Exhaustion of State Administrative Remedies Under the Civil Rights Act

I. The Doctrine of Exhaustion

A. General Nature

The doctrine of exhaustion of administrative remedies concerns the "completion or lack of completion"[1] of prescribed institutional procedures other than judicial procedures. Although this doctrine can be a congressionally imposed requirement,[2] it is more often a self-imposed policy of restraint allowing courts to narrow the scope of their jurisdiction. As such it is a "pseudo-jurisdictional" requirement based upon considerations of comity and equitable discretion.[3]

It is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[4] This rule has been applied in cases involving a failure to exhaust state administrative remedies as well as in cases involving exhaustion of federal remedies.[5] Since exhaustion concerns the satisfaction of certain prerequisites prior to the institution of judicial proceedings, it is, therefore, similar to the doc-

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[1]3 K. Davis, Administrative Law Treatise § 20.01, at 57 (1958) [hereinafter cited as 3 Davis].

[2]Federal habeas corpus, 28 U.S.C. § 2254(b) (1970), is an example of congressionally imposed restraint. This statute specifically provides that courts cannot hear a case until state corrective processes are complete or unless such processes are inadequate. *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970).

[3]Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); C. Wright, Law of Federal Courts § 49 (2d ed. 1970); Note, *Constitutional Law: Civil Rights—A Consideration of Federal Equitable Intervention and State Procedural Sovereignty*, 8 Wake Forest L. Rev. 442 (1972).

[4]Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). *See* Franklin v. Jonco Aircraft Corp., 346 U.S. 868 (1953); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947); Illinois Commerce Comm'n v. Thompson, 318 U.S. 675, 686 (1943); First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450 (1924); Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916); Marin v. University of P.R., 346 F. Supp. 470, 476 (D.P.R. 1972).

[5]For example, in Illinois Commerce Comm'n v. Thompson, 318 U.S. 675 (1943), the Supreme Court refused to uphold a challenge to fares set by the Illinois Commerce Commission because the plaintiff failed to first pursue the administrative remedy afforded him before the commission. Similarly, in First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450 (1924), the Court held that the bank was compelled to exhaust state administrative remedies before challenging a tax appraisal in federal court.

trine of abstention.[6] They are, however, separate doctrines and should not be confused. Nor should exhaustion be confused with jurisdictional requirements based on statutory interpretations.[7]

Although only exhaustion requirements of the federal courts will be discussed herein, it should be noted that exhaustion is a doctrine of both state and federal courts. As in federal courts, a state court may refuse to hear a case in which administrative remedies have been by-passed.

B. Rationales for the Exhaustion Requirement

There are many reasons for requiring that administrative remedies be exhausted. First, federal courts, when asked to review state administrative proceedings, desire to avoid friction which may result when state remedies are by-passed. This policy is thought to exemplify the principles of federalism, taking into consideration not only the position the federal judiciary occupies in our scheme of government, but also reflecting the federal courts' recognition of a state's interest in a comprehensive scheme of regulation and in not having that scheme prematurely interrupted.[8]

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[6]The doctrines are similar in that they both concern points at which it is proper for a court to entertain a lawsuit. If that point has not yet been reached, under both doctrines, the court will dismiss the case but will grant wide rights of return once compliance with the doctrines has been achieved. Several distinctions between the two doctrines have been suggested: first, exhaustion is a jurisdictional or quasi-jurisdictional requirement whereas abstention is a policy designed to avoid premature decisions of constitutional questions. *See* Kennedy & Schoonover, *Federal Declaratory and Injunctive Relief under the Burger Court*, 26 SW. L.J. 282, 286 (1972). A second distinction is that abstention relates only to the completion of state judicial remedies while the doctrine of exhaustion relates only to the fulfillment of administrative requirements. *See* Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967). *But see* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1205 (1968). A final distinction is made on the basis of the jurisdictional power a court has to hear a particular case. For example, since exhaustion is a prerequisite to entering court, the failure to exhaust means that a court has no "jurisdiction" and, therefore, the case must be dismissed. *See* 17 VILL. L. REV. 336, 338 n.13 (1971). If abstention is involved, all the prerequisites necessary to give a court jurisdiction (such as exhaustion) have been satisfied; the court has jurisdiction but, in its discretion, declines to exercise it. Moreno v. Henckel, 431 F.2d 1299, 1307 (5th Cir. 1970).

[7]Such statutory interpretations would mean that courts would have no jurisdiction to hear cases regardless of exhaustion. Such a statutory interpretation, called deferral, has been advanced in section 1983 cases which would, under certain circumstances, prevent a federal court from ever hearing the case. Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1498 (1969).

[8]Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 350 (1951);

Secondly, the courts also desire to avoid strained relations with the other branches of government. As the United States Supreme Court said in *McKart v. United States*,[9] "[t]he administrative agency is created as a separate entity and invested with certain powers and duties. . . . As Professor Jaffe puts it, '[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.'"[10]

Thirdly, efficiency is hoped for in allowing the administrative procedure to run its course. This efficiency may result from the "sifting" function an agency performs, since cases may be resolved or settled during the administrative process, thereby avoiding lengthy and expensive litigation. This lessens the burden on the federal judiciary[11] and allows a plaintiff to pursue a more flexible, less expensive and less time-consuming remedy. Further, the development of a factual background during the course of the administrative proceeding provides a record the court may consult. Thus, district courts will not be forced to decide cases "in a vacuum."[12]

Requiring exhaustion also takes advantage of the expertise of administrative agents.[13] Ideally, agencies will be composed of persons who are knowledgeable in an agency's particular area, have knowledge of pertinent local factors and, through experience, have learned the practical consequences and related problems involved in different solutions to a disagreement. Such expertise may be lacking in the courts.

A fourth reason for requiring exhaustion, closely related to efficiency, is the courts' assumption that an agency will decide the matter not only quickly but correctly.[14] Moreover, if the initial agency determination is incorrect, courts assume that such errors will be corrected as the plaintiff progresses through the admin-

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Buford v. Sun Oil Co., 319 U.S. 315 (1943). *See generally* Graham, *The Federal Courts and Exhaustion of State Remedies*, 36 CONN. B.J. 60 (1962).

[9]395 U.S. 185 (1969). *McKart* is the most definitive case on the reasons for requiring exhaustion. *See* 3 DAVIS, *supra* note 1, § 20.01 (Supp. 1970).

[10]395 U.S. at 194, *quoting from* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965).

[11]41 GEO. WASH. L. REV. 657, 661 (1973); 17 VILL. L. REV. 336 (1971).

[12]Ogletree v. McNamara, 449 F.2d 93, 99 (6th Cir. 1971).

[13]This is probably the most cited reason for requiring exhaustion of administrative remedies. See United States v. Radio Corp. of America, 358 U.S. 334 (1959), for an example of the Supreme Court's reliance on this rationale. *See generally* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206 (1968); Note, *Administrative Law—Judicial Review—Agency Misconduct—The Doctrine of Exhaustion of Administrative Remedies*, 18 WAYNE L. REV. 1403, 1413 (1972).

[14]Public Welfare Comm'n v. State, 87 Okla. 654, 105 P.2d 547 (1940).

istrative appeal.[15] In this manner, agencies become self-policing. Since agencies know their decisions will ultimately be reviewed by the courts, they have an incentive to correct their own errors. Such an incentive would be absent if their procedures were easily by-passed.

Finally, by requiring completion of the administrative process, courts are assured of finality in the cases which reach them; thus a final institutional decision which affects the plaintiff will be presented for court review. This is roughly comparable to the courts' requirement of "finality of decision" in cases on appeal from lower courts.[16] Such finality is also understandable as part of standing, ripeness or justiciability considerations and, therefore, as falling within the United States Constitution's Article III case or controversy requirement.[17]

C. Exceptions to Application of the Exhaustion Requirement

In spite of the powerful rationales for the exhaustion doctrine, exhaustion is not required, nor should it be required, in all situations. Generally, exhaustion will not be required if the administrative remedy established by the state is inadequate or if pursuing the remedy would be futile. Inadequacy of the remedy may be found if agency delays are unwarranted or if there is some doubt as to whether an agency has the power to grant the relief sought.[18] Inadequacy may also be found if an agency is biased toward one of the parties before it.[19] This often occurs when the agency has a financial interest in the matter before it or when it simply does not want a plaintiff to pursue his available channels of relief.

There is some indication that an administrative remedy may be found inadequate when constitutional questions are involved since courts, not agencies, are the experts in that area.[20] Although inadequacy and futility appear to be different grounds for finding

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[15]Preiser v. Rodriguez, 411 U.S. 475, 490 (1973); Vistamar, Inc. v. Vazquez, 337 F. Supp. 375, 379 (D.P.R. 1971); 3 DAVIS, *supra* note 1, § 21, at 644 (Supp. 1970).

[16]North Dakota State Bd. of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156 (1973); Radio Station WOW v. Johnson, 326 U.S. 120, 124 (1945).

[17]Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 858 (1953).

[18]Union Pac. R.R. v. Board of Comm'rs, 247 U.S. 282 (1918).

[19]Gibson v. Berryhill, 411 U.S. 564 (1973); Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958).

[20]See note 93 *infra*.

a remedy insufficient, they have, in fact, been used interchangeably. Hence, no clear line of division appears between them.

A further exception to the exhaustion doctrine appears to be in the important field of civil rights litigation. This is a recent exception to the exhaustion rule and its impact as yet is not fully known. However, it does appear that a civil rights plaintiff will no longer be required to exhaust his administrative remedies. Whether the doctrine of exhaustion of state administrative remedies has been or should be abrogated in civil rights cases is the subject of this Note.

II. Exhaustion and Section 1983

A. Provisions and Use of Section 1983

Historically, section 1983 was passed as part of the Ku Klux Klan Act of 1871. It provides a private federal remedy for persons who are deprived of rights under color of state law.[21] This section may be employed by anyone deprived of a federal or constitutional right through the agency of a state. The one requirement is state action in some form. State action may be found when a state government is directly involved or when it is indirectly involved through control or financing of an institution. For example, the statute applies to public school systems,[22] prisons,[23] state agencies[24] and police departments.[25]

Although its language is fairly broad and inclusive, the section has not, until recently, been a powerful weapon for the protection, against state encroachment, of federal rights.[26] Beginning in the 1940's, however, the Supreme Court began to broaden the scope of the statute by expanding the meaning of the "under color of"

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[21]42 U.S.C. § 1983 (1970) states:

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

[22]*See, e.g.*, McNeese v. Board of Educ., 373 U.S. 668 (1963); Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

[23]Preiser v. Rodriguez, 411 U.S. 475 (1973); Houghton v. Shafer, 392 U.S. 639 (1968).

[24]Powell v. Workmen's Comp. Bd., 327 F.2d 131 (2d Cir. 1964).

[25]District of Columbia v. Carter, 409 U.S. 418 (1973).

[26]This section had been limited by the Civil Rights Cases, 109 U.S. 3 (1883), and United States v. Cruikshank, 92 U.S. 542 (1875), to actions only of the state.

language of section 1983.[27] This expansion also prompted courts to allow plaintiffs suing under section 1983 easier judicial access. Since exhaustion of state administrative remedies presents one of the bars to federal court suits, it has been attacked by those wishing to expand the access to federal courts.

B. The Increasing Trend Toward a No-Exhaustion Rule

The "requirement that a plaintiff exhaust state administrative remedies before he may maintain a suit in equity under section 1983 was once black letter law."[28] But, with the growth in the scope and effectiveness of section 1983, courts have seemingly begun to shift toward a no-exhaustion requirement. However, the cases concerning this specific point are unclear and it is arguable that not all section 1983 cases fall within a new no-exhaustion rule. The confusion surrounding these cases derives partly from the factual contexts of the cases (most fall within traditional "inadequate" or "futile" exceptions) and partly from the puzzling brevity of the courts' explanations for such a no-exhaustion rule.

The Supreme Court has been the leader in this new wave of thought. In *Monroe v. Pape,*[29] the Supreme Court examined section 1983 and ascertained that exhaustion of judicial remedies should not be required. *McNeese v. Board of Education*[30] expanded this holding to remedies which are administrative in nature. This rationale was subsequently adopted in several other Supreme Court cases, including two cases decided quite recently. An examination of these cases is helpful in understanding a no-exhaustion exception and the reasons why this may or may not have been the intention of the Supreme Court.

C. The Monroe v. Pape *Breakthrough*

In *Monroe,* an Illinois resident brought suit against the City of Chicago and individual Chicago police officers who, while acting

[27]The reach of section 1983 has been held to cover all constitutional rights and to extend to actions of private individuals acting under color of state law. *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); Hague v. CIO, 307 U.S. 496 (1939). *See also* Note, *The Civil Rights Act of 1871: Continuing Vitality,* 40 NOTRE DAME LAW. 70, 71 (1964).

[28]Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1500 (1969). For cases in accord, see Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Carson v. Board of Educ., 227 F.2d 789, 790-91 (4th Cir. 1955), *mandamus denied on same ground sub nom.* Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910 (1957); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); Davis v. Arn, 199 F.2d 424, 425 (5th Cir. 1952).

[29]365 U.S. 167 (1961).

[30]373 U.S. 668 (1963).

under color of state law, allegedly had committed an illegal search of his home. Plaintiff sought damages under section 1983. The action could have been brought under state law in state court since the policemen's alleged conduct was illegal under Illinois law. In reaching the exhaustion issue, the Court first had to resolve two important questions. One was whether the City of Chicago could be sued under section 1983. The second was whether the policemen were acting "under color of state law" since their actions were illegal under Illinois law. If the Court found no action under color of state law, the plaintiff could not bring suit under section 1983 regardless of the exhaustion question. The Court concluded that the City of Chicago could not be sued as a "person" under section 1983 and that the conduct of the policemen was action under color of state law. In resolving these difficult questions, the Court examined the history of section 1983 and the purposes sought to be served by its passage. The Court concluded that the purpose of section 1983 was to override particular state laws, to provide a remedy when state law was inadequate, and to provide a federal remedy when the state remedy, though adequate in theory, was not available in practice.[31] Under these rationales, the plaintiff would have been required to exhaust his state judicial remedy since there was no showing that the state law was inadequate or that the remedy was not available in practice. Therefore, the Court defined a fourth purpose which has generally been incorporated with the first three by later interpretations of *Monroe*. The Court held that, even if the state has a remedy which would give relief if enforced, 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."[32]

Nothing in *Monroe* pertained to the exhaustion of state administrative remedies. The Court's decision that judicial remedies need not be exhausted was not a remarkable development or change in the existing law. Exhaustion of judicial remedies had generally not been required before relief was sought in a federal court.[33] It is arguable whether the Court meant to be laying a foundation for a no-exhaustion principle applicable to exhaustion of administrative procedures.[34] Certainly the "fourth purpose" is

[31]365 U.S. at 173-74.

[32]*Id.* at 183.

[33]Bacon v. Rutland Ry., 232 U.S. 134 (1914); Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958). If an agency's function is of a judicial, rather than discretionary or initiatory, nature, exhaustion will not be required. Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972).

[34]Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400

couched in language broad enough to support such an interpretation, but the problem remains unresolved. Further, *Monroe* was a suit for legal, rather than equitable, relief. This has led some to interpret its no-exhaustion requirement as applicable only to cases when legal relief, such as damages, is sought.[35]

D. McNeese *and Administrative Remedies*

It was not long before the Court extended the *Monroe* holding to include cases involving administrative exhaustion problems. The first such application was in *McNeese v. Board of Education.*[36] In that case, black students alleged racial discrimination in an Illinois public school system and brought suit under section 1983 for equitable relief. The suit was dismissed by the district and appellate courts for failure to exhaust available administrative remedies. The administrative remedy available to the plaintiffs provided that residents could file a complaint with the Superintendent of Public Instruction who would then hold a hearing. If the Superintendent decided that the allegations were correct, he would *request* the Attorney General to bring suit in the state courts.

The Supreme Court reversed the appellate court's dismissal for two different reasons. First, the Court determined that plaintiffs bringing suit under section 1983 were not subject to an exhaustion requirement and stated that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy."[37] The purposes of the Civil Rights Act, as defined in *Monroe,* demanded a no-exhaustion rule because otherwise, the Court said, these purposes would easily be defeated if federal claims had to wait until available state remedies were completed. The Court held that the only time federal courts should refuse access to their forums is when there are "strands of local law . . . woven into the case."[38] Since there

U.S. 481 (1970). *See also* 3 DAVIS, *supra* note 1, § 20.09, at 668-69 (Supp. 1970).

[35]In Potwora v. Dillon, 386 F.2d 74 (2d Cir. 1967), Judge Friendly declared that, "*Monroe v. Pape* was an action for damages and . . . must be read in that light . . . ." *Id.* at 77. *Accord,* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). The court recognized *Monroe* as having settled "beyond cavil that exhaustion is not required when only *legal* relief is sought." *Id.* at 523 (emphasis added).

[36]373 U.S. 668 (1963).

[37]*Id.* at 671.

[38]*Id.* at 673. C. WRIGHT, LAW OF FEDERAL COURTS § 49, at 187 n.6 (2d ed. 1970) concurs, stating that a plaintiff need not exhaust his administrative remedies when suing under section 1983 when his claim is based *entirely* on federal law.

were no such "strands" in *McNeese*, the federal courts should have decided the case on the merits.

The second reason for the Court's decision that plaintiffs need not exhaust their state administrative remedies was based on its finding that the remedy was inadequate. Since the most plaintiffs could have achieved by exhausting state remedies was a request from the Superintendent to the Attorney General to bring suit, the Court felt that these remedies afforded only a "tenuous protection" to the plaintiffs' federal rights.[39] It is also interesting to note that the ultimate remedy was, in essence, judicial. These two factors, the inadequacy of the remedy and its essential judicial nature, have been a constant source of irritation to those who favor a broad no-exhaustion rule and a source of inspiration to those who wish to restrict exceptions to the exhaustion doctrine.

After *Monroe*, *McNeese* is the most important case establishing the principle that exhaustion is not required in actions brought pursuant to section 1983. There have been basically four responses to the *McNeese* decision by the courts. It has been held that: (1) *McNeese* totally eliminates the exhaustion requirement;[40] (2) *McNeese* eliminates the exhaustion requirement only in school segregation cases;[41] (3) *McNeese* is only a specific application of the general inadequacy exception to the exhaustion rule;[42] and (4) *McNeese* held only that administrative remedies of a judicial

[39]373 U.S. at 676. Justice Harlan protested this conclusion in his dissenting opinion. He argued that no showing had been made that the remedies were, in fact, inadequate. It was his feeling that the Court should never have heard this case since sound respect for the independence of state action would have dictated its dismissal. *Id.* at 677.

[40]Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 311 (1968); Damico v. California, 389 U.S. 416 (1967); Moreno v. Henckel, 431 F.2d 1299, 1306 (5th Cir. 1970); Whitner v. Davis, 410 F.2d 24, 28 (9th Cir. 1969); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Powell v. Workmen's Comp. Bd., 327 F.2d 131 (2d Cir. 1964); Lee v. Hodges, 321 F.2d 480, 484 (4th Cir. 1963); Vistamar, Inc. v. Vazquez, 337 F. Supp. 375 (D.P.R. 1971). *See* Aycock, *Introduction to Certain Members of the Federal Question Family*, 49 N.C.L. REV. 1, 21 (1970); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56, 86 (1972).

[41]Wright v. McMann, 257 F. Supp. 739 (N.D.N.Y. 1966), *rev'd on other grounds*, 387 F.2d 519 (2d Cir. 1967); United States *ex rel.* Wakely v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965).

[42]Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Toney v. Reagan, 326 F. Supp. 1093 (N.D. Cal. 1971), *aff'd*, 467 F.2d 953 (9th Cir. 1972); Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839, 855 n.116 (1964). The effect of *McNeese* may have been to shift the burden of proof as to the adequacy of the administrative remedy from the plaintiff to the defendant. *See* American Fed'n of State, County & Municipal Employees v. Woodward, 406 F.2d 137, 141 (8th Cir. 1969).

nature need not be exhausted.[43] Professor Davis has even remarked that *McNeese* "seems much more in the nature of a judicial fiat than as a reasoned analysis of the problem on the basis of relevant and related law."[44]

Despite these conflicting interpretations, the Supreme Court has consistently cited *McNeese* as totally eliminating the exhaustion requirement. The problem with the citing cases, however, is that, even though they seem to state that exhaustion is eliminated as a prerequisite, they are subject to the same wide range of construction that so afflicted the *McNeese* decision.

E. Subsequent Supreme Court Decisions

Damico v. California,[45] a case subsequent to *McNeese,* is as unenlightening as its predecessor in its explanation for a no-exhaustion rule. Citing *McNeese* as its authority, the Court, in a brief per curiam opinion, 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."[46] Although this is a quote from *McNeese,* the words "an administrative" were inserted by the *Damico* Court. That insertion may indicate the Court's awareness of the controversy surrounding *McNeese* and its desire to firmly establish that *McNeese* abolished the exhaustion requirement. On the other hand, it might show that *McNeese* was not applicable to administrative remedies and that the Court was expanding the *McNeese* no-exhaustion requirement to remedies of an administrative nature.[47] The latter explanation may be the

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[43]Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated,* 406 U.S. 914 (1972).

[44]3 DAVIS, *supra* note 1, § 20.01, at 646 (Supp. 1970).

[45]389 U.S. 416 (1967).

[46]*Id.* at 417, *quoting from* McNeese v. Board of Educ., 373 U.S. 668, 671 (1963) (brackets in original).

[47]Justice Harlan was, again, the lone dissenter. He noted the weakness of the Court's reliance upon *Monroe* and *McNeese.* He especially argued that *Monroe* said nothing about by-passing administrative procedures since it involved only judicial procedures. *McNeese* held only that administrative remedies which were inadequate could be by-passed. Justice Harlan noted:

> This Court, without plenary consideration and without stating its reasons, now reverses the District Court's dismissal, citing *McNeese v. Board of Education* . . . . Although I did not at the time and do not now fully understand the Court's opinion in *McNeese,* the net result of the case as I see it was that the right to assert, in a federal court, that state officials had acted in a manner depriving the plaintiff of clear constitutional rights could not be delayed by the interposition of intentionally or unintentionally *inadequate* state remedies for the alleged discrimination.

Id. at 418-19 (footnotes omitted) (emphasis added).

stronger since the portion of *McNeese* which the Court cited dealt only with judicial, and not administrative, remedies. It is also possible that the *Damico* Court based its decision on the inadequacy of the administrative remedy even though it appeared not to have done so.[48] The action brought by the plaintiffs was for injunctive relief and for a declaration that a state statute was unconstitutional. Since the administrative agency was not competent to declare the statute unconstitutional or to change its terms, plaintiffs' administrative remedy was clearly inadequate.

Courts which interpret *Damico* as holding only that inadequate administrative remedies need not be exhausted generally follow two lines of thought. First, if a statute is attacked, as in *Damico*, because it deprives a plaintiff of a constitutional right, exhaustion is not required. But if the statute is attacked because it deprives a plaintiff of a federal right, the requirement that administrative remedies be exhausted is still effective. The second line of thought interprets *Damico* to hold that, if a statute is attacked because it is unconstitutional on its face, administrative remedies are inadequate and exhaustion will not be required. But if the statute is attacked because it is unconstitutional "as applied," the administrative remedy is adequate and exhaustion is necessary in order to determine the finality of the administrative decision.[49]

The first line of thought seemed to be upheld by *King v. Smith*,[50] the next Supreme Court case discussing exhaustion. Therein, the Court, dismissing the exhaustion issue in a footnote, stated that remedies do not have to be exhausted when the "constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court."[51] This distinction, however, was shortly thereafter eliminated in *Houghton v. Shafer*.[52]

Houghton, like the other cases, is weak support for the principle that exhaustion of administrative remedies is not required in section 1983 suits because, on the facts of that case, exhaustion

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[48]The *Damico* Court stated: "The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error." *Id.* at 416-17. It thus appears that even adequate administrative remedies do not have to be exhausted.

[49]Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972).

[50]392 U.S. 309 (1968) (plaintiffs challenged the constitutionality of Alabama's "substitute father" regulation).

[51]*Id.* at 312 n.4. *See* Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Nichols v. Schaffer, 344 F. Supp. 238 (D. Conn. 1972); Schwartz v. Galveston Indep. School Dist., 309 F. Supp. 1034 (S.D. Tex. 1970).

[52]392 U.S. 639 (1968) (confiscation by prison officials of prisoner's legal materials).

would have been futile and, therefore, not required. In *Houghton*, there was a showing that the petitioner, a prison inmate, had petitioned the Deputy Superintendent of his prison for relief, but without avail. It was further shown that later administrative appeals would have reached the same result since the rules under which the Deputy Superintendent's decision was made were correctly applied to the petitioner and the agency was without power to change those rules. Hence requiring plaintiff to exhaust would have been to require a futile act. Under the usual exceptions to the exhaustion rule, no exhaustion would have been required. But the Court added these words: "In any event, resort to these remedies is unnecessary in light of our decisions in *Monroe, McNeese* and *Damico*."[53] This certainly indicates the Court felt a no-exhaustion rule had been established by the three prior cases. But the examination by the Court of the adequacy of the remedy does not preclude a different interpretation of those cases.

Later cases have been equally ambiguous in stating their reasons for not requiring exhaustion. *Wilwording v. Swenson*[54] held simply that the federal remedy is supplementary to the state remedy and the latter need not be invoked before a federal forum can be entered. The Court noted *Houghton's* elimination of the exhaustion requirement.[55] The Court was again careful to examine the adequacy of the administrative remedy. Since the remedy was inadequate, the plaintiff was not required to exhaust it.

Carter v. Stanton[56] concerned the constitutionality of an Indiana welfare regulation requiring a person seeking assistance due to separation or absence of a spouse to wait until the spouse had been continuously absent for six months. Plaintiffs brought suit without exhausting their administrative remedy and a three judge court dismissed. The court alternatively held that no substantial federal question was presented and therefore the three judge court lacked jurisdiction. In a brief per curiam opinion, the Supreme Court vacated the decision, holding that *Damico*, "an indistinguishable case, likewise establishes that exhaustion is not required in circumstances such as those presented here."[57] As in *Damico*, the constitutionality of the statute was in issue and the Court may again have felt that the administrative remedy was inadequate.

Although the cases cited thus far appear to rule unequivocally that exhaustion of administrative remedies is not required

[53] *Id.* at 640.

[54] 404 U.S. 249 (1971) (prisoners challenged both living and disciplinary conditions of their confinement).

[55] *Id.* at 250.

[56] 405 U.S. 669 (1972).

[57] *Id.* at 671.

in actions brought under section 1983, all are mixed with issues of inadequacy or futility, and all lack an adequate explanation for a no-exhaustion rule. Professor Davis expressed this feeling succinctly:

> Whatever reasons the Supreme Court may have for this startling result are obfuscated through the pretense that the *Damico* result followed from *McNeese* and the pretense that the *McNeese* result followed from *Monroe*. The holdings have been largely in the nature of unreasoned fiats, and the results seem altogether unsatisfactory because they are so clearly contrary to such principles as have heretofore been discernible in exhaustion law.[58]

It is his feeling that the Court's result "probably cannot endure."[59]

F. The Recent Supreme Court Decisions

On May 7, 1973, the Supreme Court rendered decisions in two cases involving the issue of exhaustion. In *Preiser v. Rodriguez*,[60] New York inmates deprived of good time credits sought injunctive relief to compel restoration of those credits. Restoration of the credits would have resulted in their immediate release. The question presented to the Court was whether the plaintiffs could sue under section 1983 or whether they were required to pursue their habeas corpus remedies. If section 1983 were available, then no exhaustion of state remedies was necessary; if it were not, relief had to be first sought and denied in the state forums before federal relief would be available. The district court held that this action was properly brought under section 1983 and that the plaintiffs were, therefore, not required to exhaust.[61] The Second Circuit Court of Appeals reversed, stating that the Civil Rights Act was not available when the action was really an application for habeas corpus relief.[62] This decision was subsequently set aside and the case was reheard en banc. The court then affirmed the holding of the district court and found that, according to *Wilwording v. Swenson*,[63] a prisoner's complaint relating to the conditions of his confinement was cognizable either in federal habeas corpus or under the Civil Rights Act.

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[58] 3 DAVIS, *supra* note 1, § 20.09, at 668-69 (Supp. 1970). *See also* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 261 (1970).

[59] 3 DAVIS, *supra* note 1, § 20.09, at 669 (Supp. 1970).

[60] 411 U.S. 475 (1973).

[61] 307 F. Supp. 627 (N.D.N.Y. 1969).

[62] 451 F.2d 730 (2d Cir. 1971).

[63] 404 U.S. 249 (1971). See text accompanying notes 54 & 55 *supra*.

The Supreme Court reversed. After examining the history and purposes of habeas corpus, the Court concluded that it is the *exclusive* federal remedy available to prisoners attacking the legality or duration of their confinement. Section 1983 can be used only when the *conditions* of confinement are in issue. The Court found that the petitioners' case fell squarely within the traditional scope of habeas corpus and declared that it "would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings."[64] The Court found that exhaustion in habeas corpus cases is necessary to further a congressional intent to avoid unnecessary friction between state and federal forums which would result if federal courts did not allow states a chance to correct their own constitutional errors.[65] Federal-state comity demands exhaustion especially in this area since states have a strong interest in a comprehensive scheme of regulation for the administration of their prison systems.

Cases cited by the petitioner were distinguished by the Court. *Wilwording*, the Court said, held that section 1983 was the proper remedy when the conditions of confinement were in issue. That section is not appropriate when the fact or length of confinement is at stake, which was the issue in *Preiser*. Hence, *Wilwording* would not be applicable. The Court found that the other civil rights

[64]411 U.S. at 489-90. *See also* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972); Kirby v. Sutton, 436 F.2d 1082 (5th Cir. 1971).

[65]This attitude, until recently, has been the predominant attitude of the courts toward prisoners' grievances. As Zeigler & Hermann state in *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 159 (1972):

> Until recently, the federal courts maintained a "hands off" policy in these cases, ruling that they presented questions of internal prison administration in which the judiciary would not meddle. In the past several years, however, the federal courts have acknowledged that prisoners do not leave their constitutional rights behind them when they pass through the prison gates, and recently have moved far to protect these rights . . . .

Id. at 168. *Accord*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). *See also* Grayson v. Montgomery, 421 F.2d 1306 (1st Cir. 1970). In that case, the court noted:

> [T]he Civil Rights Act provides a supplementary federal remedy which may be invoked without exhausting state remedies. . . . While this may be the general rule, federal courts have traditionally been reluctant to exercise their jurisdiction under the Civil Rights Act to intervene in the state criminal process.

Id. at 1308 (citations omitted). Reluctance to interfere generally stems from a strong congressional policy of noninterference with state litigation and from the serious risk of disrupting state law enforcement policies if they are easily by-passed.

cases, holding that section 1983 requires no exhaustion, were also distinguishable because of the absence of an overriding statute showing a different congressional intent.

The distinction made by the majority—that section 1983 is the proper remedy if the conditions of confinement are in issue and that habeas corpus is the sole federal remedy when the fact or duration of the imprisonment is in issue—was attacked in a vigorous dissent by Justice Brennan as "unsound," "unworkable in practice," and "in defiance of the purposes underlying both the exhaustion requirement of habeas corpus and the absence of a comparable requirement under section 1983."[66] This dissent contains the most extensive discussion of a possible rationale for not requiring exhaustion that has, to date, been written. One reason for not requiring exhaustion, Justice Brennan explained, concerns the intent of Congress in passing the Civil Rights Act. Congress recognized important interests which would be served by allowing a plaintiff to choose a federal forum in cases arising under federal law.[67] Congress, therefore, created a judicial duty to respect a plaintiff's forum choice. Justice Brennan remarked that "escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts" to protect federal rights.[68] The dissent noted several purposes which would be served by not requiring exhaustion. First, expertise would be developed. Secondly, uniformity in the protection of federal rights would be attained and, finally, plaintiffs would benefit by having available a more sympathetic and understanding forum.[69] Moreover, the dissent argued, the history of the Act mandates that plaintiffs have a right to a federal forum. Since section 1983 was passed in order to protect federally created rights from nonprotection by state instrumentalities, Congress intended to vest federal courts with the power to intervene between states and their citizens to protect those citizens from "unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'"[70] To adequately protect

[66]411 U.S. at 504 (Brennan, Douglas & Marshall, JJ., dissenting).

[67]*Id.* at 514-15.

[68]*Id.*, *quoting from* Robb v. Connolly, 111 U.S. 624, 637 (1885).

[69]Justice Brennan, in a footnote, notes the remarks of Representative Coburn, CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871), to the effect that the federal courts will be better able to enforce this section because they are "above mere local influence; . . . their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood." 411 U.S. at 514.

[70]411 U.S. at 516, *quoting from Ex parte* Virginia, 100 U.S. 339, 346 (1879).

plaintiffs, Congress gave the federal courts the power to intervene immediately, not after the exhaustion of all available administrative remedies. Therefore, the dissent concluded, the absence of an exhaustion requirement in section 1983 cases is not "an accident of history or the result of careless oversight by Congress or this Court. . . . Exhaustion of state remedies is not required precisely because such a requirement would jeopardize the purposes of the Act."[71] A rule of no-exhaustion is, hence, an "integral feature of the statutory scheme."[72] The displacement of the no-exhaustion rule of section 1983 with an action falling under an alternative remedial device which requires exhaustion, the dissent stated, must be clearly justified by considerations of policy or by statements of congressional intent. The dissent could find no such justifications in this case. The dissent then examined the purposes to be served by the habeas corpus exhaustion doctrine and gave several reasons for not requiring exhaustion, especially noting that friction-avoidance would not be served by requiring exhaustion here.

This case would seem to indicate that exceptions to a no-exhaustion rule do exist. One exception exists when a case brought under section 1983 would more properly have been brought under another applicable statute. This exception aids those who argue that the Court has been developing a flexible rule of no-exhaustion and has not totally eliminated the exhaustion doctrine in section 1983 actions.

The same exhaustion question faced the Court in another case, *Gibson v. Berryhill,*[73] decided the same day as *Rodriguez.* In *Gibson,* licensed optometrists employed by a corporation brought suit for injunctive relief against the Board of Optometry and the Alabama Optometric Association. They wished to enjoin pending Board hearings which could result in suspending or revoking their licenses to practice. The defendants claimed that the named optometrists, by accepting employment with a corporation, had violated an Alabama statute forbidding the practice of optometry by individuals not privately employed. The defendant Association was composed solely of optometrists in private practice and the defendant Board was chosen solely from the membership of the Association. Plaintiffs claimed their remedy was inadequate due to bias on the part of Board members in that if plaintiffs' licenses were revoked, their business practice would, of necessity, fall to Board or Association members. Thus the Board members would have a personal financial interest in the outcome of plaintiffs' hearings.

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[71] 411 U.S. at 518.

[72] *Id.*

[73] 411 U.S. 564 (1973).

The problem facing the Court in this case was whether or not an injunction should issue against pending administrative agency decisions, specifically, whether these plaintiffs should first be required to exhaust their administrative remedies before seeking aid in the federal courts.[74] The Court concluded:

> [T]he matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceeding is terminated, at least where coverage or liability is contested and administrative expertise, discretion or fact-finding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983.[75]

The Court quickly added: "Whether this is invariably the case . . . is a question we need not now decide."[76] That this language indicates the existence of exceptions to a no-exhaustion rule, as *Rodriguez* may also indicate, is one possible construction.[77] If such a construction is correct, the surrounding language indicates that any exception found in *Gibson* will be construed narrowly and limited solely to those cases in which a plaintiff has not yet been deprived of any rights because an agency hearing is pending and not complete.

The Court concluded that plaintiffs should not be required to exhaust since the Board was unconstitutionally constituted and thus could not provide plaintiffs with an adequate and impartial

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[74]The reason for the Court's hesitancy may have been its desire to establish first whether any of the plaintiffs' rights had been infringed. As the court in Thomas v. Chamberlain, 143 F. Supp. 671 (E.D. Tenn. 1955), *aff'd*, 236 F.2d 417 (6th Cir. 1956), remarked: "How can a United States court determine whether the federal rights of a citizen have been invaded by a state until all the administrative remedies offered by the state have been exercised?" 143 F. Supp. at 676. The Ninth Circuit faced a similar problem in Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969), and reached a different conclusion from the *Gibson* Court. *Whitner* is distinguishable, however, because the remedy in *Whitner* was shown to be adequate and to provide the plaintiff with an opportunity for a fair hearing.

[75]411 U.S. at 574.

[76]*Id.* at 574-75.

[77]This very possibility so worried two members of the Court that they felt compelled to clarify this point in a concurring opinion. Therein, they stated that the rule has been "firmly settled by this Court's prior decisions" in *McNeese, Houghton, King,* and *Damico* that no exhaustion in section 1983 actions is required. *Id.* at 581.

administrative forum in which their rights could be adjudicated. Since the *Younger v. Harris*[78] ruling limiting injunctions against pending state proceedings "presupposes an opportunity to raise and have timely decided by a *competent* state tribunal, the federal issues involved,"[79] and since no such competent body was present here, the proceedings could be enjoined.

G. The Response From Below

In all these cases, has the Court eliminated the exhaustion requirement? The answer generally heard from lower courts is yes, but the issue may not yet be closed. Certainly the cases are subject to, and have received, varying responses.[80] Several circuit courts have very narrowly construed the Supreme Court de-

[78]401 U.S. 37 (1971).

[79]411 U.S. at 577.

[80]For examples of cases holding in line with the Supreme Court's decision that exhaustion is not required in suits brought under section 1983, see Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973) (no exhaustion required when constitutionality of a statute is in question); Galligher v. McCarthy, 470 F.2d 740 (9th Cir. 1972) (habeas corpus petition partly treated as brought under section 1983 and, therefore, no exhaustion required for that part); Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) (exhaustion of legal or political remedies is not required); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972) (prospective state administrative remedies must be exhausted); McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972) (inmates charged prison officials with racial discrimination); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (state prisoners were not required to exhaust); Hayes v. Secretary of Pub. Safety, 455 F.2d 798 (4th Cir. 1972) (inmates alleged custodial force misconduct); Chisley v. Richland Parish School Bd., 448 F.2d 1251 (5th Cir. 1971) (school teacher alleged that his discharge from the school was attributable to racial motives); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971) (firemen protested an ordinance prohibiting their participation in election campaigns); Burnett v. Short, 441 F.2d 405 (5th Cir. 1971) (plaintiff claimed that his arrest was made with undue force and without inquiry as to whether he had shot a police officer); Rainey v. Jackson State College, 435 F.2d 1031 (5th Cir. 1970) (a college teacher claimed his dismissal violated his civil rights); Jones v. Superintendent, 370 F. Supp. 488 (W.D. Va. 1974) (prisoners not required to exhaust state administrative remedies); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682 (M.D. Ala. 1973) (teachers attacking facial unconstitutionality of statute not required to exhaust); Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn. 1973) (suspended municipal employees not required to exhaust); Boyd v. Smith, 353 F. Supp. 844, 846 (N.D. Ind. 1973) (exhaustion in civil rights cases is not required unless school disciplinary procedures are involved); UAW v. State Farm Ins. Co., 350 F. Supp. 522 (N.D. Ill. 1972) (no exhaustion is required if a statute is challenged as unconstitutional on its face or if remedies are really judicial and not administrative); Inmobiliaria Borinquen, Inc. v. Garcia Santiago, 295 F. Supp. 203 (D.P.R. 1969) (plaintiff alleged that the city's reservation of two parcels of his land for future acquisition deprived him of property without due process of law).

cisions. The Second Circuit in *Eisen v. Eastman*[81] provides just such an example. The case was brought by a plaintiff challenging the constitutionality of a New York City rent control law. After an examination of the available authority holding that exhaustion was not required, the court concluded that those cases "have been given a bigger sweep than the Court intended,"[82] and stated:

> [W]e thus read these decisions as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. . . . We shall need much clearer directions than the Court has yet given or, we believe, will give, before we hold the plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum.[83]

The Supreme Court refused to review this case on a writ of certiorari and it is still law to which the Second Circuit apparently adheres.[84]

The Seventh Circuit has also been reluctant to apply the no-exhaustion rule suggested by the Supreme Court. In *Metcalf v. Swank*,[85] a constitutional challenge under section 1983 was raised against an Illinois public aid regulation controlling shelter allowances. Plaintiff's position was that exhaustion of state administrative remedies was never required under section 1983. The Supreme Court precedents cited by him were examined and interpreted as not requiring an inflexible no-exhaustion rule. The court found

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[81] 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[82] *Id.* at 568. The court read *McNeese* to hold only that exhaustion was not required when the administrative remedies were inadequate. *Damico* and *King* were read to hold only that no exhaustion would be required if the question were substantial enough to require the summoning of a three-judge district court, and *Houghton* was read to hold only that administrative remedies need not be exhausted if pursuing them would be futile.

[83] *Id.* at 569.

[84] In Blanton v. State Univ., 489 F.2d 377, 384 (2d Cir. 1973), the court noted that "*Gibson v. Berryhill* seems to support our conclusion in *Eisen* that the doctrine requiring exhaustion of administrative remedies is not dead in civil rights cases—an interpretation emphasized by the concurring opinions." The *Blanton* court remarked upon the *Gibson* Court's failure to rely upon its prior cases suggesting that exhaustion is never required in civil rights suits. The *Blanton* court concluded that, "therefore, [we] see no occasion to retreat from this portion of *Eisen* . . . ." *Id.* The court, however, refused to find that plaintiffs' failure to exhaust was an absolute bar to this suit. *See also* Ray v. Fritz, 468 F.2d 586, 587 (2d Cir. 1972); James v. Board of Educ., 461 F.2d 566, 570 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); David v. New York Tel. Co., 341 F. Supp. 944, 947 (S.D.N.Y.), *aff'd on other grounds*, 470 F.2d 191 (2d Cir. 1972). Many other cases agree with *Eisen's* desire for a flexible rule. See cases cited note 89 *infra*.

[85] 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972), *noted in* 17 VILL. L. REV. 336 (1971).

no "abrogation of the exhaustion requirement in Civil Rights Act cases . . . . Rather, [it found] only a pattern of flexibility in imposing the exhaustion requirement in this special area."[86] Plaintiffs were required to exhaust. This decision was vacated by the Supreme Court and remanded for further consideration in light of the Court's holding in *Carter*. In addition, recent decisions of the First Circuit Court of Appeals indicate that it may require completion of the administrative process in some cases.[87]

H. Conclusions Derived From These Cases

If any definite rules have emerged from these cases, they are that (1) exhaustion *will not* be required if the administrative remedy is inadequate or if pursuing it will almost certainly be futile, (2) no exhaustion will be required if a statute is attacked on its face or if a constitutional, as opposed to statutory, right is involved or if the only administrative remedy is of a judicial nature, (3) no exhaustion will be required if an agency is unconstitutionally constituted and an action is still pending before it, (4) on the other hand, exhaustion *will* probably be required when

[86]444 F.2d at 1356. The dissenting judge argued that the court had misinterpreted the Supreme Court cases. He felt the Supreme Court had indicated a "broad rule that exhaustion is not required in cases properly brought under the Civil Rights Act." *Id.* at 1361. Noting that the majority formulated an "as applied" test versus a "facial attack" test for those cases which must be exhausted, he argued that this distinction was mechanical, novel and groundless. He then stated that a more proper distinction could be made on the basis of an individual suit versus a class suit.

In a later case, Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973), the Seventh Circuit again faced the exhaustion question. In this case, plaintiffs attacked the facial constitutionality of an Indiana statute, IND. CODE § 12-2-1-18 (Burns 1973), granting poor relief benefits, because the statute lacked due process pretermination hearings and notice of the reasons for termination. The court held that the plaintiffs were not required to exhaust and stated that, "beginning with *Monroe v. Pape*, however, the Court has persisted in holding that the civil rights remedy . . . is supplementary to any state administrative remedies and that federal jurisdiction may be invoked without exhaustion of state remedies . . . ." 485 F.2d at 386. The court refused to adopt this broad no-exhaustion rule, however, and indicated that the exhaustion question "remains open." *Id.*

[87]Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973). In *Raper*, the court cited the general no-exhaustion rule and noted that its cases seemed to be contrary to that rule. The court then held that its prior cases were disapproved "[t]o the extent that they indicate a general or automatic requirement of administrative exhaustion." *Id.* at 751 n.3. This may indicate that the court is retaining a flexible rule and that exhaustion or no exhaustion will be determined on a case by case basis. *See* Beattie v. Roberts, 436 F.2d 747, 748 (1st Cir. 1971); Drown v. Portsmouth School Dist., 435 F.2d 1182, 1186 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Dunham v. Crosby, 435 F.2d 1177, 1180 (1st Cir. 1970).

the plaintiff is threatened with only a future deprivation of rights by a properly constituted agency,[88] (5) exhaustion will be required if the claim should have been brought under another statute which shows a congressional intent to require exhaustion, and (6) some courts will shun any hard and fast rules and will adopt a pattern of flexibility in applying the exhaustion doctrine.[89]

Other suggestions have been made, including requiring exhaustion only if the agency determination would avoid any constitutional issue.[90] Another suggestion is to require exhaustion if a plaintiff is suing only as an individual and not to require it if he is suing on behalf of a class to protect rights common to that group.[91] One final suggestion, making all these other exceptions unnecessary, would be not to require exhaustion at all in suits brought under section 1983.

III. Reasons for not Requiring Exhaustion

There are many good reasons for not requiring exhaustion of administrative remedies in actions under section 1983. The confusion presently surrounding this doctrine would be removed

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[88] *Compare* Gibson v. Berryhill, 411 U.S. 564 (1973), *with* Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969).

[89] *See* Blanton v. State Univ., 489 F.2d 377 (2d Cir. 1973); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973); Mattingly v. Elias, 482 F.2d 526 (3d Cir. 1973); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972); James v. Board of Educ., 461 F.2d 566, 570 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); Metcalf v. Swank, 444 F.2d 1353 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972); Dunham v. Crosby, 435 F.2d 1177 (1st Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Marin v. University of P.R., 346 F. Supp. 470 (D.P.R. 1972); David v. New York Tel. Co., 341 F. Supp. 944 (S.D.N.Y.), *aff'd on other grounds*, 470 F.2d 191 (2d Cir. 1972); McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973); Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823 (D. Del. 1972); Vistamar, Inc. v. Vasquez, 337 F. Supp. 375 (D.P.R. 1971); Griffin v. DeFelice, 325 F. Supp. 143 (E.D. La. 1971). *See also* Jackson v. Hepenstall, 328 F. Supp. 1104 (N.D.N.Y. 1971). This case involved a suit against the Superintendent of the Albany schools by a plaintiff challenging a state statute which permitted suspensions for five days without a hearing. The court declared that "plaintiffs in these purported Civil Rights cases may not turn their backs on state administrative remedies and rush into a federal forum." *Id.* at 1108, *citing* Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[90] Elmwood Properties, Inc. v. Conzelman, 418 F.2d 1025 (7th Cir. 1969).

[91] *See* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201, 1209 (1968). *See also* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 Harv. L. Rev. 1486 (1969), for a parallel argument in regard to the jurisdictional requirement, as opposed to the exhaustion requirement, of the federal courts under section 1983.

if courts would compare the purposes to be served by requiring exhaustion with the peculiar needs served by civil rights actions. When this is done, most of the reasons for requiring exhaustion simply are either not present or do not outweigh competing interests.[92]

The value of expertise found in administrative agencies, for example, would not always be present. The only experts on constitutional rights are the courts and they should not be prevented from hearing cases involving important federal and constitutional rights because the agency may have expertise in another area.[93] The rule that a plaintiff need not exhaust judicial remedies is well settled. Therefore, the federal courts could hear such cases immediately.

It would also seem that the "sifting function" performed by agencies may not be welcome when such important rights and potential for bias are present. Certainly the delay inherent in using the administrative process may divert some from seeking vindication of their rights. Moreover, when the individual is a member of a class and is suing to protect the rights of the class, an individual settlement may be satisfactory as far as the individual plaintiff is concerned, but it does not protect other class members from similar deprivations nor does it correct state laws to conform to constitutional requirements.

In addition, overburdening of the federal courts has not been a problem since section 1983 has been broadened and since entry requirements to a federal forum have been relaxed.[94] It is also

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[92]*But see* 17 VILL. L. REV. 336, 349 (1971).

[93]Metcalf v. Swank, 444 F.2d 1353, 1363 (7th Cir. 1971) (dissenting opinion); Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 262 n.569 (1970).

[94]*See* Sedler, Dombrowski *in the Wake of* Younger: *The View from Without and Within*, 1972 WIS. L. REV. 1. The author notes that, out of 93,207 civil cases brought in the federal courts, the most substantial portion were brought under diversity jurisdiction. Only 3,616 were civil rights cases.

This caseload may also be "transitional." *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1354 (1970). Mr. Chevigny is also speaking to the expanded scope of section 1983 and not only to the relaxation of the exhaustion requirement when he states that an examination of cases from December 1966 to March 1968 shows that most cases were dismissed on the face of the complaint. This suggests that "most section 1983 cases present simple fact situations with a clear issue of federal law requiring limited, if any, evidentiary hearings. Federal courts, then, do not appear so overburdened with avoidable, trivial cases as to require any major retrenchment in civil rights protection." *Id.* at 1354-55.

But see McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973); Younger, *State v. Uncle Sam*, 58 A.B.A.J. 155, 157 (1972); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1493 & n.11 (1969).

arguable that federal courts should be more concerned with these cases due to the importance of the federal rights involved than with cases based merely on diversity of citizenship. Those cases comprise the major portion of federal litigation.

It is also arguable that agencies would not lose any incentive to correct their own errors. Indeed, such incentives may even be increased and may result in achieving a higher standard for protecting civil rights than heretofore achieved. This result would follow because administrative agents may be personally liable under section 1983 for any deprivation of federal rights brought about because of their actions. This would make the entire administrative hierarchy more attentive to federal standards in this sensitive area.[95] Further, friction between states and the federal judiciary might actually be lessened since federal courts would no longer have to judge the adequacy of state administrative remedies.

It is also very doubtful that considerations of friction-avoidance have any place in civil rights litigation in light of the history and purposes of section 1983. That section was intended to erect a barrier between states and their citizens and to provide those citizens with neutral forums in which to adjudicate their rights.[96] The statute's history demonstrates that Congress knew it was altering the relationship between the states and the nation with respect to the protection of federally created rights.[97] Furthermore, Congress was concerned that state instrumentalities could not protect those rights. The very purpose of section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights.[98] Recent court

[95] *See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1360 (1970).

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

[97] *Ex parte* Virginia, 100 U.S. 339, 346 (1879). This has recently been recognized by the courts. For example, in Landry v. Daley, 288 F. Supp. 200 (N.D. Ill. 1968), Judge Will noted the concern the Forty-second Congress showed for the enforcement of the Civil War Amendments. He stated:

> By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the desire to place the national government between the state and its citizens.

Id. at 223 .

[98] *Ex parte* Virginia, 100 U.S. 339, 346 (1879). It was precisely this federal interposition that opponents of the act so feared. *See* CONG. GLOBE, 42d Cong., 1st Sess. 50 (Appendix 1871) (remarks of Congressman Kerr);

interpretations have also seen the Act in this light. As one court said:

> The Act was not one artfully phrased so as *not* to disturb the relationship between the States and the Nation. If there is one thing certain about the legislative history of the Act, it is that Congress, open-eyed, deliberately set out to alter the so-called "delicate balance" between the state and the federal government so that federal courts could effectively protect federal rights.[99]

That Congress intended the federal courts to protect these rights can also be demonstrated through an examination of the purposes the Act was to promote. Section 1983 was designed to protect federal rights in federal courts "because by reason of prejudice, passion, neglect, intolerance or otherwise" state courts were not enforcing them.[100] To protect these rights, Congress designed section 1983 to override particular state laws, to provide remedies when state laws are inadequate, to provide remedies when the state remedies are not available in practice and to provide supplementary remedies to those offered by the states.[101]

Section 1983 was also passed to promote other goals. It was designed to promote greater uniformity throughout the United States in the protection of federal rights. It was also designed to allow federal judges to decide civil rights cases. This was considered desirable because federal judges would not be as prone to compromise federal rights if they conflicted with state statutes as would state judges or administrators. In addition, federal judges would not be as subject to community pressures as would state judges and administrators. For example, state agents and judges often depend on community good will for their re-election or re-appointment and, hence, are careful not to decide cases in ways which arouse local anger. Federal judges, who enjoy life tenure, do not face this kind of local pressure. These policies suggest that, even though there is a recognized state interest in having comprehensive administrative schemes, there is an overriding federal interest in preserving federally granted rights and in providing an efficient remedy for their deprivation.[102]

CONG. GLOBE, 42d Cong., 1st Sess. 216 (Appendix 1871) (remarks of Senator Thurman).

[99]Moreno v. Henckel, 431 F.2d 1299, 1305 (5th Cir. 1970).

[100]Monroe v. Pape, 365 U.S. 167, 180 (1961).

[101]*Id.* at 173-74.

[102]Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 146 (1972); Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1207 (1968).

Exhaustion of available administrative procedures should retain validity in three instances. One is a situation in which the plaintiff faces only a future, threatened deprivation of rights. Exhaustion in this situation would insure an authoritative institutional decision that would be final in the sense of being ripe for adjudication.[103] This exception to a no-exhaustion rule should be narrowly confined to those cases in which there is an adequate remedy available and plaintiffs would suffer no irreparable harm by the consequent delay. In addition, the no-exhaustion rule should be discretionary with the courts when a case involves questions of local law. In such a case, administrative exhaustion would aid the courts by interpreting and untangling the state law from the federal issues. Finally, the no-exhaustion rule should not be applicable when the section 1983 claim is used merely to avoid exhaustion requirements imposed by other applicable statutes. This exception should be confined solely to those cases in which another federal statute is present evidencing a congressional intent to require exhaustion.[104]

IV. Exhaustion Requirements in Sections 1981 and 1982 Actions

A. History

All the Civil Rights Acts[105] were passed to implement the Civil War Amendments and all "were originally designed to guarantee certain fundamental rights to the emancipated Negro."[106] Sections 1981[107] and 1982[108] were passed in 1866 to enforce the

[103]*See* Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). *See also* Beattie v. Roberts, 436 F.2d 747 (1st Cir. 1971); Hall v. Garson, 430 F.2d 430, 436 n.11 (5th Cir. 1970); Boyd v. Smith, 353 F. Supp. 844, 846 (N.D. Ind. 1973); Tillman v. Dade County School Bd., 327 F. Supp. 930 (S.D. Fla. 1971).

[104]Preiser v. Rodriguez, 411 U.S. 475 (1973).

[105]Civil Rights Act of 1866, 14 Stat. 27 (codified in 42 U.S.C. §§ 1981, 1982 (1970)); The Enforcement Act, 16 Stat. 140 (1870); Amendments to the Enforcement Act, 16 Stat. 433 (1871); Civil Rights Act of April 20, 1871, 17 Stat. 13 (codified in 42 U.S.C. §§ 1983, 1985(3)).

[106]17 Vill. L. Rev. 336, 338 (1971).

[107]42 U.S.C. § 1981 (1970). This statute states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

[108]42 U.S.C. § 1982 (1970). This statute states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof

thirteenth amendment's bar against slavery and involuntary servitude. These sections have been held applicable against all acts of discrimination whether public or private, federal or state.[109] They are broader than section 1983 since they are not limited to the "under color of state law" requirement of that section.[110]

B. State Action—A Key Distinction

Although these sections were all passed to implement the Civil War Amendments, section 1983 enforces the fourteenth amendment while the other two enforce the thirteenth.[111] The Supreme Court has held that "different problems of statutory meaning are presented by two enactments deriving from different constitutional sources."[112] While this statement indicates that the same words in sections 1981 and 1982 will be treated differently than they are treated in section 1983, it may also imply, by analogy, that different remedies will be available under them. This is further strengthened by the differences between section 1983 and sections 1981 and 1982.

The key ingredient in section 1983 suits is the presence of state action in some form. At the same time, the remedies the plaintiff is required to pursue are also the state's. This often means that a state agency, whose agents are state officers, is

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to inherit, purchase, lease, sell, hold, and convey real and personal property.

[109]For cases extending the scope of section 1981 to actions of private citizens, *see* Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972); Tramble v. Converters Ink Co., 343 F. Supp. 1350, 1352 (N.D. Ill. 1972); Sims v. Order of United Commercial Travelers of America, 343 F. Supp. 112, 114 (D. Mass. 1972). For cases extending the scope of section 1982 to actions of private citizens, see Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[110]For example, if a black is denied a chance to hold property by another private citizen, he can bring a suit against that person under section 1982. Section 1983 would not be applicable to this suit since the state is not involved. If this plaintiff were denied the right to hold property because of a state statute saying that blacks may not hold property, he could bring suit under both sections 1982 and 1983. Very often, a suit will be brought under all three sections simultaneously.

[111]There is some debate on this interpretation. Some courts maintain that the reenactment of sections 1981 and 1982 after the passage of the fourteenth amendment, in the Act of May 31, 1870, 16 Stat. 144, was intended to make these sections applicable only when state action and, hence, the fourteenth amendment, was involved. *See* Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971). For a good discussion of these conflicting interpretations, see Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972).

[112]Monroe v. Pape, 365 U.S. 167, 205-06 (1961) (Frankfurter, J., dissenting), *cited with approval in* District of Columbia v. Carter, 409 U.S. 418 (1973).

asked to review the actions of other state officers or the actions of the agency's employer. It is not improbable that the agent will be biased in favor of the defendant since they are both state affiliated or are officers of the same employer. This inherent potential for bias makes administrative remedies, in the eyes of those favoring a no-exhaustion rule, inadequate under section 1983. It is this same potential which would make them inadequate for section 1981 or 1982 plaintiffs suing a state's officers.

But this inherent potential for bias is absent when a state official is not a party to the litigation and when agency actions are not in issue. The state agency can be presumed to be neutral when the case before it is one between two private citizens who are not connected to the state and are not raising questions of state action.

C. Exhaustion—The Courts' Decisions

All this would indicate that section 1981 and 1982 plaintiffs should not be required to exhaust their administrative remedies when they are suing the state in some form and that they should be required to exhaust when they are suing merely a private citizen. Such an easy analysis is complicated by two factors. One is the often-present bias against minority groups and the second is the presence of federal statutes requiring exhaustion in certain instances. Race may work to make the remedy inadequate while statutes may have the effect of requiring its exhaustion.

The courts which have dealt with the exhaustion issue have unanimously adopted a flexible rule so that factors such as race, state action, and federal statutes may be considered. Although the Supreme Court has never dealt with the exhaustion issue solely under these two sections, several circuit courts have dealt with it in relation to the exhaustion of *federal* administrative remedies. An analysis of these cases will be helpful in developing an exhaustion formula applicable to *state* administrative remedies.

One court to decide a case involving federal administrative remedies has been the Fifth Circuit in *Beale v. Blount.*[113] In *Beale,* suit was brought by a substitute mail carrier for reinstatement and injunctive relief against the Post Office Department. He had not exhausted available administrative remedies prior to initiating suit.

The court noted the no-exhaustion rule established by the Supreme Court for section 1983 plaintiffs and rejected that rule as applying to section 1981 plaintiffs. The court believed that this plaintiff's plight was "totally dissimilar" to that of a sec-

[113] 461 F.2d 1133 (5th Cir. 1972), *noted in* 41 GEO. WASH. L. REV. 657 (1973).

tion 1983 plaintiff since the federal government, not a state government, was involved. There was no potential for bias against black plaintiffs because the federal government, as a matter of policy, forbids racial discrimination in any government dealings.[114] Hence an adequate and impartial remedy was available. The court also noted that an early judicial forum would tend to undermine the efforts of the federal bureaucracy to correct its own errors. The court concluded that "the time-tested requirement that available administrative remedies be exhausted prior to the institution of a mandamus action" would be adhered to.[115]

A flexible rule has been reached by three other courts deciding similar cases dealing with exhaustion of federal administrative remedies. These courts adopted a flexible rule of exhaustion so that an accommodation between their jurisdictions under section 1981 and the administrative agencies' jurisdiction under the federal statutes could be developed on a case by case basis.[116] A firm rule of exhaustion or no-exhaustion, the Seventh Circuit Court of Appeals noted in *Waters v. Wisconsin Steel Works of International Harvester*,[117] would eventually lead to irreconcilable conflicts between federal statutes (in that case section 1981 and Title VII) which might result in the nullification of one statute by the other. A flexible rule would avoid such a clash.

D. Guidelines for an Exhaustion Rule

Although these cases deal only with the exhaustion of federal remedies, their rulings, combined with several theories borrowed from section 1983 suits, may establish guidelines for exhaustion rules in section 1981 and section 1982 suits involving state administrative remedies. Several rules emerge: First, exhaustion should not be required if, for any reason, the adminis-

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[114]461 F.2d at 1139.

[115]*Id.* The court clearly indicated that exhaustion would not be required in suits brought under section 1983 since "[t]he Supreme Court's decisions in *Monroe*, *McNeese* and *Damico* make it clear that such exhaustion is not required of a section 1983 plaintiff no matter what state administrative avenues of relief are open to him." *Id.* at 1139 n.11.

[116]Penn v. Schlesinger, 490 F.2d 700 (1973), *rev'd on rehearing*, 497 F.2d 970 (5th Cir. 1974); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works of Int'l Harvester, 427 F.2d 476, 485 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). In the *Schlesinger* case, the court held that exhaustion under sections 1981 and 1982 was not a matter of black letter law and that exhaustion should be decided on a case by case basis. The court decided that plaintiffs should not be required to exhaust any further administrative remedies in that case because the agency had failed to process their grievances.

[117]427 F.2d 476, 485 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

trative remedy is inadequate or if pursuing it would be futile. It would be grossly unfair to deny a civil rights plaintiff the benefit of this general exception to the exhaustion doctrine. Secondly, exhaustion should not be required under sections 1981 or 1982 if a state agency or officer is being sued. In such cases, his suit will probably also be brought under section 1983, and the same reasons that make a by-pass of state remedies necessary in that context would be applicable here as well. Thirdly, exhaustion should be required if Congress has passed a statute evincing an intent to require exhaustion in specific areas or if Congress has established a federal administrative procedure to be exhausted first. Thus, exhaustion would be required in Title VII actions unless the plaintiff proves that his remedy there is inadequate.[118] Finally, for those cases not falling within these three categories, a flexible rule should be adopted according to the circumstances of the case. Since suits in this category will all be brought against private persons (suits against state agencies or their officers fall under the second category), the need for federal intervention will be less. State administrative remedies would not, then, be per se unreasonable but a consideration of various factors could make them so.

The factors a court could consider in reaching its decision concerning exhaustion are numerous. The court could examine the three factors suggested by Professor Davis—the extent of injury to a plaintiff who must exhaust, the ease with which an administrator's jurisdiction over this case can be determined, and the need for specialized administrative understanding in this area.[119] The court may further want to examine the involvement of the agency in the case and may also want to ask whether exhaustion or no-exhaustion would tend to make the agency operate in a remedial fashion.[120] Plaintiffs should be allowed to present evidence of agency bias against minority group plaintiffs. Such a showing, for example, could consist of statistical data concerning the agency's effectiveness in protecting the rights of section 1981 or 1982 plaintiffs.

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[118]See Larson, *The Development of Section 1981 as a Remedy for Private Employment*, 7 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 56 (1972), for an argument that Title VII remedies are so inefficient as to always be "inadequate."

[119]3 DAVIS, *supra* note 1, §§ 20.10 *et seq.* (1958).

[120]Note, *Administrative Law—Judicial Review—Agency Misconduct—The Doctrine of Exhaustion of Administrative Remedies*, 18 WAYNE L. REV. 1403, 1421-22 (1972).

E. Summary of Section 1981 and 1982 Exhaustion Requirements

Although a no-exhaustion rule is desirable in section 1983 cases, it is not as necessary in sections 1981 and 1982 actions for the reason that the essential ingredient of state involvement is often missing. A flexible rule is much more practical. Such a rule could take into account important factors, such as adequacy of the remedy, state involvement, racial bias, and pertinent statutes. A flexible rule would afford better protection for civil rights and would better promote state interests in an administrative scheme. Finally, it would allow courts to accommodate congressional intent to require exhaustion, as voiced in other federal statutes, without destroying the usefulness of sections 1981 and 1982 altogether as might be the case if a firm no-exhaustion rule were adopted.

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