Exhaustion of State Administrative Remedies in a Prerequisite to 42 U.S.C. 1983 Action.

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CIVIL RIGHTS—Exhaustion of Remedies—Exhaustion of State Administrative Remedies is a Prerequisite to 42 U.S.C. § 1983 Action.

Patsy v. Florida International University 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874).

Patsy was a white female secretary employed at Florida International University. She had applied for several promotions, each of which was rejected. Contending the denials were based on race and sex discrimination, she brought a civil rights action against the Florida State Board of Regents.[1] The district court granted the university's motion to dismiss because of Patsy's failure to exhaust available state administrative remedies.[2] The Court of Appeals for the Fifth Circuit reversed and remanded.[3] Subsequently, the court of appeals, en banc, granted a rehearing to determine if exhaustion of state administrative remedies was a prerequisite for federal court consideration of a section 1983 action.[4] Held—*Vacated and remanded.* Exhaustion of state administrative remedies is a prerequisite to a 42 U.S.C. § 1983 action.[5]

Administrative acts are the legislature's vehicle for implementing policy.[6] Exhaustion of administrative remedies[7] has enabled administrative

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1. Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874). Patsy brought her civil rights action under 42 U.S.C. § 1983 (1976). Section 1983 is a codification of the Civil Rights Act of 1871 and provides:

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

Civil Rights Act of 1871 §§ 1, 17, 42 U.S.C. § 1983 (1976).As a result of the alleged discrimination, Patsy sought promotion to a higher position or an award of $50,000.00 for actual and punitive damages. *See* Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874).

2. *See* Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874).

3. *See* Patsy v. Florida Int'l Univ., 612 F.2d 946, 946-47 (5th Cir. 1980) (reversed on grounds plaintiff need not exhaust state administrative remedies prior to § 1983 suits).

4. *See* Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874).

5. *See id.* at 912-14.

6. *See* McKevitt v. City of Sacramento, 203 P. 132, 136 (Cal. Ct. App. 1921). Executive

agencies to fulfill legislative intent while conserving judicial resources.[8] The federal judiciary has, therefore, generally required exhaustion of state administrative remedies before allowing a plaintiff to proceed in federal court.[9]

The United States Supreme Court, however, has stated that exhaustion of state administrative remedies is not required in civil rights actions.[10] In *Monroe v. Pape*,[11] the Court reasoned that federal remedies were supplementary to state remedies; therefore, exhaustion of state judicial remedies was not required in actions brought under 42 U.S.C. § 1983.[12] Subse-

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departments initiate and enforce legislative policies, thus creating the administrative process. *See id.* at 136; *cf.* Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U.S. 282, 291 (1908) (legislature may delegate to administrative agency power of regulation); Commonwealth v. Benn, 131 A. 253, 257 (Pa. 1925) (administrative bodies necessary to carry out public policy of legislature).

7. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The Court stated the exhaustion requirement provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50-51.

8. *See, e.g.*, Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. 185, 193-95 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). *See generally Developments in the Law - Section 1983, and Federalism*, 90 HARV. L. REV. 1133, 1265-66 (1977).

9. *See, e.g.*, McKart v. United States, 395 U.S. 185, 193 (1969) (well established rule administrative remedy must be exhausted before judicial relief sought); Franklin v. Jonco Aircraft Corp., 346 U.S. 868, 868 (1953) (per curiam) (lower court decision reversed for appellee's failure to exhaust administrative remedies); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (no judicial relief for real or impending injury until administrative remedies exhausted).

10. *See, e.g.*, Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) (exhaustion of state administrative remedy not necessary in § 1983 action); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (Congress established federal judiciary as protector of constitutional rights and thus no requirement to exhaust state administrative remedies); Damico v. California, 389 U.S. 416, 417 (1967) (per curiam) (relief under Civil Rights Act may be sought first in federal court). *But see, e.g.*, City of Columbus v. Leonard, 443 U.S. 905 (1979) (Rehnquist, J., dissenting) (no-exhaustion rule in § 1983 action should be reconsidered); Runyon v. McCrary, 427 U.S. 160, 186 n.*a (1976) (Powell, J., concurring) (extreme interpretation of post Civil War acts do not require exhaustion of state administrative remedies in § 1983 claims); Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973) (question whether state administrative remedies need be exhausted undecided).

11. 365 U.S. 167 (1961).

12. *Id.* at 183. The Court in *Monroe* reasoned the purpose of the Civil Rights Act of 1871 was to enforce the provisions of the fourteenth amendment. *See id.* at 171 (construing title of Civil Rights Act of 1871); CONG. GLOBE, 42d Cong., 1st Sess. 83-85 (1871) (Civil Rights Act carries out powers of fourteenth amendment). Section 1 of the Civil Rights Act of 1871 provides redress in federal courts for citizens deprived of rights under the color of state law. 42 U.S.C. § 1983 (1976); *see, e.g.*, Wilwording v. Swenson, 404 U.S. 249, 249-51 (1971) (prisoners filed suit against state prison officials because of living conditions and disciplinary measures); King v. Smith, 392 U.S. 309, 311 (1968) (class action seeking declara-

quently, in *McNeese v. Board of Education*,[13] the Court extended the *Monroe* no-exhaustion rule to state administrative remedies.[14] The Court has continued to adhere to the no-exhaustion concept, but has excused exhaustion on grounds other than section 1983 principles.[15] Since *McNeese*, exhaustion of state administrative remedies has been excused when one of the following circumstances exist: the administrative remedy is inadequate,[16] the case involves a constitutional question,[17] the ade-

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tory and injunctive relief against state officials); Damico v. California, 389 U.S. 416, 416 (1967) (per curiam) (class action seeking declaratory and injunctive relief against state welfare law). Congress has thus established, through the fourteenth amendment, a federal remedy for civil rights litigants supplemental to state remedies. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961).

13. 373 U.S. 668 (1963).

14. *See id.* at 671 (black students alleging racial discrimination against Illinois public school system). The *McNeese* Court held that when citizens are deprived of rights protected by the fourteenth amendment "it is immaterial whether respondent's conduct is legal or illegal as a matter of state law." *Id.* at 671; *See* Stapelton v. Mitchell, 60 F. Supp. 51, 55, *appeal dismissed, sub. nom., pursuant to stipulation*, 326 U.S. 690, 690 (1945). Before *McNeese*, civil rights litigants did not have to exhaust judicial remedies in all cases, but they did have to exhaust all state administrative remedies. *See* Dove v. Parham, 282 F.2d 256, 262 (8th Cir. 1960) (state administrative but not judicial remedies must be exhausted before access to federal forum); Baron v. O'Sullivan, 258 F.2d 336, 37 (3d Cir. 1958) (state administrative not judicial remedies must be exhausted for abridgement of constitutional rights).

15. *See, e.g.*, Barry v. Barchi, 443 U.S. 55, 63 n.10 (1979); Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973); Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The majority in *Gibson* acknowledged that exhaustion of state administrative remedies is not required in section 1983 actions, but questioned the cogency and construction of prior section 1983 decisions. *See* Gibson v. Berryhill, 411 U.S. 564, 581 (1973) (Burger, J., concurring) (Marshall, Brennan, J.J., concurring). In his concurring opinion, Chief Justice Burger would have withheld judgment until further exhaustion of state remedies. *Id.* at 581 (Burger, J., concurring). Justice Marshall, with whom Justice Brennan concurred, stated that the question of whether section 1983 plaintiffs must exhaust administrative remedies is still open. *See id.* at 581 (Marshall, J., concurring). Other Supreme Court opinions contain statements which question the no-exhaustion rule in section 1983 actions. *See, e.g.*, City of Columbus v. Leonard, 443 U.S. 905, 910-11 (1979) (Rehnquist, J., dissenting) (purposes of Civil Rights Act need not bar exhaustion of adequate and available state remedies); Runyon v. McCrary, 427 U.S. 160, 186 (1976) (Powell, J., concurring) (no exhaustion requirement is extreme interpretation of post-Civil War Act); Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973) (question of exhaustion requirements is still open); *cf.* Paul v. Davis, 424 U.S. 693, 712 (1976) (Court relies on available state judicial tort remedies rather than allowing § 1983 action). *But see, e.g.*, Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) (exhaustion of state administrative remedy not necessary in § 1983 action); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (Congress established federal judiciary as protector of constitutional rights thus no need to exhaust state administrative remedies); Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam) (claim brought under Civil Rights Act does not require exhaustion).

16. *See* Walker v. Southern Ry., 385 U.S. 196, 198-99 (1966); United States v. Joseph A. Holpuch Co., 328 U.S. 234, 240 (1946); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 210 (1945).

quacy of the administrative remedy is coextensive with the merits of the plaintiff's claim,[18] or it is futile to comply with administrative remedies.[19] Nevertheless, the Supreme Court has not expressly prohibited lower courts from applying their own exhaustion rules.[20]

Lower federal courts are divided on the issue of section 1983 exhaustion requirements.[21] Courts opposing the exhaustion requirement reason that the legislative intent in creating section 1983 was to establish federal remedies in civil rights actions as a supplement to state remedies.[22] Proponents of the no-exhaustion view argue civil rights questions are best resolved by the experts of the Constitution, the federal courts.[23] Moreover, the delays associated with the exhaustion of state remedies is said to have

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17. *See* Public Utilities Comm'n v. United States, 355 U.S. 534, 539 (1958).

18. *See* Gibson v. Berryhill, 411 U.S. 564, 575 (1973); Fuentes v. Roher, 519 F.2d 379, 387 (2d Cir. 1975); Finnerty v. Cowen, 508 F.2d 979, 982-83 (2d Cir. 1974).

19. *See* City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 34 (1934); Montana Nat'l Bank v. Yellowstone County, 276 U.S. 499, 505 (1928).

20. *See, e.g.*, Secret v. Brierton, 584 F.2d 823, 827-28 (7th Cir. 1978) (Supreme Court retains flexible approach to exhaustion requirement; any intimation towards inflexible rule is dicta); Canton v. Spokane School Dist. #81, 498 F.2d 840, 844 (9th Cir. 1974) (Court never stated state administrative remedies need not be exhausted under any circumstances); Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969) (court needs clearer directions from Supreme Court before eliminating all exhaustion requirements), *cert. denied*, 400 U.S. 841 (1970).

21. Seven circuits do not require exhaustion of state remedies. *See* Davis v. Southeastern Community College, 574 F.2d 1158, 1160 n.4 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); Green v. Ten Eyck, 572 F.2d 1233, 1239 (8th Cir. 1978); United States *ex rel.* Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3rd Cir. 1977); Wells Fargo Armored Serv. Corp. v. Georgia Pub. Serv. Comm'n, 547 F.2d 938, 939 n.1 (5th Cir. 1977); Gillette v. McNichols, 517 F.2d 888, 890 (10th Cir. 1975); Guerro v. Mulhearn, 498 F.2d 1249, 1252 (1st Cir. 1974); Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972). The remaining circuits do require exhaustion of state remedies. *See* Secret v. Brierton, 584 F.2d 823, 831 (7th Cir. 1978); Gonzalez v. Shanker, 533 F.2d 832, 833-34 (2d Cir. 1976); Canton v. Spokane School Dist. #81, 498 F.2d 840, 844-45 (9th Cir. 1974).

22. *See, e.g.*, United States *ex. rel.* Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3rd Cir. 1977); Hardwick v. Ault, 517 F.2d 295, 297 (5th Cir. 1975); Guerro v. Mulhearn, 498 F.2d 1249, 1252 (1st Cir. 1974).

23. *See* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COL. L. REV. 1201, 1207-08 (1968); Comment, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 586-88 (1975); *cf.* Stone v. Powell, 428 U.S. 465, 530 (1976) (Brennan, J., dissenting) (federal judges to be relied on for vindicating constitutional rights). In addition to constitutional law expertise, the federal judges with life tenure are less likely to be influenced by community pressures. *See, e.g.*, Palmore v. United States, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting) (life tenure safeguards judge from external pressures); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975) (life tenure sufficient to insulate judges from public opinion); United States v. Montanez, 371 F.2d 79, 84 n.17 (2d Cir. 1967) (federal judges independent of outside influence because of life tenure).

a "chilling effect" on section 1983 suits.[24] Other courts, however, argue exhaustion of state administrative remedies will ameliorate both the judicial and administrative process.[25] Advocates of the pro-exhaustion rule contend exhaustion does not abuse legislative intent.[26] Courts which have adopted the rule requiring exhaustion of administrative remedies in section 1983 actions reason that mere postponement of an individual's right to proceed in federal court is harmless in its effect.[27]

The Fifth Circuit Court of Appeals in *Patsy v. Florida International University*[28] reasoned that recent Supreme Court decisions provide sufficient latitude to sanction "an analytical rather than a mechanical approach" to exhaustion questions and, thus, require exhaustion of state administrative remedies in section 1983 actions.[29] The court noted its decision would bolster, rather than contravene, congressional aims.[30] The majority listed several policy reasons for their decisions.[31] First, exhaustion promotes a wiser allocation of judicial resources.[32] Second, exhaus-

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24. *See* Riley v. Ambach, 508 F. Supp. 1222, 1236 (E.D.N.Y. 1980) (long process may cause irreparable harm).

25. *See, e.g.*, Secret v. Brierton, 584 F.2d 823, 829 (7th Cir. 1978) (administrative procedure provides written record and provides speedier trial); Eisen v. Eastman, 421 F.2d 560, 567 n.11 (2d Cir. 1969) (exhaustion reduces official abuse and costly trials); Powell v. Workmens' Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964) (flood of litigation from failure to exhaust state remedies).

26. *See* Comment, *Exhaustion of State Administrative Remedies in 1983 Cases*, 41 U. CHI. L. REV. 537, 552-54 (1974).

27. *See* Morgan v. Lavallee, 526 F.2d 221, 226 (2d Cir. 1975) (delay harmless if "speedy, sufficient and readily available" administrative remedy open). *But see* Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 591 (1926) (unreasonable delay same effect as express act).

28. 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874).

29. *See id.* at 908. The court based this flexible approach on the Supreme Court's reasoning in *Barry v. Barchi* and *Gibson v. Berryhill*. *See id.* at 905-06; *cf* Barry v. Barchi, 443 U.S. 55, 63 n. 10 (1979) (exhaustion not required because of available traditional exception); Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973) (question of exhuastion requirement still open). The use of this analytical approach will require exhaustion of adequate and appropriate state administrative agencies before a section 1983 claim will be heard in the federal forum. *See id.* at 908.

30. Patsy v. Florida Intn'l University, 634 F.2d 900, 910 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874). The court discussed three major reasons for the enactment of the Civil Rights Acts of 1871. These reasons are: (1) to dominate state laws which contradicted federal laws, (2) to provide a federal law where state law is inadequate, and (3) provide a federal remedy where a state remedy is available in theory, but not in fact. *Id.* at 910. The legislative intent will be fulfilled for two reasons. First, the requirement to exhaust state administrative remedies will expose inept administrators. Second, the legislation was aimed only at inadequate remedies, therefore, adequate remedies should be exhausted. *Id.* at 910-12.

31. *See id.* at 910-11.

32. *See id.* at 911.

tion assures the action is ripe for adjudication and improves the administrative process.[33] Third, since administrative remedies are generally simpler, speedier, and cheaper[34] civil rights litigants benefit from exhaustion. Finally, exhaustion preserves the concepts of a dual constitutional government.[35] The court of appeals ultimately emphasized its ruling was procedural in nature and did not pertain to the substantive rights which were the foundation of section 1983.[36]

The dissent argued there was insufficient justification in recent Supreme Court decisions to support the majority's departure from precedent.[37] Furthermore, compelling the exhaustion of state administrative remedies thwarts the legislative intent of section 1983.[38] The dissent attacked the majority's failure to consider a major reason for enacting section 1983—to insure the civil rights litigant a supplemental federal remedy.[39] The dissent believed the majority's opinion would encroach on the legislative function assigned to Congress,[40] and concluded the holding

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33. *See id.* at 911.

34. *See id.* at 911.

35. *See id.* at 911-12.

36. *See id.* at 912. The court also emphasized that certain minimum requirements must be met before state administrative proceedings are exhausted. *See id.* at 912-13. Such minimum requirements include a documented and orderly system of review which provides relief within a minimum period of time. *See id.* at 912. The standards must insure the relief will be commensurate with the claim. *See id.* at 912. Review procedures must be fair and not used to harass those with legitimate claims. *See id.* at 912-13. Finally, interim relief must be available to prevent irreparable harm. *See id.* at 912-13.

37. *See id.* at 917 (Hatchett, J., dissenting). Unequivocal statements in several Supreme Court decisions that exhaustion is not required led the dissent to state: "We must not presume that the Supreme Court makes meaningless, gratuitous statements. Instead, we must give deference to its repeated, unequivocal declaration that exhaustion is not required in section 1983 cases." *Id.* at 917 (Hatchett, J., dissenting). The dissent reasoned that the Court has maintained a firm stance on its no exhaustion requirement in section 1983 actions. *Id.* at 917. *See, e.g.*, Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) (action under § 1983 free of exhaustion); Allee v. Medrano, 416 U.S. 802, 814 (1974) (no requirement to exhaust under Civil Rights Act); Steffel v. Thompson, 415 U.S. 452, 472 (1974) (federal claims under § 1983 do not require exhaustion).

38. *See* Patsy v. Florida Intn'l University, 634 F.2d 900, 910 (5th Cir. 1981) (Hatchett, J., dissenting), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874). (Hatchett, J., dissenting).

39. *See id.* at 919 (Hatchett, J. dissenting). The minority conceded that some purposes of the Civil Rights Act may be met by requiring exhaustion of state administrative remedies. *See id.* at 919 (Hatchett, J., dissenting). In *Monroe*, there was no indication state laws were inadequate. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961). The majority in *Monroe*, therefore, reasoned that the federal remedy is completely independent of state remedies in section 1983 actions. *See id.* at 183; Patsy v. Florida Int'l Univ., 634 F.2d 900, 919 (5th Cir. 1981) (Hatchett, J., dissenting), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874).

40. *See* Patsy v. Florida Int'l Univ., 634 F.2d 900, 924-25 (5th Cir. 1981) (Hatchett, J.,

would have a "chilling effect" on future civil rights litigation.[41]

The *Patsy* majority's interpretion of two recent Supreme Court decisions[42] is inconsistent with the Court's repeated denial of a mechanical approach to section 1983 exhaustion requirements.[43] Although the Supreme Court's reliance on a traditional exception to exhaustion in *Barry v. Barchi*[44] implicitly suggested the Court required exhaustion in section 1983 actions,[45] the *Barry* Court did not confront the issue of whether exhaustion of state administrative remedies is required in section 1983 actions.[46] Similarly, the *Patsy* majority's reliance on *Gibson v. Berryhill*[47] is misplaced in that the *Gibson Court* expressly refused to decide the exhaustion question.[48] Contrary to *Patsy*, the Supreme Court has uniformly asserted that the federal courts are designed to protect constitutional rights; thus, exhaustion of state remedies is not required in section 1983 actions.[49]

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dissenting), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874). The dissent reasoned Congress enacted section 1983 to protect citizens from state discriminatory abuses by creating a separate and independent remedy outside the control of the states. The Civil Rights Act of 1871 was developed from exhaustive public debate and findings. The Act, therefore, should only be altered or modified by legislation and not judicial fiat. *See id.* at 925 (Hatchett, J., dissenting).

41. *See id.* at 926 (Hatchett, J., dissenting). Civil rights litigants will be provided a more swift, less expensive, and more reliable remedy, if they are allowed immediate access to the federal forum. *See id.* at 916 (Rubin, J., dissenting).

42. *See* Barry v. Barchi, 443 U.S. 55 (1979); Gibson v. Berryhill, 411 U.S. 564 (1973). The majority noted that *Barry v. Barchi* and *Gibson v. Berryhill* contain "analysis and language strongly suggesting that the Supreme Court does not adhere to a rigid no-exhaustion rule." *Id.* at 905-06.

43. *Compare* Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) (exhaustion of state administrative remedy not necessary in § 1983 action) *and* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (Congress established federal judiciary as protector of constitutional rights and thus no requirement to exhaust state administrative remedies) *and* Damico v. California, 389 U.S. 416, 417 (1967) (per curiam) (relief under Civil Rights Act may be sought first in federal court) *with* Patsy v. Florida Int'l Univ., 634 F.2d 900, 905 (5th Cir. 1981) (Supreme Court has suggested it does not adhere to rigid no exhaustion rule), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874) .

44. 443 U.S. 55, 63 n.10 (1979) (issue of adequacy identical to merits of suit).

45. *See* Patsy v. Florida Int'l Univ. 634 F.2d 900, 905 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874) (construing Barry v. Barchi, 443 U.S. 55, 63 n.10 (1979)).

46. *See* Barry v. Barchi, 443 U.S. 55-75 (1979) (exhaustion regarding § 1983 suits not addressed as constitutional infirmity in administrative law).

47. 411 U.S. 564 (1973).

48. *See id.* at 574-75. The Court stated it held in the past that exhaustion of state administrative remedies is not required in section 1983 actions, but then added "whether this is invariably the case . . . is a question we need not now decide . . . . " *Id.* at 574-75.

49. *See* Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974); Damico v. California, 389 U.S. 416, 416-17 (1967); McNeese v. Board of

By requiring exhaustion in section 1983 cases, the United States Court of Appeals for the Fifth Circuit has usurped the legislative authority of Congress and, in so doing, has neglected the major purpose for the enactment of the Civil Rights Act of 1871—uniform enforcement of the provisions of the fourteenth amendment.[50] To effectuate this aim, federal and state remedies must be coextensive and permit the civil rights litigant a choice of forum.[51] Permitting litigants to bypass state remedies and pursue available federal remedies allows federal courts to fulfill their role as the paramount "guarantor[s] of basic federal rights."[52] *Patsy*, however, effectively precludes the federal judiciary from protecting citizens from state infringement of federal rights by requiring that questions of constitutional magnitude be initially deferred to state forums.[53] Further, the uniformity required in section 1983 decisions will only be realized through federal court rulings.[54] Civil rights causes must be advanced in the federal forum because the federal judiciary is less likely to be influenced by community pressures than a local state office.[55]

Educ., 373 U.S. 668, 671 (1963).

50. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238 (1972) (§ 1 of the Civil Rights Act of 1871 enacted to enforce fourteenth amendment); Monroe v. Pape, 365 U.S. 167, 171 (1961) (purpose of Act was to enforce the provisions of the fourteenth amendment); CONG. GLOBE, 42d Cong. 1st Sess. 83-85 (1871) (Senator Edmunds stating Civil Rights Act carries out powers of fourteenth amendment).

51. *See* McNeese v. Board of Educ., 373 U.S. 668, 671 (1963) (relief under Civil Rights Act not defeated because state remedy not sought first); Monroe v. Pape, 365 U.S. 167, 183 (1961) (state remedies need not be exhausted before resort to federal remedies).

52. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (federal courts "guardians of people's rights"); *See Ex Parte* Virginia, 100 U.S. 339, 346 (1880) (Congressional prohibitions on state power used to restrict state actions); Landry v. Daley, 288 F. Supp. 200, 223 (N.D. Ill. 1968) (§ 1983 places national government between states and people).

53. *Compare* Patsy v. Florida Int'l Univ., 634 F.2d 900, 905 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3213 (U.S. Oct. 6, 1981) (No. 80-1874) (exhaustion of administrative remedies required unless traditional exception found) *with* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (Congress established federal judiciary protector of constitutional rights thus no need to exhaust state administrative remedies) *and* McNeese v. Board of Educ., 373 U.S. 668, 671 (1963) (relief under Civil Rights Act not defeated because state remedy not pursued first) *and* Monroe v. Pape, 365 U.S. 167, 183 (1961) (federal remedy co-extensive with state remedy; civil rights plaintiff may choose forum).

54. *See* Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965) (without uniformity purpose of Civil Rights Act could not be realized); Wright v. McMann, 257 F. Supp. 739, 746 (N.D.N.Y. 1966) (benefits of Civil Rights Act not to vary from state to state). *See generally* Comment, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 588 (1975).

55. *See, e.g.*, Palmore v. United States, 411 U.S. 389, 412 (1972) (Douglas, J., dissenting) (life tenure safeguards judge from external pressures); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975) (life tenure sufficient to insulate judges from public opinion); United States v. Montanez, 371 F.2d 79, 84 n.17 (2d Cir. 1967) (federal judges independent of outside influence because of life tenure).

In *Patsy*, the Court of Appeals for the Fifth Circuit abandons the well reasoned no-exhaustion rule established by the Supreme Court in section 1983 actions.[56] Consequently, the *Patsy* decision erodes the congressional aim of the Civil Rights Act of 1871 to interpose the federal courts between the states and their citizens to ensure even application of federal safeguards.[57] Civil rights litigants, therefore, will no longer be permited unrestrained access to a neutral forum, but must pursue avenues controlled by agencies more likely to render judgements influenced by local biases.

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56. *See, e.g.*, Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) (long settled rule that exhaustion of state remedies not prerequisite to § 1983 actions); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (exhaustion not required in § 1983 actions because federal courts protecting constitutional rights); Wilwording v. Swenson, 404 U.S. 249, 251-52 (1971) (per curiam) (relief under Civil Rights Act not subject to exhaustion requirements).

57. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (Congress established federal courts as protector of constitutional rights); Monroe v. Pape, 365 U.S. 167, 173-74 (1961) (Civil Rights Act of 1871 provides federal remedy where state remedy inadequate); *Ex Parte* Virginia, 100 U.S. 339, 346 (1880) (Congressional prohibitions on state power used to curtail state action).