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Civil Rights - Private Citizens Acting Under Color of State Law - A Federal Cause of Action Under 42 U.S.C.A. 1983

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CASE NOTES

CIVIL RIGHTS—PRIVATE CITIZENS ACTING UNDER COLOR OF STATE LAW—A FEDERAL CAUSE OF ACTION UNDER 42 U.S.C.A. § 1983

On the night of September 24, 1969, plaintiff, Claudine Hall returned home and found that her portable television set was missing. It had been taken out of her apartment by her landlady, defendant, Sylvia Garson. Garson seized plaintiff's television set while acting under the authority of Tex. Rev. Civ. Stat. Ann. article 5238a,[1] which gives the landlord a lien on the personal goods of the tenants that are in the rented premises and also allows enforcement of that lien by the landlord's peremptory seizure of the property. The lien is authorized up to the amount of the past-due rents and the property can be seized without any prior judicial procedure to determine validity of the amount or the claim, itself. Hall challenged the constitutionality of article 5238a as individual plaintiff for herself and as a representative of the class of tenants[2] affected by said statute, seeking injunctive relief against defendants. She brought her constitutional challenge in the United States District Court for the Southen District of Texas, urging that the court had jurisdiction under 28 U.S.C.A. § 1343(4)[3] and that a claim for which relief could be granted was stated

1. "Section 1. The operator of any . . . apartment . . . shall have a lien upon all baggage and all other property found within the tenant's dwelling for all rents due and unpaid by the tenant thereof; and said operator shall have the right to take and retain possession of such baggage and other property until the amount of such unpaid rent is paid. Such baggage and other property shall be exempt from attachment or execution to the same extent as set out in Article 4594, Revised Civil Statutes of Texas, 1925, as amended, regulating baggage liens for hotels, boarding houses, rooming houses, inns, tourist courts and motels." *See also,* Stalcup and Williams, *Property,* 24 Sw. L.J. 30 (1970), where it was stated: "The Texas legislature extended the landlord's lien by enactment of a variation of the hotel operator's baggage lien law. . . . The Act arms the landlord with the right to enter and take possession of such property until the rent is paid and to sell the property to satisfy the lien." *Id.* at 32.

2. *See* 28 U.S.C.A. rule 23(a).

3. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any con-

under 42 U.S.C.A. § 1983.[4] After a hearing, the court dismissed the action on the grounds that there was neither jurisdiction under 28 U.S.C.A. § 1343 nor a claim under 42 U.S.C.A. § 1983 for which relief could be granted, since there were adequate state judicial remedies available. The court of appeals reversed the district court, and ruled that there was federal jurisdiction under 28 U.S.C.A. § 1343(4) and that a claim for which relief could be granted was stated under 42 U.S.C.A. § 1983. *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970).

This decision is significant because it extends a federal cause of action under 42 U.S.C.A. § 1983 to plaintiffs who are deprived of their civil rights by private persons, that is, those not employed by federal, state, or municipal governments. Furthermore, such private person need not have acted in concert with a government employee in order to be subject to liability. The purpose of this note is to analyze the scope of this decision against the backdrop of prior decisions in the area of 42 U.S.C.A. § 1983 and its criminal counterparts, 18 U.S.C.A. §§ 241 and 242.[5]

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spiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

4. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. *See* Turkington, *Introduction: Some Limitations on an Impact Analysis in Equal Protection Cases*, 19 DEPAUL L. REV. 443 (1970), where it is stated that "When the Supreme Court interprets a constitutional provision such as the equal protection clause of the fourteenth amendment, in addition to resolving a conflict in a particular case, the Court is also setting down a standard for criminal and civil responsibility. This is so because of the interconnection between the fourteenth amendment and federal penal statutes, and statutes creating federal civil remedies." *Id.* at 448.

18 U.S.C.A. § 241 (1964) reads: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years,

This note will begin by analyzing the jurisdictional considerations of exhaustion of state remedies, abstention, and jurisdictional amount, all within the framework of a § 1983 cause of action. An examination of the development and widening scope of § 1983, leading to the *Hall* decision that a landlord acting pursuant to a state statute is acting under color of state law, will follow.

JURISDICTIONAL CONSIDERATIONS FOR 42 U.S.C.A. § 1983

The first jurisdictional question the court considered is whether exhaustion of state remedies must be required before the court can acquire jurisdiction. The doctrine of exhaustion is a court imposed limitation on the exercise of federal jurisdiction. It requires a party to exhaust all other state remedies available to him before he can resort to the federal court.[6] Exhaustion is generally required with regard to administrative remedies as opposed to judicial remedies. The rationale behind this distinction between administrative and judicial exhaustion of remedies is that the party seeking the relief will not necessarily need judicial relief until the administrative process is complete, *i.e.*, he will then receive judicial relief as a consequence of the normal review process. Upon exhausting state administrative remedies, the party can choose between state or federal courts.[7] Another distinction is that a judicial remedy determines liability based on past or present facts under currently existing laws. An administrative remedy looks to the future and forms a new rule to *change* conditions then existing.[8]

The district court in *Hall* held that it lacked jurisdiction because plaintiffs failed to exhaust whatever state remedies they had or to show the inadequacy of those remedies. They found support for their holding by the recent lower court opinion of *Schwartz v. Galveston Independent School*

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or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

18 U.S.C.A. § 242 (1964) reads: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life." *See also* Adickes v. S.H. Kress and Co., 398 U.S. 144, 152 n.7 (1970).

6. 1 BARRON & HOLTZOFF § 64 (Wright ed. 1960).

7. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 49 (1963).

8. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

District,[9] authored by another judge of the District Court for the Southern District of Texas. That court held that where state judicial and administrative remedies were available, they should be exhausted before pursuing federal remedies, since no federal interest would be served in avoiding appropriate state remedies.[10] That court based its premise on the legislative history of 42 U.S.C.A. § 1983,[11] but an examination of that history clearly shows that relief may be had in the federal courts without exhausting the judical remedies of state courts.[12] *Hall*, it will

9. 309 F. Supp. 1034 (S.D. Tex. 1970).

10. *Id.*

11. 42 U.S.C.A. § 1983 (1970) was taken largely from § 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act (an act to enforce the Provisions of the Fourteenth Amendment to the United States Constitution, 17 STAT. 13 (1871)). It later became REV. STAT. § 1979 and then 42 U.S.C.A. § 1983 (1964). For a thorough study of the legislative history of § 1983 and of the exhaustion doctrine, *see generally* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967); Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Comment, 49 CAL. L. REV. 145 (1961); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968); Note, 38 U. OF DET. L.J. 655 (1961); Note, *Constitutional Law: "Under Color of" Law and the Civil Rights Act*, 1961 DUKE L.J. 452 (1961); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486 (1969); Note, 66 HARV. L. REV. 1285 (1953); Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.L. REV. 839 (1964); Comment, *Civil Action for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015 (1967); Note, *Civil Rights and State Authority: Toward the Production of a Just Equilibrium*, 1966 WISC. L. REV. 831 (1966).

12. The case history of judicial remedies indicates such remedies need not be exhausted before seeking relief in the federal courts. *See* Bacon v. Rutland R.R., 232 U.S. 134 (1914) (bill in equity to prevent a state public service commission from requiring a railroad to locate a passenger station in a particular place). In this case, Mr. Justice Holmes held that the state remedy available was judicial, and thus "the railroad company was free to assert its rights in the district court of the United States." *Id.* at 138. *See also supra* note 8, at 211, where Mr. Justice Holmes stated: "A Federal circuit court should not entertain a suit by which injunctive relief is sought against railway passenger rates as fixed by the Virginia State Corporation Commission, in advance of the appeal to the highest state court from the order fixing the rates which is given by the state Constitution as of right to any aggrieved party." There appears to be no reason for the difference in the decision of these two cases.

In Pacific Telephone and Telegraph Co. v. Kuykendall, 265 U.S. 196 (1924) (bill in equity by a utility against a director of public works to enjoin the fixing of rates based on a valuation of the utility), Mr. Chief Justice Taft held that "[t]he state statute forbidding a stay of proceedings until a final judicial decree was rendered, of course, could not prevent a federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required." *Id.* at 201. The case history of exhaustion of administrative remedies indicates such remedies must be exhausted before seeking relief in the federal courts. *See, e.g.*, WRIGHT, *supra* note 7, at § 49, which holds that a plaintiff must exhaust state administrative remedies although not judicial ones before complaining to a federal

be remembered, dealt with state *judicial* remedies. Further, *Harkness v. Sweeny Independent School District 300*,[13] which was decided by the same court as *Hall*, has rejected much of the *Schwartz* opinion.[14]

An exception to the general rule that state administrative remedies must be exhausted is found in the landmark case of *Monroe v. Pape*,[15] where Mr. Justice Douglas, speaking for the United States Supreme Court, said that federal relief could be granted where state remedies were inadequate or available only in theory, but not in practice.[16] This rule can be applied to cases which involve administrative remedies, as well as to those which involve judicial remedies. Thus, where it would be futile to pursue state administrative remedies, federal relief might be sought.

Another exception to the general premise that administrative remedies must be exhausted is found in the line of cases where the state-afforded remedies are inadequate both in theory and practice. Thus, the Supreme

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court.

See also Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929), which held that a transit company having filed application for a new rate, was without right, before expiration of the thirty day statutory period, to resort to a federal court to enjoin an attempt to enforce existing rates, even though the commission had already decided that it lacked jurisdiction to permit the new rate. The court in *Hall v. Garson*, 430 F.2d 430, 435 (5th Cir. 1970) insists this decision was guised in the abstention doctrine. *See* Lane v. Wilson, 307 U.S. 268 (1939) (a suit against an Oklahoma restriction on voting based on the deprivation of personal civil rights). Mr. Justice Frankfurter held that a plaintiff must exhaust administrative remedies but "[t]o vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. . . . Barring only exceptional circumstances, . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts." *Id.* at 274. *Accord*, House Committee's report on the 1957 Civil Rights Act, 1957 *U.S. Code Cong. & Admin. News.* 1975. *But see* the discussion of the exceptions to this historically developed view, *infra.*

13. 427 F.2d 319 (5th Cir. 1970).

14. *Harkless, id.*, was a suit for damages and injunctive relief against a school district and its officers in their official capacities which sought relief from the firing of seventeen black teachers in an all-black high school.

15. 365 U.S. 167 (1961). In *Monroe*, plaintiff sought damages against the City of Chicago and thirteen Chicago policemen who broke into his home late at night without a search warrant, forced him and his family into the living room, and proceeded to ransack their home and rip their mattress covers "searching" for evidence of a two-day old murder. They took Monroe to police headquarters, held him on open charges for many hours without allowing him a phone call, and finally let him go without charging him of any crime—all this while a judge was readily available to hear any charges against him.

16. Three purposes were provided by Justice Douglas for 42 U.S.C.A. § 1983 (1970): 1) to override certain kinds of state laws; 2) to provide a remedy where state law was inadequate; and 3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Supra* note 15, at 173-74.

Court in *McNeese v. Board of Education*,[17] noted that the *Monroe* case pointed out that the "federal remedy is supplementary to the state remedy and the latter need not be sought and refused before the federal one is invoked."[18] The Court went on to find that the state administrative remedy would have been ineffective in the case at hand, and held that exhaustion was not required.

A third exception to the general rule is that where there is a substantial constitutional question sufficient enough to require the convening of a three-judge court, the state administrative remedies need not be exhausted.[19]

There is a conflict between two United States circuits as to the current state of the law pertaining to exhaustion of administrative remedies. The Second Circuit in *Eisen v. Eastman*, a case in which a landlord brought a § 1983 action challenging the constitutionality of a city rent control law,[20] felt that the decisions similar to *McNeese* were too broad and qualified them.[21] The court based its decision on the premise that there would be destructive consequences to the concepts of federalism and that there would be a great burden to the federal courts if they were compelled to hear all cases involving unconstitutional acts by state and local officials.[22] The Second Circuit in *Eisen* stated that *McNeese* dealt with an administrative remedy which was not effective,[23] that other rem-

17. 373 U.S. 668 (1963).

18. *Id.* at 671. *Accord*, Damico v. California, 389 U.S. 416 (1967), where the Court held that relief under the Civil Rights Act could not be denied welfare claimants on the ground that they had not first sought relief under state laws which provided inadequate administrative remedies; and Houghton v. Shafer, 392 U.S. 639 (1968), where the Court held that a state prisoner has a federal cause of action for a Civil Rights Act allegation in equity asking that the court order the governor and state correction officials to return certain legal material and other property seized from him without resort to futile state administrative remedies.

19. This exception arose in King v. Smith, 392 U.S. 309 (1968), where the Court held that the "[d]ecisions of this Court, however, establish that a plaintiff in an action brought under the Civil Rights Act, 42 U.S.C.A. § 1983, 28 U.S.C.A. § 1343, is not required to exhaust administrative remedies, where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court." *Id.* at 312 n.4. *But see* Wright v. McMann, 387 F.2d 519, 523 (2d Cir. 1967), where the court cited Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967), in holding that there must be exhaustion where the state remedy was complete and adequate.

20. 421 F.2d 560 (2d Cir. 1969).

21. *Id.*

22. *Id.*

23. "We find little basis in this for the view taken by many courts and commentators, *see* Note, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1203 n.15, that McNeese abolished the requirement of ex-

edies were inadequate[24] or futile,[25] and therefore, exhaustion was not required. *McNeese*, however, the court continued, did not abolish the general principle that plaintiff's must exhaust state administrative remedies before being allowed a federal cause of action.[26]

The Fifth Circuit, on the other hand, felt in *Hall* that the doctrine of exhaustion of state administrative remedies was abolished: "This Court routinely rejects the cry that it is necessary to exhaust state remedies."[27] The *Hall* court, however, maintained that while exhaustion was unnecessary, a plaintiff must pursue state administrative remedies until he receives an "authoritative institutional decision or pronouncement."[28] Only after such authoritative decision would the plaintiff be permitted a federal cause of action. Thus it appears that a uniformity among the circuits on the question of administrative exhaustion has yet to be accomplished. Since *Hall* dealt with the issue of exhaustion of state judicial remedies, its opinion on state administrative remedies was dictum. Nevertheless, the *Hall* court refused to require exhaustion based on the facts.

The second jurisdictional issue which the *Hall* court encountered is whether the doctrine of abstention is appropriate under this factual setting. The doctrine of abstention is another device by which the federal courts may avoid exercise of federal jurisdiction and thus avoid a controversy over issues of constitutional law.[29] The rationale behind the doctrine is that it is a way in which the federal courts in "exercising a wise discretion"[30] refuse to use their authority because of their regard for federalism.

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haustion of adequate state administrative remedies in all cases brought under the successor to § 1 of the Civil Rights Act of 1871. The Court held only that there was no administrative remedy by which plaintiffs could have any assurance of getting the relief they wanted . . . even if they were clearly entitled to it." *Id.* at 569.

24. "[I]t was also exceedingly unlikely that an administrative hearing would produce a change." *Id.* at 569.

25. "Under such circumstances to compel resort to an administrative remedy culminating in an appeal to that very officer 'would be to demand a futile act.'" *Id.* at 569.

26. "The answer, we think, can be found in the later statement in *King v. Smith*, citing *Damico*, that a plaintiff in an action under the Civil Rights Act 'is not required to exhaust administrative remedies, where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court.'" *Id.*

27. Hall v. Garson, *supra* note 12, at 436. *Accord*, Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970).

28. "It may be that exhaustion of administrative remedies is still required at least to the extent that it is necessary to have an authoritative institutional decision or pronouncement." Hall v. Garson, *supra* note 12, at 436 n.11.

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

30. Railroad Commission v. Pullman Co., 312 U.S. 496, 501 (1940).

The federal court declines to exercise its jurisdiction, and allows the state court to decide issues of state law.

> Abstention allows a federal court whose jurisdiction has been properly invoked to postpone decision, pending trial in a state court when the result might turn on issues of state law. . . . It denies immediate relief but retains jurisdiction, sending the parties to the state courts to obtain a decision on the state-law issues, usually in a declaratory judgment action.[31]

Thus, if the party does not obtain satisfactory relief at the state level, he may then seek relief in the federal courts. This often results in an extensive delay causing much hardship, for, after litigating his federal claims in the state court, the party must start all over again in the federal district court. For example, in *Government Employees v. Windsor*,[32] a ruling on the merits was not produced after five years of litigation, while in *England v. Louisiana Medical Examiners*,[33] it took nine years to achieve a ruling on the merits. Presently, four interpretations of the abstention doctrine are being advanced. The first holds that where a question may be disposed of entirely on state law, the federal courts should avoid a decision on a federal constitutional question; the second holds that the federal courts should avoid a needless conflict with the state when it determines its own affairs; the third states that unsettled questions of state law are properly for the states to decide; the fourth seeks to avoid congesting the dockets of the federal courts.[34] The district court in *Hall* had also cited *Schwartz*[35] for the proposition that the case should be dismissed based upon the doctrine of abstention. The *Schwartz* version of the abstention doctrine was that since the state court had a procedure which allowed a claim to be presented, the fact that there existed an opportunity for direct review to the Unites States Supreme Court of all state judicial decisions protected any federal interests involved. But the court rejected the *Schwartz* appraisal of the doctrine:

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31. *Supra* note 29.

32. 353 U.S. 364 (1957).

33. 375 U.S. 411 (1964).

34. For a complete analysis of the abstention doctrine, *see*, Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959); Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Abstention, An Exercise in Federalism*, 108 U. PA. L. REV. 226 (1959); 40 TEX. L. REV. 1041 (1962); Note, *Civil Rights and State Authority: Toward the Production of a Just Equilibrium*, 1966 WISC. L. REV. 831, 857 (1966); Comment, *Federal Jurisdiction: Problems Involved in the Discretionary Use of the Abstention Doctrine*, 1961 WISC. L. REV. 450 (1961); Note, 69 YALE L.J. 643 (1960).

35. *Supra* note 9.

"This mutation is inconsistent with the prior evolution of the law. It like the exhaustion doctrine cannot survive."[36] The rationale underlying the court's analysis is that the state law was clear: there was no need further to define it. The Texas statute[37] does in fact give the questioned power to the landlord of seizing the tenant's property without any hearing or other proceeding.[38] And using article 5238a as an example of when "the cloth of state law" is "off the loom" the court stated that where "there can be no doubt as to what the state law provides, there is no place for abstention."[39]

Judge Murrah's famous statement in *Stapleton v. Mitchell*,[40] quoted in *McNeese* and again in *Hall*, admirably lends support to this trend against abstention:

> We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.[41]

Thus it is clear that where, as in *Hall*, the constitutionality of a state statute is challenged in federal court, and that state statute is settled as to its meaning, there should be no place for federal court abstention in the case. The courts are required to pass on the issue of the constitutionality of the statute.

The remaining jurisdictional question facing the court was whether the $10,000 amount generally required for federal jurisdiction applied in this case. This jurisdictional amount is set out in 28 U.S.C.A. § 1331.[42]

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36. Hall v. Garson, *supra* note 12, at 436. For arguments for and against abstention, *see* WRIGHT, *supra* note 7, at § 52.

37. TEX. REV. CIV. STAT. ANN. art. 5238(a) (1970).

38. Hall v. Garson, *supra* note 12, at 437 n.13.

39. Hall v. Garson, *supra* note 12, at 437. *See also supra* note 15, at 183, where the Court held: "The fact that a state remedy is available is not a valid basis for federal court abstention." *Cf. supra* note 17; Zwickler v. Koota, 389 U.S. 241 (1967); Harman v. Forssenius, 380 U.S. 528 (1965); Wright v. City of Montgomery, Alabama, 406 F.2d 867 (5th Cir. 1969); Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970). *See* Reetz v. Bozanich, 397 U.S. 82 (1970), where Mr. Justice Douglas held that abstention should have been invoked by the district court because the question of the constitutionality of the state statute in question was uncertain and had never been interpreted by the state court. *See also* City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959). In Hostetter v. Idlewild Bon Voyage Corp., 377 U.S. 324 (1964), it was decided that "[a]bstention, which is not automatically required, and which had been requested by neither party was not warranted . . . there being no danger that a federal decision would disrupt state regulation." *Id.* at 328-29.

40. 60 F. Supp. 51 (D. Kan. 1945).

41. *Id.* at 55.

42. "(a) The district courts shall have original jurisdiction of all civil actions

There are many exceptions to this requirement. Quite clearly, 28 U.S.C.A. § 1343(4)[43] provides one exception, because it gives the federal courts jurisdiction to redress the deprivation of civil rights—as opposed to property rights—regardless of the amount of damages. It was used in *Hall* to overcome the $10,000 amount, based on the personal civil right of being free from unreasonable searches and seizures in one's abode. Another example where § 1343(4) was used as a means of avoiding the $10,000 requirement is *Gomez v. Florida State Employment Service*,[44] where the court ruled that § 1343(4) allows jurisdiction for claims stated under § 1983 as it works as a "conduit through which other statutory rights are protected . . ." and by itself protects civil rights, without a requirement of any jurisdictional amount.[45]

Gomez and *Hall* are similar in that both use § 1343(4) to circumvent the jurisdictional requirement of $10,000. They are also similar in that both deal mainly with personal rights—civil rights of migratory workers in *Gomez*. At first glance, one would thing that *Hall* was based on property rights—the seized television set of Sylvia Garson—and indeed one of defendant's arguments was that the District Court lacked jurisdiction under 28 U.S.C.A. § 1343 because only "property rights are involved and . . . § 1343 does not protect property rights."[46] But the court held that

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wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

43. 28 U.S.C.A. § 1343(4) (1958), reprinted *supra* note 3.

44. 417 F.2d 569 n.39 (5th Cir. 1969).

45. *Id. Accord*, Bussie v. Long, 383 F.2d 766 (5th Cir. 1967), where that court held: "No jurisdictional amount is necessary if a complaint states a cause of action for deprivation of civil rights under 42 U.S.C.A. § 1983." *Id.* at 769.

46. Hall v. Garson, *supra* note 12, at 438. Defendant based her argument on Hague v. C.I.O., 307 U.S. 496 (1939), where Mr. Justice Stone, in stating his "personal right" theory, held that "[t]he conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction. . . ." *Id.* at 531-32.

See also Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900); Abernathy v. Carpenter, 208 F. Supp. 793 (W.D. Mo. 1962). *But see* Mansell v. Saunders, 372 F.2d 573 (5th Cir. 1967); McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964); Bussie v. Long, *supra* note 45; Atlanta

those cases cited by defendant based on property rights were not applicable to *Hall* because *Hall* dealt with personal rights and not property rights, even though the object of the controversy was a television set. Defendant's property right theory was rejected because the invasion of the tenant's home, a violation of his rights, far outweighed the seizure of the television set.[47] Appropriately, as the court had determined in *Gomez*, "[w]e need not determine the extent to which 'property' rights are outside of § 1983 recourse since the essence of the claim here is the denial of rights of an essentially personal nature [civil rights of migratory workers]."[48] Thus, the jurisdictional requirement of $10,000 did not have to be met in *Hall*.

PRIVATE CITIZENS AND § 1983[49]

A question arises as to whether a private citizen can be said to act "under color" of state authority. This question arises because, previously, decisions were rendered allowing a federal cause of action which concerned only acts of the state itself, acts of state officials—whether acting pursuant to or in derogation of a state statute—or private citizens acting in concert with state officials. The *Hall* court decided that a federal cause of action will lie for acts by a private citizen, who, acting alone, deprived a party of his constitutional rights while acting under color of a state statute.

Defendant in *Hall* argued that the requisite state action needed to allow a federal cause of action under 42 U.S.C.A. § 1983 was not present because the property taken was seized by a landlady and not a state official. The court held that the defendants were correct in their claim that the requisite state action must be met for a suit under § 1983: For a deprivation of rights secured by the fourteenth amendment to ensue, a state action *must* occur.[50] What constitutes "state action" has been

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Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Note, *The "Property Rights" Exception to Civil Rights Jurisdiction—Confusion Compounded,* 43 N.Y.U.L. REV. 1208 (1968).

47. "[b]ut the rights that the petition seeks to protect are not the rights to the television. They are, instead, the right of the individual to be secure in his home and free from the invasion of that home without any prior procedure to protect his interest. They are then the most personal constitutional liberties of privacy and the right to be free from unreasonable searches and seizures by private persons with the blessings of this state. . . . These rights that this petition seeks to protect are truly the fundamentals of liberty, the essence of human dignity. Such fundamental, human, highly personalized rights are 'just the stuff from which § 1983 claims are to be made.' " Hall v. Garson, *supra* note 12, at 438.

48. *Supra* note 44 at 579.

49. 42 U.S.C.A. § 1983 (1964), reprinted *supra* note 4.

50. *See generally* Horan, *Law and Social Change; The Dynamics of the 'State*

interpreted in an increasingly liberal vein in the last several years. *Hall* held that the acts of a private citizen can become the actions of the state for purposes of § 1983 *and* for the due process clause of the fourteenth amendment.[51]

Two cases were cited by the court to support this decision. The first case, *Baldwin v. Morgan*,[52] found a plaintiff suing a railroad for its maintenance of separate waiting rooms for whites and blacks. A state order had demanded that the railroad provide such waiting rooms. The court held:

> [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature they become instruments of the State and subject to the same constitutional limitations as the State itself.[53]

But here, since the state had commanded, via order, the doing of the act in question, there was really not an independent action by a private citizen. The second case, *Adickes v. S. H. Kress and Co.*,[54] was an action by a white woman against an owner of a restaurant who failed to serve her because she was in the company of blacks. The United States Supreme Court held that a federal cause of action could lie under § 1983 against a private citizen and not the state or one of its officials; but that in order for such an action to lie, plaintiff would have to prove that the employee of the restaurant, in the course of his employment, had reached an agreement with the city policeman—*a state official*—to deny plaintiff service in the restaurant or subsequently to cause her arrest because she was a white person in the company of blacks. Here, again, there was the connotation of acting in concert with a "state" official in order for a federal

Action' Doctrine, 17 J. PUB. L. 258 (1968). *See also* Shelley v. Kraemer, 334 U.S. 1 (1947); Virginia v. Rives, 100 U.S. 313 (1880); *Ex parte* Virginia, 100 U.S. 339 (1880); Twining v. New Jersey, 211 U.S. 78 (1908); Brinkerhoff Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); Neal v. Delaware, 103 U.S. 370 (1881); Scott v. McNeal, 154 U.S. 34 (1894); Chicago, Burlington and Quincy R. Co. v. Chicago, 166 U.S. 226 (1897); Hovey v. Elliott, 167 U.S. 409 (1897); Carter v. Texas, 177 U.S. 442 (1900); Martin v. Texas, 200 U.S. 316 (1906); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907); Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913); Prudential Insurance Co. v. Cheek, 259 U.S. 530 (1922); American Railway Express Co. v. Kentucky, 273 U.S. 269 (1927); Mooney v. Holohan, 294 U.S. 103 (1935); Hansberry v. Lee, 311 U.S. 32 (1940).

51. Hall v. Garson, *supra* note 12, at 439. *See also* Gomez v. Florida State Employment Commission, *supra* note 44, at 578.

52. 287 F.2d 750 (5th Cir. 1961). In this case, the Court held that the act of maintaining separate waiting room facilities based on skin color "when done by the [Railroad] Terminal as commanded by state orders is action by the state." *Id.* at 755-56.

53. *Id.* at 755, n.9.

54. *Supra* note 5.

cause of action to lie.[55] A similar case was *United States v. Price*,[56] a criminal case prosecuted under 18 U.S.C.A. § 242, the criminal counterpart to 42 U.S.C.A. § 1983. Criminal and civil cases involving action under color of state law should be viewed together, as a decision in one area is necessarily binding on the other area.[57] There, the court held that a private citizen acting together with a state official constitutes the requisite state action needed under § 1983.[58]

The *Hall* decision went much further than *Baldwin, Adickes,* and *Price* in its holding that a private citizen acting *alone* can be acting with the requisite state action necessary to constitute a cause of action under § 1983.

> [T]he action taken, the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State. . . . Thus, Article 5238a vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function.[59]

Thus the cases of *Baldwin, Adickes,* and *Price* really are not precedents for the *Hall* decision as they all involve a private citizen acting in concert with a state official.

To further support its view, however, the *Hall* court considered past cases. In the last thirty years, state action questions centered on whether the alleged wrongdoer "was dressed with state authority."[60] The predecessor of 42 U.S.C.A. § 1983—Rev. Stats. § 1979—was interpreted so that only action authorized under state law came under the statute.[61] The case of *United States v. Classic*,[62] changed this interpretation. In *Classic,* it was alleged that defendants altered and falsely counted ballots in a Louisiana primary. The decision was that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrong-

55. *Id. See also* Shelley v. Kraemer, *supra* note 50, where state judicial action affirmatively enforcing a private scheme of discrimination against blacks was held unconstitutional.

56. 383 U.S. 787 (1966).

57. Turkington, *supra* note 5.

58. "To act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state." *Supra* note 56, at 789. *See also infra,* note 91.

59. Hall v. Garson, *supra* note 12, at 439.

60. Hall v. Garson, *supra* note 12, at 439.

61. *See* Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

62. 313 U.S. 299 (1941).

doer is clothed with the authority of state law, is action taken 'under color' of state law."[63]

This view that misuse of state law by one acting under color of state law allows a federal cause of action was upheld in *Douglas v. City of Jeannette*,[64] where members of Jehovah's Witnesses brought a class action in a federal district court to restrain a city and its mayor from enforcing against them an ordinance prohibiting the solicitation of orders of merchandise without first procuring a license from the city authorities and without paying a license tax. The Supreme Court affirmed the dismissal by the court of appeals and held that a cause of action arises under the Civil Rights Act whenever the right of free speech is violated under color of a state statute or ordinance.[65]

A qualification of the color of law clause occurred in *Snowdon v. Hughes*,[66] where the court found that plaintiff failed to state a cause of action under Rev. Stat. § 1979—predecessor to § 1983—when he alleged that defendants did not certify him as a nominee for state representative, as required by state law and under the fourteenth amendment.

> The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law.[67]

These cases illustrate the interpretation of state action as it applies to § 1983 and its counterparts. If a person receives power and authority to act from a state law, his subsequent act is state action, even if in the performance of that act he misuses such authority.

A major step in extending the color of law interpretation was taken in the famous case of *Screws v. United States*.[68] In *Screws*, a criminal action under U.S.C.A. § 242,[69] the Sheriff of Baker County, Georgia, arrested Hall, a black, on a charge of theft of a tire. Hall was handcuffed and then beaten to death by the sheriff and two other state officials. The

63. *Id.* at 326.

64. 319 U.S. 157 (1943).

65. *Id.*

66. 321 U.S. 1 (1944).

67. *Id.* at 6-7. *Accord*, Maxwell v. Bugbee, 250 U.S. 525 (1919); Prudential Insurance Co. v. Cheek, 259 U.S. 530 (1922); Madden v. Kentucky, 309 U.S. 83 (1940); Pope v. Williams, 193 U.S. 621 (1904); Breedlove v. Suttles, 302 U.S. 277 (1937). *See also* Taylor & Marshall v. Beckham, 178 U.S. 548 (1900), where the Court held that an unlawful denial, by state action, of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause.

68. 325 U.S. 91 (1945).

69. 18 U.S.C.A. § 242 (1964), reprinted *supra* note 5.

indictment charged that petitioners, acting under color of the laws of Georgia, willfully deprived Hall of his rights under the fourteenth amendment. The Supreme Court held:

> We are of the view that petitioners acted under color of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence their conduct comes within the statute.[70]

Thus, *Screws* extended the "under color" statutes to cases involving issues—police brutality here—other than those having racial and political overtones.[71]

In *Monroe v. Pape*,[72] police officers illegally broke into plaintiff's home, ransacked it, arrested plaintiff, and detained him on an "open" charge for ten hours. The Supreme Court held that § 1983 provided plaintiff with a *civil* action against such police officers in lieu of the *Classic* and *Screws* (both criminal cases) expansions of state action. "We conclude that the meaning given 'under color of' law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it."[73] In a dissenting opinion, however, Mr. Justice Frankfurter rejected this expanded definition, and maintained that state action—especially as applied to civil remedy sections such as § 1983—meant only action taken pursuant to and in accordance with state law.[74]

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70. *Supra* note 68, at 108.

71. *Accord*, Williams v. United States, 341 U.S. 97 (1951), where a special police officer was convicted, based on Screws v. United States, *supra* note 68, under the same criminal statute for using brutality to extract a confession of theft. *See also* Bell v. Hood, 327 U.S. 678 (1946), where federal jurisdiction was upheld in a civil damage action against F.B.I. agents, based on the fourth and fifth amendments. *See* Picking v. Pennsylvania R. Co., 151 F.2d 240 (3d Cir. 1945), where the court used *Screws* as a basis for holding that Congress gave a right to a federal cause of action ". . . to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." *Id.* at 249. They also stated that Congress intended to abrogate the absolute privilege of judicial officers and governors of the various states. *Id.* But for a limitation on this abrogation, *see* Tenney v. Brandhove, 341 U.S. 367 (1951), and Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955). Several other cases have followed *Screws* to use ordinary police brutality without racial overtones: Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947); Valle v. Stengel, 176 F.2d 697 (3rd Cir. 1949); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957); Davis v. Turner, 197 F.2d 847 (5th Cir. 1952); McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); State *ex rel.* Temple v. Central Surety & Ins. Corp., 102 F. Supp. 444 (W.D. Ark. 1952); Gordon v. Garrson, 77 F. Supp. 477 (E.D. Ill. 1948); Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958); Deloach v. Rogers, 268 F.2d 928 (5th Cir. 1959); McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955).

72. *Supra* note 15.

73. *Supra* note 15, at 187.

74. *Supra* note 15.

In *Gannon v. Action*,[75] defendants, members of various black militant organizations, entered a church and disrupted the ongoing services. Plaintiff, pastor of the church, brought an action under § 1983 seeking to enjoin defendants from future disruptions. The courts granted the injunction, holding that defendants had acted under color of a state "custom."[76] The court reasoned that a Missouri "custom" allows persons to worship at the church of their choice. Defendants, the court continued, entered the church under the color of this custom. After so entering, defendants deprived plaintiff and other churchgoers of their constitutional rights of freedom of assembly, speech, and worship. Since defendants had entered under color of a state custom and subsequently violated the civil rights of others, the court concluded, they were subject to civil liability under § 1983. Thus, the *Gannon* court expanded the scope of § 1983 to include actions against those acting under color of state custom as well as state law.

Plaintiffs in *Hall* based their claim on the case of *Sniadach v. Family Finance Corp.*,[77] where a Wisconsin prejudgment garnishment statute allowed wages to be frozen before a trial and without any opportunity on the part of the wage-earner to be heard or to tender any defense he might have. Plaintiff in *Sniadach* moved to dismiss the garnishment proceedings for failure to satisfy due process requirements of the fourteenth amendment. The United States Supreme Court reversed the Wisconsin Supreme Court and held this statute unconstitutional. There, it was stated that "[w]here the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process."[78] However, this statement was qualified: Not all summary procedure will violate due process and "may well meet the requirements of due process in extraordinary situations."[79]

In comparing *Sniadach* with *Hall*, the court found the two cases similar. The functional role of the creditor's attorney and debtor's employer in Sniadach, even when coupled with the formal roles of the clerk who issued the writ, is not

75. 303 F. Supp. 1240 (E.D. Mo. 1969).

76. *Id.* at 1245. *See also* 42 U.S.C.A. § 1983 (1964). *But see supra* note 54 and 23 VAND. L. REV. 413 (1970), which criticize the *Gannon* opinion.

77. 395 U.S. 337 (1969).

78. *Id.* at 340. He also stated that "[t]he interim freezing of wages without a chance to be heard violated procedural due process." *Id.*

79. *Id.* at 341. Cf., Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Ownbey v. Morgan, 256 U.S. 94 (1920); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).

significantly different from the role of the landlady here. And here [in *Hall*] the state action requirement is also met.[80]

But query, were they not significantly different because, in *Hall*, there was a federal cause of action against a private citizen acting independently of any state official or command whereas in *Sniadach* the person acting was the creditor's attorney—an officer of the court and thus a state official who was acting in a formal role according to a writ issued by the court itself?

Though recognizing the similarity of the *Sniadach* case, the court in *Hall* was reluctant to pass judgment on the merits of plaintiff's claim.[81] The court provided, however, adequate guidelines for the lower court to consider on remand in determining the constitutionality of article 5238a, and therefore to resolve plaintiff's claim definitively. The court suggested the balancing of due process requirements with "the competing interest of society served by quick and decisive action."[82] The court likened article 5238a to the prehearing summary procedure in the Wisconsin garnishment statute in *Sniadach*,[83] hinting that unless other facts are produced, article 5238a should be declared unconstitutional. But the court did warn that article 5238a is not a garnishment statute, and that not "all prehearing summary procedures are . . . unconstitutional."[84] Also, the court held, as did the *Sniadach* court, that the prehearing seizure of property is permissible in extraordinary situations.[85]

In further examining the balancing of interests analysis suggested in *Hall*, with particular emphasis directed to the constitutionality of the summary prehearing procedure as detailed in *Sniadach*, the case of *Goldberg v. Kelly*,[86] serves to provide firm support. That case held that only a hearing which allowed the person affected by the act to present his case would

80. Hall v. Garson, *supra* note 12, at 440.

81. Hall v. Garson, *supra* note 12, at 440. The court based its decision not to pass on the merits of Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111 (1962), where the Court held that adjudication of such delicate problems which are sure to have far-reaching import should rest on a full and complete record.

82. Hall v. Garson, *supra* note 12. *See also* Wasson v. Trowbridge, 382 F.2d 807 (2d cir. 1967), where the court held: "[t]o determine in any given case what procedures due process requires, the Court must carefully determine and balance the nature of the private interest involved, taking account of history and the precise circumstances surrounding the case at hand." *Id.* at 811.

83. W.S.A. § 267.18(2)(a) (1957).

84. Hall v. Garson, *supra* note 12, at 440.

85. Hall v. Garson, *supra* note 12. The court based this decision on Ewing v. Mytinger & Casselberry, Inc., *supra* note 79, where the Court, in an opinion delivered by Mr. Justice Douglas, held that a provision of the Federal Food, Drug, and Cosmetic Act permitting multiple seizures of misbranded articles when the administrator has probable cause to believe, from facts found, without hearing, that a misbranded article may lead to injury or damage of the purchaser is not unconstitutional. *See also* Fahey v. Mallonee, *supra* note 79.

86. 397 U.S. 254 (1970). *See* Note, *Constitutional Law—Due Process—Evidenti-*

avoid depriving that person of his constitutional rights. The commissioner of social services of the city of New York sought to terminate the benefits of welfare recipients before any type of pre-termination hearing was held, arguing that the combination of a post-termination "fair hearing" and informal pre-termination review was sufficient. The Supreme Court affirmed the district court's decision that only a pre-termination evidentiary hearing would satisfy the procedural due process requirement.[87] This decision was based on the obvious delay which would cause the already burdened welfare recipient much economic hardship before his case could be heard. The court in *Hall* gave another hint as to how the lower court should rule:

> Art. 5238a seems only to protect the landlord's interest, and not any broader public interest. Moreover, there is no requirement in Art. 5238a that there be any showing of the likelihood or the threat of the debtor-tenant's absconding, leaving the creditor-landlord with no effective way to collect a just debt. In addition, the same kind of deep personal hardship can result from the seizure of personal and household goods as resulted from the garnishment of wages under the Wisconsin statute in Sniadach.[88]

However, the court felt that if a "compelling interest" is served by article 5238a, or its peremptory seizure procedure—as brought out in the lower court—there may be a just reason for upholding its constitutionality.[89]

In conclusion, *Hall v. Garson* is significant because it widens the scope of § 1983 to include actions against private citizens acting alone. Of course, such actions must still be authorized by a state law. This decision has been buttressed by *United States v. Guest*.[90] In *Guest*, a Georgia grand jury indicted six private persons for criminal conspiracy in violation of 18 U.S.C.A. § 241.[91] The indictment charged that the defendants had conspired to deprive blacks of their fourteenth amendment right of equal protection. After stressing the fact that the equal protection clause only protected persons from action by the state, or by those acting for the state, the Court stated:

> This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a

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ary Hearing Required Prior to Termination of Welfare Benefits, 19 DEPAUL L. REV. 552 (1970).

87. Goldberg v. Kelly, *supra* note 86.

88. Hall v. Garson, *supra* note 12. For cases applying *Sniadach* to different types of garnishment statutes, and other prehearing summary devices, *see, e.g.*, Arnold v. Knettle, 10 Ariz. App. 509, 460 P.2d 45 (1969). *See also* Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969); Sackin v. Kersting, 10 Ariz. App. 340, 458 P.2d 544 (1969).

89. Hall v. Garson, *supra* note 12, at 441.

90. 383 U.S. 745 (1966).

91. *Id.* at 747.

nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the Constitutional violation.[92]

Thus, the *Guest* majority opinion admitted that state action occurs even when the participation of the state is "peripheral." Moreover, Mr. Justice Clark,[93] concurring (joined by Mr. Justice Black and Mr. Justice Fortas), and Mr. Justice Brennan,[94] concurring and dissenting in part (joined by Chief Justice Warren and Mr. Justice Douglas), both indicated that Congress has the power to pass legislation which prohibits and punishes all action that interferes with fourteenth amendment rights—regardless of whether that action is state action; a majority of the Court supported this view. Thus, while the *Hall* court expanded § 1983 so that it provides a remedy for those deprived of their rights by a private person acting with state authorization, the *Guest* court is willing to constitutionally accept a statute which prohibits any—even totally private—interference with the civil rights of others.

The ramifications of the *Hall* decision are innumerable. For example, an owner of a restaurant licensed by the state refuses to serve persons with long hair. Is this state action within the ambit of the *Hall* decision? Or an owner of a surburban housing subdivision refuses to sell to a foreigner because a state law gives a right to discriminate in the sale of real estate. Is the owner dressed with state authority according to the *Hall* decision? Or a state law allows a landlord to enter a tenant's apartment to inspect for damages without the tenant's permission. Is the landlord within the *Hall* determination of state authority? Or a city ordinance permits a citizen's arrest for violation of curfew. Is this state action according to the *Hall* doctrine of state authority? Or a state law allows private clubs to restrict membership based on race, creed, or color. Is this the kind of state action contemplated by the *Hall* court? Or a state law permits the incorporation of a group which terrorizes minority groups (e.g. the Ku Klux Klan). Is that group dressed with state action as per the *Hall* ruling?

Even though the plaintiff's remedies in the area of § 1983 have expanded, it still takes a very long time for the American judicial system to grind out that remedy. *Sniadach* and *Hall* are good examples of this problem. In *Sniadach*, the plaintiff waited three years for a remedy. In *Hall*, the plaintiff is still waiting for an answer to the invasion of her abode and the taking of her property therefrom.

Robert Walner

92. *Id.* at 755-56.
93. *Id.* at 762.
94. *Id.* at 782.