

THE SUPREME COURT'S SHELL GAME: THE CONFUSION OF JURISDICTION AND SUBSTANTIVE RIGHTS IN SECTION 1983 LITIGATION†

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In recent years the work load of the federal courts has expanded substantially.¹ At the same time, there has been increasing concern that the federal courts have been intruding on the state system in an unwarranted manner.² As a result, a variety of proposals have been made to cut back on the courts' jurisdiction to ensure that those cases in need of a federal forum will receive a hearing in a reasonable period of time.³ When issues of controlling access to a federal forum arise, claims involving "federally" protected rights raise some difficult issues. The framers of the Constitution viewed the state court system as an open and available means of ensuring that individuals receive sufficient protection for federal interests,⁴ giving it full power to interpret and apply federally secured rights, with the Supreme Court as an appellate forum to ensure uniform national application.⁵ Inasmuch as two forums are available for the adjudication of a given claim, a tension exists between the two when a decision must be made as to which forum is the most appropriate. Whether a dispute should be heard in either federal or state court depends on such factors as paramountcy of national interests, deference to state decisionmaking, comity, congressional intent, and the limited nature of federal jurisdiction.⁶ When

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¹ During the six month period from July through December, 1981, 97,609 civil cases were filed, an increase of 11.2% over the same period a year before. This compares with 63,868 filed during the same period in 1977. In fact, the twelve month period which ended December, 1981 represented a record year for civil activity in the United States District Courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, FEDERAL JUDICIAL WORKLOAD STATISTICS 5 (1981).

² See, e.g., Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (suggesting the important role which the state courts play in elaborating federal constitutional principles).

³ See, e.g., H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969).

⁴ See, e.g., BATOR, MISHKIN, SHAPIRO, & WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 11-12 and accompanying notes (2d ed. 1973) [hereinafter HART & WECHSLER].

⁵ U. S. Const. art. III, § 2; see also § 25 of the Judiciary Act of 1789, *An Act to Establish the Judicial Courts of the United States*, 1 Stat. 73 (1789); D. CURRIE, *CASES AND MATERIALS ON FEDERAL COURTS* 1-4 (2d ed. 1975).

⁶ See *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2566-67 (1982). For a general discussion of these concerns see HART & WECHSLER pp. 980-1050 *passim*.

these various considerations are balanced appropriately in making such a decision; the tension between state and federal systems is minimized.

Recently there has been debate over the role of the federal courts in adjudicating claims which are potentially cognizable under both section 1983 of the Civil Rights Act of 1871⁷ and various state common law or statutory theories.⁸ Increasing numbers of section 1983 cases are being filed⁹ where legitimate state-created procedures are available to the litigant for the adjudication of his claim. These cases provide a particularly acute example of the problems created by the availability of two forums. One way of dealing with this problem is to have these cases decided initially by state authorities with the federal courts serving only as appellate bodies.¹⁰ This approach, which would involve the imposition of an exhaustion requirement for section 1983 actions,¹¹ was rejected recently by the Supreme Court.¹² In another line of cases dealing with procedural due process,¹³ however, the Court has reacted to the work distribution problem in a manner which is both more far reaching than, and doctrinally inconsistent with, its stand on exhaustion. Rather than closing the federal courts jurisdictionally, the Court is taking civil rights cases out of the system by looking at the merits and rejecting the claims simply because remedies exist at the state level.¹⁴ The Court is in effect mixing substantive constitutional issues of due process with what should otherwise be procedural decisions based on statutory jurisdictional issues.¹⁵

⁷ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1981)).

⁸ For a sample of recent articles recognizing the concern and proposing suggestions, see Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983 and the Federal Caseload*, 1973 LAW & SOC. ORDER 557; Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); McCormack, *Federalism and Section 1983: Limitation on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1 (1941); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L. J. 5 (1974); Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

⁹ Between 1961 and 1979, filings under § 1983 increased from 296 to 13,168 and petitions by state prisoners increased from 218 in 1966 to 11,195 in 1979. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 6, 61. See also Whitman, *supra* note 8, at 6.

¹⁰ See *infra* notes 66-71 and accompanying text.

¹¹ For a sampling of recent articles dealing with this issue, see Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

¹² *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2568 (1982) (held that exhaustion of state administrative remedies was not required to bring a § 1983 action in federal court).

¹³ See *infra* notes 94-155 and accompanying text.

¹⁴ See *infra* notes 94-155 and accompanying text.

¹⁵ This conclusion follows from comparing the Court's decision in *Patsy v. Board of Regents*, 102 S. Ct. 2257 (1982), with that in *Parratt v. Taylor*, 451 U.S. 527 (1981). In *Patsy*, the Court held "exhaustion of state remedies should not be required to bringing an action pursuant to § 1983." *Patsy*, 102 S. Ct. at 2568. In *Parratt*, however, the Court determined that the "Fourteenth Amendment protects only against deprivations without 'due process' of law" and that, in the case of a negligent deprivation of property by a person acting under color of state law,

Denying that an exhaustion requirement exists in section 1983 actions yet allowing those actions to proceed only where no parallel state remedy exists has serious implications. Not only is doctrinal purity being lost,¹⁶ there are far more practical ill effects. In neglecting to adopt a straightforward approach to section 1983 claims, the Court has created confusion among both litigants and lower court judges.¹⁷ Most notably, litigants will proceed with a section 1983 claim believing there is no exhaustion requirement, but will find that their appropriate remedy was, after all, in state court.¹⁸ Furthermore, this mixture of jurisdictional issues with what is properly a substantive rights analysis has dangerous implications to the future of due process. By deciding the merits of these cases on the existence of a parallel state remedy, the Court is losing the ability to view the cases flexibly because it is making determinations about the existence of underlying rights rather than operating at a jurisdictional level.¹⁹ It is locking itself into an approach which will require litigants to win or lose, not on the significance of the right being affected or the actual harm to the individual or society, but solely on the existence of a potential parallel state remedy.

The task facing the court is to decide, on a consistent basis and in a manner consonant with notions of comity, federalism and the role of the Federal courts as the primary protector of federally created rights, when a claim should be heard under section 1983.²⁰ One suggestion is to re-evaluate the type of

no deprivation without due process of law occurs where the state provides an adequate post-deprivation hearing. *Parratt*, 451 U.S. at 543-44. These two cases leave litigants in a strange position. On the one hand litigants need not exhaust state remedies to bring a § 1983 claim. On the other hand, where a § 1983 litigant is alleging a deprivation of property without due process of law, the litigant must exhaust state remedies before the actual deprivation without due process of law — upon which the § 1983 claim rests — will be deemed by the court to have occurred. The Court, therefore, has imposed no exhaustion requirement on the statutory grant of federal jurisdiction over § 1983 claims, while at the same time it is requiring exhaustion of state remedies by some litigants before allowing them to claim that their constitutional rights have been abridged. Accordingly, the Court has acted to restrict claims coming into the federal court under § 1983 by limiting the *constitutional* — *due process* — rights § 1983 was designed to protect, rather than limiting *statutory* rights — by imposing a procedural exhaustion requirement — under § 1983 itself. The Fourth Circuit Court of Appeals in *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1983) noted this constitutional dimension of the *Parratt* decision when it wrote as follows:

Parratt, of course, did not restrict the availability of § 1983 as a remedy for constitutional wrongs. Instead, it held the constitutional requirement of procedural due process to be satisfied if the state provides a post facto remedy for an injury inflicted by an official which was not done pursuant to an established policy and was not amenable to prior control.

Palmer, at 1222 n.2.

¹⁶ See *infra* note 176 and accompanying text.

¹⁷ See *infra* note 177 and accompanying text.

¹⁸ *Id.*

¹⁹ For example, to the extent the court determines a post-deprivation state remedy provides the process due a party under the fourteenth amendment, it has made a constitutional level determination. Such determinations clearly are not subject to modification by Congress.

²⁰ A great deal of discussion in law reviews has been devoted to this issue. For a sampling and recent articles, see Aldisert, *supra* note 8; Nahmod, *supra* note 8; Whitman, *supra* note 8; Comment, *supra* note 11; Developments in the Law — *Section 1983 and Federalism*, 90

right which is constitutionally cognizable, relegating those which are not sufficiently important to require constitutional protection to the state court forum.²¹ A better approach, perhaps, is simply requiring the exhaustion of remedies provided by state law.²² This would entail a showing that the state remedy was in some way inadequate before a litigant could proceed in federal court with a claim.²³ Either approach would resolve the present workload and comity problems while at the same time eliminating the difficult situation which the Supreme Court has created by its current bifurcated approach. The "exhaustion" solution, however, is the sounder course because it would keep constitutional protections in place but shift the primary responsibility for enforcing these rights to the state system. Such action would solve the work distribution issue at the jurisdictional level rather than by redefining constitutional rights. The federal courts, of course, would be available to assure that uniformity existed and could step back into the process in the event of any problems or failures on the part of the state courts.²⁴

In Parts I and II this article will discuss section 1983 and the problems which it has engendered and the development of procedural due process. Then, in Part III, it will demonstrate the manner in which the Court has utilized substantive issues of procedural due process as a means for dealing with what are really jurisdictional issues, showing that, in light of the developments in procedural due process, the Court is eroding its own standards — which require no exhaustion of state remedies — while appearing to adhere to them. The serious implications of such inconsistent positions then will be analyzed. This article will conclude with the view that, although the existence of parallel state and federal remedies in the context of section 1983 cases is seriously in need of reconsideration, there are other sounder ways of dealing with the problem than the rationales presently being used by the Court. Most notably, it is

HARV. L. REV. 1133, 1264-74 (1977); Note, *supra* note 11. Furthermore, the lower courts have adopted a number of approaches, see Whitman, *supra* note 8, at 6-7; see also *infra* notes 162-67 & 177 and accompanying text. In fact, the attempts by the lower courts to cut back on these cases is one reason why it is incumbent on the Supreme Court to face the issue head on. Additionally, the concurring and dissenting opinions of a number of Justices in cases raising these issues reflect a wide range of solutions that have been suggested. See *infra* notes 102-06, 149-55 and accompanying text.

²¹ This concept alone incorporates a wide range of possibilities. The definition of constitutionally cognizable interests in "property", created in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (interests created and defined by rules or understandings "that secure certain benefits and that support claims of entitlement to those benefits") may be in need of redefinition. See Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); Terrell, "Property", "Due Process," *And the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1982). Alternatively, certain interests may not be significant enough to merit constitutional protection, see *infra* notes 102-06, 154-55, 187 and accompanying text, or the concept of "deprivation" may be read to exclude negligent deprivations. See *infra* note 129 and accompanying text.

²² See *infra* notes 66-71 and accompanying text.

²³ See *infra* notes 190-98 and accompanying text.

²⁴ Individual protections would be preserved as no exhaustion would be required where no adequate state remedy was found available. See *infra* notes 190-98 and accompanying text.

suggested that the Court should adopt a modified form of exhaustion requirement, requiring that to state a claim under section 1983 the plaintiff must allege that the state remedies are unavailable or inadequate for the protection of federal rights.

I. 42 U.S.C. § 1983

In 1871, concerned that the states were not adequately protecting the rights of minority citizens,²⁵ Congress enacted The Civil Rights Act of 1871.²⁶ Section I, now section 1983 of Title 42 of the United States Code,²⁷ provides a private, federal remedy for persons deprived of federal rights under color of state law. It states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁸

This statute created a distinct federal statutory remedy for individuals alleging an impairment of rights secured by the general laws of the federal government or specific sections of the Constitution.²⁹ This protection is designed to apply when the wrongdoer is acting in his governmental capacity as an official of the state.³⁰ Since its inception, the statute has been coupled with its own jurisdictional grant.³¹ This factor eliminated any potential jurisdic-

²⁵ The history of the Civil Rights Act is well documented in *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 665-89 (1978).

²⁶ An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes, 17 Stat. 13 (1871).

²⁷ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1964)). Section 1983 was originally introduced as § 1 of the Civil Rights Act of 1871 and was a reaction to the increased activity of the Ku Klux Klan. See *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 665 (1978).

²⁸ 42 U.S.C. § 1983 (1981).

²⁹ *Id.*

³⁰ *Id.*

³¹ The statute's jurisdictional counterpart provides as follows:

[T]he district courts shall have original jurisdiction on any civil action authorized by law to be commenced by any person . . . (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing by equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

28 U.S.C. § 1343(3) (1976 & Supp. 1982). In *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 616-20 (1979), the Court made it clear that § 1343(3) was not simply the jurisdictional counterpart of § 1983 since § 1983 protects against wrongs with respect to "laws," not merely equal rights laws and is therefore applicable to any claim alleging federally protected rights. This effectively removed the jurisdictional impediment, normally present at that time, to federal question jurisdiction, which arose because of the existence of the "amount in controversy" requirement. A 1980 amendment to 28 U.S.C. § 1331 eliminated the need for jurisdictional amount in

tional barriers to civil rights claims and enabled anyone asserting a deprivation of a right secured by the statute to be assured of a federal forum to adjudicate the claim.³²

For many years section 1983 went largely unrecognized, having been given a narrow reading which permitted its use only in cases alleging racial discrimination or voting rights restrictions.³³ Then, in *Hague v. C.I.O.*³⁴ it was found applicable to a claim by labor organizers asserting a constitutional right to assemble and distribute literature. This reading substantially broadened the applicability of the statute by adding a new set of rights for which section 1983 would grant relief. All challenged state actions, however, were still grounded on state statutes or local ordinances, and therefore fell within the most restrictive interpretation of the "under color of state law" language of section 1983.³⁵ That is, for any given course of conduct by a state official to be actionable under section 1983, the conduct in question had to be sanctioned by the state.³⁶

In 1961, in *Monroe v. Pape*,³⁷ the Court recognized a section 1983 claim which fundamentally changed the type of activity which was actionable under the statute. *Monroe* was brought by an Illinois resident seeking damages against the City of Chicago and individual Chicago policemen for an allegedly unconstitutional search of his home. The Court held that the policemen's conduct, although not taken pursuant to any state or local statute or ordinance, constituted action "under the color of state law."³⁸ The Court also noted that individuals alleging constitutional deprivations under section 1983 could go forward under the federal statute even though the state courts also provided an alternative forum for litigation of the plaintiff's grievances.³⁹ In this regard the Court stated that, with respect to the validity of a claim under section 1983, it was "no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."⁴⁰ In reaching this conclusion, the Court set forth what it viewed as the purposes of the Civil

all federal question cases. See 28 U.S.C.A. § 1331 (1982 Supp.).

³² Although originally interpreted to apply to state officials acting pursuant to state or local law, *Monroe v. Pape*, 365 U.S. 167, 183-85 (1961), has extended § 1983 to cover the actions of local officials and *Monell v. New York City Dep. of Social Serv.*, 436 U.S. 658, 690 (1978) extended the reach of § 1983 to local governmental entities.

³³ See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See generally, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952).

³⁴ 307 U.S. 496 (1939).

³⁵ See *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1159-69 (1977).

³⁶ *Id.* at 1160-61.

³⁷ 365 U.S. 167 (1961).

³⁸ *Id.* at 187.

³⁹ *Id.* at 183.

⁴⁰ *Id.* The Court rejected Justice Frankfurter's dissenting argument, *id.* at 202, that the suit should first be brought in state court and that the illegality of the act would deprive the state officer of any immunity he would have had by virtue of his official position.

Rights Act, one of which "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."⁴¹ After *Monroe*, therefore, the challenged action of the state official did not have to be officially sanctioned by the state, either directly, that is expressly by statute or regulative, or indirectly, by being upheld in state court as appropriate under state law.

One of the rights most readily implicated by litigants availing themselves of this expanded section 1983 cause of action is the fourteenth amendment's prohibition against the taking of life, liberty or property without due process of law.⁴² The due process clause applies to a wide range of interests attached to diverse procedural protections⁴³ and, therefore, the provision has easily become the vehicle through which these section 1983 claims are asserted. Section 1983 due process claims fall into two general categories. The first group, exemplified by *Barry v. Barchi*,⁴⁴ are in essence claims that the established state procedures in themselves are unconstitutional and violate due process protections for one reason or another.⁴⁵ The asserted violation may be an allegedly biased system,⁴⁶ or the system may not have sufficient procedural safeguards.⁴⁷ Although these claims could have been brought in state court, as constitutional challenges to the state process itself, they can also be brought in federal court. Moreover, under traditional exhaustion doctrine the federal forum is preferable, since these cases fall into the category exempting the exhaustion requirement where the constitutionality of state relief itself is called into question.⁴⁸

Monroe v. Pape, however, made federal forums available for cases which were essentially tort claims performed by state actors. Consequently, another type of due process case is being brought into federal court under section 1983. These cases, exemplified by *Paul v. Davis*,⁴⁹ *Parratt v. Taylor*,⁵⁰ and *Rutledge v. Arizona Board of Regents*,⁵¹ are essentially causes of action for assault and battery, conversion, or defamation which have been transformed into due process claims actionable in federal court under section 1983 since the tortfeasor is an

⁴¹ *Id.* at 174. The other two delineated purposes were to enable federal courts to override certain kinds of state laws and to provide a remedy where the state law was inadequate. *Id.* at 173-74.

⁴² U.S. Const. amend. XIV, § 1.

⁴³ See *infra* notes 86-92 and accompanying text.

⁴⁴ 443 U.S. 55, 62-64 (1979).

⁴⁵ See also *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Swan v. Stoneman*, 635 F.2d 97 (2d Cir. 1980); *Dobosz v. DelMonte*, 509 F. Supp. 964 (D. Conn. 1981).

⁴⁶ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Dobosz v. DelMonte*, 509 F. Supp. 964, 970 (D. Conn. 1981).

⁴⁷ See, e.g., *Barry v. Barchi*, 443 U.S. 55 (1979); *Swan v. Stoneman*, 635 F.2d 97 (2d Cir. 1980).

⁴⁸ See *Swan v. Stoneman*, 635 F.2d 97, 102-04 (2d Cir. 1980). See also *infra* note 69 and accompanying text.

⁴⁹ 424 U.S. 693 (1976).

⁵⁰ 451 U.S. 527 (1981). See Note, *Defining the Parameters of § 1983: Parratt v. Taylor*, 23 B.C. L. REV. 1219 (1982).

⁵¹ 660 F.2d 1345 (9th Cir. 1981).

individual acting in an "official" capacity. As a result, litigants with grievances against any state entity or individual often proceed immediately into federal court without first utilizing available state administrative or judicial remedies.⁵²

There has been a mounting concern among commentators⁵³ and the courts⁵⁴ that the existence of these parallel forms of relief may be an unfortunate development.⁵⁵ Not only does it burden the federal courts with claims which may well be as competently adjudicated in the state courts,⁵⁶ but it has the effect of relegating the state court system into an inferior position,⁵⁷ contrary to the theory of comity with which the two systems were created.⁵⁸ When section 1983 was enacted there was a perceived need to keep the federal courts open and available to provide a corrective process for abuses by government officials.⁵⁹ This concern persisted through the "civil rights era" of the 1950's and early 1960's when *Monroe* was decided.⁶⁰ Section 1983 may have "burst its historical bounds,"⁶¹ however, inasmuch as the federal courts, arguably, no longer need to play this role in cases with no civil rights overtones.⁶² As a result, commentators⁶³ have suggested means to distinguish these claims from those in need of federal protection and to avoid "trivializing" the Civil Rights Act⁶⁴ by turning the federal courts into "font[s] of tort law."⁶⁵

One way to cut back on section 1983 claims which involve matters of essentially state law is the imposition of a requirement that remedies available in state court be exhausted before a section 1983 claim can be brought in federal court. Exhaustion, in its traditional sense, requires a litigant first to pursue an available administrative remedy before a court will act.⁶⁶ The requirement is,

⁵² This preference for the federal system is supported by a number of rationales which are independent of the type of claims at issue or the jurisdictional means implemented. Some of the reasons suggested are that federal judges are more competent, and more independent in resisting popular and political pressure. See, *Bator*, *supra* note 2, at 607; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Whitman, *supra* note 8, at 23 & n.108.

⁵³ See *supra* note 20.

⁵⁴ See cases discussed in sources collected at *supra* note 20.

⁵⁵ See *supra* note 20. See also, Aldisert, *supra* note 8, at 560-62; Whitman, *supra* note 8, at 9-11.

⁵⁶ See Whitman, *supra* note 8, at 25; Aldisert, *supra* note 8, at 560-62. ("If federal judicial intervention [in civil rights cases] is at all necessary, it is questionable whether intervention should be allowed to take the form of a litigant's Pavlovian recourse to federal courts.").

⁵⁷ See Aldisert, *supra* note 8, at 558-63.

⁵⁸ *Id.*

⁵⁹ *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring).

⁶⁰ *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (reflecting on the concern of the Civil Rights Act that the state remedy, although adequate in appearance, would not be adequate in practice and concluding that the fact that Illinois had a law which, if enforced, would give relief was "no barrier to the present suit in the federal court", *id.* at 183).

⁶¹ *Parratt v. Taylor*, 451 U.S. 527, 554 (1981) (Powell, J., concurring).

⁶² See discussions presented in sources collected at *supra* notes 8 and 20.

⁶³ *Id.*

⁶⁴ *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring).

⁶⁵ *Paul v. Davis*, 424 U.S. 693, 701 (1976).

⁶⁶ See, *McKart v. United States*, 395 U.S. 185, 193 (1969); *Meyers v. Bethlehem Ship-*

however, riddled with exceptions.⁶⁷ Where the prescribed administrative remedy is inadequate, exhaustion will not be required,⁶⁸ nor will it be required where the state procedure itself is being challenged.⁶⁹ In the context of a section 1983 action, "exhaustion of state remedies" has come to incorporate both "administrative"⁷⁰ and "judicial"⁷¹ exhaustion. In *Monroe v. Pape*, the Court had emphatically stated that state created judicial remedies were irrelevant to whether the claim could be brought in federal court.⁷² Similarly, in *McNeese v. Board of Education*,⁷³ a school desegregation case brought two years later in which the plaintiffs had available both administrative and judicial remedies at the state level in addition to their section 1983 claim, the Court found that neither procedure need be exhausted.⁷⁴

More recently, in *Patsy v. Board of Regents*,⁷⁵ the Court had occasion to reconsider its holdings in *McNeese* and *Monroe*. *Patsy* was an equal protection case brought by a white female teacher alleging sex discrimination. Although the state university system provided a grievance procedure, the plaintiff had not availed herself of it and had proceeded directly into federal court with her claim. The Court of Appeals for the Fifth Circuit, in a rehearing en banc,⁷⁶

building Corp., 303 U.S. 41, 50-51 (1938).

⁶⁷ For a discussion of other exceptions, see *Patsy v. Florida Intn'l University*, 634 F.2d 900, 903-04 (5th Cir. 1981), *rev'd sub nom.* *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982); *Comment, supra* note 1, at 538-40.

⁶⁸ 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.07 (1958 & Supps. 1970, 1976 and 1978).

⁶⁹ *Public Util. Comm'n v. United States*, 355 U.S. 534, 539-40 (1958); *Swan v. Stoneman*, 635 F.2d 97, 104 (2d Cir. 1980) ("given this attack on the constitutional adequacy of the remedies that are available, we conclude that it would be pointless to require [plaintiffs] to exhaust those remedies"). 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04 (1958 & Supps. 1970, 1976 and 1978).

⁷⁰ In *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982), the Court was urged to impose an administrative exhaustion requirement. It was suggested that it would lessen the burden on the federal courts by § 1983, further comity and improve federal-state relations, and enable the agency, with perceived expertise, to enlighten the federal court. *Id.* at 2566.

⁷¹ Judicial exhaustion requires a litigant to pursue judicial remedies at the state court level. Although not traditionally considered as included in the doctrine of exhaustion, it has become part of exhaustion concerns in civil rights cases, possibly because of confusion with the related area of abstention. See Note, *supra* note 11, at 1205. Judicial exhaustion has traditionally been more problematic than has administrative exhaustion because state court judgments are accorded *res judicata* effect. However, recently in *Kremer v. Chemical Construction Corp.*, 102 S. Ct. 1883 (1982) the Court held that administrative determinations which have been reviewed under an "arbitrary and capricious" standard by the state courts also carry such effect. In fact, decisions of administrative tribunals, at both state and federal levels, are now entitled to preclusive effect. See *Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975). See also 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.04, at 569 (1958).

⁷² *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

⁷³ 373 U.S. 668 (1963).

⁷⁴ *Id.* at 670-72.

⁷⁵ 102 S. Ct. 2557 (1982).

⁷⁶ The district court had dismissed for failure to exhaust administrative remedies. A panel of the Court of Appeals reversed and remanded, 612 F.2d 946 (5th Cir. 1981). Then, in a rehearing en banc, vacated the panel decision and remanded with instructions. *Patsy v. Florida Intn'l Univ.*, 634 F.2d 900 (5th Cir. 1981).

considered the full line of Supreme Court precedent⁷⁷ and determined that a plaintiff who had not exhausted available state administrative remedies would be required to show that they were, in some way, inadequate or inappropriate.⁷⁸ The case was remanded to give *Patsy* the opportunity to demonstrate that the state administrative grievance procedure was inadequate.⁷⁹

The Supreme Court reversed the lower court in *Patsy*, relying heavily on congressional intent,⁸⁰ and emphatically reiterating that there was no requirement that state administrative remedies be exhausted in section 1983 actions.⁸¹ Although *Patsy* did not involve judicial remedies, the Court relied on *Monroe*⁸² and *McNeese*,⁸³ both of which involved judicial as well as administrative remedies. Moreover, the court had recently addressed the judicial exhaustion requirement in *Board of Regents v. Tomanio*.⁸⁴ Therefore, it is reasonable to assume that its decision applies to all state created remedies whether administrative or judicial.

Although a much heralded decision,⁸⁵ *Patsy*, is significant only for what it did not do. The Court's refusal to accept the suggestion that it reconsider *Monroe* and *McNeese*, and deal with the mounting comity and workload issues on a jurisdictional level, is indicative of its decision to rely on another method of approaching these problems. In another line of cases — those dealing with procedural due process — the Court had already begun to address its concerns about workload and intrusion into the state domain as part of its substantive constitutional analysis rather than on a statutory jurisdictional level. This approach can be seen by reviewing the Court's recent decisions involving procedural due process.

⁷⁷ *Id.* at 902-10.

⁷⁸ The court reasoned, in a lengthy opinion considering the earlier precedents, that adequate and appropriate state administrative remedies must be exhausted before a § 1983 action could proceed in federal court. *Id.* at 912. The court noted, however, the traditional exceptions to the exhaustion doctrine, one of which was the inadequacy of the state administrative remedy. *Id.* at 912-14. In light of the fact that there was no indication of whether the state remedy was adequate or not, the case was remanded for a showing of adequacy of administrative remedies. *Id.* at 914.

⁷⁹ *Id.* at 914.

⁸⁰ *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2561-66 (1982). The Court relied on legislative history of both the 1871 Congress and the history of The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997-1997 (1976) (specific, limited exhaustion requirement enacted, § 1997(e)).

⁸¹ *Patsy*, 102 S. Ct. at 2568.

⁸² *Id.* at 2563.

⁸³ *Id.* at 2560.

⁸⁴ 446 U.S. 478, 491 (1980) (reiterating that there would be no judicial exhaustion requirement in such cases).

⁸⁵ On June 22, 1982, the day after the decision was rendered, The New York Times carried a front page article on the decision. Greenhouse, *Supreme Court Eases Path of Those Filing Civil Rights Actions*, N.Y. TIMES, June 22, 1982, § 1, at 1, col. 6. In it the author states that the decision was "important because a series of modern Supreme Court decisions have greatly expanded the usefulness and scope of the 111-year old statute. At the same time, these decisions raised concern that Federal courts were being overburdened by lawsuits." *Id.*

II. PROPERTY RIGHTS AND PROCEDURAL DUE PROCESS

The fourteenth amendment to the United States Constitution, among other things, prohibits the deprivation by the government of the life, liberty or property of any individual without due process of law.⁸⁶ At its most basic, this prohibition, enacted to ensure the individual against state governmental abuse,⁸⁷ means that before an individual is deprived of a constitutionally protected interest, the state government must afford him certain procedural protection. These processes must be adequate to enable the individual to be heard at a meaningful time and in a meaningful manner.⁸⁸

When an individual claims that a right has been violated, the analysis typically proceeds along two lines.⁸⁹ Does the claim involve a right protected by the Constitution and, if so, has the individual been denied due process with respect to the claim.⁹⁰ Depending on the significance of the right affected, the type and extent of these procedures differ.⁹¹ Generally, the Court has applied a balancing test to aid its resolution of the issue: the more essential the interest, the more process is due.⁹²

One way of approaching this balancing process was to focus on the timing of the hearing required.⁹³ This approach was adopted first in *Sniadach v. Family Finance Corporation*.⁹⁴ There, the Court invalidated a state statute permitting garnishment of wages without notice and a hearing for the debtor, finding that the affected individual must be granted a hearing prior to the action by the government.⁹⁵ Similarly, in *Goldberg v. Kelly*⁹⁶ the Court held unconstitutional a state act permitting the termination of welfare benefits without a prior hearing, stating that a pre-termination hearing was required.⁹⁷ *Bell v. Burson*⁹⁸ dealt with the constitutionality of a state statute authorizing the suspension, without a prior hearing, of drivers' licenses where drivers involved in accidents lacked proof of financial responsibility or failed to post security. There the Court required a prior hearing to determine the probability of an ultimate judgment against the individual.⁹⁹

*Goss v. Lopez*¹⁰⁰ raised the issue of the procedural rights due high school

⁸⁶ U.S. CONST. amend. XIV, § 1.

⁸⁷ See *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977).

⁸⁸ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁸⁹ See *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

⁹⁰ *Id.*

⁹¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 502 (1978).

⁹² *Id.* at 532-63. See also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (Court set forth four-part balancing test).

⁹³ See *infra* notes 138-70 and accompanying text.

⁹⁴ 395 U.S. 337 (1969).

⁹⁵ *Id.* at 342.

⁹⁶ 397 U.S. 254 (1970).

⁹⁷ *Id.* at 254-60.

⁹⁸ 402 U.S. 535 (1971).

⁹⁹ *Id.* at 542.

¹⁰⁰ 419 U.S. 565 (1975).

students prior to suspension. There the Court upheld the student's rights to some kind of pre-suspension hearing, but clearly imposed minimal procedural protections.¹⁰¹ In a dissent which was to foreshadow subsequent concerns with the Court's approach in this area, Justice Powell indicated that the interests involved in the case were not sufficient to merit constitutional scrutiny,¹⁰² being merely routine issues of school discipline.¹⁰³ He took the Court to task for placing undue emphasis on procedural considerations rather than focusing on the substantive quality of the right being violated.¹⁰⁴ Because he felt that the students had suffered no "grievous loss"¹⁰⁵ he questioned whether they had been deprived of anything sufficiently significant to merit constitutional protection.¹⁰⁶

Since then the Court has accepted the principle that, at least where some interests are concerned, a "post-deprivation" hearing, prior to the final deprivation, will be sufficient to satisfy due process. The issue of pre-termination, as contrasted with post-termination, hearings was first introduced in *Arnett v. Kennedy*.¹⁰⁷ There, in a case involving a discharged government employee, the Court determined that where a constitutionally cognizable property right has procedural limitations built into it, certain restrictions on it are constitutionally acceptable, since they are inextricably tied up with the very grant of that right by the government.¹⁰⁸ There were, however, multiple opinions in the case,¹⁰⁹ and a suggestion on the part of a number of concurring justices that they viewed the termination as acceptable only as long as there was an opportunity for review of the initial decision to dismiss before the employee was permanently terminated.¹¹⁰

¹⁰¹ The Court required, in connection with suspensions of ten days or less, merely oral or written notice of charges and an explanation of the evidence and an opportunity for the student to present his version. If prior notice and hearing, however, were not feasible, they should follow "as soon as practicable." *Id.* at 582-84.

¹⁰² *Id.* at 587 (Powell, J., dissenting).

¹⁰³ *See id.* at 600 (Powell, J., dissenting).

¹⁰⁴ *Id.* at 595-97 (Powell, J., dissenting). Powell felt that the state statute set forth procedures which were fully as substantial as the minimal ones which the Court imposed and that the Court's procedural emphasis was thus unnecessary.

¹⁰⁵ *Id.* at 587-89 (Powell, J., dissenting).

¹⁰⁶ *Id.* at 589 (Powell, J., dissenting).

¹⁰⁷ 416 U.S. 134 (1974).

¹⁰⁸ *Id.* at 151-54.

¹⁰⁹ Justice Rehnquist was joined in the opinion of the Court by Chief Justice Burger and Justice Stewart. *Id.* at 136. Justice Powell, joined by Justice Blackmun, concurred in part and concurred in the result in part. *Id.* at 164. Justice Douglas dissented, *id.* at 203, as did Justice Marshall, joined by Justices Douglas and Brennan. *Id.* at 206.

¹¹⁰ Justice Powell, anticipating his opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976), felt that, upon balance, the employee's right to a hearing after removal was sufficient and that under those circumstances a prior evidentiary hearing was not constitutionally required. *Arnett*, at 170-71 (Powell, J., concurring). *See infra* note 112. Similarly, Justice White's concurrence focused on the timing of the hearing and expressed the view that a hearing "at some time before a competitive civil service employee may be finally terminated for misconduct" is required, but that it did not need to be held prior to discharge. *Id.* at 185 (White, J., concurring).

Subsequently, this principle — that review prior to final termination might be all that the Constitution required — was adopted in *Mathews v. Eldridge*.¹¹¹ There, in a decision in which he attempted to balance the needs of the individual against those of society, Justice Powell introduced a four-step test¹¹² to evaluate the timing of a hearing. Applying the test, the Court found that a post-deprivation hearing, held prior to the time a final decision was reached but subsequent to the termination of benefits, satisfied the due process rights of individuals threatened with termination of disability payments.¹¹³

By 1979, post-deprivation hearings were held to satisfy the due process clause in a number of diverse cases. In *Mackey v. Montrym*¹¹⁴ a post-suspension hearing on the suspension of drivers' licenses where individuals had refused to take a drunk driving test was declared adequate.¹¹⁵ *Barry v. Barchi*¹¹⁶ held that a race horse trainer suspended for illegal drugs detected in a horse was entitled to no more than a post-suspension hearing.¹¹⁷ With respect to the timing of the administrative hearing, the Court had modified its approach and was beginning to consider the adequacy of post-deprivation remedies as a means of providing due process.

At the same time, the Court had also begun to look at state judicial remedies as sufficient on their own to satisfy due process concerns. *Paul v. Davis*,¹¹⁸ for example, was a section 1983 due process case in which the claimant asserted a defamation claim against a state official who had allegedly injured his reputation by posting his name on a list of shoplifters sent to local merchants.¹¹⁹ Although the case was decided against the plaintiff on the grounds that his interest in his reputation did not rise to the level of constitutional scrutiny,¹²⁰ the Court's reasoning proved both illuminating and prophetic. In Part I of his opinion, Justice Rehnquist noted that "respondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every state."¹²¹ In Part II, the Justice considered the two possible bases on which the Court of Appeals could have bottomed its holding for the claimant. He characterized the first as representing the view that the Due Process Clause and section 1983 somehow "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state

¹¹¹ 424 U.S. 319 (1976).

¹¹² The *Mathews* test involved four factors: (1) the private interest at stake; (2) the risk that the procedures used will lead to erroneous results; (3) the probable value of the procedural safeguard suggested; (4) the governmental interest affected. *Id.* at 335.

¹¹³ *Id.* at 349.

¹¹⁴ 443 U.S. 1 (1979).

¹¹⁵ *Id.* at 19.

¹¹⁶ 443 U.S. 55 (1979).

¹¹⁷ *Id.* at 66-68.

¹¹⁸ 424 U.S. 693 (1976).

¹¹⁹ *Id.* at 697.

¹²⁰ *Id.* at 712.

¹²¹ *Id.* at 697.

law claims."¹²² Justice Rehnquist then rejected the possibility that the fourteenth amendment by itself and without allegation of any other specific constitutional deprivation¹²³ could be read so as to turn it into "a font of tort law to be superimposed upon whatever systems may already be administered by the States."¹²⁴ The Justice then turned to the second possibility, the existence of a protectible liberty interest, which he found lacking.¹²⁵ Although the absence of any such protectible interest by itself precluded the presentation of a valid cause of action under the fourteenth amendment, the Court's analysis also gave rise to the notion that unless a state procedure was itself challenged, a fourteenth amendment cause of action could be precluded where state procedures existed.

The dissent by Justice Brennan, with whom Justices Marshall and White concurred, attacked the majority approach to the extent that it was based to any degree on the existence of a state remedy for defamation;¹²⁶ seeing any such reliance as a direct departure from *Monroe v. Pape*.¹²⁷ The dissent went on to say:

Indeed, even if the Court were creating a novel doctrine that the state law is in any way relevant, it would be incumbent upon the Court to inquire whether respondent has an adequate remedy under Kentucky law or whether petitioner would be immunized by state doctrines of official or sovereign immunity. The Court, however, undertakes no such inquiry.¹²⁸

The dissent recognized that the majority was influenced by the availability of remedies in the state court system in determining the merits of section 1983 due process claims.¹²⁹

This analysis was continued a year later in *Ingraham v. Wright*.¹³⁰ There, in a due process case brought under section 1983, school children challenged school authorities' use of physical punishment.¹³¹ Although not referring to *Paul v. Davis*, the Court found that even though a constitutionally protected liberty interest was involved, due process was satisfied through the existence of a state tort remedy.¹³² In an important dissent, Justice Stevens noted that where a property right was concerned, a post-deprivation remedy may be all that due

¹²² *Id.* at 699.

¹²³ *Id.* at 700-01.

¹²⁴ *Id.* at 701.

¹²⁵ *Id.* at 712.

¹²⁶ *Id.* at 715 (Brennan, J., dissenting).

¹²⁷ *Id.* at 715 (citing *Monroe v. Pape*, 365 U.S. 167, 183 (1961)).

¹²⁸ *Id.* at 715.

¹²⁹ *Id.*

¹³⁰ 430 U.S. 651 (1977).

¹³¹ *Id.* at 653.

¹³² *Id.* at 682. ("We conclude that the due process clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools as that practice is authorized and limited by the common law.").

process requires.¹³³ He then went on to say that in the liberty context also, it now appeared that *Paul v. Davis* had been correctly decided, but for the wrong reasons; the proper reason now being that the existence of an adequate state tort remedy would provide all the process that was due where reputational interests were involved.¹³⁴

The *Ingraham* Court equated due process with the availability of legal relief. In making its due process analysis the Court looked not to a subsequent administrative process but instead to the availability of state judicial remedies.¹³⁵ That due process could be satisfied in this latter manner amounts to a significant doctrinal leap which can be best understood by examining two recent cases, one of the Supreme Court¹³⁶ building on *Ingraham* and one by the Ninth Circuit¹³⁷ in which the Circuit Court followed what it viewed as Supreme Court teaching.

In *Parratt v. Taylor*,¹³⁸ a section 1983 case brought by a state prisoner for the negligent loss of a twenty-three dollar hobby kit, the Court had an opportunity to retreat from its apparent formalistic reliance on parallel state remedies. As the concurring opinions indicate,¹³⁹ the Court could have decided the case on a number of grounds.¹⁴⁰ Nonetheless, it held specifically both that a constitutionally cognizable property right was implicated¹⁴¹ and that negligent actions were covered under the purview of section 1983.¹⁴² The Court went on, however, to state that because the prisoner had a state court remedy for the property loss, he was not deprived of his property without due process.¹⁴³ Accordingly it dismissed the claim for failure to allege a constitutional violation.¹⁴⁴

In holding as it did the Court specifically noted that the state entity had not had an opportunity to address the issue before the claimant proceeded into federal court.¹⁴⁵ Consequently, the Court distinguished the case as involving a deprivation resulting from failure to follow established state procedure rather than the result of following state procedure.¹⁴⁶ That is, the procedure itself is not being attacked, but rather the attack is upon the unauthorized action of the state official.¹⁴⁷ This was a surprising distinction to be made at this juncture in

¹³³ *Id.* at 701 (Stevens, J., dissenting).

¹³⁴ *Id.* at 701-02 (Stevens, J., dissenting).

¹³⁵ *Id.* at 675.

¹³⁶ *Parratt v. Taylor*, 451 U.S. 527 (1981). See Note, *supra* note 50.

¹³⁷ *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981).

¹³⁸ 451 U.S. 527 (1981).

¹³⁹ See *infra* notes 149-55 and accompanying text.

¹⁴⁰ See *infra* notes 149-55 and accompanying text.

¹⁴¹ *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981).

¹⁴² *Id.* at 534-35.

¹⁴³ *Id.* at 543-44.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 541, 543.

¹⁴⁷ *Id.*

section 1983 development. After *Monroe v. Pape*, allegations involving this latter type of random, as contrasted with authorized, behavior have been regularly brought under that provision.¹⁴⁸

Justice Powell concurred, but only because he felt that negligent acts did not constitute deprivation of property within the meaning of the fourteenth amendment.¹⁴⁹ He referred to the "somewhat disturbing implication in the Court's opinion concerning the scope of due process guarantees."¹⁵⁰ Noting that the Court analyzed the case solely in terms of procedural rights,¹⁵¹ "fail[ing] altogether to discuss the possibility that the kind of state action alleged here constituted a violation of the substantive guarantees of the Due Process clause,"¹⁵² he was concerned that the Court was putting an artificial emphasis on procedure rather than substantive merit in adjudicating these claims.¹⁵³ Justice Stewart also concurred, but on different grounds. He felt that the property loss involved was not the kind of deprivation to which the fourteenth amendment was addressed¹⁵⁴ but added that, even if it were, by making a reparations remedy available, the state had provided all the process that was due.¹⁵⁵

The significance of *Parratt* is evident in a recent Ninth Circuit opinion, *Rutledge v. Arizona Board of Regents*.¹⁵⁶ In *Rutledge*, a scholarship athlete sued the state university in federal court under section 1983 on a number of grounds. Among the various claims asserted were allegations of assault and battery, demotion, harrassment, defamation, and deprivation of his scholarship without a hearing. Although the court's approach to all four of these claims is indicative of the lower courts' current handling of section 1983 claims,¹⁵⁷ its treatment of the assault and battery allegations demonstrates the effect of *Parratt v. Taylor*.

¹⁴⁸ See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976).

¹⁴⁹ *Parratt v. Taylor*, 451 U.S. 527, 546 (1981) (Powell, J., concurring). Justice Powell felt that negligent losses were not "deprivations" in the constitutional sense, distinguishing "active" and "passive" deprivations. *Id.* at 546-54.

¹⁵⁰ *Id.* at 552.

¹⁵¹ *Id.* at 547 ("the Court suggests a narrow, wholly procedural view of the limitation imposed on the states by the Due Process Clause") and at 552.

¹⁵² *Id.* at 553. (Powell, J., concurring).

¹⁵³ *Id.* at 550-51 n.8.

¹⁵⁴ *Id.* at 554. (Stewart, J., concurring).

¹⁵⁵ *Id.* at 545. (Stewart, J., concurring).

¹⁵⁶ 660 F.2d 1345 (9th Cir. 1981).

¹⁵⁷ The court approached the demotion, deprivation of scholarship, and harassment claims in the way that has become a standard approach of the federal courts to these cases, holding that no constitutional rights were involved. *Id.* at 1352-53. The court found no state-created liberty or property right in a particular position on a football team and buttressed its conclusion by stating that the demotion was not a "grievous loss", citing *Goss v. Lopez* (Powell, J., dissenting). *Id.* at 1353. With respect to the harassment and defamation claim the court cited *Paul v. Davis*, finding that any transgressions constituted nothing more than a tort which the state may protect against. *Id.* The claim of deprivation of scholarship was rejected by the court, for failing to allege adequately an interest in "liberty" or "property" coupled with a deprivation of that interest. *Id.*

The court simply cited *Parratt*¹⁵⁸ and stated that although the plaintiff's "liberty" interest may have been implicated, his due process rights would be satisfied through the "postdeprivation hearing available under the law of the state of Arizona."¹⁵⁹ The court stated:

The Supreme Court in *Parratt v. Taylor* indicated that when no practical way to provide a pre-deprivation hearing exists, a postdeprivation hearing provided at a 'meaningful time and in a meaningful manner' will suffice. (citation omitted) The issue becomes merely whether the remedies available under Arizona law and in the Arizona courts constitute the postdeprivation hearing required by the Fourteenth Amendment. As already mentioned, counsel have informed us that certain proceedings growing out of the incidents related by the complaint before us already have taken place. This indicates not only the existence of postdeprivation remedies under Arizona law, but also that appellant has pursued those remedies. Thus, our task is made less difficult than that of the *Parratt* Court, which relied on the mere existence of state tort procedures to find that due process concerns had been met, despite the plaintiff's failure to take advantage of those procedures. In the instant case, since appellant has sought redress in the Arizona state courts, and in the absence of suggestion that the postdeprivation procedures under state law are deficient, we must conclude that the alleged deprivation was not without due process of law. That the effect of our holding is to relegate appellant to his tort law remedy under Arizona law for Kush's alleged assault and battery should surprise no one. That is the consequence of *Parratt v. Taylor* as applied to this action of Kush.¹⁶⁰

In effect, the court assumed that Rutledge had a protected interest and proceeded to find that the existence of a state tort remedy was an adequate protection for that interest. Rutledge was unable to state a claim under section 1983 because there existed no violation of the due process clause itself.

In two subsequent cases¹⁶¹ the confusing situation left by *Parratt* is well-documented. Without mentioning *Rutledge*, another Ninth Circuit panel in *Wakinekona v. Olim*,¹⁶² dealt with an appeal by a state prisoner who claimed that he had been denied the independent decisionmaker required by the state regulations at his hearing before his transfer out-of-state.¹⁶³ In determining that a liberty interest was implicated and that the prisoner stated a claim under sec-

¹⁵⁸ *Id.* at 1352.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981) (as amended on denial of rehearing and rehearing en banc); *Pantoja v. City of Gonzales*, 538 F. Supp. 335 (N.D. Calif., 1982).

¹⁶² 664 F.2d 708 (9th Cir. 1981) (as amended on denial of rehearing and rehearing en banc).

¹⁶³ *Id.* at 709.

tion 1983, the court, on a petition for rehearing, distinguished *Parratt* as having implicated a property rather than a liberty interest.¹⁶⁴ Nonetheless, the court went on to note that in *Parratt* there was general language to the effect that if a deprivation occurs "because a state *fails* to follow its procedure rather than because it follows its procedure, and there is a state court remedy, then the state has provided all the process that is due."¹⁶⁵ To state a claim under section 1983 implicating an interest protected by due process, one must attack either the state procedure itself or allege a violation for which there is no remedy provided by the state.

In framing *Parratt* in this manner, the court is recognizing that the Supreme Court was drawing a novel distinction. Where the allegation of deprivation is based on an unconstitutional state procedure or practice, the federal courts appropriately adjudicate and, in fact, no exhaustion is ever required.¹⁶⁶ For the first time, however, the Court was addressing the common law tortious act by the official and saying that where a state judicial remedy is provided, and its legitimacy not challenged, due process is afforded. Significantly, the *Wakinekona* court went on to state that to read *Parratt* as any broader than the

context in which it was made, that of a tortious deprivation of property for which the state provided a tort remedy . . . would remit all § 1983 cases to state courts whenever the conduct complained of violated state law as well as the federal Constitution. The result would be to read into § 1983 a requirement of exhaustion that has consistently been rejected by the federal court.¹⁶⁷

The court in *Wakinekona* thus recognized that the effect of *Parratt* might be the equivalent of imposing an exhaustion requirement upon section 1983 actions based on misconduct, albeit at a different stage in the proceeding. Evidently not wishing to adopt any such requirement, the court distinguished *Parratt*.¹⁶⁸

In another case involving a district court in the Ninth Circuit, *Pantoja v. City of Gonzales*,¹⁶⁹ the court cited the language of *Wakinekona*, but failed to recognize the point contained in the passage which it quoted, thus embracing the supposed distinction between exhaustion and due process — that between jurisdiction and the merits — flowing from *Parratt*. The court stated:

It is important to keep in mind that *Parratt* is not an exhaustion case. The issue there was not whether state remedies had to be pursued before a federal court action could be maintained . . . Rather the

¹⁶⁴ *Id.* at 715.

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* notes 48, 69 and accompanying text.

¹⁶⁷ *Wakinekona v. Olim*, 664 F.2d 708, 715 (9th Cir. 1981).

¹⁶⁸ The court observed, "In short, *Parratt* is simply a different case from the present one." *Id.*

¹⁶⁹ 538 F. Supp. 335 (N.D. Calif. 1982).

issue was whether the availability of certain post-deprivation state remedies was sufficient to render the alleged deprivation one not without due process of law.¹⁷⁰

The fact that exhaustion and due process issues are viewed as separate by the lower courts signals how confusing the Supreme Court's approach has been. This analytic confusion has successfully lulled both litigants and jurists into believing that these two issues are distinct, leading to the conclusion that the availability of parallel state remedies is properly considered in determining due process issues on their merits, while at the same time having no relevance to access to the federal courts under the exhaustion doctrine.

III. THE DANGERS OF MIXING JURISDICTIONAL DOCTRINES WITH SUBSTANTIVE RIGHTS

The interrelationship of these purportedly unrelated lines of cases is readily apparent. As a result of the holdings of *Patsy*, *McNeese*, and *Monroe*, it appears that the availability of alternative state relief is irrelevant to a claim under section 1983.¹⁷¹ Nonetheless, the outcome of the procedural due process cases casts substantial doubt on the real effect of the *Patsy* holding. Although parallel state remedies may be irrelevant for jurisdictional questions, the Court has chosen to deal with them in a much more comprehensive and hidden manner. Concerned about the problem of parallel remedies¹⁷² and their impact on the federal system, yet reluctant to overrule or reconsider *Monroe* and *McNeese*, the Court has opted to interject state law procedural remedies as a solution to work load and other problems of the federal courts on a substantive constitutional, rather than jurisdictional, basis. The result is anomalous. One need not exhaust one's subsequent state administrative or judicial remedies before proceeding into federal court under section 1983. The very existence of such a state-based remedy, however, causes the court to conclude, where the constitutionality of the state procedures are not challenged, that the claimant has no right to recovery, as no violation of the due process clause will be deemed to have occurred. This is the teaching of *Paul v. Davis*, *Ingraham v. Wright*, and *Parrott v. Taylor*. It is a back door method of re-introducing parallel state remedies, but at the substantive, rather than the jurisdictional level. In essence the Court is solving a jurisdictional, work distribution problem by abolishing the underlying cause of action.¹⁷³ There is no federal jurisdiction and no recourse to fed-

¹⁷⁰ *Id.* at 338 n.5.

¹⁷¹ See *supra* notes 37-41, 64-72, 75-85 and accompanying text.

¹⁷² That the Court is concerned is well documented. This was the basis of Justice Frankfurter's dissent in *Monroe v. Pape*. See *supra* note 40. As early as *Paul v. Davis*, Justice Rehnquist expressed concern that the federal courts were being asked to create "a font of tort law to be superimposed [on] . . . the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). See also *infra* note 183 and accompanying text.

¹⁷³ This is distinctly similar to the Burger Court's approach to other "jurisdictional" and work distribution issues. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

eral court if there is no federal claim at issue. This is jurisprudentially inappropriate. Such action results in eliminating constitutional protections rather than determining only whether the constitutional protections should be enforced by a state or a federal court.

Several distinct problems arise from the Court's recent integration of procedural due process and section 1983 cases. The holding in *Monroe v. Pape* is severely undercut and doctrinal purity is being lost. On a practical level, the workload of the federal courts is in no way substantially reduced, and litigants are misled about the relief available to them in federal court. Finally, procedural due process protections are diluted.

Although pretending to adhere to *Monroe*, the Court has, in essence, begun to disregard the case. The Court is maintaining the appearance of an open door but shutting the federal courts as avenues from which to obtain relief by leaving the statutory federal remedy intact but restricting its constitutional, substantive, underpinnings. Moreover, the Court's current approach pays no heed to the actual adequacy or inadequacy of the state remedy, thereby disregarding one of *Monroe's* basic tenets.¹⁷⁴ In *Parratt v. Taylor* the Court addressed this concern, making its position clear. It stated:

[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy due process. The remedies provided *could* have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process. (emphasis added).¹⁷⁵

Thus, the mere *potential* availability of a forum, without more, is sufficient to meet the constitutional requirement of procedural due process and preclude a section 1983 action.

Moreover, the mingling of issues of substance with issues of jurisdiction has always been disfavored.¹⁷⁶ By treating jurisdictional considerations of comity and workload at the substantive level, that is, in making determinations on the merits in individual cases, the Court is actually expanding its workload at the access level in contravention of its goals, while narrowing substantive rights. The removal of rights is not an appropriate way of solving questions of comity or work distribution. These issues are properly treated as system-wide problems, not as issues upon which to decide the merits of individual cases.

In addition to the question of legal inconsistency, there are far more dangerous practical and theoretical implications of mixing substance and

¹⁷⁴ See *supra* notes 40-41 and accompanying text; see also *Paul v. Davis*, 424 U.S. 693, 715 (1976) (Brennan, J., dissenting).

¹⁷⁵ *Parratt v. Taylor*, 451 U.S. 527, 544 (1981).

¹⁷⁶ See, e.g., Mr. Justice Brennan's dissenting opinion in *Warth v. Seldin*, 422 U.S. 490, 520 (1975). See also *Bell v. Hood*, 327 U.S. 678, 680-85 (1946) for the Court's discussion of such problems.

jurisdiction in this manner. As noted, confusion for litigants is likely to result.¹⁷⁷ Believing that the lack of an exhaustion requirement signals an open and responsive approach to civil rights claims by the federal courts, claimants opt to litigate in a federal forum. Once there, the litigant discovers that the federal courts have concluded that there has been no violation of due process with respect to their section 1983 claims since the mere existence of a state remedy was all the process that was due.¹⁷⁸ The logic of this approach hardly seems ineluctable and is, if anything, circular, confusing and irrational.

Finally, the effect which this combination of procedural due process and section 1983 analysis is having on substantive issues of procedural due process is more serious. As Justice Powell noted in his *Parratt* concurrence, due process decisions cannot be based merely on the existence or non-existence of potential alternative relief.¹⁷⁹ Due process requires specific normative conduct and is not alone a function of what other forums might be available.¹⁸⁰ It imposes substantive limitations on state action,¹⁸¹ which must be decided by balancing the particular governmental action against the specific deprivations claimed by the individual.¹⁸² Such rights should not be defined away by reference to possible outcome had a litigant proceeded in another forum. In its current approach, the Court is running the risk of losing the ability to distinguish between different types of due process claims that will likely arise. It is locking itself into a procedural approach, whereby it will be unable to separate a claim legitimately in need of protection in the federal court from a claim for which relief could just as well be obtained at the state level. This shortsighted course of conduct can well end up denigrating the very rights which the due process clause and section 1983 are meant to secure and to which the Court is giving lip-service in the exhaustion cases.

¹⁷⁷ See Whitman, *supra* note 8, at 6-7. She notes that § 1983 litigation is not only an "elaborate, and often unpredictable game," *id.* at 7, but that federal judges have elaborated their own doctrines to dispose of specific cases. *Id.* at 6. Furthermore, courts who wish to acknowledge certain § 1983 claims are forced to go out of their way to distinguish Supreme Court precedent. See *supra* notes 162-70 and accompanying text.

¹⁷⁸ See, e.g., *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 829-30 (1st Cir. 1982). There the court found no procedural due process violation where a real estate development corporation brought a § 1983 suit against municipal officers, rejecting plaintiff's assertion that it had been denied a fair and meaningful hearing. The Court noted that the plaintiff had available administrative hearings as well as state judicial review, citing *Mathews v. Eldridge*. *Id.* at 830. See also *Ellis v. Hamilton*, 669 F.2d 510, 515 (7th Cir. 1982) (state remedies provide due process where adopted children seized by county officials); *Roslindale Cooperative Bank v. Greenwald*, 638 F.2d 258, 261 (1st Cir. 1981) (state statutory proceeding satisfies due process requirements where bank, its directors and shareholders claimed due process violations in certification of bank by Massachusetts Commissioner of Banks); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981). See also *supra* notes 156-60 and accompanying text.

¹⁷⁹ *Parratt v. Taylor*, 451 U.S. 527, 552-53 (1981) (Powell, J., concurring).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 552. It should be noted, however, that Justice Powell wrote the opinion in *Ingraham* which was instrumental in creating the current due process problems. See *supra* notes 130-34 and accompanying text.

¹⁸² See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

IV. A PROPOSED SOLUTION

The inherent tension between the federal and state court systems is particularly prevalent in actions brought under section 1983. There is a pressing need for the resolution of the problems raised by the existence of parallel federal and state remedies. The Court has indicated its own awareness of this problem, both in terms of workload and of comity, and has, in fact, appealed to the legislature for help.¹⁸³ In the meantime, however, the Court has opted to deal with the problem by injecting parallel state remedies into the content of the due process clause rather than treating such state remedies as part of the jurisdictional issue which they create.

The problem was Court created,¹⁸⁴ however, and, at least until the legislature acts, should be dealt with by the Court in a forthright manner. One approach, repeatedly suggested, would be to reconsider the type of deprivations which are constitutionally cognizable. This approach could take a number of tacks. As suggested by Justice Powell in *Goss v. Lopez*,¹⁸⁵ Justice Stewart in *Parratt*¹⁸⁶ and a number of lower courts,¹⁸⁷ some deprivations are simply not significant enough to trigger due process protection. Alternatively, as Justice Powell suggests in *Parratt v. Taylor*, negligent deprivations may not constitute deprivations in the constitutional sense.¹⁸⁸ In effect, as some commentators have suggested, the type of right which constitutes a legitimate property or liberty interest may need to be reconsidered.¹⁸⁹

Approaching the problem from the standpoint of the interest at stake and the nature of the deprivation involves a piecemeal, step by step, approach which the Court has indicated, through its appeal to the legislature to correct the problem on a broad, statutory basis, it is unwilling to undertake. Furthermore, while this approach is forthright, it too solves a work distribution problem by defining rights rather than focusing on remedies. This approach also can lead to a deprivation of rights rather than their ultimate protection by a different device.

A preferable solution to the problem would be to adopt the traditional approach taken in exhaustion cases, requiring some showing of the inadequacy of a state remedy¹⁹⁰ before allowing a case to proceed directly to federal court.¹⁹¹

¹⁸³ *Patsy v. Board of Regents*, 102 S. Ct. 2257, 2566-67 (1982).

¹⁸⁴ See *supra* notes 37-41, 72-74 and accompanying text.

¹⁸⁵ See *supra* notes 102-06 and accompanying text.

¹⁸⁶ See *supra* notes 154-55 and accompanying text.

¹⁸⁷ See, e.g., *Raymon v. Alvord Indep. School Dist.*, 639 F.2d 257, 258 (5th Cir. 1981). (Some rights may be so insubstantial that case is not cognizable under § 1983); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981).

¹⁸⁸ See *supra* note 149 and accompanying text.

¹⁸⁹ See *supra* note 21.

¹⁹⁰ This is the suggestion made by the appeals court in *Patsy* and rejected by the Supreme Court. *Patsy v. Florida State Univ.*, 634 F.2d 900, 912-14 (5th Cir. 1981), *rev'd sub nom.* *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982).

¹⁹¹ This is not to say the holding in *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2568 (1982), that no exhaustion of state remedies is required to bring a claim under § 1983, should be

Both Justice Brennan in his dissent in *Paul v. Davis*¹⁹² and the court in *Rutledge v. Arizona Board of Regents*¹⁹³ were concerned that the remedy, although adequate in theory, might not be adequate in practice. Furthermore, such concern about the adequacy of state remedies lay at the root of *Monroe v. Pape*.¹⁹⁴ These concerns appear to be overstated since the exhaustion doctrine currently contains well-articulated exceptions to protect against a litigant being forced to a fruitless resort to a state forum.¹⁹⁵ This proposed use of the doctrine is consistent with standard exhaustion analysis since it allows for decision of claims initially by state decision makers but preserves the availability of federal courts to step in to protect rights when there is no available state remedy¹⁹⁶ or when another exception to exhaustion exists.¹⁹⁷ This proposal would have the desired effect of addressing the problem in a straight-forward manner, clearing up confusion and doctrinal impurities, and preserving section 1983 for exactly those cases for which it was intended: cases where the states are, in fact, abusing the individual's federally protected rights.

The solution allows full protection of individual rights. It furthers the goals of the federal system by allowing the state courts to act as protectors of federal rights yet assures national uniformity through potential Supreme Court review. Furthermore, an existing exception to the exhaustion doctrine assures immediate access to federal court where the protected rights of an individual are willfully abridged by a state action. This would return federal civil rights litigation to the bounds for which the statute was created — remedying only that state action against citizens growing out of discriminatory conduct — rather than providing an additional remedy for any possible harm done at the hands of state actors.

The exhaustion approach should be adopted by the Court in the cases presently awaiting decision so long as state remedies are in fact presently avail-

ignored. Rather, the limited exhaustion requirement suggested here addresses determinations of whether a violation of procedural due process has occurred at all, following from the court's *Parratt* decision. Where there is found no adequate post-deprivation state remedy, no exhaustion of such inadequate state remedies should be required before the substantive violations of a constitutional right can be litigated under § 1983 in federal court.

¹⁹² See *supra* notes 127-28 and accompanying text.

¹⁹³ See *supra* note 160 and accompanying text.

¹⁹⁴ See *supra* notes 40-41, 60 and accompanying text.

¹⁹⁵ For a thorough discussion of the presently recognized exceptions to the exhaustion doctrine as well as cases from the Supreme Court and Circuit Courts discussing these issues, see *Patsy v. Florida State Univ.*, 634 F.2d 900, 902-12 (5th Cir. 1981), *rev'd sub nom.* *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982).

¹⁹⁶ To the extent that there is no state remedy, exhaustion is clearly not required. *Id.* at 903 and cases cited therein. Moreover to the extent that the individual has claims against the state itself for failure to provide a remedy, these claims must be brought in state court because of the eleventh amendment and are not proper subjects for federal court action even under the Civil Rights Act. See Mr. Justice Powell's concurring opinion in *Parratt v. Taylor*, 451 U.S. 527, 550 n.8 citing *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

¹⁹⁷ See *supra* notes 66-69 and accompanying text.

able and adequate.¹⁹⁸ The only questions the Court need face are the availability and adequacy of the state remedy. If such avenues exist, the case should be dismissed on jurisdictional grounds alone and sent to the state system for decision.

Adoption of this proposal will ensure preservation of the purpose and scope of the Civil Rights Act, protection of individual rights and a distribution of workload which makes sense in terms of both the needs of the federal system and principles of comity.

CONCLUSION

In its current approach to actions brought under section 1983, the Supreme Court has created considerable confusion. In effect, pretending to adhere to *Monroe* and *McNeese*, the court refuses to require the exhaustion of state created remedies before a section 1983 action may be brought in federal court. At the same time the court has chosen to make the substantive availability of section 1983 to vindicate due process claims dependent on the mere existence of a state remedy. This mixing of substance and procedure has serious doctrinal and practical consequences and ill serves the interests of the courts, litigants and both the federal and state systems. The problems caused by the Court's present approach can best be remedied by adopting a requirement that before a section 1983 can proceed the litigant show that the state procedure is in some way inadequate. Such a requirement would serve to facilitate a proper distribution of work between federal and state systems while preserving the civil rights acts for the preservation of federally created rights against actions by the states. Nonetheless, whether this particular proposal is adopted is less important than taking note that the present approach of the court is illogical and harmful.

¹⁹⁸ A determination of adequacy is straight forward with respect to administrative remedies, and would follow traditional exhaustion analysis. Where judicial remedies are involved the plaintiff would need to make a showing that the defendants were somehow immune under state law, that no state tort remedy existed, or that reliance on the state system would result in a frustration of the protections for which § 1983 was enacted.

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