South Carolina Law Review

Volume 24 | Issue 1 Article 16

1972

Federal-State Relations and Section 1983

Edward G. Menzie

FEDERAL-STATE RELATIONS AND SECTION 1983

Section 1 of the Civil Rights Act of 1871, recodified 42 U.S.C. section 1983, is a statute with endless potential to remedy deprivations of an individual's civil rights; yet for the first fifty years of its existence, it appears to have been invoked no more than 21 times.[1] Over the last fifteen years, however, persons have more and more frequently relied on this statute to protect rights guaranteed by federal law. While the specific purpose of section 1983 is not apparent from its broad language,[2] nor ascertainable despite the hundreds of pages of recorded debate on the Civil Rights Act,[3] it is clear that the section was intended to open the federal courts to Negroes denied equality.[4] Placed in this setting, the section does seem to qualify as remedial legislation which should result in liberal constructions of remedies and narrow construction of defenses under the Act.[5] There are, however, countervailing considerations based on conceptions of federalism which have developed to somewhat inhibit the potentially sweeping application of section 1983. This article will examine problems which prospective plaintiffs must face when attempting to obtain relief in federal courts; problems to a considerable degree based on federal-state relations.

1. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?* 26 IND. L. J. 361, 362 (1951). *See generally*, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952).

2. 42 U.S.C. §1983 reads:

> Every person who, under color of any statute, ordinance, regulations, 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 proceedings for redress.

3. *See generally* Cong. Globe, 42d Cong., 1st Sess. (1871).

4. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 376, 459, 514 (1871).

5. *See* Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U. L. REV. 839 (1964).

I. THE RIGHTS PROTECTED BY SECTION 1983

Section 1983 was infrequently utilized in civil rights cases for a great portion of its history, possibly because early judicial treatment placed a very narrow interpretation on the phrase "secured by the Constitution or laws." The idea prevailed that to come within the scope of section 1983 a "right, privilege or immunity" had to be one newly conferred, *i.e.*, created by the Constitution or federal law.[6] However, in the 1939 case of *Hague v. Committee for Industrial Organization*,[7] the Third Circuit determined that "secured" meant "protected,"[8] which made section 1983 apply to deprivations of all federal rights. This interpretation, coupled with increased interest by the Justice Department in civil rights legislation, precipitated the renovation of attitudes toward section 1983. Incorporation of the Bill of Rights into the due process clause of the fourteenth amendment has secured federal rights against state action and section 1983 reaches deprivations of such rights even when the deprivations are of an individual nature.[9]

One possible limitation on the scope of section 1983 protection has been suggested in the equal protection area to which section 1985(3)[10] is made specifically applicable. The argument is that section 1983 involves due process but not equal protection because Congress specifically intended section 1985(3) to operate in the equal protection area.[11] This argument, because of the fusion of equal protection into the

6. 26 IND. L. J., *supra* note 1, at 367.

7. 101 F.2d 774 (3d Cir. 1939).

8. While the Supreme Court upheld the court of appeals on other grounds, Chief Justice Stone, in a concurring opinion, specifically endorsed the Third Circuit approach. 307 U.S. 496, 518 (1939).

9. *See* Note, *Limiting the Section 1983 Actions in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969).

10. 42 U.S.C. §1985(3) reads:

> If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

11. *See* Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); McShane v. Moldavan, 172 F.2d 1016 (6th Cir. 1949).

due process clause seems questionable,[12] and has been rejected for the most part in cases such as *Valle v. Stengel*[13] and *Moss v. Hornig*.[14]

Generally, courts faced with the unqualified language of section 1983 should have no basis for denying relief based on any federally created rights. (Note the possible exception being rights created under a federal statute which itself specifies a means of redress.)[15] Some of the areas where section 1983 has been utilized to protect individual rights are: (1) Violence and abuse in the administration of law, (2) Prisoners rights, (3) Abuse of Judicial Process, (4) Freedom of Speech, assembly and religion, (5) Right of franchise, and (6) Discrimination because of race.[16]

II. UNDER COLOR OF LAW

Section 1983 violations occur when individuals are deprived of rights secured by federal law by persons acting "under color of law."[17] Acting "under color of law" demands state action of some variety[18] and the requirement is satisfied whenever a state official deprives a person of a federal right, whether he acts in accordance with state law or contrary to it.[19] In addition, it was determined in *United States v. Price*[20]

12. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that due process as expressed in the fifth amendment includes the concept of equal protection).

13. 176 F.2d 697 (3d Cir. 1949).

14. 314 F.2d 89 (2d Cir. 1963). Note, however, that when a denial of equal protection is alleged, the plaintiff must make a showing of purposeful discrimination against a class. *Oyler v. Boles*, 368 U.S. 448 (1962). *See generally* 39 N.Y.U. L. REV., note 5 *supra*, at 840-43, for a discussion of this entire problem and the arguments raised for retaining broad section 1983 protection.

15. *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV., 1285, 1291-92 (1953).

16. *See* 2 EMERSON, HABER, AND DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1356-2253 (1967) for an extensive collection of cases dealing with the different individual rights mentioned.

17. Note that section 1983, unlike its criminal counterpart 18 U.S.C. §242, applies only to actions under color of state law. *See* Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). Otherwise, however, the color of law requirements sections 242 and 1983 have been treated as synonymous. Monroe v. Pape, 365 U.S. 167, 185 (1961). *See generally* 15 AM. JUR. 2d *Civil Rights* §14 (1964).

18. *See generally* Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970) for a discussion of the meaning of this term.

19. Monroe v. Pape 365 U.S. 167 (1961).

20. 383 U.S. 787 (1966).

that private persons, jointly engaged with state officials in prohibited action, are acting under "color of law for purposes of the statute."[21]

Without exploring in any great detail the possible outer limits of the "color of law" requirement,[22] it seems that private citizens acting under the authority of a state statute making them police officers for special purposes,[23] or a person acting in a specially state sanctioned occupation,[24] will be held to have satisfied the requirements for a section 1983 action. The line, however, may fall on the other side of a private citizen making a "citizen's arrest."[25]

A 1970 Supreme Court decision may have some broad ramifications on the "color of law" requirement of Section 1983. The case, *Adickes v. S. H. Kress and Co.*,[26] arose out of a refusal to serve a white New York school teacher seated with six blacks in a Hattiesburg, Mississippi lunchroom. The school teacher subsequently brought suit in New York under section 1983 seeking injunctive relief and attempted to satisfy the state action requirement by alleging that "the customs of the people" were "customs" within the meaning of Section 1983. It was the plaintiff's position that the customs of the people amounted to state action within the fourteenth amendment. A second theory utilized was that the defendants had acted under color of a Mississippi criminal trespass statute[27] which allowed people engaged in public businesses to refuse to serve anyone in their unfettered discretion. It was argued that such statute necessarily encouraged private discrimination and consequently amounted to state action.

21. Note that this case dealt with 18 U.S.C. 242, but that its holding with regard to the scope of the term "under color of law" is generally applicable to section 1983. *See* note 17 *supra*, as well as *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

22. *See* LOCKHART, KAMIZAR, AND CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 1019-20 (3d ed. 1970) for an interesting set of questions on the problem of how far "color of law" should be extended.

23. *See* Flemming v. S. C. Elec. & Gas Co., 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956) (bus driver who under state law was a "police officer")

24. *See* Williams v. U.S., 341 U.S. 97 (1951) (private detective who was a "special police officer" under local law).

25. *See* Warren v. Cummings, 303 F. Supp. 803 (D. Colo. 1969).

26. 398 U.S. 144 (1970). *See* 84 HARV. L. REV. 71 (1970) for an excellent casenote on *Adickes*.

27. MISS. CODE §2046.5 (1956).

The Supreme Court, in a five-to-two opinion by Mr. Justice Harlan, held that the plaintiff could recover under Section 1983 by proving individual discrimination with knowledge of and pursuant to a custom having the force of law by virtue of persistent official practices. Aside from the encouragement of the criminal trespass statute, the court suggested a custom of segregation might have been "enforced" through intentional police tolerance of violence or threats of violence against sit-in demonstrators, or through direct police harassment involving groundless arrests on any charges.[28]

Dissenting Justices Brennan and Douglas felt that the term "custom" in section 1983 included mere "customs of the people." The majority did not accept this expansive approach to the term but no real hint was given as to how far the term "customs having the force of law" may be carried even if the phrase does not include purely personal practices.[29]

III. JURISDICTION OF THE FEDERAL COURTS

Federal district courts have jurisdiction to hear actions under section 1983 so long as there is deprivation of a right protected by federal law or the Constitution, by anyone acting under color of state law. There is no jurisdictional amount necessary so long as the complaint states a cause of action for deprivation of a civil right.[30] Two problems that immediately arise, however, when an action is brought in a federal district court are exhaustion of state remedies and abstention.

A. *Exhaustion of State Remedies.*

Exhaustion of remedies as applied to section 1983 generally involves a federal court declining in its equitable jurisdiction to exercise properly invoked federal jurisdiction as a matter of comity to prevent interference with matters normally handled by the states. The rule has been limited to cases where the state remedy is administrative and implies wide

28. 398 U.S. at 172 (1956).

29. *See* United States v. Johnson, 390 U.S. 563 (1968) for an interpretation of the relation of older civil rights legislation to the "exclusive" remedies of the Civil Rights Act of 1964 when dealing with private discrimination. *See also* Adickes v. S. H. Kress and Co., 398. U.S. 144 (1970).

30. Douglas v. City of Jeannette, 319 U.S. 157 (1943).

rights of return to the federal court once state remedies have been exhausted.[31]

The doctrine of exhaustion has been excluded from section 1983 actions by a series of cases beginning with *Monroe v. Pape*[32] which upheld a complaint alleging a grossly illegal search by a Chicago policeman as sufficient to maintain a section 1983 cause of action. The Court here said, "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 remedy is invoked."[33] (Note that here the court was speaking with reference to a state judicial proceeding.)

Then in 1963 *McNeese v. Board of Education*[34] was decided. In this case a Negro objected to school segregation and requested that a federal district court order integration according to an approved plan. The Seventh Circuit affirmed a dismissal of the complaint, citing the plaintiff's failure to exhaust remedies under the state education law. The Supreme Court reversed for what seemed to be alternative reasons: (1) the opinion suggests that the Civil Rights Act provided an alternative remedy to those available under state law, and (2) the available state administrative remedy was inadequate.

Finally, in *Damico v. California*,[35] a 1967 welfare case, the Court in a one paragraph opinion said:

> [To require exhaustion] was error. In *McNeese v. Board of Education* . . . noting that one of the purposes underlying the Civil Rights Act was to 'provide a remedy in federal courts supplementary to any remedy, any State might have' . . . we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy.' . . . See *Monroe v. Pape*. . . .[36]

---

31. The doctrine developed because a particular self-restraint was felt necessary in administrative proceedings to permit persons with special expertise to render final determination on a specific matter. *See* 2 AM. JUR. 2d *Adm. Law* §595 (1962).

32. 365 U.S. 167 (1961).

33. *Id.* at 183.

34. 373 U.S. 668 (1963).

35. 389 U.S. 416 (1967).

36. *Id.* at 417. Justice Harlan in dissent objected to decision "without benefit of briefs and oral argument and on a skimpy record," and disagreed with the majority's reading of *McNeese* and *Monroe*. *Id.* at 418-420.

While *Damico* has been strongly criticized[37] for its use of insufficient authority to justify its off-handed treatment of the exhaustion problem, it does represent the present law on the matter.[38]

A suggestion that the exhaustion rule might be revived under proper circumstances, however, can be vaguely inferred from the case of *King v. Smith*[39] where Chief Justice Warren stressed "the importance of the case" as a reason for not requiring exhaustion.[40] Certainly, there are cases which involve only minor deprivations of an individual's civil rights,[41] yet without requiring exhaustion of state remedies, even these actions may be permitted to disrupt established state administrative procedures. A possible method of limiting such consequences of section 1983 actions is expounded in the HARVARD LAW REVIEW[42] where it is suggested that the courts take a "deferral approach" to jurisdiction.[43] This approach involves the federal courts accepting jurisdiction only when section 1983 would: (1) override certain kinds of state law, (2) provide a remedy where state law is inadequate, (3) provide a remedy where state recourse is adequate in theory but not in practice, or (4) remedy class deprivation. (Note that the first three areas are those which Mr. Justice Douglas articulated as the "three main aims" of section 1983 in *Monroe v. Pape.*) Such an approach would seem to permit effectuation of the purposes behind section 1983, yet dampen the seemingly uncompromis-

37. 82 HARV. L. REV., note 9 *supra;* Comment, *Exhaustion of State Remedies Under the Civil Rights Act,* 68 COLUM. L. REV. 1201 (1968).

38. *See also* King v. Smith, 392 U.S. 416 (1968); Houghton v. Shafer, 392 U.S. 639 (1968). *But see* Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971).

39. 392 U.S. 309 (1968).

40. *See* 82 HARV. L. REV., note 9 *supra,* at 1500-01.

41. For example, alleged improper action by a university official could be termed a relatively minor deprivation if a clear procedure for appeal of the decision is provided.

42. 82 HARV. L. REV., note 9 *supra.*

43. This article discusses the concept of a fully supplementary federal remedy, as well as propounds a "deferral approach" to limit access to the federal courts. *See also* Chevigny, *Section 1983 Jurisdiction; A reply,* 83 HARV. L. REV. 1352 (1970).

ing language of recent cases[44] which may lead to overburdened federal dockets and needless friction with state interests.

B. ABSTENTION.

The counterpart to the exhaustion rule, when dealing with state judicial activities, is the doctrine of abstention.[45] The basic elements of the doctrine are that: (1) a district court is vested with *discretion* to decline to exercise or postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law;[46] (2) where resolution of a federal constitutional question is dependent upon, or materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, or premature constitutional adjudication;[47] and (3) deference to state court adjudication will be made only where the issue of state law is uncertain.[48]

Since the doctrine of federal abstention was first propounded in *Railroad Commission of Texas v. Pullman Co.*,[49]

44. *See* Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam), (welfare); McNeese v. Board of Educ., 373 U.S. 668 (1963), (school segregation). The deferral approach would seem to allow federal relief in all these cases and would only be irreconcilable with *Monroe v. Pape*, 365 U.S. 167 (1961) (grossly illegal search and detention by police officer).

45. *See generally* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

46. The doctrine has traditionally developed around notions of equitable discretion, although in special situations has been invoked in cases not technically within this area. *Id.* at 605 n. 16.

47. Federal-question abstention should be distinguished from broader concepts of abstention which involve federal restraint to prevent disruption of "comprehensive regulatory systems." *E.g.*, Alabama Public Serv. Comm'n v. Southern R.R., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943). It is to be pointed out that in this section abstention will be treated primarily as a general rule applied by federal courts to decline jurisdiction in deference to state interest-operating very similarly to exhaustion of remedies. *See generally* Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960), which discusses the problems underlying attempts to allow state courts to decide only specific state law questions.

48. Harmon v. Forssenius, 380 U.S. 528, 534 (1965) *citing* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), and McNeese v. Bd. of Education, 373 U.S. 668, 673-74 (1963).

49. 312 U.S. 396, 500 (1941). A unanimous court through Mr. Justice Frankfurter said:

a racial discrimination case, it is somewhat ironic that the civil rights area is the one where a specific exception has been carved out. The earliest case holding abstention improper where "fundamental human liberties" are drawn in issue is *Stapleton v. Mitchell.*[50] The Court here stated that human rights under the Federal Constitution are always a proper subject for adjudication "and . . . we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other form."[51]

In the 1961 case of *Monroe v. Pape,*[52] the Supreme Court determined that section 1983 provided a supplemental remedy in the federal courts for any deprivation of a constitutionally protected right. Relying on this reasoning in the 1963 case of *McNeese v. Board of Education,*[53] it was stated that a requirement that assertion of a federal right "await an attempt to vindicate the same claim in a state court" would defeat the purpose of the Civil Rights Act. While this case dealt with the question of exhaustion of state administrative remedies, because of the broad language used in condemning any delay in adjudication of federal rights, it has also been taken to exclude abstention from the area of civil rights cases.[54]

Dombrowski v. Pfister[55] was decided in 1965, and the Court specifically rejected abstention where a statute was justifiably attacked as on its face abridging free expression, or as applied for purposes of discouraging protected activities. This case, because it dealt with the freedom of speech, certainly added support to the contention that a specific civil

---

> In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

50. 60 F. Supp. 51 (D. Kans. 1945), *appeal dismissed per stipulation,* 326 U.S. 690 (1945).

51. *Id.* at 55. The *Stapelton* rationale has been followed with few dissenting voices by a number of lower federal courts. *See Jordan v. Hutcheson,* 323 F.2d 597 (4th Cir. 1963); 80 HARV. L. REV., note 45 *supra,* at 608 n. 31.

52. 365 U.S. 167 (1961).

53. 373 U.S. 668 (1963).

54. *See* 80 HARV. L. REV., note 45 *supra,* at 610. *But see* Askew v. Hargrave, 401 U.S. 476 (1971).

55. 380 U.S. 479 (1965).

rights exception should be recognized to the abstention doctrine.[56] A narrower interpretation of the case, however, involves the assertion that the court was justified in refusing to abstain because the statute was void on its face and issuing an injunction against enforcement until such time as a valid narrowing construction was placed on the statute compelled the state to express itself in clear terms, thereby insuring prospective violators fair warning of the scope of the prohibition.[57]

The normal justifications for a broad "civil rights case" exception to the abstention doctrine are that civil rights cases are especially likely to enflame local passion creating substantial possibilities of prejudice, and civil rights cases involve an especially strong national interest in the federal forum.[58] Solutions are offered to a complete abrogation of the doctrine in civil rights cases and include limiting the exception to abstention in cases arising under the Civil Rights Act,[59] limiting it to cases of racial discrimination,[60] or limiting refusal to abstain to cases involving personal, as opposed to property, rights.[61]

At the present time there is no clear answer as to the status of abstention under section 1983. It does appear, however, that the recent case of *Askew v. Hargrave*[62] rules out adoption of any broad "civil rights case" exception to the abstention doctrine. The case arose out of a challenge to a Florida law known as the "Milledge Roll-back Law"[63] which required that, to be eligible to receive state monies, the local school dis-

56. *See also* Harman v. Forssenius, 380 U.S. 528, 537 (1965) which held that it was not an abuse of discretion to refuse to abstain in a challenge to a Virginia poll tax. Here the court seemed to adopt a "national interest" rationale by finding support for refusal to abstain in "the nature of the constitutional deprivation" (here voting rights). *But see* Harrison v. N.A.A.C.P., 360 U.S. 167 (1959).

57. 80 HARV. L. REV., note 45 *supra*, at 612-13.

58. *See generally* 80 HARV. L. REV., note 45 *supra*, at 605; 82 HARV. L. REV., note 9 *supra*, at 1490-92.

59. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW AND CONTEMP. PROB. 216, 230 (1948).

60. ALI Study, proposed 28 U.S.C. Section 1371(f) (Tent. Draft, No. 4, 1966) at 112-13.

61. *See* Reetz v. Bozanich, 397 U.S. 82 (1970); HARV. L. REV., note 41 *supra*, at 611.

62. 401 U.S. 476 (1971).

63. FLA. STAT. ANN. §236.251 (Supp. 1970).

trict, with certain exceptions, must limit *ad valorem* taxes to not more than 10 mills. A class action was filed in the federal court alleging invidious discrimination, in violation of the Equal Protection Clause, against school children in poor counties. A three-judge court granted summary judgment in favor of the plaintiffs declaring the law unconstitutional.[64]

The Supreme Court noted that while suit had also been commenced attacking the law in the state court based primarily on state constitutional grounds, the district court still refused to abstain on the basis of the *Monroe v. Pape* and *McNeese* decisions. Commenting on this, it was said:

> The reliance upon *Monroe v. Pape* and *McNeese* was misplaced. *Monroe v. Pape* is not in point for there "the state remedy, though adequate in theory, was not available in practice." 365 U.S., at 174. . . . McNeese held that "assertion of a federal claim in a federal court [need not] await an attempt to vindicate *the same claim* in a state court." 373 U.S., at 672. . . . Our understanding from the colloquy on oral argument with counsel for the parties is that the [state] case asserts, not the "same claim," that is, the federal claim of alleged denial of the federal right of equal protection, but primarily state law claims under the Florida Constitution, which claims, if sustained, will obviate the necessity of determining the Fourteenth Amendment question.[65]

The *Askew* opinion cites the case of *Reetz v. Bozanich*[66] as a recent example of the line of decisions which should inform the district court as to whether or not to abstain. Until *Askew*, the *Reetz* decision had been minimized because it required abstention in a case which dealt with property, rather than personal, rights;[67] although the case did re-emphasize the fact that in limited situations, where state law was uncertain and a state decision would alleviate the need for a decision on federal constitutional grounds, abstention was appropriate.

Even after *Reetz* and *Askew*, a qualification would appear to be necessarily placed on any abstention involving civil rights; and that is that a "plain, speedy and efficient state

64. Hargrave v. Kirk, 313 F. Supp. 944 (1970).
65. 401 U.S. 476, 478 (1971).
66. 397 U.S. 82 (1970).
67. Reid v. Board of Education, 40 U.S.L.W. 2410, 2411 (2d Cir. Dec. 14, 1971).

court remedy be available."[68] A decision as to whether a state court remedy meets this qualification should not depend solely on how rapidly a declaratory judgment or other review is obtainable, but should also take into consideration the nature of the rights involved, the potential injury, the degree of importance placed on the state interest with which the federal court would be interfering, and other factors pertinent to the specific situation. Consequently, while the *Askew* decision does not appear to undermine decisions such as *Dombrowski* and *Harman v. Forssenius*,[69] it may require federal courts, desiring to here specific civil rights cases which potentially interfere with legitimate state interests, to balance the various factors involved in light of notions of comity, the purpose behind the abstention doctrine, and the obligation to protect federally guaranteed rights.[70] It may be difficult at times to determine precisely where the balance is struck in the civil rights area, but thorough, well-reasoned opinions should for the most part produce results far more acceptable than either abstaining entirely or not at all in an area so susceptible to federal-state friction.

Reflecting on the doctrines of exhaustion of remedies and abstention in anticipation of commencing section 1983 actions, it does appear as though neither doctrine will substantially impede this "supplemental" relief where important and preferred federally guaranteed rights are involved. In periferal areas, however, where matters may be more satisfactorily resolved by the states because of the availability of an adequate state remedy and an especially strong state interest, individuals may find exhaustion and abstention far more formidable

68. *See ALI* Study, proposed 28 U.S.C. §1371 (2) (Tent. Draft No. 4, 1966). Such a requirement could mean that even a limited application of the rule foreclosed when a federal court is faced with deprivations of "preferred freedoms" within the first amendment because any delay in such area is intolerable. *See* Dombrowski v. Pfister, 380 U.S. 479, 489 (1965); Cameron v. Johnson, 381 U.S. 741 (1965). This rationale of "unwarranted delays" may place many other fundamental civil rights outside even the narrowest notions of abstention, relegating any application of the doctrine to more or less secondary rights in strict factual settings which clearly require abstention to prevent clear waste of a tentative decision. *Cf.* Harman v. Forssenius, 380 U.S. 528 (1965) (voting rights). *See* Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L. J. 143, 153 (1968).

69. 380 U.S. 528 (1965).

70. *See* Reid v. Board of Education, 40 U.S.L.W. 2410, 2411 (2d Cir. Dec. 14, 1971).

as a deterrent to federal relief.[71] In addition, even if one is successful in presenting his complaints to a federal court under section 1983, there are other difficulties such as immunity, the federal anti-injunction statute, and notions of federal equity jurisdiction, which may further complicate efforts to obtain relief. A discussion of the potential problems that may be encountered in these areas will be undertaken in the next section.

IV. REMEDIES

Once it is established that there has been deprivation of a federally protected right, that the deprivation was caused by one acting under color of law, and that a federal court should properly hear the case, the next question becomes one of seeking a remedy. An initial decision usually involved in section 1983 actions is whether to proceed in equity for an injunction, or at law for damages.[72]

A. Damages

The major problem with a damage action under section 1983 is the doctrine of state immunity for public officials.[73] It is clear that state common law immunities do protect individuals even from *federal* damage suits.[74] One must decide, however, who is entitled to immunity and whether it is complete or only qualified. In 1967, in *Pierson v. Ray*,[75] the Supreme Court held the doctrine of absolute judicial immunity applicable to actions under section 1983. Support for this position was drawn from the 1951 case of *Tenney v. Brand-*

71. *See* Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971) (refusing to adopt a complete abrogation of exhaustion in the civil rights area); 68 COLUM. L. REV., *note* 37 *supra*, at 1205; Askew v. Hargrave, 401 U.S. 476 (1971) (rejecting any broad abstention exception in the civil rights area).

72. Note that there may be a statute of limitations problem. *See generally* Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763 (1968).

73. *See generally* Comment, *Federal Comity, Official Immunity and the Dilemma of Section 1983*, 1967 DUKE L. J. 741 (1967) for an extensive treatment of this subject which includes discussions of possible defendants on a class basis.

74. *See* 39 *N.Y.U.* L. REV., note 5 *supra*, at 851, which draws the inference from the anti-injunction statute 28 U.S.C. §2283 (1965) that states should be free from disruptive federal activities, even under section 1983.

75. 386 U.S. 547 (1967).

hove[76] which held state legislators immune under section 1983. *Pierson* has been criticized, however, in that the congressional intent of section 1983 and the policies underlying the exception are said not to support a grant of judicial immunity, but rather argue for judicial liability under an actual malice standard.[77]

At the opposite end of the spectrum is immunity when dealing with ministerial officials. In 1961, the Supreme Court, in *Monroe v. Pape*,[78] held that a police officer need not have a specific intent to deprive an individual of his constitutional rights to become liable under section 1983. Mr. Justice Douglas concluded that "Section [1983] . . . should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[79] Consequently, a plaintiff suing a police officer under section 1983 need only state that he was deprived of federal rights "under color of law" to state a cause of action.[80] While *Monroe* does away with the qualified privilege based on "the lack of a specific intent to deprive a person of a federal right" that has sometimes mistakenly been read into section 1983,[81] the impact of the case must be appraised in light of the immunity that still exists if a policeman acts in good faith with probable cause.[82]

The question has also been raised as to whether an immunity exists if an official is properly carrying out an unconstitutional activity dictated by a state statute or a judicial order. Beginning with *Myers v. Anderson*,[83] several election cases have imposed liability on officials for refusing to register Negroes under discriminatory state legislation. Note, however, that the problem becomes far more difficult when the official is faced with *questionable*, as opposed to clearly

76. 341 U.S. 367 (1951).

77. *See* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L. J. 322 (1969); 39 N.Y.U. L. REV., note 5, *supra*, at 852-54.

78. 365 U.S. 167 (1961).

79. *Id.* at 187.

80. *See* 1967 DUKE L. J., note 73, *supra*, at 801.

81. *See* Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962), *overruling* Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959).

82. Monroe v. Pape, 365 U.S. 167, 187 (1961); Pierson v. Ray, 386 U.S. 547, 557 (1967). *See also* 1967 DUKE L. J., note 73, *supra*, at 804 n. 290.

83. 238 U.S. 368 (1915).

unconstitutional, legislation.[84] On the other hand, the courts have uniformly found an immunity to be present if the official is acting under a judicial order.[85]

Faced with the gamut of state common law immunities, section 1983 has still been reasonably effective in providing redress against law enforcement officials,[86] local boards,[87] and councils.[88] However, the problem often faced in suits for damages, even if immunity is avoided, is a hostile jury. This is one difficulty even the insulation of a federal court does not overcome. To avoid both the immunity problem and the jury, one may consider relief which can be sought in equity.[89]

B. Injunctions

"Federalism aims to promote, not only pluralism, the dissemination of power among distinct units, but also democratic participation in individual liberty."[90] When individual liberty and minority rights have been abused, direct intervention by the federal government has usually been unnecessary. Federal judicial review has normally been sufficient to protect basic political values, but where local abuse is not satisfactorily checked, "direct" intervention may be justifiably necessary. Normally, federal courts should be reluctant to use injunctive powers to interfere with the conduct of state officials, but where there is a deprivation of a constitutionally guaranteed right, the duty to use injunctive relief cannot be avoided.[91] Consequently, after a trial on the merits, equitable relief is available to protect civil rights under section 1983. This relief

84. *See* Note, *The Doctrine of Official Immunity Under the Civil Rights Acts,* 68 HARV. L. REV. 1229, 1239-40 (1955). *See generally* 1967 DUKE L. J., note 73, *supra.*

85. *See* 1967 DUKE L. J., note 73 *supra,* at 798.

86. *See* note 78 and accompanying text.

87. *See* 1967 DUKE L. J., note 73 *supra,* at 791.

88. *Id.* at 773 n. 143 which discusses the "rule of reasonable discretion" as applied to local boards and councils.

89. Note that if damages and injunctive relief are requested, the federal courts preference for a jury trial may leave crucial factual determinations in the hands of the jury. These findings are consequently binding on the court sitting in equity. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

90. Note, *Theories of Federalism and Civil Rights,* 75 YALE L. J. 1007, 1029 (1966).

91. *See* e.g., Wood v. Wright, 334 F.2d 369 (5th Cir. 1964).

has the advantage, as opposed to damage actions under section 1983, in that violators of an injunction will be subject to a contempt proceeding which does not involve a jury.

One area especially sensitive to federal-state friction, however, involves state enforcement of its criminal laws, and an individual seeking relief under section 1983 from either threatened or pending criminal prosecutions may run into a great deal of difficulty. Generally, courts of equity have been restrained from interfering in state criminal prosecutions as a result of the notion of "comity," which is an attempt to permit state courts to decide state cases free from interference from federal courts.[92] Comity, with regard to enjoining pending criminal proceedings, finds expression in 28 U.S.C. section 2283 which forbids federal courts from enjoining state proceedings "except as expressly authorized by Act of Congress." As for threatened state prosecutions, the case of *Ex parte Young,* and others, have established,

> the doctrine that, when absolutely necessary for the protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may ordinarily not be done, except under extraordinary circumstances, where the danger of an irreparable loss is both great and immediate. . . . The accused should first set up and rely on his defenses in state courts, even though this involves a challenge to the validity of some statute, unless it plainly appears that this course would not afford adequate protection.[93]

The "irreparable" injury which must be shown to justify injunctive relief against threatened prosecutions must be something more than the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, brought lawfully and in good faith.[94]

In 1965 the Supreme Court decided *Dombrowski v. Pfister,*[95] which was taken by many to hold that irreparable injuries sufficient to justify injunctive relief against threatened prosecutions could be based upon two independent circumstances.[96] The first of these involved statutes justifiably attacked on their face for overbreadth and vagueness, which the

92. *See generally* 75 YALE L. J., note 90 *supra.*

93. Fenner v. Boykin, 271 U.S. 240, 243-44 (1926).

94. Younger v. Harris, 401 U.S. 37, 46 (1971).

95. 380 U.S. 479 (1965).

96. *See, e.g.,* Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within,* 18 KANS. L. REV. 237, 252 (1970).

court in *Dombrowski* appeared to conclude exerted a "chilling effect" on the exercise of first amendment rights that alone was sufficient to warrant federal intervention. An alternative ground justifying injunctive relief involved a showing of bad faith application of a statute in an attempt to discourage protected activities.

In an effort to resolve some of the confusion surrounding *Dombrowski*, the Court handed down a series of decisions[97] in February, 1971, principally involving the cases of *Younger v. Harris*,[98] and *Samuels v. Mackell*.[99] *Younger v. Harris* dealt with an individual who obtained an injunction against a state prosecution commenced against him under an act allegedly unconstitutional on its face because of vagueness and overbreadth. In its opinion, the Supreme Court first recognized that the federal anti-injunction statute, 28 U.S.C. Section 2283, expressed the long-standing public policy against federal court interference with state court proceedings. The question of whether this statute specifically barred injunctive relief was never reached, however, because the court subsequently found that in order to grant injunctive relief from pending criminal prosecutions, a showing of "extraordinary circumstances, where the danger of irreparable loss was both great and immediate," would first have to be made.[100] Turning to *Dombrowski*, the court recognized that while certain statements in that opinion could be taken to indicate that the existence of a "chilling effect" from an overbroad or vague statute, alone could justify the granting of equitable relief, such re-

97. In addition to the cases of *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. MacKell*, 401 U.S. 66 (1971), and *Perez v. Ledesma*, 401 U.S. 82 (1971), which are discussed *infra*, *see Boyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stern*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971). *See also* Carey, *Federal Court Intervention in State Criminal Prosecutions*, 56 MASS. L.Q. 11 (1971) for an article discussing all these decisions.

98. 401 U.S. 37 (1971).

99. 401 U.S. 66 (1971).

100. While the Court specifically stated that it was expressing no view on situations where there was no prosecution pending in the state court and attempted to deal in *Younger* with only a pending prosecution, since it relied in part on *Dombrowski* which involved threatened prosecutions, it would seem to be permissible to conclude that general criteria applicable to both situations was actually being discussed. Of course, additional circumstances, beyond what would otherwise be necessary to enjoin threatened action, could still be required to entitle one to relief where a prosecution has actually begun.

marks were unnecessary to the decision. Consequently, it was stated:

> We do not think that opinion [*Dombrowski*] stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridges First Amendment rights. There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harrassment.[101]

Failing to find any bad faith or other extraordinary circumstances in the case sufficient to justify intervention irrespective of whether a criminal prosecution was threatened or actually commenced, the Court held that injunctive relief had been improperly granted by the three-judge court.

Samuels v. Mackell[102] was a case involving three defendants seeking injunctive and declaratory relief in pending state prosecutions. The Court in this case determined that:

> A declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.[103]

The reasons for this conclusion were, first, that once a declaratory judgment is issued, a district court could grant injunctive relief to protect or effectuate their decision. Secondly, it was stated that even if the declaratory judgment were not used as a basis for actually issuing an injunction, the declaratory relief alone had virtually the same impact as a formal injunction. Consequently, the Court held that unless some unusual circumstances were present, a district court should not issue declaratory judgments concerning proceedings already underway in state courts.

The Court in *Samuels* was careful to state that it expressed no view on the propriety of declaratory relief when no state proceeding had begun at the time the federal suit was commenced, but Mr. Justice Brennan, in *Perez v. Ledesma*,[104] did undertake to express his views on this matter. In an extensive concurring opinion, he pointed out the distinctions between declaratory and injunctive relief and concluded that when no state proceeding is pending and a statute is challenged as unconstitutionally vague or overbroad,

101. 401 U.S. 37, 53 (1971).
102. 401 U.S. 66 (1971).
103. *Id.* at 72.
104. 401 U.S. 82 (1971).

> the federal court must decide which of the requested forms of relief should be granted. Ordinarily a declaratory judgment will be appropriate if the case-or-controversy requirements of Article III are met, if the narrow special factors, warranting federal abstention are absent, and if the declaration will serve a useful purpose in resolving the dispute.[105]

Aside from the question of whether declaratory relief may yet be appropriate under threatened state prosecutions, the question left unanswered by the court after the *Younger v. Harris* and *Samuels v. Mackell* decisions is whether section 1983 is an "express" exception to 28 U.S.C. section 2283. The Fourth Circuit, representative of the majority of circuits, has held that section 1983 does not constitute an express exception.[106] The Third Circuit, however, in *Cooper v. Hutchinson,*[107] has expressed the view that section 1983 does constitute an express exception to section 2283.[108]

Even prior to *Younger v. Harris,* the Supreme Court had an opportunity to resolve this conflict when it faced *Cameron v. Johnson*[109] in 1965. In this case the appellant specifically raised the issue of whether section 1983 was an express exception to section 2283, but the Supreme Court avoided the issue with a *per curiam* reversal requiring that the district court reconsider the case "in light of the criteria set forth" in *Dombrowski.*[110] The case came back to the Court in 1968,[111] but this time the plaintiffs had failed to meet the "irreparable injury" test which permitted the Court to state that:

> We find it unnecessary to resolve either question [of whether Section 1983 is an express exception or whether Section 2283 prohibits an injunction against state action already commenced] and intimate no view whatsoever on the correctness of the holding of the District Court.[112]

A suggested method of avoiding section 2283 when injunctive relief is requested to stay pending state court actions under section 1983 is to hold that the anti-injunction statute

105. *Id.* at 122-23. *See also* Wulp v. Corcoran, 40 U.S.L.W. 2494 (1st Cir. January 11, 1972).

106. Barnes v. City of Danville, 337 F.2d 579 (4th Cir. 1964).

107. 184 F.2d 119 (3d Cir. 1950).

108. *See also* Machesky v. Bizzel, 414 F.2d 283 (5th Cir. 1969); 4 GA. L. REV. 610 (1970).

109. 381 U.S. 741 (1965).

110. *Id.* at 742.

111. Cameron v. Johnson, 390 U.S. 611 (1968).

112. *Id.* at 613, n. 3.

merely expressed a principle of comity and is not a rule restricting the power of the federal courts.[113] This would permit the court to issue injunctions, even against pending state actions, upon a showing of extraordinary circumstances sufficient to justify the interference. This method may possibly be foreclosed, however, as a result of the case of *Atlantic Coast Line v. Brotherhood of Locomotive Engineers,*[114] which concluded that any injunction against state court proceedings must be based on one of the specific statutory exemptions to section 2283 and that these exceptions should not be enlarged by loose statutory construction.

Irrespective of the language found in *Atlantic Coast Line v. Brotherhood of Locomotive Engineers,*[115] there does seem to be sufficient justification for the court to find an implied exception for specific section 1983 actions which involve "extraordinary circumstances" that satisfy the requirements of cases such as *Younger v. Harris.* The justification involves the fact that it is totally inconsistent with the policies underlying section 1983, that the courts should be powerless to act in clear cases of bad faith, harassment, or multiple prosecution under unconstitutional statutes.[116]

The case of *Sheridan v. Garrison* [117] illustrates a situation in which injunctive relief may properly be used in order to stay a pending state criminal prosecution. The case arose out of an hour-long documentary television show highly critical of New Orleans district attorney Jim Garrison's probe into the Kennedy assassination, after which bills of information were filed with the grand jury charging the reporters of the television show with bribery of the star witness in the probe. The reporters sought an injunction against the foreman of the grand jury and Garrison under section 1983, but the district court denied relief under section 2283 and granted summary judgment for the defendants.[118]

On appeal, the Fifth Circuit relied on an earlier decision and concluded that Section 2283 was no more than a statutory

113. *See* Machesky v. Bizzel, 414 F.2d 283 (5th Cir. 1969); Barnes v. City of Danville, 337 F.2d 579, 599-600 (4th Cir. 1964) (dissent of Judge Sobeloff).

114. 398 U.S. 281 (1970).

115. *Id.*

116. 56 MASS. L.Q. note 97, *supra,* at *27.*

117. 415 F.2d 699 (5th Cir. 1969), *cert. denied,* 396 U.S. 1040 (1970). *See also* 45 NOTRE DAME LAWYER 360 (1970).

118. Sheridan v. Garrison, 273 F. Supp. 673 (D.C. La. 1967).

enactment of the principle of comity which gave way in those extraordinary circumstances where the federal injunction is necessary to vindicate clear first amendment rights. The court, thereafter, carefully limiting its holding to the context of the first amendment, noted that the proceedings in question had "begun" only in a technical sense with the filing of a bill of information and indictment, and recognized that no equally effective protection could be had for first amendment rights other than resorting to a federal injunction. On this basis, it was concluded that the plaintiffs would be entitled to relief if they could establish the bad faith and chilling effects which they had alleged in their complaint and offered to prove.

Commenting on the impact of such a holding, Judge Thornberry said:

> Indeed, we are concerned, as was the district court, lest "every state defendant might have a go at the game" and win delays and exposition of the state's case merely by alleging that the prosecution against him is being brought in bad faith and that his first amendment rights are being chilled. . . . In the case before us, however, we do not find that a reluctance to "open the floodgates" of litigation would justify judgment without a hearing of appellants' case. In the first place, as we have already held, the appellants' pleading *if fully proved,* would state a cause of action under *Dombrowski.* In the second place, the cases themselves demonstrate that the courts have been able to distinguish, with surprising clarity for so difficult an area of law, those cases in which the *Dombrowski* requirements are pleaded in insufficient terms or are not supported by the facts.[119]

VI. CONCLUSION

In conclusion, it should be remembered that section 1983 is intended to provide "supplemental" relief for deprivations of federally protected rights.[120] Where such potentially sweeping power is vested in the federal government, however, it is only reasonable to find that certain checks are placed on this power in order to protect the delicate balance involved in federal-state relations. Therefore, while various difficulties arise in pursuing section 1983 actions which easily could frustrate legitimate efforts to protect an individual's rights, such inconvenience should be looked on as the price that must be paid to preserve a federal system of government. The doctrines which

119. 415 F.2d at 710 (5th Cir. 1969).
120. Monroe v. Pape, 365 U.S. 167 (1961).

affect section 1983 litigants will hopefully, however, remain flexible enough to permit federal judges to continue to hear those cases which, from the totality of the circumstances, require immediate federal intervention to protect an individual's civil rights even though some friction with state interests will result.

EDWARD G. MENZIE