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Section 1983 and Federalism: The Burger Court's New Direction

Michael J. Dewberry

NOTES

SECTION 1983 AND FEDERALISM: THE BURGER COURT'S NEW DIRECTION*

INTRODUCTION

Section 1983 grants a civil cause of action for damages or equitable relief against persons who, acting "under color" of state law, deprive the plaintiff of "rights, privileges or immunities" extended by the laws of the Constitution of the United States.[1] Enacted more than a century ago against the backdrop of the widespread breakdown in law enforcement and the terrorism of vigilante groups against black citizens in the Reconstruction South, the broadly phrased statute has been judicially developed into a pervasive remedy of national scope. The expansion of the remedy by the federal courts has lead to its use in a wide variety of cases alleging deprivations of rights by state authorities.

This proliferation of section 1983 suits has brought into focus important concerns regarding the scope and availability of the remedy. The primary underlying concern is the issue of federalism implicit in section 1983 actions. Suits against state officials concerning state policies or other areas of important state interests are now being litigated in federal courts under section 1983 to the virtual exclusion of state courts and administrative processes. In addition, the sheer number of actions filed each year poses a significant burden on the docket of the lower federal courts.[2] The concerns of federal-state comity and federal caseload burdens are accentuated by the confusion regarding the nature of the substantive rights that section 1983 should protect in its modern application.

For these reasons, the need for clarification and reduction of the remedy's present scope has become clear. Although legislative change has been advocated, future congressional reform to reduce the judicial expansion of the statute is unlikely. The Supreme Court, however, has recently employed a more restrictive analysis of section 1983,[3] which, if continued, will have a significant impact on the scope of section 1983 jurisdiction.

After briefly tracing the historical background and early development of the section 1983 remedy, this note analyzes the modern expansion of the statute through discussion of the Supreme Court's major decisions from 1939 to 1972. The problems generated by this expansion are also examined. Next, the note focuses on the developing trend in more recent Supreme Court cases toward a retrenchment in section 1983 analysis that would restrict the present scope of the remedy. Finally, the note suggests the possible future direction of Supreme Court analysis.

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1. 42 U.S.C. §1983 (1974).
2. See text accompanying notes 86-90 *infra*.
3. See text accompanying notes 111-183 *infra*.

SECTION 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 injured in an action at law, suit in equity, or other proper proceeding for redress.[4]

Originally enacted as section one of the Ku Klux Klan Act of 1871,[5] 42 U.S.C. section 1983 represented an early exercise of the power of Congress under section five of the fourteenth amendment to enforce the amendment's provisions.[6] The legislation was enacted in response to a congressional message from President Grant deploring the lawless conditions in the southern states resulting from the violence of such organizations as the Klan against black citizens and Northern sympathizers.[7] These violent activities were supported actively and tacitly by local law enforcement authorities[8] whose deliberate inaction was viewed by proponents of the Ku Klux Klan legislation as a denial of equal protection of the laws to the victims of the violence.[9] The legislation was aimed, therefore, not at the perpetrators of the violence but against those individuals acting "under color" of state law. Its overriding purpose, as later interpreted by the Supreme Court, was to "afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[10]

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4. 42 U.S.C. §1983 (1974).

5. Act of April 20, 1871, ch. 22, 17 Stat. 13.

6. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, §1. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, §5.

7. "A condition of affairs now exists in some states of the Union rendering life and property insecure. . . . That the power to correct these evils is beyond the control of state authorities I do not doubt. . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States." Message of March 23, 1871, CONG. GLOBE, 42d Cong., 1st Sess. 274 (1871).

8. "While murder is stalking abroad in disguise, while whippings and lynching and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity has been given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." CONG. GLOBE, 42d Cong., 1st Sess. 274 (1871) (remarks of Mr. Lowe of Kansas).

9. *Id.* Monroe v. Pape, 365 U.S. 167, 175 (1961).

10. 365 U.S. at 180. See further discussion of *Monroe* at text accompanying notes 26-44 *infra*.

Opponents of the legislation decried the "transfer [of] another large portion of jurisdiction from the state tribunals . . . to those of the United States."[11] Regarding the broad scope of the legislation, one opponent declared that: "[A federal action would be created] without any limit whatsoever as to amount in controversy. The deprivation may be of the slightest conceivable character . . . merely nominal damages; and yet by this section jurisdiction of that civil action is given to the federal courts instead of its being prosecuted as now in the courts of the states."[12] These fears have been realized. From its specific post-Civil War origins, the statute after decades of disuse has been expanded within the past 15 years to a pervasive remedy of national scope.

Early Development

The section 1983 remedy was moribund during the post-Reconstruction period and the first four decades of this century,[13] primarily because of the restrictive interpretation placed on the scope of the fourteenth amendment by the Supreme Court.[14] The cases reaching the Court from 1915 to 1939 involved deprivations of the voting rights of black citizens under unlawful state statutes;[15] the Court focused on fourteenth and fifteenth amendment deprivations, avoiding discussion of the scope of the section 1983 remedy itself.

Modern Development

The modern era of section 1983 analysis began in 1939 with the Supreme Court's decision in *Hague v. Council of Indus. Organizations.*[16] Seeking injunctive relief, plaintiff labor organizers alleged that city officials, acting pursuant to unlawful local ordinances, had interfered with the plaintiffs' rights to distribute union literature and hold organizational meetings.[17] In

11. CONG. GLOBE, 42d Cong., 1st Sess. App. 50 (1871) (remarks of Mr. Kerr of Indiana).

12. *Id.* App. 216 (remarks of Mr. Thurman of Ohio). Some critics have suggested that the broad, remedial phrasing of the statute was not wholly deliberate but rather the product of haste and carelessness. Justice Frankfurter observed that: "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feelings caused inadequate deliberation and lead to loose and careless phrasing of laws related to new political issues." United States v. Williams, 341 U.S. 70, 74 (1951).

13. One source has placed the number of reported cases during the 1875-1939 period at 19. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 LAW & SOC. ORDER 557, 568.

14. The most critical of these early Supreme Court cases was the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), in which a 5-4 majority held that the fourteenth amendment's privileges and immunities clause protected only rights of national citizenship. Since the rights of national citizenship were quite limited (the right to travel to the nation's capital being one), the fourteenth amendment did not reach the type of outrageous conduct by state officials that inspired the passage of §1983's predecessor. For a comprehensive review of this early judicial restriction, see Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323, 1330-37 (1952).

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

16. 307 U.S. 496 (1939).

17. *Id.* at 501.

granting relief, Justice Robert's opinion for the Court affirmatively answered the "narrow" question of whether plaintiffs' freedom to disseminate information about labor organizations was a "privilege and immunity" protected by the fourteenth amendment.[18] Justice Stone's lengthy concurring opinion, however, engaged in a broader analysis of section 1983, indicating that:

> [It] extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment.[19]

Justice Stone's recognition that violation of the due process and equal protection clauses created a cause of action under section 1983 provided the foundation for the Court's later, more expansive analysis of the remedy.[20] Although neither opinion squarely addressed the issue of whether defendants' actions were under color of state law, plaintiffs' allegations indicated that the officials were acting pursuant to city ordinances.[21]

Of critical importance to the future expansion of section 1983 was the interpretation placed on the phrase "under color" by Justice Douglas in the 1945 case of *Screws v. United States*.[22] The case arose under section 1983's criminal counterpart derived from the 1871 legislation,[23] which also contains the "under color" requirement. The *Screws* decision involved the issue of whether a fatal beating administered by a Georgia sheriff to a black arrestee was performed under color of state law. Although the force applied was excessive and clearly without authority, the Court concluded that the beating had nevertheless occurred while the sheriff was performing his duty. Therefore, the conduct came within the statute since "[i]t is clear that under 'color' of law means under 'pretense' of law."[24] By this reasoning, the abuse of the power granted to an officer by the state was actionable under the statute.[25]

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18. *Id.*
19. *Id.* at 526.
20. See text accompanying notes 45-82 *infra.*
21. 307 U.S. at 501.
22. 325 U.S. 91 (1945).
23. 18 U.S.C. §242 (1974).
24. 325 U.S. at 111. The construction in *Screws* reaffirmed the earlier construction announced in United States v. Classic, 313 U.S. 299, 325-26 (1941) (state official charged with willfully depriving plaintiff of his right to vote and convicted under 18 U.S.C. §242).
25. Justice Frankfurter, in his lengthy *Monroe* dissent, strongly disagreed with the pretense construction of "under color" that derived from *Screws* and *Classic.* His analysis of the relevant legislative history persuaded him that Congress had intended to reach only those illegal actions taken *pursuant* to state law. Monroe v. Pape, 365 U.S. 167, 212-16 (1961). He was especially critical of the Court's analysis in *Classic,* arguing that the construction of the "under color" phrase had been "summarily announced without exposition" on an issue "only passingly argued." *Id.* at 217. Furthermore, he felt that the cases relied on as authority had not clearly presented the issue. *Id.* at 217-18. Frankfurter argued that the majority in *Screws* had uncritically concluded that *Classic* was stare decisis on the "under color" issue. *Id.* at 218. The *Monroe* majority cited *Classic* and *Screws* as justifying

MONROE V. PAPE

Section 1983 was definitively construed by Justice Douglas 16 years after *Screws* in the seminal case of *Monroe v. Pape*,[26] which firmly established a civil action for damages against state officials for deprivations of civil rights. The Court's holding, in view of lower court decisions reaching similar conclusions,[27] was not as significant as the Court's expansive analysis of the scope of section 1983 and its emphasis on federal courts as the primary protectors of civil rights.[28]

In holding 13 Chicago policemen liable for an egregious search and seizure violation,[29] Douglas engaged in an extensive analysis of the legislative history of section 1983[30] from which he derived the "three main aims" of section 1983: (1) to override certain types of state laws;[31] (2) to provide "a remedy where state law was inadequate";[32] and (3) to provide a federal remedy if the theoretically adequate state remedy was inadequate in practice.[33] Douglas, however, went beyond these basic purposes and concluded broadly:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and

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the importation of the pretense formulation from these criminal cases into the civil action under §1983. *Id.* at 184-85. See text accompanying notes 37-38 *infra*.

26. 365 U.S. 167 (1961).

27. *See, e.g.*, Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947). *Picking* was later overruled in Bauers v. Heisel, 361 F.2d 581, 584 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967). For a discussion of the cases arising during the period from *Screws* to *Monroe*, see Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 287-94 (1965).

28. "*Monroe* did much more than sound a note of encouragement for victims of conduct theretofore only apparently proscribed by the language of section 1983. The point is not that [the Court] was departing radically from prior interpretations of the provision, for . . . several of its conclusions were anticipated by lower court opinions. Rather, the Supreme Court in *Monroe* exhibited a sweeping change in the judicial attitude toward the reading of complaints under section 1983." Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70, 72 (1964).

29. Monroe brought an action for damages against 13 individual police officers and the City of Chicago as their employer. He alleged that the officers' conduct deprived him of his constitutional rights within the meaning of §1983. Justice Douglas outlined the facts in *Monroe* as follows: "The complaint alleges that 13 Chicago police officers broke into petitioner's home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on open charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate . . . that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant. . . ." 365 U.S. at 169.

30. *Id.* at 171-92. Justice Douglas' analysis of the legislative history was undertaken in part to refute the defendants' arguments that the plaintiff's remedy was under state, not federal law, and that the "under color" phrase meant pursuant to state law.

31. *Id.* at 173.

32. *Id.*

33. *Id.* at 174.

> the latter need not be first sought and refused before the federal one is invoked.[34]

Rejecting the defendant's arguments that the plaintiff's remedy was under state law, Douglas laid the foundation for the no-exhaustion doctrine of section 1983 that was more fully developed in later cases[35] and that has been a focus for critics of expanded section 1983 jurisdiction.[36]

In further construing the statute, Douglas relied on *Screws*[37] and determined that the "under color" requirement in section 1983 must be given a similar construction to the analogous criminal statute; therefore, this phrase was interpreted to mean acting under pretense of state law.[38] Douglas, however, refused to read into section 1983 the criminal statute's express element of willfulness[39] or "a specific intent to deprive a person of a federal right."[40] Rather, Douglas concluded that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[41] Although finding the individual officers liable, Douglas concluded that the drafters of section 1983 had not intended municipalities to be included as "persons" liable under the statute;[42] this controversial conclusion has precluded access to the "deep pocket" in actions against police officers.

In sum, the *Monroe* Court's reliance on the due process clause, the conclusion that section 1983 was supplementary to any state remedy, and the relaxed scienter element required for an actionable deprivation cumulatively set an expansive tone for the application of section 1983[43] and affirmed the

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34. *Id.* at 183.

35. See text accompanying notes 63-74 *infra* for a discussion of the later development of the no-exhaustion doctrine.

36. *See, e.g.*, Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1491 (1969); Aldisert, *supra* note 13, at 563-64.

37. See text accompanying notes 22-25 *supra*.

38. 365 U.S. at 184-85. Justice Frankfurter strongly dissented from this view of the "under color" requirement. See note 25 *supra*.

39. 365 U.S. at 187. The criminal statute is 18 U.S.C. §242 (1974).

40. 365 U.S. at 187, *quoting* Screws v. United States, 325 U.S. 91, 103 (1945).

41. 365 U.S. at 187. This was clearly not meant to be nor has it been interpreted as imposing strict liability for constitutional deprivations. "It is more likely that Mr. Justice Douglas did not intend to alter the state-of-mind requirement for the underlying tort, but meant rather to eliminate any requirement that a defendant know or have reason to know that his tort infringes a federal right." *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 215 (1961). See also note 43 *infra*.

42. 365 U.S. at 187-91. For a persuasive argument that Justice Douglas incorrectly construed the legislative debates regarding municipal immunity, see Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972). This article contains an excellent discussion of the problems of municipal immunity under §1983 and the policy factors favoring its abolition. For further discussion of judicial attempts to alleviate the immunity problem, see notes 112-122 *infra* and accompanying text.

43. The *Monroe* Court's constructions of §1983, with the exception of the tort mental element, had been presaged by *Hague* and *Screws* and anticipated in some lower court decisions. See Shapo, *supra* note 27, at 287-94; Note, *supra* note 28, at 72. The Court also strongly, if implicitly, affirmed the use of the due process clause as a basis for a §

primacy of the federal courts as a forum for deprivation of constitutional rights.[44]

POST-*Monroe* DEVELOPMENT

The expansive analysis of section 1983 in *Monroe* resulted in a quantum increase in the number of actions in the next decade.[45] The suits instituted covered a broad spectrum of alleged constitutional deprivations and were facilitated primarily by the broad interpretation given the fourteenth amendment due process clause and the incorporation of most of the substantive guarantees of the Bill of Rights into the fourteenth amendment.[46] The present scope of the remedy is suggested by cases alleging deprivations resulting from fire department hair-length regulations,[47] from the patronage practices of the Democratic Party apparatus in Chicago,[48] from a university's withdrawal of an artist's nude painting from an exhibition on university premises,[49] and from the Nevada Gaming and Control Board's blacklist of undesirable persons.[50] Each of these alleged deprivations has been held sufficient to withstand motion to dismiss for failure to state a section 1983 claim. In addition, section 1983 continues to be a vehicle for the redress of unconstitutional voting apportionment,[51] racial discrimination in educational opportunities,[52] and other infringements.[53]

1983 action. 365 U.S. at 171. Justice Stone in *Hague*, see text accompanying notes 19-20 *supra*, had first stressed the application of the due process clause, and lower courts had read complaints generously prior to *Monroe*. *See, e.g.*, Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953) (plaintiff clearly attempted to state claim under §1983's predecessor so that there was a sufficient allegation of the "under color" requirement to justify reversal of dismissal).

The Court's interpretation of the requisite mental element was a useful clarification in view of the divergent lower court analyses prior to *Monroe*. Some lower courts had interpreted §1983 and state tort law to be mutually exclusive; others had read into §1983 the specific intent requirement of the related criminal statute; still others had extended overly broad immunities to state officials. *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 1, 213 (1961).

44. A defender of expanded §1983 jurisdiction has described its modern scope simply. "A person may resort to the federal courts to remedy an abuse by a state official in a matter of personal rights protected by the Federal Constitution." Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1356 (1970).

45. See text accompanying notes 86-90 *infra*.

46. For a discussion of this development, see Shapo, *supra* note 27, at 321-24.

47. Michini v. Rizzo, 379 F. Supp. 837 (E.D. Pa. 1974), *aff'd*, 511 F.2d 1394 (3d Cir. 1975).

48. Shakman v. Democratic Organization of Cook County, 356 F. Supp. 1241 (N.D. Ill. 1972).

49. Close v. Lederle, 303 F. Supp. 1109 (D. Mass. 1969), *rev'd*, 424 F.2d 988 (1st Cir. 1970).

50. Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).

51. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

52. *See, e.g.*, McNeese v. Bd. of Education, 373 U.S. 668 (1963).

53. *See, e.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) (denial of equal protection to blacks and Puerto Ricans in urban renewal relocation).

Currently, the bulk of section 1983 claims are asserted against state prison officials for alleged violations of prisoners' constitutional rights and against police officers.[54] The greatest increase in the number of section 1983 actions has been in state prisoner complaints.[55] While in some post-*Monroe* cases lower federal courts had denied such petitions on the ground that federal courts should not interfere with the operation of state prisons,[56] the Supreme Court in 1964 implicitly rejected such a view in *Cooper v. Pate*.[57] In that decision the Court reversed a lower court's dismissal of a Black Muslim's claim that he had been unconstitutionally deprived of access to religious literature. Subsequent Supreme Court cases have extended the no-exhaustion doctrine to suits by prisoners through per curiam reversals of lower court dismissals on exhaustion grounds.[58] The prison context is the clearest example of federal intrusion into state affairs under section 1983, and critics of expanded section 1983 jurisdiction have focused special attention on the use of the remedy in this area.[59]

Plaintiffs asserting section 1983 claims against police officers have succeeded in stating actionable due process violations, as well as deprivations under the specific guarantees of the Bill of Rights incorporated into the fourteenth amendment.[60] For example, a plaintiff who was beaten by the police during an arrest might assert that the beating deprived him of due process since

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54. *See* Shapo, *supra* note 27, at 297-309, 320.

55. In 1966 there were 218 §1983 petitions filed by state prisoners; in 1974, the number was 5,236, a 2,300% increase over 1966. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 220 (1974).

A wide variety of alleged prisoner deprivations have sustained §1983 actions. *See* Hines v. Askew, 514 F.2d 673 (5th Cir. 1975) (discriminatory denial of access to vocational training); Bailey v. Crain, 496 F.2d 23 (5th Cir. 1974) (denial of medial treatment and continuous harassment); Aulds v. Foster, 484 F.2d 945 (5th Cir. 1973) (unjustified beatings by prison guards); O'Malley v. Brierley, 477 F.2d 785 (3d Cir. 1973) (refusal to allow visits by a clergyman); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963) (denial of access to the courts).

Although a wide variety of actions are sustained, broad conclusory allegations regarding prison grievances are generally rejected. *See, e.g.*, Patterson v. Walters, 363 F. Supp. 486 (W.D. Pa. 1973). Other claims have been held insufficient to state the requisite deprivation. *See, e.g.*, Elam v. Henderson, 472 F.2d 582 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973) (claim asserting prison's failure to provide means in compliance with religious dietary laws); Campbell v. Patterson, 377 F. Supp. 71 (S.D.N.Y. 1974) (claims of improper and inadequate medical treatment).

56. *See, e.g.*, Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964).

57. 378 U.S. 546 (1964) (per curiam reversal).

58. Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968). For a discussion of the no-exhaustion doctrine in §1983 cases, see text accompanying notes 63-74 *infra*.

59. See Aldisert, *supra* note 13, at 575-77.

60. To maintain his cause of action against a policeman or prison official, a §1983 plaintiff must sufficiently allege that the misconduct by the defendant deprived him of some constitutional right under color of state law. *See* Monroe v. Pape, 365 U.S. 167 (1961). The constitutional deprivation must be alleged since the plaintiff cannot plead only that a state law tort was committed. *See* Butler v. Bensinger, 377 F. Supp. 870 (N.D. Ill. 1974). While some "semblance of factual specificity" regarding the act committed and the right infringed is required, Buszka v. Johnson, 351 F. Supp. 771, 773 (E.D. Pa. 1972), the

punishment was inflicted prior to a jury trial to determine his guilt or innocence of the offense;[61] alternatively, he might allege that the beating was cruel and unusual punishment under the eighth amendment as applied to the states through the fourteenth.[62]

The Section 1983 No-Exhaustion Doctrine

The Court's conclusion in *Monroe* that section 1983 was supplementary to any available state remedy and that the state remedy "need not be first sought and refused before the federal one is invoked"[63] laid the broad foundation for subsequent development of section 1983's no-exhaustion doctrine. Two years after *Monroe* the Court in *McNeese v. Board of Education* held that black plaintiffs seeking equitable relief from school segregation were not required to exhaust the available state administrative procedure.[64] The Court's analysis was unclear, but the opinion could be read as sustaining a no-exhaustion rule only if the state remedy was inadequate or provided tenuous protection for the federal rights asserted.[65] The Court's language suggested a recognition of the traditional inadequate remedy exception to the administrative exhaustion rule.[66] Furthermore, this reading would comport with one of the primary purposes of section 1983 — to provide a federal remedy when the theoretically available state remedy is inadequate.[67]

Four years later, however, in *Damico v. California,* the Court held in a per curiam opinion that welfare claimants need not exhaust administrative

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courts are usually generous in construing §1983 complaints. *See* Wilkerson v. City of Coralville, 478 F.2d 709 (8th Cir. 1973). The courts are particularly solicitous of *pro se* litigants. *See, e.g.,* Newsome v. Sielaff, 375 F. Supp. 1189 (E.D. Pa. 1974).

Most of the substantive provisions of the Bill of Rights have sustained §1983 actions against the police. *First amendment*: Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962) (seizure of religious tracts being peaceably distributed); *fourth amendment*: Monroe v. Pape, 365 U.S. 167 (1961); Beightol v. Kunowski, 486 F.2d 293 (3d Cir. 1973) (illegal forcible detention of plaintiff for fingerprints and mug shots); *see also* York v. Story, 324 F.2d 450 (9th Cir. 1963) (privacy theory); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); *fifth amendment*: Ney v. California, 439 F.2d 1285 (9th Cir. 1971) (failure to comply with *Miranda* requirements resulted in coerced confession); *sixth amendment*: Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1956) (deprivation of right to counsel when police moved plaintiff from county jail to state prison to prevent consultation with attorney regarding murder defense); *eighth amendment*: Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974) (failure to secure needed medical attention for arrested plaintiff).

61. *See* Smith v. Spina, 477 F.2d 1140, 1144 n.1 (3d Cir. 1973). In *Smith* the plaintiff was denied relief, but in dicta the court discussed the two alternative theories on which federal jurisdiction under §1983 could be asserted. The case presents a useful discussion of the confusion between state law tort actions and constitutional claims under §1983. *Id.* at 1144-45.

62. The eighth amendment was made applicable to the states through the fourteenth amendment in Robinson v. California, 370 U.S. 670 (1962).

63. 365 U.S. at 183. See text accompanying notes 34-36 *supra.*

64. 373 U.S. 668, 672 (1963).

65. *Id.* at 674, 676.

66. *See generally* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 429-58 (1965).

67. See text accompanying notes 30-33 *supra.*

remedies prior to initiating a section 1983 action.[68] *Monroe* and *McNeese* were cited as authority,[69] but the opinion did not discuss the adequacy of the state procedure. The absolute no-exhaustion rule suggested in *Damico* was affirmed the following year in *Houghton v. Shafer*.[70] In that case plaintiff prisoner had initially sought resolution of his claim in the prison administrative procedure but had failed to exhaust administrative appeals prior to initiating a section 1983 action. The Court, citing *Monroe, McNeese,* and *Damico,* held that exhaustion of the appeals process was not required.[71] Significantly, the Court said that resort to such remedies would amount to a "futile act," but added that, on the basis of the three prior cases, resort was unnecessary "[i]n any event."[72]

The Court's development of the no-exhaustion doctrine from an unelaborated statement by Justice Douglas in *Monroe* to an absolute rule in *Houghton* has been strongly criticized. One critic has noted the lack of synthesis of precedent and articulation of sound bases of decision in this development.[73] Another has characterized the decision in *McNeese* as "much more in the nature of judicial fiat than a reasoned analysis of the problem."[74] This lack of a clear statutory foundation and well-reasoned precedent renders the no-exhaustion rule the weakest link in an expansive section 1983 analysis.

Property Rights Under Section 1983

An additional dimension of section 1983 jurisdiction was established by the Supreme Court in 1972. In *Lynch v. Household Finance Corp.*,[75] the Court overturned a distinction between personal and property rights that had been recognized in earlier decisions[76] and that was based on an apparent

68. 389 U.S. 416 (1967).

69. *Id.* at 417. This decision has been criticized for citing *Monroe* and *McNeese* as "settled" law in the exhaustion area, which extends the application of the two cases without any discussion of the adequacy of the state remedy. Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1209 (1968).

70. 392 U.S. 639 (1968).

71. *Id.* at 640-41.

72. *Id.* at 640.

73. This commentator referred to the no-exhaustion holding in *McNeese* as a "questionable expansion of an unsubstantiated, half-concealed statement in a judicial remedies case [*Monroe*] into a full-fledged purpose, a strongly stated no-exhaustion rule, and the rejection for section 1983 matters of any definite distinction between state administrative and state judicial remedies." Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1491 (1969). It is arguable that the no-exhaustion rule was "strongly stated" in *McNeese* since the Court did discuss the adequacy of the state remedy without indicating whether exhaustion would have been required had the state remedy actually been adequate. However, the above criticism is clearly applicable a fortiori to the Court's extended development of the doctrine in *Damico* and *Houghton*.

74. K. DAVIS, ADMINISTRATIVE LAW TREATISE ¶20.01, at 646 (Supp. 1970), *cited in* Aldisert, *supra* note 13, at 565.

75. 405 U.S. 538 (1972). The action in *Lynch*, asserting jurisdiction under §§1343(3) and (4) was brought against Connecticut sheriffs who had garnished plaintiff's bank accounts pursuant to an allegedly unconstitutional state statute and against the creditors who had instituted the proceedings. *Id.* at 539-40.

76. *See, e.g.*, McManigal v. Simon, 382 F.2d 408, 410 (7th Cir. 1967), *cert. denied*, 390 U.S. 980 (1968).

conflict between the section 1343(3) and section 1331 jurisdictional statutes.[77] The dichotomy that was introduced in *Hague v. Council of Industrial Organizations*[78] had resulted in some lower courts denying section 1983 jurisdiction over property deprivation claims if the plaintiff could not establish the $10,000 amount in controversy requirement under section 1331.[79] Only personal claims were cognizable under section 1343 (3), which imposes no monetary jurisdictional threshhold. The district court in *Lynch* had relied on its circuit's recognition of the *Hague* dichotomy in dismissing a class action challenge to Connecticut's garnishment statute under section 1983.

The Supreme Court, after carefully reviewing the history and purpose of the two jurisdictional statutes, reversed the district court and expressly rejected the personal-property rights distinction, concluding that the right to be free from unlawful property deprivations was a personal right.[80] The potential impact of *Lynch* was demonstrated by the subsequent case of *Cruz v. Cardwell.*[81] Relying on *Lynch,* the Eighth Circuit reversed the district court's dismissal of a section 1983 action based on a fourteenth amendment property deprivation — $206 that the defendant sheriff had failed to return to the plaintiff-arrestee. The result in *Cruz,* in addition to illustrating the modern breadth of the remedy, raises the policy question of whether a plaintiff should be entitled to an immediate federal forum for every property claim in which the deprivation occurred under the color of state law. The *Lynch* fact situation, a class action challenge to a state garnishment statute, is arguably a federal case — section 1983 was enacted to remedy deprivations against classes of citizens and to override unconstitutional state laws.[82] How-

77. 28 U.S.C. §1331 (1974) confers jurisdiction on federal district courts of civil actions arising "under the Constitution, laws, or treaties of the United States," in which the $10,000 amount in controversy requirement is sufficiently alleged. 28 U.S.C. §§1343(3) and (4) (1974) confer jurisdiction of civil rights actions and substantially track the language of §1983 and related statutes but require no allegation of amount in controversy. Justice Stone in *Hague* had felt that to rationalize the coexistence of the two statutes, §1331 must apply only to property rights, and §1343 only to personal rights. If this distinction were accepted, a property claim could be litigated under §1983 only if the plaintiff could assert jurisdiction under §1331, which would require a claim worth $10,000 or more. Not all of the lower courts recognized the distinction Stone suggested, and those that did would strain interpretations of the right asserted to avoid dismissing a meritorious complaint. For an excellent discussion of *Hague* and *Lynch* and the intervening lower court cases, see *The Supreme Court, 1971 Term,* 86 HARV. L. REV. 1, 201-07 (1972).

78. 307 U.S. 496 (1939).

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

80. 405 U.S. at 552. See Aldisert, *supra* note 74, at 569. Judge Aldisert states that: "*Lynch,* unfortunately, has made the federal court a nickel and dime court. A litigant now has a passport to federal court if he has a 5-dollar property claim and can find some state action. This result is to be contrasted with a claim against a *federal* officer for deprivation where the plaintiff must meet the statutory amount in controversy. . . ." Aldisert, *supra* note 13, at 569 (emphasis original).

81. 486 F.2d 550 (8th Cir. 1973).

82. See text accompanying notes 9, 31 *supra.*

ever, an individual claim asserting an unlawful conversion of $206 by an individual state official should be left to state remedies.

MODERN CONCERNS WITH SECTION 1983 JURISDICTION

The expansion of the section 1983 remedy to cover a broad range of constitutional rights,[83] the further development of the no-exhaustion of state remedies requirement,[84] and the absence of a monetary jurisdictional threshold have resulted in a realization of the fears of the opponents of the original legislation.[85] Present concerns regarding the scope of the remedy have been expressed in three overlapping areas: (1) the burden imposed on overcrowded federal court dockets by the proliferation of actions; (2) the broad underlying issues of federalism raised by such extensive federal review of state official action; and (3) the confusion regarding the breadth of the remedy, that is, the limits of the substantive rights protected by the statute.

The Increasing Federal Caseload Burden

The federal district courts are facing a mounting number of section 1983 actions. Between the enactment of the statute in 1871 and 1939, only 19 section 1983 cases were reported.[86] In fiscal 1960, the year prior to *Monroe*, only 280 cases were filed.[87] By 1970, the number had mushroomed to 3,586, and the upward trend continued in 1971 with a 30 percent increase to 4,609.[88] One estimate placed the number of actions filed in 1973 at approximately 8,000.[89] The diversity and complexity of cases impose additional burdens on federal judicial resources.[90]

The Problem of Federalism

Justice Black defined federalism, or federal-state comity, as:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[91]

83. See text accompanying notes 45-81 *supra*.
84. See text accompanying notes 63-74 *supra*.
85. See text accompanying notes 10-12 *supra*.
86. Aldisert, *supra* note 13, at 568.
87. *Id.*
88. P. BATER, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 950 n.3 (2d ed. 1973), *cited in* Aldisert, *supra* note 13, at 563.
89. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974).
90. "These [§1983] cases, even in 1969-70, approximated in volume the appeals in conventional tort, labor and procedural and jurisdictional matters, falling below only criminal and habeas corpus cases. Raising issues in fields relatively untilled, their claim on the Court's time and thought was even more substantial than their number." Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK L. REV. 567, 570 (1971). Judge Coffin is on the First Circuit Court of Appeals.
91. Younger v. Harris, 401 U.S. 37, 44 (1971).

The modern expansion of the section 1983 remedy, however, compels federal courts to review a wide range of traditional state functions.[92] The controversy over the scope of section 1983 jurisdiction is fundamentally a debate over federalism and the division of responsibility between federal and state courts for the protection of individual civil rights.[93] In discussing the inherent dilemma of the debate, one federal judge stated:

> In approaching the subject of private litigation under [section 1983], I must own a Faustian conflict. It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states. Yet, we also have state courts whose judges, like those of the federal courts, must take an oath to support the Constitution and were intended to play an important role in carrying it out.[94]

The expansion of section 1983 jurisdiction and the development of the no-exhaustion doctrine have resulted in the burden being carried by the federal courts.

In a 1970 defense of the modern breadth of the section 1983 remedy, one commentator conceded that the Court "ha[d] not articulated a doctrinal basis for the present scope of section 1983 jurisdiction";[95] nevertheless, he identified the roots of the policy that favors "affording a federal forum for protecting federal rights."[96] First, the superiority of federal courts and judges in applying federal constitutional law was noted. Second, the unitary nature of the federal court system was viewed as providing more uniform treatment of constitutional claims than would 50 individual state systems. Third, the federal courts were seen as satisfying a "basic felt need for a fair trial of individual claims," as well as eliminating the potential bias inherent in state court review of state officials' actions. In conclusion the commentator argued that federal jurisdiction promotes higher standards of protection for individual rights.[97]

Critics of expanded section 1983 jurisdiction have argued that immediate recourse to federal courts and the consequent bypass of state judicial and administrative processes have the undesirable result of shifting responsibility for decision making in the area of individual rights away from local officials. In addition, there is the possibility that state officials can evade their decision

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92. Justice Frankfurter voiced concern with the potential of this result in his *Monroe* dissent. "[R]espect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute . . . into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator. . . ." 365 U.S. at 241-42.

93. See Chevigny, *supra* note 44, at 1360.

94. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1973), *cited in* Aldisert, *supra* note 13, at 561.

95. Chevigny, *supra* note 44, at 1353.

96. *Id.* at 1356.

97. *Id.* at 1356-60.

making responsibilities by allowing federal courts to make the difficult or unpopular decisions.[98]

The Substantive Rights Protected by Section 1983

The critical underlying factor in the increase of section 1983 actions and the greater intrusion into areas of state concern has been the increase in the scope of fourteenth amendment protections. This expansion has occurred in two ways: first, the rights protected by the due process clause have increased with the closer interrelationship of citizens and state governments; second, most of the substantive protections of the first 10 amendments have been incorporated into the fourteenth amendment.[99] The protections guaranteed by those amendments, which were originally conceived as shields interposed between the federal government and the individual citizen, now form the basis of civil damage actions against state officials.[100]

In addition to this expansion of due process protections, *Monroe's* conclusion that section 1983 must be "read against the background of tort liability"[101] has added to the analytical confusion regarding the substantive rights protected by section 1983. The problem is to distinguish between a common law tort committed by a state official and a constitutional deprivation actionable under section 1983. The Court in *Screws* noted that not every tort committed under color of state law is actionable as a constitutional deprivation under federal law.[102] Currently, while many state law torts are actionable under section 1983, some clearly do not have a constitutional dimension.[103] The distinction is, of course, not amenable to a bright-line definition, and judicial attempts at clarification are necessarily ambiguous.[104]

A task more difficult than defining the interests currently protected is deciding which interests *should* be protected by section 1983 in its modern application. Critics of expanded section 1983 jurisdiction would construe the statute in terms of its historical origin and return to the states the initial task of protecting the majority of the expanded rights now covered by section 1983.[105] This viewpoint necessarily favors a reevaluation of the no-

98. See Aldisert, *supra* note 13, at 562. This was also the view of Justice Frankfurter in his *Monroe* dissent. 365 U.S. at 243.

99. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment).

100. For a more comprehensive discussion of the development, see Shapo, *supra* note 27, at 322-24.

101. See text accompanying notes 39-41 *supra*. The Court was attempting to identify the requisite mental element for §1983 liability after having rejected the "specific intent" standard of the criminal statute. See note 41 *supra*.

102. The plurality opinion in *Screws* stated that: "[The 1871 Congress did not intend] to make all torts of state officials federal crimes. It brought within [18 U.S.C. §242] only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States." 325 U.S. at 109.

103. For example, an illegal search and seizure may be actionable under state law as an invasion of privacy, or an unconstitutional arrest as false imprisonment. See text accompanying notes 158-184 *infra*.

104. See text accompanying note 172 *supra*.

105. *See, e.g., supra* note 36, at 1495-97.

exhaustion doctrine.[106] Defenders of expanded section 1983 jurisdiction emphasize that the statute must remain responsive to newly felt needs in the protection of individual civil rights and view the no-exhaustion doctrine as a necessary element in assuring immediate federal court protection of federal rights.[107]

An interesting viewpoint to add to this modern debate is that of Professor Chafee, a staunch defender of civil rights, who two years before *Monroe* wrote:

> If federal protection be desirable we ought to get it by something better than a criminal statute of antiquated uncertainties and based upon the out-moded Privileges and Immunities Clause of the fourteenth amendment. . . . It is very queer to try to protect human rights in the middle of the Twentieth Century by a left-over from the days of General Grant.[108]

Section 1983 has remained substantially intact for over 100 years. During the past 15 years the Court has read its broad language to create a pervasive federal remedy for the protection of human rights. Justice Frankfurter foresaw the possibility of this post-*Monroe* development and the formulation of what he called "policy through legislation."[109] If in fact the breadth of the statute permitted the Warren Court to implement its own civil rights policy, the statute will not prevent a more restrictive policy analysis by the present Burger Court. The only constraints will be the limits of the Burger Court's civil rights policy and the extent to which the Court feels bound by stare decisis.

THE BEGINNING OF A NEW ANALYSIS

One year after the liberalizing 1972 *Lynch* decision,[110] the Court announced three decisions[111] that signaled the beginning of a retreat from expansive section 1983 analysis.

The Municipal Immunity Cases

The first two Supreme Court cases resolved issues that were thought to have been cemented by the *Monroe* Court's holding that municipalities were not "persons" liable under section 1983.[112] This restrictive holding had reduced the utility of the remedy in damage actions against municipal officials, particularly policemen, who were usually judgment proof. Recognizing the restrictiveness of this interpretation, Judge Bazelon of the D.C. Circuit in

106. See text accompanying notes 63-74 *supra*.

107. *See generally* Chevigny, *supra* note 44, at 1352.

108. Chafee, *Safeguarding Fundamental Human Rights: The Tasks of the States and Nation*, 27 GEO. WASH. L. REV. 519, 529 (1959). This view, of course, predated the significant post-*Monroe* expansion of the statute's scope.

109. Monroe v. Pape, 365 U.S. 167, 244 (1961).

110. See text accompanying notes 75-82 *supra*.

111. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973); Preiser v. Rodriguez, 411 U.S. 475 (1973).

112. See text accompanying note 42 *supra*.

Carter v. Carlson[113] held that a municipality could be liable under section 1983 *if* the state's tort law imposed liability.[114] Although this expansion of the remedy was welcomed by commentators,[115] it was rejected by other circuits.[116] In *Moor v. County of Alameda*,[117] the Supreme Court decisively rejected the *Carlson* rationale. Relying on *Monroe's* construction,[118] the Court refused to re-examine that holding in light of the policy arguments for a more liberal construction.[119]

Another more fully developed line of post-*Monroe* circuit court cases had conceded municipal immunity in damage actions but had granted injunctive relief against municipalities.[120] In *City of Kenosha v. Bruno*, the Court struck down this development, holding that nothing in the legislative history of section 1983 would sustain either damages or injunctive relief against municipalities.[121]

The *Moor* and *Kenosha* decisions, although justified in terms of stare decisis, restricted potentially useful expansions of the section 1983 remedy that attempted to deal with the modern realities of actions against municipal officials.[122]

Preiser v. Rodriguez

The third 1973 Supreme Court decision revealed a change in the majority's thinking on section 1983 and federalism. In *Preiser v. Rodriguez*, the Court,

113. 477 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

114. 447 F.2d at 369. This interpretation of *Monroe* simply ignored the holding of that case that a municipality was not a person under §1983.

115. *See, e.g.*, Comment, 24 VAND. L. REV. 1252 (1971).

116. *See, e.g.*, Gonzalez v. Doe, 476 F.2d 680 (2d Cir. 1973); Yumich v. Cotter, 452 F.2d 59 (7th Cir. 1971), *cert. denied*, 410 U.S. 908 (1973).

117. 411 U.S. 693 (1973).

118. *Id.* at 700. The petitioners did not directly challenge *Monroe*'s holding on municipal immunity; rather, they sought to circumvent that holding by relying on 42 U.S.C. §1988, which permits federal courts to apply state remedies in civil rights actions if the available federal remedy is "deficient" or "not adapted to the object." The adopted state remedy, however, must not be "inconsistent with the Constitution and laws of the United States." Petitioner argued that since §1983 did not provide a remedy against municipalities, the federal court could adopt the state's rule of municipal tort liability through §1988 and apply the state remedy in granting relief under §1983. This argument was rejected as being inconsistent with *Monroe*'s express holding on municipal immunity; therefore, §1988 had no application.

119. 411 U.S. at 700 n.10.

120. *See, e.g.*, Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961).

121. 412 U.S. 507, 513 (1973).

122. During the 1976 term, the Burger majority in Aldinger v. Howard, 96 S. Ct. 2413 (1976), further insulated municipalities from damage actions in federal courts. Answering a question left open in *Moor v. County of Alameda*, the Court held 5-4 that district courts have no authority under pendent jurisdiction principles to join on a pendent state law claim a party over whom no independent federal jurisdiction exists. This decision prevents plaintiffs from litigating their state law tort claim against municipalities in federal court with their §1983 action against the individual officers. For a discussion of the problems generated by municipal immunity under §1983, see Kates & Kouba, *supra* note 42, at 131.

in a 6-3 decision, held that a state prisoner challenging the duration of his confinement on due process grounds, as opposed to the constitutionality of the conditions of confinement, must proceed in federal court under the habeas corpus statute rather than under section 1983.[123] Under the habeas corpus remedy, the state prisoner must exhaust state remedies, a burden not faced under section 1983.[124] The Court emphasized that although the prisoner's claims were within the literal terms of section 1983, the claims lay at "the core" of the habeas corpus remedy, and that was their sole remedy.[125] In reaching this conclusion, the Court stressed the importance of state primacy in administration of state prisons and the superiority of state administrative bodies and courts in resolving the myriad problems for which prisoners might seek relief.[126] Although the holding of the case is quite narrow, the Court's federalism discussion represented a departure from unquestioned federal supremacy in protecting constitutional rights and "an admission that federalism and comity cannot continue to be ignored in section 1983 actions."[127]

CURRENT RETRENCHMENT IN SECTION 1983 ANALYSIS

The Court's previous foreshadowing of a more restrictive section 1983 analysis developed into a clear signal with two decisions[128] in the 1975-1976 term. The tone of the language and the analyses employed by Justice Rehnquist are significant indications of the Court's reorientation. Just as *Monroe* 15 years earlier set a liberal tone for expansion of the section 1983 remedy,[129] these recent decisions mark the beginning of a more restrictive analysis in the federal courts.

Rizzo v. Goode

The note sounded by the Supreme Court in *Rizzo v. Goode*[130] is one of

123. 411 U.S. 475, 500 (1973). The prisoners in *Preiser* were New York inmates participating in the state's "good time" credit program; prison officials had reduced their accumulated credits as a result of prison disciplinary proceedings. Their §1983 actions, which were joined with the habeas corpus petitions, alleged due process deprivations resulting from the summary withdrawal of their credits. The §1983 claims were added to avoid the exhaustion requirement of habeas corpus. The district court granted relief under §1983 and restored the credits, which resulted in the prisoners being released on parole. Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969). The Second Circuit, on rehearing *en banc*, sustained the district court's application of §1983. Rodriguez v. McGinnis, 406 F.2d 79 (2d Cir. 1972). The court relied on Wilwording v. Swenson, 404 U.S. 249 (1971), in which the Supreme Court had appeared to establish a broad no-exhaustion rule in prisoner cases.

124. See text accompanying notes 63-74 *supra*.

125. 411 U.S. at 489.

126. "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-92.

127. Aldisert, *supra* note 13, at 581.

128. Rizzo v. Goode, 96 S. Ct. 598 (1976); Paul v. Davis, 96 S. Ct. 1155 (1976).

129. See text accompanying notes 43-44.

130. 96 S. Ct. 598 (1976).

federalism and a consequent diminution of federal court equity power under section 1983. The case involved class actions brought by two black groups against the Mayor and Police Commissioner of Philadelphia that sought to enjoin an alleged pervasive pattern of unconstitutional treatment of black citizens in the city.[131] The mistreatment was allegedly attributable to two individual police officers not named as defendants; the named defendants were charged in their supervisory capacities with authorizing or encouraging the illegal conduct.[132] After a lengthy hearing, the district court determined that the named defendants had not maintained a deliberate policy of violating constitutional rights;[133] however, the court did identify departmental practices that had the effect of minimizing complaints of police misconduct. Although the district court felt that its equitable power to supervise the functioning of the police department was clearly established, it declined to use that power.[134] Rather, the final judgment, based on an agreement negotiated by the black groups and the police, required the defendants to institute a comprehensive program for dealing adequately with citizen complaints.[135]

In reversing the lower court, Justice Rehnquist for a 5-3 majority indicated that it was doubtful whether the class representatives had sufficient standing.[136] He nevertheless addressed the district court's "novel" theory that a class action was sustainable because twenty separate incidents of the constitutional deprivation of individual rights throughout the entire city were proven.[137] Distinguishing earlier pattern deprivation cases relied on by the lower courts,

131. The case in the district court was tried as parallel trials of separate class actions. COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973). In the first, *Goode v. Rizzo*, plaintiff class alleged eight separate incidents of unconstitutional conduct by two identified police officers who were not named as defendants. The district court found unconstitutional misconduct in three of the eight incidents. In the second action, *COPPAR v. Rizzo*, 28 separate incidents of misconduct were alleged without specifically identifying any individual officers. The Supreme Court found the district court's findings on these 28 incidents unclear but accepted *arguendo* respondents' contention that 16 of the incidents amounted to constitutional deprivations. 96 S. Ct. at 602-03.

132. *Id.* at 602.

133. With regard to the plaintiff class composed of all Philadelphia citizens, the district court concluded that only a small percentage of police officers had violated their civil rights. The court felt, however, that the frequency was such that the incidents could not "be dismissed as rare, isolated instances." COPPAR v. Rizzo, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973).

134. The district court judge stated that: "In the course of these proceedings, much of the argument has been directed toward the proposition that courts should not attempt to supervise the functioning of the police department. Although . . . the Court's legal power to do just that is firmly established . . . I am not persuaded that any such drastic remedy is called for, at least initially, in the present cases." *Id.* at 1320.

135. The plan included the revision of police manuals and rules of procedure for dealing face-to-face with citizens, improved complaint processing, and notification to citizens of action taken on their complaints. While finding that the plaintiffs had no constitutional right to the improvements, the district court judge concluded that the new program was necessary to prevent future abuses by the police, which were occurring in unacceptably high numbers. *Id.* at 1321.

136. 96 S. Ct. at 604-05. The Court felt that the individual respondents' allegations of potential future injury by unnamed defendants were speculative and conjectural.

137. *Id.* at 605.

the Court found that the requisite "pervasive pattern" of deliberate intimidation was not present in this case.[138]

The Court next considered plaintiffs' theory that the Mayor and Police Commissioner had a duty to eliminate police misconduct, a duty that created a corresponding right in the citizens to be free from such abuse and that rendered the defendants liable for its breach under section 1983.[139] Rejecting the existence of such a right as an "amorphous" proposition, the Court concluded that the Mayor and Police Commissioner could not be held vicariously liable because they had "played no affirmative part" in the individual constitutional violations.[140]

Although dicta, the significant part of the Court's discussion addressed the scope of federal courts' equity powers vis-à-vis "important considerations of federalism."

> Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy" of the adjustment to be preserved between federal equitable power and State administration of its own law.[141]

Noting that the Court had consistently held the federal government to have the widest latitude in the administration of its own affairs, the Court continued its federalism theme.

> When the frame of reference moves from a unitary court system . . . to a system of federal courts representing the Nation, *subsisting side by side* with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.[142]

In developing its federalism argument, the majority relied chiefly on recent cases that stressed the dangers of federal court interference in ongoing state criminal trials.[143] The majority conceded that principles of federalism are entitled to the greatest weight in criminal cases but argued that the principles had never been limited to those situations.[144]

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138. "The focus in [Hague v. CIO, 307 U.S. 496 (1939)] and [Allee v. Medrano, 416 U.S. 802 (1974)] was not simply on the number of violations which occurred but on the common thread running through them: a 'pervasive pattern of intimidation' flowing from a deliberate plan by *named* defendants to crush the nascent labor organizations." *Id.* at 606 (emphasis original).

139. *Id.*

140. Respondents relied primarily on Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) to invoke the broad equitable power of the district court against the supervisory officials. The Court, however, distinguished the two cases on the basis of the direct personal involvement of the state officials in *Swann* and the vicarious involvement by the officials in the instant case. *Id.* at 606-07.

141. *Id.* at 607, *citing* Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

142. *Id.* at 608 (emphasis added).

143. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974).

144. 96 S. Ct. at 608.

While the Court could properly have been concerned with the district court's pronouncement as to its extensive equity powers,[145] the actual intrusion into the functioning of the police department was minimal in the instant case and presented an apparently workable solution.[146] Clearly, the majority in looking beyond the instant case was concerned with "abstract principle that, when extended to the limits of logic, may produce untoward results . . . ."[147]

The type of circumstance contemplated by the majority is illustrated by *Inmates of Suffolk County Jail v. Eisenstadt*.[148] In that decision inmates of a Boston jail sued the Massachusetts Director of Corrections under section 1983, alleging that the overcrowded jail conditions violated their rights to due process. The district court granted relief, ordering the defendants not to incarcerate more than one inmate per cell.[149] This plan required a reduction in jail population and consequently necessitated inmate transfers to other institutions. When the Commissioner failed to cooperate with the local jail officials in effecting the transfers, the district court judge calculated the jail's capacity under his original order, determined the existence of vacancies elsewhere, and issued a more detailed order regarding the transfers to be made.[150] On the Commissioner's appeal, the First Circuit upheld the order, citing *Swann v. Charlotte-Mecklenburg Board of Education*[151] as authority for the exercise of broad equitable power by the district court.[152]

The Supreme Court denied certiorari in *Inmates of Suffolk County Jail*,[153] but the Court's rationale in *Rizzo* raises doubt as to whether such equitable intervention by a federal court would now be sustained. In *Rizzo* the Court distinguished *Swann* on the issue of defendents' culpability; the defendants in *Swann* were found liable because they had played an *affirmative* part in the constitutional deprivations.[154] The Court might now conclude that the Commissioner in *Inmates of Suffolk County Jail* was more like the police commissioner in *Rizzo* due to his nonaffirmative conduct. Additionally, although the First Circuit said that the district court would "continue to respect the expertise of the Commissioner and the practical difficulties he may face,"[155] it

145. See note 137 *supra*.

146. Prior to taking their appeal from the district court's order, the petitioners had negotiated and consented to the program eventually ordered. The order was supported by several *amici* in the Supreme Court, including the Commonwealth of Pennsylvania and the Philadelphia Bar Association. 96 S. Ct. at 609 (Blackmun, J., dissenting).

147. *Id.* (Blackmun, J., dissenting).

148. 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 477 (1974).

149. The district court found that "the quality of incarceration at [the jail] is 'punishment' of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial; and therefore it violates the due process clause of the Fourteenth Amendment." Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973).

150. 494 F.2d at 1198.

151. 402 U.S. 1 (1971).

152. 494 F.2d at 1198.

153. 419 U.S. 477 (1974).

154. 96 S. Ct. at 607.

155. 494 F.2d at 1199.

is unlikely that this represents the degree of deference to the "principles of federalism" that *Rizzo* contemplates.

The actual result in *Rizzo*, the denial of the minimal relief granted by the district court against official "indifference"[156] to police misconduct, is regrettable. In dissent Justice Blackmun noted the majority's departure from the *Monroe* Court's emphasis on the purpose of section 1983 — to "afford a federal right in federal courts" in order to redress constitutional deprivations resulting from the neglect of state officials.[157] *Rizzo* accomplished this departure by closely reading the factual allegations and strictly requiring affirmative conduct by state officials. Also, the power of federal courts as forums to redress deprivations of individual rights was expressly deemphasized.

The positive effect of the decision's federalism discussion, however, is to introduce greater consideration of state interests in the application of the section 1983 remedy. The contrast of the rather minimal intrusion involved in *Rizzo* with the strong statements of federalism is a clear indication of the Burger Court's intent to restore some balance in federal court actions against state officials.

Paul v. Davis

In contrast to *Rizzo*, in which a class sought equitable relief from alleged police misconduct, *Paul v. Davis* involved an individual's action for damages against police officers for a single alleged wrong.[158] The Supreme Court's primary focus shifted from federalism to an explication of the substantive fourteenth amendment right protected by section 1983. By clarifying the scope of the due process clause, the Court attempted to reallocate the burden of actions against state officials between state and federal forums.

In *Paul* the police officers had included plaintiff's photograph in a flyer that identified active shoplifters and that was distributed to approximately 800 merchants. The prior shoplifting charge against the plaintiff had been dismissed.[159] As a result, plaintiff brought a section 1983 action seeking damages and declaratory and injunctive relief. Holding that no constitutionally protected right of the plaintiff had been infringed, the district court dismissed the action.[160] The Sixth Circuit, relying on the 1971 Supreme Court case of *Wisconsin v. Constantineau*,[161] reversed and held that the plaintiff had stated a claim for the denial of due process.[162]

On review the Supreme Court reversed in another 5-3 decision.[163] The majority, again through Justice Rehnquist, first addressed the relationship of the fourteenth amendment due process clause and section 1983 actions

156. 96 S. Ct. at 609 (Blackmun, J., dissenting).
157. *Id.* at 610-11. (Blackmun, J., dissenting, *quoting* Monroe v. Pape, 365 U.S. 167, 180 (1961)).
158. 96 S. Ct. 1155 (1976).
159. *Id.* at 1158.
160. *Id.*
161. 400 U.S. 433 (1971).
162. Davis v. Paul, 505 F.2d 1180, 1182 (6th Cir. 1974).
163. *Id.* at 1167.

to state tort law.[164] The plaintiff, noted the majority, was attempting to convert a "classical" state defamation action into a constitutional case via the due process clause.[165] Characterizing plaintiff's theory as "strained," the majority noted that if it were accepted there would be "no logical stopping place to such reasoning."

> Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting "under color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result. . . .[166]

Contrary to the developed trend in post-*Monroe* decisions in which the lower courts had generously read complaints and permitted broad due process allegations to sustain section 1983 jurisdiction,[167] the Court read its prior decisions as indicating the "*limited* effect of the Fourteenth Amendment."[168] Furthermore, the *Paul* Court believed that the *Monroe* decision had emphasized this point.

> [In *Monroe*] the Court was careful to point out that the complaint stated a cause of action under the Fourteenth Amendment because it alleged an unreasonable search and seizure violative of the guarantee "contained in the Fourteenth Amendment [and] made applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment."[169]

The Court indicated that the plaintiff had not identified the deprivation of a "specific constitutional guarantee."[170] In addition, the Court stated that the due process clause did not *"ex proprio vigore"* render all torts committed under color of state law actionable as constitutional deprivations.[171]

Although the lower courts have recognized a distinction between a common law tort actionable in state court and a constitutional tort triable in federal court under section 1983, state tort claims styled to allege colorable due

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164. *Id.* at 1158.

165. *Id.* at 1159. "[Plaintiff] asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment." *Id.*

166. *Id.*

167. See text accompanying notes 43-44 *supra.*

168. 96 S. Ct. at 1160 (emphasis added).

169. *Id.*

170. *Id.*

171. *Id.* "[S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed on whatever systems may already be administered by the States." *Id.*

process deprivations have been sustained by lower federal courts. For example, the Third Circuit pointed out:

> The two rights of action do not always stand *in pari materia*. Some common law and statutory torts . . . do not rise to constitutional dimensions. The converse is equally true. Conduct may be actionable as a deprivation of constitutional rights when no force or violence has been utilized, and there exists no orthodox counterpart of state common law or statutory relief available.[172]

However, in a subsequent case the same court was confronted with a claim of excessive force used in making an arrest.[173] Reconstructing the plaintiff's confusing section 1983 allegations, the court indicated that a fourteenth amendment due process violation could be made out if the plaintiff alleged that "without due process of law the police punished him for his alleged traffic violation by administering a physical beating upon him instead of submitting him to trial by jury to determine his guilt or innocence. . . ."[174] In this manner, local assault and battery actions against police officers were brought in federal court under the amorphous rubric of a due process violation.[175]

The Supreme Court in *Paul*, however, held that only the specific substantive guarantees of the bill of rights that have been incorporated into the fourteenth amendment — the recognized liberty and property interests protected by the due process clause — and the substantive, fundamental limitations on government action implicit in the liberty concept of the fourteenth amendment can form the basis of a section 1983 action.[176] As the Court emphasized, the procedural guarantees of the due process clause "cannot be the source [of a] body of general federal tort law."[177] Liberty and property interests protected by procedural due process "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law."[178] Therefore, in the instant decision, the plaintiff was left to pursue vindication of his reputation in a state tort action.

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172. Howell v. Cataldi, 464 F.2d 272, 278 (3d Cir. 1972).

173. Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973).

174. *Id.* at 1144 n.1.

175. *See, e.g.*, Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (due process deprivation held stated against prison personnel who failed to restrain and disarm another inmate who in their presence attacked plaintiff).

176. 96 S. Ct. at 1160, 1165-66, 1165 n.5.

177. *Id.* at 1160.

178. *Id.* at 1165. The Court's references to rights protected by state law is confusing since it implies that the state is not protecting the plaintiff's interest by making available a state court for litigation of a tort action. The Court's focus, however, is on the creation of a *legal status* by the state. "In each of these cases [holding procedural guarantees of the due process clause applicable], *a right or status previously recognized by state law* was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment." *Id.* (emphasis added). *Cf.* Bishop v. Wood, 96 S. Ct. 2074

The Court also analyzed and rejected an alternate theory of section 1983 jurisdiction — that the plaintiff's reputational interest alone was protected as a fourteenth amendment liberty interest.[179] Conceding that prior decisions had identified the drastic effect of the stigma attached by government defamation, the Court concluded that an injury to reputation alone, "apart from some more tangible interest such as employment," is insufficient to invoke the protections of the due process clause.[180]

The vigorous dissent attacked the majority's emphasis on the availability of a state tort action that duplicated the plaintiff's section 1983 allegations.[181] Given the fact that the policemen's conduct was intentional and clearly under color of law, the dissent argued that the only issue properly presented was whether plaintiff's reputation was a recognized liberty interest under the fourteenth amendment, an issue the dissent would have resolved affirmatively.[182] Additionally, while not specifically addressing the majority's rejection of the due process clause as a "font of tort law," the dissent rejected the restrictive interpretations placed on fourteenth amendment liberty and property interests. The dissent also discarded the majority's apparent conclusion that such interests are protected only when recognized by state law or protected by one of the guarantees incorporated into the Bill of Rights.[183]

The majority's interpretation, restricting the previously understood scope of liberty interests, is an unfortunate reversal in the protection of an individual's reputation. Nevertheless, the Court's construction of the operative effect of the due process clause will significantly affect future application of section 1983. Although the Court was defining the reach of the constitutional guarantee, the effect was to narrow the class of alleged constitutional deprivations that will sustain section 1983 jurisdiction. *Monroe's* elevation of the due process clause as a source of section 1983 jurisdiction, the liberal reading of plaintiffs' alleged constitutional deprivations, and the broad remedial tone of the decision had resulted in more amorphous due process allegations

(1976), in which the Court, construing the applicable state law as not creating any protected property interest, upheld the discharge of a policeman who did not receive a hearing.

179. *Id.* at 1160-66.

180. *Id.* at 1161. The plaintiff was not a state employee and did not lose his job as a result of the flyer. However, his employer did warn him about future recurrences. *Id.*

The case of Wisconsin v. Constantineau, 400 U.S. 433 (1971), which the Court of Appeals had held controlling, was distinguished from the instant case in that the stigma involved in *Constantineau* — posting of plaintiff's name in taverns pursuant to a state law prohibiting liquor sales to those posted — was accompanied by the loss of a legal status, the right to buy alcoholic beverages. In the instant case, the majority pointed out that state law did not extend to the plaintiff "any legal guarantee of present enjoyment of reputation" that was infringed by the defendants' actions. 96 S. Ct. at 1166. The dissent persuasively argued that the concept of a reputational interest in liberty had never been so restrictively defined and that the majority's decision rendered "due process concerns *never* applicable to the official stigmatization, however arbitrary, of an individual." *Id.* at 1170 (emphasis original). The dissent found this prospect "frightening for a free people." *Id.* (Brennan, White, Marshall, JJ., dissenting).

181. *Id.* at 1167-68.

182. *Id.* at 1168.

183. *Id.* at 1171 n.10.

sustaining jurisdiction. *Paul,* however, restricts *Monroe* to its facts — a deprivation of a specific incorporated guarantee — and thus significantly limits the remedial effect of section 1983.

Although the Court required an alleged violation of a specific constitutional guarantee, it failed to establish a standard for future courts to apply to judge the sufficiency of a section 1983 complaint. Prior to *Paul,* a plaintiff assaulted by police might have invoked section 1983 jurisdiction on the basis of a due process violation.[184] Now, in the aftermath of *Paul,* he might restate the identical factual allegations but select the eighth amendment's cruel and unusual punishment clause as his constitutional deprivation. It is difficult to ascertain whether the district court would grant section 1983 jurisdiction or find that the plaintiff was merely attempting to invoke federal jurisdiction for his state law tort claim. While the literal language of *Paul* would seem to sustain jurisdiction, the Court's obvious intent to require classical state tort actions to be litigated in state courts may require a convincing rather than a colorable allegation of a specific violation. An example of the former would be the clear fourth amendment violation in *Monroe.* Thus, the federal district courts must more carefully confront the ambiguous issue of whether a state law tort has risen to a constitutional dimension.

The Court's emphasis on the difference between common law torts and constitutional deprivations should have the positive effect of reducing expanded section 1983 jurisdiction. The broad remedial emphasis of the *Monroe* decision resulted in lower courts giving more liberal readings to section 1983 complaints. After *Paul* a section 1983 claim asserting tortious injury by state officials should be read more strictly to find a clear constitutional deprivation and a firm basis for federal intervention.

Future Directions

In *Rizzo* and *Paul* the Court made an important beginning in redefining the proper scope of section 1983 jurisdiction. The doctrinal underpinning of previous expansive analysis — the emphasis on the immediate availability of a federal forum to enforce every constitutional right — has been clearly rejected by the Burger Court. The recent emphasis on reducing the intervention of federal courts in areas of state concern and on increasing the involvement of state courts in the protection of individual rights provides a sound doctrinal base for future applications of section 1983. In addition, the explication of the fourteenth amendment's scope in *Paul* adds some clarification of the substantive rights protected by section 1983. But *Rizzo* and *Paul* are still beginnings and the full contours of this rationale must be developed in future cases. The manner in which district courts are to properly restrain their equitable powers in response to the Supreme Court's federalism emphasis and a clearer distinction between a classical state law tort and a constitutional deprivation cognizable under section 1983 must be elaborated.

The critical question remaining is whether the Court will merely superin-

184. *Cf.* Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973). See text accompanying note 173 *supra.*

tend the implementation of its new analysis by lower courts or will reverse existing section 1983 precedent to further restrict section 1983 jurisdiction. Since the *Monroe* decision, critics of expanded section 1983 jurisdiction have developed theories explaining the proper functional role of the remedy in modern society. Prior to considering what the Court may or should do, it will be useful to briefly review some of these suggested approaches.

Proposals for the Modern Scope of Section 1983 Jurisdiction

Critical analyses of expanded section 1983 jurisdiction generally accept the three original purposes of section 1983 identified in *Monroe*: to override state statutes conflicting with federal law, to provide a remedy for violation of a federal right when the state remedy is inadequate, and to provide a federal remedy when the state's theoretically adequate remedy is unavailable in practice.[185] Instead the proposals focus on the necessity of restricting the remedy to conform more closely to its historical origins and restricting or eliminating the no-exhaustion doctrine.

An early post-*Monroe* proposal suggested a two-tiered functional analysis for section 1983 jurisdiction derived from the historical origins of the statute.[186] The first element of this analysis requires that the defendant's conduct in depriving the plaintiff of his rights be outrageous, reprehensible, or shocking; in the police tort cases extraordinarily offensive conduct is needed.[187] In cases that lack the element of physical coercion, the plaintiff must allege facts showing a near-total breakdown in local law enforcement.[188] While this approach reflects in part the original legislative purpose, it is clearly too restrictive for modern conditions. Constitutional deprivations can be committed without violence or other shocking conduct.[189] The solution to restricting section 1983 jurisdiction is not to give it an 1871 interpretation but to attempt to mold it to fill modern needs.

A more recent proposal is directed at overriding the no-exhaustion doctrine and *Monroe's* supplementary remedy rationale in section 1983 cases.[190] Unless one of the three situations in *Monroe* were present, or the deprivation were alleged by a class or some member thereof, this proposal would require federal courts to defer to state courts if adequate remedies existed.[191] Going beyond the elimination of the no-exhaustion doctrine, this deferral approach would not permit de novo federal jurisdiction once state remedies have been exhausted but would limit plaintiffs to the normal appellate processes.[192] The

185. See text accompanying notes 30-33 *supra*.

186. Shapo, *supra* note 27, at 327-29.

187. *Id.* at 327-28.

188. *Id.* at 328. The two-tiered approach would not be applied to cases involving first amendment rights since they have been traditionally subject to "zealous judicial protection." *Id.* at 329.

189. *See* Note, *supra* note 36, at 1508.

190. *Id.* at 1486.

191. *Id.* at 1502. "The cases subject to dismissal from federal courts under the deferral approach would be those of individual deprivations when state remedies are adequate in theory and practice and no state law is challenged as denying a federally secured right."

192. *Id.* at 1502-04. The author details the appellate procedures that the deferral

primary criticism of this proposal is that it imposes onerous burdens on section 1983 plaintiffs to demonstrate inadequacy or unavailability of state remedies. Also, the district courts would be compelled to engage in a difficult weighing of subtle factors to decide whether to defer.[193] Although concern with expanded section 1983 jurisdiction is proper, the role of federal courts in protecting federal rights need not be diminished to the extent contemplated by the deferral approach. A better balance between state and federal interests must be found.

A federal appeals court judge has suggested that section 1983 jurisdiction be restricted by *statute*.[194] The statute that he proposes would remove from section 1983 jurisdiction those cases in which state interests predominate, in which state remedies are adequate in fact, in which no "specially important" federal rights are threatened, or in which no irreparable harm would result from declining federal jurisdiction.[195] While fully articulating the policies of federalism that a legislator might consider in amending section 1983, the proposal requires broad standards that cannot be expressly incorporated into a concrete substantive or jurisdictional statute. In contrast to the "deferral" approach, this proposal focuses attention on the quality of the deprivation as well as the adequacy of state remedies.

All of these functional approaches to section 1983 jurisdiction, if enacted into statute or implemented by the Court, would eliminate classes of cases that arguably should not be in federal court — minor property claims, torts with only colorable constitutional overtones, prison grievances, and cases such as challenges to hair-length regulations. But as one critic of such functional approaches has noted, they reflect "an excessive confidence in the effectiveness of flexible procedural standards in isolating and protecting the truly 'deserving' cases."[196] Moreover, each has its own inherent problems. Although the modern scope of section 1983 has been solely a judicial creation, a sudden change in section 1983 jurisdiction through adoption of similar functional tests by the Court would be more of a legislative than a judicial act.

If the Court cannot legislate a new scope of section 1983 jurisdiction through sweeping departures from prior analysis, the proper role of the Court in further clarifying section 1983 jurisdiction should be identified.

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approach would entail. He states a preference for the deferral approach over the imposition of an exhaustion requirement since under the latter "once the plaintiff has pursued his state remedies he may return to federal court and demand full relitigation as to fact and law on whatever federal claims he still has." *Id.* at 1502. The result of this would be a lower reduction of the burden on the federal courts than under the deferral approach. and "much of the reduction would come about through the imposition of expense and delay too great for many plaintiffs to bear." *Id.*

193. See Chevigny, *supra* note 44, at 1356 (the author criticizes the entire deferral approach and its underlying federalism rationale, as well as advancing strong arguments for the continued existence of expansive §1983 jurisdiction).

194. Aldisert, *supra* note 13, at 577-78.

195. *Id.* at 577. Judge Aldisert would distinguish cases affecting the "rights of black citizens to equal education, housing, or employment opportunity — questions which should be handled by the federal courts." *Id.* at 578.

196. See Chevigny, *supra* note 44, at 1356.

First, the Court should continue to articulate and implement considerations of federalism in applying section 1983 in the area of equitable intervention in state affairs by district courts. Second, the nature of the substantive right protected, particularly a clearer distinction between a common law tort and constitutional deprivation, must continue to be defined. These are the approaches begun in *Rizzo* and *Paul* and both should have positive impacts on lower court handling of section 1983 complaints. Further diminution of section 1983 jurisdiction would require the Court to overrule or substantially modify existing precedent.

In considering possible reversals or modification of current section 1983 doctrine, the modern construction of the statute seems solid. Although Justice Douglas' construction of "under color" was initially questioned,[197] the statute would have a virtually nonexistent scope without the pretense formulation of *Screws-Monroe*. The mental element or tort standard of liability also seems sound in policy. The Court has adhered to the *Monroe* holding as to municipal immunity[198] and has recently indicated an adherence to traditional section 1983 official immunity analysis.[199] However, one key area of expansive section 1983 analysis clearly merits re-examination by the Court.

The Future of the No-Exhaustion Doctrine

The critical area of section 1983 precedent subject to reversal or modification by the Burger Court is the no-exhaustion doctrine. The potential for this result derives from the Court's present emphasis on federalism,[200] the recognition of state courts in the scheme of protecting individual rights,[201]

197. See note 25 *supra*.

198. See text accompanying notes 112-122 *supra*.

199. In the recent case of Imbler v. Pachtman, 96 S. Ct. 984 (1976), the Court extended an absolute immunity under §1983 to state prosecutors engaged in their prosecutorial function. The Court followed the traditional approach originally adopted in Tenney v. Brandhove, 341 U.S. 367 (1951), in which the Court held that official tort immunities under the common law had not been abrogated by §1983. Therefore, in deciding whether to extend a common law immunity to §1983, the Court first considers what immunity existed at common law and then determines if the policy supporting the immunity will also justify its extension to §1983.

200. For a discussion of *Rizzo v. Goode*, see text accompanying notes 120-157 *supra*.

201. In Stone v. Powell, 96 S. Ct. 3037 (1976), the Court held 6-3 that a state prisoner is not entitled to federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was used against him at trial. Although the decision primarily represents a refusal to extend the exclusionary rule to collateral proceedings and a restriction of habeas corpus review, it also reflects the Burger Court's increasing deference to state court adjudication of constitutional rights. Justice Powell explicitly rejected the prevalent mistrust of state court protection of individual rights. "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and uphold federal law. . . . Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is 'no

and the fragility of the doctrine's statutory base and case law development.[202]

In moving away from the absolute no-exhaustion rule, the Court could re-examine the legislative debates and conclude that the Framers in 1871 had intended to provide a federal forum only where state remedies were inadequate or nonexistent. Such a conclusion would require the rejection of *Monroe's* supplementary remedy analysis.[203] Finding modern conditions different from those of the Reconstruction South, the Court could determine that the absolute no-exhaustion rule is unjustified both as a matter of statutory construction and policy.

If the remedy were then restricted to the three original purposes identified in *Monroe*, the Court would in effect be adopting the deferral approach.[204] As indicated earlier, this approach represents too great a diminution in the role of the federal courts. Additionally, such a drastic revision of existing federal jurisdiction would be legislative in character, and the Court should and no doubt would eschew this approach to the exhaustion problem.

If the deferral approach were rejected, the Court could alternatively require exhaustion of state remedies in all cases, whether the available remedy was judicial or administrative. In judicial remedies cases, however, the burden on plaintiffs of proving the unavailability or inadequacy of state remedies, or the time consumed in exhausting them, is particularly onerous. Also, federal courts would have to make threshhold determinations of the adequacy of state remedies to decide whether to require exhaustion[205] — a particularly delicate confrontation of the state and federal judicial systems.

In view of such difficulties, the Court should elect the intermediate course of requiring exhaustion of state administrative remedies if these remedies are adequate.[206] This approach would reduce federal-state friction in key areas

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intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.' " *Id.* at 3051-52 n.35.

202. See text accompanying notes 63-74 *supra*. The Court also demonstrated its deference to state responsibility in Boehning v. State Employees Ass'n, Inc., 96 S. Ct. 168 (1976). The Court reversed per curiam the Seventh Circuit's conclusion that a state employee had been deprived of her constitutional rights when she was discharged without a pre-termination hearing. The district court had elected to abstain on the ground that the controlling but unconstrued state statute might require the pretermination hearing, and the federal constitutional issue might thereby be avoided. The Seventh Circuit found nothing in the state statute that supported the plaintiff's right to a pretermination hearing and resolved the constitutional claim under §1983 in her favor. The Supreme Court felt the statute was unclear and therefore upheld abstention, which required the plaintiff to seek state court resolution of the statutory question. Justice Douglas dissented, noting the continuation of the "strangulation of 42 U.S.C. §1983 that has recently been evident." *Id.* at 170. For a detailed discussion of abstention and §1983, see McCormack, *Federalism and Section 1983: Limitations on the Judicial Enforcement of Constitutional Protections, Part II*, 60 VA. L. REV. 250 (1974).

203. See text accompanying note 34 *supra*.

204. See text accompanying notes 190-93 *supra*.

205. See Chevigny, *supra* note 44, at 1356. For a discussion of the differences between judicial and administrative remedies in the exhaustion context, see Note, *supra* note 69, at 1203-05.

206. The desirability of some change from the absolute no-exhaustion rule in the

of state concern and competence such as prisons, education, welfare, and licensing and would permit reliance on the developed body of administrative exhaustion law.[207] While this would allow the states the initial opportunity to redress alleged wrongs, the federal forum would be available once the state administrative procedures were exhausted. Federal review of state administrative protection of individual rights would result in improved consideration of such claims by the state agencies.[208]

Exhaustion, of course, is a discretionary doctrine and would allow the federal courts some flexibility in requiring initial resort to the state administrative remedy. Due to the nature of administrative adjudication, attention would be focused on individual plaintiffs in important areas of state concern, such as prisons, welfare, education, and licensing.[209] Claims alleging racial discrimination or class-wide deprivation would not be subject to the exhaustion requirement, since such claims have strong roots in the statute's history and original purpose and are not the type of claims that are amenable to administrative resolution. Damage actions against the police would not be subject to exhaustion since the plaintiff is seeking and deserves a judicial remedy. Some reduction in the scope of jurisdiction in the police area should follow from *Paul's* emphasis on separating state law torts from constitutional deprivations.

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case of administrative remedies has been previously expressed or intimated in different contexts. In Gibson v. Berryhill, 411 U.S. 564 (1973), a case decided the same day as *Preiser*, the Court considered a §1983 challenge to a state license revocation. The Court's opinion speculated on whether exhaustion should be required in such a case. Although exhaustion of the state administrative procedure was *not* required, this brief intimation of a potential departure from the absolute no-exhaustion rule drew quick responses from Justices Marshall and Brennan, who indicated that the rule was "firmly settled by this Court's prior decisions." 411 U.S. at 581.

One of the criticisms of the Court's announcement of the no-exhaustion doctrine in *McNeese* was that the Court failed to consider a distinction between exhaustion in the administrative, as opposed to the judicial, context. See note 73 *supra*. *See also*, K. DAVIS, ADMINISTRATIVE LAW TREATISE ¶20.01, at 646 (Supp. 1970), *cited in* Aldisert, *supra* note 13, at 565, for a discussion of the incongruity of requiring administrative exhaustion in the case of federal prisoners but not in state prisoner cases. Justice Harlan, who dissented in both *McNeese* and *Damico*, was a strong critic of the no-exhaustion doctrine in administrative cases. *See* 389 U.S. 416, 418 (1967) (Harlan, J., dissenting).

For a pro and con discussion of administrative exhaustion, which concludes that if exhaustion is required, it is appropriate only in cases of individual deprivations, see Note, *supra* note 69, at 1205-09.

207. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE ¶¶20.01-.10 (1958); L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-58 (1965). In Bishop v. Wood, 96 S. Ct. 2074 (1976), the Court, upholding the discharge of a policeman without a prior hearing on the ground that the applicable state law created no protected property interest, observed: "The Federal Court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 2080.

208. See Aldisert, *supra* note 13, at 563.

209. For an earlier proposal that administrative exhaustion should apply only to individual claims, see Note, *supra* note 69, at 1205-09. Under this approach, *Damico* and *McNeese*, which involved respectively claims of racial segregation in schools and a class action complaint against the state welfare system, were correctly decided in terms of result. Nevertheless, the criticism of the Court's decisional process in the two cases remains valid. See text accompanying notes 73-74 *supra*.

The actual impact of an administrative exhaustion requirement on the caseload burden is difficult to assess, but a reduction in the prison context alone would have a substantially beneficial effect.[210]

None of the possible approaches to the no-exhaustion problem is without difficulty, and the administrative exhaustion approach is not the extensive reform some feel is necessary. But the question is how far the Court may and should go in restricting the present scope of the remedy. The exhaustion area represents the Court's best opportunity to begin to more adequately mold the section 1983 remedy to the demands of federalism without overly restricting the federal courts' role in the protection of individual rights against state interference.

SUMMARY AND CONCLUSION

Immediately after the Court's decision in *Paul*, the chief counsel for the American Civil Liberties Union characterized the *Rizzo*, *Pachtman*,[211] and *Paul* cases as indications that the Burger Court is "busy reversing the results of the Civil War, and putting protection against illegal action back in the hands of the states."[212] More accurately, the Court is beginning to remold a broad piece of hastily enacted post-Civil War legislation to protect individual rights in the modern era. This retrenchment from previous expansive analysis no doubt derives both from the Burger Court's philosophical orientation regarding federalism and from the pragmatic pressures of federal caseload burdens.

While the Court's beginning in *Rizzo* and *Paul* is significant, the lower courts must implement the Court's analysis in particular cases. The Court should provide more specific contours to the *Rizzo* and *Paul* analyses. In attempting to further implement an accommodation between federalism and individual rights, the Court should re-examine the absolute no-exhaustion doctrine in section 1983 cases for the purpose of identifying classes of cases that can be handled initially by the state systems. An immediate course available to the Court, and one it should take, is to require exhaustion of state administrative remedies in appropriate cases.

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210. For a discussion of the differential impact of an exhaustion requirement as opposed to a deferral approach on the actual caseload burden, see note 192 *supra*.

As an alternative to an administrative exhaustion requirement, the Court could review *Preiser* and give full scope to its tentative exhaustion rationale by requiring exhaustion in all prisoner cases. Prior to the Court's decision in *Preiser*, Judge Aldisert had recommended that Wilwording v. Swenson, 404 U.S. 249 (1971), the leading no-exhaustion case in the prisoner context, be overruled by statute. Aldisert, *supra* note 13, at 576. Since prisoners' §1983 complaints comprise the largest portion of total claims filed, a reduction of these complaints would have a significant effect on reducing the total burden, as well as returning to state control a critical area of state concern. Judge Aldisert also suggested that, in addition to overruling the no-exhaustion rule in prisoner cases by statute, the statute place limitations on the prisoners' access to federal court under §1983 after an adverse administrative determination. *Id.* This suggestion effects a compromise between the deferral approach and the exhaustion requirement in prisoner cases, depending on the stringency of the limitations that would be adopted.

211. See note 199 *supra*.

212. Miami Herald, March 25, 1976, §A, at 2, col. 4.