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42 U.S.C. 1983 - Exhaustion of State Administrative Remedies

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42 U.S.C. § 1983—EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES—The United States Court of Appeals for the Fifth Circuit has held that state administrative remedies, where adequate and appropriate, must be exhausted before proceeding with a section 1983 action in a federal court.

Patsy v. Florida International University, 612 F.2d 946 (5th Cir. 1980), *vacated on rehearing*, 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 5, 1981) (No. 80-1874).

Georgia Patsy, a white female secretary at Florida International University (FIU or University) brought an action under 42 U.S.C. § 1983[1] against the University in the United States District Court for the Southern District of Florida.[2] In the complaint, she alleged that during her employment at FIU[3] she was uniformly rejected from numerous employment openings in the University because the University engaged in a pattern and practice of racial and sexual discrimination in violation of the

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1. 42 U.S.C. § 1983 (1976) (amended 1980) (current version at 42 U.S.C. § 1983 (Supp. III 1980)), states in relevant part:

> 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.

Id. Patsy asserted jurisdiction under 28 U.S.C. § 1343(3) (1976) which states in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (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.

Id.

2. Patsy v. Florida Int'l Univ., 612 F.2d 946, 946 (5th Cir. 1980), *vacated on rehearing*, 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 5, 1981) (No. 80-1874).

3. The plaintiff was employed as a "Secretary III" in the personnel office at the time the suit was commenced in February, 1979. She began employment at FIU in June of 1972 as a "Clerk Typist III." Brief for Appellee at 5.

Constitution[4] and laws of the United States.[5] The plaintiff contended that FIU segregated applicants' files according to race and sex and sought out individuals from minority groups to hire and promote.[6]

Naming the Board of Regents of the State of Florida as defendants on behalf of FIU,[7] Ms. Patsy requested that the court promote her to the next available position for which she had applied and for which she was qualified or, in the alternative, award her $50,000 actual and punitive damages.[8] The district court granted the defendants' motion to dismiss the complaint because the plaintiff had failed to exhaust administrative remedies, in accord with the general rule that plaintiffs must exhaust available administrative remedies before seeking judicial relief.[9]

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4. U.S. CONST. amend. XIV, § 1, provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The fourteenth amendment was applicable because the Board of Regents, representing FIU, was considered a part of the state. *See infra* note 7.

5. 634 F.2d at 902.

6. *Id.*

7. Brief for Appellee at 3, 612 F.2d 946 (5th Cir. 1980). Patsy originally filed the complaint against FIU but was required to amend it because FIU lacked capacity to be sued. The defendant Board of Regents is a ten-member corporate state agency that serves as Director, Division of Universities, Department of Education, State of Florida. The Board of Regents operates and manages the State University System, which includes FIU and eight other state universities, with state appropriated funds. *Id.* at 5.

8. 634 F.2d at 902.

9. *Id.* This rule applies to both state and federal administrative remedies. *See* Illinois Commerce Comm'n v. Thompson, 318 U.S. 675 (1943); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929); 3 K. DAVIS, ADMINISTRATIVE LAW, § 20.01, at 56-57 (1958).

In support of the motion to dismiss, the defendants in *Patsy* offered a memorandum outlining the administrative remedies available to Career Service employees under the State University System. The Florida International University career service employee (CSE) grievance procedure, FLA. ADMIN. CODE R. 6C8-4.05, requires an employee to seek redress from his immediate superior and on up through the FIU chain of command. Appeal can be taken to the Florida Director of Personnel in the Department of Administration who may then issue a final decision. The Director, however, lacks enforcement authority. *Id.*

Having completed the CSE grievance procedure, the employee may, if dissatisfied, file a complaint with the Human Relations Commission (HRC). FLA.

On appeal, a panel of the Fifth Circuit Court of Appeals reversed, maintaining that the United States Supreme Court had ruled that exhaustion of state administrative remedies was not a prerequisite for a section 1983 suit.[10]

On rehearing en banc,[11] however, the court of appeals held that state administrative remedies, where adequate and appropriate, must be exhausted before proceeding with a section 1983 action in federal district court.[12] Judge Roney, writing for the majority,[13] first discussed the policy purposes for requiring exhaustion of *federal* administrative remedies, such as the desire to conserve scarce judicial resources and to improve the administrative process, as articulated in *McKart v. United States*.[14] In addition, the

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ADMIN. CODE R. 9D-9. After completing the necessary evaluations by the Executive Director, HRC General Counsel, and the HRC Hearing Officer, none of whom have enforcement authority for their decisions, the employee may appeal to the appropriate Florida circuit. 634 F.2d at 925-28 (Hatchett, J., dissenting).

Based upon Patsy's failure to mention in her complaint any effort made to obtain relief through these remedies, the district court dismissed. *Id.* at 913-14.

10. Patsy v. Florida Int'l Univ., 612 F.2d at 946 (5th Cir. 1980). Judge Godbold was joined by Judges Reavley and Anderson. *See* Ellis v. Dyson, 421 U.S. 426 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973).

The panel decision also held that the district court's reliance on Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974), was misplaced because *Penn* involved a 42 U.S.C. § 1981 suit, not a section 1983 action. 612 F.2d at 947. 42 U.S.C. § 1981 provides in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . as is enjoyed by white citizens. . ." The Fifth Circuit in *Penn*, sitting en banc, reasoned that because litigants were traditionally required to exhaust available federal administrative remedies before commencing their suit in federal court, the plaintiffs should be required to exhaust the remedies available under the Civil Service Commission. The case was remanded with instructions to dismiss. 497 F.2d at 971.

11. 634 F.2d at 900.

12. *Id.* at 914.

13. *Id.* at 901. Joining in the majority opinion were Chief Judge Coleman and Judges Brown, Ainsworth, Godbold, Charles Clark, Gee, Tjoflat, Hill, Fay, Garza, Henderson, Reavley, Politz, Anderson, Randall and Tate.

14. 395 U.S. 185, 193-95 (1969). In *McKart* the validity of a selective service reclassification order was challenged in federal court during a criminal proceeding for refusing induction. As a matter of statutory interpretation McKart was not required to administratively appeal the order. The policy purposes behind the normal requirement for exhaustion, as set forth in *McKart*, were to: (1) avoid premature interruption of the administrative process; (2) let the agency develop the necessary factual background upon which decisions should be based; (3) permit the agency to exercise its discretion or apply its expertise; (4) improve the efficiency of the administrative process; (5) conserve scarce judicial

court stated that considerations of federalism and comity weigh against federal intervention in a dispute involving state action.[15] The court acknowledged that practical exceptions to the exhaustion doctrine are required to properly balance the claimant's rights against the policy purposes favoring the rule.[16] Indicating

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resources, because the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) give the agency a chance to discover and correct its own errors; and (7) avoid the possibility that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures. *Id.* at 193-95. *See* DAVIS, *supra* note 9, at 642-44 (Supp. 1970) (describes the *McKart* decision as a long-awaited clarification of the Court's exhaustion doctrine and the reasons for it).

15. 634 F.2d at 903. The court cited several nonexhaustion cases, not involving section 1983, for the purpose of showing the general prohibition against federal intervention in state proceedings. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), involving application of the 1974 amendments of the Fair Labor Standards Act, which extended the statutory minimun wage and maximum hours provisions to employees of states and their political subdivisions. The Court ruled these provisions to be over-extensions of the commerce clause power. Congress may not exercise power in a way that impairs the states' integrity or their ability to function effectively in a federal system. 426 U.S. at 852. In Younger v. Harris, 401 U.S. 37 (1971), a criminal defendant in a state proceeding sought federal injunctive relief on grounds that the state statute was unconstitutional. The Court denied relief because prima facie unconstitutionality is not a sufficient basis for injunctive relief, and federal courts are forbidden from enjoining pending state criminal proceedings absent a great and immediate danger of irreparable injury. 401 U.S. at 46. In Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), an order of the Texas Railroad Commission forbidding operation of sleeper cars without a Pullman conductor (white) was attacked by Pullman porters (blacks) as discrimination against Negroes in violation of the fourteenth amendment. The Court ruled that scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary required giving the state courts an opportunity to make a definitive ruling on the case before federal intervention. 312 U.S. at 501.

16. 634 F.2d at 903-04. The court listed the traditional exceptions to the requirement of exhaustion of administrative remedies: (1) when the prescribed administrative remedy is plainly inadequate because either no remedy is available, or the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury; (2) when the claimant seeks to have a legislative act declared unconstitutional and administrative action will leave standing the constitutional question; (3) when the question of the adequacy of the administrative remedy is essentially co-extensive with the merits of the plaintiff's claim, e.g., where the plaintiff contends that the administrative system is unlawful or unconstitutional in form or application; and (4) when it is futile to comply with the procedures because the claim will clearly be rejected. *See, e.g.*, Annot., 47 A.L.R. FED. 15 (1980); DAVIS, *supra* note 9, § 20.07, at 97-100 (1958 and Supps. 1970, 1976 and 1980).

that the application of these exceptions is not an exact science but one that requires careful analysis and a balancing of competing interests,[17] the court queried whether it should adopt the analytical approach[18] applied in other administrative remedy cases or apply a blanket no-exhaustion rule to all section 1983 cases.[19]

The majority examined this question in light of relevant Supreme Court cases. The court first observed that in *Monroe v. Pape*,[20] the Court had held that state *judicial* remedies need not be exhausted before filing a section 1983 action, but the question of the exhaustion of state *administrative* remedies had not been addressed.[21] The court also noted that in *McNeese v. Board of Education*,[22] which involved exhaustion of both state administra-

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17. 634 F.2d at 904. *See* DAVIS, *supra* note 9, at 56-57.

18. By analytical, the court is referring to a flexible case-by-case determination whether exhaustion should be required. This is in contrast with a blanket no-exhaustion rule which allows the court no room for analysis. 634 F.2d at 904.

19. *Id.*

20. 365 U.S. 167 (1961). In *Monroe*, a suit was filed in a federal district court by a husband and wife against Chicago police officers and the city of Chicago alleging that the officers broke into the plaintiffs' home and searched it without a warrant and arrested and detained the husband without a warrant or arraignment in violation of 42 U.S.C. § 1983. In response to the defendants' assertion that the plaintiffs were required by Supreme Court precedent to exhaust the available Illinois State judicial remedies prior to asserting their claim in federal court, the Court ruled that the federal remedy under section 1983 for deprivation of civil rights was supplementary to the state remedy. It need not be sought and refused before the federal remedy was invoked. 365 U.S. at 183. *See, e.g.*, DAVIS, *supra* note 9, at 644-45 (Supp. 1970); S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, § 2.02, at 34-36 (1979); Comment, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

21. 634 F.2d at 904.

22. 373 U.S. 668 (1963). *McNeese* involved a section 1983 suit brought in federal district court by Negro students in the Illinois public school system against alleged racial segregation. *Id.* at 669. The suit was dismissed by both the district court and the court of appeals on the grounds that the plaintiffs failed to exhaust administrative remedies available under an Illinois statute. The statute provided that a certain minimum number or proportion of the school district (50 people or 10%, whichever is less) file a complaint with the Superintendent of Public Instruction alleging racial segregation and that if the Superintendent finds the charge substantially correct that he request the Attorney General to bring suit to correct it. *Id.* at 670. The Supreme Court reversed the lower courts on the ground that in its earlier opinion in *Monroe v. Pape* the Court held that the federal remedy was supplementary to the state remedy and that the state one need not be invoked first. Additionally, the

tive and judicial remedies, the Supreme Court had held that failure to first resort to state proceedings did not defeat relief under the Civil Rights Acts.[23] The court determined, however, that exhaustion of administrative remedies in *McNeese* would not have been required even if it were not a section 1983 case because present in the case was a recognized exception to the exhaustion requirement: inadequate administrative remedies.[24] The court concluded that subsequent cases relying upon *McNeese*, despite *McNeese*'s falling within a recognized exception, have nevertheless developed the rule, relied upon by most circuits, that exhaustion is never required in section 1983 suits.[25] Avoiding the question of whether the Court in *McNeese* ever intended to establish this no-exhaustion rule, the majority concluded that the Supreme Court does not follow such a rule now and, if such a rule were to be sustained, it would come only after the issue is squarely presented and thoroughly considered.[26]

To support its conclusion, the court analyzed two recent Supreme Court cases, *Gibson v. Berryhill*[27] and *Barry v. Barchi*.[28]

Court stated that it was by no means clear that the Illinois statute in fact provided a remedy sufficiently adequate to preclude prior resort to the federal court. *Id.* at 674-75. *See generally* DAVIS, *supra* note 9, § 20.01, at 645-46 (Supp. 1970); NAHMOD, *supra* note 20, § 5.10, at 144-46; Sullivan, *Exhaustion in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 543-46 (1974).

23. 634 F.2d at 904-05.

24. *Id.* at 905. *See supra* note 16.

25. 634 F.2d at 905.

26. *Id.*

27. 411 U.S. 564 (1973). The plaintiffs in *Gibson* had been charged with unprofessional conduct within the meaning of a state optometry statute because they were practicing optometry under the employment of a company, not independently. *Id.* at 567. They filed a section 1983 suit in federal district court to enjoin hearings scheduled before the Alabama Board of Optometry. *Id.* at 569. The Supreme Court held that the district court was warranted in enjoining the proceedings and in concluding that the Board's make-up of independent optometrists disqualified them from passing on the decision. *Id.* at 578-79. However, because the Alabama statute did not preclude the optometrists from practicing as employees of corporations, the Court vacated and remanded for futher consideration. *Id.* at 580-81.

28. 443 U.S. 55 (1979). After his horse-trainer's license was temporarily suspended under New York state law as a result of the discovery of a drug found in one of his horses in a post-race urinalysis, *id.* at 59, the plaintiff in *Barry* filed suit directly in a federal district court rather than pursue the available state remedies. *Id.* at 61. Barchi alleged, *inter alia*, that the statute in question violated the due process clause of the fourteenth amendment because it permitted his license to be revoked without a pre-suspension hearing and be-

Significantly for the court, it concluded that in *Barry* the Supreme Court did not merely recite a no-exhaustion rule, but rather focused on another traditional exception to the no-exhaustion rule: where the question of the adequacy of the administrative remedy is practically identical to the merits of the lawsuit.[29] For Judge Roney, the fact that the Supreme Court went to the trouble of finding and using traditional exceptions to the exhaustion rule indicated that the Court did not adhere to a rigid no-exhaustion rule.[30] This is further supported by *Gibson v. Berryhill*,[31] in which, according to the court, the Supreme Court indicated that the question of a no-exhaustion rule was still unsettled.[32] Moreover, the court noted that Justice Marshall and Justice Brennan, in concurring opinions in *Gibson*, joined in the majority opinion except so far as it suggested that the question of exhaustion remained open.[33]

The *Patsy* court recognized that the Supreme Court has stated apparently quite categorically that exhaustion is not required in section 1983 cases.[34] However, the court pointed out that all the Supreme Court cases addressing this issue involved inadequate state administrative remedies and fell within one of the tradi-

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cause a summary suspension could not be stayed pending administrative review. *Id.* In accepting this contention the Court also rejected the state's preliminary objection that Barchi should not have commenced the federal action prior to exhausting his available administrative remedies. Quoting from Gibson v. Berryhill, 411 U.S. 564 (1973), the *Barry* Court stated that exhaustion of administrative remedies is not required when the question of the remedies' adequacy is, for practical purposes, "identical with the merits of the plaintiff's lawsuit." 443 U.S. at 63 n.10 (quoting *Gibson*, 411 U.S. at 564).

29. 634 F.2d at 905. An example of this is where the plaintiff asserts the unconstitutionality of the administrative procedure either in form or practice. Because this question goes to the heart of the plaintiff's alleged harm and requires the agency to make a determination it is unqualified to make, the exhaustion requirement is waived. *See supra* note 16 & 27. *See, e.g.*, DAVIS, *supra* note 9, § 20.00-4, at 139-40 (Supp. 1980).

30. 634 F.2d at 906.

31. 411 U.S. 564 (1973). *See supra* note 27.

32. 634 F.2d at 906. "Whether this [exhaustion of state administrative remedies] is invariably the case . . . is a question we need not now decide . . . . Thus, the question of the adequacy of the administrative remedy, an issue which under federal law this District Court was required to decide, was for all practical purposes identical with the merits of appellees' lawsuit." *Gibson*, 411 U.S. at 574-75.

33. 634 F.2d at 906. *See* 411 U.S. at 581 (Marshall & Brennan, JJ., concurring).

34. 634 F.2d at 906.

tional exceptions to the exhaustion doctrine.[35] Judge Roney

35. *Id.* at 906-07. *See* Ellis v. Dyson, 421 U.S. 426 (1975). After being convicted and fined for violating a Dallas loitering ordinance, *id.* at 428, the defendant in *Ellis* brought an action directly in federal district court under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343 (3) and (4) challenging the constitutionality of the ordinance. *Id.* at 429-30. Dismissed in the district court because federal declaratory and injunctive relief were unavailable absent a showing of bad faith or harassment, the case was affirmed by the court of appeals. *Id.* at 430-31. The Supreme Court reversed, citing its decision in Steffel v. Thompson, 415 U.S. 452 (1974), and reiterating that exhaustion of state judicial or administrative remedies is unnecessary in section 1983 actions. 421 U.S. at 432.

In *Steffel*, an action was filed in a federal court for injunctive and declaratory relief from an allegedly unconstitutional Georgia criminal trespass law the violation of which the police threatened to charge the petitioner if he did not stop handbilling against the Vietnam war. 415 U.S. at 455-56. The federal district court dismissed, and the court of appeals affirmed, on the grounds that there was no actual controversy and that the same standards of bad faith and harassment that applied to federal injunctive relief also applied to declaratory relief. *Id.* at 456-57. The Supreme Court reversed on the grounds that there was an actual controversy despite the absence of pending state actions, that declaratory relief was not dependent upon a showing of bad faith or harassment, and that it is immaterial whether the attack is made on the prima facie unconstitutionality of a state criminal statute or its applicaton. Furthermore, the Court noted that requiring the federal courts to refuse relief unless a charge were pending would turn federalism on its head and that when claims are properly premised on 42 U.S.C. § 1983 no such federal deference to state judicial or administrative remedies is required. *Id.* at 472-73. The *Patsy* majority reasoned that the statements in *Steffel* and *Ellis* concerning exhaustion of state administrative remedies were strictly dicta. 634 F.2d at 907.

Carter v. Stanton, 405 U.S. 669 (1972), involved a challenge to an Indiana welfare regulation that required a six-month separation of the spouse before eligibility for Aid For Dependent Children was dismissed by the federal district court for failure to exhaust administrative remedies. 405 U.S. at 670-71. Citing Damico v. California, 389 U.S. 416 (1967), the Court reversed on the grounds that exhaustion is not required in these circumstances.

After their state habeas corpus petitions were dismissed, the petitioners in Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam), sought and were denied federal habeaus corpus on the grounds that they had failed to invoke state judicial alternatives to habeas corpus, such as a suit for injunction or writ of mandamus. *Id.* at 249-50. The Supreme Court reversed, holding that the federal habeas corpus statute, 28 U.S.C. § 2254, did not require repetitious applications in the state courts. Furthermore, citing *Monroe v. Pape*, *Damico v. California*, and *Houghton v. Shafer*, the Court ruled that the prisoners' pleadings also could have been read to plead causes of action under 42 U.S.C. § 1983, where the federal remedy was supplementary to the state remedy which need not be sought before the federal one was invoked. 404 U.S. at 251. According to the *Patsy* majority, the *Wilwording* Court's discussion of administrative remedies was dictum. 634 F.2d at 907.

While the petitioner in Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam), was in jail pursuing an appeal of a burglary conviction, his law books, trial records and other materials were confiscated by prison officials because they

asserted that several of the Supreme Court justices have expressed dissatisfaction with a blanket no-exhaustion rule in section 1983 cases.[36] Moreover, he maintained that the Court, by

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were in the possession of another inmate in violation of prison regulations. *Id.* at 640. The Court ruled that the petitioner's bringing an action in federal court, without exhausting available administrative remedies, was appropriate because of the futility of the administrative remedies and because in any event, in light of previous decisions in *Monroe*, *McNeese*, and *Damico*, resort to these remedies was unnecessary. *Id.* at 640.

In King v. Smith, 392 U.S. 309 (1968), the Supreme Court held that an Alabama regulation declaring a man who cohabited with a mother receiving Aid For Dependent Children (AFDC) a "substitute father," regardless of any marital relationship or any obligation to support the children and thereby disqualifying the mother for AFDC benefits, was invalid because it was inconsistent with section 406(a) of the Social Security Act. *Id.* at 333. The Court also rejected the state's argument that administrative remedies must first be exhausted, stating that this requirement was waived where the constitutional challenge is sufficiently substantial to require the convening of a three-judge court. *Id.* at 312 n.4.

In Damico v. California, 389 U.S. 416 (1967) (per curiam), welfare claimants asserted that a state law establishing a three-month separation requirement for nondivorced mothers to be eligible for welfare was unconstitutional. *Id.* Dismissed by the federal district court because of the claimants' failure to exhaust adequate administrative remedies, *id.* at 416-17, the case was reversed by the Supreme Court on the basis of the Court's holding in *McNesse v. Board of Education* that the Civil Rights Act provided a federal remedy supplementary to any remedy any state may have. *Id.* at 417.

See Comment, *Developments in the Law-Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1274 (1977) [hereinafter cited as *Developments in the Law*]. *See also* Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 570 (1975). *See supra* note 16.

36. 634 F.2d at 907. *See* Runyon v. McCrary, 427 U.S. 160 (1976) (42 U.S.C. § 1981 prohibits private commercially operated nonsectarian schools from denying admission to Negro students). The *Patsy* majority relied upon Justice Powell's concurrence in *Runyon* in which he alluded to what he considered the extreme interpretations given to some of the Civil Rights Acts, especially 42 U.S.C. § 1983. In Justice Powell's opinion, the no-exhaustion rule resulted largely without the benefit of briefing or argument. 427 U.S. at 186 n.* (Powell, J., concurring). *See* Note, *supra* note 35, at 570. *See also* City of Columbus v. Leonard, 443 U.S. 905 (1979) (once state remedies are invoked, they must be exhausted prior to commencing a federal suit). The *Patsy* majority relied upon Justice Rehnquist's dissent to the denial of certiorari. 634 F.2d at 907-08. After noting that the Court had earlier held in *Monroe v. Pape* that "[A] federal plaintiff need not initiate state proceedings before filing a § 1983 action," *Leonard*, 443 U.S. at 910 (Rehnquist, J., dissenting), Justice Rehnquist went on to say: "Quite apart from this distinction [between invoking the federal remedy before the state action is initiated rather than after] the time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the 'federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' " *Id.* at 910-11 (Rehnquist, J., dissenting) (quoting *Monroe*, 365 U.S. at 183).

holding in *Huffman v. Pursue*[37] that a plaintiff was required to appeal an adverse state court decision prior to filing a section 1983 action,[38] indicated that failure to exhaust state remedies will sometimes preclude the federal action.[39]

Finally, the court noted the unevenness of treatment given by the federal courts to federal officials, against whom actions must first be pursued under federal administrative remedies, and state officials, against whom actions can be taken directly to federal court. The court expressed a concern that this unevenness would be destructive of good federalism and burdensome to the courts.[40] The court concluded, based upon its analysis of these cases, that it was not prevented by Supreme Court precedent from taking an analytical approach to the question of exhaustion of state administrative remedies.[41] This conclusion was supported, according to the majority, by the division among the circuits on this question.[42]

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37. 420 U.S. 592 (1975). In *Huffman* an owner of a pornographic movie theater filed a section 1983 suit directly in a federal court rather than appeal a state judgment that declared his establishment a nuisance and therefore subject to closing for one year under a state statute. The Court held that absent *Younger*-type extraordinary circumstances, the state proceedings must be allowed to proceed. *Id.* at 611. While conceding that *Huffman* dealt with judicial, not administrative remedies, the *Patsy* court nevertheless found the opinion strongly indicative of what it considered to be the Supreme Court's flexible approach to section 1983. 634 F.2d at 908.

38. 420 U.S. at 611.

39. 634 F.2d at 908.

40. *Id.* This concern was voiced by Judge Friendly in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). In *Eisen*, a landlord filed suit in a federal district court against the New York City district rent and rehabilitation director, challenging the constitutionality of the city rent control law, the general levels of rent allowed under it, and the propriety of the director's reducing maximum rents. The suit was dismissed on the grounds that the Civil Rights Act did not apply to suits against municipalities. 421 F.2d at 562. The decision was affirmed on the grounds that section 1343 (3), *see supra* note 1, jurisdiction did not extend to property rights, only civil rights, and that therefore a section 1983 action did not arise. 421 F.2d at 566-67.

41. 634 F.2d at 908.

42. *Id.* Six circuits—the third, fourth, fifth, sixth, eighth and tenth—have concluded that the Supreme Court has established a blanked no-exhaustion rule. *See* Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); Ricketts v. Lightcap, 567 F.2d 1226 (3rd Cir. 1977); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

Four circuits—the first, second, seventh, and ninth—have applied more flexi-

Judge Roney next considered whether the court *should* take an analytical approach to exhaustion in section 1983 cases.[43] He began by addressing the two basic arguments used in favor of a blanket no-exhaustion rule: An exhaustion requirement would thwart Congress's purposes in enacting section 1983, and because of the nature of the rights being protected by section 1983 claimants are entitled to federal court adjudication.[44] The court examined the first argument in light of *Monroe v. Pape*[45] in which, according to the majority, the Supreme Court identified three main purposes of the legislation surrounding section 1983:[46] To override certain kinds of state laws that were inconsistent with federal law; to provide a federal remedy where state law was inadequate; and to provide a federal remedy where the state remedy was available in theory but not practice.[47]

As to the first purpose, the *Patsy* court felt that even when a state law was considered discriminatory and therefore in consistent with federal law exhaustion may still be appropriate for, among other things, developing a factual record and raising the expertise of the responsible agency.[48] Concerning the second and third purposes, the court considered a requirement of exhausting *adequate* administrative remedies consistent with the intent to

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ble approaches. *See* Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Blanton v. State Univ., 489 F.2d 377 (2d Cir. 1973); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Toney v. Reagan, 467 F.2d 953 (9th Cir. 972), *cert. denied*, 409 U.S. 1130 (1973). *See generally* Annot., 47 A.L.R. FED. 15 (1980).

43. 634 F.2d at 909-10.

44. *Id.*

45. 365 U.S. 167 (1961). *See supra* note 20.

46. Section 1983 is based upon the Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3) (1976)). It received little attention for the next 90 years primarily due to the restrictive judicial interpretation given to the meaning of "under color of state law." In the 1940's the Supreme Court finally opened the action to encompass more than just those actions attributable directly to the states themselves. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941). *See* Comment, *supra* note 35, at 1135-50.

The *Monroe* court maintained that Congress was more concerned with discriminatory enforcement of state statutes than with the statutes themselves. 365 U.S. at 174-80.

47. 634 F.2d at 910 (citing 365 U.S. at 173-74).

48. 634 F.2d at 910. *See* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 553 (1974).

protect litigants against inadequate remedies: if state administrative remedies are adequate, there is no need for the protection of a blanket no-exhaustion rule.[49]

In response to the argument that section 1983 litigants are entitled to a federal remedy, the majority felt that pursuing adequate administrative remedies could only postpone, not preclude, federal action because the administrative proceedings carry no res judicata or collateral estoppel effect with them into federal court.[50] Section 1983 cases, according to the court, should focus on relief from wrong and the adequacy of the administrative system to provide a remedy, not on the federal origin of the right.[51]

The court then discussed controlling policy reasons for requiring exhaustion of adequate state administrative remedies: To promote wiser allocation of judicial resources; to assure that the complained action is ripe for adjudication; to improve the administrative process; to prevent waste of the litigant's resources; and to promote fundamental notions of federalism and comity.[52] The court found that the last reason was based on the states' constitutionally based interest in autonomy, the concern that circumventing state administrative procedures would undo much of the federal courts' efforts to prescribe due process requirements for state agencies, and the general requirement that plaintiffs exhaust federal administrative procedures.[53]

Considering these policy reasons and their bases the court decided that, absent any of the traditional exceptions to the exhaustion doctrine,[54] adequate state administrative remedies must be exhausted prior to commencing a section 1983 suit in a federal court.[55] The court insisted that this decision affected only the procedural steps required before prosecuting a section 1983 suit and in no way limited the substantive rights protected under it.[56]

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49. 634 F.2d at 910.

50. *Id.* at 911. *See* NAHMOD, *supra* note 20, § 5.17, at 160 n.185.

51. 634 F.2d at 910.

52. *Id.* at 911-12. *See McKart*, 395 U.S. at 193-95. *See also* DAVIS, *supra* note 9, at 642-44 (Supp. 1970); Note, *supra* note 35, at 566-68.

53. 634 F.2d at 912. The court asked why state defendants should have greater rights than federal defendants in terms of not having to resort to administrative remedies. *Id. See* DAVIS, *supra* note 9, at 646 (Supp. 1970).

54. *See supra* note 16.

55. 634 F.2d at 912.

56. *Id.*

Judge Roney then enumerated five minimum conditions that must be met before requiring an exhaustion of available state administrative remedies: An orderly system of review or appeal must be available; the agency must be able to grant relief commensurate with the claim; relief must be available within a reasonable time period; procedures must be fair, not unduly burdensome, and not used to harass; and interim relief must be available in appropriate circumstances to prevent irreparable injury.[57] In addition, once these minimum conditions have been met, the majority required that courts examine the particular administrative scheme, the nature of the interest the plaintiff seeks to protect, the values served by the exhaustion doctrine, and that the courts properly balance these interests.[58] In response to the argument that requiring exhaustion would "turn back the clock" on civil rights law, the court stated that the necessary development of speedy and effective state administrative remedies would in fact advance the protection of civil rights by providing less expensive, less time consuming and more easily understood procedures.[59]

Applying its decision to Ms. Patsy's case, the court found that the district court record did not indicate whether Patsy had attempted to obtain relief through administrative procedures or whether the available administrative remedies[60] were adequate in terms of the conditions established by the majority.[61] The court therefore remanded the case to allow Patsy to amend her complaint and to allow the district court to determine the adequacy of the available remedies and whether an exception to the requirement for exhaustion was present.[62]

Writing in dissent, Judge Rubin[63] disagreed with the majority's disregard for the numerous instances where the Supreme Court has stated that exhaustion is not required in section 1983 cases.[64]

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57. *Id.* at 912-13.
58. *Id.* at 913. *See McKart*, 395 U.S. at 193; *supra* note 14.
59. 634 F.2d at 913.
60. *See supra* note 9.
61. 634 F.2d at 914.
62. *Id.*
63. 634 F.2d at 914 (Rubin, J., dissenting). Judge Rubin was joined by Judges Vance, Frank M. Johnson, Jr., Hatchett, and Sam Johnson.
64. *Id.* at 914 (Rubin, J., dissenting). *See* cases cited *supra* note 35; NAHMOD, *supra* note 20, § 5.10, at 144-46 (the Supreme Court has never required exhaustion of state administrative remedies in a section 1983 case).

Conceding that some of the Justices have intimated that there is a need or desirability for re-evaluating the no-exhaustion rule, Judge Rubin argued that the Court has never actually abandoned the doctrine.[65]

The majority had concluded that in *Wilwording v. Swenson*[66] the Supreme Court had referred to exhaustion of state administrative remedies in dicta only.[67] Judge Rubin disagreed with that conclusion, asserting that the Supreme Court must have been aware of the considerations of federalism and comity relied on by the majority in *Patsy* and that the policy of no-exhaustion was the basis of the Court's decison in *Wilwording*.[68] The *Wilwording* Court, Judge Rubin maintained, was also aware of the desirability of giving civil rights plaintiffs the swiftest and least costly form of relief and of the legislative intent to redress violations of federal constitutional rights that the states refused to protect.[69]

Judge Rubin speculated that the majority may have felt that Patsy's claim was not ripe because of the general lack of information concerning the University's actions and the plaintiff's alleged injuries.[70] Correspondingly, he believed that questions about ripeness may have warranted a remand to the district court but not the adoption of an exhaustion rule. Finally, he was concerned

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65. 634 F.2d at 914 (Rubin, J., dissenting). Judge Rubin noted that despite the majority's reliance on *Barry v. Barchi* and *Gibson v. Berryhill*, *see supra* notes 27-33 and accompanying text, the Court did not abandon its no-exhaustion requirement in these cases. 634 F.2d at 914.

66. 404 U.S. 249 (1971). *See supra* note 35.

67. 634 F.2d at 907.

68. *Id.* at 915 (Rubin, J., dissenting). Judge Rubin cited the *Wilwording* Court's holding that "[t]he remedy provided by [the Civil Rights Act] 'is supplementary' to the state remedy and the latter need not be first sought and refused before the federal one is invoked." *Id.* (quoting 404 U.S. at 251).

69. 634 F.2d at 915 (Rubin, J., dissenting). *See* Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167 (1961).

70. 634 F.2d at 916 (Rubin, J., dissenting). Ripeness is satisfied at the moment a controversy becomes justiciable: at the time a defendant is "committed to conduct that would raise the proferred issues for decision." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3532, at 247 (1969). Ripeness requires an actual, concrete dispute between the parties which can be resolved judicially, and normally requires that the defendant's conduct has had some practical effect on the plaintiff. As a result, ripeness is normally not at issue any time damages are part of the requested relief. NAHMOD, *supra* note 20, § 5.06, at 138-39. *See also*, DAVIS, *supra* note 9, § 21 (1958 and Supps. 1970, 1976, 1980); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 54-83, 100-11 (1978).

that, despite the majority's belief in the ability of state administrators and judges to vindicate federal rights and fashion procedural measures to protect them, the requirement of "remedy exhaustion" may instead turn out to be "litigant exhaustion."[71]

In a separate dissent, Judge Kravitch stated that no Supreme Court opinion authorized a lower court to change the no-exhaustion rule.[72] In his judgment, such a change must await congressional action or a Supreme Court reversal.[73]

In a lengthy dissent, Judge Hatchett[74] asserted that the majority opinion contravened numerous Supreme Court decisions, presumed a congressional intent never articulated by Congress, usurped congressional authority, and created a procedural nightmare that would have a chilling effect on civil rights litigation.[75]

Referring to the majority's observation that all the cases in which the Supreme Court stated that exhaustion was not required were situations in which exhaustion of administrative remedies would not have been required because of inadequate administrative remedies,[76] Judge Hatchett asked why the Supreme Court would bother articulating an absolute no-exhaustion rule if it were not required. It was not for the court of appeals, according to Judge Hatchett, to assume that the Supreme Court had made meaningless, gratuitous statements.[77] Furthermore, he reasoned that the Court has had numerous opportunities to retreat from its original no-exhaustion pronouncement but that in each case it has refused to do so.[78] To this dissenter, the decisions in *McNeese*[79] and later cases represented a natural judicial effort to allow full implementation of the Civil Rights Act of 1871.[80]

Conceding that there is confusion in these cases partly because they fall within the traditional exceptions to the exhaustion rule

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71. 634 F.2d at 916 (Rubin, J., dissenting).
72. *Id.* at 916 (Kravitch, J., dissenting).
73. *Id.*
74. *Id.* at 916 (Hatchett, J., dissenting). Joining Judge Hatchett were Judges Rubin, Vance, Frank M. Johnson, Jr., and Thomas A. Clark.
75. *Id.* at 917 (Hatchett, J., dissenting).
76. *Id. See supra* note 35.
77. 634 F.2d at 917 (Hatchett, J., dissenting).
78. *Id. See, e.g.*, Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). *See supra* note 40.
79. *See supra* note 22.
80. 634 F.2d at 917 (Hatchett, J., dissenting). *See supra* note 46.

and partly because of the Supreme Court's brief explanations,[81] Judge Hatchett nevertheless contended that careful examination of the Supreme Court's decisions removes any confusion surrounding the Court's no-exhaustion declaration.[82] He examined the history of section 1983, from its passage as part of the Civil Rights Act of 1871,[83] through its years of dormancy, to *Monroe v. Pape*[84] and the resulting dramatic increase in federal civil rights litigation.[85] Judge Hatchett acknowledged that the first three purposes of section 1983, as articulated by the *Monroe* Court and relied upon by the majority,[86] could have been achieved by a properly tailored exhaustion rule.[87] He focused, however, on a fourth purpose listed in *Monroe*: To provide a federal remedy supplementary to the state remedy, one that was not dependent upon the state remedy being first sought and refused.[88] It is this critical fourth purpose, according to the dissenter, that the majority failed to recognize, except obliquely.[89]

Judge Hatchett then traced the expansion of the no-exhaustion rule from state judicial remedies in *Monroe* to state administrative remedies in *McNeese v. Board of Education*.[90] Admitting that the *McNeese* Court based its decision partly on the inade-

81. 634 at 917-18 (Hatchett, J., dissenting). *See* Note, *supra* note 35, at 570 (confusion over no-exhaustion rule arises partly from factual circumstances of the cases and partly from the puzzling brevity of the Court's opinions).

82. 634 F.2d at 918 (Hatchett, J., dissenting).

83. *See supra* note 46.

84. *See supra* note 20.

85. 634 F.2d at 918 (Hatchett, J., dissenting). In 1960, fewer than 300 federal suits were brought under all of the Civil Rights Acts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1960 ANNUAL REPORT 232 Table C2 (1960). *See, e.g.*, Comment, *supra* note 35, at 1169-72. Since 1961 the number of federal civil rights cases brought annually has grown to 994 in 1965, 3,985 in 1970, 10,392 in 1975, and 12,944 in 1980. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1965 ANNUAL REPORT 105 (1965); 1970 ANNUAL REPORT 109, Table 14 (1970); 1975 ANNUAL REPORT 194, Table 17 (1975); 1980 ANNUAL REPORT 230, Table 19 (1980).

86. *See supra* text accompanying notes 46-49.

87. 634 F.2d at 918-19 (Hatchett, J., dissenting).

88. *Id.* (quoting *Monroe*, 365 U.S. at 183).

89. 634 F.2d at 919 (Hatchett, J., dissenting). Judge Hatchett was referring to the majority's reliance on Justice Rehnquist's dissent in City of Columbus v. Leonard, 443 U.S. 905 (1979). *See supra* note 36. To Judge Hatchett, Justice Rehnquist's call, in *Leonard*, for reassessing existing no-exhaustion policy was an invitation only, one that was declined by the majority. 634 F.2d at 919 (Hatchett, J., dissenting).

90. *Id. See supra* note 22.

quacy of the state administrative remedy, he stated that the *McNeese* Court also relied upon the critical fourth purpose articulated in *Monroe*.[91] To Judge Hatchett, subsequent Supreme Court interpretations of *McNeese* show conclusively that state administrative remedies need not be exhausted, even when adequate.[92]

This dissenter also examined the majority's discussion of *Gibson v. Berryhill*,[93] deeming the majority's reliance on *Gibson*'s intimation that exhaustion might be required in limited circumstances misplaced because the intimation was in dicta.[94] In support of his interpretation of *Gibson*, Judge Hatchett pointed out that the

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91. 634 F.2d at 920 (Hatchett, J., dissenting). "[R]elief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Id.* (quoting *McNeese*, 373 U.S. at 671).

92. 634 F.2d at 920 (Hatchett, J., dissenting). Specifically, the dissent stated that Damico v. California, 389 U.S. 416 (1967), erased any doubt about exhaustion by confirming that *McNeese* stood for the proposition that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided an administrative remedy." 389 U.S. at 417. *See supra* note 35. According to the dissent, the majority's insistence that *Damico* rested upon the inadequacy of the state administrative remedies missed the fact that the *Damico* Court refused to base its decision on this ground. 634 F.2d at 920-21 (Hatchett, J., dissenting).

Similarly, Judge Hatchett cited language in other Supreme Court cases that rejected the argument favoring exhaustion and in each case reiterating *McNeese*'s no-exhaustion policy. 634 F.2d at 921 (Hatchett, J., dissenting) (citing Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968)). *See supra* note 35. *See also*, Comment, *supra* note 48, at 544-47.

Judge Hatchett then cited the Court's reliance upon the *Damico* findings in Carter v. Stanton, 405 U.S. 669 (1972), where a lower court dismissal of a complaint was vacated because *Damico* "established that exhaustion is not required in circumstances such as those presented." 405 U.S. at 671. The dissent reasoned that, as in *McNeese* and *Damico*, the *Carter* Court refused to rest its decision on the inadequacy of the administrative remedy. 634 F.2d at 921-22 (Hatchett, J., dissenting).

93. *See supra* notes 31-33 and accompanying text.

94. 634 F.2d at 922 (Hatchett, J., dissenting). *See* NAHMOD, *supra* note 20, § 5.10, at 145. *See* Steffel v. Thompson, 415 U.S. 452 (1974). The *Steffel* Court stated: "When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." 415 U.S. at 472-73. *See supra* note 35.

In Ellis v. Dyson, 421 U.S. 426 (1975) the Court maintained that "exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, for we have long held that an action under section 1983 is free of that requirement." 421 U.S. at 432-33. *See supra* note 35.

Supreme Court had clearly reaffirmed the no-exhaustion rule in cases decided after *Gibson*.[95]

Judge Hatchett also cited *Barry v. Barchi*,[96] stating that its real significance was that the Court had not retreated from its no-exhaustion rule, and not, as the majority stated, that the Court had focused on a traditional exception to it.[97] Turning to the majority's arguments against the no-exhaustion rule for reasons of federalism and comity, this dissenter reasoned that good federalism did not demand unreasoned acquiescence to state interests but rather a balancing of competing federal and state interests.[98] He asserted that this balance was not possible when the federal half of the system is crippled.[99] To Judge Hatchett, the history of section 1983 shows the need for an independent federal remedy in addition to state mechanisms to protect civil rights.[100]

For Judge Hatchett, the difference noted by the majority between the requirement for exhaustion of federal administrative remedies in section 1983 cases and the absence of such a requirement for state administrative remedies[101] merely illustrated the difference between federal and state roles in vindicating civil

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95. 634 F.2d at 922 (Hatchett, J., dissenting).

96. *See supra* note 28.

97. 634 F.2d at 922 (Hatchett, J., dissenting). *See supra* text accompanying note 28.

98. 634 F.2d at 923 (Hatchett, J., dissenting). *See Younger v. Harris*, 401 U.S. at 44. *See supra* note 15.

99. 634 F.2d at 923 (Hatchett, J., dissenting). *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

100. 634 F.2d at 923 (Hatchett, J., dissenting). In Judge Hatchett's opinion, the purpose of section 1983's forerunner, *see supra* note 46, was to "interpose the federal courts between the States and the people as guardians of the people's federal rights." 634 F.2d at 923 (Hatchett, J., dissenting) (quoting Mitchum v. Foster, 407 U.S. 225, 238-39 (1972)). Also, "[i]f there is one thing certain about the legislative history of the Act, it is that Congress, open-eyed, deliberately set out to alter the so-called 'delicate balance' between the state and the federal government so that federal courts could effectively protect federal rights." 634 F.2d at 923 (Hatchett, J., dissenting) (quoting Moreno v. Henckel, 431 F.2d 1299, 1305 (5th Cir. 1970)). Finally, "[t]he absence of an exhaustion requirement in § 1983 is not an accident of history or the result of careless oversight by Congress or this Court . . . . Exhaustion of state remedies is not required precisely because such a requirement would jeopardize the purposes of the Act." 634 F.2d at 924 (Hatchett, J., dissenting) (quoting Preiser v. Rodriguez, 411 U.S. 475, 518 (1973) (Brennan, J., dissenting)).

101. *See supra* text accompanying note 40.

rights.[102] The federal role, to Judge Hatchett, is totally inconsistent with the majority's dilution of section 1983 cases with an exhaustion requirement, deferring to state interests to the detriment of both federal and private ones.[103] He believed that the no-exhaustion rule should not be abolished because, among other reasons, existing Supreme Court policy and congressional intent will be violated.[104] Judge Hatchett admonished that the most unconscionable aspect of the majority's opinion was its chilling effect on civil rights litigation. He concluded that exhaustion of state administrative remedies had no place in the civil rights context.[105]

Both the *Patsy* majority and dissenters relied primarily on Supreme Court precedents in deciding whether exhaustion of state administrative remedies should be required in section 1983

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102. 634 F.2d at 924 (Hatchett, J., dissenting).

103. *Id.* at 924-26 (Hatchett, J., dissenting). *See* Comment, *Exhaustion of State Remedies*, 68 COLUM. L. REV. 1201, 1206-07 (1968).

104. 634 F.2d at 924-25 (Hatchett, J., dissenting). Judge Hatchett listed six additional reasons for sustaining the no-exhaustion rule. First, the federal courts, not state administrative bodies, have the expertise to resolve federal issues such as section 1983 claims. Second, requiring the use of state administrative processes may discourage aggrieved individuals from seeking recourse. To support this contention Judge Hatchett described the administrative procedures Patsy must follow before she would have access to the federal courts under the majority's ruling. *See* 634 F.2d at 927-28, app. A; *supra* note 9. Third, the majority opinion may create a procedural nightmare. Judge Hatchett described a likely scenario that could occur under the majority's ruling: The plaintiff would file suit in a federal court, the defendant would move for a dismissal, the federal court would then have to determine if administrative remedies were adequate, and, if so, the plaintiff would pursue these remedies until they were exhausted and then return to federal court to continue suit. 634 F.2d at 925-26 (Hatchett, J., dissenting). Fourth, the typical state administrative process is not designed to provide adequately for the award of attorney's fees. The dissent noted that in the event that a litigant prevails in the state administrative process he normally would be required to go to federal court to recover attorney's fees and costs. *Id.* at 926 (Hatchett, J., dissenting). Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976) (provides for federal courts to award attorney's fees in section 1983 cases). *See also* NAHMOD, *supra* note 20, § 1.17, at 25. Fifth, most administrative processes cannot adequately entertain class action claims, vindicating an individual's rights but not necessarily other class members. Finally, friction between the states and federal judiciary can only increase under a system that requires a federal judge to determine the adequacy of state administrative remedies. To illustrate this, Judge Hatchett queried what will happen if a remedy is judged inadequate. Will the state be under a duty to amend its statutes and regulations for the next litigant? If a state disagrees with the federal finding, may it appeal? May the state appear in the adjudicatory hearing? 634 F.2d at 926 (Hatchett, J., dissenting).

105. 634 F.2d at 926 (Hatchett, J., dissenting).

cases. Extensive examination of the same cases by these opposing sides resulted in conflicting interpretations. An evaluation of the validity of these conflicting interpretations is aided by the fact that the Supreme Court has never actually renounced its position that exhaustion of state administrative remedies is not required in section 1983 cases.[106] The majority, however, concluded that the Court's frequent reliance on the traditional exceptions to the exhaustion rule alone acts to nullify the no-exhaustion policy.[107]

The *Patsy* court's reliance on several of the cases used to support its decision may have been misplaced. The majority cited *Huffman v. Pursue*[108] as evidence that the no-exhaustion rule is not immutable.[109] *Huffman*, however, dealt with whether state *judicial*, not administrative remedies, must be exhausted before the federal courts will assert jurisdiction. The majority also relied upon *Eisen v. Eastman*,[110] but failed to indicate that *Eisen* only decided whether section 1983's protection extended to property rights.[111] Similarly, the majority relied upon Justice Rehnquist's dissent from the Court's denial of certiorari in *City of Columbus v. Leonard*[112] to demonstrate the Court's willingness to re-examine the no-exhaustion rule. *Leonard* is not supportive, however, because the issue there was not whether exhaustion was never required in section 1983 cases but whether, once a state remedy was initiated, the litigant was bound by his choice to pursue that remedy to its conclusion. Moreover, the cited portion of Justice Rehnquist's dissent calling for a re-evaluation of the no-exhaustion rule was dicta,[113] and by relying upon his invitation to reconsider the Court's no-exhaustion rule, the *Patsy* majority implicitly conceded that the Supreme Court *had* imposed a no-exhaustion rule in section 1983 cases.

Although the *Patsy* court maintained that federal treatment of

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106. NAHMOD, *supra* note 20, § 5.10 at 145.
107. *See, e.g.*, *supra* notes 27-33 and accompanying text.
108. 420 U.S. 592 (1975). *See supra* note 37.
109. 634 F.2d at 908.
110. 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). *See supra* note 40. Apparently, the majority cited *Eisen* to show that the Second Circuit used a rationale similar to their own in urging that exhaustion was sometimes appropriate and that this rationale was not reversed by the Supreme Court.
111. *See supra* note 40.
112. 443 U.S. 905 (1979). *See supra* note 36.
113. 443 U.S. at 910-11 (Rehnquist, J., dissenting). *See supra* note 36.

section 1983 cases is burdensome to the courts,[114] figures complied by the Administration Office of the U.S. Courts show that following the surge of civil rights cases filed after *Monroe v. Pape* and *McNeese v. Board of Education*, the relative number of civil rights cases has actually dropped. Civil rights cases have gone from 8.9% of the total civil cases in 1975[115] to 7.7% in 1980.[116] Contract cases, on the other hand, have risen from 19.5% of the total civil cases filed in 1975[117] to 29.1% in 1980.[118] The majority, then, stands in the position of urging federal deferment to the states for protection of constitutionally guaranteed civil rights that represent less than 8% of the total federal civil caseload, while nearly a third of the federal caseload is devoted to the settlement of non-constitutionally protected contract disputes.

Patsy is significant because the Fifth Circuit has reversed its previous policy of no-exhaustion in section 1983 cases. In two recent cases, *Hardwick v. Ault*[119] and *Mitchell v. Beaubouef*,[120] the courts have held that state administrative remedies need not be exhausted before a state prisoner contesting conditions of confinement may file a section 1983 suit in a federal court. The

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114. *See supra* text accompanying note 40.

115. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1975 ANNUAL REPORT 195 (1975) [hereinafter cited as 1975 ANNUAL REPORT].

116. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT 226 (1980) [hereinafter cited as 1980 ANNUAL REPORT].

117. 1975 ANNUAL REPORT, *supra* note 115, at 195.

118. 1980 ANNUAL REPORT, *supra* note 116, at 226.

119. 517 F.2d 295 (5th Cir. 1975). In *Hardwick*, the plaintiff, a state prisoner, filed suit directly in a federal court under 42 U.S.C. § 1983 alleging interference with his right to receive newspapers, books, and writing materials. After the case was dismissed by the district court without prejudice for failure to exhaust the available state administrative remedies, *id.* at 296, the Fifth Circuit held that in civil rights actions challenging conditions of confinement, as opposed to its fact or duration, prisoners were not required to exhaust their state administrative remedies, regardless of their adequacy. *Id.* at 298.

120. 581 F.2d 412 (5th Cir. 1978). In *Mitchell*, three inmates of the Louisiana State Penitentiary, alleging deprivation of due process of law in a prison disciplinary hearing, filed a pro se complaint in a federal district court. Relying upon a magistrate's unverified administrative report, the court dismissed the suit with prejudice, granting leave to the plaintiffs to appeal in forma pauperis. 581 F.2d at 414. In ruling that the district court's reliance upon the unverified report in granting a summary judgment violated the requirements in FED. R. CIV. P. 56, the court of appeals noted that, in accordance with *Hardwick*, *see supra* note 119, a prisoner is not required to exhaust state administrative proceedings when challenging conditions of confinement. 581 F.2d at 416.

court's holding in *Patsy* will require either an extension of the Fifth Circuit's new exhaustion policy to all types of section 1983 actions or a distinguishing of confinement from non-confinement actions to preserve the rights established in *Hardwick* and *Mitchell*. The *Patsy* decision will also align the Fifth Circuit with the other circuits that have adopted a flexible no-exhaustion policy.[121]

The Supreme Court has recently granted certiorari to Patsy[122] to consider three issues:[123] (1) whether the Fifth Circuit's requirement for exhaustion of adequate state administrative remedies in section 1983 cases conflicts with Supreme Court holdings; (2) whether the *Patsy* holding is inconsistent with congressional intent as illustrated by the recent enactment of a limited exhaustion requirement in section 7 of the Civil Rights of Institutionalized Persons Act;[124] and (3) whether the *Patsy* court erred in requiring exhaustion where the defendant failed to demonstrate that such remedies would be plain, speedy, and effective, and where the agency with final authority is not empowered to grant the requested relief.[125]

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121. *See supra* note 42.

122. Patsy v. Florida Int'l Univ., 50 U.S.L.W. 3213 (U.S. Oct. 5, 1981) (80-1874).

123. *See* Petitioner's Brief for Certiorari at i. The issues presented for consideration, as reported in the United States Law Week, are nearly identical to the three issues presented in Patsy's petition.

124. Act of May 23, 1980, Pub. L. No. 96-247, 94 Stat. 352 (codified at 42 U.S.C. § 1997e (1980)). The statute requires the U.S. Attorney General to adopt minimum standards for the development and implementation of a speedy, effective grievance system for adults confined in correctional facilities. It further provides for the states to apply to the Attorney General for certification of their grievance procedures. Once he certifies these procedures, if an adult prison inmate brings a section 1983 action regarding prison conditions, the federal district court may continue the case for a maximum of 90 days to allow exhaustion of the certified procedures. No provision is made in the Act for a dismissal of the suit pending exhaustion of state administrative remedies. 42 U.S.C. § 1997e (1980).

Patsy argues that by establishing very narrow exhaustion requirements in a limited context, Congress has indicated there are no exhaustion requirements in other applications. *See* Petitioner's Brief for Certiorari at 22-34.

125. Patsy argues that even if the Court rejects the first two arguments, the decision of the court of appeals should be reversed because it is inconsistent with even the narrowest reading of *McNeese v. Board of Education*. *See supra* note 22. According to Patsy, *McNeese* stands at least for the rule that exhaustion is not required where the state has failed to carry its burden of proving

The Court's treatment of the first two issues, which squarely address the questions of Supreme Court and congressional policy on section 1983, will have a profound effect on future civil rights litigation. A decision in favor of Patsy on either of these issues will result in uniform treatment of litigants asserting their civil rights and will require those jurisdictions with flexible no-exhaustion policies to reverse their present policies. A decision against Patsy will not only vindicate the *Patsy* court and those jurisdictions with a flexible approach but will likely, over time, result in restrictions on civil rights litigants' access to the federal courts.

Joseph H. Chivers

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the adequacy of the remedies and where the final administrative officials in the state scheme must petition a state court for enforcement.

Applying these rules to the facts in *Patsy*, it is argued that the Board of Regents never attempted to prove the adequacy of the remedies and that even if they had, the fact that the Human Relations Commission, as the final administrative appeal, lacks enforcement authority renders the state scheme inadequate. Petitioner's Brief for Certiorari at 39-43. For a discussion of the FIU administrative grievance process *see supra* note 9.