative procedures in line with federal criteria. Without certification there can be no exhaustion. Thus, unless a substantial number of state agencies are certified, something for which there is no guarantee, the exhaustion requirement would exist only on paper, and the § 1983 problem would remain unresolved.

federalism and comity,⁵⁶ such a requirement might not, after all, lessen federal-state tensions. An unintended benefit of unimpeded access to federal courts in civil rights cases is that federal courts are not put in a position of superior authority over state courts and agencies; the states and the federal judiciary operate in separate spheres. Requiring litigants to channel claims first through state administrative agencies, and then in essence allowing federal courts to review state agency decisions would end this separation. First, section 1983 litigants receiving adverse dispositions at the state agency level would take the claim directly to federal court, requiring the federal court to sit in judgment on a decision rendered by a state agency. The federal courts would thus act as overseers of state agencies, not a result calculated to reduce federal-state tensions. Second, the same federalism concerns urging the exhaustion of state agencies could well lead to development of a rule requiring the exhaustion of state judicial remedies as well.⁵⁷ Such a rule could, in many instances, require federal courts to monitor state courts,⁵⁸ again, not a situation liable to lessen federal-state tensions.

2. *Delays inherent in an exhaustion requirement*— An exhaustion requirement would delay access to federal court,⁵⁹ and thereby

56. See *Patsy*, 634 F.2d at 912; *Patsy*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206-07 (1968). See generally Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557.

57. *Developments*, *supra* note 6, at 1266 ("Of course, to the extent that the calls for administrative exhaustion are predicated on concerns for federalism and the workload of the federal courts, the arguments ineluctably shade into arguments for judicial exhaustion as well.").

58. See, e.g., *Maine v. Thiboutot*, 448 U.S. 1 (1980). After *Thiboutot*, many § 1983 claims may involve rights springing from joint federal-state programs, enabled by federal legislation and administered by state agencies. Because these rights are federal in nature, even though overseen by states, it can be strongly argued that the interests of federalism — the proper division of function between the federal and state governments — is better served by allowing federal courts to hear 1983 claims without state interference.

59. See, e.g., Kupfer, *supra* note 15, at 476 n.72 (In *Patsy*, claimant's case might have been delayed up to a year had she followed each step of the procedure set forth in the appendix of the en banc lower court opinion, 634 F.2d at 927-28.); see also Note, *supra* note 56, at 1207. ("Even without conscious state efforts to frustrate the assertion of unpopular rights by requiring recourse to dilatory remedial procedures — and an exhaustion rule does open the door to such efforts — the inevitable consequence of insistence on exhaustion is substantial delay in vindication of the constitutional rights of the complainants."). The delay inherent in an exhaustion scheme would contravene the policy that the very nature of the rights protected under § 1983 warrants their adjudication in federal courts — particularly when constitutional rights are at issue. Indeed, few tasks better lend themselves to federal adjudication than the protection of federal rights. See Comment, *Exhaustion of State Administrative Remedies in § 1983 Actions*, 50 U. CIN. L. REV. 594, 612-13 (1981) (casting doubt on arguments favoring a first hearing at the state level). Another commentator has observed that the federal forum results in an atmosphere more receptive to constitutional rulings against the excesses of state officials. See Kupfer, *supra* note 15, at 467. One commentator has argued that the provision of a federal forum presents sufficient justification for § 1983. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L.

discourage or preclude section 1983 claims.⁶⁰ Such delays would be particularly threatening to the rights of indigent litigants, who can ill afford the costs of protracted litigation. Moreover, a state administrative exhaustion requirement could encourage individual adjustments or settlements,⁶¹ at the expense of more significant conclusions of law. The rules of the agency would not fall subject to external scrutiny, and “others who, because of fear, ignorance, or lack of resources, fail to mount challenges of their own, [would] continue to be governed by a rule of questionable constitutionality.”⁶²

3. *The uncertain economics of an exhaustion requirement and the problem of disparate access to federal courts*— An administrative exhaustion requirement assumes that the imposition of definite standards and the creation of a certification mechanism will induce states to bring their administrative procedures in line with statutory criteria.⁶³ Nevertheless, uniform and universal — or even widespread — certification may not be achievable.⁶⁴

An exhaustion requirement may induce some states to certify, while it may prove insufficient inducement to others. For example, one state’s agencies may address so few cases that the state does not consider it worthwhile, in terms of autonomy, to spend the money necessary to secure and maintain certification of its agencies.⁶⁵ Other states hearing the same number of claims may attach a higher value to autonomy.

REV. 725 (1981). *But see* Monaghan, *supra* note 37. For a general discussion favoring the federal forum as more appropriate for the vindication of federal rights, see H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 90 (1973); Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 943-44 (1979).

60. *See* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 101 (1967) (state statutes or regulations may “create pressures . . . analogous to the ‘chilling effects’ of strictures upon first amendment rights”).

61. *See* Note, *supra* note 60, at 104.

62. *Id.*

63. *See* *Patsy v. Florida Int’l Univ.*, 634 F.2d 900, 911 (5th Cir. 1981), *rev’d sub nom.* *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (“Prompted by appropriate judicial decisions, the state administrative agency will have the incentive and be able to hone its procedures to comply with federal requirements, both procedural and substantive, without losing the advantage of the agency’s expertise . . .”). Without this incentive to improve their procedures, states might choose *not* to certify their agencies, as would be required by an exhaustion scheme. Yet, if there were no certification, federal courts could not order exhaustion. Thus, widespread noncertification could greatly limit the practical effect of an exhaustion requirement on the § 1983 caseload problem.

64. Indeed, the closest experience with a similar exhaustion requirement, § 1997e, indicates that states’ responses in this regard have been disappointing. By the time of the *Patsy* opinion, *not one* state inmate grievance procedure had been certified by the Department of Justice. *See Patsy*, 457 U.S. 496, 535 n.21 (1982) (Powell, J., dissenting). Thus, in the more than two years since the enactment of § 1997e (March 30, 1980) no state has taken action to bring its prison grievance system into line with federal statutory standards. There is no *a priori* reason to believe a similar scheme for nonprisoner claims will fare any better.

65. One objection to this argument is that the costs of certifying an agency may be very low. There are two responses to this. First, though costs of paper procedure may be low, there

This uneven inducement to certify could result in a situation in which litigants from some states would have direct access to federal court, while litigants from other states would be denied such access.

Unequal access to federal courts could hinder the effectiveness of an exhaustion requirement for several reasons. First, disparity in access to federal courts could produce inequalities between the litigation times of those litigants who do and those who do not have to exhaust state remedies. This would subject litigants who have to exhaust state remedies to long delays before a federal hearing. This additional litigation time might discourage claimants who must exhaust state remedies. Second, an exhaustion requirement could create an economic bias against complainants. From a fiscal standpoint, a state would want its agencies to dispose of claims if agency damage awards to litigants were smaller, on the average, than federal court awards on the same cases. Thus, states may harbor an economic bias against civil rights litigants that federal courts do not.

4. *Inability of Congress to formulate an adequate exhaustion standard*— The formulation of an exhaustion plan for nonprisoner section 1983 cases might prove unworkably complex. The variety of agencies and of factual circumstances of the cases would require that Congress promulgate a general standard, leaving the details to be filled in by the certifying authority. Such an alternative would give the certifying authority broad discretion to decide which agency procedures the claimant must exhaust. The vagueness of a general standard, and the wide variety of agencies to which it would have to be applied, could lead to litigation concerning the correct application of the standard. Moreover, federal court evaluations of state procedures would bog the courts down in a morass of largely unguided procedural litigation. This would impose the problems of standard-setting upon the courts, something Congress has explicitly sought to avoid.⁶⁶

5. *Effect of an exhaustion requirement on federal policies encouraging litigation*— Further complications in enacting an exhaustion statute derive from the existence of secondary federal policies embodied in statutes designed to encourage civil rights litigation. For example, sec-

are potentially dozens of agencies in any given state. Each will need to establish and maintain a procedure that meets federal criteria in order to receive certification. Second, while a state may prove willing to incur the costs of creating a paper procedure eligible for certification, it may not prove willing to incur the costs necessary to ensure that state practice meets those standards.

66. See *Patsy v. Board of Regents*, 457 U.S. 496, 514 n.18 (1982). One argument that states might advocate in favor of an exhaustion requirement would involve the creation of a centralized super-agency mechanism, which could handle all administrative disputes in the state. There are several problems with this approach. First, Congress would have to depend on the states to create such a mechanism. It is unclear whether federal legislation could mandate the creation of such a mechanism. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). Second, a super-agency of this sort would flatly contradict the argument that agency expertise primarily justifies agency exhaustion.

tion 1988 grants federal courts the discretion to allow the prevailing party a reasonable attorney's fee as part of costs.⁶⁷ That statute attempts to create an incentive for the private enforcement of civil rights and especially to encourage those litigants who, because of their indigency, might not otherwise be inclined to vindicate their rights.⁶⁸ No analogous general policy exists at the state level.⁶⁹ As a result, some claimants might not pursue their claims because of the unavailability of favorable attorney's fee statutes at the state level. Thus, Congress, in deciding whether to enact an exhaustion requirement, must decide whether to limit this important policy of encouraging civil rights litigation.

Similarly, in determining whether to enact an exhaustion requirement, Congress must also consider the availability of class actions at the federal level.⁷⁰ Claimants generally cannot obtain class certification when pursuing an action before an administrative agency.⁷¹ Thus, an exhaustion requirement could hamper the class action as a device to encourage civil rights litigation.⁷²

Of course, even if the litigant must first exhaust administrative remedies, once the litigant reaches federal court both attorney's fees and class action status become available. Many litigants, however, might pursue their actions only if these resources are available at the start of the action. Thus, an exhaustion requirement could deter many civil rights litigants from bringing their claims.⁷³

IV. A SYSTEM OF SECTION 1983 MAGISTRATES

As a solution for the section 1983 caseload problem, an expanded use of the federal magistrate system provides a superior alternative to

67. 42 U.S.C. § 1988 (1976).

68. *Maier v. Gayne*, 448 U.S. 122 (1980); *Staten v. Housing Authority of Pittsburgh*, 638 F.2d 599 (3d Cir. 1980); *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980); *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir.), *cert. denied*, 447 U.S. 911 (1979); *see also* S. REP. NO. 1011, 94th Cong., 2d Sess., reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908; H.R. REP. NO. 1558, 94th Cong., 2d Sess. (1976). *See generally* Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1978*, 47 U. CHI. L. REV. 332 (1980); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act*, 80 COLUM. L. REV. 346 (1980).

69. *See Kupfer*, *supra* note 15, at 468. Nebraska is unusual in providing for attorney's fees for state administrative procedures. NEB. REV. STAT. §§ 81-8,209 to 81-8,226 (Supp. 1980).

70. *See United States ex rel. Sero v. Prieser*, 372 F. Supp. 660 (S.D.N.Y. 1974) (class actions may be appropriate under § 1983); FED. R. CIV. P. 23.

71. *See Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975).

72. *See Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975) (recognizing a general rule encouraging liberal construction of civil rights class actions); *Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763 (8th Cir. 1971) (upholding class of twenty).

73. An exhaustion requirement could also preclude punitive damages in § 1983 suits, *see Carey v. Piphus*, 435 U.S. 247 n.11 (1978), because state administrative procedures generally do not allow for punitive damages.

an exhaustion requirement. Magistrates are currently empowered to serve as adjuncts to federal district courts, and they provide a readily available and very flexible response to section 1983 caseload pressures. A scheme of 1983 magistrates would allow Congress to address the 1983 problem while leaving the core meaning of the statute intact.⁷⁴

A. Mechanics of the Proposal

The Federal Magistrates Act of 1968 (FMA) could form the basis for a system of special section 1983 magistrates.⁷⁵ The FMA provides that magistrates will serve as subordinate adjuncts to article III judges in district courts. Traditionally, magistrates have filled the role that masters once filled, acting as fact finders, rather than as decision makers.⁷⁶ In 1972, however, amendments to the FMA expanded traditional duties of fact finding⁷⁷ and recommendation,⁷⁸ empowering magistrates to conduct evidentiary hearings,⁷⁹ to rule on nondispositive pretrial matters,⁸⁰ and, with the consent of the parties, to conduct hearings in which the magistrate may render binding judgments reviewable by a court of appeals.⁸¹ The legislative history of the FMA and the 1979 amendments suggests that the magistrate system primarily seeks to "assist judges in handling an ever-increasing caseload."⁸² This same philosophy could be applied to the section 1983 caseload.

74. See *supra* text accompanying notes 8-9. There are indications that Congress has delayed addressing the § 1983 problem precisely because of its fear that any action it takes will adversely affect the vindication of civil rights through § 1983. As evidenced from its recent enactment of 42 U.S.C. § 1997e, see *supra* notes 51-54 and accompanying text, Congress recognizes the problems of crowded dockets and growth in the number of § 1983 cases. Had Congress been inclined to enact a similar provision for nonprisoner cases it could have done so at that time. "Congress failure to redefine § 1983, given the available statistics on the federal caseload, [indicates] that it is Congress' intention to keep the remedy intact." See Kupfer, *supra* note 15, at 473-74.

75. Federal magistrates are governed by 28 U.S.C. §§ 631-636 (1976 & Supp. V. 1981). For a comprehensive analysis of the FMA and recent amendments, see McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979).

76. See generally Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070 (1975); Silberman, *Masters and Magistrates, Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975).

77. 28 U.S.C. § 636(b)(1) (1976 & Supp. V 1981).

78. *Id.*

79. *Id.* The 1976 amendment to this section rejected the Supreme Court decision in *Wingo v. Wedding*, 418 U.S. 461 (1973), which held it was improper for a magistrate to conduct an evidentiary hearing on a prisoner's petition for federal habeas corpus; see also McCabe, *supra* note 75, at 354.

80. 28 U.S.C. § 636(b)(1)(A) (1976).

81. 28 U.S.C. § 636(c)(1) (Supp. V 1981). See *Munich v. Allen*, 603 F.2d 1247 (7th Cir. 1979) (holding consensual reference not unconstitutional where district court retained jurisdiction over the litigation by exercising supervisory powers in the form of de novo review and by invoking exclusive authority to enter final judgment).

82. S. REP. NO. 74, 96th Cong., 1st Sess. 2, reprinted in 1979 U.S. CODE & AD. NEWS 1469, 1470.

Under this proposal, a section 1983 magistrate would serve in much the same capacity as an ordinary magistrate. The section 1983 magistrate would retain the power to find facts and recommend dispositions, provided that parties could request a *de novo* review of case-determinative matters. Nevertheless, a more extensive use of magistrates in 1983 cases must not detract from a continued high level of civil rights enforcement. Thus, a system of special magistrates could only provide an acceptable solution to the 1983 problem if Congress modifies some of the present provisions of the FMA to reflect heightened concern for civil rights enforcement. These modifications should restrict the discretionary power of federal judges in the use of section 1983 magistrates, thereby promoting uniformity in the use of section 1983 magistrates and avoiding unequal treatment of litigants.⁸³

1. *De novo review of pretrial matters*— The first modification of the FMA would allow federal judges to retain the power of *de novo* review of any pretrial determination made by a magistrate. Currently, a district judge may consider a determination by a magistrate of any pretrial matter if the appealing party can show that the magistrate's order is "clearly erroneous and contrary to law."⁸⁴ Some courts have therefore refused to exercise *de novo* review over magisterial determinations of pretrial matters.⁸⁵

In enacting this section of the FMA, Congress determined that the time saved by allowing magistrates to hear preliminary matters and enter "final" dispositions on those matters, subject to a "clearly erroneous" standard of review, outweighed the costs to litigants of not having all phases of the legal proceeding decided by an article III judge. Thus, a modification allowing judges to exercise *de novo* review over pretrial determinations by a 1983 magistrate might seem inconsistent with congressional intent. Nevertheless, as the legislative history indicates, section 636 of the FMA concerns a general category of civil cases and does not contemplate a magisterial system focusing specifically on sensitive issues of civil rights. Congress's interest in according civil rights the greatest degree of protection suggests that the balance between a savings of time and the cost to litigants of limiting *de novo* review should tip in favor of the latter under a scheme of 1983

83. Indeed, the possibility of unequal treatment constitutes a major drawback of an exhaustion requirement. *See supra* notes 63-65 and accompanying text.

84. 28 U.S.C. § 636(b)(1)(A) (1976).

85. *United States v. Raddatz*, 447 U.S. 667 (1980) (holding that a district court's authority to refuse to consider anew a suppression motion that a magistrate recommended be denied is within his sound judicial discretion); *Merritt v. International Bhd. of Boilermakers*, 649 F.2d 1013 (5th Cir. 1981) (holding pretrial orders of magistrate not subject to *de novo* determination); *United States v. Marshall*, 609 F.2d 152 (5th Cir. 1980); *United States v. Miller*, 609 F.2d 336 (8th Cir. 1979) (both holding that the district judge need not conduct a *de novo* hearing in reviewing a pretrial matter).

magistrates. Under the present proposal, then, federal judges would retain the right to review de novo any pretrial determination made by a magistrate

2. *Assignment of new duties*— A related change in the FMA would eliminate a judge's general discretion to assign to magistrates additional duties not inconsistent with the Constitution.⁸⁶ Although experimentation with the duties assigned magistrates might allow federal judges to operate more efficiently, such additional discretion might also allow judges to respond to increased caseload pressures by experimentally expanding the scope of the duties of their section 1983 magistrates. Experimentation of this sort would undermine the policy that Congress, and not overworked judges acting out of a sense of self-preservation,⁸⁷ should provide a remedy for the swollen 1983 caseload.

3. *Consensual reference*— A third modification would consist of closing the consensual reference option provided by the 1979 amendments to the FMA. Under those amendments, a magistrate may, with consent of the parties and on an order of the judge, conduct "any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case."⁸⁸ Although such a procedure allows speedier disposition,⁸⁹ it might cast the magistrate in the role of a "poor man's" judge.⁹⁰ Consensual reference puts poorer litigants in the position of having to decide whether or not to "purchase" an article III judge with the extra time and money required to wait for one.

Moreover, the option of consensual reference lends itself to abuse. By threatening delay or extensive discovery, defendants may coerce litigants into consenting to submit their cases to magistrates.⁹¹ Although Congress condemned such coercive tactics,⁹² it did not enact any provision to safeguard against their use. Congress's endorsement of con-

86. 28 U.S.C. § 636(b)(3) (1976) ("A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.").

87. See Whitman, *supra* note 16.

88. 28 U.S.C. § 636(c)(1) (Supp. V 1981).

89. S. REP. No. 74, 96th Cong., 1st Sess. 13, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1469, 1481.

90. See H.R. REP. No. 1364, 95th Cong., 2d Sess. 42 (1978) (dissenting view of the Hon. Elizabeth Holtzman); *Hearings on Diversity of Citizenship/Magistrate Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 499 (1977) [hereinafter cited as *Hearings*]; *id.* at 62-63, 122-24 (Rep. Dorinan); *id.* at 54-55 (statement of Thomas Ehrlich); H.R. REP. No. 1364, 95th Cong., 2d Sess. 542 (1978) (remarks of Rep. Holtzman) ("It is unlikely that a litigant will hold out for an article III judge when he or she is poor or denied bail or is suing for badly needed money."). See generally Note, *Article III Constraints and the Expanding Civil Jurisdiction for Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979).

91. See Note, *supra* note 90 at 1052.

92. See *Hearings*, *supra* note 90, at 14.

sensual reference may be appropriate in the context of the general run of civil cases. In light of the special status of civil rights, however, the potential for abuse of the consensual reference option dictates its elimination in the context of 1983 magistrates.

4. *Screening cases*—Despite the efficiency of allowing magistrates to handle all technical and routine matters, some cases may present constitutional or statutory questions of such importance that they warrant the exclusive attention of a federal judge. A screening mechanism must isolate such cases before they go to the magistrate. Under this proposal, the federal judge would screen incoming cases and decide which ones to submit to the 1983 magistrate.⁹³ Because section 1983 primarily seeks to protect important constitutional and statutory rights, no case should be referred to a magistrate that presents a novel or undecided constitutional question, or a claim that would require a thorough interpretation of an important statutory right.

B. Evaluation of the Proposal

1. *Advantages*—A system of 1983 magistrates could respond to the varying caseload problems across the federal districts.⁹⁴ Such a

93. Requiring the judge to screen cases might seem to thwart the labor-saving objective of a magistrate system. But the time saved by allowing the magistrate to find facts and deal with other relatively routine matters in the majority of cases would far outweigh the time spent in a preliminary scan of incoming § 1983 complaints. Indeed, available evidence suggests that a screening process combined with task division has this positive effect. Although not directly analogous to the proposal at hand, one study found that the creation of intermediate appellate courts at the state level, with discretion to screen appeals left in the state supreme courts, resulted in longer, more thoroughly researched supreme court opinions. Lower courts were reversed more often and the courts tended to decide more constitutional issues. See Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978). Moreover, the screening process can be streamlined to distribute the burden of screening among judges. Enlarging judges' professional staffs might also ease the burden. The California Court of Appeals, for example, was successful when it created a central staff to prepare memoranda and draft per curiam opinions, assigning the screening function to the staff director under criteria fixed by the judges. See Meador, *Appellate Management and Decisional Processes*, 61 VA. L. REV. 255, 270 (1975).

94. It is likely that not all states experience the same civil rights caseload pressures. It is probable that some areas are subject to great caseload pressures, while others are not. For instance, there has been disparate growth patterns of total civil and criminal filings in the period 1976 to 1981. In 1981, the Eastern District of Kentucky experienced a 48.8% decline in total filings during the period. ADMIN. OFFICE OF U.S. COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1980, at 80. The Northern District of California, on the other hand, saw a 46.1% rise in total filings over the same period. *Id.* at 116. The Northern District of New York witnessed an 83.1% rise, *id.* at 28, while the Southern District of West Virginia experienced a 38.3% drop. *Id.* at 48. See generally *id.* Of course, these numbers do not directly reflect the growth pattern of § 1981 cases over this period, but it would seem a reasonable conclusion that § 1983 filings may follow a similar pattern. The likely disparity in growth and concomitant § 1983 caseload pressures is important to the success of an exhaustion requirement because the presence or absence of caseload pressures may determine whether a state chooses to certify its agencies.

system would meet the caseload problem only where and to the extent it exists. Conversely, a statutory exhaustion requirement would apply overinclusively to all areas, regardless of local conditions. An added benefit of this approach is that the use of magistrates could grow with the increase in the number of 1983 cases.

The proposal for an expanded use of the existing magistracy apparatus also has certain political and financial advantages over the creation of federal judgeships. First, the creation of federal judgeships is a costly process, more than twice as expensive as the creation of a new magistracy position.⁹⁵ A budget-conscious Congress may postpone the creation of needed judgeships, even at the expense of continued caseload strain on the federal judiciary.⁹⁶ Second, the creation of federal judgeships introduces complex political factors, and may not lend itself to solving the immediate problem of the burgeoning 1983 caseload.⁹⁷ Third, the creation of federal judgeships inevitably lags behind the actual needs of the judicial system.⁹⁸ As a result, in the interim period judges may be forced to adopt expedient docket clearing techniques that may or may not prove desirable in the long term. The flexibility of the magistrates scheme avoids this problem.

2. Potential objections to a section 1983 magistrate scheme-

a. *The article III decision maker*— Critics of a section 1983 magistrates scheme might argue that it unconstitutionally delegates judicial power to magistrates who do not enjoy article III tenure and salary privileges.⁹⁹ This argument is largely disposed of by the Supreme Court's recent decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co.*¹⁰⁰ In *Marathon*, the Court struck down the Bankruptcy Reform Act of 1978,¹⁰¹ because Congress failed to limit the Act's broad grant of jurisdiction to non-article III bankruptcy judges in such a way that the "essential attributes" of judicial power remained in an article III decision maker.¹⁰² But *Marathon* does

95. In 1977, cost figures revealed that the creation of the average federal district judgeship cost, in its first year, \$308,000, and thereafter \$225,000 per year. The cost for a magistrate is less than half that for a judge: \$145,000 the first year, and \$112,000 per year thereafter. See McCabe, *supra* note 75, at 382; see also *Hearings, supra* note 90, at 498.

96. See Note, *supra* note 90, at 1049; Kaufman, *The Judicial Crisis, Court Delay and the Para-Judge*, 54 JUDICATURE 145, 147-48 (1970).

97. The creation of federal judgeships is attended by great "jousting, visibility and political oversight." See Note, *supra* note 90, at 1048.

98. S. REP. NO. 117, 95th Cong., 1st Sess. 7-8 (1977).

99. U.S. CONST. art III, § 1, grants life tenure to federal judges, with removal only according to the impeachment standard in article II, § 4. See, e.g., *O'Donoghue v. United States*, 289 U.S. 516, 529-30 (1933).

100. 458 U.S. 50 (1982).

101. 28 U.S.C. § 1471 (1976 & Supp. V 1981).

102. The Court discussed five essential attributes of judicial power: (1) that the scope of determination be narrow; (2) that the court retain a measure of jurisdiction over the matter at hand;

not preclude a scheme for section 1983 magistrates if an article III judge remains the ultimate decision maker. The scheme would confine the magistrate's function to elaborating a factual record, writing a report, and filing a recommendation upon which the article III judge would then render a decision.

Moreover, from a nonconstitutional point of view, the same policy concerns weighing against a more extensive use of magistrates weigh even more heavily against an exhaustion requirement, which would involve state agency officials, themselves non-article III decision makers. Indeed, unlike the present proposal, under which a magistrate merely finds facts and recommends dispositions, an exhaustion scheme would require state agency officials to dispose of cases, without any initial accountability to a federal judge.

b. Disparate treatment— Critics might also object to the section 1983 magistrates scheme because it may lead to a disparity of treatment between litigants whose cases are heard initially by magistrates and those whose cases are reserved for judges. But an exhaustion requirement could also result in disparate treatment. The magistrates proposal, however, enjoys two advantages over an exhaustion requirement in this respect. First, because uniform national standards could carefully define the relationship between judges and magistrates, litigants would not suffer a significant level of disparate treatment. In contrast, an exhaustion scheme would impose disparate treatment upon litigants, because some would have direct access to federal courts while others would have to exhaust local remedies. Furthermore, a federal judge could monitor the actions of a magistrate, whereas, under an exhaustion requirement, review of an agency decision entails the filing of a separate case, a further delay, and the problem of federal court deference to state agency decisions.

Critics of a system of section 1983 magistrates might also contend that such a system will lead judges to cope with rising caseload pressures by delegating ever greater powers to their magistrates. Nonetheless, the instant proposal minimizes judicial discretion concerning the use of magistrates: a judge cannot experimentally assign additional duties,¹⁰³ the proposal precludes the consensual reference option,¹⁰⁴ and the section 1983 magistrate has no power of decision on case-dispositive

(3) that orders by the bankruptcy court (or magistrate under this proposal) be enforceable only on order of a district court; (4) that findings made by the adjunct court (or magistrate) be set aside if "not supported by the evidence"; (5) that the adjunct court not issue final judgments that are binding and enforceable even in the absence of an appeal. The instant proposal, which carefully restricts the power of the 1983 magistrate, meets all of these criteria.

103. See *supra* notes 86-87 and accompanying text.

104. See *supra* notes 88-92 and accompanying text.

matters.¹⁰⁵ Thus, all of the avenues by which a judge might expand the use of section 1983 magistrates have been blocked.

CONCLUSION

Unmanaged, the great number of section 1983 claims threatens that statute's continued effectiveness as a guarantor of federal court access for civil rights litigants. In an effort to exercise control over the growing number of 1983 claims, the Supreme Court has developed several doctrines that may severely restrict the scope of section 1983. Some members of the judiciary have urged Congress to pass a state administrative exhaustion requirement as a solution to the 1983 caseload problem. Neither of these two "solutions" is acceptable. The courts should not limit the scope of an important civil rights statute, and an exhaustion requirement would probably prove unworkable and ineffective.

An expanded, though carefully circumscribed, use of the existing magistracy concept offers a better solution. Such a proposal could create a flexible and workable response to the 1983 caseload problem while minimally impinging on section 1983 as a device designed to ensure access to federal courts by "throw[ing] open the doors of the United States courts"¹⁰⁶ to civil rights litigants.

—Brian P. Owensby

105. See *supra* notes 84-85 and accompanying text.

106. *Mitchum v. Foster*, 407 U.S. 225, 242 (1971).

