ARTICLES

Restructuring the *Monroe* Doctrine: Current Litigation Under Section 1983

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Introduction

The New Federalism has begun to trickle down through constitutional doctrine. A consistent contingent of the Burger Court supports the view that initial adjudication of constitutional claims against state officials should occur in state, rather than federal, forums. In the course of elaborating on the principles that draw the potential civil rights plaintiff away from the door of the federal courthouse, the Court has substantially undermined some of the major tenets of its decision in *Monroe v. Pape*[1] two decades ago.

The effect of a recent spate of decisions altering the remedy provided by 42 U.S.C. section 1983[2] can no longer be ignored. The Court is in the process of formulating a theory of federalism affecting litigation of federal rights in federal courts inconsistent with that expressed in *Monroe*. Stretching and twisting existing authority into almost unrecognizable forms to support its view of section 1983 litigation, the Court flirts with ultimate incoherence in its doctrinal formulation.

Recent decisions demonstrate the difficulties of the Court's approach. While the Court has been willing to overrule explicitly a basic

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1. 365 U.S. 167 (1961).

2. 42 U.S.C. § 1983 (Supp. III 1979) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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." *Id.*

aspect of *Monroe* to provide a more comprehensive remedy,[3] it has evidenced a rather cryptic approach to other revisions of *Monroe*. For example, although the Court has at times expanded the scope of the section 1983 remedy,[4] it has taken away with the right hand what it gave with the left through cases that modify some basic elements of section 1983.[5] The decisions expanding the scope of section 1983 claims will put additional pressure on the caseload of the federal courts. Development of new restrictions on the availability and applicability of the section 1983 remedy may be a response to this pressure. But the Court has created these restrictions on an ad hoc, case by case, basis and their overall integration into the analytical framework is confusing.

Despite the mounting scholarly comment on section 1983 litigation,[6] each term in different contexts the Court provokes the question:

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3. Monell v. Department of Social Servs., 436 U.S. 658 (1978), overruling *Monroe* in part, 365 U.S. at 187-92, held that a municipality could be sued directly under § 1983 and provided a more extensive reach for damages in those actions involving a municipality.

4. *See, e.g.*, Dennis v. Sparks, 449 U.S. 24 (1980) (extended "under color of state law" to persons participating in conspiracy with state judge even though judge was entitled to immunity); Maine v. Thiboutot, 448 U.S. 1 (1980) (§ 1983 makes actionable violations by state officials of federal statutory schemes); Owen v. City of Independence, 445 U.S. 662 (1980) (municipality cannot defend § 1983 action by showing that its officers were entitled to qualified immunity).

5. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (explicit statutory remedies foreclose private right of action and prevent § 1983 claim that might be otherwise available); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (municipality not liable for punitive damages under § 1983); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (enforceable rights under § 1983 may not be created if statute has exclusive remedy); City of Memphis v. Greene, 451 U.S. 100 (1981) (intentional adverse impact required to state claim under 42 U.S.C. § 1982); Edelman v. Jordan, 415 U.S. 651 (1974) (Eleventh Amendment and sovereign immunity bar suits against state treasury for damages under § 1983). *See also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 5-7 (1980).

6. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). *See also* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978); Katz, *The Jurisprudence of Remedies, Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968); Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977). For a discussion of the scope of § 1983, see Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Whitman, *supra* note 5. For a discussion of federalism and § 1983, see Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY. L. REV. 639 (1981); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Durchshlag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979); Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section*

To what extent will opportunities to pursue initial relief for deprivation of constitutional rights continue to be available in the federal courts?

Various rationalizations of the policy of deferral to initial adjudication in state forums[7] have been offered by the Court, including a view of proper statutory construction or legislative intent,[8] the increasing caseload burden in the federal courts,[9] and the limited appropriateness of federal remedial procedures when compared to those available in state forums.[10]

A more revealing defense of the Court's actions might involve the "comity" aspect of federalism; that is, proper respect for the role of the

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1988, 128 U. PA. L. REV. 499 (1980); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974); Monaghan, *The Burger Court and "Our Federalism,"* 43 LAW & CONTEMP. PROBS. No. 3, at 39 (1980); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981); Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981).

7. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-04 (1977); Glennon, *supra* note 6, at 393-97; Monaghan, *The Burger Court and "Our Federalism,"* *supra* note 6, at 43-47; Soifer & Macgill, *supra* note 6, at 1142.

8. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 98-99 (1980).

An indication of the current Court's judicial restraint is its manipulation of the doctrine of congressional intent to foreclose § 1983 actions. The Court, by drawing largely unsubstantiated inferences from legislation creating actions supplementary to § 1983, has held that these specified remedies may replace entirely the § 1983 cause of action. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981) (when remedial devices in the statute are "sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"). *See also* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). *But see* Fair Assessment in Real Estate Ass'n v. McNary, 102 S. Ct. 177, 196 (1981) (Brennan, J., concurring) (absent explicit congressional intent, the Anti-Injunction Act in tax cases should not be taken as evidence of congressional intent to foreclose § 1983 remedy); Carlson v. Green, 446 U.S. 14 (1980) (passage of Federal Tort Claims Act not intended to replace *Bivens* remedy unless Court can find explicit statutory authorization). The holdings in *Sea Clammers* and *Pennhurst* seem surprising as there was no explicit language in the statutes involved indicating congressional intent to replace the § 1983 remedy through the specified statutory remedial scheme, particularly in light of the Court's position in *Carlson*.

9. *Annual Report of the Director of the Administrative Office of the U.S. Courts* (1981), reporting an increase of filings of civil cases in the district courts. Although the civil rights cases are not separated out, the statistics indicate that prisoner filings have increased to 15,639 in 1981. *See* Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring); Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1159 (1981); Whitman, *supra* note 5, at 25, 26-30. The connection between the burgeoning caseload and changes in the § 1983 remedy was recognized by two Supreme Court justices in their testimony before a subcommittee of the House Appropriations Committee, *see 2 Justices' Budget Testimony Seen as Hint to Key Decisions*, N.Y. Times, Mar. 10, 1982, at B8, col. 4. *See also* note 59 *infra*.

10. *See, e.g.*, text accompanying notes 46-51 *infra*.

states in the constitutional scheme should lead to federal reluctance to exercise primary jurisdiction on constitutional matters, enabling the states to develop increased responsibility for implementing constitutional rules through their own institutions.[11]

This particular bias in favor of initial state adjudication surfaces in interpretations of other areas of the law in which concerns about federalism predominate, including the doctrines of abstention[12] and equitable restraint,[13] the law of habeas corpus,[14] and the creation of implied federal rights of action.[15] The Burger Court's theory of federalism mirrors that of Justice Frankfurter's dissent in *Monroe*—that federal interference with state institutions is to be avoided, that the states should share ultimately in the protection of constitutional rights, and that federal remedies should be ancillary to those created, provided, or administered by the states.[16] In contrast, the majority opinion in *Monroe* forcefully delineated the role of the federal courts in administering the section 1983 remedy. That position, most consistently espoused today by Justice Brennan, maintains that primary responsibility for definition and vindication of federal constitutional rights lies with the federal courts.[17] Moreover, several members of the Court now believe that the time has arrived to reconsider and revise the principles underlying section 1983 and the Court's decision in *Monroe*.[18]

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11. City of Columbus v. Leonard, 443 U.S. 905, 908 n.2 (1979) (Rehnquist, J., dissenting to denial of certiorari, quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

12. *See* Moore v. Sims, 442 U.S. 415 (1979).

13. *Compare* Dombrowski v. Pfister, 380 U.S. 479 (1965), *with* Younger v. Harris, 401 U.S. 37 (1971). *See also* Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

14. *Compare* Fay v. Noia, 372 U.S. 391 (1963), *with* Stone v. Powell, 428 U.S. 465 (1976), *and* Wainwright v. Sykes, 433 U.S. 72 (1977). *See also* Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) as to the interrelationship of § 1983 and *habeas corpus* for prisoners (*habeas corpus* is the exclusive remedy for prisoners who challenge "the very fact or duration" of confinement, while § 1983 is available for relief from the *conditions* of confinement).

15. See the fourth criterion for implying a federal cause of action set out in Cort v. Ash, 422 U.S. 66 (1975). "[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78.

16. *Monroe*, 365 U.S. at 241-43 (Frankfurter, J., dissenting). *See also* Moore v. Sims, 442 U.S. 415, 427 (1979) (Rehnquist, J.); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975). *See generally* Soifer & Macgill, *supra* note 6, for an understanding of the development of this line of thought.

17. *See* Fair Assessment in Real Estate Ass'n v. McNary, 102 S. Ct. 177, 190 nn. 11 & 12 (1981) (Brennan, J., concurring); Zwickler v. Koota, 389 U.S. 241, 246-49 (1967) (quoting with approval F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1927)).

18. *See* Parratt v. Taylor, 451 U.S. 521, 555 n.13 (1981) (Powell, J., concurring) ("In view of increasing damages-suit litigation under § 1983, and the inability of courts to iden-

The reluctance on the part of the Court to consistently adhere to the original view of the majority in *Monroe* creates uncertainty about the conditions under which the federal courts will continue to exercise jurisdiction in the first instance in certain civil rights actions.[19]

In addition to legitimate concerns about the incoherence of judicial policy and its place in the constitutional scheme,[20] the availability and efficacy of a section 1983 remedy in contrast to a state administrative common law tort or statutory remedy, makes a discernible difference in litigation strategy.

First, it is argued that providing a federal *forum* results in an atmosphere more receptive to constitutional rulings against the excesses of state officials.[21] Federal judges with greater expertise on federal constitutional issues are more sensitive to the impact of constitutional claims.[22] Although section 1983 actions can also be brought in state court, state judges might tend to empathize with their fellow state officials and thus blunt the impact of the remedial relief.[23] Contraction of federal jurisdiction by limiting the scope of the remedy generally consigns potential plaintiffs to weaker state remedies in less favorable state forums, reducing their capacity to obtain relief for constitutional violations.

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tify principles that can be applied consistently, perhaps the time has come for a revision of this century-old statute—a revision that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action"); City of Columbus v. Leonard, 443 U.S. 905, 910-11 (1979) (Rehnquist, J., dissenting from denial of certiorari) ("[T]he time may now be ripe for reconsideration of the Court's conclusion in *Monroe* that 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' "); O'Connor, *supra* note 6, at 810 ("In view of the great caseload increase in the federal courts . . . one would think that congressional action might be taken to limit the use of the section 1983").

19. *See* Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 686-87 (1981) (either the jurisdictional rules are unclear or "the rule is well established but its terms are so elastic that the result they yield on any given set of facts is not predictable"). Professor Field argues that the case law developing the discretionary scope of jurisdiction of the federal courts masks, through procedural decisions, "value judgment(s) [that] . . . reflect hostility to civil liberties cases on the merits" and that one solution would be to allow an election of the forum by parties where Congress has created concurrent jurisdiction. *Id.* at 721-24.

20. *See* Monaghan, *Of "Liberty" and "Property,"* *supra* note 6. "But the cases are capable of broader mischief. . . . They are capable of generating doctrine and results that are inconsistent with the long-standing conceptions about the meaning of 'liberty' and 'property' in a 'Constitution for a free people.' " *Id.* at 443-44.

21. That the provision of a federal forum alone is sufficient justification for § 1983 has been argued most persuasively by Professor Neuborne. *See* Neuborne, *The Myth of Parity*, *supra* note 6; Neuborne, *Toward Procedural Parity in Constitutional Litigation*, *supra* note 6.

22. Other commentators disagree. *See* Bator, *supra* note 6, at 623; Whitman, *supra* note 5, at 23-25 (federal forum is "largely symbolic").

23. Chevigny, *supra* note 6, at 1358.

More importantly, the *content* of the remedies of section 1983 and its *Bivens*[24] counterpart provides several practical advantages. Damages are obtainable against individuals,[25] punitive damages are available,[26] a jury trial is provided,[27] and attorney's fees may be sought.[28] Additionally, as in the case of prisoner actions, suits may be brought *pro se* and may be investigated under the auspices of the federal court.[29] By contrast, state administrative procedures, such as tort claim remedies, provide primarily a summary method of determining easily proven compensatory damages, award only those damages, shield individual defendants by providing compensation through an agency procedure,[30] and normally do not make provision for attorney's fees.[31]

In addition to obtaining damages for past deprivations of rights, attorneys bringing section 1983 actions can also procure interim injunctive relief against continuing abuse by state or local officials—a key consideration in most institutional litigation involving ongoing relationships.[32] State tort law further undermines the special significance of the constitutional violation by reducing it to one compensated only by reference to traditional tort rules. Injunctive relief is not available in administrative settings, and if addressed at all in a tort suit, it is adjudicated without consideration of the substantive policies behind section 1983.

Several cases from recent terms illustrate the Court's preference for initial state adjudication of section 1983 claims and its reversal of some basic aspects of the *Monroe* decision. The aspects affected were:

Definition: In *Parratt v. Taylor*,[33] the Court defined the scope of the deprivation of the due process right according to the availability of a state common law remedy or administrative procedure to compensate the victim.

Exhaustion: The Court has indicated some uncertainty

24. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (federal common law damage remedy is available against federal officials for violation of constitutional rights).

25. Carlson v. Green, 446 U.S. 14, 21 (1980).

26. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978).

27. Carlson v. Green, 446 U.S. 14, 20-23 (1980) (remedial scheme provided by the *Bivens* remedy was more effective than that provided by Federal Tort Claims Act and thus the *Bivens* remedy could be chosen by plaintiff despite the availability of FTCA).

28. 42 U.S.C. § 1988 (1976). *See generally* Eisenberg, *supra* note 6.

29. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 647-53 (1979).

30. See, *e.g.*, NEB. REV. STAT. §§ 81-8,209 to -8,226 (Supp. 1980), the Nebraska statute involved in Parratt v. Taylor, 451 U.S. 527 (1981).

31. The Nebraska statute is unusual in that it does have an attorney's fee provision.

32. FED. R. CIV. P. 65. *See* notes 58-60 and accompanying text *infra*.

33. 451 U.S. 527 (1981).

about retaining the blanket nonexhaustion rule[34] and has an opportunity, when it decides *Patsy v. Florida International University*,[35] to require state administrative adjudication of constitutional claims before section 1983 can be invoked.

Preclusion: In *Allen v. McCurry*,[36] the Court held, under the doctrine of collateral estoppel, that prior state adjudication is dispositive of issues raised in subsequent section 1983 actions.

I. Definition

In a series of recent decisions that culminated last term in *Parratt v. Taylor*,[37] the Court applied a high level of judicial scrutiny to factual situations involving alleged deprivations of liberty or property in order to determine whether or not a claim is actionable under section 1983. The scope of the remedy made available under section 1983 has been strictly delimited by this line of cases, and that redefinition of elements of Fourteenth Amendment claims has become ensconced as a matter of constitutional law.[38] Yet, it is still unsettled which kinds of primary conduct now give rise to a viable claim under the section.

The Court has indirectly restricted the scope of section 1983 through its construction of the due process clause: cases have held that the interest affected did not constitute liberty or property with regard to

34. Fair Assessment in Real Estate Ass'n v. McNary, 102 S. Ct. 177, 194-97 (1981) (Brennan, J., concurring).

35. 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 88 (1981).

36. 449 U.S. 90 (1980).

37. 451 U.S. 527 (1981). The cases include Vitek v. Jones, 445 U.S. 480 (1980) (transfer of state prisoner to mental hospital); Baker v. McCollan, 443 U.S. 137 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); Meachum v. Fano, 427 U.S. 215 (1976) (transfer of prisoner to maximum security institution); Bishop v. Wood, 426 U.S. 341 (1976) (dismissal of nonprobationary city chief of police); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (dismissal of teacher by state university did not implicate protected liberty or property interests). For a discussion of *Paul*, *Baker*, and *Ingraham*, see notes 48-50, *infra*.

38. *See* Monaghan, *Of "Liberty" and "Property,"* *supra* note 6. "Read literally, section 1983 incorporates every 'liberty' or 'property' interest protected by the fourteenth amendment. Accordingly, statutory explication necessarily becomes constitutional exegesis as well. . . . But quite plainly, a majority of the Court rejects [this broad definition] . . . and seems determined to prevent the escalation of every grievance against state and local government into a constitutional claim." *Id.* at 408.

However, this is precisely the situation brought about by the decision in Maine v. Thiboutot, 448 U.S. 1 (1980). The Court must realize some of the consequences of *Thiboutot*: an increase in federal caseload coupled with the unpredictability of the types of wrongs by state officials that will now constitute § 1983 claims.

a state standard for determining such,[39] that there was no "deprivation" of the interest,[40] or that the deprivation did not occur without due process of law.[41] This last analysis was employed in *Parratt*, which held that the provision of a postdeprivation administrative procedure that might compensate the injured party fulfills the requirements of the Fourteenth Amendment due process clause and therefore precludes a section 1983 cause of action.[42] This emphasis on procedural regularity, which the Court seems satisfied exists in almost any state procedure, vitiates the strength of section 1983 as a plenary federal court remedy. By not insisting on the existence of a *substantially similar* remedy, albeit in a different forum, the Court essentially denies the *types* of relief especially available under section 1983.[43]

On its facts, *Parratt* makes it easy to be unsympathetic to the plaintiff's desire to "make a federal case out of it." Taylor, a state prisoner, sued prison officials to recover the loss of a mail-order hobby kit, valued at $23.50, which was signed for by others while he was in solitary confinement. The kit was subsequently lost and never recovered. Taylor alleged a constitutional deprivation of property without due process of law and sued directly under section 1983. The lower court rendered summary judgment in his favor, a decision which was affirmed on appeal. The Supreme Court, with three separate concurring opinions and one, that of Justice Marshall, concurring in part and dissenting in part, reversed.

Justice Rehnquist's opinion for the majority found that there was a deprivation, even though only negligent conduct of state officials was claimed,[44] because the officials had acted contrary to established prison procedures.[45] Although the Court found that negligence could be ac-

39. Paul v. Davis, 424 U.S. 693 (1976).

40. Baker v. McCollan, 443 U.S. 137 (1979).

41. Ingraham v. Wright, 430 U.S. 651 (1977).

42. 451 U.S. at 544.

43. *See* Carlson v. Green, 446 U.S. at 21-23, as to the differences in effectiveness of the remedies.

44. In doing so, the Court decided the question that had been avoided in Procunier v. Navarette, 434 U.S. 555 (1978), and Baker v. McCollan, 443 U.S. 137 (1979), in the affirmative. The Court held that nothing in either the legislative history or the statutory language limited § 1983 to intentional deprivations of constitutional rights, and that *Monroe* itself had used the word "neglect." 451 U.S. at 531-35. *But see id.* at 546-54 (Powell, J., concurring). "As I do not consider a negligent act the kind of deprivation that implicates the procedural guarantees of the Due Process Clause, I certainly would not view negligent acts as violative of these substantive guarantees." *Id.* at 553.

45. Justice Rehnquist noted that the deprivation occurred because the prison officials failed to conform to established prison procedures regarding the delivery of mail to prisoners specially confined. "There is no contention that the procedures themselves are inade-

tionable under section 1983, it found that there was not a deprivation without due process of law because Taylor had a state tort claims procedure available to recover the cost of the kit. That procedure fully satisfied his Fourteenth Amendment entitlement.[46]

Parratt formally relegates to state tort claims procedure actions that could have been brought concurrently under section 1983. It effectively reduces the twin aims of section 1983—compensation and deterrence of unlawful official conduct—[47]to one: compensation. It defies the congressional attempt to create a plenary remedy by substituting an abbreviated one in state forums. The danger of such substitution is that this approach abdicates federal judicial responsibility for fact finding in order to determine whether or not a federal right has been violated. In effect, *Parratt* substitutes procedural due process for substantive due process guarantees.

In so doing, *Parratt* follows the line of reasoning that the Court has been pursuing through *Paul v. Davis*,[48] *Ingraham v. Wright*,[49] and *Baker v. McCollan*.[50] Together, these cases evidence a disturbing ten-

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quate nor . . . [that] the State [could have provided] a predeprivation hearing." 451 U.S. at 543. Nevertheless, the prison officials were acting "under color of state law." Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278 (1913).

46. 451 U.S. at 543-44.

47. In Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978), the Court said, "[t]he policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Compare Robertson with* Whitman, *supra* note 5, at 48-52, as to the "attenuated" effect on deterrence of official misconduct through the award of damages. *See also* Carey v. Piphus, 435 U.S. 247, 254-56 (1978) (actual injury must be proved to justify more than nominal compensatory damages, although punitive damages are allowable under § 1983).

48. 424 U.S. 693 (1976). *Paul* held that reputation, standing alone, is not constitutionally protected as either liberty or property. The plaintiff's name and picture had been included on a flyer of "Active Shoplifters" which the police had circulated to merchants. The Court based part of its decision on the notion that the interest injured in the case could be protected by state tort law and that it did not rise to an independent constitutional level. *Id.* at 701.

49. 430 U.S. 651 (1977). *Ingraham* involved a § 1983 claim filed by students who were subjected to corporal punishment in public schools. Although the punishment was meted out immediately following the infraction, an administrative hearing was available after the fact to test the propriety of the action. The Court held that the post-beating hearing was sufficient to satisfy due process and that therefore the students' challenge to the procedure did not state a claim under § 1983.

50. 443 U.S. 137 (1979). *Baker* concerned another factual situation implicating police procedures. In *Baker*, the plaintiff's § 1983 claim was based on the detention following an arrest that was admittedly valid but of the wrong person. While in confinement for three days, the plaintiff repeatedly requested the sheriff to confirm his claim of mistaken identity. The Court first addressed whether or not the sheriff's negligence (as the majority termed it) would be actionable under § 1983 and determined that there was no deprivation of liberty amounting to a constitutional violation. The Court thereby avoided reaching the question

dency to redefine the scope of the section 1983 remedy by removing from its ambit cases that also might fit into settled state procedural remedies. Justice Rehnquist seems to believe, on the grounds of federalism, that it is wise policy to have primary adjudicative responsibility left to the states.[51] There is little logic otherwise for the Court's refusal to find that these particular instances of state action violate constitutional guarantees.

These decisions destroy the major effect of *Monroe's* holding that the federal remedy of section 1983 was concurrent with and "supplementary" to any available state remedy.[52] They must also be criticized from the perspective of the litigator, who, in initially choosing the type of action to bring, needs solid, not incoherent, criteria to determine when otherwise available state remedies or procedures will make section 1983 unavailable.

Parratt raises some doubt about the validity of the Court's approach to constitutional litigation. First, one would think that the monetary amount of the claim would not matter when constitutional rights are at stake.[53] By using this case to limit the scope of section

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of whether or not the sheriff's conduct was negligent or deliberate. The holding was based on the reasonableness of the sheriff's conduct under the circumstances.

51. Justice Rehnquist, author of the majority opinions in § 1983 cases such as Parratt v. Taylor, 451 U.S. 527 (1981), Baker v. McCollan, 443 U.S. 137 (1979), and Paul v. Davis, 424 U.S. 693 (1976), has had a strong influence on the language defining the scope of the § 1983 claim. It seems that one of his chief concerns is precisely the one raised in Frankfurter's dissent in *Monroe*: that the federal court system will, through expansion of the § 1983 right, interfere with the daily administration of state business by state officials. *See generally* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). The result of foreclosing the § 1983 remedy is to require the plaintiff to pursue other available state procedures; this was explicitly stated as the position of the Court in *Paul*, 424 U.S. at 712 (plaintiff should pursue an action at common law for defamation), *Baker*, 443 U.S. at 145 (complaint might state a claim for false imprisonment under state law), and *Parratt*, 451 U.S. at 544 (existence of state tort claims procedure sufficient to compensate for injury). *See also* Whitman, *supra* note 5, at 8-11.

52. Monroe v. Pape, 365 U.S. at 183. The independent nature of the § 1983 remedy is established. In principle, it stands for the necessity to redress violations of federal constitutional rights in a federal forum because the constitutional interest should be defined and protected by the federal system. *See id.* at 196 (Harlan, J., concurring). The original language in *Monroe* about the "supplementary" nature of the remedy has been held to mean that it is available regardless of alternative remedial procedures under state law, *id.* at 183, state administrative remedies, McNeese v. Board of Educ., 373 U.S. 668 (1963), or, as in the parallel *Bivens* remedy against other federal claims, procedures such as the Federal Tort Claims Act, Carlson v. Green, 446 U.S. at 19.

53. Section 1983's jurisdictional counterpart, 28 U.S.C. § 1343(3) (1976), has never required a minimum amount to be in controversy as a prerequisite to a federal court claim because of the substantive nature of the interests arising under the Civil Rights Act. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Hague v. CIO, 307 U.S. 496, 501 (1939) (Stone, J., concurring).

1983, however, the Court implies that the federal courts cannot be bothered with trivial cases. The real issue is not the recovery of the value of the hobby kit, but the availability of a remedy that might redress instances of unconstitutional action by state prison officials. Second, in contrast to the rest of the citizenry, prisoners are in a uniquely unfavorable position; their captivity makes it difficult to receive information about their legal rights[54] and subjects them to the control of prison authorities.[55]

For prisoners, section 1983 is more effective than state remedies to redress repeated but isolated deprivations of property or liberty. A suit against a guard or prison official in an individual capacity is allowed under section 1983, but not under most state tort claims procedures.[56] Neither does a state procedure provide the interim injunctive relief, available in a section 1983 action, that allows a judge to pinpoint effective remedial treatment. On these grounds alone, the two remedies simply are not equivalent. Despite the assertion that a state remedy is adequate, a prisoner who has suffered only a small monetary loss, but who seeks access to the federal court for ancillary injunctive relief, is clearly disadvantaged under this decision.

The substance behind the triviality argument is, of course, the necessity to conserve judicial resources and the enormous increase in caseload caused by section 1983 cases, a situation often mentioned by the commentators.[57] It is certainly difficult to argue that trivial actions should be allowable in the face of an overburdened federal judiciary, yet the solution to crowded dockets should not be careless judicial redefinition of a constitutional standard.[58]

Congress' failure to redefine section 1983, given the available statistics on the federal caseload, should convince the Court that it is Con-

54. Parratt v. Taylor, 451 U.S. at 554 (Marshall, J., concurring in part and dissenting in part).

55. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

56. *See* Turner, *supra* note 29, at 611, 644.

57. Parratt v. Taylor, 451 U.S. at 546, 554 n.13 (Powell, J., concurring). *See also* Weinberg, *supra* note 6. "It is difficult to resist the conclusion that much of this federal door closing is not so much a function of enlightened federalism or even an evolving political environment as of crowded dockets." *Id.* at 1203 (footnote omitted).

58. The potential implication of the Court's reasoning is illustrated by a recent lower court decision that relied on *Parratt*. In Sheppard v. Moore, 514 F. Supp. 1372 (M.D.N.C. 1981), the court dismissed a claim under § 1983 alleging an intentional deprivation of the plaintiffs' property by county officials following a criminal investigation. The court read *Parratt* to require dismissal since there was a postdeprivation procedure (a common law action in conversion) available under state law to redress the damage. *Id.* at 1377.

Although *Parratt* and *Sheppard* are technically consistent with *Monroe*, as they are both interpretations of the scope of the Fourteenth Amendment and not of § 1983, they

gress' intention to keep the remedy intact.[59] That Congress is aware of the crowded dockets is clear from the recent enactment of 42 U.S.C. section 1997e,[60] which sets up a limited exhaustion requirement for certain cases brought by prisoners. That statute specifically delineates the circumstances under which exhaustion would be required, and instructs the lower court to retain jurisdiction for ninety days while the administrative claim is being pursued.[61] Because Congress has so recently demonstrated this *limited* approach to the problem of prisoner lawsuits in federal courts, it is an abuse of judicial power for the Court now to find that state administrative procedures should become a *complete* substitute for the section 1983 action.

The decision in *Parratt*, coupled with an expanded vision of the principle of *Allen v. McCurry*,[62] has the alarming potential for making section 1983 relief completely unavailable to prisoners. If most state compensatory procedures would satisfy the Court's general delineations of due process, collateral estoppel would then bar any further federal court remedy.[63] Persons bringing section 1983 actions face a hard

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clearly alter the Court's assumption in *Monroe* that the existence of a state administrative or common law remedy would not bar access to federal court.

Another puzzling legacy of *Parratt* is whether or not its holding will also be applied to limit actions claiming deprivation of a liberty interest. (One assumes that no postdeprivation procedure could compensate for a loss of life.) There is no logical reason why the Court would not construe "liberty" to be subject to the same due process analysis as "property." There are fewer common law analogues to compensate for deprivation of a liberty interest; the torts of false imprisonment and battery are possible examples, but they are not capable of reaching constitutional claims based upon allegations of denial of equal protection or interference with voting rights. *Sheppard* portends the further erosion of the § 1983 remedy when any remedy is available under state law.

59. Approximately 30,000 suits were filed under § 1983 in the United States district courts during 1980, comprising 17 percent of the courts' entire civil case load. *After 111 Years Federal Rights Law Faces Grilling*," N.Y. Times, March 7, 1982, § E, at 2, col. 3. One commentator believes that application of the principle of *Parratt* will result in a reduction of § 1983 filings by as much as 90 percent. K. DAVIS, TREATISE ON ADMINISTRATIVE LAW 416 (Supp. 1982).

When § 1983 was amended in 1979 to include the District of Columbia, Congress did not attempt to revise in any way the construct of that section. *See* United States v. Rutherford, 442 U.S. 544, 559 (1979).

60. The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 352 (1980). The Act remits prisoners who file lawsuits under § 1983 to "plain, speedy, and effective" administrative grievance procedures if a court determines that reference to these procedures would be appropriate. 42 U.S.C. § 1997e(a)(1) (1980). The procedures themselves must be found to be in "substantial compliance" with standards set forth by the Attorney General or so determined by the court. 42 U.S.C. § 1997e(a)(2). *See also* note 79 *infra*.

61. 42 U.S.C. § 1997e(a)(1) (1980).

62. 449 U.S. 90 (1980). For a discussion of *Allen*, see text accompanying notes 91-107 *infra*.

63. *See* text accompanying notes 91-102 *infra*.

choice: either to bring the action initially in federal court and wait for the motion to dismiss in order to raise the substance of the due process concern, or, in the interest of expediency, to begin the state procedure and face potential *res judicata* or collateral estoppel problems in the subsequent federal court suit.

II. Exhaustion

Before the Court this term is the case of *Patsy v. Florida International University*,[64] which presents an opportunity to reverse still another aspect of the original conception of *Monroe v. Pape*—that access to the federal courts under section 1983 does not require exhaustion of state remedies. *Patsy* involves a section 1983 claim alleging reverse racial discrimination and sex discrimination in employment. The plaintiff sought damages and injunctive relief against a state university. The district court dismissed the case on motion for failure to exhaust the employer's administrative remedies, which consisted of a university grievance procedure.[65] That decision was reversed and remanded by a panel of the Fifth Circuit Court of Appeals, but following a rehearing *en banc*, the Fifth Circuit reversed again, holding that there was no blanket rule excepting section 1983 actions from traditional rules requiring exhaustion of administrative remedies.[66]

Quite to the contrary, *Monroe* and a long line of cases[67] have countenanced an exception to the general rule that administrative remedies must first be exhausted when the action involves a claim brought under section 1983. The *Monroe* decision boldly stated that the "independent" and "supplementary" section 1983 remedy, which it recognized and reinforced, did not depend on initial resort to state judicial tribunals prior to the entry of the federal claim.[68] The section 1983

64. 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 88 (1981).

65. The procedure itself is outlined in 634 F.2d at 925 n.7 (Hatchett, J., dissenting), 927-28 (appendix to opinion). Not only must a complainant pursue the grievance procedures of the university, but, following an unfavorable decision, a claim must then be entered with the Human Relations Commission (HRC). Both administrative agencies lack enforcement power; the orders of the HRC must be enforced through a Florida trial court, with appeal through the state appellate system.

66. 634 F.2d at 912-14. The Fifth Circuit required, absent any traditional exceptions to the general exhaustion rule, exhaustion of adequate state remedies as a procedural prerequisite to filing a § 1983 claim.

67. Board of Regents v. Tomanio, 446 U.S. 478, 490 (1980); Wilwording v. Swenson, 404 U.S. 249 (1971); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963). *See also* Fair Assessments in Real Estate Ass'n v. McNary, 102 S. Ct. 177, 190-91 nn.11&12 (1981) (Brennan, J., concurring).

68. 365 U.S. at 183.

exception to the exhaustion requirement was also recognized in *McNeese v. Board of Education*,[69] which held that reference to administrative remedies supplied by a local school board would not be required before litigation of section 1983 claims of racial discrimination and segregation in the school system.[70]

In *Patsy*, majority and dissenting opinions in the Fifth Circuit differed in their versions of the legislative history of the Civil Rights Act of 1871 and of the import and *stare decisis* effect of the Supreme Court's decisions since *Monroe*.[71] Disagreement at this level, based ultimately on different policy positions, can only be resolved by the Supreme Court, and *Patsy* provides the Court with an opportunity to alter another aspect of *Monroe*.

Institution of a judicially imposed exhaustion requirement would have a burdensome effect on potential section 1983 plaintiffs. Exhaustion of state administrative procedures is not only time consuming but also is expensive if done with legal assistance. An exhaustion requirement inevitably delays gaining access to a federal forum,[72] and in some cases, such delay results in permanent exclusion from the federal courts.[73] In *Patsy*, the Fifth Circuit expressed the hope that resort to the state administrative procedure would result in timely settlement of the claim in terms favorable to the plaintiff.[74] Even if that were the outcome, Congress, in enacting the provisions of section 1983,[75] and the Court, in deciding *Monroe*, have operated on the presumption that the access to the federal forum and vindication of the substantive rights

69. 373 U.S. 668 (1963).

70. *Id.* at 671, 676.

71. *Compare* 634 F.2d at 906-08 (majority opinion), *with* 634 F.2d at 914-16 (Rubin, J., dissenting), 916-26 (Hatchett, J., dissenting). The *en banc* majority favored a flexible exhaustion requirement, monitored by the district court.

72. Ms. Patsy's case could conceivably be delayed up to a year if she followed each step of the procedure set forth in the appendix to the *en banc* opinion, 634 F.2d at 927-28.

73. Since state statutes of limitation borrowed for analogous § 1983 actions are not tolled pending exhaustion of state administrative procedures, § 1983 actions not brought within that statutory period would be foreclosed. Board of Regents v. Tomanio, 446 U.S. 478 (1980).

74. 634 F.2d at 913. "[W]e think that a carefully devised, well-monitored exhaustion requirement might well advance the cause of potential civil rights litigants." *Id.*

75. Congress created concurrent jurisdiction in § 1983 actions with the clear intent that the federal courts provide immediate access for adjudication of constitutional violations. *See* CONG. GLOBE, 42d Cong., 1st Sess. 368, 376, 389 (1871). "It seems . . . proper, to make a permanent law affording to every citizen a remedy in the United States courts for injury to him in those rights declared and guaranteed by the Constitution . . . ." *Id.* at 368 (remarks of Rep. Sheldon). "[T]his bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Id.* at 376 (remarks of Rep. Lowe).

protected by section 1983 are guaranteed as matters of the first instance.[76]

The practical problems created by a court-imposed exhaustion requirement are numerous. Without specific statutory authority delineating the administrative procedure, plaintiffs will have difficulty knowing which claims require which types of state administrative exhaustion. Certainly, after *Maine v. Thiboutot*,[77] section 1983 actions will arise in thousands of different state and local agencies having differing administrative systems.[78] Can it seriously be said that policy dictates the exhaustion of any state remedy as an improvement over immediate access to a federal court? Congress has determined a comprehensive scheme for cases involving certain prisoners; only such a carefully tailored scheme would suffice were an exhaustion requirement imposed.[79]

Certain aspects of the section 1983 remedy could be lost with compelled primary resort to state agency adjudication. For example, preliminary injunctive relief generally is unavailable through state agencies. It is unclear whether a federal district court would take jurisdiction to provide such relief pending the outcome of the administrative process. Furthermore, requiring plaintiffs to resort initially to state administrative agencies might result in findings of waiver if they did

76. Even Justice Frankfurter, in his dissent in *Monroe*, presumed that one of the major purposes behind the enactment of § 1983 was that fact finding for constitutional violations would be done in the federal forum, "in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts." 365 U.S. at 251 (Frankfurter, J., concurring in result). For the Court's agreement with the presumption, see Mitchum v. Foster, 407 U.S. 225, 242 (1972). *See also* Soifer & Macgill, *supra* note 6 at 1188-90.

77. 448 U.S. 1 (1980). Because of *Thiboutot*, potential violations of § 1983 can now occur through official abuses in any federally mandated statutory schemes involving joint federal-state participation. The sheer number and kinds of state agencies involved in implementing and administering federal statutes and regulations give an indication of possible complications for a state administrative exhaustion requirement before bringing a § 1983 suit.

78. Perhaps the Court is predicting this will indeed be the result of *Maine v. Thiboutot* and, at least subconsciously, is the reason for the recent decisions retrenching access to federal courts in § 1983 claims.

79. The legislative history surrounding the enactment of 42 U.S.C. § 1997e (1981) suggests the care and determination with which Congress applied itself in drafting the limited exhaustion requirement for prisoners. *See* 125 CONG. REC. H3634-35 (daily ed. May 23, 1979) (statement of Rep. Kastenmeier); *id.* at H3636-37 (statement of Rep. Drinan).

It also is clear that Congress had detailed information about the caseload situation in § 1983 filings generally and chose to address only a limited aspect of that problem. *See, e.g.*, 125 CONG. REC. H3635 (daily ed. May 23, 1979) (statement of Rep. Harris); *id.* at H3639-40 (statement of Rep. McClory).

Even the majority in *Patsy* felt that exhaustion should be required only when there was a district court determination that an "adequate and appropriate" remedy existed for exhaustion, 634 F.2d at 912-14. The implication is that a general exhaustion requirement without specific reference to a carefully drawn statutory scheme would be valueless.

not first commence their agency action. Such findings would then effectively preempt subsequent section 1983 action for failure first to exhaust state remedies.[80] Statutes of limitations could also create problems for potential section 1983 plaintiffs, since utilization of administrative procedures does not toll the statutes.[81] Finally, most state tort claims procedures require judicial review of the agency action, and under *Allen v. McCurry*, any findings by a state court might have a *res judicata* or collateral estoppel effect in any subsequent section 1983 action.[82]

This term, the Court had occasion to review the exhaustion doctrine in *Fair Assessments in Real Estate Association (FAIR) v. McNary*.[83] The plaintiffs in *FAIR* sought compensatory and punitive damages against county and state tax officials under section 1983 for an allegedly unconstitutional assessment of property taxes. Their section 1983 action followed a series of administrative appeals to the State Tax Commission and some state court actions, several of which were still pending at the beginning of the federal suit. The district court dismissed the section 1983 lawsuit, and the court of appeals affirmed. The Supreme Court also affirmed. The majority of the Court, per Justice Rehnquist, held that comity and the *Younger* doctrine[84] required the Court to refuse to exercise section 1983 jurisdiction.[85] Even though equitable relief was not sought in the case, the Court held that in order for plaintiffs to prevail in the section 1983 action, there would have to be a finding, similar to a declaratory judgment, that the tax assessed was unconstitutional. The majority noted that:

80. The waiver argument made in Allen v. McCurry, 449 U.S. at 115 (Blackmun, J., dissenting), is particularly disturbing to the potential § 1983 litigant. Given the confusion, absent a clear congressional delineation about whether or not the exhaustion requirement is present, and, if present, through which administrative procedure it must be pursued, those bringing § 1983 claims might very well foreclose their federal remedy by failing to exhaust administrative remedies in a timely manner.

81. *See* note 73 *supra*.

82. For example, the Nebraska Tort Claims Procedure detailed in *Parratt* provides for judicial review of the administrative decision in the state courts. NEB. REV. STAT. § 81-8,214 (Supp. 1980). Under 28 U.S.C. § 1738 (1976), the statute utilized in *McCurry*, a state court determination would have a preclusive effect on any subsequent § 1983 action, and would therefore, under *McCurry*, foreclose a § 1983 action, in federal court. *See* text accompanying notes 91-102 *infra*.

83. 102 S. Ct. 177 (1981).

84. Younger v. Harris, 401 U.S. 37 (1971). The *Younger* doctrine requires, on the grounds of comity, federalism, and equity principles, a federal court to dismiss an action whenever there is a pending state court action in which the constitutional issues can be raised.

85. 102 S. Ct. at 185-86.

> [T]he intrusiveness of such § 1983 actions would be exacerbated by the non-exhaustion doctrine of *Monroe* . . . . Therefore, despite the ready access to federal courts provided by *Monroe* and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts.[86]

The Court did not reach the question of whether or not the Tax Injunction Act,[87] standing alone, prevented the section 1983 action in the case. Justice Brennan, writing for four members of the Court in a concurring opinion, rejected the notion that the discretionary principles of comity and federalism could force federal courts to refuse to accept jurisdiction under section 1983. He argued that "displacement of section 1983 remedies" could be accomplished only by a "clear statement of congressional intent."[88] Although he, too, stopped short of deciding that the Tax Injunction Act itself was evidence of congressional intent to restrict section 1983 jurisdiction, he did require exhaustion of state administrative and judicial remedies as a precondition to a federal action when the exhaustion of those remedies is required for similar suits against the tax brought in state court.[89]

The Court's current elastic view of the nonexhaustion requirement for section 1983 actions expressed in *FAIR*, may extend to future decisions such as *Patsy*. Although it is true that state tax systems traditionally have received hands-off treatment from the federal system and that, arguably, Congress intended to address the disruption of state tax collection by federal courts when it enacted the Tax Injunction Act, *FAIR* might presage similar judicial flexibility in federal court jurisdiction in other cases. The majority's willingness to utilize a discretionary doctrine such as comity to refuse section 1983 jurisdiction provides little comfort to those who believed that, after *Monroe*, access to federal courts was guaranteed. Justice Brennan's concurrence was careful to recognize the continuing nonexhaustion principle of *Monroe* and to distinguish the special class of state tax challenges from other situations, such as *habeas corpus*, in which only Congress could require exhaustion.[90]

Nevertheless, even Justice Brennan's assurance that this is only a narrow judicial exception to section 1983 actions involving challenges to the state tax systems does little to assuage the concerns of those who

86. *Id.*
87. 28 U.S.C. § 1391 (1976).
88. 102 S. Ct. at 196 (Brennan, J., concurring).
89. *Id.* at 195-97.
90. *Id.* at 196.

fear that the Court might just as easily create other exceptions to the guarantees of section 1983.

III. Preclusion

A potentially disturbing aspect of the Court's deference to the initial adjudication at the state level for cases with concurrent federal-state jurisdiction arose in *Allen v. McCurry*.[91] That case involved a section 1983 suit against police officers for damages based upon an alleged illegal search under the Fourth and Fourteenth Amendments. The issue of the unconstitutional search and seizure had been raised in the section 1983 plaintiff's prior criminal trial in state court at a pretrial suppression hearing. Although the search was held to have been constitutional, some of the evidence seized that had not been in plain view was suppressed.[92] The Court of Appeals for the Eighth Circuit reversed the district court's summary judgment in favor of the police defendants in the section 1983 action on the ground that since *Stone v. Powell*[93] made a *habeas* remedy unavailable on the Fourth Amendment claim, a section 1983 action was the only opportunity for a federal district court to hear the constitutional claim for damages.[94]

The Supreme Court disagreed. Justice Stewart, writing for the majority, found simply that 28 U.S.C. section 1738[95] required collateral estoppel on the issue litigated in the state criminal trial. The Court further found that neither the statutory language, the legislative history, the policies behind the decision in *Monroe*, nor the Constitution required "one unencumbered opportunity to litigate that [federal] right in a federal district court."[96] If a party has a "full and fair opportunity" to litigate the issue once in an earlier case, a section 1983 action is thus precluded.[97]

Justice Blackmun's dissent, joined by Justices Brennan and Marshall, recognized the ramifications of the majority's decision. He spoke to several elements of the protective nature of section 1983:

91. 449 U.S. 90 (1980).

92. *Id.* at 92.

93. 428 U.S. 465 (1976) (writ of *habeas corpus* not available to relitigate claim under Fourth Amendment that had been adjudicated in the context of a prior criminal trial).

94. 449 U.S. at 91, 93-94, 103-04.

95. 28 U.S.C. § 1738 (1976) provides, "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions. . . ." *Id.*

96. 449 U.S. at 103.

97. *Id.* at 104.

> The legislative intent, as expressed by supporters and understood by opponents [of the 1871 Civil Rights Act], was to restructure relations between the state and federal courts. . . . Even when there was procedural regularity, which the Court today so stresses, Congress believed that substantive justice was unobtainable. . . . Congress consciously acted in the broadest possible manner.[98]

Justice Blackmun then relied on both *Monroe* and *Mitchum v. Foster*[99] for the proposition that the strength of the provision of the federal remedy was that it enabled the federal courts to act as "primary and final arbiters of constitutional rights."[100]

Because the Court's decision in *Allen* was not expressly limited to Fourth Amendment situations, nor indeed to criminal cases,[101] it is an easy matter to envision other contexts in which potential section 1983 litigants mights be forced to confront this dilemma. Certainly, allegations challenging the legality of police procedures such as arrests and searches or allegations of police brutality would require initial factual determinations affecting the issue of unconstitutionality to be made in criminal trials, determinations which would foreclose an otherwise available section 1983 action for damages.

It is neither fair nor logical to bind a section 1983 plaintiff to a determination made in a prior criminal proceeding. First, the standard that a state court trial judge is likely to apply as to the admissibility of evidence casts a different light on the Fourth Amendment right than that shed on a section 1983 claim. In a criminal proceeding, a judge might be more inclined to find no constitutional violation in order to admit evidence so that the "truth-seeking" process of a criminal trial will not be impaired. In addition, the pragmatic concern of a defendant in a criminal proceeding—to avoid a conviction by excluding incriminating evidence—differs significantly from the goal of a section 1983 proceeding—to vindicate constitutional rights by seeking damages. Although winning the criminal trial is of first importance, the lawyer representing the criminal defendant must also weigh the likeli-

98. *Id.* at 107-09.

99. 407 U.S. 225 (1972). Ironically, Justice Stewart was also the author of the *Mitchum* opinion.

100. 449 U.S. at 110 (Blackmun, J., dissenting).

101. For discussion of the effect of the preclusive doctrines of collateral estoppel or *res judicata*, see Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191 (1972); Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1980); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859 (1976); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543 (1976); *Developments in the Law—Section 1983 and Federalism*, *supra* note 6, at 1133, 1330-54.

hood of success on any motion raising constitutional rights against the subsequent rights of his or her client to monetary damages under section 1983.[102] In short, *Allen* would force a criminal defendant to choose between raising the constitutional violations in defense motions made during the criminal proceedings, only to be precluded from raising those issues in a subsequent section 1983 action, and not raising the issues at the criminal trial in order to pursue monetary relief in the subsequent section 1983 action. In reality, this is no choice at all.

A further danger follows from the fact that section 1738 similarly applies to civil actions; it applies to judicial review of an administrative proceeding in state court. The entire class of claims deferred to state adjudication under the principles of *Parratt* and *Patsy* thus would be barred from relief under section 1983.

It is also unclear whether the majority's requirement in *Allen* of a "full and fair" opportunity to litigate could be extended to suggest that a section 1983 defendant might raise the defense of waiver by the plaintiff as to issues not completely raised and aired during the prior court proceedings.

More importantly, *Allen* demonstrates yet another instance in which the Court appears to view "due process" as encompassing procedural regularity and little else. Remitting a potential section 1983 plaintiff to a prior opportunity to be heard in radically different circumstances celebrates form over the substance of the section 1983 right as elaborated in *Monroe*. The *Allen* decision indicates that a majority of the Court would prefer to defer completely to state procedures rather than, at a minimum, provide a federal judicial check on the substantive merits of the initial state adjudication. Allowing primary adjudication of federal rights to be determined in a state setting moves away from the Court's position in *Bell v. Hood*,[103] which held that the grant of jurisdiction to the federal courts is a source of the power to shape remedies.[104]

To support a shift from the reasoning in *Bell* toward the theory developed in *Allen* (which perhaps is justifiably rooted in frustration with dual adjudication and relitigation),[105] one needs to believe consistently not only that the remedy will be the same but also that adjudica-

102. *See Allen*, 449 U.S. at 115-16 (Blackmun, J., dissenting).

103. 327 U.S. 678 (1946).

104. For a view that the *Bell* decision required a development of a judicially protective remedy to vindicate constitutional claims, see Katz, *supra* note 6.

105. For a broad discussion of a theory of restraint from duplicative or overlapping proceedings in the application of equitable intervention by federal courts in state court matters, see Theis, Younger v. Harris: *Federalism in Context*, 33 HASTINGS L.J. 103 (1981).

tion in each forum will yield substantially the same result.[106]

The point is not, as has been argued, that there is no logical reason why state court or agency adjudication might not conceivably be equally sensitive to federal constitutional issues,[107] but that the statute, its legislative history, and *Monroe* all determine that there be federal enforcement in a federal forum. This determination cannot be discarded based on the mere availability and minimal procedural propriety of a different forum. The *Allen* case does much to dissipate the substantive spirit behind section 1983.

Conclusion

In his dissent in *Monroe*, Justice Frankfurter maintained that federal interference through the provision of a plenary, prompt, and thorough federal remedy might wreak havoc with state institutions and procedures.[108] He may have been right to worry about the specifics of enforcement through use of the section 1983 remedy. The *Monroe* decision paid much attention to the description of a broad, general substantive policy of federal protection of civil rights against state officials, but did not linger long on the specifics of the remedy provided by the statute.[109] The clear implication was that it was left to the federal

106. *See* Bator, *supra* note 6, at 621-29; Cover, *supra* note 6, at 668-80 (concurrency of jurisdiction evolved for substantial reasons, including the perceived success of dispute resolution when an alternative forum was available).

107. *Compare* Bator, *supra* note 6, at 623-35, *with* Neuborne, *The Myth of Parity*, *supra* note 6, *and* Neuborne, *Toward Procedural Parity in Constitutional Litigation*, *supra* note 6.

108. 365 U.S. at 211-21, 233-46 (Frankfurter, J., dissenting).

109. The majority opinion in *Monroe* made no mention at all of the specific procedural elements that were to become part of any lawsuit under § 1983. 42 U.S.C. § 1988 speaks to the laws that should govern civil rights actions. "The jurisdiction . . . [of the lower federal courts in civil rights actions] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ." 42 U.S.C. § 1988 (1976). *But see* Eisenberg, *supra* note 6, at 508-15, arguing that § 1988 should not apply to cases under § 1983 unless removed under 28 U.S.C. § 1443 to federal court.

It is unclear what kinds of inconsistency between state and federal law would be necessary before the courts could declare the action to be governed by federal common law. When faced with these issues, the Court has shown a willingness to "borrow" the relevant state law. *See* Board of Regents v. Tomanio, 446 U.S. 478 (1980) (analogous state statute of limitations and coordinate tolling rules govern federal § 1983 action); Robertson v. Wegmann, 436 U.S. 584 (1978) (state survivorship statute applied in § 1983 action). *But see* Carlson v. Green, 446 U.S. 14 (1980) (federal common law controls survivorship of federal

courts or to Congress to fill in the details and provide the basic structure of the lawsuit within the framework laid out by the Court.[110]

The Court in *Monroe* did not and could not anticipate all the questions to be raised by the remedy it created or all the uses to which that remedy might be put. The Burger Court has chosen to resolve both the question of interference with state institutions and the burden of the heavy caseload by changing the scope of the right itself through the addition of procedural wrinkles in the fabric of the original remedy. This judicial approach is misguided. Any change in the substantive scope of the right is more appropriately left to Congress.[111]

The most startling emphasis throughout these recent decisions is the Court's stressing of procedural assurances over substantive guarantees. *Monroe* established a settled policy of *federal* definition of the scope of the right, and federal exposition and implementation of the section 1983 remedy. A majority of the Burger Court appears to be satisfied that this level of federal court involvement can be replaced merely by assurance of the existence of state procedures[112] and that federal scrutiny ends with the assurance of state procedural regularity.

These recent pronouncements have resulted in vitiation of the principles expounded in *Monroe*. One effect of this doctrinal trend is to place litigators of section 1983 claims in a quandary. Litigators are faced with uncertainties and with the choice either of submitting the claim initially to the applicable state forum to fulfill jurisdictional prerequisites, with a possible preclusionary effect on the subsequent section 1983 action, or of risking dismissal of the section 1983 action on grounds of failure to state a claim or failure to exhaust administrative

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Bivens remedy). Although the cases speak of the primacy and independence of the federal remedy from any other available state remedy, "uniformity" of results in § 1983 lawsuits was held *not* to require a general federal rule to resolve these procedural issues in favor of § 1983 plaintiffs. Board of Regents v. Tomanio, 446 U.S. at 489; Robertson v. Wegmann, 436 U.S. at 594 n.11; Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975) (§ 1981 action). Regarding the *Bivens* remedy, however, the Court in Carlson v. Green, 446 U.S. 14 (1980), held that even though the Federal Tort Claims Act was available to satisfy plaintiff's complaint for compensation, the characteristics of the *Bivens* remedy (punitive damages, jury trial) made the remedy a more effective deterrent to unlawful official conduct. The Court thereby created a uniform federal policy for *Bivens* actions. *Id.* at 21-23. *Carlson* reaffirms the specifics of the § 1983 remedy. *Id.*

110. The *Carlson* case also suggested that Congress has the primary authority to alter the provisions of the § 1983 or *Bivens* remedy and that congressional intent was crucial to the determination of conflicting views of the content of the remedies. *Carlson*, 446 U.S. at 19-21.

111. For criticism of this methodology in earlier cases, see Durschlag, *supra* note 6.

112. The danger of this approach is demonstrated as well in the *Younger* line of cases. Soifer & Macgill, *supra* note 6, at 1191.

remedies. This difficulty can only generate hesitancy on the part of potential litigants to file federal constitutional claims against state officials. The ultimate result of this judicial preference for state court adjudication is a noticeable retraction of the rights guaranteed by Congress in voting the section 1983 remedy and underscored by the Court in *Monroe*.[113]

113. The Supreme Court reversed Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1981), under the name of Patsy v. Board of Regents while this article was in pageproofs. Patsy v. Board of Regents, 102 S. Ct. 2557 (June 21, 1982). In a majority opinion, written by Justice Marshall, the Court held that exhaustion of state administration remedies was not required before commencing a § 1983 action. *Id.* at 2568. The majority's analysis relied heavily on derivation of congressional intent from the Civil Rights Act of 1871 as well as from the passage of 42 U.S.C. § 1997e. 102 S. Ct. at 2461-66. *See* text accompanying notes 59-61 *supra*. The majority felt that the Court had not "deviated" from its refusal to impose a judicially mandated exhaustion requirement since the *McNeese* line of cases, *see* note 67 and accompanying text, *supra*, and could not find a policy argument that would convince it to do so now. 102 S. Ct. at 2560.

Justice O'Connor's concurrence, joined by Justice Rehnquist, felt constrained to follow the clear intent of Congress, while remarking as an aside that the caseload burden alone should prompt Congress to require exhaustion in all § 1983 cases. *Id.* at 2568 (O'Connor, J., concurring). Justice Powell, with Chief Justice Burger, dissented on a jurisdictional ground, but noted that exhaustion of available administrative remedies is "dictated in § 1983 actions by common sense, as well as by comity and federalism." *Id.* at 2579 (Powell, J., dissenting).

Although the decision in *Patsy* demonstrates the Court's marshalling of a majority to refuse a judicially imposed exhaustion requirement, the concurrences or dissents of five of the justices (Justices O'Connor and Rehnquist concurred; Justice White concurred in part; and Justice Powell dissented, joined by Chief Justice Burger on the exhaustion of remedies portion of the dissent) indicate a questionable commitment to preserving the federal remedy explicated in *Monroe*. The Court's increasing concern with burden of the federal caseload, and its own tendency to use discretionary doctrines such as federalism and comity, vitiates the initial right to a federal forum in civil rights cases. This may indicate that judicial tinkering with the § 1983 remedy will continue.