

# THE EXHAUSTION REQUIREMENT UNDER SECTION 1983 IN THE SECOND CIRCUIT

## INTRODUCTION

Section 1983, Title 42 of the United States Code<sup>1</sup> grants to any person within the jurisdiction of the United States the right to bring suit against any individual<sup>2</sup> who, through actions under color of state law,<sup>3</sup> deprives that person of any "rights, privileges or immunities secured by the Constitution and laws"<sup>4</sup> of the United States. The existence of a cause of action under Section 1983, however, does not mean a federal court has jurisdiction to hear the case. Thus, while Section 1983 provides a cause of action for certain deprivations under color of state law, federal courts can only hear these cases if there also exist some grounds for jurisdiction.<sup>5</sup>

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1. 42 U.S.C. § 1983 (1976).

2. "Individual" includes states, cities and other municipal corporations. *Monell v. Department of Social Services*, 436 U.S. 658, 688-89 (1978). See also Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 405, 409 (1978).

3. 42 U.S.C. § 1983 (1976).

4. *Id.* See *Maine v. Thibotut*, 448 U.S. 1, 4-8 (1980), for discussion of the meaning of "and laws."

5. 28 U.S.C. § 1343(3) (1976) is generally regarded as the "jurisdictional counterpart" of Section 1983. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 454 (1974); *Eisen v. Eastman*, 421 F.2d 560, 561 (2d Cir. 1969), cert. denied 400 U.S. 841 (1970). See also Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49, 52 n.22 (1976). Section 1343(3) provides:

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

28 U.S.C. § 1343(3) (1976).

It is important to note that the constitutional deprivations under § 1343(3) include any constitutional deprivations, but deprivations under any "act of Congress providing for equal rights of the citizens" has been held limited to just that—deprivations of statutorily created equal rights. See, e.g., *Maine v. Thibotut*, 448 U.S. 1, 8 n.6 (1980); *Chapman v. Houston Welfare Rights Comm'n*, 441 U.S. 600 (1979); but see *Maine v. Thibotut*, 448 U.S. 1, 17-24 (1980) (Powell, J., dissenting).

Once there is a cause of action under Section 1983 and some jurisdictional requirement has been satisfied under title 28, there remains at least one hurdle to be cleared before the case will be heard in a federal court. That hurdle is a doctrine called exhaustion.

Even since the framers wrote article III of the Constitution,<sup>6</sup> which is the grant of jurisdiction to the federal courts, the question has been raised whether, in cases where a state has an interest, the plaintiff should be required to "exhaust" his state judicial or administrative remedies prior to filing suit in federal court. In Section 1983 cases, where the cause of action exists solely by virtue of acts "under color of state law," this is a very important question.

On the one hand, proponents of states' rights argue that judicial economy, as well as proper concepts of federalism, will be promoted by allowing states an opportunity to correct their own mistakes prior to involving the federal judiciary.<sup>7</sup> A plaintiff who is not satisfied with the state resolution of his claim can always go to federal court after exhausting his state remedies.<sup>8</sup> On the other hand, the language and legislative history of Section 1983 have been read by many to indicate that Congress' intent in passing this provision was to grant a cause of action in federal court for constitutional deprivations brought about under color of state law, without regard to any state remedy.<sup>10</sup>

Since 1961 the question of judicial exhaustion in Section 1983 actions has been settled.<sup>11</sup> A plaintiff need not seek and exhaust

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In addition to exhaustion, there are other hurdles such as abstention, mootness, ripeness, standing, and case in controversy which are beyond the scope of this note. For general treatment of these subjects, see: Redish, *Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978) (abstention); Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) (standing); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974) (mootness); Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106 (1962) (controversy, ripeness).

6. U.S. CONST. art. III.

7. "Exhaust" in this context means to go through the state judicial or administrative system until a "final decision" has been rendered. See Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 538 (1974).

8. See Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206 (1968); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 540-42 (1974).

9. See 41 U. CHI. L. REV., *supra* note 8, at 551-52.

10. See Justice Douglas' majority opinion in *Monroe v. Pape*, 365 U.S. 167, 171-83 (1961), for an example of this position.

11. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). See also *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1264 (1977).

state judicial remedies prior to filing a Section 1983 suit in federal court.<sup>12</sup> While the Supreme Court has held in numerous cases that exhaustion of administrative remedies is not a prerequisite to filing Section 1983 actions,<sup>13</sup> it has not, however, done so with the clarity and finality attending the death of judicial exhaustion.<sup>14</sup>

Predictably, while some circuits have interpreted the Supreme Court cases as adopting a flat, no-exhaustion rule,<sup>15</sup> other circuits have not.<sup>16</sup> The Court of Appeals for the Second Circuit has chosen to deal with the issue on a case-by-case basis, reading the Supreme Court cases as merely condemning a wooden application of the exhaustion requirement.<sup>17</sup> As a result, district court judges in the second circuit have been faced with conflicting signals from the Supreme Court and the court of appeals in regard to Section 1983. In fact, there currently exists a split in the Vermont District on the question of administrative exhaustion in Section 1983 cases.<sup>18</sup>

This note will discuss the exhaustion requirement in Section 1983 cases in the Supreme Court and the second circuit. It will attempt to show the inconsistency in the approaches, how the dif-

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12. 365 U.S. at 183.

13. See, e.g., *Ellis v. Dyson*, 421 U.S. 426 (1975); *Alee v. Medrano*, 416 U.S. 802 (1974); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Carter v. Stanton*, 405 U.S. 669 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Shafer*, 392 U.S. 639 (1968); *King v. Smith*, 392 U.S. 309 (1968). See also *Steffel v. Thompson*, 415 U.S. 452 (1974).

14. *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); cf. *Eisen v. Eastman*, 421 F.2d 560, 567-69 (2d Cir. 1969), cert. denied 400 U.S. 841 (1970).

15. See, e.g., *Gillette v. McNichols*, 517 F.2d 888 (10th Cir. 1975); *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1974), cert. granted, 423 U.S. 923 (1975), cert. dismissed, 426 U.S. 471 (1976); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Gilliam v. Omaha*, 459 F.2d 63 (8th Cir. 1972).

16. See, e.g., *Patsy v. Florida Int'l. Univ.*, 600 F.2d 900 (5th Cir. 1981), cert. granted 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 80-1874); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

17. *Eisen v. Eastman*, 421 F.2d at 569.

18. District Judge Holden has held exhaustion of administrative remedies is required. See *Garrison v. Stoneman*, Civ. Action 80-6, slip op. at 6 (D. Vt. 1979). District Judge Coffrin has held exhaustion is not required. See *Malanson v. Wilson*, Civ. Action 79-116, slip op. at 5 (D. Vt. 1980); *Hark v. Dragon*, 477 F. Supp. 308 (D. Vt. 1979), aff'd, 611 F.2d 11, 14 (2d Cir. 1979). But see Holden, District Judge, *Bowles v. Robbins*, 359 F. Supp. 249 (D. Vt. 1973).

ferences developed, and why the second circuit court of appeals' approach may no longer be viable.

### I. THE HISTORY OF SECTION 1983

Following the Civil War, Congress was eager to prevent the Southern states from continuing to treat Blacks as slaves. The War was over, but changing the relationships which had evolved over generations was altogether another problem. Thus, in 1865 the thirteenth amendment was added to the Constitution, which provided for the abolition of slavery in the United States.<sup>19</sup>

Having expressed its intention, the nation was still faced with a major problem—enforcement. Section 2 of the thirteenth amendment<sup>20</sup> had authorized Congress to adopt measures to see to it that that article's mandate was effective, not only as to the federal government but also to states and private individuals.<sup>21</sup>

Congress' first attempt to implement the thirteenth amendment was the passage of the Civil Rights Acts of 1866.<sup>22</sup> These Acts were designed to make the thirteenth amendment effective in Southern states which were resisting the expansion of federal powers over matters previously considered the exclusive domain of the states.<sup>23</sup> For example, some states had enacted "Black Codes" and similar police regulations designed to control the conduct of the Black population.<sup>24</sup> But the Civil Rights Acts came under immediate criticism, and Congress' power to take such action was ques-

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19. U.S. CONST. amend. XIII (1865) provides:

*Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

20. *Id.*

21. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1143 (1977).

22. Ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§1981-1982 (1976)).

23. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1423 (1864).

24. *See P. PALUDAN, A COVENANT WITH DEATH* 215 (1975); J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 571-74 (1969).

tioned.<sup>25</sup> Never before had the states been so directly subject to oversight by the federal government.<sup>26</sup>

Two months later, in apparent response to the challenge to Congress' power, the fourteenth amendment<sup>27</sup> was submitted to the states for ratification. Section I of this amendment had at least three purposes. The first was to insure that Blacks would be treated as "citizens" of the United States. In so doing, the amendment created a national citizenship independent of that of any state.<sup>28</sup> Secondly, in declaring that persons "born or naturalized in the United States . . . are citizens . . . of the state wherein they reside,"<sup>29</sup> the amendment effectively precluded states from passing state citizenship requirements that would exclude the freed Blacks. Thirdly, the amendment created a category of guaranteed "privileges and immunities" attendant to national citizenship, and pronounced that these privileges and immunities would be protected from state encroachment.<sup>30</sup>

The Southern states, however, refused to ratify this amendment.<sup>31</sup> Temporary military rule was established, followed by a drastic reconstruction of Southern states' governments.<sup>32</sup> During this period the fourteenth and fifteenth amendments<sup>33</sup> were

25. See *supra* note 21, at 1143-44.

26. *Id.*

27. The fourteenth amendment provides in Section I:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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, § I.

28. See CONG. GLOBE, 42d Cong., 1st Sess. app. at 67, 69 (1871).

29. U.S. CONST. amend. XIV (1868).

30. See, e.g., I. BRANT, *THE BILL OF RIGHTS* 315-45 (1965).

31. See J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 584-85 (1969).

32. *Id.* at 565.

33. The fifteenth amendment provides:

Section I. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

adopted. The fifteenth amendment provided voting rights for all citizens of the United States, regardless of "race, color, or previous condition of servitude."<sup>34</sup> This amendment represented a major encroachment on states' rights—prior to its adoption states had exclusive control over voting qualifications.<sup>35</sup>

Thus, the federal government was emerging as the new protector of individual rights. But even with these measures, there remained one major area which represented a serious roadblock to Congress' mandate to establish equality before the law in all states; that roadblock was the state courts.<sup>36</sup>

Prior to the Civil War, Southern state courts had denied Blacks the right to serve on juries, or to testify, and had limited their right to bring suit.<sup>37</sup> It seemed highly improbable that these same courts, made up of the same individuals, would cooperate in vigorously protecting the rights of the newly freed Blacks. There were two alternative solutions: an attempt could be made to reconstruct the state courts, as had been done with the state governments,<sup>38</sup> or the federal courts could be given exclusive jurisdiction over enforcement of federally protected individual rights.

In 1870, shortly after the ratification of the fifteenth amendment,<sup>39</sup> the Civil Rights Acts of 1866<sup>40</sup> were re-enacted<sup>41</sup> with additional provisions for the use of federal troops to police the polls in the South.<sup>42</sup> This "Force Act,"<sup>43</sup> however, could not address the increasing number of atrocities being committed by vigilante groups such as the Ku Klux Klan. Thus the problem shifted from

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Section II. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV, §§ 1-2.

34. *Id.*

35. H. HYMAN, A MORE PERFECT UNION 425 (1973).

36. *Id.* at 273.

37. *Id.*

38. See text accompanying note 32 *supra*.

39. U.S. CONST. amend XV.

40. Ch. 31, 14 Stat. 27 (1866).

41. Ch. 114, 16 Stat. 140 (1870).

42. *Id.* § 13.

43. *Id.* §§ 3, 10.

a need to halt affirmative state actions against Blacks to a need to deal with states' failure to effectively control groups such as the Klan.<sup>44</sup>

In March of 1871 President Grant requested emergency legislation to provide civil rights protection against official state inaction and tolerance of private lawlessness.<sup>45</sup> In response, Congress enacted the Civil Rights Acts of 1871.<sup>46</sup> Section 1983 of Title 42 of the United States Code is the present codification of Section I of the Civil Rights Acts of 1871.

While the original impetus for the Civil Rights Acts may have been the desire to provide a cause of action for individuals harmed by virtue of acts under color of state law in the area of racial discrimination,<sup>47</sup> the language of the Acts was broad and open-ended, thus inviting, if not necessitating, a good deal of judicial construction.<sup>48</sup> Congress was not unmindful of the potential expansion of Section 1983 beyond the scope of racial discrimination. In fact, during congressional debates on the desirability of extending federal powers over actions under color of state law, it was noted:

There can be no question that can arise under the Constitution that may not be made the subject of judicial decision. . . . That, then, is the great idea of the Constitution, that in respect to this class of provisions, which are limitations upon the powers of the states, they are to be protected by the Federal Judiciary.<sup>49</sup>

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44. See *supra* note 21, at 1153.

45. This request stated:

A condition of affairs now exists in some of the states of the Union rendering life and property insecure, and the carrying of the mails and collection of the revenue dangerous. . . . That the power to correct these evils is beyond the control of state authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of the existing laws is sufficient for present emergencies is not clear.

CONG. GLOBE, 42d Cong., 1st Sess. 229 (1871).

46. Ch. 22, 17 Stat. 13 (1871).

47. See text accompanying notes 39-46 *supra*.

48. See Note, *Civil Rights—States' Eleventh Amendment Immunity Under 42 U.S.C. § 1983*, 10 CUM-SAM. L. REV. 223, 225 (1979).

49. Senator Thurmon, noting the authorization of federal question jurisdiction in Article III. CONG. GLOBE, 42d Cong., 1st Sess. 221 (1871).

By enacting Section 1983, Congress intended to provide an effective tool for enforcement of the thirteenth, fourteenth, and fifteenth amendments. Individuals who, through actions under color of state law, deprived any person within the jurisdiction of the United States of any "rights, privileges, or immunities secured by the Constitution and laws"<sup>50</sup> of the United States would now be subject to a suit in federal court by the person so deprived.

Despite Section 1983's potential for protecting individual rights incident to federal citizenship, it was little used by federal courts for ninety years.<sup>51</sup> It must be remembered that Section 1983 is not a provision which in itself grants any substantive rights. Accordingly, this section is only as broad as the recognized protectable interests which it is designed to enforce, such as those arising under the fourteenth amendment. The limited use of Section 1983 during this period is attributable in part to the Supreme Court's reluctance to enlarge the role of the federal government to include areas "traditionally vested in the states."<sup>52</sup> Thus, although Congress' goal in enacting Section 1983 was to expand federal protection of individual rights, the federal courts frustrated this intent by not adopting a broad view of individual rights.

50. 42 U.S.C. § 1983 (1973).

51. For example, between 1871 and 1920 only 21 cases were decided under § 1983, and only 280 in 1960. Compare this with 3,985 in 1970, and 12,213 in 1977. Note, *Civil Rights—States' Eleventh Amendment Immunity Under 42 U.S.C. § 1983*, 10 CUM.-SAM. L. REV. 223, 226 n.27, 227-28 n.35 (1979); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 452 (1978).

52. In its first opportunity to consider the issue, the Supreme Court defined these "rights, privileges and immunities" very narrowly indeed. In the *Slaughter House Cases*, decided in 1873, the Court limited those "privileges and immunities" incident to federal citizenship and guaranteed by the federal Constitution to:

- (1) the right to come to the capitol to assert any claims against the government;
- (2) the right to free access to the country's seaports;
- (3) the right to protection on the high seas or when abroad;
- (4) the right to peaceably assemble and petition for redress of grievances;
- (5) the privilege of the writ of habeas corpus; and
- (6) the right to use the navigable waters of the United States.

The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). See also Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952).

This narrow construction of the scope of protectable interests was perhaps a reflection of the prevailing social and ethical values of the times; apparently the sanctity of property was more important than personal rights.<sup>53</sup> Section 1983 did enjoy limited use after 1900, principally in connection with voting rights violations under the fifteenth amendment.<sup>54</sup> Predictably, as the Bill of Rights began to be incorporated into the due process clause of the fourteenth amendment, suits alleging deprivations of these rights under color of state law began to appear under Section 1983.<sup>55</sup>

## II. EXHAUSTION

There are, of course, other reasons why litigation under Section 1983 comprised such a small portion of the total federal caseload for so long.<sup>56</sup> Among those reasons is the "exhaustion doctrine." This doctrine is generally considered to have two parts: judicial exhaustion, which is based on concepts of federalism and comity,<sup>57</sup> and administrative exhaustion, which, while serving those considerations, developed in part as a response to overcrowded dockets and growing administrative expertise.<sup>58</sup> This note will turn now to an examination of that doctrine, principally administrative exhaustion, and the consideration of whether such court-made limitations on jurisdiction are inappropriate in the Section 1983 setting.

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53. Note, *Civil Rights—States' Eleventh Amendment Immunity Under 42 U.S.C. § 1983*, 10 CUM.-SAM. L. REV. 223, 226 n.27 (1979), citing Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

54. See Note, *supra* note 53, at 227. See also *supra* note 21, at 1167-79.

55. See *supra* note 21, at 1169; Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. at 53.

56. See note 51 *supra*.

57. See *supra* note 21, at 1265-66.

58. See *Exhaustion of State Administrative Remedies in Section 1983 Cases*, *supra* note 8, at 540-42. Administrative exhaustion has been described as a "self-imposed policy of restraint allowing . . . courts to narrow the scope of their jurisdiction . . . [a] long settled rule of judicial administration that no one is entitled to judicial relief for supposed or threatened injury until the prescribed administrative remedy has been exhausted." Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 565 (1975).

A. *The Supreme Court Decisions*

In 1961 the Supreme Court decided *Monroe v. Pape*,<sup>59</sup> which is recognized as the starting point for any discussion of the exhaustion requirement in Section 1983 cases. The Court held that there is no judicial exhaustion required in suits brought under Section 1983. *Monroe* was a suit brought by six Black children and their parents against thirteen police officers and the City of Chicago seeking damages for violation of their rights under the fourteenth amendment.<sup>60</sup> The police officers, without a warrant, broke into their home in the early morning, got them out of bed, and made them stand naked in the living room while they ransacked every room. The policemen then took the father to the police station and, without arresting him or taking him before a magistrate, interrogated him for ten hours about a two-day old murder. He was not permitted to call his family or an attorney, and was eventually released without being charged. It was alleged that such searches and questioning by the police officers were permitted under color of the statutes, customs, and usages of Illinois and of the City of Chicago.<sup>61</sup>

The district court dismissed as to all defendants, finding no cause of action under Section 1983 or the federal Constitution.<sup>62</sup> The Court of Appeals for the Seventh Circuit affirmed the district court's decision.<sup>63</sup> The Supreme Court granted certiorari, and undertook an in-depth examination of the legislative and judicial history of Section 1983.<sup>64</sup> One of the issues the Court addressed was the question whether the plaintiff should first be required to seek redress in Illinois courts, since no showing had been made that the state law was inadequate or that a remedy was not available in practice.<sup>65</sup>

In reaching its conclusion that Congress, in enacting Section

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59. 365 U.S. 167 (1961).

60. *Id.* at 169.

61. *Id.*

62. 272 F.2d at 365.

63. 272 F.2d 365 (7th Cir. 1959).

64. 365 U.S. at 171-92.

65. *Id.* at 172.

1983, did not intend to impose a requirement of judicial exhaustion,<sup>66</sup> the Court held: "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 the latter need not be first sought and refused before the federal one is invoked."<sup>67</sup> Thus it was established that before bringing suits pursuant to Section 1983 in federal court, state judicial remedies need not be exhausted.

In a 1963 decision the Supreme Court extended the no-exhaustion rule to cases involving state administrative remedies in *McNeese v. Board of Education*.<sup>68</sup> *McNeese* was a suit involving racial segregation in Illinois public schools. Specifically, Black students were made to attend classes in one portion of the building, separate and apart from the Whites, and were compelled to use separate entrances.<sup>69</sup> The defendants moved to dismiss the complaint on the grounds that the plaintiffs had not exhausted the administrative remedies provided by Illinois law.<sup>70</sup> The district court granted the motion,<sup>71</sup> and the court of appeals affirmed.<sup>72</sup> The Supreme Court then granted certiorari.<sup>73</sup> Relying on *Monroe*, the Court reversed and in so doing said "[w]e have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy."<sup>74</sup> Justice Douglas, speaking for the Court, added:

We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.<sup>75</sup>

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66. *Id.* at 167.

67. *Id.* at 183.

68. 373 U.S. 668 (1963).

69. *Id.* at 669.

70. *Id.* at 670.

71. 199 F. Supp. 403 (1961).

72. 305 F.2d 783 (7th Cir. 1962).

73. 371 U.S. 933 (1962).

74. 373 U.S. at 671.

75. *Id.*, n.8 at 674 (quoting Justice Murrah in *Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan. 1945)).

The opinion, however, did not stop there. The Court went on to note that, in any event, exhaustion would not be required because the available state administrative remedy was inadequate. The Court said that "it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights."<sup>76</sup> Given this opinion alone, it is difficult to discern whether the Supreme Court was doing away with administrative exhaustion entirely in Section 1983 cases, or whether it was not requiring exhaustion where the available remedy may be inadequate.<sup>77</sup>

In its 1967 opinion in *Damico v. California*,<sup>78</sup> the Supreme Court attempted, seemingly, to resolve any doubt as to just what its role regarding exhaustion was to be. In a brief per curiam opinion, the Court reversed the three-judge district court, which had dismissed a suit brought pursuant to Section 1983 "solely because 'it appear[ed] to the court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.'"<sup>79</sup> This, in the words of the Court, was error.

There followed a long line of Supreme Court cases which reiterated the position that, given the important role Congress had assigned federal courts in enacting Section 1983, administrative exhaustion is not a prerequisite to bringing such an action in federal court.<sup>80</sup> One such case was *Steffel v. Thompson*,<sup>81</sup> decided in 1974. The plaintiff in *Steffel* had twice been threatened with state prosecution if he continued to handbill in a Georgia shopping center in protest of the Viet Nam War. He filed a complaint in the district

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76. *Id.* at 674-75.

77. See Judge Friendly's discussion on this point in *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969).

78. 389 U.S. 416 (1967).

79. *Id.* at 416-17 (quoting *McNeese*, 373 U.S. at 674-75).

80. See, e.g., *Ellis v. Dyson*, 421 U.S. 426 (1975); *Allee v. Medrano*, 416 U.S. 802 (1974); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Carter v. Stanton*, 405 U.S. 669 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Shafer*, 392 U.S. 639 (1968); *King v. Smith*, 392 U.S. 309 (1968). See also *Steffel v. Thompson*, 415 U.S. 452 (1974).

81. 415 U.S. 452 (1974).

court under Section 1983, seeking declaratory judgment in that the Georgia statute was being applied in violation of his first and fourteenth amendment rights.<sup>82</sup>

The Supreme Court unanimously held that federal intervention was permissible in this case, despite the fact that there was no state prosecution pending:

In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.<sup>83</sup>

Thus, while *Steffel* involved state judicial remedies, the above quoted language implied that, for the same reasons, administrative remedies need not be exhausted.

### B. The Second Circuit Decisions

The Supreme Court cases are generally read as laying down a flat no-exhaustion rule for Section 1983 cases.<sup>84</sup> This rule, however, has by no means been accepted in every circuit.<sup>85</sup> This is primarily because of the language which appears in such decisions as *McNeese*, indicating that exhaustion should not be required in

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82. *Id.* at 454-55. The plaintiff also sought an injunction to restrain respondents from enforcing the statute "so as to interfere with petitioner's constitutionally protected activities." *Id.* at 455.

83. *Id.* at 472-73 (citations omitted).

84. See, e.g., *Gillette v. McNichols*, 517 F.2d 888 (10th Cir. 1975); *Hardwick v. Ault*, 517 F.2d 295 (5th Cir. 1975); *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1974), *cert. granted*, 423 U.S. 923 (1975), *cert. dismissed*, 426 U.S. 471 (1976); *Gilliam v. Omaha*, 459 F.2d 63 (8th Cir. 1972); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

85. See, e.g., *Patsy v. Florida Int'l. Univ.*, 600 F.2d 900 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 80-1874); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

Section 1983 cases for traditional reasons, such as an inadequate remedy,<sup>86</sup> or where resort to the remedy would be futile.<sup>87</sup> Language in other cases has indicated that exhaustion should not be required where the question of the adequacy of the administrative remedy is for all practical purposes co-extensive with the merits of the plaintiff's constitutional claims.<sup>88</sup>

This conflicting language has caused confusion in the lower courts, among them the courts in the second circuit. That appeals court has never adopted a flat no-exhaustion rule. Responding to the Supreme Court's language in cases like *McNeese*, the second circuit has chosen to view those cases as merely condemning a "wooden application" of the exhaustion rule.<sup>89</sup> While the approach taken by the Second Circuit Court of Appeals appears to be reasonable given the Supreme Court decisions, it has resulted in some serious problems for district courts and plaintiffs in Section 1983 cases.

This case-by-case approach was first announced by the court of appeals in *Eisen v. Eastman*<sup>90</sup> in 1969. *Eisen* was an action by a New York landlord against the city rent director, challenging the constitutionality of the city's rent control laws, the general level of rents fixed for Eisen's buildings, and reductions by the director. Eisen claimed that his rights had been violated under the fourteenth amendment's due process clause.<sup>91</sup>

The district court, in deciding the merits, held that the rent statute was constitutional.<sup>92</sup> On appeal, the court of appeals, rather than deciding the question on the merits,<sup>93</sup> said:

[A] much more satisfactory ground for rejecting both claims, if it is available, would lie in Eisen's failure to pursue the

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86. 373 U.S. at 671-72.

87. *Houghton v. Shafer*, 392 U.S. 639, 640 (1968).

88. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564 (1973).

89. *Eisen v. Eastman*, 421 F.2d 560, 569.

90. *Id.*

91. *Id.* at 562.

92. *Id.*

93. On appeal, the defendant claimed for the first time that federal inquiry was foreclosed by plaintiff's failure to exhaust administrative remedies. *Id.* at 562-63.

administrative remedy of a protest to the main office of the Rent Administration permitted by . . . the Rent and Rehabilitation Law.<sup>94</sup>

In light of such Supreme Court cases as *McNeese*<sup>95</sup> and *Damico*,<sup>96</sup> the question clearly was whether exhaustion of administrative remedies was still "available" as a ground for dismissal in Section 1983 cases. The *Eisen* court proceeded to answer this question by closely examining the language of those cases:

Despite the breadth of some of the language, particularly in the *Damico* per curiam, we thus read these decisions as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, as in *McNeese*, or where it is certainly or probably futile, as in *Damico*, *Smith* and *Houghton*.<sup>97</sup>

In concluding his opinion in *Eisen*, Judge Friendly called for "much clearer directions than the Court has yet given."<sup>98</sup> The Supreme Court, however, denied certiorari,<sup>99</sup> thus arguably approving the appellate court's decision to require administrative exhaustion in Section 1983 cases unless the facts of a case indicate that such a requirement would be futile or inadequate.

In 1971, in *Sostre v. McGinnis*,<sup>100</sup> the Second Circuit Court of Appeals, sitting *en banc*, considered a district court decision which had granted the plaintiff, a prisoner in a New York correctional facility, a wide variety of injunctive relief under Section 1983 for deprivation of his constitutional rights by the prison administrators.<sup>101</sup> In affirming the district court's decision that administrative

94. 421 F.2d at 567 (emphasis added).

95. *McNeese v. Board of Educ.*, 373 U.S. 668 (1968).

96. *Damico v. California*, 389 U.S. 416 (1967).

97. 421 F.2d at 569. It is interesting to note that the *Eisen* court cited *Damico* as representing a situation where the remedy was "futile." In fact, the brief *per curiam* opinion in that case does not indicate this.

98. *Id.*

99. 400 U.S. 841 (1970).

100. 442 F.2d 178 (2d Cir. 1971).

101. *Id.* at 182. The plaintiff was also awarded damages as to the warden and commis-

exhaustion was not required since it was plainly futile,<sup>102</sup> the court said: "Nor is exhaustion of state *legal* or *equitable* remedies necessary to a Section 1983 action, which provides 'a remedy in the federal courts supplementary to any remedy any state might have.'" <sup>103</sup> This statement is then supported by citation to Supreme Court cases holding that *administrative* exhaustion is not required in Section 1983 cases.<sup>104</sup>

One possible reading of this reference to cases dealing with administrative exhaustion would be that the second circuit was adopting the proposition put forth in those cases—that administrative exhaustion is not required in Section 1983. Another reading is that the court could have been confusing judicial with administrative exhaustion. In any event, the case was decided on the basis that the remedy in question was "plainly futile."<sup>105</sup>

The court of appeals, then, had not abandoned its exhaustion requirement, despite a continuing concern that the Supreme Court cases pointed to a no-exhaustion rule. This concern was further evidenced when the court, in *Goetz v. Ansell*,<sup>106</sup> decided the appeal of a high school student who had sued school officials. The plaintiff was seeking a preliminary injunction to prevent a threatened suspension from school for his refusal to participate in the pledge of allegiance.<sup>107</sup> The district court had dismissed the complaint for failure to exhaust administrative remedies and, alternatively, ruled against the plaintiff on the merits.<sup>108</sup> In reversing both rulings, the court of appeals expressed its growing concern regarding the applicability of the exhaustion requirement in Section 1983 cases. "Putting to one side the question whether the doctrine of exhaustion of

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sioner of corrections. *Id.* at 181.

102. *Id.* at 182.

103. *Id.* (emphasis added) (quoting, in part, *McNeese v. Board of Educ.*, 373 U.S. 668, 672 (1963)).

104. *Id.* Specifically, the court in *Sostre* cited: *Damico v. California*, 389 U.S. 416, 416 (1967) (per curiam); *King v. Smith*, 392 U.S. 309, 309 (1968); *McNeese v. Board of Educ.*, 373 U.S. 668, 672 (1968); *Wright v. McMann*, 387 F.2d 519, 522-23 (1967).

105. 442 F.2d 178, 182 (2d Cir. 1971).

106. 477 F.2d 636 (2d Cir. 1973).

107. *Id.*

108. *Id.* at 637.

administrative remedies still applies in a Section 1983 suit,"<sup>109</sup> the court decided not to require it on the facts of this case. They then reviewed a number of decisions, all of which had been denied certiorari, which stated the rule in the second circuit requiring exhaustion.<sup>110</sup> They also reviewed two Supreme Court per curiam opinions which had stated that administrative exhaustion is not required.<sup>111</sup>

Although this dichotomy was clearly disturbing the court, it felt that this case need not be the vehicle for reconciling the holdings of the court of appeals with the Supreme Court decisions.<sup>112</sup> Rather, the court noted that invoking the requirement on the facts of this case was unwarranted under *Eisen*, as exhaustion of the remedy here was "certainly or probably futile."<sup>113</sup>

In *Blanton v. State University of New York*,<sup>114</sup> five students had been suspended for one semester from college for staging a sleep-in in the lounge of a dormitory as part of a demonstration seeking all-Black dormitories. A suit was filed under Section 1983 seeking injunctive and declaratory relief as to the suspensions, and money damages for alleged violation of the students' first, fourteenth, and eighth amendment rights. The district court denied the temporary injunction and later granted summary judgment for the defendants.<sup>115</sup>

The court of appeals, in affirming the decision, once again addressed the exhaustion question. "Our recital of the facts makes evident that . . . this would be an appealing case for application of the principle of *Eisen v. Eastman* . . . that a plaintiff challenging the constitutionality of state action must exhaust speedy and effec-

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109. *Id.*

110. *Id.*, citing: *James v. Board of Educ.*, 461 F.2d 566, 570-71 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 628 n.5 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

111. *But see* *Carter v. Stanton*, 405 U.S. 669, 670-71 (1972) (per curiam); *Wilwording v. Swenson*, 404 U.S. 249, 251-52 (1971) (per curiam).

112. 477 F.2d at 637.

113. *Id.*

114. 489 F.2d 377 (2d Cir. 1973).

115. *Id.* at 382.

tive state administrative remedies."<sup>116</sup> The court then examined the viability of that requirement in light of then recent Supreme Court decisions<sup>117</sup> and found that its approach had not been expressly ruled out by the holdings in those cases.<sup>118</sup> The last of these Supreme Court decisions, *Gibson v. Berryhill*,<sup>119</sup> had held that exhaustion was not required, but added that this was so because "the adequacy of the administrative remedy . . . was for all practical purposes identical with the merits of the [plaintiff's] lawsuit."<sup>120</sup>

The *Blanton* court, having found its requirement of exhaustion still viable, declined to apply it:

While we therefore see no occasion to retreat from this portion of *Eisen*, it is unnecessary to go as far as to hold that the . . . plaintiffs' failure to appeal . . . constituted an absolute bar at least as to their due process claims. At minimum such failure to appeal can be taken as one of the factors to be weighed in determining whether these plaintiffs were deprived of any of their constitutional rights.<sup>121</sup>

The plaintiffs' constitutional claims were then adjudicated, despite the fact that the court found the state "provided for a speedy appeal to a higher administrative [office]."<sup>122</sup>

Consequently, while ostensibly adhering to its requirement of exhaustion, the court of appeals declined to apply it even when the available remedy was "speedy" and there was no indication that it was "inadequate" or "futile."<sup>123</sup> Perhaps the court's reference to the exception in *Gibson* indicates that the due process claim escaped the exhaustion requirement under that exception, but it did not so state.

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116. *Id.* at 383.

117. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Carter v. Stanton*, 405 U.S. 669 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

118. 489 F.2d at 383-84.

119. 411 U.S. 564 (1973).

120. *Id.* at 575.

121. 489 F.2d at 384.

122. *Id.*, (quoting *Eisen v. Eastman*, 421 F.2d 560, 569 (1969)).

123. *Id.* at 384-85.

In *Plano v. Baker*<sup>124</sup> the court attempted once again to reconcile its approach with that of the Supreme Court. The plaintiff in *Plano*, a probationary teacher, instituted an action under Section 1983 seeking reinstatement, back pay and damages, and injunctive relief in connection with his dismissal.<sup>125</sup> The plaintiff alleged that he was discharged for activities protected by the first amendment and in a manner that deprived him of procedures due under the fourteenth amendment.<sup>126</sup>

The district court dismissed the case for failure to exhaust administrative remedies.<sup>127</sup> The court of appeals reversed on the grounds that the remedy was inadequate.<sup>128</sup> In so doing the court again discussed the Supreme Court's latest pronouncement regarding the exhaustion requirement. In *Steffel v. Thompson*<sup>129</sup> the Court had declared that given the paramount role of the federal courts under the mandate of Section 1983, judicial or administrative exhaustion was not required.<sup>130</sup>

The court of appeals then stated that "[t]his language, standing alone, concededly appears contrary to *Eisen* and *Blanton*."<sup>131</sup> The court, however, went on to conclude that the language in *Steffel* probably did not overrule those cases because: 1) the language regarding administrative exhaustion was mere dictum; 2) the circuit does not woodenly apply the doctrine, which was what the Supreme Court was really worried about; and 3) given the benefits to be derived from a "sensible application of the exhaustion doctrine . . . this Circuit's exhaustion rule should be subject to re-examination only in a case requiring that issue to be reached."<sup>132</sup>

*Plano* was not such a case; the remedy there was inadequate since it provided no mechanism designed to resolve factual issues,

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124. 504 F.2d 595 (2d Cir. 1974).

125. *Id.* at 596.

126. *Id.*

127. *Id.* at 597.

128. *Id.*

129. *Id.*, (citing *Steffel v. Thompson*, 415 U.S. 452 (1974)).

130. 415 U.S. at 472-73. See also text accompanying note 94 *supra*.

131. 504 F.2d at 597.

132. *Id.*

and the issues in *Plano* were, according to the court, all factual.<sup>133</sup> The court added that any procedure that expressly forbade examination or cross-examination cannot be adequate for purposes of the exhaustion rule.<sup>134</sup> Furthermore, the plaintiff was seeking damages; and since the Commissioner had no authority to grant damages, the remedy was inadequate.<sup>135</sup>

In *Plano* the court had closely scrutinized the constitutional claims of the plaintiff in light of the administrative remedy available. This, then, seemed to be the analysis the court wanted district courts to use in deciding the exhaustion issue.<sup>136</sup> This was not, however, the extent of the influence the *Steffel* decision was to have on the second circuit.

One year later in its 1975 decision in *Morgan v. LaVallee*,<sup>137</sup> the court of appeals, apparently haunted by the implications of the language the Supreme Court had used in its *Steffel* opinion, re-examined the import of that decision. Morgan was a prisoner who brought a Section 1983 action for, among other things, the prison administration's refusal to let him receive a specific publication,<sup>138</sup> and for an institutional order banning his correspondents from sending him postage stamps.<sup>139</sup> The district court, without a hearing, dismissed these two claims for failure to exhaust administrative remedies.<sup>140</sup>

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133. *Id.* at 598.

134. *Id.*

135. *Id.* at 599. "In *Ray v. Fritz* . . . (per curiam) we held that exhaustion of state administrative remedies in [Section] 1983 actions is not required where the administrator is not empowered to grant the relief sought." (citation omitted).

136. 504 F.2d at 599. However, in *Brown v. General Serv. Admin.*, 507 F.2d 1300 (2d Cir. 1974), decided shortly after *Plano*, the second circuit affirmed a district court's decision to dismiss the case on the grounds that the plaintiff had not exhausted his administrative remedies, in a manner which seems contrary to *Plano*. The plaintiff in *Brown* was claiming that he had been the object of racially discriminatory employment practices. After examining the substance of the plaintiff's constitutional claims, the court said: "[E]ven if we were to hold in favor of *Brown* . . . his claim would fall for failure to exhaust administrative remedies." *Id.* at 1307. This seems like a wooden application of the exhaustion doctrine if ever there was one.

137. 526 F.2d 221 (2d Cir. 1975).

138. "The Midnight Special," an interprison newsletter.

139. 526 F.2d at 222.

140. *Id.* at 223.

Judge Oakes, writing for the court, reversed this dismissal, noting that “[t]he trial court’s imposition of a requirement that state administrative remedies be exhausted is not in accord with . . . the holdings of the Supreme Court,”<sup>141</sup> most notably the holding in *Steffel v. Thompson*.<sup>142</sup> Judge Oakes then stated that while it is true that the wording in *Steffel* was dictum as regards administrative exhaustion because the issue in *Steffel* was judicial exhaustion, this statement was “integral” to the holding of that case.<sup>143</sup> He further noted that the fourth circuit had relied on the *Steffel* language in an *en banc* decision holding that administrative exhaustion is not required in Section 1983 cases.<sup>144</sup>

The opinion once again warned that any exhaustion requirement “is not to be applied woodenly in such cases.”<sup>145</sup> In reversing the district court’s dismissal, Judge Oakes summarized the rule in the second circuit in light of *Steffel*:

Before the court below may relinquish its § 1983 jurisdiction it must, on the most narrow reading of the cases, be positively assured—it may not presume—that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record.<sup>146</sup>

Defendants in Section 1983 actions in the second circuit must plead and prove, to the positive assurance of the trial court, that there remain open to plaintiffs in those actions speedy, sufficient, and readily available administrative remedies. Furthermore, the facts supporting such a finding by a trial court must be apparent on the record. This determination must be made *before* a trial court decides whether or not to dismiss the case and require exhaustion of those remedies.

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141. *Id.*

142. 415 U.S. 452 (1974).

143. 526 F.2d at 223. *Cf. Plano v. Baker*, 504 F.2d at 597, and text accompanying note 145 *infra*.

144. 526 F.2d at 223 n.4, (citing *McCray v. Burrell*, 516 F.2d 357, 363 (4th Cir. 1975)).

145. 526 F.2d at 223 (citing *Plano v. Baker*, 504 F.2d at 597, and *Eisen v. Eastman*, 421 F.2d at 569).

146. 526 F.2d at 224.

In *Gonzales v. Shanker*,<sup>147</sup> in 1976, the second circuit pointed out the type of findings which would be necessary to support a decision on the exhaustion issue. Gonzales, a school principal, filed suit under Section 1983 in district court seeking declaratory and injunctive relief and damages, as the result of certain acts by the school board, teachers' union, and members of both groups.<sup>148</sup>

The district court found that the administrative remedies available to the plaintiff were inadequate and that exhaustion was therefore not required.<sup>149</sup> In upholding the decision, the court of appeals carefully re-examined the administrative remedy available to Gonzales. They agreed with the district court's finding that this remedy lacked the procedural safeguards that "would assure either accurate fact-finding or satisfactory resolution of constitutional claims."<sup>150</sup> This finding was supported because 1) the plaintiff was not permitted an attorney; 2) the remedy called for advisory, not binding, arbitration; 3) the remedy did not provide for testimony under oath, nor for subpoena powers for witnesses or papers.<sup>151</sup> The remedy was further inadequate both because it lacked a provision for notice, and because the presiding authority was not empowered to grant money damages, part of the relief the plaintiff sought.<sup>152</sup> This remedy clearly did not meet the test of "speedy, sufficient and readily available" relief.<sup>153</sup>

In 1978, in *Jones v. Califano*,<sup>154</sup> the court further expanded the notion that those remedies which cannot provide the relief sought need not be exhausted. *Jones* was a class action which chal-

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147. 533 F.2d 832 (2d Cir. 1976).

148. *Id.* at 833. Gonzales alleged that because he favored certain minority candidates in school board elections, and was himself a Puerto Rican and outspoken in his support of bilingual and community education and reform, he was subjected to deliberate, continuing and discriminatory harassment, and interference and noncooperation which hindered his performance as a principal.

149. *Id.* at 838. The district judge, apparently not comfortable with his decision, certified the exhaustion question to the Court of Appeals for the Second Circuit. *Id.* at 833.

150. *Id.* at 838.

151. *Id.* at 837-38.

152. *Id.*

153. *Morgan v. Lavalley*, 526 F.2d at 224.

154. 576 F.2d 12 (2d Cir. 1978).

lenged the constitutionality of certain welfare regulations.<sup>156</sup> In holding that the exhaustion requirement was waived, "limit[ed] to the combination of circumstances [in this case],"<sup>156</sup> the court addressed the applicability of the requirement to class actions:

For poor and disabled people, time is a precious commodity even when the amounts involved are small. To require each claimant to pursue his individual administrative remedy is to vindicate no legitimate agency interest when the only disputed issue is one of statutory construction. In this unusual case where a statutory interpretation can be universally applied to all eligible claimants, an exception to case-by-case exhaustion is appropriate.<sup>157</sup>

While the *Jones* court had said that its holding was limited to the facts of that case, similar reasoning was employed by the Second Circuit Court of Appeals in the following year in its per curiam opinion in *Hark v. Dragon*.<sup>158</sup> *Hark* was a class action which challenged Vermont's CETA<sup>159</sup> policy limiting enrollment in federally funded training programs to one year. District Judge Cofrin, in refusing to dismiss the action for lack of administrative exhaustion, stated that there is no exhaustion requirement for Section 1983 class actions.<sup>160</sup>

The court of appeals, while agreeing that exhaustion was not required, did so because "in this context it probably would have been futile."<sup>161</sup> Additionally, the court added, "the jobs of over one thousand low-income class members are affected by the same sharply defined, purely legal issue, suggesting that time is of the essence."<sup>162</sup> The court, then, seemed to be implying that in the circumstances of a class action under Section 1983, where all the plaintiffs, by definition, are seeking redress for the same state ac-

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155. *Id.* at 14.

156. *Id.* at 21.

157. *Id.* at 20-21 (footnote omitted).

158. 611 F.2d 11 (2d Cir. 1979).

159. Comprehensive Employment and Training Act of 1973, Vermont's CETA program was established pursuant to 29 U.S.C. §§ 801-999 (1973).

160. *Hark v. Dragon*, 477 F. Supp. 308 (D. Vt. 1979), *aff'd*, 611 F.2d 11 (1979).

161. *Id.* at 14 (citing *Jones v. Califano*, 576 F.2d 12 (2d Cir. 1978)).

162. *Id.*

tion, exhaustion would be futile and therefore not required.

### C. *Recent Developments in the Second Circuit*

In 1980 the effort to develop an exhaustion rule compatible with that of the Supreme Court was achieved in *Swan v. Stoneman*.<sup>163</sup> The plaintiffs in *Swan* alleged that the defendants failed to provide pretermination hearings and written notices of the reasons for its actions before termination of certain benefits provided pursuant to the Rehabilitation Act of 1973.<sup>164</sup> As a result, the recipients were deprived of rehabilitation benefits in violation of federal statute and without due process of law.<sup>165</sup>

Chief Judge Holden of the District Court for Vermont, in granting defendant's motion to dismiss, concluded that

the availability of a hearing before the Vermont Human Services Board under 3 V.S.A. § 3091 . . . provided the plaintiff and the proposed intervenors with a speedy, sufficient and readily available administrative remedy. Exhaustion of this remedy was, therefore, necessary before bringing this action.<sup>166</sup>

In reversing the district court as to the exhaustion question in *Swan*, the court of appeals relied on *Morgan*<sup>167</sup> and *Gonzales*<sup>168</sup> in reiterating that it expects more than a conclusory finding that the remedy is "speedy, sufficient and readily available."<sup>169</sup> Such a finding must be supported by findings of fact readily ascertainable on the record.<sup>170</sup>

After noting that the appellate court's view had not been overruled, and that administrative remedies must be exhausted in "ap-

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163. 635 F.2d 97 (2d Cir. 1980).

164. 29 U.S.C. §§ 701-94, 723(a)(1) (1976); 45 C.F.R. § 1361.36.

165. 635 F.2d at 99. Plaintiffs were seeking declaratory and injunctive relief under §§ 1983 and 1343(3). *Id.* at 98-99.

166. *Swan v. Stoneman*, No. 79-36, slip op. at 8-9 (D. Vt. Sept. 11, 1979).

167. *Morgan v. Lavalley*, 526 F.2d 221.

168. *Gonzales v. Shanker*, 533 F.2d 832.

169. 635 F.2d at 103 (quoting *Morgan v. Lavalley*, 526 F.2d at 224).

170. *Id.*

propriate circumstances,"<sup>171</sup> the court outlined the approach to be taken by district courts in determining when exhaustion is, and when it is not, required:

In each case, the applicability of the exhaustion requirement will depend upon the nature of the asserted claim, the requested relief, and the available state administrative procedures. . . . Thus, a civil rights suit will not be dismissed on exhaustion grounds if the availability of the remedy is not assured . . . or if the remedy *may be* inadequate, . . . or if the adequacy of the remedy is "for all practical purposes coextensive with the merits of the plaintiff's constitutional claim" . . . or if the administrative procedures fail to provide for representation of counsel, testimony under oath or subpoena of witnesses or papers . . . or if there is no adequate procedure for resolution of issues of fact.<sup>172</sup>

Turning to the facts of the *Swan* case, the court found that, while the procedure in question "avoid[ed] many of the deficiencies noted above,"<sup>173</sup> it was not sufficient for a number of reasons. First, the due process claim attacked the very procedures provided; thus, it was "for all practical purposes coextensive with the merits of the plaintiff's constitutional claim."<sup>174</sup> Second, the remedies available to the plaintiffs could not provide the relief sought.<sup>175</sup> This was so because the Vermont Human Services Board was not empowered to provide classwide or prospective relief, nor was it capable of modifying the offending regulations.<sup>176</sup> Thus, while the defendant agreed, voluntarily, to abide by the decision on the merits,<sup>177</sup> the court held that the plaintiffs in *Swan* should not be required to exhaust their administrative remedies, "since we are not 'positively assured' . . . that the administrative machinery is adequate to grant the requested relief."<sup>178</sup>

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171. 635 F.2d at 103 (citing *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979)).

172. *Id.* at 103-04 (emphasis added) (quoting *Fuentes v. Roher*, 519 F.2d 379, 387 (2d Cir. 1975) (citations omitted)).

173. *Id.*

174. See text accompanying note 172 *supra*.

175. 635 F.2d at 104.

176. *Id.* at 104-05.

177. *Id.* at 105.

178. *Id.*

After his decision in *Swan*, but before the Second Circuit Court of Appeals reversed his decision, Judge Holden was again called upon to decide a case brought under Section 1983. *Garrison v. Stoneman*<sup>179</sup> was a civil rights class action under Section 1983 seeking declaratory and injunctive relief. The plaintiffs in *Garrison* were parents of children who had been judicially committed to the Vermont Department of Social and Rehabilitative Services (SRS) and placed in foster homes pursuant to Vermont law.<sup>180</sup>

The plaintiffs contended that certain practices of SRS unreasonably interfered with family integrity and privacy,<sup>181</sup> and thus violated the parents' rights under the first, ninth, and fourteenth amendments.<sup>182</sup> In addition, the plaintiffs alleged that SRS violated their due process rights as guaranteed by the first and fourteenth amendments.<sup>183</sup> Finally, plaintiffs' statutory claim asserted that SRS' failure to develop individualized plans designed to reunite children committed to its care with their families was in contravention of the requirement of the Social Security Act.<sup>184</sup>

Without deciding the question of class certification, Judge Holden dismissed the case for lack of administrative exhaustion.<sup>185</sup> In so doing, Judge Holden relied heavily on his own reasoning in *Swan v. Stoneman*:<sup>186</sup>

In *Swan v. Stoneman* . . . the district court considered the continuing application in this circuit of the doctrine of exhaustion of administrative remedies to § 1983 actions. The exhaustion requirement continues to be viable because it is

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179. No. 80-7606 (2d Cir. Dec. 30, 1980).

180. VT. STAT. ANN. tit. 13, § 1355; tit. 33, §§ 631-667.

181. Plaintiffs alleged that SRS, under Commissioner Stoneman, had restricted their visiting privileges with their children and failed to provide them with written notice of the restrictions, the reasons for them, or procedures available for appeal of these restrictions. They also alleged that the agency failed to develop individualized plans designed to promote unification of the children with plaintiffs, and failed to regularly consult the plaintiffs regarding secular and religious education. *Garrison v. Stoneman*, No. 80-6, slip op. at 2 (D. Vt. 1980).

182. U.S. CONST. amend. I, IX, XIV.

183. *Id.*, amend. V, XIV.

184. 42 U.S.C. § 608(f)(1) (1977).

185. Civ. Action No. 80-6 at 7 (D. Vt. 1980).

186. Civ. Action No. 79-36 (D. Vt. 1979).

designed to promote judicial economy, to enable litigants and review courts to benefit from agency expertise, and to promote proper concepts of federalism.<sup>187</sup>

Judge Holden concluded: "Here, as in *Swan*, appeal the Vermont Human Services Board . . . would provide the plaintiff with a speedy, competent, and readily available administrative remedy."<sup>188</sup>

Since *Swan*, upon which the *Garrison* decision had been based, was reversed on appeal,<sup>189</sup> it would seem to follow that *Garrison* would also be reversed on appeal to the same court. However, in its one sentence summary judgment decision, the second circuit affirmed *Garrison* "substantially for the reasons set forth in Chief Judge Holden's opinion dated June 19, 1980."<sup>190</sup>

The two cases were substantially similar—both were class actions, both involved the same administrative remedy, both contained constitutional claims and were therefore premised on Section 1983. While there were factual differences, which would have bearing on the ultimate decisions on the merits, the factors germane to the questions of administrative exhaustion were indistinguishable. And, while the impact of the *Garrison* decision is limited in that it is not precedent under the rules of the second circuit,<sup>191</sup> its impact on the plaintiffs in *Garrison* is substantial.

### CONCLUSION

Section 1983 was designed to provide a cause of action in federal court for persons deprived of federal rights by acts under color of state law. The Supreme Court has held that this federal remedy is supplemental to that provided by any state and that, therefore, there is no judicial exhaustion requirement in Section 1983 cases.

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187. Civ. Action No. 80-6 at 6-7.

188. *Id.* at 7.

189. No. 79-7729 (2d Cir. Oct. 17, 1980).

190. No. 80-7606 (2d Cir. Dec. 30, 1980) (a one page summary order).

191. Rules of the United States Courts of Appeals for the Second Circuit, Part I, § 0.23.

For a discussion of the summary order procedure in general, and the future of the *Garrison* case in particular, see Judge Coffrin's opinion in *Doe v. Allen*, Civ. Action 79-302 (D. Vt. Mar. 5, 1981).

However, by using language that obscures the reasons for its holdings when the cases involve administrative remedies, the Court's position on administrative exhaustion has been subject to inconsistent interpretation by the circuit courts. Some circuits have read the opinions as laying down a flat no-exhaustion rule in cases brought pursuant to Section 1983. Other circuits, among them the second, have instead adopted a case-by-case approach to the question. By denying certiorari in cases where exhaustion was required, and by continuing, in dicta, to refer to traditional exceptions to the exhaustion rule, the Court has allowed if not encouraged the inconsistent interpretations.

While this approach undoubtedly has been employed successfully by the Court in the past in areas where the Court is divided, or where there are strong arguments to be made for conflicting statutory constructions, it would seem that perhaps sufficient time has elapsed for all the arguments to have been made, and for the Court to resolve the inconsistencies.

The second circuit's rule has evolved from one which stated that exhaustion was required unless the plaintiff could show that the remedy fell within one of the traditional exceptions, to one which states that exhaustion is not required unless the defendant fails to prove, to the positive assurance of the court, that it does not. The list of exceptions has become fairly extensive. It is, in fact, difficult to perceive how the justifications for imposing the requirement are any longer served.

Given the fact-finding involved in determining whether the remedy may not be adequate, or sufficiently speedy, or whether resort to it may be futile, or whether the adequacy of the remedy is coextensive with the constitutional claim, or if it fails to provide for procedural safeguards such as representation of counsel, testimony under oath, etc., it seems incongruous that such determinations are desirable on the ground that they promote judicial economy.

A plaintiff whose 1983 action is dismissed for lack of exhaustion must appeal that determination before having the merits of his claim adjudicated. If he wins, he must then return to the dis-

strict court for a determination on the merits. Since the wealthy are not interfered with by states with the regularity of the less fortunate, Section 1983 plaintiffs are frequently poor or otherwise disadvantaged. Given that delay in decisions on the merits only serves to allow further deprivation, this additional step is inappropriate in the Section 1983 setting. As was stated in a second circuit decision, "[f]or poor and disabled people, time is a precious commodity even when the amounts involved are small."<sup>192</sup> This sentiment is no less applicable when not money, but federally guaranteed individual rights are involved.

Furthermore, the argument that proper concepts of federalism will be promoted by preventing excessive federal intervention in state business is not only in direct opposition to the purposes of Section 1983, but it is far from reality. It would seem that such states' rights interests would be better served by abandoning the initial close scrutiny that the second circuit federal courts must employ in determining the adequacy of the state remedy. With a flat no-exhaustion rule, the federal courts could decide the merits of the claim and leave the affected state agencies to amend their procedures accordingly.

It is also said that requiring administrative exhaustion allows the federal courts to take advantage of agency expertise. This argument, a carry-over from the exhaustion requirement for cases not arising under Section 1983, is clearly inapplicable in this setting. It is difficult to believe that any agency would have more expertise than the federal courts in adjudicating claimed deprivations of "rights, privileges or immunities secured by the Constitution and laws" of the United States.

Finally, given the situation presented in the *Swan - Garrison* sequence, it is clear that this is an area which is badly in need of clarification. The time has come for the Supreme Court to answer Judge Friendly's call "for clearer direction" in *Eisen v. Eastman* in 1969. The Supreme Court has, in fact, recently granted certiorari to a fifth circuit case involving the very issue of exhaustion in 1983

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192. *Jones v. Califano*, 576 F.2d at 20, 21.

cases. The question to be decided in *Patsy v. Florida International University*<sup>193</sup> is whether the fifth circuit's requirement of administrative exhaustion in Section 1983 cases conflicts with the many holdings by the Supreme Court that there is no such requirement. The rule in the fifth circuit is very similar to that in the second circuit, and any decision by the Supreme Court in *Patsy* will inevitably affect the usefulness of Section 1983 for plaintiffs in the second circuit as well as the fifth. One can only hope that *Patsy* will be the vehicle for clearer direction from the Court.

If Section 1983 is to fulfill its mandate and afford citizens protection from state encroachment of their federally guaranteed rights, the judicially imposed barrier of administrative exhaustion must be removed. For, as Justice Douglas so aptly stated:

When the judiciary is no longer "the great rock" in the storm, . . . when the courts are niggardly in the use of their power and reach great issues only . . . reluctantly, the force of the Bill of Rights in the life of the nation is greatly weakened.<sup>194</sup>

*Kathleen McDonnell Moore*

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193. *Patsy v. Florida Int'l Univ.*, 600 F.2d 900 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 80-1874).

194. Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y. L. REV. 207, 232 (1963).