COMMENTS

Exhaustion of State Administrative Remedies in Section 1983 Cases

Section 1983 of title 42 of the United States Code¹ provides a private federal remedy for deprivation of federal civil rights under color of state authority. This statute has been one of the most frequently litigated federal statutes,² and the Supreme Court's apparent relaxation³ of the doctrine of exhaustion of administrative remedies in section 1983 cases has contributed to a continuing increase in this litigation.

The Supreme Court has more recently, however, indicated a concern with the concept of a relaxed exhaustion requirement, and has suggested that in certain cases the traditional exhaustion doctrine is appropriate. In *Preiser v. Rodriguez*,⁴ the Court refused to liberally construe habeas corpus cases as section 1983 claims, and thus declined to relieve the habeas corpus litigant of the statutory exhaustion requirement.⁵ In

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¹ 42 U.S.C. § 1983 (1970) provides:

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

² Section 1983 litigation has increased rapidly in the past twenty-five years. This phenomenon has been noted at two different points of development. Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953); H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 75-107 (1973). The impact of this increase on the federal system was persuasively stated in Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. O. 557 (1973).

³ This trend, which began with the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), is discussed in text at notes 25-42 *infra*.

⁴ 411 U.S. 475 (1973). See text and notes at notes 43-50 *infra*.

⁵ Exhaustion in habeas corpus cases is governed by 28 U.S.C. § 2254 (1970), which provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the application has exhausted the remedies available in the courts of the State, or that there is either an absence or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Gibson v. Berryhill,⁶ decided the same day as *Preiser*, the Court noted in dictum that the traditional exhaustion requirement might apply where the litigant's rights under section 1983 were completely protected during the state administrative process.⁷

These recent developments suggest that this is an appropriate time to re-evaluate the exhaustion principle in section 1983 cases. This comment will focus on exhaustion in section 1983 cases to determine whether a relaxed requirement is necessary or appropriate in terms of federalism, sound judicial administration, and the purposes of section 1983. The comment first examines the nature of the exhaustion requirement and the rationale for its application to state administrative rather than judicial remedies. Next, it considers relaxation of the exhaustion requirement in section 1983 cases, and examines the purposes of section 1983 in light of the rationale for exhaustion. The comment concludes that relaxation of the exhaustion requirement in section 1983 cases is not necessary to satisfy considerations of federalism or the purposes of section 1983, and suggests an alternative exhaustion requirement for section 1983 cases modeled on section 704 of the Administrative Procedure Act.⁸

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. The Doctrine

The federal courts follow a general rule that an administrative action—by either a state or a federal agency—will not be reviewed unless the plaintiff has exhausted all available administrative remedies.⁹ The

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⁶ 411 U.S. 564 (1973).

⁷ *Id.* at 574-75.

⁸ 5 U.S.C. § 701 *et seq.* (1970).

⁹ The exhaustion requirement is the result of two fundamental principles: 1) that questions should be decided by those most competent to do so, and 2) that questions should be decided in an orderly way. Judge Coffin succinctly stated the first of these principles in *Bradley v. Weinberger*, 483 F.2d 410, 415 (1st Cir. 1973): "The exhaustion requirement, as it applies to administrative agencies, is no mere technical rule to enable courts to avoid difficult decisions. It is grounded in substantial concerns not only of fairness and orderly procedure . . . but also of competence. Courts are not best equipped . . . to judge the merits of the scientific studies and the objections to them. Specialized agencies . . . are created to serve that function." The second principle supporting the exhaustion requirement was indicated by Justice Holmes when he wrote, in an early habeas corpus case, that although "both executive officers . . . are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." *United States v. Sing Tuck*, 194 U.S. 161, 168 (1904). See also *United States v. Morgan*, 307 U.S. 183, 190-91 (1939). The exhaustion principle allows agency and court to perform their respective tasks by segregating them on the basis of time. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.01 (1958); cf. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 424-32 (1965); J. LANDIS, *THE ADMINISTRATIVE PROCESS* 153 (1938); S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 3-9, 111-20 (3d ed. 1973).

courts recognize, however, several exceptions to this rule. First, the administrative agency must have jurisdiction over the controversy.¹⁰ For example, a federal court will not require an interstate carrier subject to the jurisdiction of the Interstate Commerce Commission to exhaust its administrative remedies within a municipal agency that has no jurisdiction over the carrier.¹¹ Second, the courts do not require exhaustion of remedies that are judicial in nature.¹² Third, the doctrine does not require exhaustion of unnecessary, inadequate, or futile administrative remedies.¹³ Exhaustion is not required, for example, where the agency

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¹⁰ In *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562 (1919), Justice Brandeis distinguished between relief sought on the basis of an excessive rate or a discriminatory practice and an act in excess of an agency's statutory powers: "If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission. . . . But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

¹¹ See *Chicago v. Atchison, T. & S.F. Ry.* 357 U.S. 77 (1958).

¹² The distinction between administrative and judicial remedies for the purposes of exhaustion rests on the fact that an administrative determination does not ordinarily have the *res judicata* or collateral estoppel effect of a judicial determination. See text and notes at notes 67-73 *infra*. Significantly, it is the character of the remedy rather than that of the tribunal which is dispositive. A state court may be empowered to act administratively, and in such instances exhaustion of administrative remedies will be required. *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908). Cf. *Bacon v. Rutland R.R.*, 232 U.S. 134 (1914), in which the Vermont Constitution provided that the state supreme court could act only judicially. The Supreme Court held that state law was controlling in regard to the powers of the state court and that the state court's action would be judicial despite the attempt of the legislature to invest it with legislative power. Because the court's judicial determination would have *res judicata* effect, exhaustion was not required. See also 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 64 (C. Wright ed. 1960). *Prentis* concerned federal judicial review of state rate orders, which was subsequently limited by 28 U.S.C. § 1342 (1958), which states:

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

- (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
- (2) The order does not interfere with interstate commerce; and,
- (3) The order has been made after reasonable notice and hearing; and,
- (4) A plain, speedy and efficient remedy may be had in the courts of such State.

¹³ The Supreme Court of the United States recently noted that "the basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). Because the relative importance of these factors and the capacities of the particular agency involved will vary from case to case, the exhaustion doctrine must be applied with an "understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193 (1969). For example, where the controversy

has taken action to deny the litigant access to the appeal process,¹⁴ or where the agency does not have the authority to grant the requested relief.¹⁵ Finally, exhaustion of administrative remedies is not required where the litigant will be subject to irreparable injury due to lengthy administrative procedures that fail to provide interim relief.¹⁶

B. The Rationale

The requirement of exhaustion of state administrative remedies continues as a well-settled doctrine of federal judicial administration.¹⁷ It does so primarily because it facilitates an efficient allocation of judicial resources,¹⁸ while protecting the litigant's choice of forum and the state's interest in local regulation.¹⁹ The exhaustion requirement pro-

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involves only a question of statutory interpretation and there is no need for the application of agency expertise or the development of a factual record, exhaustion will not be required. *Id.* at 197-98.

¹⁴ See *Dunham v. Crosby*, 435 F.2d 1177 (1st Cir. 1970), in which the court found exhaustion not to be required where a school superintendent attempted to deny a teacher access to the administrative procedures established by state law. Denial of access may be accomplished in this manner simply by dilatory administrative inaction. As one commentator has noted: "The big discretionary power all along the line may be the seemingly omnipresent power to do nothing." K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 401 (3d ed. 1972).

¹⁵ See *Public Utilities Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), in which the rate orders of which plaintiffs complained, if made, would have intruded into an area of exclusive federal regulation. Compare *L. JAFFE, supra* note 9 at 437-38, with 3 K. DAVIS, *supra* note 9, at § 20.02.

¹⁶ In *Oklahoma Natural Gas v. Russell*, 261 U.S. 290 (1923), the state remedy in question was administrative but the Court held that excessive delay, compounded by a refusal to grant a supersedeas writ, would nullify the otherwise applicable exhaustion requirement where a constitutional issue was raised. Justice Holmes stressed the fact that the company had "done all that they can under the state law to get relief and cannot get it." *Id.* at 293. Significantly, the Court indicated in *Oklahoma Natural Gas* that it would look not only at the state exhaustion scheme as it existed in statute, but also at how it functioned in fact. The requirement that exhaustion of state administrative remedies be predicated on the availability in fact of interim relief was reaffirmed in *Pacific Telephone Co. v. Kuykendall*, 265 U.S. 196 (1924).

¹⁷ C. WRIGHT, *LAW OF THE FEDERAL COURTS* § 49 (2d ed. 1970); See also 3 K. DAVIS, *supra* note 9, at § 18.02; *id.* (Supp. 1970); F. JAMES, *CIVIL PROCEDURE* § 11.35 (1965).

¹⁸ Dean Landis said of this dimension of the administrative-judicial relationship that "one can ask little more than to have issues decided by those who are best equipped for the task." J. LANDIS, *supra* note 9, at 153. The role of the courts is to determine whether the agency's fact-finding, rule-making and enforcement processes conform to legal requirements; ordinarily courts are equipped to deal with technical issues only through a seriously inefficient reallocation of judicial resources.

¹⁹ Justice Black considered a related aspect of this problem in his discussion of comity in *Younger v. Harris*, 401 U.S. 37, 44 (1971):

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and

vides a state agency with an opportunity to correct its own errors, thus reducing the likelihood of resort to the federal courts for resolution of the dispute.²⁰ Exhaustion also promotes judicial economy by providing the federal court with an opportunity to profit from the agency's expertise, its experience in the administration of its own statutes and regulations, and the agency's ability to generate a more thorough and relevant factual record, especially in areas of complex regulation.²¹

Since the *res judicata* and collateral estoppel effects of state court²² and federal agency determinations²³ do not attach to a state adminis-

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National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Although it is frequently asserted that the Civil Rights Acts and other Reconstruction statutes changed the nature of American federalism and expanded the role of the federal courts, the question remains as to the precise extent of this change. See *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972). The limited jurisdiction conferred on the federal judiciary by Article III of the Constitution remains the guiding principle of federal jurisdiction and requires that the federal courts not make needless incursions into state matters.

²⁰ Systematic circumvention of adequate administrative remedies is almost certainly counterproductive. As Professor Jaffe has suggested, such abuse of the administrative process is likely to cause a "dislocation of the administrative scheme." L. JAFFE, *supra* note 9, at 452. Moreover, immediate judicial review of decisions made at low levels of the administrative machinery tends to exalt the correction of individual bad decisions at the expense of a systematic correction of bad decision-making processes. As Herbert Simon has written in a slightly different context: "Under ordinary circumstances . . . the function of correcting the decisional processes of the subordinate which lead to wrong decisions is more important than the correcting of wrong decisions." H. SIMON, *ADMINISTRATIVE BEHAVIOR* 235 (1960). In terms of judicial and administrative efficiency, the proper view seems to be that suggested by Judge Brown in *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1177 (5th Cir. 1972): "The federal courts are open for § 1983 redress. But it is to redress wrongs of a city, or a county, or a school board, or a state, not wrongs of the city engineer, the county highway supervisor, or the state director of utilities." Although the Supreme Court held in *City of Kenosha v. Bruno*, 412 U.S. 507, 511-13 (1973), that a city is not a "person" within the meaning of section 1983, and thus as a formal matter cannot be made a defendant under section 1983; that holding does not diminish the force of Judge Brown's analysis: section 1983 actions should be addressed to persons who are capable of redressing the harm rather than the lowest persons in the administrative framework.

²¹ See *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Nor-Am Agricultural Products, Inc. v. Hardin*, 435 F.2d 1151 (7th Cir. 1970). An alternative approach has been noted by Professor Jaffe, who suggests that an emphasis on the complexity of the issues and the expertise of the agency "permits false implications and creates damaging expectations with respect to those agencies it does purport to describe." Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1184 (1973). Jaffe suggests that such a model neglects the political realities of the administrative process. *Id.* at 1189-90. See also W. GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 27-29 (1941).

²² See *Bacon v. Rutland R.R.*, 232 U.S. 134 (1914).

²³ The exhaustion rule with regard to federal administrative remedies was articulated by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). In *Hearst*, the Court held that an agency determination would stand if "reasonable," even though the reviewing court might entertain a different view. This principle presupposes, how-

trative decision, the exhaustion of state administrative remedies requirement accomplishes this efficient allocation of judicial resources without unduly limiting the litigant's right to a federal forum.

II. EXHAUSTION IN SECTION 1983 CASES

Prior to *Monroe v. Pape*,²⁴ the Supreme Court had strongly suggested, although it never explicitly ruled, that the exhaustion doctrine applied to cases brought under section 1983.²⁵ Most lower federal courts required exhaustion of administrative remedies in section 1983 cases²⁶ without regard to the substantive nature of the claim.

In *Monroe*, the Court held that a plaintiff in a section 1983 case was not required to exhaust state judicial remedies.²⁷ The decision is

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ever, the constitutionality of the underlying statute, the fairness of the administrative procedure employed, and the agency's jurisdiction to act. These factors may present the opportunity for judicial nullification of the agency's determination even where a statute seems to preclude judicial review. See L. JAFFE, *supra* note 9, at 153-55.

24 365 U.S. 167 (1961).

25 In *Lane v. Wilson*, 307 U.S. 268 (1939), a Black plaintiff sought damages from state officials who had denied him the right to register to vote, acting under color of a state registration statute which he alleged violated the fifteenth amendment. The defendant state officials relied on *Prentiss v. Atlantic Coast Line*, 211 U.S. 210 (1908), for the proposition that federal relief would not lie because plaintiff had not exhausted his state judicial remedies. The Court reaffirmed the distinction drawn in *Bacon v. Rutland R.R.*, 232 U.S. 134 (1914), between judicial and administrative remedies and held that exhaustion of state judicial remedies was not a prerequisite to federal judicial relief. The implication of Justice Frankfurter's opinion was that a different result could be expected if state administrative remedies were involved:

Normally . . . [state administrative remedies] must be completed before resort to the federal courts can be had . . . . But the state procedure open [here] . . . has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies . . . . Barring only exceptional circumstances . . . or explicit statutory requirements . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts.

Lane v. Wilson, 307 U.S. 268, 274 (1939).

26 Despite some confusion, in the early 1950s, as to the meaning of the rule of *Lane v. Wilson*, 307 U.S. 268 (1939), by mid-decade lower courts generally held that state administrative, but not judicial, remedies must be exhausted prior to federal intervention. See *Dove v. Parham*, 282 F.2d 256 (8th Cir. 1960); *Covington v. Edwards*, 264 F.2d 780 (4th Cir. 1959); *Baron v. O'Sullivan*, 258 F.2d 336 (3d Cir. 1958); *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956); *Williams v. Dalton*, 231 F.2d 646 (6th Cir. 1956); *McDonald v. Key*, 224 F.2d 608 (10th Cir. 1955); *Peay v. Cox*, 190 F.2d 123 (5th Cir. 1951); *Cooper v. Hutchison*, 184 F.2d 119 (3d Cir. 1950). See also Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285, 1287 (1953).

Because of the limited scope given section 1983, Professor Chafee was able to base his argument for new civil rights legislation on the ineffectiveness of the 1871 Civil Rights Act, describing it as an "unintelligible statute" and a "bent and blunted sword." Chafee, *Safeguarding Fundamental Human Rights*, 27 GEO. WASH. L. REV. 519, 526-27 (1959).

27 365 U.S. 167 (1961). Although the Supreme Court had already determined this question in *Lane v. Wilson*, 307 U.S. 268 (1939), Justice Douglas did not cite the earlier case. In fact, the only way in which *Lane* differed from *Monroe* was that while the state officials

so broadly worded as to suggest that there is no requirement of exhaustion of state administrative remedies in those cases. Four subsequent Supreme Court opinions²⁸ have been interpreted by courts²⁹ and commentators³⁰ as confirmation of a relaxed exhaustion requirement. Each of the cases, however, involved situations in which traditional principles would not have required exhaustion.

In the first of these opinions, *McNeese v. Board of Education*,³¹ a group of Black plaintiffs sued in federal district court for an order requiring desegregation of a local school system. The court of appeals affirmed a district court dismissal of the complaint on the ground that plaintiffs failed to exhaust administrative remedies available under the state education law.³² The Supreme Court concluded that the avail-

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in the earlier case were enforcing an unconstitutional state statute, the local police officers in *Monroe* acted in excess of their authority and in violation of state law. The principal issue in *Monroe* was whether such ultra vires acts could constitute action "under color" of state law. See *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 152 (1970); *United States v. Classic*, 313 U.S. 299, 326 (1941). The *Monroe* briefs show that the plaintiffs cited *Lane* for the proposition that availability of state judicial remedies was not a bar to a federal suit under section 1983. Petitioners' Brief at 13, 15-16. There is no reference in the respondents' brief to the exhaustion issue, indicating that their exhaustion argument had been given up by the time the case reached the Supreme Court. The only plausible reason for the Court's failure to cite *Lane* is that it chose to state the issue in broader terms than the earlier case permitted, so as to encompass all state remedies within its statement of the exhaustion principle: "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." 365 U.S. 167, 183 (1961). Although *Monroe* itself concerned only judicial remedies and the broader language used by the Court is only dictum, it is dictum which has successfully obscured the necessary distinction between administrative and judicial remedies in subsequent cases.

²⁸ *Houghton v. Shafer*, 392 U.S. 639 (1968); *King v. Smith*, 392 U.S. 309 (1968); *Damico v. California*, 389 U.S. 416 (1967); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

²⁹ *Brooks v. Center Township*, 485 F.2d 383 (7th Cir. 1973); *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Hayes v. Secretary of Dep't of Public Safety*, 455 F.2d 798 (4th Cir. 1972); *Chisley v. Richland Parish School Bd.*, 448 F.2d 1251 (5th Cir. 1971); *LeVier v. Woodson*, 443 F.2d 360 (10th Cir. 1971); *Rainey v. Jackson State College*, 435 F.2d 1031 (5th Cir. 1970).

³⁰ Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Note, 72 COLUM. L. REV. 1078 (1972); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968); Note, *Limiting Section 1983 in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1969).

³¹ 373 U.S. 668 (1963).

³² Under ILL. REV. STAT., ch. 122, § 22-19 (1961), the State Superintendent of Public Instruction was required to hold a hearing regarding allegations of racial imbalance upon complaint by fifty residents or 10 percent of a school district (whichever was lesser). The State Superintendent was then required to decide whether the allegations were substantially correct and request the Attorney General, if he also so found, to file a suit. Any decision of the Superintendent would be reviewable by the courts, but the determination by the Attorney General would presumably be unreviewable because of his prosecutorial discretion. The effect of this process was to force the plaintiff to follow, at considerable public and

able state administrative remedy was inadequate, and reversed the dismissal of the complaint.³³ The Court's citation of *Monroe v. Pape* implied that exhaustion of administrative remedies is not required in section 1983 cases.

In *Damico v. California*,³⁴ a group of welfare claimants challenged as unconstitutional a state welfare law making a paternal absence of three months a prerequisite for payments under Aid to Families with Dependent Children. A three-judge court dismissed the complaint for failure to exhaust state administrative remedies.³⁵ The Supreme Court, citing *Monroe* and *McNeese*, reversed in a per curiam opinion. In *King v. Smith*³⁶ the Supreme Court held that a three-judge court had properly refused to require state welfare claimants in a section 1983 case to exhaust their state administrative remedies prior to resorting to the federal courts to challenge a state welfare regulation as unconstitu-

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private expenses, a lengthy administrative process which might result in an entirely political decision by the Attorney General not to prosecute. See Petitioner's Brief at 28-29, *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

³³ The Court based its holding both on an extension of *Monroe* and on the finding 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." 373 U.S. 668, 674-75 (1963). Although Justice Harlan dissented in *McNeese* on other grounds, he later argued that *McNeese* both misinterpreted and gratuitously extended *Monroe*, since it was the prevailing view in *McNeese* that the state administrative procedures were inadequate in fact. See *Damico v. California*, 389 U.S. 416, 418-19 (1967) (Harlan, J., dissenting).

Harlan was unable to distinguish convincingly *Monroe* in *McNeese*. Three modes of distinction were available to him. The first was based on the type of relief sought; in *Monroe* the federal court had intervened only to provide damages, whereas plaintiffs in *McNeese* sought injunctive relief. Harlan asserted that "a sound respect for the independence of state action required the federal equity court to stay its hand." 373 U.S. 668, 677 (1963); the majority was not convinced by this reasoning. The second distinction was the one he attempted to raise in *Damico* in order to rewrite the holding in *McNeese*: the adequacy of the state remedy. Since Harlan did not share the majority's view that the remedy was inadequate in fact, he was in no position in *McNeese* to argue for that narrower holding. The third distinction was one that escaped even Harlan's circumspection: the conceptual and practical difference between administrative and judicial remedies.

³⁴ 389 U.S. 416 (1967).

³⁵ California did not argue the distinction between administrative and judicial remedies, but attempted instead to distinguish *McNeese* on the theory that the remedy involved in *McNeese* was entirely a state remedy whereas the remedy in *Damico* was a hybrid federal-state remedy entitled to particular deference. Respondent's Motion to Affirm at 5-6. Only Justice Harlan was persuaded by the state's argument. He argued in dissent that the Department of Health, Education and Welfare's supervision of state welfare programs made federal judicial intervention inappropriate. 389 U.S. 416, 419 (1967). What Harlan failed to understand was that the utility of exhaustion was only enhanced by the failure of the federal executive to exercise its statutory duty with respect to the supervision of state welfare administration where state regulations may be inconsistent with federal law.

³⁶ 392 U.S. 309 (1969).

tional.³⁷ Finally, *Houghton v. Shafer*³⁸ was a suit by a state prisoner to recover his law books, which were confiscated under prison regulations. The court of appeals affirmed without opinion the dismissal for failure to exhaust administrative remedies. In reversing, the Supreme Court explicitly noted the probable futility of an administrative appeal to the state Attorney General, who had submitted to the Court an opinion that the prison regulations were valid and had been properly applied to the prisoner.³⁹

The Second Circuit has rejected the view that these four opinions abolished the exhaustion requirement in section 1983 cases. In *Eisen v. Eastman*,⁴⁰ Judge Friendly argued that exhaustion is still required in section 1983 cases and that these four cases come under the traditional limitations to the exhaustion doctrine covering inadequate or futile administrative remedies.⁴¹ In *McNeese* the Court held that the avail-

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37 In a footnote, the Court stated that a section 1983 plaintiff is not required to exhaust administrative remedies where the constitutional challenge is sufficiently substantial to require the convening of a three-judge court. *Id.* at 312 n.4. The introduction of the three-judge court requirement narrows rather than codifies the Court's previous statement of the law. Under 28 U.S.C. § 2281, a three-judge court must be convened when an injunction is sought to restrain the enforcement, operation or execution of any State statute by restraining an officer engaged in such enforcement or in the enforcement of an administrative determination made thereunder; the injunction must be sought on the ground of unconstitutionality. Apart from the fact that this statement does not codify the Court's earlier holdings, it is unsatisfactory because there is no reason to assume that it limits section 1983 in a way that is relevant to the statutory intent. Federal jurisdiction in section 1983 cases is usually founded on 28 U.S.C. § 1343, which gives to federal courts "original jurisdiction" in civil rights cases; under 28 U.S.C. § 1343, there is no requirement that the state officer be acting in the enforcement of a state statute or that his action violate the Constitution. What relationship do these additional barriers have to the language of section 1983, which makes no distinction between violations of federal law and violations of the federal Constitution nor between wrongs under color of state statute and wrongs accomplished by ultra vires acts of state officers?

38 392 U.S. 639 (1968).

39 Again, the Court's opinion used language that was broader than necessary. The state Attorney General certified that the prison authorities' action was in strict compliance with rules enforced throughout the Commonwealth. Moreover, the prisoner had attempted to appeal to higher administrative authority and had been told to "leave well enough alone." *Id.* at 640. The Court conceded that the official policy of the Commonwealth was being challenged and that nothing could be gained from requiring exhaustion, but noted: "In any event resort to these remedies is unnecessary in light of our [earlier] decisions . . ." *Id.*

40 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

41 *Id.* at 567-69. Judge Friendly has been a persistent critic of the use of section 1983 in expanding federal jurisdiction and has argued in favor of exhaustion and abstention where possible. See H. FRIENDLY, *supra* note 2, at 75-107. In *James v. Board of Educ.*, 461 F.2d 566, 570 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972), the Second Circuit stated: "It is still the law in this Circuit . . . that a Civil Rights plaintiff must exhaust state administrative remedies." See also *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973); *Ray v. Fritz*, 468 F.2d 586 (2d Cir. 1972); *Rodriguez v. McGinnis*, 451 F.2d 730 (2d Cir. 1971),

able administrative remedies were inadequate, and in *Shafer* the Court noted the futility of an appeal to the state Attorney General. *Damico* and *King* involved constitutional challenges to a state statute and a state regulation; Judge Friendly maintained that in those cases the administrative remedies were inadequate because in *Damico* the state agency had no authority to declare a state statute unconstitutional and in *King* it was unlikely that the agency would change the welfare regulation.⁴²

The Supreme Court undermined Judge Friendly's argument in *Wilwording v. Swenson*,⁴³ a habeas corpus case challenging state prison conditions. The Court rejected the suggestion that its holding in *Shafer* was based on the futility of the appeal: "Although the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.'" ⁴⁴ The Court's willingness to extend its liberalized exhaustion principle seemed unambiguous when it held in *Wilwording* that, for exhaustion purposes, the plaintiffs were entitled to have their habeas corpus claim treated as if it had been brought under section 1983.⁴⁵ Two cases recently decided by the Court, however, suggest that the liberalization of exhaustion requirements for section 1983 cases has reached its limits.

In *Preiser v. Rodriguez*⁴⁶ the Supreme Court held that relief in the nature of habeas corpus must be sought under the habeas corpus statute,⁴⁷ which requires exhaustion, rather than under section 1983. Although *Wilwording* was distinguished as challenging only the conditions and not the duration of imprisonment,⁴⁸ *Preiser* indicates a genuine shift in the Court's perspective. In *Wilwording*, the Court seemed anxious to find fungibility between the habeas corpus claim

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rev'd on rehearing en banc, 456 F.2d 79 (2d Cir. 1972); cf. *Blanton v. State University of New York*, Nos. 73-1088 & 73-1259, 2d Cir., Nov. 19, 1973 (unreported opinion), in which the Second Circuit reaffirmed its earlier view in light of *Gibson v. Berryhill*, 411 U.S. 564 (1973), *Carter v. Stanton*, 405 U.S. 669 (1972), and *Wilwording v. Swenson*, 404 U.S. 249 (1971).

⁴² *Eisen* was in fact a double-barreled attempt at cutting back the scope of section 1983. Judge Friendly also asserted in *Eisen* that the Civil Rights Act of 1871 was limited to the protection of personal rights. 421 F.2d 560, 564 (2d Cir. 1969). Justice Stewart explicitly rejected this view in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 551 n.19 (1972).

⁴³ 404 U.S. 249 (1971).

⁴⁴ *Id.* at 252.

⁴⁵ The willingness of the Court to treat habeas corpus and section 1983 cases as fungible was underscored by the procedural posture of the case: the plaintiffs had previously brought a section 1983 action which was denied after a full hearing. The writ of habeas corpus was sought on the same facts, only to be held by the Supreme Court as entitled to treatment as a section 1983 case. Chief Justice Burger was understandably disturbed by this sleight of hand. See *id.* at 252-53 (Burger, C.J., dissenting).

⁴⁶ 411 U.S. 475 (1973).

⁴⁷ 28 U.S.C. § 2254 (1970).

⁴⁸ *Preiser v. Rodriguez*, 411 U.S. 475, 498-99 (1973).

and section 1983, and did so despite the fact that the habeas corpus claim had previously been brought and had failed as a section 1983 claim.⁴⁹ *Preiser* must be seen to undercut the trend of *Wilwording*.⁵⁰

Gibson v. Berryhill,⁵¹ a section 1983 action that sought a federal injunction against state license revocation proceedings because of unconstitutional bias in the licensing board, was decided the same day as *Preiser*. The Court held exhaustion unnecessary where the administrative board was challenged as unconstitutionally composed, but suggested that a liberalized exhaustion principle might be inappropriate where the state has provided an administrative remedy by which "the individual charged is to be deprived of nothing until the completion of that proceeding . . ."⁵² Although this statement is dictum, it represents a potentially important qualification of the section 1983 exhaustion rule, and a new approach that would re-emphasize the adequacy of the state remedy. The importance of this dictum was not lost on Justices Marshall and Brennan, who concurred "except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U.S.C. § 1983 may have to exhaust administrative remedies."⁵³

III. THE CONTROLLING PRINCIPLES

A. Immediate Protection of Fundamental Federal Rights

Nonexhaustion of state judicial remedies can be justified on the ground that they merely duplicate the section 1983 remedies available in federal court.⁵⁴ This justification clearly does not apply, however,

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⁴⁹ See 404 U.S. 249, 252-53 (1973) (Burger, C.J., dissenting).

⁵⁰ Justice Brennan rejected the majority's distinction between section 1983 claims and habeas corpus: "In sum, the absence of an exhaustion requirement in § 1983 is not an accident of history or the result of careless oversight by Congress or this Court. On the contrary, the no-exhaustion rule is an integral feature of the statutory scheme. Exhaustion of state remedies is not required precisely because such a requirement would jeopardize the purposes of the Act." 411 U.S. 475, 518 (1973). As a matter of historical interpretation, this analysis is questionable. See text and notes at notes 74-78 *infra*. Compare Justice Brennan's opinion for a unanimous court in *District of Columbia v. Carter*, 409 U.S. 418 (1973), where he said: "Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted," *id.* at 425. He noted further: "we [are] not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it." *Id.* at 432.

⁵¹ 411 U.S. 564 (1973).

⁵² *Id.* at 574-75.

⁵³ *Id.* at 581.

⁵⁴ In *Monroe v. Pape*, 365 U.S. 167, 183 (1961), the Supreme Court held that the federal judicial remedy was supplementary to the state judicial remedy in section 1983 cases, and therefore the state remedy need not be exhausted prior to seeking federal relief. The underlying rationale seems to be that judicial remedies are essentially interchangeable, whether enforced by the state or federal judiciary. Section 1983, by itself, merely states a cause of action, while 28 U.S.C. § 1343 grants original jurisdiction to the federal courts.

to state administrative remedies. A reading of the commentary and cases under section 1983 suggests that application of the special exhaustion principle developed in *Monroe* and its progeny to state administrative actions is justified by the fundamental character of the rights protected by that statute.⁵⁵ The underlying proposition is that the only practical device to insure protection of these rights is circumvention of all state administrative remedies in favor of immediate federal adjudication.⁵⁶ Even assuming that it is possible both to define fundamental rights⁵⁷ and to show that the rights protected by section 1983 are categorically fundamental rights,⁵⁸ immediate federal adjudication through a relaxed exhaustion requirement is not necessary to provide immediate protection for these rights.⁵⁹

Presumably section 1983 claims could be litigated in state courts although they would be subject to removal to a federal forum. See *Hirych v. State*, 376 Mich. 384, 136 N.W.2d 910 (1965); *Clarke v. Sullivan*, 99 R.I. 96, 205 A.2d 828 (1964).

⁵⁵ Justice Douglas stated this view succinctly in *McNeese v. Board of Educ.*, 373 U.S. 668, 674 (1963): "It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts." The justification for this statement is that "wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication . . ." *Id.* at 674 n.6 (1963).

⁵⁶ The argument that section 1983 actions should be immediately cognizable in federal courts, irrespective of the state remedy's adequacy in practice, stems from an unrealistic view of the capacity of the federal courts. See Chevigny, *supra* note 30, at 1359, which asserts that "[t]he federal judiciary serves the important function of ombudsman for those whose personal rights have been violated." This view has led Judge Coffin to note that, "A judge is tempted to conclude that the chief weapon expected to forestall Orwell's 1984 is the United States Code's § 1983." Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK U.L. REV. 567, 570 (1970). It is difficult to see how immediate federal adjudication is better designed to safeguard fundamental federal rights than an approach that distinguishes between adequate and inadequate state administrative remedies. See text and notes at notes 67-73 *infra*.

⁵⁷ In fact, the definition is not analytically easy. The cases generally make no attempt to define fundamental rights, perhaps with the view that, like obscene works, a judge will know them when he sees them. Traditionally, the courts have held that equity will not intervene to protect personal rights. See *In re Sawyer*, 124 U.S. 200, 210 (1888). In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), however, the Court held that the conventional dichotomy between personal and property rights would not withstand analysis. See also *Kenyon v. City of Chicopee*, 320 Mass. 528, 533-34, 70 N.E.2d 241, 244 (1946). The difficulty of reaching consensus on the definition of fundamental rights is indicated by Justice Blackmun's comment in *New York Times v. United States*, 403 U.S. 713, 761 (1971): "The First Amendment, after all, is only one part of an entire Constitution." (Blackmun, J., dissenting).

⁵⁸ The variety of the case law defies attempts at finding any conceptual integrity. See, e.g., *Beal v. Lindsay*, 468 F.2d 287 (2d Cir. 1972); *Hutchens v. Alabama*, 466 F.2d 507 (5th Cir. 1972); *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); *Wardrop v. Dean*, 459 F.2d 1030 (3d Cir. 1972). See also H. FRIENDLY, *supra* note 2, at 95; Coffin, *supra* note 56, at 570.

⁵⁹ Judge Aldisert believes that there is no "rational relationship between federal civil rights actions for personal money judgments against underpaid prison guards, wardens and

The relevant inquiry in determining whether exhaustion is required should be the adequacy of a particular remedy in providing the desired relief—in this case immediate protection of section 1983 rights—rather than the character of the rights asserted.⁶⁰ If the primary concern of the Court is immediate protection of section 1983 rights, complete relaxation of the exhaustion requirement is unnecessary. Exhaustion of state administrative remedies will not interfere with the exercise of section 1983 rights in those cases in which the deprivation does not take place until the conclusion of the state administrative process.⁶¹ Although the

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deputy wardens and the reluctance of state legislatures to spend the funds needed to clean up horrible conditions in the prisons." Aldisert, *supra* note 2, at 565-66. This conclusion about prisons is expandable in two directions. First, it is applicable to other spheres of administration insofar as poorly paid officers and clerks exercise discretionary power throughout the government. Second, it is applicable where equitable relief is sought: an injunction is subject to its own peculiar infirmities as a rule of law addressed to individuals and of limited precedential value. As such, it is particularly susceptible to a "law of the case" analysis after the manner of argument made by Southern officials regrouping after *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See Frankel, *The Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243, 1249-50 (1964). The impact of an injunction depends on the structure of the administrative machinery at which the injunction is aimed, the role and influence of the particular addressees within the machinery, and the outside political pressures in favor of or against the injunction. See *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284 (2d Cir. 1971); Denenberg, *The U.S. Supreme Court: An Introductory Note*, 29 CAMBRIDGE L.J. 134, 140, 144 (1971). Since an injunction is legally binding only upon the persons actually addressed, the effectiveness of the injunction as a reform mechanism will depend in part on its nonmandatory collateral force. In an organization that has many power centers and little administrative integration, the effects of an injunction against a single power center will have minimal effects elsewhere.

⁶⁰ The Supreme Court noted this principle in the context of federal administrative remedies in *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309 (1967), holding that exhaustion of federal administrative remedies is required even in the adjudication of constitutional claims if the development of a factual record would aid the courts in resolving the dispute and the administrative procedures are fair and adequate. See also *A Quaker Action Group v. Morton*, 460 F.2d 854 (D.C. Cir. 1971), in which the court said "[t]he governing concept as expressed in both judicial doctrine and statute may require even constitutional claims to be determined on the administrative record when the administrative procedure is fair and adequate for presentation of material facts." *Id.* at 861.

⁶¹ An example is a license revocation process where the individual charged with malpractice or abuse of his license is allowed to practice until the completion of the administrative proceeding and thus is deprived of nothing until the administrative process has run its course. The Supreme Court noted this possibility in *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973), and indicated that the licensing revocation procedure in that case was of this type.

If complete interim relief is defined as delaying the deprivation of federal rights until the conclusion of the administrative process, it is possible to argue that no cause of action exists under section 1983 during the interim period. This comment, however, takes the generally accepted position that the federal cause of action exists after the initial administrative action, but that adjudication in the federal courts can be postponed until administrative remedies are exhausted.

Court held in *Monroe*⁶² that the federal remedy was supplementary to the state remedy, the failure to require exhaustion of state remedies in that case took place in a context in which the deprivation of federal rights—accomplished through the misconduct of local police⁶³—had already occurred and could not be avoided through interim state relief. The only method to achieve immediate protection of federal rights in *Monroe* was a state court or federal court action, and the plaintiff in *Monroe* had a right to choose a federal forum.

There is one group of cases in which even the availability of complete interim relief during the state administrative process will not provide an adequate administrative remedy. If a section 1983 plaintiff can prove bad faith harassment on the part of state administrative officials, the state administrative remedy is inadequate and a relaxed exhaustion requirement is appropriate. Although the cost of exhausting state administrative remedies is usually not sufficient to make the administrative remedy inadequate,⁶⁴ immediate protection of federal rights requires a relaxed exhaustion requirement when the plaintiff is able to prove that the state is using the cost of administrative appeals to harass or deter those seeking to enforce section 1983 rights.⁶⁵ The administrative remedy in cases of bad faith harassment is adequate in theory but inadequate in practice.⁶⁶

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⁶² 365 U.S. 167, 183 (1961).

⁶³ In *Monroe*, a Black family alleged that Chicago police officers broke into their apartment at 5:45 A.M., woke the parents and forced them to stand naked while the children were routed from their beds and herded into the living room. The plaintiffs further alleged that they were subjected to physical and verbal abuse, that their apartment was ransacked and that the father was detained on "open" charges for ten hours. He was neither brought before a magistrate nor advised of his procedural rights. He was later released without being charged. *Id.* at 169.

⁶⁴ In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938), Justice Brandeis stated the general principle that mere unrecoupable litigation expense did not constitute the type of injury which would require circumvention of administrative remedies. As Professor Jaffe has written: "The expense and woe of litigation are risks to which whatever the modes of justice—and though one may win in the end—we are all subject." L. JAFFE, *supra* note 2, at 428.

⁶⁵ An analogous case was presented by *Younger v. Harris*, 401 U.S. 37 (1971), in which plaintiffs sought a federal injunction against a state criminal prosecution. The Court held that an injunction would not be routinely granted and required that the circumstances of a case must "establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention." *Id.* at 48 (1971). In holding that the plaintiffs failed to meet this standard, the Court indicated that the standard could be met by either a single prosecution made in bad faith or a series of repeated prosecutions. *Id.* at 49.

⁶⁶ A state agency may engage in bad faith harassment by placing unreasonable conditions upon the provision of services. For instance, it may adhere to a very strict "law of the case" approach to administration and require a client to follow a lengthy series of administrative appeals to determine his rights when, by any fair standard, the rights of

B. Federal Protection of Fundamental Federal Rights

The argument has frequently been made that exhaustion of state administrative remedies should not be required in section 1983 cases because federal rights are entitled to enforcement in a federal forum.⁶⁷ This argument is based on the proposition that federal courts should not decline the exercise of federal jurisdiction simply because another forum is available to enforce the asserted rights.⁶⁸ A relaxed exhaustion requirement, however, is not necessary to insure eventual federal enforcement of fundamental federal rights.

A litigant's right to enforcement of section 1983 rights in a federal forum is preserved intact despite an exhaustion requirement because state administrative agency determinations do not create *res judicata* or collateral estoppel effects.⁶⁹ The exhaustion of state administrative remedies postpones rather than precludes the assertion of federal jurisdiction.⁷⁰ A section 1983 litigant can pursue his claim in the federal district courts after an adverse state administrative decision, and the district court proceeding is an original rather than an appellate proceeding. Al-

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the individual have been determined in similar litigation or proceedings. It may also engage in practices such as requiring recipients to register for various services at excessively inconvenient locations or times, such as requiring all welfare recipients in Chicago to register at City Hall. The principal difficulty in this situation arises when the conditions are minimally burdensome to an individual but pernicious to society in the aggregate. A central problem of constitutional law is, as Professor Kalven has noted, that "often the great constitutional issues involve only modest private interests." H. KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 79 (1965). *But cf.* Justice Brennan's majority opinion in *NAACP v. Button*, 371 U.S. 415, 429 (1963).

⁶⁷ See *McNeese v. Board of Educ.*, 373 U.S. 668, 674 (1963); Chevigny, *supra* note 30, at 1359.

⁶⁸ Insofar as judicial remedies are concerned, *Monroe v. Pape*, 365 U.S. 167, 183 (1961), established that the plaintiff is effectively granted the right to choose his forum under section 1983. The rationale for this choice of forum is the potential *res judicata* and collateral estoppel effects of state court judgments. If the plaintiff is required to sue first in state court, he will not then be able to bring his section 1983 action in federal court insofar as the state court judgment creates collateral estoppel effects. See *Bacon v. Rutland R.R.*, 232 U.S. 134, 138 (1914). The same argument does not apply with regard to administrative remedies because there the specter of *res judicata* or collateral estoppel does not appear; the only cost of requiring exhaustion is the delay involved in any such process. *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 230 (1908). This distinction was applied to section 1983 cases in *Lane v. Wilson*, 307 U.S. 268, 274 (1939).

⁶⁹ See text and notes at notes 54-60 *supra* & note 71 *infra*. Different problems may arise where the exhaustion issue concerns the exhaustion of federal administrative remedies, because of the greater weight given the determination of a federal agency's findings. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). See also Judge Wright's discussion of exhaustion of federal administrative remedies in *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 354-61 (D.C. Cir. 1972).

⁷⁰ See *Petroleum Exploration Inc. v. Public Service Comm'n*, 304 U.S. 209, 219 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938).

though the findings of a state agency are entitled to some deference, they do not create collateral estoppel effects.⁷¹

The absence of *res judicata* or collateral estoppel effects when state administrative remedies are exhausted can be compared with the effects when federal administrative remedies are exhausted or when a federal court abstains pending a state court decision on state law issues. A federal administrative agency's determination will be upheld on review by a federal court if "reasonable," even though the court might have reached a different conclusion if it made a *de novo* judgment.⁷² Similarly, under the abstention doctrine, a federal court is bound by a state court determination of state and federal issues submitted by the litigant to the state court.⁷³

Exhaustion of adequate administrative remedies in section 1983 cases allows the state agency to apply its expertise, develop a factual record, and cure its own errors without prejudicing the litigant's right to a federal forum.

C. Section 1983: The Legislative Intent

In *Monroe* the Court discussed at length the historical background⁷⁴ and the legislative intent of the framers of section 1983. It concluded that the purpose of the Civil Rights Act was three-fold: (1) to override certain kinds of state laws that were inconsistent with federal law; (2) to provide a federal remedy where state law was inadequate; and (3) to

⁷¹ *Prentiss v. Atlantic Coast Line*, 211 U.S. 210 (1908).

⁷² *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944).

⁷³ See C. WRIGHT, *supra* note 17, at § 52; W. BARRON & A. HOLTZOFF, *supra* note 12, at § 64.

⁷⁴ 365 U.S. 167, 172-82 (1961). Grant believed in early 1871 that a situation close to rebellion existed in the states of the former confederacy. See CONG. GLOBE, 42d Cong., 1st Sess., 244 (1871) (President Grant's Message to Congress of March 23, 1871). For a variety of views regarding the reliability of Grant's perceptions of the situation in the Southern states in early 1871, see C. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* 340-47 (1929); W. DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC 1865-1877*, at 186-87 (1962); J. FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR 165-68* (1961). An excerpt from a speech by Representative Kelley of Pennsylvania should indicate the hysterical flavor of Congressional response to the alleged state of affairs in the South:

Violence is to be expected under such circumstances. Violence, sporadic, emotional, sudden, riotous, turbulent, we were to expect. But the possibility of organized, armed, trained, drilled, sworn bands of murderers, who should murder for political effect, came not within the scope of my imagination. Yet the proofs are glaring as the sun at noonday or the stars in a moonless and cloudless night that this state of affairs has existed and does exist to a large extent among men who are bound by the highest honorable obligation known to soldiers, a parole of honor, to remain at peace . . .

I repeat, sir, that this is war. And that the facts known to us would justify . . . the President to use the United States Army in the suppression of armed rebellion and the establishment of law and order. The bill . . . proposes no such violent remedy as this.

CONG. GLOBE, 42d Cong., 1st Sess., 339 (1871).

provide a federal remedy where the state remedy was available in theory but not in practice.⁷⁵ One must conclude from this statement of legislative purpose that Congress intended to deny state authorities the opportunity to redress harms in this area only where the state is unable or unwilling to provide a fair and efficacious remedy.⁷⁶ Although the state judicial remedy is always inefficacious because its *res judicata* and collateral estoppel effects jeopardize the litigant's right to a federal forum, the state administrative remedy is subject to no such infirmity and its adequacy must be judged by its merits.

In the Court's view, Congress was least concerned with nullifying state laws; its quarrel was not with state statutes then on the books, but with their lack of even-handed enforcement.⁷⁷ Discriminatory state statutes, however, present the strongest case for not requiring exhaustion; where the statute is clear, administrative procedures are unlikely to provide any significant relief. Even there, however, categorical rejection of exhaustion is inappropriate. Assuming a state statute is inconsistent with federal law, exhaustion may be appropriate for the purpose of developing a factual record, receiving the benefit of agency expertise in the administration of its statutes and rules, and allowing the agency to limit the application of the statute consistently with federal law.⁷⁸ Only where a factual record is irrelevant and the statute is both facially unconstitutional and incapable of any appropriate construction is exhaustion without value.

The second and third congressional purposes—to provide a federal remedy where the state remedy is inadequate on its face or in practice—require application of the exhaustion principle for their fulfillment. If the threshold for federal intervention is the inadequacy of the state remedy, it is unreasonable to foreclose a state officer with the willingness and authority to correct the errors of his subordinates from doing so. If Congress sought to provide a federal remedy where the state remedy is not adequate in fact, it follows that the legislative intent requires adequate remedies to be exhausted. The third element of congressional purpose requires that the federal court inquire not only into the state remedy's adequacy as it appears from statute and regulation, but also

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⁷⁵ *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

⁷⁶ The legislative history indicates that Congress was primarily concerned with abuses that occurred both "under the forms of law," *see* CONG. GLOBE, 42d Cong., 1st Sess., App. 277 (1871) (speech of Representative Porter), and "permanently and as a rule," *see* CONG. GLOBE, 42d Cong., 1st Sess., 334 (1871) (speech of Representative Hoar). Something akin to a systematic state policy was the target of the legislative action.

⁷⁷ *Monroe v. Pape*, 365 U.S. 167, 176 (1961).

⁷⁸ *See Parisi v. Davidson*, 405 U.S. 34, 37 (1972); *McKart v. United States*, 395 U.S. 185, 193 (1969).

its adequacy in practice. Rather than precluding exhaustion, this element supports the exhaustion requirement, since there is no reason to distinguish between adequate and inadequate remedies if the exhaustion principle is to be abrogated in all section 1983 cases.

In short, the legislative intent was not to create a complete substitute for all state remedies, but rather to provide a federal remedy where state remedies are inadequate on their face or in practice, or where a state law, as applied, is inconsistent with federal law. In both situations cases can arise that require exhaustion for their proper resolution.

IV. AN ALTERNATIVE EXHAUSTION REQUIREMENT

Complete relaxation of the exhaustion of state administrative remedies requirement in section 1983 cases is unnecessary to insure immediate protection of federal rights or to guarantee the litigant's right to a federal forum. A modified exhaustion requirement, modeled on section 704 of the Administrative Procedure Act,⁷⁹ can maximize effective protection of federal rights and minimize the unnecessary dislocation of legitimate state administration.

A. Section 704 of the Administrative Procedure Act

The APA provides for judicial review of final agency action except to the extent that statutes preclude judicial review or commit agency action to agency discretion. Section 704 of the Act provides:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.⁸⁰

This section of the APA differs from the judicial doctrine of exhaustion of administrative remedies in two important ways. First, under section 704, a litigant is not required to exhaust intra-agency appeals unless the right to appeal is given by statute or agency rule. This provision places upon the legislature or administrative agency the burden of establishing an appeals mechanism before exhaustion can be required. Second, and more important, section 704 requires that the effect of preliminary agency determination be suspended while the

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⁷⁹ 5 U.S.C. §§ 551-706 (1970).

⁸⁰ 5 U.S.C. § 704 (1970).

appeal is pending. This requirement transforms a discretionary equitable remedy into a mandatory legal remedy, and thus effectively protects a litigant from even interim deprivations of his rights.

B. Application of the Section 704 Model to Section 1983 Cases

A modified section 704 approach to exhaustion of state administrative remedies in section 1983 cases can provide immediate protection of fundamental federal rights, guarantee the litigant's choice of a federal forum, and achieve efficient allocation of judicial resources. Using section 704 as a basic model, the federal courts should require exhaustion of state administrative remedies where: (1) an orderly system of appeals is provided by statute or agency rule; (2) the administrative remedies are adequate; and (3) the system of appeals provides full interim relief by protecting the litigant's rights under section 1983 until the administrative process has been concluded.

A presumption of adequacy should exist in favor of the administrative appeal process, and exhaustion should be required unless the litigant rebuts that presumption. Where the litigant seeks to preserve the status quo, the availability of complete interim relief creates a strong presumption in favor of the adequacy of the remedy, but proof of bad faith harassment would rebut the presumption. Where the litigant seeks to alter the status quo, the analysis is more complicated, because the agency can employ the appeals mechanism to deny federal rights. If, for example, the litigant's object is integration of a racially segregated school district, a lengthy administrative appeals process would frustrate compliance with federal standards. The presumption of adequacy is weaker in this group of cases because of the agency's possible interest in delay, and the presumption should be rebuttable by proof of irreparable injury, interminable delay, excessive expense, or bad faith harassment.

CONCLUSION

Application of a modified section 704 approach to the exhaustion requirement in section 1983 cases is based on a simple principle: where state administrative remedies are fair and adequate and provide complete interim relief, no legitimate interest is served through a relaxation of the exhaustion requirement. The modified section 704 approach provides immediate protection for section 1983 rights, guarantees the litigant's right to a federal forum, and achieves the legislative purposes of section 1983 with a minimum of interference with legitimate state

interests. Moreover, the suggested approach would act as an incentive for state agencies to provide complete interim relief during the state administrative process, so as to assure themselves an opportunity to correct their own errors.

Barry Sullivan