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STATUTORILY BASED FEDERAL RIGHTS: A NEW ROLE FOR SECTION 1983

INTRODUCTION

Section 1983[1] of the Civil Rights Act[2] provides the cause of action by which individuals may seek relief from state infringement of rights secured by the federal constitution and federal laws. Recent decisions of the United States Supreme Court have altered both the scope of section 1983, and the manner in which actions may be brought. In order to fully understand these changes, and their future impact on causes of action under section 1983, a brief overview of the statute's history and a discussion of recent developments are necessary.

Historical Background

On April 20, 1871, Congress enacted a law "to enforce the provisions of the Fourteenth Amendment to the Constitution."[3] Known as the Ku Klux Klan Act, the major purpose of the law was to prevent the deprivation of constitutional rights at a time when the southern states under Reconstruction were unwilling or unable to stem the growing violence directed against the freedmen.[4]

Four years later, when Congress revised and consolidated existing federal statutes into various titles, the 1871 Act was divided into a substantive portion, the predecessor of 42 U.S.C. § 1983,[5] and a jurisdictional portion, now codified at 28 U.S.C.

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1. 42 U.S.C. § 1983 (1976).

2. Statutes pertaining to civil rights are codified at 42 U.S.C. §§ 1981-2000(h) (1976).

3. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. Now referred to as the Civil Rights Act of 1871, its original, formal title was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

4. The historical background of the Ku Klux Klan Act and its early development are extensively treated in two excellent articles, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

5. The original codification, 18 Stat. § 1979 (1875), provided for a cause of action in terms identical to the present § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or 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

§ 1343(3).[6] In the process of codification and consolidation, the wording of the original Act was changed. The words "and laws" were added, thus making the substantive section applicable on its face to violations not only of the Constitution, but of a right created by any federal statute.[7] The jurisdictional section retained the historical restriction, limiting its scope to laws providing for equal rights.[8] The difference created complicates the interpretation of both statutes.[9]

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injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

6. The original codification was contained in two separate sections. In 1875, both the circuit and district courts were courts of original jurisdiction. *See* 18 Stat. §§ 563(12), 629(16) (1875). The jurisdiction of circuit and district courts was merged in 1911, adopting the language of § 629(16). Act of March 3, 1911, § 24 (Fourteenth), 36 Stat. 1092. The consolidation became the present § 1343(3).

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

28 U.S.C. § 1343(3) (1957).

7. Justice Powell suggested that the phrase might logically be interpreted to mean a right secured by *both* the Constitution *and* the laws of the United States. He reasoned that, otherwise, the statute would read "Constitution *or* laws." He cited as examples 28 U.S.C. § 1331, which provides federal jurisdiction over matters arising "under the Constitution or laws," and 18 U.S.C. § 241, which creates criminal penalties for conspiracy to deprive persons of rights secured by "the Constitution or laws." Maine v. Thiboutot, 100 S. Ct. 2502, 2508 n.1 (1980) (Powell, J., dissenting).

8. Rev. Stat. § 1979 referred to rights "secured by the Constitution of the United States or . . . by any law of the United States;" § 629 (16) referred to rights secured "by the Constitution of the United States or . . . by any law providing for equal rights of citizens of the United States." 36 Stat. 1092, which consolidated §§ 563(12) and 629(16), adopted the narrow language of § 629(16).

9. Throughout the several years that it took to prepare the Revised Statutes, various members of the committee charged with the task of codifying the Statutes at Large insisted that no substantive changes would be made. *See, e.g.*, 2 CONG. REC. 646 (1874) (remarks of Rep. Poland) ("there shall be nothing omitted and nothing changed"); 2 CONG. REC. 4220 (1874) (remarks of Sen. Conkling) ("[t]he aim throughout has been to preserve absolute identity of meaning, not to change the law in any particular"). While the Supreme Court has admonished that "an insertion [of language] in the Revised Statutes . . . is not lightly to be read as making a change . . . ." United States v. Sischo, 262 U.S. 165, 168-69 (1923), it has also decided that the "customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance should not be taken at face value." United States v. Price, 383 U.S. 787, 803 (1966). *Cf.* United States v. Williams, 341 U.S. 70, 74 (1951) ("The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feelings caused inad-

Claims brought under section 1983 were rare[10] until the emergence of the Civil Rights Movement.[11] This era saw an expansion of the scope of section 1983 to encompass claims arising under constitutional provisions other than the fourteenth amendment.[12] Decisions before 1950 assumed, *sub silentio*, that jurisdiction for these claims was provided by section 1343(3). No discussion of the relationship between the two sections was necessary, as all of the claims alleged constitutional violations.[13]

Subsequently, in *Bomar v. Keyes*,[14] the Second Circuit held that a purely statutory claim might be brought under section 1983.[15] No authority for this view was cited and the jurisdictional problem was ignored. The issue did not arise again with

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equate deliberation and led to loose and careless phrasing of laws related to the new political issues.").

10. In the first fifty years after its enactment, only 21 cases were decided under § 1983. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). In 1960, 280 suits were filed under all of the civil rights acts combined. Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1172 (1977). *See generally* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1286 (1953).

11. By 1972, approximately eight thousand suits were filed annually under § 1983 alone. McCormack, *Federalism and Section 1983*, 60 VA. L. REV. 1, 1 n.2 (1974). By 1977, the number had topped thirteen thousand, where it has remained. (This number does not include prisoner petitions filed under § 1983). Maine v. Thiboutot, 100 S. Ct. 2502, 2515 n.16 (1980) (Powell, J., dissenting).

12. Early decisions limited § 1983 to statutory and constitutional claims related to racial discrimination. This restriction explained the rejection of three suits involving alleged violations of the contracts clause that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. 1, § 10. Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); Pleasants v. Greenhow, 114 U.S. 323 (1884); Carter v. Greenhow, 114 U.S. 317 (1883). The Supreme Court has since abandoned this view, and it has also expanded the application of the fourteenth amendment. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (prohibiting state residence requirement for welfare eligibility); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death recovery rights for illegitimate children); Skinner v. Oklahoma, 316 U.S. 535 (1942) (prohibiting sterilization of persons convicted more than twice of felonies involving moral turpitude). Section 1983 claims have also been allowed in cases involving other constitutional violations. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (fourth amendment); Douglas v. City of Jeannette, 319 U.S. 157 (1943) (first amendment); Hague v. CIO, 307 U.S. 496 (1938) (first amendment).

13. *See generally* Note, *The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction Era Civil Rights Acts*: Blue v. Craig, 43 GEO. WASH. L. REV. 1343 (1975).

14. 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

15. In *Bomar*, a public school teacher discharged because of absences due to federal jury service brought suit under § 1983, claiming violation of her statutory right to serve on a jury. In concluding that the complaint stated a claim under § 1983, Judge Learned Hand found no case "in which the right or privilege at stake was secured by a 'law' of the United States." 162 F.2d at 139. The jurisdictional problem posed by § 1343(3) was not even mentioned.

any frequency until the late 1960's, when challenges to state administration of federal welfare legislation became common. The first Social Security cases to be considered by the Supreme Court involved constitutional claims, with pendent statutory claims.[16] The Court consistently refused to consider whether the statutory claim could stand independently. However, most commentators believed that sections 1343(3) and 1983, stemming from the same legislative act, had to be read as coextensive.[17] The real problem centered on which of the provisions was controlling: should section 1983 be read as narrowly as section 1343, thus ignoring the "and laws" language, or should 1343 be read as broadly as section 1983, giving no effect to the restrictive words "any Act . . . providing for equal rights"?[18]

Recent Decisions

In the past year, the Supreme Court has interpreted both section 1343(3) and section 1983 in a manner that would be surprising to most early commentators.[19] In *Chapman v. Houston Welfare Rights Organization*[20] the Court decided, after a thorough discussion of the legislative history, that section 1343 jurisdiction was limited to those cases alleging violation of a right secured by the Constitution or by a federal statute providing for equal rights.

Having found there was no jurisdiction under section 1343, the Court reached no decision on the scope of section 1983.[21]

16. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968). In *King*, the Court explicitly avoided deciding whether "suits challenging AFDC provisions only on the ground that they are inconsistent with the federal statutes may be brought in federal courts." 392 U.S. at 312 n.2. *Rosado*, too, left undecided the § 1343(3) question. 397 U.S. at 405 n.7.

17. *See, e.g.*, Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violation of Constitutional Rights are Alleged*, 2 CLEARINGHOUSE REV. 5, 25 (1969) ("idiotic" to interpret § 1343(3) and § 1983 differently); Herzer, *Federal Jurisdiction Over Statutorily Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1, 8 (1970) (illogical to infer historical limitation of § 1983 by restriction of § 1343(3)). Herzer argues that § 1343(3) should provide jurisdiction for all § 1983 claims.

18. For a discussion of this dilemma see Note, *The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction Era Civil Rights Acts*: Blue v. Craig, 43 GEO. WASH. L. REV. 1343, 1373-74 (1975).

19. *See* note 17 *supra*.

20. 441 U.S. 680 (1979). The Court thoroughly analyzed and rejected two theories frequently advanced to bring purely statutory claims within the scope of § 1343: (1) that a state violation of a federal statute is a violation of the Supremacy Clause, *id.* at 612-15; and (2) that § 1983 itself is an Act of Congress providing for equal rights within the meaning of § 1343(3). *Id.* at 615-20.

21. The case did reveal serious differences of opinion among the Jus-

However, the future of section 1983 was in serious doubt. Prior to *Chapman*, only a few courts held section 1983 inapplicable to purely statutory claims;[22] other courts limited its scope to claims encompassed by the narrow language of section 1343.[23] A great number of courts, however, found section 1983 applicable to all federal statutory claims.[24] These cases assumed that all section 1983 claims were within the jurisdiction of section 1343(3). If the two sections were indeed coextensive, it looked as if those provisions calling for restriction of the scope of section 1983[25] would prevail.[26]

Then, in *Maine v. Thiboutot*,[27] the Supreme Court held that section 1983 encompasses *all* federal statutory as well as constitutional violations.[28] In *Thiboutot*, plaintiffs were denied certain welfare benefits by the Maine Department of Human Resources. They sought review by the state court after exhausting state administrative remedies. Section 1983 was added as a claim in an amended complaint, and the Thiboutots sought attorney's fees

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tices over whether § 1983 encompasses a deprivation of purely statutory rights. It appeared from the several opinions that four members of the Court thought § 1983 was available for relief in such cases, and three thought it was not. Two Justices, members of the majority, gave no opinion on the scope of § 1983.

22. *See, e.g.*, Wynn v. Indiana State Dep't of Public Welfare, 316 F. Supp. 324, 330-33 (N.D. Ind. 1970).

23. *See, e.g.*, Chase v. McMasters, 573 F.2d 1011, 1017 n.5 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978) (relationship between federal government and Indians embodied in the Indian Organization Act of 1934 has "constitutional dimension"); McCall v. Shapiro, 416 F.2d 246, 249-50 (2d Cir. 1969) (Social Security Act does not provide for equal or civil rights); First Nat'l Bank of Omaha v. Marquette Nat'l Bank, 482 F. Supp. 514, 521-22 (D. Minn. 1979) (National Bank Act restriction on interest rates not a statute providing for equal or civil rights).

24. *See, e.g.*, Blue v. Craig, 505 F.2d 830, 835-38 (4th Cir. 1974) (Social Security Act); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act of 1933); La Raza Unida v. Volpe, 440 F. Supp. 904, 908-10 (N.D. Cal. 1977) (Uniform Relocation Assistance and Real Property Acquisition Act of 1970).

25. *See generally* Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79 (1976); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1068-69 (1977).

26. The Burger Court has moved steadily toward a more restrictive view of § 1983. This attitude is consonant with the recent limitations placed on implied rights of action. *See* text accompanying notes 38-42 *infra*. *See generally* Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904 (1976).

27. 100 S. Ct. 2502 (1980).

28. *Id.* at 2504. *But see* Owen v. City of Independence, 100 S. Ct. 1398 (1980). Just two months before *Maine v. Thiboutot*, the Court seemed to view § 1983 as covering only constitutional claims. "[A principal] in the scenario of the § 1983 cause of action [is] the victim of the *constitutional deprivation*. . . ." *Id.* at 1400 (emphasis added).

pursuant to the Civil Rights Attorney's Fees Award Act of 1976.[29] There was no allegation of a constitutional or civil rights violation. The lower court enjoined enforcement of the Maine regulation, but denied attorney's fees. On appeal, the Supreme Judicial Court of Maine reversed on the issue of attorney's fees. The court held that although there was no entitlement under state law, the Thiboutots were eligible for attorney's fees under the Civil Rights Attorney's Fees Award Act.[30]

In order to sustain the award of attorney's fees, the United States Supreme Court first had to consider whether the original claim was validly brought under section 1983.[31] The Court held that the phrase "and laws" should be given its plain meaning; it should not be limited to civil rights or equal protection laws.[32] The Court relied on dicta in several cases which suggested that section 1983 applied to purely statutory claims.[33] The majority's discussion of the issue seems to be a "reaffirmation of a statutory interpretation that has been settled authoritatively for many years."[34]

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29. 42 U.S.C. § 1988 (1976). *See* text accompanying notes 116-31 *infra*.

30. Thiboutot v. State, 405 A.2d 230 (Me. 1979).

31. The Civil Rights Attorney's Fees Act of 1976 is only applicable to actions brought under 42 U.S.C. §§ 1981-86, Title IX of Public Law 92-318, actions by the United States under the Internal Revenue Code, and Title VI of the Civil Rights Act of 1964. Therefore, if there were no cause of action under § 1983, there would be no right to attorney's fees.

32. Maine v. Thiboutot, 100 S. Ct. 2502, 2504 (1980). The Court found the legislative history of § 1983 inadequate to prove an intention on the part of the drafters to limit its scope. In his dissent, Justice Powell insisted that reliance on plain meaning was a "flawed premise." *Id.* at 2510. There is legislative history which indicates that no substantive change from the wording of the Civil Rights Act of 1871 was intended. *See* note 9 *supra*. In addition, the statute could be read to mean rights secured by both the Constitution and the federal laws. *See* note 6 *supra*.

33. Maine v. Thiboutot, 100 S. Ct. 2502, 2504 (1980). Each of these cases involved constitutional as well as statutory claims. The statutory claims were allowed to go forward, after dismissal of the constitutional claims, under the Court's pendent jurisdiction. The Court mentions various cases in which statutory claims under § 1983 were the exclusive cause of action. *Id.* at 2504-05. However, as the dissent points out, none of the cases cited expressly confronted the jurisdictional issue. *Id.* at 2517. In fact, two cases decided during the same time period expressly reserved the question whether § 1983 creates a cause of action for purely statutory claims. *See* Southeastern Community College v. Davis, 442 U.S. 397, 404-05 n.5 (1979); Hagans v. Lavine, 415 U.S. 528, 534 n.5 (1974). Even if the unspoken assumption in many of the cases was that § 1983 encompassed statutory claims, that would not necessarily support the ruling in *Maine v. Thiboutot*. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, [the] Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." *Id.* at 535 n.5.

34. Maine v. Thiboutot, 100 S. Ct. 2502, 2515 (1980) (Powell, J., dissenting). If the majority is correct in its assertion that the answer was obvious, and for all practical purposes settled, then a number of courts and commentators have been singularly obtuse. *See, e.g.*, La Raza Unida v. Volpe, 440 F.

The dissent, however, noted the far-reaching implications of allowing any statutory claim to be brought under section 1983.[35] Indeed, the states are understandably concerned about the expansion of the scope of section 1983.[36] At first glance, it appears that this decision will dramatically increase the number of suits filed against the states and their subdivisions.

This Comment will focus on the implications of expanding section 1983 to encompass purely statutory claims. Thought must be given to what claims may now be brought under section 1983. Of particular interest is the possibility that section 1983 is now a viable substitute for implied rights of action.[37] Since sections 1983 and 1343 may no longer be viewed as coextensive, the jurisdictional question must be considered. Finally, the new role of section 1983 requires reconsideration of the related problems of immunity, exhaustion of remedies, and attorneys' fees. These questions will be critical where actions are brought in state courts.

CLAIMS UNDER SECTION 1983

The decline in the availability of implied rights of action is well documented.[38] Initially, four factors were utilized in determining whether a private remedy is implicit in a statute: (1) whether the plaintiffs are especial beneficiaries of the statute; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether a private remedy would further the policies of the statute; and (4) whether the cause of action is

Supp. 904, 908 (N.D. Cal. 1977) (issue "has yet to be definitively resolved"); Thiboutot v. State, 405 A.2d 230, 235 (Me. 1979) (answer "by no means clear"). *See generally* Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169-74 (1977).

35. Maine v. Thiboutot, 100 S. Ct. 2502, 2513 (Powell, J., dissenting). The decision would allow an action to be brought under § 1983 whenever an individual desired to challenge a federal-state cooperative program. The burden of increased litigation would fall unequally on the states, as § 1983 grants no right of action against the United States. Even where an action against the United States is possible, litigants would be likely to focus on the state in order to obtain attorney's fees under § 1988.

36. Several states filed *amici* briefs. *See* Maine v. Thiboutot, 100 S. Ct. 2502, 2506 n.7 (1980). Shortly after the decision was published, states were so concerned about an onslaught of suits that the National Governor's Association was reportedly contemplating the establishment of a legal defense fund to help its members. TIME, July 7, 1980, at 72.

37. An implied right of action refers to a private remedy which a court may find implicit in a statute which does not expressly provide a private remedy. *See* text accompanying notes 38-65 *infra*.

38. *See, e.g.*, Morrison, *Rights without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977).

one traditionally relegated to the states.[39] Later decisions further restricted the remedy.[40] Recent cases have relied almost exclusively on congressional intent,[41] and whether express remedies are available under any provision of the act in question.[42]

In contrast, actions brought under section 1983 need not satisfy the criteria necessary for determining an implied right of action. The question whether a claim under section 1983 may substitute for an implied right of action has been considered,[43] but was not decided until *Maine v. Thiboutot*.[44] In discussing various Social Security Act cases, the Court determined that section 1983 had to be the exclusive basis for the cause of action in each instance because the Court had previously[45] held that the Social Security Act affords no private right of action against a state.[46] Therefore, it would logically follow that section 1983 is available in cases where an implied right of action would not be.

While the *Thiboutot* decision demonstrates that section 1983 is not coextensive with, nor dependent upon, the existence of an implied right of action, it does not indicate under what circumstances a claim under section 1983 is proper. The elements of an action may be gleaned from prior decisions where constitutional issues were litigated. First, the action complained of must be a

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39. Cort v. Ash, 422 U.S. 66, 78 (1975).

40. One case indicates that the implied right of action may be restricted now to civil rights statutes. Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 97 n.16 (3d Cir. 1979). Such a view makes little sense since civil rights statutes either provide their own remedies or would come under §§ 1983 and 1343(3). This view would make implied rights of action coextensive with already existing remedies.

41. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) ("The central inquiry remains whether Congress intended to create . . . a private cause of action . . . the inquiry ends there. . . ."). For a discussion of this case, and other recent decisions further restricting implied rights of action, see Comment, *Implied Causes of Action: A New Analytical Framework*, 14 J. MAR. L. REV. 141 (1980).

42. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (White, J., dissenting) ("[t]he Court departs from established principles governing the implication of private rights of action by confusing the inquiry into the existence of a right of action with the question of available relief.").

43. Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979) (reserving question whether suit was maintainable under § 1983 regardless of any private action provided by statute in question).

44. 100 S. Ct. 2502 (1980).

45. Edelman v. Jordan, 415 U.S. 651 (1973).

46. Maine v. Thiboutot, 100 S. Ct. 2502, 2504 (1980). In fact, as pointed out by Justice Powell in his dissent, *id.* at 2517 n.24, *Edelman* made no such holding. An implied right of action was mentioned only in passing by the majority, and by Justice Marshall in his dissent. Edelman v. Jordan, 415 U.S. at 674, 690. Lower courts still consider the question undecided. *See, e.g.*, Holley v. Lavine, 605 F.2d 638, 646-47 (2d Cir. 1979); Podrazik v. Blum, 479 F. Supp. 182, 187-88 (N.D.N.Y. 1979).

violation of a federally created right.[47] Second, the action must be one taken under color of state law.[48] Each of these requirements, and their implications, will be considered in turn.

Most of the statutorily based litigation in recent years has arisen under the Social Security Act. This statute creates no "right" to receive public assistance. Instead, it provides for grants-in-aid, usually matching federal funds, to those states which have submitted plans for the distribution of these funds. A common feature of the Act's various portions is a section delineating the elements which must be included in the state plan. Possible administrative sanctions for failure to comply with the requirements[49] are also frequently included. A multitude of federal regulations formulated under the Social Security Act[50] make strict compliance much more difficult for state administrative agencies.[51] Suits have also been based on the Wagner-Peyser National Employment System Act,[52] the Uniform Relocation Assistance and Real Property Acquisition Act,[53] the National School Lunch Act,[54] and the Developmentally Disabled Assistance and Bill of Rights Act.[55] Each of these Acts involves either cooperative agreements between federal and state agencies, or grants-in-aid to state and local agencies.

As society becomes more complex, state and local governments have placed increasing reliance on the federal government for financial support of social programs. Federal-state interaction is found in all phases of government once tradition-

47. Baker v. McCollan, 443 U.S. 137 (1979) (under § 1983, the first inquiry is whether the plaintiff has been deprived of a federal right).

48. Lorentzen v. Boston College, 440 F. Supp. 464 (D. Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1978), *cert. denied*, 440 U.S. 924 (1979) (state action is essential element of cause of action under § 1983).

49. A good example of such a scheme is the provision for Aid to Families with Dependent Children (AFDC). *See* 42 U.S.C. §§ 601, 602, 604 (1970). The state may not receive funding if a plan has not been submitted and approved.

50. *See* 48 C.F.R. §§ 200-99 (1979).

51. Courts have expressed some concern over the implications of judicial enforcement of the Social Security Act. The main concern is that federal courts will become embroiled in a "massive influx" of controversies best left to state courts. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528, 555-56 n.4 (1974) (Rehnquist, J., dissenting). Additionally, courts are concerned that the end result will be tantamount to daily supervision of state welfare commissioners. *See, e.g.*, McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969).

52. 29 U.S.C. §§ 49-49n (1970). *See* Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

53. 42 U.S.C. §§ 4601-38 (1970). *See* La Raza Unida v. Volpe, 440 F. Supp. 904 (N.D. Cal. 1977).

54. 42 U.S.C. §§ 1751-64 (1970). *See* Stogner v. Page, [1970] POV. L. REP. (CCH) ¶ 10,928 (N.D. Ill. 1970).

55. 42 U.S.C. §§ 6001-81 (1976). *See* Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978).

ally within the exclusive province of local government.[56] It would seem, then, that the most fertile field for section 1983 claims will be the multitude of statutes which provide some degree of federal funding for state and local use.[57] However, any federal statute which arguably grants a right should not be overlooked. Suits have been brought alleging violation of rights totally unconnected with federal funds.[58] Any of these statutes will satisfy the requirement that the action complained of be a violation of a federally created right.

The requirement that action[59] be taken "under color of state law" is easily met when the defendant is a state or local official or agency.[60] Where the state is involved in some "private" activity, the facts of the individual case must be scrutinized carefully. Mere receipt of state or federal funds by a private institution,[61] or state regulation,[62] is not sufficient to constitute state action. The facts must show that the private entity is acting as a state instrumentality or joint participant, under circumstances indi-

56. The effects of this modern partnership, and its consequent impact on federalism, is thoroughly discussed in Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1184-86 (1977).

57. The federal courts have never been loath to adjudicate matters involving state expenditure of federal funds. "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. . . ." Rosado v. Wyman, 397 U.S. 397, 422-23 (1970), quoting Helvering v. Davis, 301 U.S. 619, 645 (1937).

Justice Powell, in his dissent, provided the prospective counsel with a list of statutes which might be amenable to a § 1983 cause of action. Maine v. Thiboutot, 100 S. Ct. 2502, Appendix, 2519-21 (1980) (Powell, J., dissenting).

58. *See, e.g.*, Chase v. McMasters, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978) (Indian Organization Act of 1934); Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978) (extradition of prisoners); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947) (right to sit on federal juries); Gage v. Commonwealth Edison Co., 356 F. Supp. 80 (N.D. Ill. 1972) (right to an environmental impact statement prior to action in which federal agency participates); McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951) (federal ban on the tapping of telephones).

59. The word "action" should be read to include failure to act as well as custom and usage. *See, e.g.*, Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979) (continued pattern of inadequate funding resulting in failure to prevent substandard living conditions in county jail adequately alleged custom within scope of § 1983); Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (state action may be predicated on failure to act).

60. Questions of immunity may arise in some instances. *See* text accompanying notes 81-102 *infra*.

61. *E.g.*, Manning v. Greensville Memorial Hosp., 470 F. Supp. 662 (E.D. Va. 1979) (receipt of Hill-Burton funds does not *per se* convert actions of otherwise private hospital to state action).

62. *E.g.*, Wagner v. Sheltz, 471 F. Supp. 903 (D. Conn. 1979) (receipt of Medicare funds and state regulation did not convert actions of private nursing home to state action).

cating state control of the private activity.[63] The state action requirement, then, would act as a bar to a section 1983 cause of action in some of the same situations where, although for different reasons, an implied cause of action is barred.[64] Section 1983 can substitute for an implied right of action only in a narrow range of cases. At least for purposes of federal redress of statutory rights, it appears that there are indeed some rights which have no remedy.[65]

Where section 1983 does constitute a viable cause of action, a variety of issues arise. Doctrines developed in the context of constitutional claims must be reconsidered in the context of purely statutory claims. Among these related problems are jurisdiction, immunity, exhaustion of remedies, and attorney's fees.

RELATED PROBLEMS

Jurisdiction

Initially, the section 1983 cause of action was considerably weakened by separation from jurisdiction under section 1343. Since the two sections were no longer to be read as coextensive, it followed that jurisdiction over a purely statutory claim would be grounded in some other jurisdictional provision, such as section 1331(a),[66] the federal question provision. This section placed severe limitations on section 1983 claims because the $10,000 jurisdictional amount had to be satisfied. Welfare litigants and those bringing suit under other federal funding statutes would find it difficult to meet the $10,000 requirement, particularly since aggregation of individual claims for jurisdictional purposes was barred unless the claims were "common and undivided."[67] Each member of a class, whether or not a

63. Musso v. Suriano, 586 F.2d 59 (7th Cir. 1978). *See also* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978).

64. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (The Court held that there was no implied right of action because there was no evidence that Congress intended to create a private cause of action. A suit under § 1983 would be barred because Touche Ross, an accounting firm, was not acting "under color of state law.").

65. *Cf.* Arnett v. Kennedy, 416 U.S. 134, 152 (1973) ("[a] substantive right may [not] be viewed wholly apart from the procedure provided for its enforcement").

66. 28 U.S.C. § 1331(a) (1976). This result was contemplated by the Court in Maine v. Thiboutot, 100 S. Ct. 2502, 2506 n.6 (1980). The majority found nothing "inherent[ly] illogic[al] in construing section 1983 more broadly than section 1343(3). . . ." According to the Court, "[i]t would only mean that there are statutory rights which Congress had decided cannot be enforced in the federal courts."

67. Snyder v. Harris, 394 U.S. 332, 335 (1969).

named party, had to satisfy the jurisdictional amount.[68]

This restriction of section 1983 raised the question of the role of state courts in deciding claims based on federal statutory rights. Section 1983 was originally enacted in reaction to violence unchecked, either willfully or for lack of power, by the states.[69] The concerns involving the ability of state courts to cope with violations of fundamental rights to a large extent disappeared. However, the question still remained whether state courts would be willing, or able, to grant some of the sweeping changes[70] that federal courts had initiated in response to section 1983 claims.[71] With the separation of sections 1983 and 1343, claims under many federal statutes would be relegated to state courts unless some substantial constitutional claim were made, or an implied right of action were found.[72]

Five months after the decision in *Maine v. Thiboutot*, Congress provided a solution to the anomaly of a federal right unenforcible in a federal forum. Section 1331 was amended to eliminate the jurisdictional amount requirement.[73] As a result,

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68. Zahn v. International Paper Co., 414 U.S. 291, 294-95 (1973).

69. The purpose of § 1983 was to provide a federal forum to redress the violation of federal rights where state authorities were unwilling or unable to do so. *See* text accompanying notes 1-8 *supra*. As late as 1973, this purpose was still recognized as the underlying basis for § 1983. District of Columbia v. Carter, 409 U.S. 418, 426-29 (1973).

70. For example, federal courts in the past have used their injunctive powers to effect reform of state mental hospitals and prison systems, and to integrate public schools. *See, e.g.*, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974) (prison reform); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976), *enforced*, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (school integration); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part and remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (reform of state mental hospital).

71. *See generally* Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1173-87 (1977). The author argues that much of the opposition to § 1983 claims comes from those who see the section as destroying the balance between federal and state governments.

72. The problem in bringing these actions in state court is that state courts might be unwilling, or unable, to effect statewide reforms which have a dramatic impact on state fiscal policies. For example, in Illinois, despite the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-81 (1976), and the availability of Medicaid funds, smaller, less restrictive facilities are being closed, and their residents transferred to overcrowded and more restrictive institutions. *See* Mullen, *President's Page*, 68 ILL. B.J. 634 (1980). Responding to criticism of this policy, the Assistant to the Governor for Human Services cites the demands of funding strategies and current fiscal problems as complicating the issue. Letter from J.W. Kiley, Assistant to the Governor for Human Services, to Mr. Mullen, President of the Illinois Bar Association, *reprinted in* 68 ILL. B.J. 694 (1980). Such conflicts in allocation of available funding are common. A state court judge, well aware of such local problems and controversies, might understandably hesitate to attempt a solution of the problem by judicial action.

73. Federal Question Jurisdictional Amendments Act of 1980, Pub. L.

any federal statutory claim may now be brought without restriction in the federal courts. Section 1983 claims have been strengthened, and are likely to increase in number as federal programs proliferate.[74] To some extent, the recent Congressional action will reverse the trend toward limiting the actions federal courts will entertain.[75]

While most section 1983 claims will be brought in federal courts, it is generally agreed that state courts have concurrent jurisdiction.[76] To date, most of the state court cases have involved section 1983 claims pendent to a state claim.[77] One court has asserted that, if the claim were the same type as would arise under state law and be heard in state courts, a state court would have to enforce the federal claim.[78] Many statutorily based claims have a state counterpart. For example, the Social Security Act, in its criteria for state plans, requires that the state provide means of enforcement.[79] Such a plan would normally provide for administrative remedies, with appeal to the state court upon exhaustion of the remedies.[80] Since section 1983 claims may arise in either federal or state court, the discussion of other issues which follows will consider the alternative forums.

No. 96-486 (1980) (amending 28 U.S.C. § 1331(a)). As amended, § 1331 now provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

74. *See* text accompanying notes 56-58 *supra*.

75. *See* text accompanying note 38 *supra*.

76. *See, e.g.*, Brown v. Pitchers, 13 Cal. 3d 518, 531 P.2d 772 (1975). *Contra*, Chamberlain v. Brown, 442 S.W.2d 248 (Tenn. 1969). The Court in Maine v. Thiboutot, 100 S. Ct. 2502, 2503 n.1 (1980), purported to have settled the issue affirmatively in a prior case, citing Martinez v. California, 100 S. Ct. 553 (1980). The *Martinez* court noted that the California decision on concurrent jurisdiction "appear[ed] to be consistent with the general rule. . . ." *Id.* at 558 n.7.

77. A good example is Thiboutot v. State, 405 A.2d 230 (Me. 1979). An action was brought in the state court pursuant to state regulations governing review of administrative decisions of the state welfare department. The plaintiffs amended their complaint to include a § 1983 claim, apparently for the purpose of obtaining attorney's fees under § 1988.

78. *See* Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977) (state courts have affirmative obligation under Constitution of the United States to assume jurisdiction to hear and decide § 1983 cases whether or not the federal right asserted is pendent to a state claim).

79. *E.g.*, 42 U.S.C. § 602(a)(4) (1976) (state plan must provide for a fair hearing before the state agency).

80. *See, e.g.*, ILL. REV. STAT. ch. 23, § 11-8.7 (1968) (setting forth procedures for obtaining review, including judicial review of the final administrative decisions). *See* text accompanying notes 109-11 *infra*.

Immunity

Traditionally, in section 1983 cases, immunity and the doctrine of exclusive remedies have precluded successful suits. The latter bar is still intact,[81] and means that no alternative remedy is available under section 1983[82] where a particular statute provides an exclusive remedy for violations. Immunity, on the other hand, has undergone some changes in the past year, and may need reevaluation as the incidence of section 1983 claims increases,[83] especially where the claim arises in a state court.

Immunity may arise in a claim against the state itself or one of its agencies, a municipality,[84] or a state officer or employee. A state may rely on the eleventh amendment[85] as a bar to suits seeking damages for past actions.[86] This defense is available even where individual state officials are named as defendants, so long as the state remains the real party in interest and recovery will be provided from state funds.[87] However, where the suit involves prospective injunctive relief, the eleventh amendment does not preclude relief, even where there would be fiscal consequences to state compliance.[88]

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81. Maine v. Thiboutot, 100 S. Ct. 2502, 2507 n.11 (1980).

82. *E.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 n.5 (1970) (42 U.S.C. §§ 2000a(a)-(e), Public Accommodation provisions of the Civil Rights Act of 1964, provides its own, exclusive remedy); Schatte v. International Alliance of Theatrical State Employees, 182 F.2d 158, 166 (9th Cir. 1950) (National Labor Relations Act, 29 U.S.C. §§ 151-68, provides exclusive remedies).

83. *See* note 84 *infra*. Under the eleventh amendment, a state may not be sued by its own residents in federal courts. This doctrine has been extended to state officers acting in their official capacity. The eleventh amendment does not apply to citizens suing the state in state courts, although the doctrine of sovereign immunity, or a statute limiting state liability, may be a factor. Most states have waived such immunity in their own courts.

84. Municipalities were originally granted complete immunity, due to the Court's interpretation of "person" in § 1983. Monroe v. Pape, 365 U.S. 167, 191 (1961). Lower courts began expanding this immunity to include townships, counties, municipal agencies, states and state agencies. Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1194-95 (1977). Then, in Monell v. Department of Social Servs., 436 U.S. 658 (1978), the Court expressly overruled *Monroe*. Subsequently, in Owen v. City of Independence, 100 S. Ct. 1398 (1980), the Court held that not even the defense of good faith was open to municipalities. It is likely that other governmental subdivisions, which derived their immunity from *Monroe*, will be similarly liable. *See generally* Note, *Liability of State and Local Governments Under 42 U.S.C. § 1983*, 92 HARV. L. REV. 311 (1978).

85. U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

86. Edelman v. Jordan, 415 U.S. 651 (1974).

87. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464 (1945).

88. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (prohibiting denial of

Although these successful suits involved constitutional claims, it is doubtful that the application of immunity will change when purely statutory claims arise in federal courts. In *Maine v. Thiboutot*, the Court refused to distinguish between constitutional and statutory claims for purposes of section 1988, the Civil Rights Attorney's Fees Act.[89] Nor would immunity to retrospective awards of damages be altered,[90] although in state courts, unless prohibited by a state constitutional amendment, the state itself may be named as a defendant.[91]

Until recently, municipalities enjoyed even greater immunity to section 1983 suits than did the states.[92] In *Monroe v. Pape*,[93] the Supreme Court held that municipalities were not included within the word "person" for purposes of a section 1983 claim, thus barring suits against cities. However, after reconsidering the statutory history of section 1983, the Court expressly overruled *Monroe* in *Monell v. Department of Social Services*.[94] Furthermore, the Court has now ruled that municipalities may not even claim good faith immunity.[95] This means that even where an individual municipal official might claim a personal, good faith immunity[96] for his actions, recovery may still be had from municipal funds. One Justice has referred to this as "absolute liability,"[97] which only municipalities suffer.

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welfare funds to otherwise qualified resident aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (enjoining termination of welfare benefits without a prior hearing).

89. Maine v. Thiboutot, 100 S. Ct. 2502, 2506 (1980). *See* text accompanying notes 116-35 *infra*.

90. In two state decisions, courts have held that states retain the same immunity that they enjoy in federal courts. Thiboutot v. State, 405 A.2d 230 (Me. 1979); Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979). *Thiboutot* limited its decision to welfare claims. 405 A.2d at 237. The Supreme Court has not ruled on the use of the immunity doctrine in state courts, but has said that, at least in the context of attorney's fees, "[n]o Eleventh Amendment question is present . . . where an action is brought in a state court since the amendment by its terms, restrains only '[t]he Judicial power of the United States.'" Maine v. Thiboutot, 100 S. Ct. 2502, 2506 n.7 (1980).

91. This is obvious, as the two cases in note 90 *supra* indicate. This is not true, however, in federal courts. In Alabama v. Pugh, 438 U.S. 781 (1978), the Court ordered Alabama and the Alabama Board of Corrections dismissed as defendants because a "suit against the State and its Board of Corrections is barred by the Eleventh Amendment; unless Alabama has consented to the filing of such a suit." *Id.* at 782.

92. *See* note 84 *supra*.

93. 365 U.S. 167 (1961).

94. 436 U.S. 658 (1978).

95. Owen v. City of Independence, 100 S. Ct. 1398 (1980).

96. *See* text accompanying notes 98-100 *infra*.

97. Maine v. Thiboutot, 100 S. Ct. 2502, 2513 n.10 (1980) (Powell, J., dissenting).

Government officials and employees are another group to enjoy some measure of immunity. Their immunity is based on the common law doctrine of personal immunity for official acts.[98] Personal immunity would be irrelevant in most cases asserting a federal statutory right,[99] as the relief sought would more likely be injunctive than for monetary damages.[100] Since the claim against the official would not be a personal claim, there would be no occasion for the official or employee involved to assert immunity.

It appears, then, that immunity will continue to bar some suits based on purely statutory claims. Whether states may continue to successfully assert immunity in state court actions, where eleventh amendment questions would not arise, still remains unclear. Conversely, it is well settled that state law immunities cannot override a cause of action under section 1983.[101] This principle is likely to be upheld in state courts, just as they have upheld an award of attorney's fees, despite the absence of fee provisions under state law.[102]

Exhaustion of Remedies

The Supreme Court has frequently ruled, in the context of constitutional claims under section 1983, that neither state judicial nor state administrative remedies need be exhausted before initiating a claim in federal courts.[103] Exemption from the general rule requiring exhaustion of remedies[104] is consonant with the underlying purpose of the Civil Rights Act of 1871: to avoid the effects of discriminatory state laws, and inadequate or non-

98. Pierson v. Ray, 386 U.S. 547, 556-57 (1967). For an interesting discussion of the ramifications of personal immunity for judges, see Comment, *Derivative Immunity Under Section 1983: Conspiracies Between Immune Judicial Officials and Private Persons*, 14 J. MAR. L. REV. 89 (1980).

99. This probably would be irrelevant in any case, as public employees tend to be judgment proof. *See* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955).

100. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1977) (good faith immunity available in damage actions not available in action seeking injunctive and declaratory relief); Project Release v. Prevost, 463 F. Supp. 1033 (E.D. N.Y. 1978) (doctrine of qualified immunity from damages does not prevent entry of declaratory judgment).

101. Monell v. Department of Social Servs., 436 U.S. 658 (1978).

102. *See* text accompanying notes 125-26 *infra*.

103. *See, e.g.*, Ellis v. Dyson, 421 U.S. 426 (1975); Gibson v. Berryhill, 411 U.S. 564 (1973); Preiser v. Rodriguez, 411 U.S. 475 (1973); King v. Smith, 392 U.S. 309 (1968); Monroe v. Pape, 365 U.S. 167 (1961).

104. The general rule in federal courts is that administrative remedies, whether state or federal, must first be exhausted. The rationale for this rule is that questions should be decided by those most competent to do so, and in the most orderly fashion. Exhaustion of judicial remedies is generally not required because of the possible res judicata or collateral estoppel effects.

existent state remedies.[105] It would be senseless to require exhaustion of remedies where, by the very nature of the claim, the remedies are presumptively inadequate. However, now that section 1983 has been made available to purely statutory claims, a reevaluation of the exemption policy is necessary, regardless of whether the claim is presented in a federal or a state forum.

When a section 1983 claim is brought in federal court, exemption from the need to exhaust state judicial remedies is still a viable doctrine because of the res judicata and collateral estoppel effects.[106] Most state administrative remedies would not have a similar effect. Where no constitutional claim is present, in which federal courts would have greater expertise, the usual justification for requiring administrative exhaustion[107] is as applicable to section 1983 claims as to any other claim. In those cases where the Supreme Court has ruled that exhaustion of administrative remedies was not required, the remedies available to the plaintiffs were clearly inadequate.[108] Lower courts have begun to question this exemption from the exhaustion principle,[109] and the Supreme Court has indicated that, in the future, exhaustion will be required where the remedy is adequate.[110] When the issue is a purely statutory claim, and the administrative remedy is adequate, the exhaustion rule is sensible and will most likely be held applicable.

When section 1983 claims arise in state courts, the administrative exhaustion doctrine is certain to become a problem. Normally, state agencies provide that after a number of internal appeals are exhausted, resort may be had to the state courts.[111]

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105. Monroe v. Pape, 365 U.S. 167, 173-74 (1961).

106. Recently, even this doctrine has not been accepted without question. The Supreme Court has been attentive to adequate state judicial remedies. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976).

107. These justifications include agency expertise, judicial economy, and consistency in the application of a regulatory scheme. *See generally* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974).

108. *See* Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

109. The courts are far from uniform in their decisions. *Compare* Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970) (administrative remedies must be exhausted) *with* Simpson v. Weeks, 570 F.2d 240 (8th Cir.), *cert. denied*, 443 U.S. 911 (1978) (administrative remedies need not be exhausted).

110. *E.g.*, Preiser v. Rodriguez, 411 U.S. 475, 488-89 (1973). The Court would not allow a claim to go forward under § 1983 and avoid the exhaustion requirement of federal habeas corpus. The same day, in dictum, the Court indicated that where administrative remedies provided adequate protection of federal rights, exhaustion might be appropriate. Gibson v. Berryhill, 411 U.S. 564, 573-75 (1973).

111. A good example of the process is found in Thiboutot v. State, 405

The state courts will not accept an appeal until all administrative remedies have been exhausted.[112] Courts have already ruled that federal, not state, rules are applicable to immunity[113] and attorney's fees.[114]

If the same pattern is followed in relation to exhaustion of remedies, serious problems will arise. Section 1983 claims could be used to circumvent all of the state rules developed to assure the orderly administration of state programs. Claimants will have little incentive to pursue these remedies when an immediate adjudication is available in a state court. Claims which could have been competently handled administratively will appear in court before the state executive branch has had any opportunity to resolve the issue. For this reason alone, the relaxation of the exhaustion doctrine should be reconsidered. Absent a requirement of exhaustion, courts will become hopelessly overwhelmed and the costs of administering state programs needlessly increased.[115]

Attorney's Fees

The Civil Rights Attorney's Fees Awards Act[116] expressly provides that a court may, in its discretion, allow attorney's fees to the prevailing party in a section 1983 action. In *Hutto v. Finney*,[117] the Supreme Court held that the eleventh amendment did not bar attorney's fees awards in federal courts. The Court relied on the fact that attorney's fees are part of costs, and costs

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A.2d 230, 232 (Me. 1979). Challenging state AFDC requirements, the plaintiffs first pursued their administrative remedies through the Commissioner of the Maine Department of Human Services. Only when a final adverse administrative decision was rendered were they able to take their appeal to the Maine state courts.

112. *See, e.g.*, ILL. REV. STAT. ch. 23, § 11-8.7 (1968).

113. *See* text accompanying notes 90-91 *supra*.

114. *See* text accompanying note 125 *infra*.

115. The purpose of the exhaustion of remedies doctrine is two-fold: (1) to conserve judicial time, which results when the agency grants the relief sought; and (2) to preserve administrative autonomy by giving the agency the opportunity to correct its own errors. Smith v. Fenton, 424 F. Supp. 792 (E.D. Ill. 1976). If the agency is allowed to resolve the issue, the likelihood of resort to judicial determination is reduced. Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 541 (1974).

116. 42 U.S.C. § 1988 (1976). The 1976 revision added the following:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

117. 437 U.S. 678 (1978).

"have traditionally been awarded without regard for the State's Eleventh Amendment immunity."[118] *Hutto*, however, left unresolved the questions whether section 1988 is applicable to purely statutory claims, and whether the rule is applicable in state courts, notwithstanding state rules to the contrary.

The question of the applicability of section 1988 to statutory claims was settled in *Maine v. Thiboutot*.[119] Relying on the plain meaning rule,[120] the Court held that "since [section] 1988 makes no exception for statutory [section] 1983 actions, [section] 1988 plainly aplies [*sic*] to this suit."[121] The decision is not surprising, considering the wording of section 1988 and Congressional intent in enacting the provision. The title of section 1988 is misleading. Although it speaks of "Civil Rights," actions to enforce or to charge a violation of the United States Internal Revenue Code, clearly not a civil rights statute, are included. Additionally, comments made at the time of enactment indicate that Congress was well aware of the possibility that section 1983 might apply to statutory as well as constitutional claims.[122]

Attorney's fees may also be available where the plaintiff prevails through settlement rather than litigation. In *Maher v. Gagne*,[123] the companion case to *Maine v. Thiboutot*, the Court held that an award of fees is appropriate where the plaintiff prevails in a wholly statutory claim pendent to a substantial constitutional claim. The award is allowed "where both the statutory and the constitutional claim are settled favorably to the plaintiff without adjudication."[124]

State courts have assumed the applicability of section 1988 to actions brought in state courts.[125] The Court confirmed this

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118. *Id.* at 695.

119. 100 S. Ct. 2502 (1980).

120. When construing a statute, the courts will give words their plain, ordinary meaning. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 184 n.29 (1978) ("it is not necessary to look beyond the words of the statute"). *But see* Lynch v. Household Fin. Corp., 405 U.S. 538, 549 (1972) (civil rights statutes of the Reconstruction era "must be given the meaning and sweep [of] . . . *their origins* and their language") (emphasis added).

121. 100 S. Ct. at 2506.

122. *E.g.*, 122 CONG. REC. 35122 (1976) (remarks of Rep. Drinan, explaining that § 1983 applies to "[f]ederal statutory as well as constitutional rights"); *id.* at 33314 (remarks of Sen. Kennedy, commenting on "rights promised by Congress or the Constitution"). *But see id.* at 12159 (remarks of Rep. Drinan, § 1988 would authorize attorney's fees "in actions brought under specified sections of the United States Code relating to civil and constitutional rights").

123. 100 S. Ct. 2570 (1980).

124. *Id.* at 2576.

125. *E.g.*, Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979); Thiboutot v. State, 405 A.2d 230 (Me. 1979); Ramirez v. County of Hudson, 169 N.J. 455, 404 A.2d 1271 (1979); Board of Trustees v. Halso, 584 P.2d 1009 (Wyo. 1978).

application in *Maine v. Thiboutot*, noting that no eleventh amendment question is presented when the action is brought in a state court[126] since the amendment limits only federal judicial action. The *Thiboutot* decision makes a section 1983 action an attractive alternative to any state remedy. Many state courts have no authority to include attorney's fees as part of costs without statutory authorization. By bringing an action under section 1983 rather than, or in addition to, applicable state provisions, state rules can be circumvented and the cost of pursuing judicial remedies greatly reduced.[127]

It is perhaps this cost factor, rather than the holding that section 1983 is applicable to statutory claims, that so concerns the states.[128] If claims can be successfully adjudicated at no cost to the plaintiffs, it is likely that the incidence of such claims will increase. The cost to the state of defending claims will dramatically increase, further burdening overstrained state budgets. There is already some indication that section 1983 claims are being appended to other claims in order to obtain fees.[129] Given the liberality of pendent jurisdiction, an experienced attorney might find numerous ways to obtain fees against a state defendant.[130]

The criteria for the award of attorney's fees where the claim is purely statutory are yet undecided. Where constitutional claims are involved, the Supreme Court has held that, barring

126. Maine v. Thiboutot, 100 S. Ct. 2502, 2506 n.7 (1980). The holdings here and in Maher v. Gagne, 100 S. Ct. 2570 (1980), are somewhat confusing as to what the Court has considered in regard to attorney's fees. Between the two decisions, the Court has held that fees are available when the party prevails through litigation in a state court, whether the claim is statutorily or constitutionally based, and where the party prevails in a federal court through settlement of both a statutory and a substantial constitutional claim. Hutto v. Finney, 437 U.S. 678 (1978), decided that attorney's fees are available in federal court on constitutional claims. Whether fees are available in federal court on a purely statutory claim is still undecided. The decision in *Maine v. Thiboutot*, however, appears broad enough to cover the issue. 100 S. Ct. 2502, 2507 (1980) (fee provision is part of § 1983 remedy in federal or state court).

127. The Court indicates that the allowance of fees in state courts is necessitated by the recent split of §§ 1983 and 1343(3). *See* Maine v. Thiboutot, 100 S. Ct. 2502, 2507 n.12 (1980).

128. *See* note 36 *supra*.

129. *See, e.g.*, United States v. Imperial Irrigation Dist., 595 F.2d 525, 529 (9th Cir. 1979), *rev'd on other grounds sub nom.* Bryant v. Yellen, 100 S. Ct. 2232 (1980); Thiboutot v. State, 405 A.2d 230 (Me. 1979).

130. *See* Maine v. Thiboutot, 100 S. Ct. 2502, 2514 (1980) (Powell, J., dissenting), citing Wolf, *Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act*, 2 W. NEW ENG. L. REV. 193, 249 (1979).

unusual circumstances, fees should ordinarily be awarded.[131] One court has undertaken the task of listing factors entitled to consideration in determining the appropriate amount of the award,[132] but this case again dealt with a constitutional claim.

The standards for setting the amount of the award are broad enough to be applicable to statutorily based claims.[133] However, the standard employed for determining whether a fee should be awarded *at all* may be overly broad. The Civil Rights Attorney's Fees Act was intended to be more moderate than statutes requiring the awarding of fees.[134] Where the claim is based on a statute, an appropriate inquiry might be whether correction of the state rule in question would benefit others in addition to the plaintiff, and whether issues of public policy are served by the litigation.[135] These questions are appropriate in dealing with state regulatory schemes, and they further the purpose of the Act without unduly burdening individual plaintiffs. Most regulations, by their very nature, would affect a wide class of potential plaintiffs, thus satisfying the suggested criteria.

CONCLUSION

Since the Supreme Court has separated section 1983 from section 1343, long considered its jurisdictional counterpart, consideration must be given to the new role that section 1983 will play in relation to federal statutory claims. Section 1983 has some potential as a substitute for an implied right of action. Recent decisions have further narrowed the situations in which a statute gives rise to an implied right of action, while section 1983 is available for any statutory claim. However, since section 1983 is limited to state action, or action taken under color of state law,

131. *E.g.*, Northcross v. Board of Educ., 412 U.S. 427 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

132. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The suggested factors include: (1) time and labor actually required; (2) novelty and difficulty of the questions; (3) skill requisite to proper performance of the legal service; (4) preemption of the attorney's time; (5) the amount involved and the results obtained; (6) the experience, reputation and ability of the attorneys; (7) the "undesirability" of the case; (8) the nature and length of the professional relationship with the client; and (9) awards in similar cases. Exhaustive discussion of these factors is found in Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorney's Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331 (1980).

133. *See* note 132 *supra*. There is nothing in these factors which would limit their use to cases involving constitutional claims.

134. *See* Hutto v. Finney, 437 U.S. 678, 708 n.7 (1978) (Powell, J., concurring in part and dissenting in part) (Act does not require "routine imposition" of fees).

135. *See* Thiboutot v. State, 405 A.2d 230, 240 (Me. 1979).

its usefulness as a substitute for an implied right of action will be limited.

Despite some limitations, the courts are likely to experience an increase in section 1983 claims. Not only may purely statutory claims be brought, but recent changes in jurisdictional requirements will further facilitate suits. The abolition of the $10,000 requirement in federal question cases will enable claimants under such statutes as the Social Security Act to bring suit in the federal courts. State courts, too, will face section 1983 claims, although usually pendent to state claims.

Two important considerations will be the doctrines of immunity and exhaustion of remedies. Many of the immunity considerations which were developed in federal courts remain unchanged. However, in state courts the eleventh amendment does not bar suits in which states or state agencies are named as parties defendant.[136] The various state courts which have considered the issue are inclined to maintain the distinction between prospective and retrospective relief established by federal courts. The distinction is likely to continue, as state courts will not wish to further burden state budgets by requiring retroactive payments under such statutes as the Social Security Act. The doctrine of exhaustion of remedies, on the other hand, must be altered to comport with the new role of section 1983. Claimants should not be allowed to bypass state administrative remedies where a claim under state regulations would require such exhaustion.

Finally, statutory 1983 claims will prove most useful in the area of attorney's fees. The availability of fees will encourage challenges to state and local agencies' rules and regulations. An increase in the number of statutory 1983 claims may induce a change in the standards upon which courts base the discretionary award of fees. Any change, however, must not be allowed to unduly burden claimants, thus undermining Congress' purpose in enacting the Civil Rights Attorney's Fees Awards Act. Some claimants will bring their actions in state courts, and Congress intended that plaintiffs should not face financial burdens in asserting claims of violations of federal rights.

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136. *See* notes 83 and 90 *supra*.