MEMORANDUM TO MR. JUSTICE HARLAN

SUBJECT: Jurisdictional Problems with 42 U.S.C. §1983: Lynch v. Household Finance Corp., No. 70-5058, and Carter v. Stanton, No. 70-5082.

SCOPE OF THE MEMORANDUM

The two above-named cases raise many of the unresolved jurisdictional problems with suits brought in the federal courts under the Civil Rights Act, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343(3), seeking equitable relief. The purpose of this memorandum is to discuss those problems and to apply them to the instant cases.

The first section of this memorandum will deal with the question whether a litigant alleging a deprivation, under color of state law, only of property rights -- as opposed to "personal"

liberties -- may bring a §1983 action in federal court. The second section will discuss the thorny problems of exhaustion, that is, whether a litigant may bring a §1983 action in federal court without first exhausting state remedies, regardless of whether those state remedies are adequate. The third section will be concerned with the relationship of §1983 to the federal anti-injunction statute, 28 U.S.C. §2283: may a litigant bring a §1983 action to enjoin proceedings in a state court despite the bar of §2283 -- or, in other words, does §1983 come within the exception contained in §2283 for actions "expressly authorized by Act of Congress." A reading of the legislative history of §1983, with what I hope is the appropriate skepticism, will add to the discussion of these three problems. The last two sections of this memorandum will apply the general discussion of these basic problems to the two instant cases, respectively, and will also deal with the other, more specific, problems raised by those cases.

I. THE "PERSONAL LIBERTIES-PROPERTY RIGHTS" DISTINCTION

A. Origins. The Civil Rights Act of 1871 gave the federal trial courts original jurisdiction, without regard to jurisdictional amount, of civil actions at law or in equity against any person who, under color of any state law, subjects any person within the jurisdiction of the United States to the deprivation of any rights, privileges, and immunities secured by the Constitution of the United States. That provision is now codified in §1983, creating the liability, and in §1343(3), creating the jurisdiction. The legislative history, common origin, and identical wording of the two sections make it clear that they are to be co-extensive -- that is, that §1343(3) provides the jurisdiction for §1983 actions. See Hague v. CIO, 307 U.S. 496, 529 (1939) (opinion of Stone, J.); Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943). I will treat these two provisions as such

throughout this memorandum, often referring to only one or the other when it is meant that both apply together in the above way.

In 1875, Congress gave federal courts jurisdiction of "all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States . . ." In contrast to the 1871 Act, however, the 1875 Act -- now §1331 -- required that a minimum amount in controversy -- now $10,000 -- be alleged and proved. Although there is an evident overlap between §1343(3) and §1331, Congress has never sought to draw a line between cases involving rights "secured by" the Constitution for purposes of §1343(3) and rights "arising under" the Constitution for purposes of §1331. But in order to preserve the Congressional policy requiring a minimum amount in controversy for suits under the latter provision, courts have attempted to limit the availability of jurisdiction under the former.

In Carter v. Greenhow, 114 U.S. 317 (1884), this Court held that the right to nonimpairment of contracts was not "secured" by the Constitution since it was not directly conferred. The Court, however, did not hint at what rights were so "secured." In Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900), the Court held that §1343(3) did not apply to a suit contesting the constitutionality of state taxation of patent rights, on the ground that the right alleged was not a "civil right" for purposes of that section. Again, the Court made no attempt to define a "civil right." In Truax v. Raich, 239 U.S. 33 (1915), however, this Court upheld §1343(3) jurisdiction of an action to declare unconstitutional a state statute requiring that certain employers hire not less than 80% native-born citizens. The Court stated that the right to work for a living "is the very essence of . . . personal freedom." 239 U.S. at 41.

The most significant interpretation of §§1343(3) and 1983 came in Hague v. CIO, 307 U.S. 496 (1939). At that time, §1343(3) had fallen into disuse, partially because of the Holt decision; and plaintiffs were assigning pecuniary valuation to even the clearest intangible "personal" rights in order to meet the "amount in controversy" requirement of §1331. See, e.g., Wiley v. Sinkler, 179 U.S. 58 (1900) [right to vote accorded a pecuniary value]. The plaintiffs in Hague brought suit in a federal district court for injunctive relief, alleging that city ordinances restricting the distribution of printed matter and the holding of public meetings violated their rights to freedom of speech and assembly. The lower courts found jurisdiction under both §1331 and §1343(3). This Court held that jurisdiction could not be founded upon §1331 because the record was bare of any valuation of asserted rights. But in separate

opinions by Justices Roberts and Stone, a majority of the Court affirmed jurisdiction under §1343(3).

Justice Roberts stated that the rights alleged were attributes of national citizenship secured by the privileges and immunities clause and that §1343(3) provided jurisdiction over the deprivation of such rights. Justice Stone disagreed with this reasoning and found §1343(3) jurisdiction on the ground that freedom of speech and assembly are rights secured to all persons, regardless of citizenship, by the due process clause of the Fourteenth Amendment and were thus within the language of §1343(3). Stone viewed the problem as one of reconciling the apparent conflict between §1343(3) and §1331 as to the requisite jurisdictional amount. He was certain that Congress in 1875 had not intended to withhold jurisdiction from the federal courts of suits which Congress had authorized by the Civil Rights Act just four years earlier. He reasoned further that the continuance

of both statutes in the Judicial Code evidenced a congressional intention that suits could be brought under §1343(3) after 1875 and that §1343(3) at least must be deemed to include suits in which the subject matter is "inherently incapable of valuation." 307 U.S. at 530. On the other hand, he felt that a broad reading of §1343(3) to include all rights secured by the Constitution would render superfluous §1331's protection of rights "arising under the Constitution" when the requisite amount was in controversy. Stone attempted to harmonize the two provisions by treating §1343(3) as conferring federal jurisdiction of suits brought under §1983 when the right asserted is inherently incapable of pecuniary valuation. Thus, he concluded that "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under [§1343(3)] to entertain it without proof that the amount in controversy

exceeds [the requisite amount]." 307 U.S. at 531-32. It must be remembered, however, in this context that Stone was trying to preserve §1343(3) jurisdiction from being swallowed by §1331, not vice versa.

B. Difficulties in Application. This distinction between personal liberties incapable of valuation and property rights, articulated fully for the first time by Justice Stone, has never been expressly repudiated, but it has led to numerous unpredictable and inconsistent decisions, especially in the lower courts. In Douglas v. City of Jeannette, 319 U.S. 157 (1943), this Court upheld §1343(3) jurisdiction of a suit by the Jehovah's Witnesses to restrain the city from enforcing an ordinance prohibiting the selling of literature and the solicitation of merchandise orders without a license. Although Stone, writing for the majority, upheld the district court's jurisdiction on the ground that the Witnesses were asserting a right of free speech,

it could be argued that the right asserted was a property right -- the right to distribute literature for sale -- and that even the right to free speech here was capable of pecuniary valuation, since the Witnesses could have purchased that right from the city by paying the license fee.

The property-personal rights distinction has created considerable confusion in the lower courts. Several cases have upheld §1343(3) jurisdiction of actions to ensure nondiscriminatory treatment in the granting or continuance of liquor licenses by the state, e.g., Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), Atlanta Bowling Center v. Allen, 389 F.2d 713 (5th Cir. 1968), Glicker v. Michigan Liquor Control Comm., 160 F.2d 96 (6th Cir. 1947), although denial or revocation of such a license would appear to be loss of a property right, as well as of the right to engage in the business of one's choice, and is certainly capable of pecuniary valuation. Jurisdiction

has similarly been upheld in suits alleging discrimination in the denial of garbage collection franchise [Mansell v. Saunders, 372 F.2d 573 (5th Cir. 1967)]; in suits alleging the unconstitutional deprivation of a license to sell real estate, where the license would be restored upon payment of $585 [Gold v. Lomenzo, 425 F.2d 929 (2d Cir. 1970)]; and in suits alleging the unconstitutional impairment of contract rights when the state unlawfully sold certain land [McGuire v. Sanders, 337 F.2d 902 (5th Cir. 1964)].

The difficulty in distinguishing between property and personal interests is also illustrated by cases in which employment discrimination is alleged to have deprived a person of his job or livelihood, or in which a person has been removed from his job without due process guarantees. Sec. 1343(3) jurisdiction has frequently been granted in these cases; Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Coff v. City of Malden, 202 F.2d 701 (1st Cir. 1953);

Bernbaum v. Trussel, 371 F.2d 672 (2d Cir. 1966). No doubt the right to earn a living can be classified as a "personal right" if one views it as the right to pursue the work one enjoys or, as in Bernbaum, as the right to be free from the damage to one's reputation which would be caused by dismissal; but arguably the loss of employment is primarily the loss of wages, an item traditionally considered a proprietary interest. Indeed, this year the Second Circuit retreated from its prior position and denied §1343(3) jurisdiction on precisely this ground in a suit alleging a discharge from state employment without notice or hearing. Tichon v. Harder, _____ F.2d _____ (2d Cir. 1971).

In cases alleging unfair taxation, the courts have generally denied federal §1343(3) jurisdiction on the ground that the rights asserted were purely proprietary. E.g., Abernathy v. Carpenter, 208 F.Supp. 793 (W. D. Mo. 1962), aff'd mem., 373 U.S. 241

(1963); Hornbeck v. Hamm, 283 F. Supp. 549 (M. D. Ala.), aff'd. 393 U.S. 9 (1968). See also Bussie v. Long, 383 F.2d 766 (5th Cir. 1967) (tax cases should be excluded from §1343(3) jurisdiction even if the property-personal rights distinction is not followed in other areas, because tax cases are a special class which Congress has expressly left to the states).

Welfare cases, on the other hand, have created more diverse results. Although at first glance welfare payments would appear to be a property right, most courts have found jurisdiction under §1343(3) when welfare claimants have alleged either infringement of constitutional rights or inconsistency with the Social Security Act. E.g., King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); Kelly v. Wyman, 294 F.Supp. 893 (S. D. N.Y. 1968), aff'd. sub. nom.; Goldberg v. Kelly, 397 U.S. 254 (1970); Johnson v. Harder, _____ F.2d _____ (2d Cir. 1971). Apparently, the

the courts feel that the deprivation of this kind of property, i.e., property necessary to keep a family at subsistence level, becomes the deprivation of a personal right and is thus covered by §1343(3). On the other hand, some cases have denied federal jurisdiction of actions alleging the unconstitutional deprivation of welfare benefits. E.g., Roberts v. Harder, 320 F. Supp. 1313 (D. Conn. 1970), aff'd. _____ F.2d _____ (2d Cir. 1971); Carter v. Stanton, _____ F. Supp. _____ (S. D. Ind. 1970) (one of the instant cases).

As shown by the license revocation cases, the employment cases, and the welfare cases, many actions involve a mixture of property rights and personal rights, and it is in applying Stone's test to these cases that his distinction breaks down. Other examples of these types of cases are an action by tenants in public housing alleging that an arbitrary levy of a small fine for violation of a minor rule deprived them of their leasehold interest without due

process [Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 39 L. W. 3149 (1970) (jurisdiction upheld)]; a challenge to the unconstitutional appointment of a conservator (Dale v. Hahn, _____ F.2d _____ (2d Cir. 1971) (jurisdiction upheld); conservatorship involved more than property right, for it had consequences to reputation and destroyed right to enter into legal relations, to control and dispose of property, to enter into contracts, and to sue and be sued; JEL dissenting on ground that plaintiff alleged only deprivation of property right)]; and a challenge to the constitutionality of a state statute authorizing deputy sheriffs, at the direction of alleged creditors, summarily to garnish wages deposited in checking accounts and credit union accounts [Lynch v. Household Finance Corp., _____ F. Supp. _____ (D. Conn. 1970) (one of the instant cases) (jurisdiction denied on

property-right grounds despite contention that plaintiffs needed the deposited funds to live).

In Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), Judge Friendly undertook an extensive discussion of these problems. The plaintiff there, a landlord, alleged that the city had violated his constitutional right not to be deprived of property without due process of law by reducing the rents that he could charge under the city's rent control law. In denying jurisdiction under §1343(3), HJF, "with a good deal less than complete assurance," 421 F.2d at 566, reaffirmed Stone's Hague distinction, holding that since the plaintiff alleged only a deprivation of property, the district court had no jurisdiction of his §1983 action. Although he recognized the difficulties in applying Stone's formulation to the mixed property right-personal right cases, he stated that "there seems to be something essentially right about it, especially if one accepts, as we do, his

premise that the overlap between . . . §1331 and . . . §1343(3) should be explained in some rational way. It has the merit of preserving not only the kind of case that was at the core of congressional concern in 1871 but a good many others that Congress would probably desire to have within the statute, while at the same time excluding cases [such as tax cases] that neither the Reconstruction Congress nor later Congresses could really have had in mind." 421 F.2d at 565-66.

Despite Judge Friendly's attempt to justify the Hague test, it is clear from all of the above cases that that test is extremely difficult, if not impossible, to apply in the numerous mixed cases which face district judges today. The determination of what is a property right and what is a personal right seems to turn on the individual judge's predelictions, for, as shown above, one can almost always find some concomitant personal right affected

whenever a property right is allegedly taken away. This is certainly true, for instance, in the license revocation cases and the employment termination cases.

Moreover, in the welfare cases and public housing cases, courts paying lip service to Stone's distinction still find §1343(3) jurisdiction on the same ground that plaintiffs in those cases are poor and really need the money. But this is equally applicable to garnishment cases, as Sniadach recognized, and yet the court in one of the cases at bar -- a court which recognizes the welfare exception -- denied jurisdiction in such an action. Perhaps welfare benefits are a special class since they are based on a legislative determination that, without such assistance, welfare recipients cannot exercise their fundamental constitutional rights. But whatever the reason, it seems clear that courts attempting to apply the Hague test to these types of cases, in order to determine whether a property-type interest

is sufficiently related to the exercise of a personal liberty to allow §1343(3) jurisdiction, are forced to consider subjective factors involving the plaintiff's need for the property. Such an approach appears unwise, for a litigant's allegations of subjective need should not be a determinative factor in deciding whether a federal court has jurisdiction of a particular matter.

Since the loss of property in most cases has an effect on personal interest, Stone's formulation relies on a fallacy, i.e., that the two are separable. Furthermore, his distinction between rights capable of pecuniary valuation and those incapable of valuation similarly fails. As shown above, many rights which the courts have characterized as personal rights sufficient to give §1343(3) jurisdiction are clearly and easily susceptible of monetary valuation, e.g., the right to welfare benefits and public housing, the right to be free from the arbitrary denial or revocation of a state-granted license, etc. Thus,

not only the difficulties and unavoidable inconsistencies in applying Stone's test, but also the dubiousness of the underlying assumption that it can be applied in a reasonable way, demonstrate the need for a new method of determining the scope of federal jurisdiction under §1343(3).

Beyond these considerations, however, the personal rights-property rights distinction rests on three more basic premises: (1) that the drafters of the relevant sections of the 1871 Civil Rights Act, now §§1343(3) and 1983, intended those sections to apply only to deprivations of personal, nonproprietary rights incapable of valuation -- or at least that the drafters of §1331 four years later intended, in enacting that new section, to limit §§1343(3) and 1983 to suits alleging the deprivation of a personal liberty; (2) that the distinction is necessary in order to prevent §1331 from becoming superfluous; and (3) that personal liberties are somehow more deserving of federal

protection than are property interests under $10,000. I will now undertake to examine each of these premises.

C. Legislative History. This Court has traced the origin of §§1983 and 1343(3) to the Civil Rights Act of 1866. Monroe v. Pape, 365 U.S. 167, 171, 183-85 (1961). The basis for this is the clear indication from the title and discussion of the 1871 Act that its purpose was to enforce the Fourteenth Amendment, and the equally clear proof that the first section of that amendment was intended to incorporate the provisions of the 1866 Act into the Constitution, lest a later Congress negate that Act. Thus, it is instructive in determining the meaning of §§1343(3) and 1983, as originally enacted in 1871, to examine the scope of the 1866 Act.

The evidence before the Congress in 1866 showed that Negroes were being deprived of, among other rights, their rights to own property and to collect their wages by the processes of the law, and

Congress intended to remedy that situation. Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865); Cong. Globe, 39th Cong., 1st Sess., 3034-35 App. 219 (1866). Indeed, the statute enacted, entitled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication," provides that "all persons born in the United States . . . shall have the same right . . . to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all law and proceedings for . . . person and property, as is enjoyed by white citizens . . . ." Thus, it is plain both from the debate of the Congressmen and from the title and words of the Act that the "civil rights" being protected included "property rights." We recognized in Jones v. Mayer Co., 392 U.S. 409, 432 (1968), that the 1866 Act affirmatively secured for all men the right to acquire, hold, and dispose of property.

The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866, and it clearly asserts that states shall not deprive any person of property without due process of law. As we stated in Shelley v. Kramer, 334 U.S. 1, 10 (1948): "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

It cannot be disputed, then, that both the 1866 Act and the Fourteenth Amendment protected property interests. The only question is whether the first section of the Ku Klux Klan Act of 1871 -- now separated into §§1983 and 1343(3) -- contemplated similar

protection. The evidence is abundant that it did. It was entitled "An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes," thus indicating that the "rights, privileges, or immunities" secured by that Act are the same "rights, privileges, or immunities" secured by the Fourteenth Amendment. Likewise, the first section of the 1871 Act provides jurisdiction for claims arising under the 1866 Act, which clearly protected property rights as civil rights.

Moreover, there is no indication in the wording or the legislative history of the 1871 Act of any intention to distinguish between property rights and personal rights or to protect property rights any less vigorously than personal rights. The first section of that Act gave the federal courts jurisdiction of any action to redress the deprivation of any right to which the person is entitled under the Constitution, thus on its face including the right to property.

In addition, it appears that Congress was aware that both life and property were being rendered insecure by the lawless conditions in the South and that legislation was needed to protect both rights. On March 23, 1871, President Grant urged Congress to act: "A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States." Cong. Globe, 42nd Cong., 1st Sess. 244 (1871).

In discussing the bill, the legislators frequently referred to the necessity to protect property rights, as well as other rights, from unconstitutional deprivation, and despite the long and vigorous debates, none of them argued about whether the bill protected only personal rights, as opposed to property rights.

Indeed, they seemed to assume that there was no such distinction in the bill's protection, just as there was no such distinction in the Fourteenth Amendment's scope of protection. Representative Shellabarger, who chaired the House Committee which drafted the Act, indicated that the rights protected by it include the fundamental right "to acquire and possess property of every kind." Id. at App. 69 (quoting from Corfield v. Corzell, 6 Fed. Cas. 546, 551 (1823)). Representative Hoar stated that large numbers of citizens were being deprived of their "fundamental" right to property and that the Act was needed to secure that right. Id. at 332, 334. Representative Shanks stated that the Act is an "assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State," Id. at App. 141, and the same sentiments were echoed by several other Representatives and Senators. E.g., id. at 449, 653, 654. The only mention of personal rights that I found

was in a speech by Senator Edmunds, a supporter of the bill, id. at 692, but later in the same speech, the Senator stated that the Fourteenth Amendment, which this Act was intended to enforce, protected every person born in the United States against invasion by a state of "the privileges and immunities which have been spoken of in the Constitution and which we all agree include the right to life, the right to liberty, the right to property . . . ." Id. at 693.

It might be argued that the 1871 Congress did not intend its Act to apply to property because it felt that it had adequately protected the property rights of newly-freed Negroes in the 1866 Act quoted above. But, this argument is untenable in light of the wording and the legislative history of the 1871 Act just discussed. Thus, it is absolutely clear to me that the first section of the 1871 Act was intended by its drafters to apply to deprivations of property, as well as of personal, rights.

Of course, this intention is not conclusive since it is possible that Congress in enacting §1331 four years later meant to limit the 1871 Act to personal nonproprietary rights. But there is no indication whatsoever in the legislative history of §1331 that Congress thereby intended to limit the scope of §§1983 and 1343(3). The latter provisions, passed only four years earlier, were still fresh in Congress' mind, and if it had intended to limit those provisions in 1875, it seems likely that it would have said so or would have amended the language of those earlier provisions. It did neither.

The history of the 1875 Act is that it was meant to give precisely the jurisdiction which the Constitution, Article III, §2, confers; for the first time, "the vast range of power which had lain dormant in the constitution since 1789" was conferred on federal courts to hear all cases arising under the Constitution and federal laws, provided a requisite amount was in controversy. Zwickler v.

Koota, 389 U.S. 241, 247 (1967), quoting Frankfurter and Landis, The Business of the Supreme Court, 65 (1928). The broad scope of §1331 conforms with the far-reaching expansion of federal authority wrought by the other Reconstruction enactments, and thus the Act of 1875 seems to be part of, rather than an exception to, the trend of the legislation which preceded it. See Zwickler v. Koota, supra, at 245-48.

When Congress increased the jurisdictional amount for §1331 actions to $10,000 in 1958, it again said nothing about restricting §§1983 and 1343(3). Thus, it is clear that the restriction of §1343(3) jurisdiction to nonproprietary interests is a wholly judicial creation, unrelated to the intent of Congress. Indeed, this Court, discussing the history and scope of §1983 in Monroe v. Pape, 365 U.S. 167 (1961), interpreted that section as applying to all rights guaranteed

by the Fourteenth Amendment and made no distinction between personal and property rights.

D. Protection of §1331. Judge Friendly justified the Hague distinction on the ground that an "incongruity" would result by "reading . . . §1343(3) so broadly that it would cover the entire ground later embraced by . . . §1331, with its requirement of a jurisdictional amount, in all cases where natural persons complained of acts by state officers as violating the Constitution." Eisen v. Eastman, supra, at 564. As stated above, however, Justice Stone in Hague was trying to preserve §1343(3) jurisdiction from being swallowed by §1331, not vice versa. He did not argue, as HJF did, that if §1343(3) were interpreted to include property rights, there would be no federal question jurisdiction left for the federal courts to exercise; rather he contended that in some types of cases -- at least those in which

the subject matter is incapable of valuation -- Congress did not intend to apply the jurisdictional amount requirement.

Of course, the overlap between §1331 and §1343(3) is substantial, and without the property rights-personal rights distinction, many cases which presently must meet the §1331 jurisdictional amount requirement for federal jurisdiction would be able to be heard in the federal courts under §1343(3). But, the overlap is by no means total nor would construing §1343(3) to protect both personal and property rights render §1331 superfluous. Section 1343(3) applies only to an alleged infringement of rights "under color of state law," whereas §1331 has no "color of state law" requirement. Thus, in many federal question cases, such as suits against officials of the federal government, the jurisdictional amount of §1331 is still necessary for federal jurisdiction absent other statutory provisions. The purpose of §§1983 and §1343(3) -- to protect against unconstitutional state action -- is

more limited in scope than the general federal question jurisdiction. Furthermore, the many statutes conferring federal jurisdiction without any monetary requirement lessen the impact of the §1331 requirement and may support the theory that state courts are not always satisfactory forums for the protection of federal rights, even when the amount in controversy is small.

In light of the fact that the Hague distinction is not necessary to preserve §1331 jurisdiction, then, the jurisdictional amount requirement should not be applied to claims of deprivation of property rights under color of state law, in the absence of a clear congressional mandate. As shown above, there is not only no congressional mandate supporting that application, but the legislative history shows the congressional purpose to have been the opposite -- i.e., that §§1983 and 1343(3) were meant to cover property rights, as well as personal rights.

E. Policies. The Hague test has the effect of designating personal liberties as more deserving of federal protection than property interests under the jurisdictional amount. Whether this assumption is true or not or good or bad is a debatable matter.

On the one hand, eliminating the personal rights-property rights distinction would open the federal courts to a great many claims which heretofore were required to be brought in the state courts. The spectre of the floodgates opening in the district courts, already overburdened by civil rights actions, to allow suits challenging the unconstitutional deprivation of property is always a good argument against extending federal jurisdiction. More important, the elimination of the distinction would open federal courts to litigants asserting property claims which might be considered primarily the responsibility of the state -- for instance, attacks on the constitutionality of state tax statutes, claims alleging discriminatory taxation, or actions

addressed solely to the state's taking of real property. As Judge Friendly stated, "It is quite hard to believe, for example, that the framers of [§§1983 and 1343(3)] would have thought the statute could be invoked by a person complaining of state taxes allegedly barred by the Commerce Clause." Eisen v. Eastman, supra, at 566.

On the other hand, without the economic security which proprietary rights provide, one's personal liberty is surely less secure. This is demonstrated in the case of a poor person where the loss of money or property affects his rights to be free from hunger, to be fully clothed, or to be adequately housed. It would be incongruous to argue that the loss of the means to provide these necessities, albeit less than $10,000, is any less valuable to some people than the loss of freedom of speech or the right to vote. This is not to place property rights above personal rights or vice versa, but only to recognize that Stone's distinction ignores the inseparability of the

two and fails to recognize that to many people the deprivation of a property right worth only $1,000 is as important as the deprivation of a personal right incapable of pecuniary valuation.

The fact that a state may provide an adequate remedy for the protection of federal rights is no answer. Whether or not state remedies are adequate in a particular case, and whether or not we require exhaustion of state remedies when adequate (see Part II of this memo, infra), a reaffirmation of Stone's test -- i.e., that §§1983 and 1343(3) do not apply to deprivations of property rights -- would mean that when the state remedy is not adequate, federal courts could still not hear claims of deprivation of property under $10,000. In that case, the plaintiffs would have no forum in which to protect their federally-guaranteed rights -- surely a contradiction of the purpose for which §§1983 and 1343(3) were enacted.

On balance, I believe that the policies favoring the inclusion of property rights within the scope of the protection of §§1983 and 1343(3) are the stronger. Perhaps the tax cases could be recognized as a special class of cases which Congress has expressly left to the state courts. Thus, we would not be overruling our Holt decision, supra, or our affirmances of Abernathy and Hornbeck, supra.

But whether or not any such exception is made (and I can see strong arguments against it), the overall policy considerations, the legislative history, the difficulties in applying Stone's distinction, and the fact that eliminating that distinction would not render §1331 superfluous all dictate that we should abandon the distinction and hold that §1343(3) gives the federal courts jurisdiction of §1983 actions alleging the unconstitutional deprivation of property under color of state law.

II. EXHAUSTION OF STATE REMEDIES

A. Background. Unlike the personal rights-property rights problem, the question whether a federal court having jurisdiction of a §1983 action seeking equitable relief should dismiss the action or stay proceedings there until the plaintiff has exhausted state remedies has been ruled on in several recent decisions of this Court. Dismissal for failure to exhaust is basically an abstention doctrine. It implies that the district court has jurisdiction of the §1983 action, but will exercise its traditional equitable discretion to stay its hand, for the time being, in the interest of federal-state relations. Until recently, two doctrines were well established in this regard, one concerning state judicial remedies and the other concerning state administrative remedies. The first is the traditional abstention doctrine: that where a §1983 plaintiff challenges a state statute, regulation, or practice on federal constitutional grounds, and that

statute, regulation, or practice is capable of a construction in the state courts which would avoid a federal constitutional question, or the federal question is bound up with particularly sensitive or complex questions of state law or local administration, in which the state has a paramount concern, then the federal court, although having jurisdiction of that action, should decline to exercise that jurisdiction and to grant equitable relief until the plaintiff has exhausted his state judicial remedies. See, e.g., Harrison v. NAACP , 360 U.S. 167 (1959); Martin v. Creasy, 360 U.S. 219 (1959). The bases for this doctrine are a sound respect for the independence of state courts in sensitive areas of state concern and the valid policy of allowing the state courts the first opportunity to interpret an unclear state enactment or practice so as, perhaps, to "save" it from unconstitutionality. It is clear, however, that in other situations, i.e., when such abstention principles would not apply, the mere availability of a

state judicial remedy does not bar resort to the federal courts under the Civil Rights Act or otherwise, and the plaintiff does not have to exhaust state judicial remedies. See, e.g., Lane v. Wilson, 307 U.S. 268, §74-75 (1939).

The other doctrine was exhaustion of state administrative remedies -- that when a §1983 plaintiff complained to the federal courts of the violation of a constitutionally-protected right by state action, the federal courts, although again having jurisdiction of that action, should decline to exercise that jurisdiction and should not adjudicate the merits of the plaintiff's complaint until the plaintiff had exhausted all adequate state administrative remedies. See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943).

In 1961, we decided Monroe v. Pape, 365 U.S. 167 (1970), holding that one complaining of unlawful search and seizure by state officials could sue them in federal court under §1983 without

exhausting similar remedies in the state courts. Justice Douglas, writing for the Court, first listed the "three main areas" of §1983: (1) overriding certain points of state laws; (2) providing a remedy when state law is inadequate; and (3) providing a remedy when state recourse is adequate in theory but unavailable in practice. Id. at 173-74. Thus far, the Monroe opinion is consistent with our prior decisions on this question, for it seems to have been clear from those earlier decisions that when a plaintiff challenges a plain state law as unconstitutional on its face, or when state remedies are obviously inadequate (e.g., when the state law challenged has been definitively interpreted by the state courts in a way adverse to plaintiff's claim, or when the state has consistently refused to apply the law as plaintiff claims is constitutionally required, or when there is no state mechanism for challenging a law), then the federal courts, in equity as well as at law, should not abstain or decline to exercise their

jurisdiction, but should exercise their discretion to adjudicate the merits without requiring the prior exhaustion of state remedies. As will be shown below, that proposition, at least, is plainly the intent of the draftsmen of §1983, as indicated by its legislative history, and is supported by sound policy. Hence, for purposes of the discussion, here I will assume that exhaustion of state judicial remedies is not required when a clear state law is challenged on its face so that no saving construction is possib le or when the state judicial remedies are clearly inadequate either in theory or in practice, and that exhaustion of state administrative remedies is not required when those remedies are plainly inadequate either in theory or in practice. The difficulties arise when no state law is challenged or the law challenged is unclear, and state judicial remedies are adequate, or when, in any event, state administrative remedies appear to be adequate both in theory and practice.

Justice Douglas went on in Monroe to state that "[i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183. Indeed, that statement was necessary to the Monroe decision, for no state law authorized the police actions there and it was not contended that the state courts offered inadequate remedies in theory or practice.

In McNeese v. Board of Edcuation, 373 U.S. 668, 672 (1963), Douglas cited his statement from Monroe as establishing a fourth purpose of §1983 -- a federal remedy supplementary to any state remedy; and he indicated further that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." 373 U.S. at 671. Thus, this Court required the district court to hear plaintiff's claim for an

injunction against alleged segregation despite plaintiff's failure to exhaust state remedies -- here administrative remedies. In Damico v. California, 389 U.S. 416 (1967), this Court, relying on Monroe and McNesse, reaffirmed per curiam the proposition that exhaustion of state administrative remedies is not required before the federal equity courts should exercise their jurisdiction in a §1983 action, and it did so again in King v. Smith, 392 U.S. 309, 312 n. 4 (1968), and in Houghton v. Shafer, 392 U.S. 639 (1958) (per curiam).

The presently existing law, then, seems to be as follows: (1) Exhaustion of state judicial remedies is not required unless there is the possibility of a saving construction in the state courts or unless the plaintiff's challenge is inextricably interwoven with sensitive strands of state law and concern (as recognized even by Justice Douglas in McNeese at 673); and (2) exhaustion of state administrative remedies is never necessary in §1983 cases, whether or not those remedies

are adequate. The first of these propositions seems to be clearly established by a long line of cases from this Court and by sound policy. For instance, to require exhaustion of state judicial remedies even when a plain state law is challenged as unconstitutional on its face and there is no chance of a saving construction, on the ground that the state courts can adequately protect federal constitutional rights and are just as capable as the federal courts of striking down state enactments as unconstitutional, would virtually put the federal courts out of the business of reviewing state enactments on federal constitutional gounds and, as recognized in Monroe, would subvert the purpose of §1983. The second proposition is of more recent vintage, but was still clearly established by the McNeese-Damico line of cases. Hence, principles of stare decisis would require adherence to that proposition absent compelling considerations to the contrary. Nevertheless, your dissents in McNeese and Damico indicate that you do not agree

with this position, and the fact that the Court noted probable jurisdiction in one of the instant cases, Carter v. Stanton, raising the question of the necessity for exhausting state administrative remedies, suggests that at least four members of the present Court may question the soundness of our past decisions.

Compelling considerations which might permit a retreat from the McNeese-Damico holdings would seem to fall into three categories: (1) the ambiguity of the decisions in those cases with respect to the lack of necessity for exhaustion regardless of adequacy; (2) support in the legislative history of §1983 for an "exhaustion when adequate" requirement; and (3) the policies underpinning such a requirement. I will now examine each of these considerations in order to determine whether retreat from the McNeese-Damico cases is warranted. But because the question of the necessity for exhausting state administrative remedies is closely related to that involving state judicial

~~to that involving state judicial~~ remedies, I cannot discuss the former without frequent reference to the latter.

B. Our Recent Decisions As Consistent with an Exhaustion Requirement. It might be argued that this Court's prior decisions in Monroe, McNeese, Damico, and so on did not really hold that exhaustion is not required regardless of the adequacy of the state remedies, and that these cases can be restricted to something less than that broad proposition. Judge Friendly did that very thing in Eisen v. Eastman, supra, and in Potwora v. Dillon, 386 F. 2d 74, 77 (2d Cir. 1967). According to him, none of our past decisions is inconsistent with a requirement that a §1983 plaintiff must exhaust state remedies, when those remedies are adequate.

The action in Monroe, for instance, was solely for legal relief -- money damages -- and hence does not govern an action wherein equitable relief is sought. Moreover, although Justice Douglas'

statement in Monroe as to the supplementary federal remedy was necessary to the decision there, the use of such phrases as "and refused" and "if enforced" gives some reason to regard the statement as continuous with the discussion of presumably inadequate state remedies a few pages earlier in the opinion. If the sentences are not given such a restrictive reading and if the federal remedy is taken to be fully supplementary, the scope of §1983 is so broadened that the second and third purposes are completely subsumed and made redundant. As Judge Friendly stated in Potwora, supra, Justice Douglas' statement in Monroe "simply emphasizes that the federal court must be certain that a remedy that seems 'adequate in theory' will be 'available in practice'; it is not enough that the statute will be adequate 'if enforced.'" 386 F.2d at 77.

In McNeese, although equitable relief was sought, the opinion casts enough doubt on the efficacy of the state remedies there

available to justify a federal hearing solely on grounds of the inadequacy of state relief. 373 U.S. at 674-76. Hence, that opinion contains within it an alternative holding entirely consistent with the proposition that exhaustion can be forgone only when the state administrative remedies are inadequate. As Judge Friendly stated in Potwora, "[w]hile the Supreme Court reversed [in McNeese], it emphasized that the state administrative remedy was cumbersome and inadequate and did not suggest that a federal court cannot consult the traditional principles of equity, as informed by the standards announced in Monroe, when deciding whether or not to grant an injunction." 386 F.2d at 77. Again in Eisen v. Eastman, HJF stated that the Court in McNeese "held only that there was no administrative remedy by which plaintiffs could have any assurance of getting the relief they wanted -- an end to segregation -- even if they were clearly entitled to it." 421 F.2d at 569.

In Damico, King v. Smith, and Houghton, it again appears that the state remedies would have been inadequate. Since Damico's complaint attacked the constitutionality of a California welfare law, "it is hard to see what an administrative hearing could have accomplished; the California relief agency could not declare the state statute unconstitutional." Eisen v. Eastman, supra, at 569. Likewise, "[w]hile King v. Smith involved a state regulation rather than a statute, it was also exceedingly unlikely that an administrative hearing would produce a change." Id. at 569. In Houghton, an action by a state prisoner involving internal prison rules, this Court indicated that to require exhaustion in that case "would be to demand a futile act," 392 U.S. at 640, since the final stage of the prisoner's administrative remedy was appeal to the state attorney general, who was personally defending the challenged prison rule as validly and correctly applied to the prisoner.

Although these methods of "interpretation" of our prior decisions might arguably support the proposition that they did not clearly hold exhaustion of state administrative remedies to be unnecessary in any case, it can be seen from the above analysis that such "interpretation" would put an almost unbearable strain on the language and holdings of those decisions. Hence, I conclude that "interpretation" in this way is unsatisfactory, and that a retreat from these decisions cannot be justified on the basis of their unclarity.

C. Legislative History. The first three aims of §1983 listed by Douglas in Monroe are fully supported by the legislative history of the 1871 Act. The debates are replete with references to the lawless conditions existing in the South in 1871 and the inability of the state governments to cope with them. There are a few references to the fact that the Act provided a remedy where state law was inadequate in theory. E.g., Cong. Globe, 42d Cong., 1st

Session, at 244. But the great majority of speeches in this regard referred not to the inadequacy of the state remedies themselves but to the failure of certain States to enforce the laws with an equal hand and to the failure of the state courts in the South to secure Negroes' constitutional rights. Justice Douglas' Monroe opinion provides plentiful examples of these types of speeches, 365 U.S. at 174-180, and there are more. Senator Morton, for instance, stated:

> "But it is said that these crimes should be punished by the States . . . . But the answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people, numbering nearly one half in some of the States, are without legal remedy in the courts of the States." Globe Appendix at 252.

Representative Stevenson stated:

> "[T]he States have laws providing for equal protection, but they do not, either because they will not or cannot, enforce them equally; and hence a class of citizens have not 'the protection of the laws.'" Globe Appendix at 300.

See also Globe at 333, 477, 516, and 653.

Thus Douglas correctly concludes in Monroe that "[i]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. at 180.

The trouble arises when one attempts to determine exactly how Congress intended to remedy this situation through §1983: Did it intend to give federal courts the power to hear all claims under

this section in the first instance regardless of the adequacy of state remedies, or did it intend to have federal courts hear these cases without prior resort to state forums only when the state remedies could be shown to be inadequate? Apparently, Justice Douglas' theory is that when Congress saw that state remedies in the South were inadequate to protect Negroes, it determined that the only way to protect those citizens' rights adequately was to give them an open choice of federal or state forums in the first instance for any and all §1983 claims. Thus, in effect, it created a presumption that all state remedies are inadequate and gave plaintiffs a choice of forums in all cases. The opposite theory is that when Congress saw that state remedies in the South were generally inadequate, it created a right of action in the federal courts so long as in the particular instance the requisite state remedies were inadequate either in theory or in practice.

Of course, the granting of federal jurisdiction is different from establishing guidelines on when the federal courts should exercise that jurisdiction. Thus, it could be argued that Congress, seeing the inadequacy of state remedies in the South, decided to grant the federal courts jurisdiction in the first instance of all §1983 equity actions regardless of the adequacy of the state remedies on the particular claim, but that at the same time it expected the federal courts to use their equitable discretion to decline to exercise that jurisdiction when they could see that the state remedies were in fact adequate.

The difference in approach, however, is primarily conceptual; and its main effect is that if federal jurisdiction is proper but merely not exercised in the first instance, there are wide rights of return to the federal courts once state remedies have been exhausted, whereas if there is no jurisdiction in the first instance, return could

occur only in narrowly restricted circumstances. With respect to the problem here, however, whether the question is looked at in terms of a grant of federal jurisdiction only when state remedies are inadequate or in terms of a grant of federal jurisdiction in all §1983 cases with a requirement or authorization that the federal equity courts exercise that jurisdiction only when state remedies are inadequate, the real question is the same: Did Congress in 1871 intend to permit aggrieved persons to sue for equitable relief in the federal courts under §1983 without exhausting and to have their claims actually heard adjudicated there in the first instance regardless of the adequacy of state remedies (Douglas' theory), or did it intend to allow them to sue in federal courts and have their claims ajudicated there without prior resort to state forums only when state remedies were in fact inadequate (the opposite theory).

Both theories have bases in the legislative history of the 1871 Act, and in fact, many of the statements of the Congressmen can be read both ways. The "choice of forums in all cases" theory -- i.e., the construction which this Court has recently placed on §1983 in Monroe and McNeese -- finds considerable support in the speeches of the supporters of section 1 of the 1871 Act -- now §§1983 and 1343(3). Representative Shellabarger, the House sponsor of the bill, stated:

> "This section of this bill. . . not only provides a civil remedy for persons whose former condition may have been that of slaves, but to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship . . . . [T]o say that Congress can do no such thing as make any law so enforcing these rights nor open the United States courts to enforce any such laws, but must leave all the

protection and law-making to the very States which are denying the protection, is plainly and grossly absurd . . . . [W]herein [the rights secured by the national Constitution and those secured by the states] are identical the powers for protection are concurrent in both governments." Globe Appendix at 68, 70.

Senator Osborn spoke to the same effect:

"The question now is, what and where is the remedy. I believe the true remedy lies chiefly in the United States district and circuit courts . . . We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; i.e., the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." Globe at 653.

Representative Bingham stated:

"Sir, what would this Government be worth if it must rely upon States to execute . . . its express guarantees of rights to the people. Admitting that the States have

> concurrent power to enforce the Constitution of the United States, within their respective limits, must we wait for their action? . . . Why not in advance provide against the denial of rights by States, whether the denial be actions of omission or commission . . . ." Globe Appendix at 85.

Senator Sumner began by making remarks which could be interpreted either way: "If such things can be without a remedy applied if need be by the national Government, then are we little more than a bundle of sticks, but not a nation." Globe at 650. But he then went on:

> "If each State is left to determine the protection of Equal Rights, then will protection vary according to the State, and Equal Rights will prevail only according to the accident of local law. There will be as many equalities as States. Therefore, in obedience to reason, as well as solemn mandate, is this power in the Nation." Globe at 651.

Finally, the remarks of Senator Edmunds, a Senate manager for the bill, are instructive. True, at certain points his remarks could be interpreted as favoring the "exhaustion when adequate" theory:

"[This bill] does not undertake to overthrow any court . . . . It does not attempt to deprive any State of the honor which is due to the punishment of crime. It is a law . . . to be enforced by the courts through the regular and ordinary processes of judicial administration, and in no other way, until forcible resistance shall be offered to the quiet and ordinary course of justice." Globe at 697-98. Also at 693 and 696. But he is more clear when he says:

> "The governments of the States cannot finally or independently enforce or decline to enforce the Constitution of the United States; . . . whatever rights are secured to the people under it must be guaranteed to them and made effectual for them at last through the instrumentality of the national Government, and

> through no other . . . . it is entirely immaterial whether the State may or can do the same thing for the same act or not; and, therefore, . . . it is no objection to the constitutional exercise of power by Congress that the States themselves in the case of these disorders in the South may, if they will, punish the same things according to their own laws." Globe at 692, 695.

See also Globe at 477; Globe App. at 79, 252, 300.

The opponents of the bill were even plainer in showing that the purpose of section 1 was as the "choice of forums in all cases" theory holds it to be; but their views should probably not be infused with as much weight as those of the bill's supporters, since they may have attributed great breadth to the section's coverage in an attempt to maximize its apparent danger. Still, Representative Storm could hardly be clearer when he said:

"I object to this [section] because it subjects suitors to delay. It does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning." Globe App. at 86.

Likewise, Representative Duke stated:

"[O]ne of the privileges secured was the 'right to sue in the State courts.' Now, sir, I ask, were not the words 'any right' interpolated in order to give color of jurisdiction to the Federal courts in all cases whatsoever? If, however, I am wrong in this inference, I should be obliged to the author of this bill to explain why it was that he has interpolated these words." Globe App. at 91-92.

In the same vein, Representative Vorhees remarked:

"The first and second sections are designed to transfer all . . . jurisdiction from the courts of the States to the courts of the United States. This is to be done upon the

assumption that the courts of the southern States fail and refuse to do their duty in the punishment of offenders against the law." Globe App. at 179.

Finally, Senator Thurman stated in opposition to the bill:

> "I object to it, first, because of the centralizing tendency of transferring all mere private suits . . . from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal ct . . . . This bill embraces the whole United States; and to say that every man who may be injured, however slightly, in his rights, privileges or immunities as a citizen of the United States can go into the Federal courts for redress is to say, in effect, that the judiciary of the States is not worthy of being trusted." Globe App. at 216.

See also Globe at 337, 429; Globe App. at 88, 138.

On the other hand, there are indications in several speeches of the bill's supporters which would support the "exhaustion when adequate" theory. Representative Hoar, for instance, stated:

> "To authorize the interference of Congress there must be, not merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government. We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere . . . wherever these evils have attained to such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of republican government altogether.
>
> "Another error . . . is to suppose that Congress . . . must either let the State alone altogether, or take entire possession of all its powers and instrumentalities of government and displace the State government. But there is nothing in the Constitution that for a moment favors that idea. We have the right to limit our interference to the extent of the evil. If a particular class

> of persons are denied their civil rights permanently and as a rule in any State, we have a right to interfere simply to protect those rights, leaving the republican government, so far as it is enforced in regard to others, untouched where we can." Globe at 334.

Representative Butler felt that the bill provided:

> "that every citizen should have remedy in the Federal courts against the party depriving him of such rights, immunities and privileges; and that where the community connived at such crimes and allowed its citizens to be plundered of such rights without any sufficient attempt to stay the marauders, so that by their stealth or their poverty the citizen was left without remedy, then he should have a remedy . . . ." Globe at 449.

See also Globe at 368, 508, 514.

There are other statements both by supporters and opponents of the bill which can be read to support either theory. See, e.g., Globe at 512, 690; Globe App. at 215.

As can be seen, then, the legislative history of §1983 does not provide conclusive support either for the advocates of "a choice of forum in all cases" or for the advocates of the "exhaustion of state remedies when adequate" interpretation of that section. On balance, however, it appears to me from a full reading of that legislative history that Congress was attempting to remedy the inadequacies of state remedies in the South by giving aggrieved persons the right to sue in federal courts under the 1871 Act without exhausting state remedies, whether or not those remedies were adequate in the particular case. Otherwise, it is difficult to explain the numerous speeches by opponents of the bill averring that the state remedies were adequate for the fair administration of justice. See, e.g., Globe at 645, 660; Globe App. at 179. If §1983 was meant to apply only in situations when state remedies were inadequate, these speeches attempting to show that those remedies were in fact adequate would have been superfluous, for

when the remedies were adequate, there would be no federal intervention.

Similarly, the "exhaustion when adequate" interpretation of §1983 would make it hard to understand the rage of the bill's opponents who said that the bill would destroy the state governments and the idea of a federal union. Why were they so enraged if all the bill did was to provide a remedy in the federal courts when the state remedies could be shown to be inadequate?

Finally, in light of the extensive discussion about whether or not state remedies were adequate, it seems that Congress would have put in a proviso "save when state remedies are adequate" if it had meant to require exhaustion in such cases. Indeed, Representative (later President) Garfield believed that the Fourteenth Amendment empowered the federal government to intervene for the protection of constitutional rights only after it could be clearly shown that "by a

systematic maladministration of [the state laws providing for equal protection], or a neglect and refusal to enforce their provisions, a portion of the people are denied equal protection under them"; and he stated that he would support the bill only if an amendment were made to that effect or if it were somehow made clear that such was the meaning of the Act. Yet no such amendment was accepted, and there is no indication that Mr. Garfield's position was ever taken by the Congressmen who voted for the bill. In fact, Mr. Shellabarger, the House speaker, disputed with him.

On the whole then, there is somewhat more support -- though it is not overwhelming -- in the legislative history for Douglas' Monroe-McNeese interpretation of §1983 as a fully supplementary federal remedy, than there is for the "exhaustion when adequate" position.

Of course, there is no distinction in the legislative history between state judicial and administrative remedies, since the present wide range of state administrative agencies was virtually unknown at the time. However, it seems that whatever the Congressmen said about the inadequacy of remedies in the state courts as a basis either for providing a totally supplementary federal remedy or for providing a federal remedy when state remedies were inadequate would apply a fortiori to state administrative remedies. Administrative agencies are filled with political appointees and minor bureaucrats, and if the courts in the South in 1871 were inadequate for the protection of Negroes' rights, surely administrative agencies -- without even the pretense of judicial independence -- would have been thought to be even more inadequate. Hence, assuming that Congress meant to give litigants the right to sue in federal courts on all §1983 claims without ever exhausting remedies in the state courts, it seems

fair to say that, had it considered administrative agencies, it would have felt that they were even more inadequate and would have given §1983 litigants the right to sue in federal courts without ever exhausting state administrative remedies.

For these reasons, I conclude that the legislative history of §1983 does not support a retreat from the McNeese-Damico line of cases; indeed, that history on the whole seems to show that the purpose of §1983 was to give plaintiffs the choice of a federal forum in all cases without prior resort to state remedies, whether or not they are adequate.

(Another purpose of the 1871 Act seems to have been to deter and redress deprivations of federally-secured rights affecting classes of persons or individuals because they are class members. A distinguishing characteristic of the wrongs prompting the Act was that they were directed not so much against individuals as such, as against

persons because they shared characteristics defining a class -- primarily, the class of the recently-freed Negroes. Yet Senator Edmunds expressly described the bill's coverage as extending beyond blacks, southern Republicans, and northerners in the South, to all deprivations of the rights of members of a class -- Catholics, Vermonters, etc. -- because they were members of that class, while at the same time excluding individual torts. Globe at 567. See also Globe at 334, 505-06. Hence, it is arguable that, whether or not exhaustion is required in the case of an individual suing under §1983 solely on behalf of himself, it should not be required if he brings a class action. But this distinction is tenuous, since there is no indication that the 1871 Congress meant to require exhaustion in one case, but not in the other.)

D. Policies. The general policy considerations on both sides of this problem are well known to you, and hence I need not discuss

them in depth. The supporters of the "choice of forums in all cases" position rely heavily on sentiments such as those expressed by many supporters of the Act in 1871, i.e., that when federal constitutional rights are concerned, federal forums should be the place of their protection. According to this position, a main function of federal courts is to vindicate federal rights, and federal judges offer an expertise in the nuances of federal and constitutional rights that state judges and administrators, on the whole, cannot match. Moreover, federal forums for civil rights protection offer potentially more uniform treatment than would state courts and agencies, where the protection of those rights would vary from state to state.

Related to these considerations is the general mistrust of state bodies' willingness to give adequate weight to federal rights when state interests are also involved. There may well be an inherited potential for bias when a state judge or administrator reviews

actions of other state officials. This might be compared to presumed bias in state courts in diversity cases. Furthermore, federal courts serve to satisfy a basic need for a fair trial, since they stand apart from state government operations.

In addition, it could be argued that there is a danger of state court or agency delay. Many deprivations of rights claimed in §1983 actions seeking equitable relief are alleged to be causing or to be about to cause immediate and irreparable harm to the plaintiffs; and if the federal equity courts decline to exercise their jurisdiction to grant the relief and the states delay, that irreparable injury would follow.

Finally, the inquiries and findings necessary for a federal court to determine the adequacy of the state remedies would arguably be impractical and perhaps indelicate. Indeed, it might be said that the time spent receiving evidence, holding hearings, and making

judgments on the adequacy of state remedies in theory and in practice would approach, if not often exceed, the time currently devoted to the merits of §1983 actions. Similarly, such determinations would be difficult and would require delving deeply into the interstices of state law and administration, and there would be an onerous burden on the plaintiff to show that the state remedies were inadequate ~~to show that the state remedies were inadequate~~ or unavailable.

On the other hand, the supporters of the "exhaustion when adequate" position rely on principles of federalism and sound respect for the independence of state governments. These principles are especially strong where equitable relief is sought in the federal courts. It has long been a tenet of "Our Federalism" that federal equity courts should exercise their traditional equitable discretion to decline to interfere in matters of primary and sensitive state

concern. Surely, the states are concerned with the validity of their own statutes and regulations and with the actions of people acting under color of their laws.

Of course, there is always the final review in this Court of the federal questions raised in the state courts and agencies.

In addition, there is the "floodgates" argument that never requiring exhaustion would subject the federal courts to galaxies of trivial and insubstantial civil rights actions without "weeding out" process and mothers would hang their heads in shame. Finally, it is arguable that the "exhaustion when adequate" requirement would encourage states to improve their remedies in the knowledge that if those remedies are adequate, federal courts will defer, instead of hearing the cases themselves, but that if they do not provide redress, federal courts will. Because of the states' legitimate interest in state court and agency adjudication of matters involving their own

practices and officials, and since federal courts will defer if -- but only if -- state remedies are adequate, states will have an incentive to do away with doctrines and practices restricting redress for the deprivation of civil rights, unduly favoring official defendants, and so on.

According to the proponents of the exhaustion requirement, many of the opposing arguments can be answered with the adequacy test: if there is bias or delay in the state courts or agencies, or if irreparable harm would result from declining federal jurisdiction, then state remedies are inadequate and the federal courts can hear the case in the first instance. A more serious difficulty with the "exhaustion when adequate" position is that the determination of adequacy by the federal courts would be time consuming and difficult and would place too great a burden on the plaintiff. Of course, if there is a state law or regulation thwarting the relief sought, or if the state courts or agencies have

placed on such a law or regulation a clear interpretation inconsistent with plaintiff's right to relief, or if the state remedies were otherwise inadequate in theory, the plaintiff would easily be able to point to the inadequacy. The trouble arises when he alleges that state remedies or procedures are inadequate in practice. However, the federal courts could establish some standards for determining when state remedies are inadequate in practice: Have state courts or agencies consistently refused to grant substantive relief in certain classes of cases, despite theoretical adequacy; are state remedies "substantially equivalent" to federal ones (the standard suggested in the Civil Rights Act of 1968); is the state's review machinery workable, etc. (Of course, if there is no exhaustion requirement in class deprivation cases (see supra), determinations of whether a state remedy is inadequate because of a subtle prejudice against a particular class would be avoided.)

As to the distinction between exhausting administrative remedies and exhausting judicial remedies, there may be strong policy reasons for requiring the exhaustion of state administrative remedies, but not doing so with respect to state judicial remedies. Those reasons are bound up with the fact that administrative bodies are policymaking and discretionary and with the position that the plaintiff has suffered no wrong until the agency process has produced a final decision. It can be said that a strong state interest is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a federal court with local factors that legitimately affect administration. Moreover, there is a state, as well as a federal, interest in providing a means whereby official disputes can be corrected and necessary corrective action taken without resort to a lengthy and costly trial. Finally, whereas

this Court has long held that the mere availability of a state judicial remedy did not bar resort to the federal courts under the Civil Rights Act, e.g., Lane v. Wilson, supra, except in abstention situations, the same is not true with respect to state administrative remedies. The lack of need for exhaustion of state administrative remedies is a new development beginning with McNeese. Hence, it might be said that while exhaustion of state judicial remedies is correctly not required except when sensitive strands of state law are intertwined with the federal question and when there is the possibility of a saving construction in the state courts, exhaustion of state administrative remedies shoud be required whenever they are adequate.

It seems to me, however, that the policies favoring exhaustion of administrative, but not judicial, remedies are counterbalanced by policies favoring exhaustion of judicial, but not administrative, remedies. Adequate review, for instance, is frequently illusory

where a state administrative agency is reviewing the action of one of its own lower branches, whereas there is a much better chance for impartial review when an independent governmental body, such as the state court, is reviewing such action. Hence, I would conclude that the policies favoring exhaustion of one type of remedies but not the other balance out, and that if exhaustion of state judicial remedies is not required -- which it is not -- then exhaustion of state administrative remedies is not required.

But if this is true, one might argue, then the abstention principles, which do apply to state judicial remedies, should also apply to state administrative remedies. According to this view, since it is clear that when a state law is challenged which is susceptible of a saving construction in a state court, or when the challenge involves sensitive questions of primary state concern, the state courts should have the first opportunity to pass on that law, the same should be true

about state administrative remedies, i.e., that where a state administrative regulation is challenged involving strands of local law or administration and that regulation is susceptible of a saving construction, the state agency involved should have the first opportunity to interpret and construe the regulation so that a federal question might be avoided. Indeed, in McNeese -- where even Justice Douglas recognized the abstention principle with respect to state judicial remedies, 373 U.S. at 673 -- you felt in your dissent that strands of local law and administration were involved there and you would have left the claim to the local administrative authority in the first instance. The main problem with this position, however, is that while an administrative agency's interpretation of its own regulation must be given great weight, that interpretation is not conclusive. Hence, the basic principles underlying abstention -- the avoidance of a federal or constitutional question -- do not apply

in the case of administrative agencies, for their construction of a state regulation is not final. Accordingly, I would say that abstention should not apply to state administrative remedies just because it applies to state judicial remedies.

In balancing all the policy considerations in this area, I have come to the conclusion that while there are certain valid reasons for requiring the exhaustion of state remedies so long as they are adequate, those reasons apply equally to state judicial and administrative remedies. The reasons for requiring the exhaustion of administrative remedies but not judicial remedies are counterbalanced by those on the opposite side, and hence if exhaustion of state judicial remedies is not required, exhaustion of state administrative remedies should not be. Moreover, the traditional abstention doctrine does not apply to administrative remedies.

Accordingly, in light of the important stare decisis principles involved, I believe that a retreat from the holdings of the McNeese-Damico line of cases cannot be justified by any possible ambiguity or equivocation in the language of those decisions, by the legislative history of §1983, or by the policy considerations applicable to administrative remedies. The only possible justification for such a retreat would be found in the general policies underpinning exhaustion of state remedies when they are adequate, and if we are again going to require exhaustion on that ground, perhaps the discrepancy between the legislative history and the policy considerations might be justified on the ground that §1983 was meant to give the federal courts jurisdiction in the first instance, regardless of the adequacy of state remedies, but that, as a general matter of federalism, they should use their discretion to decline to exercise that jurisdiction in §1983 equity cases when the state administrative remedies are adequate.

III. SEC. 1983 AS AN EXCEPTION TO SEC. 2283

A. Scope of the Discussion. The federal anti-injunction statute, 28 U.S.C. §2283, provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress . . . ." The question here is whether the general grant of equity power to the federal courts in §1983 is an express authorization by Congress within the meaning of the §2283 exception, so that federal equity courts in §1983 suits may grant injunctions against pending state proceedings. This question was expressly reserved in Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2 (1965), because the state prosecution there was merely threatened, but not pending, and in the Younger cases, 401 U.S. 37, 55 (1971) (Stewart, J., concurring), because the decision there was based on policy grounds, rather than on the §2283 bar. See also Cameron v. Johnson, 390 U.S. 611, 614 n. 3 (1968).

The question whether §1983 is an exception to §2283, although limited to interference with pending state proceedings by the language of §2283 itself, permits no distinction between state criminal and civil proceedings, for §2283 makes no such distinction. However, the question here is a purely statutory problem, separate from the question whether federal equity courts should or should not interfere in pending state proceedings as a general policy matter of comity and equitable discretion. Thus, even if §1983 is found to be an exception to §2283, thus permitting, as a statutory matter, federal equitable interference with both criminal and civil state proceedings, that conclusion would not affect, or constitute an exception to, general comity principles. The Younger cases hold on policy grounds that federal courts should decline to interfere by way of injunction or declaration in pending state criminal prosecutions save in exceptional and extremely limited circumstances (such as immediate and irreparable injury, state

criminal statute flagrantly unconstitutional on its face, b ad faith harassment in a statute's enforcement). Hence, even if §1983 is an exception to §2283, Younger would still prohibit a federal equitable intervention in state criminal prosecutions in most cases, and the practical effect of our decision would be primarily on state civil proceedings. However, if §1983 is an exception to §2283, the question would still be open as to whether or not federal equity courts should intervene in state civil proceedings as a matter of comity.

On the other hand, if §1983 is found not to be an exception to the anti-injunction bar of §2283, that conclusion would deny federal equity courts all power to grant relief in all §1983 suits seeking interference with pending state proceedings. It would thereby prohibit federal equitable interference in any and all pending state civil proceedings regardless of the circumstances, and would also, by

prohibiting as a statutory matter any interference in pending state criminal prosecutions as well, remove the exceptions listed in Younger permitting such interference in certain limited circumstances.

In light of all this, I should state precisely the scope of this section of my memorandum. It will deal solely with the statutory question whether §1983 is an exception to §2283. Since it is clear that §2283 contemplates that the state proceedings be instituted first, I will not consider the question whether federal equity courts should interfere with state proceedings, either criminal or civil, which are merely threatened but not pending at the time of the institution of the federal §1983 action. Nor will I discuss whether or not -- or to what extent -- federal courts should interfere in pending state civil proceedings under general policies of comity. (Younger already decided this question with respect to pending state criminal prosecutions.) I

understand that Minsker, Senior Puisne Judge, will handle these questions in his own lucid way in a separate memorandum.

Moreover, I will not consider here the question whether §2283, in addition to barring injunctions against pending state proceedings, also bars declaratory relief that pending state proceedings are unconstitutional or contrary to federal law. Nor will I here discuss the question whether §2283, by its terms, also bars future injunctive or declaratory relief against subsequent state proceedings, either criminal or civil, to enforce a state statute or regulation against plaintiffs and others similarly situated, when at the time such a proceeding against plaintiffs is pending. While these questions are important, they are peripheral to the problem of §1983 as an exception to §2283, for they involve the scope of §2283 and the type of relief it bars, not its relationship with §1983. There is no justification in the language of either statute for saying that §1983 is an

exception to §2283 only in the case of certain kinds of relief barred by the latter, and not in others. In any event, Minsker, S. P. J., may touch upon these two questions in his memorandum with respect to the policy considerations involved, if not with respect to §2283. See also Note, 83 Harv. L. Rev. 1870, 1876-86 (1970).

B. Background. The present §2283 can by traced to the Act of 1793 providing that no "writ of injunction shall be granted by a federal court to stay proceedings in any court of a state." There is no record of any debates on this provision and nothing in its original legislative history is helpful in determining how it is to be applied. That provision remained until 1875 when an exception was added which permitted enjoining state court actions that interferred with federal disposition of a bankruptcy proceeding. With that exception, the provision was unchanged until 1948.

Despite this seemingly absolute prohibition against injunctions, the courts prior to 1941 carved numerous exceptions into it. After the passage of the Act of 1793, Congress had passed several statutes, in addition to the Bankruptcy Act, providing that once federal jurisdiction had been assumed over certain types of cases (those removed to federal courts, certain shipowners' liability cases, interpleader cases, cases brought under the Farm-Mortgage Act of 1933, and federal habeas corpus cases), proceedings in the state courts should cease to be maintained and the federal courts could stay all state proceedings. The courts, including this Court, felt that these statutes, having been enacted subsequent to the anti-injunction Act, constituted implied amendments to that Act, and they thus allowed federal courts to enjoin state proceedings in these types of cases. In addition, the courts developed an "in rem" exception to protect federal jurisdiction acquired over a particular res; when the federal

courts had first acquired jurisdiction over the res, they said, they could enjoin proceedings in a state court seeking to interfere with that res. The courts also adopted a "relitigation" exception in order to prevent the relitigation in a state court of a claim previously settled in a federal court. There were a few other exceptions as well.

In 1941, this Court decided Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), where it attempted to draw a halt to this loose judicial interpretation of the anti-injunction statute. In an opinion by Justice Frankfurter, the Court concluded that the statute was a legislative affirmation of federal comity and that Congress alone could determine when exceptions were to be made to the prohibition. Thus, Frankfurter affirmed the validity of the express statutory authorization to enjoin state proceedings and of the "in rem" exception as implicit in the legislative purpose. However, he held that the

"relitigation" exception was unwarranted and was a usurpation of the legislative function.

In 1944, this Court added another exception to the anti-injunction statute. Congress had provided in the Emergency Price Control Act of 1942 that the Emergency Court of Appeals had exclusive jurisdiction to determine the validity of any order of regulation of the Price Administrator, and we held that that Act authorized the Administrator to obtain an injunction against state proceedings. Bowles v. Willingham, 321 U.S. 503 (1944); Porter v. Dicken, 328 U.S. 252 (1946).

In 1948, Congress passed the present §2283, prohibiting federal injunctions against state proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." It is clear that the purpose of this revision of the anti-injunction statute was

to restore "the basic law as generally understood and interpreted prior to the Toucey decision," Reviser's Notes, and thus to codify the implied exceptions to the old statute. The "express authorization" exception was meant to include the previously recognized statutory exceptions; the "aid of its jurisdiction" exception was meant to include the judicial "in rem" exception; and the third exception in §2283 was meant to include the judicial "relitigation" exception which Toucey had rejected, and indeed the legislative history is plain that that third exception was meant to overrule Toucey. Reviser's Notes; H. R. Rep. No. 308 at A 181-82.

The only thing clear about the legislative history is that it was meant to restore the pre-Toucey law. As to the meaning of "express authorization," the legislative history is inconclusive. Did Congress mean to include in that exception only those statutory authorizations of federal interference which were expressly recognized prior to

Toucey and other similarly clear statutory authorizations thereafter, or did it mean to restore the pre-Toucey approach to the anti-injunction statute, with its loose interpretation of the statute and its recognition that exceptions should be made where considerations of equity and good judicial administration required them. Obviously, the former interpretation of the meaning of the phrase would militate against including §1983 as an express statutory authorization of federal interference, whereas the latter interpretation would favor it. There is no indication, moreover, whether Congress in 1948 meant to include the exception recognized in Bowles and Porter, with respect to the general grant of exclusive jurisdiction to a federal agency in the Emergency Price Control Act, in any of the statutory exceptions to §2283.

Since 1948, this Court has decided a few significant cases dealing with the scope of §2283. Two of them dealt with the Labor

Management Relations Act, which, like the Emergency Price Controls Act, contains a general grant of exclusive equity jurisdiction to the federal courts. The LMRA, § 10(l), empowers the NLRB to seek general equitable relief in federal courts, but does not specify whether this relief extends to the enjoining of state court proceedings. We held in Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954), that where an employer sought in a state court to enjoin a union's picketing and then filed an unfair labor practice with the NLRB, a federal court, at the Board's request, could enjoin both the picketing and the state court proceeding pending final adjudication by the Board. The basis for our decision was that since both a federal court and a state court were asked to enjoin the same conduct -- the picketing -- the federal court could enjoin the state court proceedings under the "aid of its jurisdiction" exception to §2283, and thus we did not have to reach the

question whether the general equity grant in the LMRA came within the "express authorization" exception to §2283.

In Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955), an employer again sued in a state court to enjoin a union's picketing, but here the union sought a federal court injunction against that state proceeding on the ground that the LMRA had given the federal courts and the Board exclusive jurisdiction over the dispute. We held that the LMRA gave no right to private litigants to protect the jurisdiction of the Board or of the federal courts and therefore that the injunction against the state proceedings was barred by §2283 ~~since exclusive federal jurisdiction did not, in and of itself, create an exception to §2283~~. We stated that by enacting §2283, "Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation," 348 U.S. at 514, thus supporting the first of the two interpretations of §2283 described

above. However, since we relied on the fact that the union had no power under the LMRA to invoke federal equity jurisdiction, but that only the NLRB did, we again did not reach the question whether, if federal jurisdiction had been properly invoked by the NLRB, the grant of jurisdiction in the LMRA would constitute an "express authorization" within the meaning of the §2283 exception so as to allow the federal court to enjoin the state proceedings.

In Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), we held that §2283 had no application to cases where the United States was seeking injunctive relief since "the frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining [an injunction] . . . would be so great that we cannot reasonably impute such a purpose to Congress from the general language of . . . §2283 alone." 352 U.S. at 226. This holding and language stands in contrast to the language in Richman advocating a stric

construction of the exceptions to §2283 and a refusal to recognize implied exceptions. In Leiter, the Court emphasized the ambiguity of §2283 and created a new implied exception -- that of preventing "threatened irreparable injury to a national interest" and a "frustration of superior federal interests." This supports the second interpretation of §2283 described above.

Last year, we decided Atlantic Coast Line RR Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). There the question did not involve the "express authorization" exception to §2283, but whether the injunction granted could be justified under either of the other two exceptions. In holding that it could not, this Court (per Black, J.) reaffirmed the policies of Richman that the exceptions to §2283 should be strictly construed and should not be enlarged by loose statutory construction, and it rejected the position that §2283 merely codified principles of comity and should yield in certain circumstances

not clearly covered in the three exceptions. Black stated that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." 398 U.S. at 297.

This, then, is where we stand. Although the abstention-type policies stated in ACL may be instructive, ~~nothing in the judicial history of the 1948 amendment to §2283 -- or indeed before 1948 -- provides any clear basis for deciding whether the general grant of equity jurisdiction to the federal courts in the Civil Rights Act, §§1343(3) and 1983 constitutes an express authorization by Congress for purposes of §2283~~. Nor are the lower court opinions particularly helpful, for although a few offer a reasoned analysis of the problem (e.g., Baines

v. City of Danville, 337 F.2d 579 (4th Cir. 1964), most of them baldly assert that §1983 is or is not an express authorization. So far as I can tell, the circuits supporting §1983 as an exception to §2283 are the Third and perhaps the Fifth, while those opposed are the Fourth, the Sixth, the Seventh, and the Ninth.

C. Section 1983 as Express Authorization. Since it is clear that the "express authorization" exception to §2283 was designed to encompass the previously recognized backruptcy exception and the other statutory exceptions recognized prior to Toucey, these recognized exceptions are the logical starting place for an effort to determine the characteristics which a statute must possess before it can be categorized as an "express authorization." There are six remedial federal statutes which -- either through established practice or clarity of congressional intent -- are generally recognized as exceptions to the prohibition against enjoining a state court proceeding.

The exception for ~~bankruptcy proceedings~~ was the only one specifically incorporated in the anti-injunction statute prior to 1948, although it is not clear why it needed to be. The Bankruptcy Act of 1867 expressly provides that "a suit which is founded upon a claim from which a discharge would be a release . . . shall be stayed until an adjudication or the dismissal of the petition." The Reviser's Notes in 1948 state that this should be included within the "express authorization" exception to §2283. H. Rep. R. No. 309 at A 181-82.

Reviser's Note indicate that this was to be w/in "jurisdiction" exception

Under the various ~~removal provisions~~, both criminal and civil, the federal court to which the case is properly removed may enjoin any further proceedings in the state court from which it is removed. Although the language of the statute merely states that once a copy of the removal petition is filed with the clerk of the state court, "The State court shall proceed no further unless and until the case is remanded," the power to enjoin has been recognized since French v.

Hay, 89 U.S. (22 Wall) 250 (1875) as necessary to sustain and protect federal jurisdiction.

The Act of 1851 limiting the ~~liability of shipowners~~, as amended, provided that once a shipowner has deposited with the court for the benefit of creditors an amount equal to the value of his interest in the ship, "all claims and proceedings against the owner with respect to the matter in question shall cease." While the remedy of injunction is not specified, it is well recognized that it is implicit. Providence and New York S. S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883).

The ~~Interpleader Act of 1926~~, as amended, reads: "In any civil action of interpleader . . . a district court may . . . enter its order restraining [all claimants] . . . from instituting or prosecuting in any State or United States court affecting the property, instrument, or obligation involved in the interpleader action." This is clearly an express authorization within the meaning of §2283.

At the time of Toucey, the ~~Frazier-Lempke Farm Mortgage Act of 1933~~, which subjects the farmer and his property to the exclusive jurisdiction of the federal court, was phrased in similar fashion to the removal statutes and the Shipowner's Liability Act. However, it was thereafter amended to provide that the federal court may "stay all judicial or official proceedings in any court," where necessary to protect federal jurisdiction. It is thus an express authorization.

Finally, the ~~federal habeas corpus act~~ provides that a federal court before whom a habeas proceeding is pending may "stay any proceeding against the person detained in any State court . . . for any matter involved in the habeas corpus proceedings." It too, then, is a clear express authorization.

These enumerated acts, each of which is deemed to come within the "express authorization" exception to §2283, shed some light on the meaning of that term. ~~First, it seems clear that a statute need~~

~~not expressly refer to §2283 in order to be an express authorization, for none of the aforementioned acts do so.~~ Moreover, it is reasonable to assume that a statute need not mention specifically that state court proceedings may be enjoined since, if this were required, only the interpleader, Farm-Mortgage, and habeas corpus acts would qualify. On the other hand, it is fairly clear from all the enumerated statutes that an injunction against state proceedings, if necessary, is contemplated. Indeed, they all have one thing in common: each is incompatible on its face with the application of §2283, that is, each in its terms contemplates the foreclosure of proceedings in tribunals other than the one in which actions under it are initiated. Such foreclosure is, in fact, a primary purpose of each.

This last characteristic of the enumerated acts has led some courts and commentators to adopt what they call the incompatibility test -- that is, that the statute involved must, for its operation, be

thoroughly incompatible with a literal application of §2283. See, e.g., Baines v. City of Danville, 337 F. 2d 579 (4th Cir. 1964); ~~Notes, Section 2283's Express Authorization Exception, 50 Va. L. Rev. 1404 (1964).~~ Applying this test to the Civil Rights Act, which contains a general grant of federal equity jurisdiction but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction against pending state proceedings, it appears that that general grant is not thoroughly incompatible with §2283's restriction on the federal equity court's power to exercise that jurisdiction -- a restriction limited to enjoining pending state proceedings. ~~Unlike the enumerated statutes above, the Civil Rights Act would still have effect even if it is not an exception to §2283, for the federal courts could still grant equitable relief in all cases where no interference was sought with pending state court proceedings.~~ Thus, §2283 merely limits, but does not nullify, the purpose or effect of §1983. On the other hand, it could be argued

from the legislative history of §1983, which will be discussed below, that since §1983 was meant to protect federal rights from infringement by the states, it is "incompatible" with a statute which makes it impossible for such protection to be granted in certain cases -- i.e., when state proceedings are pending. In those cases, there would be no remedy and the rights which §1983 was meant to protect would be violated.

One argument against the incompatibility interpretation of the express authorization exception to §2283 could be made from the cases construing the Emergency Price Control Act and the LMRA. Those Act contain general grants of equity jurisdiction which, like the Civil Rights Act, would still have effect even if they were not construed as exceptions to §2283 and would thus not be thoroughly incompatible with it. Yet we have allowed the Price Control Act to constitute an exception to §2283 (Bowles & Porter, supra) and we have indicated

that the LMRA may be (Richman, supra). Those cases might support the theory that the general equity jurisdiction in the Civil Rights Act should be construed as within the "express authorization" exception to §2283.

However, unlike the Civil Rights Act, both the Price Control Act and the LMRA provide exclusive jurisdiction in the federal courts and permit only federal agencies -- the Price Administrator and the NLRB -- and not private parties, to seek the injunctive relief. Hence, those two situations may be thought of as part of the Leiter rationale that §2283 does not bar the United States from getting an injunction against state proceedings. Since both the Price Administrator and the NLRB may be viewed as official representatives of the federal government, seeking only the proper enforcement of its laws, and since both statutes vest exclusive jurisdiction in the federal courts, it is arguable that "superior federal interests" would be frustrated

if the federal courts were precluded from enjoining state proceedings in these situations. In the same way, these exceptions could be deemed to fall within the "aid of its jurisdiction" exception to §2283, although the jurisdiction would be that of the Price Administrator or the Board. In any event, it is not clear that the Price Control Act exception survived the 1948 amendment of §2283, and we never actually ruled on the question whether the LMRA came with the "express authorization" exception. Thus, the cases dealing with these two acts cannot be read as permitting any general grant of equity jurisdiction to the federal courts to constitute an "express authorization" exception to §2283. (Note: We have granted cert in NLRB v. Nash-Finch Co., No. 70-93, to be argued this Term, where the question is whether the NLRB should be considered "the United States" for purposes of §2283, which was interpred in Leiter not to apply to stays sought by the United States.)

Besides the incompatibility interpretation of the six enumerated statutes which are clearly express statutory exceptions to §2283, another interpretation of those statutes can be made in an effort to determine the characteristics which a statute must possess to come with the

"express authorization" exception. In each of these statutes, Congress has created a specific and uniquely federal remedy available to private citizens and has opened the doors of the federal courts to dispense that remedy. But in the case of each statute, the remedy could not be meaningful unless the federal court were to enjoin state court proceedings involving the same matter, for those proceedings, if not stayed, would destroy the remedy which was created. [See Note 21, Rutgers L. Rev. 92 (1966).] Applying this approach to §1983, it could be argued that since the clear purpose of that section was to provide a federal remedy for persons deprived of their federal rights by state action, that remedy would be destroyed in cases where the alleged deprivation is being caused by state proceedings pending against them, unless those state proceedings are enjoined by the federal courts.

This seems to me to be a powerful argument. It is essentially part of the approach which looks to the purpose and legislative history of §1983, to the revolution in American federalism which took place during Reconstruction, and to the policies underpinning §1983, and concludes that the intent and rationale of §1983, coming almost 80 years after the original anti-injunction statute, was to allow federal intervention in state affairs, and if need be to protect the federal remedy for deprivations of federal rights, in pending state proceedings. On this ground, it is concluded that §1983 should be included in the "expressly authorized" exception to §2283. This approach will be discussed more fully below.

Whatever approach is employed, however, it is at least questionable whether §1983 is an express authorization for purposes of §2283. In such unclear circumstances, the general comity principles underlying §2283 would seem to indicate that the exceptions to that

section should be strictly construed. As we stated in ACL, any doubts should be resolved against letting the federal courts enjoin pending state court proceedings. Applied to §1983, those policies expressed in ACL would seem to indicate that the general federal equity jurisdiction created in that section (with §1343(3)) is too ambiguous to constitute an "express authorization" exception to §2283. ~~This position is supported by the fact that the six enumerated statutory exceptions are much clearer in their grant of federal power to enjoin state proceedings than is the Civil Rights Act; by the fact that, unlike those six statutory provisions, the equity grant in §1983 would still have effect, albeit more limited, if it were not construed as an exception to §2283; and by the fact that neither Justice Frankfurter in his scholarly opinion in Toucey nor the legislative history of the 1948 amendment to §2283 mentions §1983 as a possible exception to §2288.~~

D. Legislative History and Purpose of Section 1983. On the other hand, there is strong support in the legislative history of §1983 for the conclusion that Congress in 1871 intended that section to apply to federal intervention in pending state proceedings. If that conclusion is valid, then it may be that §1983 should be included as an exception to §2283 despite the differences between §1983 and the recognized statutory exception and despite the lack of consideration of this problem until recently.

The contours of this argument are set out by Justice Douglas in his dissent in Younger v. Harris, 401 U.S. at 60-62. There he states that while the anti-injunction statute reflects an early view of the proper role of the federal courts within American federalism, that view was fundamentally altered by the post-Civil War Amendments and the Civil Rights Act, which made civil rights a national concern and represented a later and altogether different view of federalism,

including an enlargement of federal jurisdiction. While there can hardly be any quarrel with this discussion of the revolution in American federalism, Douglas then concludes from it, with lightning-like speed, that §1983 was meant to allow federal courts to enjoin state proceedings and that it should be included in the "express authorization" exception to §2283. He states that "[t]here is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century to control another statute also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War." 401 U. S. at 62.

While Douglas' conclusion may be a bit hasty, it does find support in the history of the Fourteenth Amendment and of the 1871 Civil Rights Act which was intended to enforce that amendment. ~~Congress in 1871 was faced with a situation in which certain states were not adequately protecting the federal rights of certain people~~,

primarily Negroes, and in order to protect such people in the enjoyment of those rights, it opened the federal courts to persons deprived of federal rights under color of state law so that they might seek federal redress against the states. It is thus clear that the very purpose of the Civil Rights Act was to authorize federal interference in state affairs for the protection of federal rights against the states. The provisions of that Act were directed to the states and were meant to be restrictive on state power. We stated in 1880 that the purpose of the Act was to enforce the provisions of the Fourteenth Amendment "against state action, however put forth, whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346 (1880) (emphasis added). Indeed, it is that federal interference in state proceedings, including state judicial proceedings, that provoked the great outcry of federalism from the Act's opponents, but which the Act's supporters felt was required by the circumstances.

All of the speeches of both proponents and opponents of the Act, quoted in Part II of this memo, supra, support the position that its purpose was federal intervention in state affairs. Other remarks are similarly supportive. Representative Shellabarger, the House sponsor, stated:

> "If, after all the transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remain unrestrained, the complete, sole arbiters of power, . . . to protect or destroy . . . these United States citizens as the States may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government itself is a miserable sham, its citizenship a curse, and the Union not fit to be." Cong. Globe, 42d Cong., 1st Sess., Appendix at 69 (1871).

Likewise, Representative Elliott said that to argue that the United States cannot intervene to protect basic federal rights "is to violate every sound principle of legal and logical interpretation and to suppose a great wrong without a remedy in our political system." Globe at 389. Again, Senator Carpenter stated:

> "Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil." Globe at 577.

See also Globe at 512, 651, 691.

Moreover, it is impossible to read the debates without concluding that Congress was intensely aware of the hostility and prejudice of the southern state courts and of the use of state court

proceedings to harrass those whom the Union had an obligation to protect. Representative Perry, for instance, stated:

> "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; . . . as all the apparatus of the machinery of civil government, all the processes of justice skulk away, as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." Globe Appendix at 78.

Upon seeing that inadequacy in the state court, Congress concluded that the remedy was federal intervention. Thus, Representative Morgan, after stating that certain persons were unable to secure the enforcement of their rights in the state courts, asserted that "the power of Congress to intervene is complete and ample." Globe at 333. Furthermore, the proponents of the Act intended that it, as a remedial measure for the protection of human rights, should be

as broadly construed as possible to effectuate its purposes fully. See, e.g., Globe App. at 68.

The opponents of the bill also recognized what its meaning and effect was to be. Thus, Senator Saulisbury stated: "Without stopping at present to look at the details of this bill, its general purpose and object is to authorize Federal interference in the internal affairs of the States of this Union." Globe at 599-600. Representative Hawley opposed the bill because, among other things, "[b]y the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal Court . . . ." Globe at 385. See also Globe App. at 86, 112.

Throughout all of the debates, however, I could find no indication that the 1871 Congress considered the relationship of this bill to the anti-injunction act of 1793. Nor is there any indication, for all the talk about federal interference, that it considered the specific question

whether a federal court hearing a §1983 claim could enjoin a pending state proceeding. Nevertheless, in view of the considerations which motivated Congress to pass the Act -- the revolution in concepts of federalism, the necessity for protecting constitutional rights from any infringements by the states, and the general distrust of state bodies, including the courts, as protectors of those rights -- it seems reasonable to conclude that, had Congress considered the question of federal intervention in pending state proceedings, it would have permitted federal courts to enjoin pending state proceedings which were depriving persons of these rights. Indeed, it appears from Congress' plain intention to permit federal courts to interfere in state affairs for the protection of federal rights that if Congress had thought about a situation where a state court proceeding in the South was pending against a Negro and that proceeding was depriving him, or threatening to deprive him, of constitutional right, it would have

felt that a federal court, hearing a §1983 claim brought by that Negro to enjoin the state proceeding, could grant the relief requested under §1983. The fact that the Civil Rights Act, as a remedial statute, was intended to be liberally and beneficially construed supports that interpretation.

On the other hand, it nonetheless remains unclear whether Congress did consider the aforementioned situation and hence there can be no showing of clear congressional intent to allow federal courts hearing §1983 claims to enjoin state proceedings despite the anti-injunction bar. And when a statute is ambiguous and there is doubt as to whether it was meant to allow federal injunctions against pending state proceedings so as to come within the "express authorization" exception to §2283, the policies of ACL and a strict construction of the exception indicate that the federal injunction should be barred. In the last analysis, then, the question whether

§1983 should be treated as an "express authorization" exception to §2283 boils down to a policy judgment between comity and the federal protection of federal rights.

E. Policies. Most of the policy considerations on both sides of this problem have already been discussed in one way or another. On the side of viewing §1983 as not an exception to §2283, there are the policies of comity and due respect for the independence of the state systems; the abstention policy of allowing a state court the first chance to construe the statute or regulation involved so as to "save" it from unconstitutionality; the ambiguity of the general grant of equity jurisdiction of §1983 vis-a-vis the six express statutory exceptions; the fact that that general grant is not inconsistent with a statutory limitation on its exercise; and the fact that in the fact of the lack of clarity both in the legislative history of §1983 and in the judicial history of §2283 since 1948, ACLU seems to favor letting the state

court proceedings continue without federal injunction. ~~In addition, there is an~~ in terrorem argument ~~that once one general grant of equity jurisdiction is excepted from §2283, the door is open to all such grants, thus rendering §2283 virtually meaningless. In light of the specific legislative history of §1983, however, this contention seems overstated.~~ It is also arguable that construing §1983 as an exception to §2283 would constitute a ~~revolutionary change in federal-state relations;~~ particularly in the criminal area where the state defendant's every due process claim would allow him to seek a federal injunction against the state prosecution. Of course, this latter argument is answered, for the most part, by the Younger cases; even if §1983 were construed as a statutory exception to §2283, it would not be an exception to the general judicial principles of comity and equitable discretion set out in Younger and hence, under those principles, the

federal courts could still not interfere in pending state criminal prosecutions except in extraordinary circumstances.

Supporting the view that §1983 should be an exception to §2283 is the policy of federal protection of federal rights and that of the protection of federal jurisdiction. Section 1983 grants an equitable remedy against action under color of state law, whether that action be legislative, executive, or judicial. C.f. Ex parte Virginia, supra, at 346. ~~If that section is not an exception to the anti-injunction bar of §2283, the remedy provided in §1983 is nullified where the state action takes the form of a state court proceeding, and the rights which §1983 was meant to protect remain violated.~~ In other words, if §1983 is not an exception, a plaintiff would be left without any remedy whatsoever (except Supreme Court review) when allegedly unconstitutional state proceedings are pending against him and there is no adequate relief available in the state system. This does seem to

yes, but

subvert the policies of §1983 and does seem to negate some overriding federal interest, such as was discussed in a different situation in Leiter, where we held that §2283 has no application when the United States seeks a federal court injunction. The comity considerations underlying §2283 would seem to be inapplicable where state court proceedings threaten to prevent federal courts from effectively performing their judicial function.

~~Another argument favoring the construction of §1983 as an exception to §2283 is that if it is not, there would be a race to the courthouse: if the state gets to the state court first and proceedings are instituted, a federal court is barred by §2283 from interfering to protect federal rights, but if a person is merely threatened by a state proceeding, which has not yet been instituted, and he gets to the federal court before state proceedings are instituted, the federal court is not barred by §2283 from granting equitable relief against~~

~~the operation of the state statute or regulation which the state is threatening to enforce.~~ But §2283, in applying only to pending state proceedings, contemplates just such a race. The race concept is inherent in the present anti-injunction statute, and hence it must be said to be the intent of Congress. Still, this race concept may be unwise and should be avoided whenever possible. As you stated in Dombrowski in a somewhat different context, "[t]o make standing and criminality turn ~~of~~ on which party wins the race to a forum of its own choice is to repudiate the 'considerations of federalism' to which the Court pays lip service." 380 U.S. at 502. (Of course, the race could also be avoided by prohibiting, as a matter of comity, federal equitable interference not only in pending state proceedings, but also in threatened, non-pending ones.)

Finally, since the §2283 prohibition is absolute, a holding that §1983 is not an exception to it would bar federal interference in pending

state proceedings, both civil and criminal, even in the types of exceptional circumstances recognized in Younger, i.e., when those proceedings would cause immediate and irreparable injury to the §1983 plaintiffs, when the state statute or regulation sought to be enforced ~~is~~ is patently and flagrantly unconstitutional on its face, and when the state proceedings are part of a bad faith effort to harass the §1983 plaintiffs -- in sum, circumstances where injury would flow from the very bringing of the state proceedings and by the perversion of the very process which is supposed to provide vindication. Thus, such a holding would in effect overrule the Younger cases insofar as they recognized these exceptions, and would prevent any similar exceptions to federal interference in state civil cases. I doubt that we should so limit Younger so soon after its decision. To me, this consideration is determinative of the problem, especially when conjoined with the possibility described above that unless §1983

is recognized as an exception to §2283, persons being deprived of constitutional rights by pending state proceedings would sometimes be wholly without remedy -- a situation antithetical to the intent and policies of §1983. Consequently, I believe that §1983 should be considered an "express authorization" exception to the anti-injunction bar of §2283.

Nevertheless, this conclusion relates solely to §2283; it says nothing about the general policies of comity, federalism, and federal equitable discretion, which were relied on in Younger. Accordingly, I recommend the following course of action. Section 1983 cases seeking federal equitable intervention in pending state criminal prosecutions should be decided under the Younger principles without reaching the statutory question of §1983 as an exception to §2283. Section 1983 cases seeking federal equitable intervention in pending state civil proceedings should, (if possible,) be decided on general policy grounds

(which will be discussed elsewhere, hopefully in Minsker's memo), again without reaching the statutory §2283 question. This solution would provide a more flexible approach in dealing with individual fact situations, would protect the Younger-type "exceptional circumstances" in criminal cases, and would take into account any different policy considerations which might apply when a federal court is asked to intervene in state civil proceedings. If, however, [redacted] we are forced to decide the statutory question (e.g., if a federal court refuses on §2283 grounds to grant an injunction in one of the exceptional circumstances listed in Younger), then we should hold, on the basis of the legislative history and policies of §1983, that §1983 is included in the "express authorization" exception to §2283. [redacted]

or if we decide on the b[redacted] of general comity policies that federal intervention in pending state civil proceedings is warranted in all cases),

(One further consideration should be mentioned here -- the relationship between the §2283-§1983 question and the requirement of exhaustion of state remedies in §1983 suits. It could be argued, in light of all the talk in the legislative history of §1983 about the necessity for rederal intervention because the states could not adequately protect federal rights, that §1983 is an exception to §2283 only when state remedies are inadequate. According to this view, assuming that exhaustion of state judicial remedies is not generally required in §1983 suits regardless of the adequacy of those remedies, exhaustion would still be required -- where the state remedies were adequate -- if the §1983 suit was brought to enjoin a pending state proceeding. This position is untenable. Section 2283 makes no such distinction or exception regarding adequacy, but is a total bar against enjoining state proceedings, whether or not state remedies are adequate. Thus, a statutory "express authorization" exception to

that bar would be an exception in all cases -- save as limited by its own terms -- not merely in a certain restricted type of cases, i.e., where state remedies are inadequate. Accordingly, if exhaustion of state judicial remedies is not required, regardless of the adequacy of those remedies, then exhaustion is not required by §2283 in any case where an injunction under §1983 is sought against pending state proceedings. Conversely, if §1983 is an exception to §2283 and exhaustion of state judicial remedies is required under §1983 in the particular case (i.e., an abstention situation), then the plaintiff cannot secure a federal injunction against pending state proceedings unless he exhausts adequate state remedies. Of course, if §1983 is not an exception to §2283, then the problem evaporates, for a federal court would be barred from enjoining state proceedings in any case, whether or not exhaustion is required there and whether or not state remedies are adeuqate in the particular instance.)

IV. LYNCH v. HOUSEHOLD FINANCE CORP., No. 70-5058

These class actions were brought under §1983 by debtors who had their credit union savings accounts and checking accounts garnished without prior notice or a hearing under a Connecticut statute authorizing deputy sheriffs, at the direction of attorneys for alleged creditors, summarily to garnish such accounts. The debtors challenged the constitutionality of that statute on Sniadach grounds. The three-judge district court, Anderson, Timbers, Zamparo, did not reach the merits of this challenge, but dismissed the suits on the alternative jurisdictional grounds that (1) it lacked jurisdiction under §§1343(3) and 1983 because the complaint alleged the deprivation only of property rights, and (2) the award of any relief was barred by §2283 because it would enjoin pending state garnishment proceedings. The debtors appealed directly to this Court, and we noted probable jurisdiction, with jurisdiction postponed as to the merits.

The named appellants, Dorothy Lynch and Norma Toro, are low-income wage earners, residents of Connecticut. Lynch had authorized her employer to withhold ten dollars weekly from her wages for deposit in a credit union savings account. She used these deposited wages for family needs. Household Finance brought suit on a note against Lynch for damages in a Connecticut court. By order of the finance company's attorney, a deputy sheriff garnished her credit union account, and three days later he served her with process. She had no notice or opportunity to be heard prior to the garnishment of her account, and the garnishment was levied without court order or authorization.

Thereafter, during the pendency of the state court action against Lynch, she brought this §1983 action in the federal district court on behalf of herself and all other Connecticut residents whose assets are frozen by garnishment or who are threatened in the future

with prejudgment garnishment. She sued Household Finance, its attorney, and the deputy sheriff who garnished her account, individually and, in the case of the deputy sheriff, as a representative of the class of Connecticut sheriffs, deputy sheriffs, and constables who levy on bank accounts by serving writs of garnishment. She requested that a three-judge district court declare unconstitutional the Connecticut statute providing for summary garnishment and that it permanently enjoin defendants from enforcing that statute, presently and prospectively, by levying prejudgment garnishments in the absence of notice and a hearing. She did not, however, request the district court to enjoin the civil action for damages which was pending against her in the state court.

Appellant Toro had a checking account into which she regularly deposited her weekly wages and which she used for necessary expenses. Eugene Camposano, Toro's former landlord, sued her in a Connecticut

court for back rent allegedly due. On the instructions of Camposano's attorney, a deputy sheriff garnished her checking account and one day later served her with process. She also had no notice or opportunity for a hearing prior to the garnishment, and the garnishment was levied without court order or authorization. Along with Mrs. Lynch, she then brought the §1983 class action described above. However, after the filing of the §1983 action with the district court, but before that court's decision, Camposano, without state court order or authorization, released the garnishment of Toro's account. Thereafter, one Maurice Dancosse moved to intervene in Toro's action alleging a garnishment of his checking account under circumstances identical to those of Toro. The district court denied that motion on the ground that the "case has been fully submitted," and Dancosse has appealed to the Second Circuit.

The Connecticut prejudgment garnishment procedure, authorized by the challenged statute, is as follows: Where the debtor's assets

are in a bank account or other similar account, an alleged creditor may direct that such account be garnished prior to the institution or docketing of a state court civil suit for damages and prior to the serving of process on the debtor. The garnishment is levied without notice to the debtor or opportunity to be heard, and the creditor is not required to post a bond, to demonstrate the existence of a meritorious claim; or to show that the alleged debtor might conceal his property. No order, authorization, or supervision of the state court is necessary either for the levy of the garnishment or for its maintenance until trial of the damage suit; nor does the garnishment confer jurisdiction on the state court, since process must thereafter be served upon the debtor. Under Connecticut law, service of the writ of garnishment on the bank account, pursuant to the creditor's instructions, as well as the subsequent service of court process on the debtor, may be made by the county sheriff, his deputy, a constable

or other proper person, or by some indifferent person. In practice, service is generally made by a deputy sheriff.

After the convening of three-judge court in the instant case, appellees moved to dismiss. The court acknowledged that appellants' constitutional claims were substantial under Sniadach, but dismissed on the alternative jurisdictional grounds mentioned above.

As a threshold matter, the appellees argue that we have no jurisdiction to consider this case on direct appeal from the three-judge court under §8 U.S.C. §1253, because the three-judge court did not reach the merits of appellants' claim for an injunction, but dismissed for lack of subject-matter jurisdiction. Underlying this contention is the principle that direct appeals to this Court are authorized by §1253 only from actions required to be heard and determined by a panel of three judges. Thus, it is clear that when a single judge dismisses for lack of jurisdiction, or when a three-judge court dissolves itself and

remands to a single judge for dismissal for want of jurisdiction, the proper appeal is to the Court of Appeals and no direct review is available here. Appellees argue that the instant case differs from these situations only in that the three-judge court entered the order of dismissal itself instead of dissolving itself and remanding to one judge to dismiss. This difference, appellees submit, is irrelevant, since what counts is whether the decision below required the participation of three judges. Here, they say, it did not, for it is clear that, when a complainant requests the convening of a three-judge court, the single judge has power to determine whether federal jurisdiction exists and to dismiss the complaint if it doesn't. Thus, the three-judge court here was merely acting in the capacity of a single judge; and in Perez v. Ledesma, 401 U.S. 82, 86 (1971), we held that in such a case, we have no jurisdiction on direct review. Moreover, appellees contend, §1253 permits direct appeals to this Court only from orders granting

or denying, after notice and hearing, an interlocutory or permanent injunction. Here, the district court never even considered whether to grant an injunction, much less held a hearing on the merits, but merely dismissed for want of jurisdiction -- a wholly separate question. Thus, appellees conclude, the proper appeal is to the Second Circuit.

While this argument may give rise to a substantial obstacle to our jurisdiction here, I would answer it by saying that, even though the three-judge court did not reach the merits, it did deny the requested injunction on grounds which raise substantial federal questions -- i.e., whether federal courts have jurisdiction of §1983 suits alleging a deprivation of property rights only, and whether §2283 bars relief in §1983 suits seeking injunctions against pending state proceedings. Although these questions are jurisdictional, they are nonetheless substantial and federal and they were ruled on by a

three-judge court. Admittedly, a single judge coule have denied relief on the very same grounds and the appeal would have been to the Second Circuit; but the fact that a three-judge court did it here, rather than dissolving itself, indicates that it was passing on substantial federal questions, albeit jurisdictional ones. Although I can find no case precisely in point, and although Stern and Gressman does not consider the problem, I would say that in these circumstances we have jurisdiction on direct review under §1253 despite the fact that three judges were doing what one judge could have done. See Baker v. Carr, 369 U.S. 186 (1962).

Appellees also argue that the appellants do not constitute a valid class under the Civil Rights Act. Lynch and Toro seek to represent the class "encompassing those residents of the state of Connecticut who have been and will be in the future, subjected to or threatened with prejudgment . . . garnishment as authorized by

[Connecticut law]," and they further seek to sue the two deputy sheriffs involved as representing a class consisting of "the sheriffs, deputy sheriffs, and constables in the state of Connecticut who are authorized to serve writs of . . . garnishment." Appellees contend that both classes must fall. The class of plaintiffs, they say, really include all residents of Connecticut, since any of them might be subject to prejudgment garnishment in the future. According to appellees, this class is too broad for any reasonable determination of who falls within it, and it is too large and contains too many people with varied claims of law and fact for the named appellants adequately to protect the interests of the class. Similarly, appellees argue, the class of defendants is subject to the same infirmities, especially since Connecticut law allows service of the writ of garnishment not only by sheriffs, deputy sheriffs and constables, but also by "any other proper officer" or by "some indifferent person." Furthermore,

in appellees' view, the named deputy sheriffs do not fill all the offices named in the Connecticut law; and, in any event, they are merely servers of process and have no adversary interest in the outcome of the case. The parties with the genuine adverse interest here, appellees say, are Household Finance and Camposano, and they have no adverse interest with respect to any other member of the plaintiffs' alleged class. Indeed, appellees conclude, the class of plaintiffs and class of defendants are coextensive.

I am not at all convinced that these classes are inappropriate, even though they are clearly large. But even if they are inappropriate, I don't think it matters. We can determine the questions here solely with respect to the named plaintiffs and defendants, and principles of stare decisis and collateral estoppel will have the practical effect of affecting the relevant classes of people. Surely Connecticut will not be able successfully to enforce its statute against any other, if

that statute has been declared unconstitutional as applied to these named plaintiffs.

The next threshold matter raised by appellees is that Mrs. Toro's action is moot because, after the filing of her action in the district court but before the decision, her landlord released the garnishment. Of course, if her suit is a valid class action, the release would not render her suit moot so long as on the date when she filed her complaint, she properly represented a class who could have alleged a basis for injunctive relief. C.f. Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (case not moot when it is a problem "capable of repetition, but evading review.") But we still do not have to reach the class action question because even if Mrs. Toro's action is moot, Mrs. Lynch's is not, and the resolution of the problems raised here with respect to Lynch would seem to be dispositive of those with respect to Toro. The only difference between Lynch and Toro

is that Lynch had a savings account garnished, whereas Toro had a checking account garnished. The considerations applicable to one type of account seem to be identical to those applicable to the other, and I can see no reason to distinguish between the two for purposes of the constitutionality of the Connecticut statute providing for the summary prejudgment garnishment of bank accounts. Accordingly, Mrs. Lynch's action presents all the relevant considerations necessary for our review of this case, and our disposition of it would immediately affect the garnishment of checking accounts as well as of savings accounts. Mrs. Toro's suit is thus superfluous and there is no need for us to pass on the question of the mootness of her action. C.f. Baggett v. Bullitt, 377 U.S. 360, 366 n. 5 (1964).

Appellees further contend that these suits do not come within the requirements of §1983, because the defendants were not acting "under color of state law." Household Finance and Camposano, they

say, are merely private parties, and the deputy sheriffs who served the writs of garnishment were not acting under color of state law because Connecticut law also authorizes such service by any other proper person or by some indifferent person. Hence, the deputy sheriffs were not acting in any official capacity wherein they were clothed with the authority of the state. This contention is patently frivolous. The criterion is not whether the defendants were acting as officials of state; it is whether they acted under color of state law. Certainly, both the creditors and the deputy sheriffs, who combined to effect the garnishment of appellants' bank accounts pursuant to an express statutory procedure set up by the state, were acting under color of that state law for purposes of §1983.

Assuming that these threshold obstacles can be overcome, then, we reach the more important issues raised by this case. The first is whether §1343(3) provides jurisdiction for §1983 claims alleging

the deprivation only of property rights. Appellants argue that it does and contend alternatively that the interests of which they were deprived by the prejudgment garnishment also involve personal rights, since the garnishment removed from their use money essential for their subsistence and thus, as in the welfare cases, deprived them of their right to life. Appellees argue that §1343(3) does not comprehend the deprivation of mere property rights and that the only deprivation suffered by appellants was interference with their property. I agree with appellees that the garnishment here merely deprived appellants of property -- their use of money deposited in bank accounts -- since we can't make §1343(3) jurisdiction turn on whether the plaintiffs make sufficient claims of subjective need for the money. But, as shown in Part I of this memorandum, we should hold that §1343(3) does provide jurisdiction for §1983 claims of deprivation of property rights.

The next question is whether §2283 barred the relief sought by appellants here. At the outset, appellants argue that the summary prejudgment garnishments here were not "proceedings in a State court" within the meaning of §2283, because under Connecticut law prejudgment garnishment is an out-of-court, nonjudicial security remedy, which confers no jurisdiction on the state court, which requires no court order, authorization, or hearing, and to which alleged creditors unilaterally resort, in their absolute discretion, prior to instituting and docketing in personam suits in the state court. The creditors' damage suits, from which the garnishments are thus distinct, are the only proceedings pending in the state court and appellants requested no injunctive or declaratory relief as to them.

Garnishments are routinely levied, maintained, and released by creditors without any involvement or participation by the state courts. The levy of garnishment does not confer jurisdiction on the court and

indeed occurs prior to the institution of the creditor's suit: "[T]he service of the garnishment does not begin the action; that only occurs when the defendants are brought within the jurisdiction of the court by service of a writ upon them or by their voluntary appearance." Young v. Margiotta, 136 Conn. 429, 433, 71 A.2d 924, 926 (1950). Garnishment operates merely to secure any judgment that the creditor may obtain. Only after docketing does the suit pass beyond the physical control of the litigants and into the hands of the court. But despite the court's control over the creditor's docketed suit, the garnishment, from the date of levy until final disposition of the suit, remains wholly "distinct from and independent of" that suit, Potter v. Appleby, 136 Comm. 641, 643, 73 A.2d 819, 820 (1950), and requires no involvement of the state court. The garnished property is secured, not under the control of the court, but merely in the hands of the garnishee. The state court may make certain limited responses to

the garnishment -- ordering the substitution of a surety bond or reducing an excessive garnishment -- but these responses depend for thier initiation upon the debtor. Absent a stimulus from the debtor, an alleged creditor can freeze a debtor's assets for the duration of his suit without any participation by the state court. For these reasons, appellants argue, prejudgment summary garnishment is not a proceeding in a state court and hence §2283 does not bar an injunction against that garnishment.

The district court recognized that garnishment is separate from the in personam suit, but it concluded that enjoining such garnishment " would amount to 'substantially interfering with the prosecution of a pending state proceeding.'" The appellees agree and argue further that the garnishment is inextricably bound up with the underlying in personam suit and is necessary to make any eventual judgment in that suit effective. They rely on our statement in Hill v.

Martin, 296 U.S. 393, 403 (1935), that state "proceedings" within the meaning of §2283 include "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . . It applies alike to actions by the Court and by its ministerial officers, applies not only to executions issued on a judgment but to any proceedings supplemental or ancillary taken with the view to making the suit or judgment effective. . . Thus the prohibition applies whatever the nature of the proceedings, unless the case presents facts which bring it within one of the recognized exceptions to section [2283]." In the instant case, appellees conclude, the garnishments effected by the deputy sheriffs were clearly steps taken at the institution of the suits with a view to making the judgments effective, and hence were "proceedings" under §2283. If the federal court enjoined those garnishments, they would be nullifying the means of making effective the judgments in the creditors' pending damage

suits and would thus be interfering in those pending state suits. See also NLRB v. Underwood Mach. Co., 198 F.2d 93, 94 (5th Cir. 1952) (§2283 applies to prejudgment wage garnishment); Javelin Oil Co. v. Morrow Drilling Co., 266 F. Supp. 119, 122 (W. D. La. 1967) (§2283 applies to prejudgment lien measures taken in furtherance of pending litigation).

I tend to agree with appellants here. The prejudgment garnishments in the instant case do not fall within the meaning of §2283 "proceedings" as defined by Hill v. Martin, because they were not steps "taken in the state court or by its officers" and were not "actions by the Court," but, as shown above, were wholly independent of any order, authorization, or any other action by the state court. I cannot see how §2283 can be read to apply to actions taken and maintained purely by private parties without any involvement or participation of the state court. It may be that enjoining prejudgment

garnishments would interfere in the creditors' pending damage suits in the sense that it would interfere with the means of making the judgments in those suits effective, but that does not persuade me. We have rejected the doctrine that §2283 forbids a federal court to examine the merits of a case on the grounds that it might award relief substantially interfering with state court proceedings. Allegheny v. Frank Mashudo Co., 360 U.S. 185, 190-191 (1959). More important is the independence of the garnishment from the creditors' state court suits. Section 2283 secures the right of state courts to exert their judicial power. It does not shield a private collection remedy from interference by the federal courts, where that remedy is fully effective without any judicial involvement. Since garnishment occurs independently of any state court action, §2283's policy of avoiding friction between two judicial systems having potential jurisdiction over the same subject matter is inapplicable. Although injunctive relief

against the garnishments may affect the creditors' pending suits by taking away their security, it certainly does not interfere with the prosecution of those suits to their conclusion and creates no danger that the federal courts and state courts will "fight each other for control of a particular case." Atlantic Coast Line, supra, 398 U.S. at 286. Section 2283 bars injunctions against pending proceedings in a state court, and it should not be read as barring actions taken wholly independently of such proceedings. I would thus conclude that §2283 does not bar the requested injunction here because that injunction would not interfere in any state court proceedings, much less pending ones.

Reaching this conclusion avoids the question whether §1983 is an exception to §2283 and also the questions whether §2283 bars declaratory relief and whether it bars future injunctive relief when similar proceedings are pending. If, however, we should determine

that prejudgment garnishment is a pending state proceeding within the meaning of §2283, those questions become more pertinent. In the latter event, I recommend the following dispositions.

The question whether a federal court in a §1983 action may enjoin the garnishment -- if considered as a pending civil proceeding in a state court -- should be decided on general principles of comity and equitable discretion with respect to federal intervention in state civil proceedings, rather than on any statutory ground of §1983 as or as not an exception to §2283. The reason for this course of action is explained in Part III of this memorandum, and the comity policies relating to intervention in pending state civil proceedings are discussed, I think, in Minsker's memorandum. This disposition would rest the decision on better and more flexible grounds. Of course, if

we decide that federal intervention in pending state civil proceedings is warranted on general comity grounds, then we have to reach the problem of the anti-injunction bar of §2283. In that event, for the reasons discussed in Part III, supra, I would hold that §1983 is an exception to §2283.

Appellants argue that even if §2283 did bar an injunction against the garnishment, that statute did not excuse it from determining the propriety of declaratory relief. The question whether §2283 bars declaratory relief, as well as injunctive relief, is a difficult question of statutory interpretation. On the one hand, "the plain wording of §2283 . . . bars only injunctions designed to stay court proceedings." County of Allegheny v. Frank Mashuda Co., supra, at 198. On the other hand, a declaratory judgment results in the same kind of intervention in pending state proceedings that the anti-injunction bar was designed to prohibit. However, we might avoid this question, too, by determining the propriety of federal equitable intervention here -- whether by injunction or declaration -- on general policy grounds. We have already held that the same principles that govern the propriety of federal injunctions of state criminal proceedings govern the issuance of federal declaratory judgments in connection

with such proceedings. Samuels v. Mackell, 401 U.S. 66, 69-74 (1971). Whether the same equation of injunction and declaration applies to federal intervention in state civil proceedings, as a policy matter, is an open question, although it appears likely that it does, and Minsker, S. P. J., will discuss this question in his memorandum.

Appellants further argue that, whether or not §2283 barred federal intervention in the pending garnishment here, it certainly did not bar the award of prospective equitable relief -- both injunctive and declaratory -- on behalf of that part of the class of plaintiffs whose assets would be subject to summary prejudgment garnishment in the future. The question whether §2283 bars future equitable relief on behalf of the class, at the time when similar proceedings are pending against some or all of the named plaintiffs, is another difficult statutory question. On the one hand, §2283 doesn't espressly bar such relief; but on the other, an award of such relief would mean

that every time a plaintiff brings a class action seeking equitable relief against pending state proceedings, he could get an injunction or declaration against the future enforcement of the statute or regulation involved, even if §2283 would bar such relief against the particular pending proceedings. Whether the latter result undermines the purposes and policies of §2283 is an open question and is inextricably bound up in the instant case with the propriety of the class actions. Again, it would be preferable, (if possible,) to avoid deciding this question on §2283 grounds, and instead to decide it on general policy grounds, which may be discussed in Minsker's memorandum.

In any event, the conclusion that the prejudgment summary garnishment in Connecticut is not a state proceeding within the meaning of §2283 would allow us to avoid deciding these questions on any grounds in the instant case.

The parties argue about the adequacy of Connecticut's judicial remedies for appellants' alleged deprivation of constitutional rights, but they do so in the context of whether §2283 applies and whether §1983 is an exception to §2283. Appellants, for instance, contend that the efficacy of §2283 is grounded on the assumption of the adequacy of remedies under state law and that since Connecticuts' remedies are inadequate, §2283 does not apply, or at least §1983 should be considered an exception in these circumstances. As shown above, however, at the end of Part III of this memorandum, §2283 makes no distinction regarding adequacy, but is a total bar against enjoining pending state proceedings, whether or not state remedies are adequate except as expressly authorized by Congress, etc. Adequacy considerations, if any, are found in §1983, not in §2283, and have no relevance to whether §1983 is an exception to §2283.

Nevertheless, the adequacy of Connecticut's remedies here may be relevant to an abstention problem -- a problem neither discussed by the district court nor raised by any party here. If Connecticut's judicial remedies are adequate, the questions raised involve delicate questions of state law and administration, or there is the possibility that the state court might interpret the garnishment statute so as to save it from unconstitutionality and thus avoid a federal question, then we should require the federal court here to abstain -- i.e., to refrain from exercising its jurisdiction until the appellants had exhausted their state judicial remedies. (See Part II of this memo, supra).

Appellants argue that Connecticut completely denies them a forum in which to contest their summary garnishments. Appellees admit that the Connecticut state courts have little authority to review specific garnishments on their merits and have no power to release

good faith garnishments except to the extent that they are excessive, but they argue that this does not mean that those state courts cannot adjudicate appellants' objections to the garnishment statute on federal constitutional grounds. According to appellees, Connecticut provides a variety of means by which appellants could raise in state court proceedings their constitutional objections to the garnishment process. Moreover, they say, the constitutionality of the garnishment statute is not a closed issue in Connecticut, for appellants' constitutional claims have never been passed on by the Connecticut Supreme Court. Hence, appellees conclude, there are ample means for appellants to present their constitutional claims to the state courts and there is no indication that the state courts' remedies for that challenge would be inadequate.

Obviously, however, the instant case falls outside the abstention situation, for the appellants are challenging a plain state statute and

there are no questions of state law entwined nor is there a possibility of a saving construction. There is merely the possibility that the state court will hold the statute invalid as repugnant to the federal Constitution. As discussed in Part II of this memorandum, exhaustion is not required in such circumstances, for the appellants' claim is clearly covered by the first main aim of §1983, as listed in Monroe v. Pape, i.e., overriding certain points of state law. The Connecticut statute here plainly provides for prejudgment garnishment of bank accounts without notice or an opportunity for a hearing, and while the Connecticut courts could declare that statute unconstitutional, they could not change its plain meaning, nor deal with the question on state grounds. Although it might be argued that federal courts should abstain to give the state courts an opportunity to determine whether garnishment is or is not a "proceeding in a state court," it seems to me that whether a certain action is a proceeding in a state court

for purposes of §2283 is properly a federal question. Thus this is not an abstention situation, and consequently exhaustion is not required here.

Accordingly, the outcome of the instant case should be as follows: Federal courts have §1343(3) jurisdiction to remedy unconstitutional deprivations of property rights; neither §2283 nor comity policies is a bar to equitable relief here because garnishment is not a state court proceeding, either pending or non-pending; and hence we remand to the three-judge district court for a determination of the constitutionality of Connecticut's summary prejudgment garnishment statute on the merits and for appropriate relief.

V. CARTER v. STANTON, No. 70-5082

Indiana participates in the federal Aid to Families with Dependent Children program, and it provides by regulation that such children shall receive AFDC benefits when they have been deprived of parental support or care by reason of, among other things, "continued absence from the home" of a parent. Another Indiana regulation defines such continued absence as a period of six months except "under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bond fide."

Appellants are mothers who allegedly were deserted or separated from their husbands and were denied AFDC benefits on the ground that they had not been separated from their husbands for six months and had not filed for divorce or legal separation. They brought a §1983 suit in the Southern District of Indiana challenging the validity of the six-month waiting period requirement and the

statewide practices thereunder on constitutional and federal statutory grounds, and seeking declaratory and injunctive relief. More specifically, they challenged the state regulation and practices under it as invalid in the following respects: (1) the six-month waiting period on its face constitutes an irrational and arbitrary classification unrelated to the purposes of the AFDC program and thus violative of the equal protection clause; (2) the exceptions contained in the regulation are permissive in nature and hence on their face grant an unlimited and arbitrary discretion to the county welfare departments, in violation of the due process and equal protection clauses; (3) the regulation, as applied, enacts a conclusive and arbitrary presumption which denies applicants an opportunity to prove their gualifications for benefits, in violation of due process; (4) the state practice of interpreting the exceptions to the six-month requirement to include only situations where the applicant has filed

for divorce or legal separation infringes applicants' rights under the First, Fourth, and Fourteenth Amendments and, in conjunction with the Indiana residency requirements for filing for divorce or legal separation, impairs their constitutional right to travel; and (5) the regulation is inconsistent with the Social Security Act of 1935 requiring that AFDC benefits "be furnished with reasonable promptness to all eligible individuals." Jurisdiction of the district court was invoked under §§1343(3) and (4).

A three-judge court was convened and an evidentiary hearing was held. At that hearing, appellants testified that they were denied AFDC benefits on the ground that they either had to be separated for six months or had to file for divorce or legal separation. Appellee Stanton testified that the state welfare department has no such policy requiring filing ofr divorce or legal separation in order to get benefits prior to the expiration of six months, although he admitted that this

is a factor. Another witness for appellees testified that waiver of the six-month requirement is granted whenever there are exceptional circumstances, but he was unable to define that term. Finally, Stanton testified that the primary responsibility for the first six months of separation belong to the Township Trustee and that each appellant who requested such interim assistance from the Township Trustee received assistance in some form. Thus, appellees sought to justify the six-month requirement on the basis that applicants could get general welfare relief from the Trustees in the meantime and that the waiting period was related to the availability of assistance from the Trustees. Stanton did admit, however, that the welfare department makes no inquiry into the adequacy or inadequacy of assistance from the Trustees, Appellants contended that this practice of referring applicants to the Trustees for the first six months of separation and of denying AFDC benefits on that basis is itself contrary to the Social Security Act.

Appellants admitted at the hearing that none of them pursued administrative appeals from the county departments' denial of AFDC benefits.

The district court (Kerner, Steckler, Noland) dismissed appellants' complaint, stating:

> "We therefore conclude that none of the plaintiffs appealed the various decisions made at the office level of the County Department. Having so failed to exhaust the administrative appeal procedures provided, we find a failure on the part of the plaintiffs to exhaust their administrative remedies through the state administrative procedures.
>
> "We have examined the pleadings before us and find no substantial federal question involved, nor do we find federal jurisdiction under 28 U.S.C. §§1343(3), (4), 2201 and 2202."

Appellants appealed directly here, and we noted probable jurisdiction.

As a threshold obstacle, appellees contend that we have no jurisdiction on direct review under §1253, because the district court, in the last paragraph of its opinion (the second one quoted above), dismissed the complaint for want of a substantial federal question and for lack of jurisdiction. According to appellees, this action is one properly taken by a single judge and hence the three-judge court should have dissolved itself and remanded to a single judge. Even though they did not do so, but rather dismissed the complaint themselves on the above grounds, the effect of their action was to dissolve the three-judge court and the cause should stand as if dismissed by a single judge for lack of jurisdiction and of a substantial federal question. See Perez v. Ledesma, supra, at 86. Thus, appellees conclude, since the proper appeal from a dismissal by a single district judge on these grounds is to the Court of Appeals, the proper

appeal here is to the Seventh Circuit and we are without jurisdiction under §1253.

I would answer this contention by saying that the thrust of the opinion of the three-judge court was the need for exhaustion of state administrative remedies and that their only mention of the lack of a substantial federal question and of federal jurisdiction under §1343(3) and (4) came in the last paragraph quoted above. Hence, I would read that last paragraph as having no independent significance, but rather as relying on the main part of the opinion which preceded it. Then, we can say that since the question of the need for exhaustion of state administrative remedies is a substantial federal question, we have jurisdiction over it. Moreover, as discussed with regard to the Lynch case, supra, the fact that the jurisdictional issues raise substantial federal questions and the fact that the case was actually disposed of by three judges, rather than one, are sufficient to give jurisdiction to us under §1253.

Assuming we bypass this hurdle, then, we reach the question whether the three-judge district court in fact had jurisdiction of the instant case. At the outset, it might be argued that the district court had no jurisdiction under §1343(3) because appellants' §1983 claim alleged the unconstitutional deprivation only of property rights capable of pecuniary evaluation -- i.e., AFDC benefits. As discussed in Part I of this memo, however, an allegation of deprivation solely of property rights should not be a bar to §1343(3) jurisdiction. But even if Justice Stone's Hague distinction does retain vitality, our decisions indicate that welfare rights are to be considered "personal rights" for purposes of that distinction. See King v. Smith, 392 U.S. 309 (1968); Goldberg v. Kelly, 397 U.S. 254 (1970); Rosado v. Wyman, 397 U.S. 397 (1970).

Appellees next argue that the three-judge district court had no jurisdiction because appellants' claims did not raise any substantial

constitutional question. Appellants invoked federal jurisdiction under §1343(3) not only on the basis of thier constitutional claims, but also on the basis of their statutory claim of conflict with the Social Security Act. They claim that the Act is a law "providing for equal rights of citizens" within the meaning of §1343(3), and that even if it isn't such a law, §1343(3) should be construed as coextensive §1983, which creates a cause of action for deprivation of any rights "secured by the Constitution and laws" of the United States, thus clearly including the Social Security Act. Appellants also invoked federal jurisdiction under §1343(4) providing federal jurisdiction of any action for equitable relief "under any Act of Congress providing for the protection of civil rights." They claim that both the Social Security Act and §1983 itself are such laws providing for the protection of civil rights and thus that §1343(4) provides jurisdiction for their action. Appellants conclude, therefore, that since their substantive

statutory claims are substantial, the district court had jurisdiction over those claims under §§1343(3) and (4), regardless of the substantiality of their constitutional claims.

I cannot agree with this conclusion. While §§1343(3) and (4) may grant federal jurisdiction over the statutory claims alone, they do not permit the convening of a three-judge court to hear those claims. It seems clear that a three-judge court is properly convened only if a substantial constitutional issue is raised. Flast v. Cohen, 392 U.S. 83, 91 n. 4(1968); Ex Parte Poresky, 290 U.S. 30 (1933). Of course, if a substantial constitutional issue is raised, then the three-judge court should hear and decide the statutory claims as well, and indeed should decide the statutory claims in preference to the constitutional claims. Rosado v. Wyman, supra, at 402. But the substantial constitutional claim is the prerequisite for the convening of a three-judge court. Hence, we do not have to reach appellants arguments concerning the

bases under §1343(3) and (4) for federal jurisdiction over their statutory claims alone. For if no substantial constitutional question was raised, the three-judge court was improperly convened and had no jurisdiction to hear the case, regardless of the presence or substantiality of the statutory claims. Those latter claims alone may well permit federal jurisdiction, as appellant argues, but the jurisdiction would be solely in a single-judge district court and the appeal would be to the Seventh Circuit.

On the other hand, if a substantial constitutional claim was made, then the three-judge court did have jurisdiction both over any such claim and over the alleged statutory conflict as well. Even if they should have decided the statutory claims so as to avoid the constitutional claims, the mere presence of a substantial constitutional claim, which was presented to them, gave them jurisdiction of the whole case under §1343(3) and the three-judge court statute.

See Rosado v. Wyman, supra, at 402-03. In this event again, we do not have to reach appellants' arguments concerning the substantiality of their statutory claims as a basis for federal jurisdiction, for if there is a substantial constitutional claim, that is enough for federal jurisdiction under §1343(3). Accordingly, our only concern on the jurisdictional issue in this case is whether appellants' constitutional claims present a substantial federal question.

Appellants challenge Indiana's six-month waiting period as on its face violative of equal protection because there is no rational classification between the need of children for AFDC assistance prior to a six-month separation of one parent from the other and their need thereafter, so long as in both cases, the child is in fact deprived of the support of one parent. Indeed, California's similar three-month waiting period was struck in Damico v. California, 2 Pov. L. Rep. §10, 478 (N. D. Calif. 1969), following our remand of that case,

389 U.S. 416 (1967). Appellants also contend that since there is no requirement in Indiana's regulation that an investigation be conducted in each case to determine whether an absence is actual and bona fide and whether exceptional circumstances of need are present, but instead leaves these determinations to the discretion of the welfare authorities, the regulation grants state administrators a standardless and arbitrary discretion which encourages a capricious and invidious discrimination and is thus on its face violative of due process and equal protection. Appellants further argue that the regulation is unconstitutional as applied, for in practice the state administrators treat it as a conclusive presumption that there is no continued absence of a parent prior to six months, unless the spouse files for divorce or legal separation. The practice of requiring such filing in order to qualify for an exception, appellants contend, violates their Griswold right of privacy, their Boddie right of marriage, their right to free exercise of religion

(in the case of Catholics), and, because of the Indiana residency requirements for such filing, their Shapiro right to travel.

Appellees respond that there is no substantial claim that the regulation is unconstitutional on its face, because that regulation does not by its express terms withhold assistance while awaiting the expiration of the time period unless a suit for divorce has been filed -- as the statute in Damico did. Instead, it authorizes immediate assistance at any time if exceptional circumstances of need exist and if the absence can be shown to be actual and bona fide. Because of these exceptions, which were not present in the law involved in Damico, appellees argue, the regulation here designates the six-month period only as a guideline or, at worst, as a rebuttable presumption. Surely this is not unreasonable, say appellees, nor does it create an invidious discrimination, because an undetermined number of applicants may obtain benefits, even prior to six months, if they can make the

requisite showing. The court on remand in Damico merely outlawed a conclusive presumption that absence is not continued before the expiration of a certain time unless a suit for divorce has been filed -- a bar which is not present here. Indeed, that court went on to state that "[i]n so ruling, we do not hold that the state may not set up a reasonable time period as a rebuttable evidentiary guide to determine what constitutes a 'continued absence' in the absence of other factors. The state correctly argues that 'continued absence' cannot be attained in an instant but must endure for some period. Conversely, however, the 'continued' nature of the absence may be apparent, in an appropriate case, from the very early days of the separation. Protection of the needy children deprived by such an absence is required by the Federal Act. We hold only that the Department of Social Welfare must, in passing upon an application for [AFDC] consider all relevant facts in determining whether the particular

absence is 'continued.'" Appellees claim that the Indiana regulation here merely sets up a "reasonable time period as a rebuttable evidentiary guide" within the meaning of the Damico opinion.

Appellees also rely on our opinion in Dandridge v. Williams, 397 U.S. 471, 478, 485 (1970), where we stated ". . . that States have considerable latitude in allocating their AFDC resources, since each State is free to set up its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program . . . . In the area of economics and social welfare, a State does not violate the Equal protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" Appellees contend that the Indiana regulation is clearly permissible under these principles.

Appellees further argue that the regulation is not unconstitutional as applied, because, contrary to appellants' claim, filing for separation or divorce is not in practice a prerequisite to receiving assistance where the absence of the parent is less than six months. According to appellees, many other factors are considered in determining whether to waive the six-month requirement. Since this is a factual question and since the district court did hold an evidentiary hearing and dismissed for want of a substantial federal question, it must be inferred, appellees say, that the district court resolved all conflicts in the testimony if favor of appellees. Accordingly, appellees conclude, appellants did not meet their burden of showing that filing for divorce or separation was required in practice to come within an exception to the six-month requirement, and hence did not meet their burden of raising a substantial claim below that, as a factual matter, the regulation is unconstitutional as applied. In any event, appellees contend,

applicants can always get interim relief from the Township Trustee, and indeed most of the named appellants here did so.

It must be remembered that we are not determining the merits of this case; we are merely deciding whether appellants raised a substantial constitutional question for purposes of federal jurisdiction. It seems to me that there is a substantial question here as to whether the regulation in its face creates an irrational and invidious classification even under the Dandridge test. Although the Indiana regulation is different from the statute in Damico in that the one here provides for relief prior to the expiration of the time period in certain exceptional cases other than a filing for divorce, it still seems that the classification might be irrational. Those who seek relief prior to a six-month separation obviously have to show something more than those who do so after six months; they have to show "exceptional" need or "bona fide" absence, whereas those after six months do not

have to make such a showing. In other words, those seeking relief prior to six months who have only an ordinary need for AFDC benefits -- as opposed to an "exceptional" need -- or who cannot clearly show the "bona fide" absence of their spouse, cannot get relief, whereas the same cannot be said about those seeking relief after six months. Moreover, the regulation provides no standards for determining whether a claimant has made the requisite showing, but rather leaves that determination to the discretion of the welfare agency. Thus, those seeking relief prior to six months are subject to such standardless and possib ly arbitrary discretion of the agency, while those seeking relief after six months are not.

It may be that these classifications are within the concept of a "reasonable time period as a rebuttable evidentiary guide," as stated in Damico, and within the states' "considerable latitude" in the welfare area, as defined in Dandridge, because they have some

"reasonable basis," even though they may result in "some inequality." Indeed, the exceptions to the six-month requirement might well be flexible enough for us to uphold the Indiana regulation as constitutional under Dandridge principles, if we were reaching the merits of the case. But I think that there is a substantial question as to whether the above classifications do have some "reasonable basis" so as to come within Damico and Dandridge, and as to whether the specified exceptions in the regulation are sufficient to uphold it. Accordingly, I would conclude that appellants' claim that the regulation is unconstitutional on its face is substantial enough to warrant federal jurisdiction.

As to appellants' claim that the regulation is unconstitutional as applied, it seems clear that if they are correct that the welfare agency in practice never grants assistance prior to a six-month separation unless the applicant files for divorce of legal separation, then their constitutional claims are very substantial indeed. See

Damico, supra. For the purpose of determining whether there is a substantial constitutional question sufficient for federal jurisdiction, it seems that we should accept appellants' allegations in this regard as true and remand for a full trial on that issue. Although the district court did hold an evidentiary hearing at which appellees disputed appellants' assertions as to the practice in Indiana and although the court did dismiss for want of a substantial federal question, it made no express finding on this particular issue of fact, and we do not know whether it agreed with appellees' position as to the practice in Indiana or agreed with appellants' position but found the constitutional questions raised thereby insubstantial. Hence, I would conclude that since appellants' factual allegations as to the state's application of the regulation raise substantial constitutional questions, a full trial in federal court on those allegations is warranted. The possibility of interim assistance from the Township Trustee seems to me to be irrelevant at this stage,

since that program is wholly unrelated to Indiana's administration of the AFDC program. Since the constitutional claims raised are thus substantial, the federal court had jurisdiction of this case under §1343(3) to hear both appellants' constitutional claims and then claims of conflict between the Indiana regulation and the Social Security Act.

We now reach the problem which was the main thrust of the opinion below -- the need for exhaustion of state administrative remedies. Appellants argue that under the McNeese-Damico line of cases, exhaustion of such remedies is not required. Appellees agree, but ask us to reexamine those cases. As discussed in Part II of this memorandum, I believe that a retreat from, or overruling of, the McNeese-Damico cases cannot be justified. Hence, I would hold here that the three-judge district court has jurisdiction under §1343(3) and that there is no need for exhaustion of state administrative

remedies, and I would remand to that court for a dtermination of appellants' constitutional and statutory claims on the merits.

If, however, we should decide to hold that exhaustion of state administrative remedies is again required when they are adequate, or that the federal courts should abstain in areas involving sensitive problems of state administrative concern or when there is the possibility that the administrative appeal would produce a construction to "save" the regulation from unconstitutionality (a holding similar to the abstention doctrine with regard to state judicial remedies), then we must go further. If we do so hold and the requisite circumstances (e.g., adequacy) are present, we should still not affirm, but rather we should remand to the district court, holding that while it does have jurisdiction of the case under §1343(3), contrary to its present decision, it should decline to exercise that jurisdiction and

to decide the merits of appellants' claims until appellants have exhausted their administrative remedies in Indiana.

If we reinstate the pre-McNeese "exhaustion when adequate" requirement, then, we must examine the adequacy of Indiana's administrative remedies for appellants' claims. Under Indiana law, each claimant is provided with a right to appeal any decision made at the county level, and with notice of his right to appeal. Such an appeal may be taken if an applicant "believes his civil or constitutional rights have been violated," but appeal decisions must "be based on the law, rules and regulations of the state department of public welfare and policies officially adopted by the county board of public welfare." The appeal procedures provide a right to have the decision reviewed by the State Department of Public Welfare, and if still dissatisfied with the decision, a second appeal may be taken to the State Board of Public Welfare. Hearings on appeal are informal, but the applicant

has the right to counsel, to present evidence, to cross-examine opposing witness, and to examine all documents and records used at the hearing, and he may avail himself of the full panoply of discovery procedures available in the federal district court. A record of the hearing is made, although there is no published decision.

Appellants attack these administrative remedies as inadequate because of the requirement that appeal decisions must be based on the law, rules, and regulations of the state welfare department and on officially adopted policies. According to appellants, this requirement permits no constitutional attacks on the validity of other regulations or policies on their face and makes it unrealistic to presume that the welfare department will declare one of its own regulations invalid on federal constitutional or statutory grounds. Indeed, one of appellees' witnesses at the hearing below stated that "to the best of my knowledge, the [county welfare department] has been sustained in all of its decisions

in this area." Moreover, appellants say, where a regulation is attacked as invalid on its face, there is little need to develop a factual background. Appellants also challenge the administrative appeal procedures in that they are informal, permit no class action -- which is necessary here -- and result in no published decision, no uniform, state-wide recognition, and no binding body of law. Any decision is purely ad hoc. In addition, appellants argue those types of relief which would be appropriate for implementing an adjudication on the validity of the regulation -- injunctive and declaratory relief -- are not available from the agency. Finally, appellants contend that the Indiana administrative remedies have been inadequate in practice One of appellants' witnesses did take an administrative appeal, but her appeal was unsuccessful, and appellee Sterrett testified that, of the four appeals filed in 1970 by persons denied relief under the six-month rule, two were heard and assistance was denied in each.

Appellees argue that the state administrative remedies here are wholly adequate for appellants' claims. They rely primarily on the numerous procedural safeguards described above and on the desirability of having a record of the administrative hearing on appeal available to the federal court in a subsequent proceeding. Appellees also contend that whether the state practices which appellants challenge do in fact exist or are condoned or approved by the state welfare department are matters best resolved at the State Department or State Board level. Furthermore, they say, if challenges to the validity of the regulation and the practices thereunder are made during the process of administrative appeals within the agency, the agency would have an opportunity to take corrective action.

Surely appellees are correct in asserting that the administrative remedies are adequate for appellants' claim that the regulation is invalid as applied, since the agency could easily determine the truth

of the contention that in practice six-month requirement is never waived unless the applicant has filed for divorce or legal separation, and it also could determine whether that practice, if present, is to be condoned and it could take any necessary corrective action. But appellants also challenge the regulation as unconstitutional on its face, and despite the procedural safeguards in the Indiana administrative appeal procedure, its decision on this question would be limited by the state statutory requirement that appeal decisions be based on the law, regulations, and rules of the welfare department and on official policies of the county board. It seems exceedingly unlikely, in light of this requirement and in light of the administrative structure itself, that the state agency would strike down its own regulation as invalid on its face as repugnant to the federal Constitution and laws. Indeed, as Judge Friendly stated in Eisen v. Eastman, supra, in support of the "exhaustion when adequate"

requirement: "Insofar as Damico's complaint attacked the constitutionality of the California law postponing AFDC aid for three months after desertion by or separation from the father unless a suit for divorce had been filed, it is hard to see what an administrative hearing could have accomplished, the California relief agency could not declare the state statute unconstitutional. While King v. Smith involved a state regulation rather than a statute, it was also exceedingly unlikely that an administrative hearing would produce a change." 421 F.2d at 569. The same can be said about the situation here -- i.e., that Indiana's administrative remedies are inadequate for appellants' challenge to the state regulation on its face.

Nevertheless, there is on e good argument that exhaustion of administrative remedies should be required here even though the regulation is challenged on its face. That argument is based on abstention grounds, similar to those involved with regard to judicial

remedies: The regulation here involves sensitive questions of local concern and administration, and since it, unlike the law in Damico, does provide for a flexible number of exceptions to the six-month waiting period -- exception based on exceptional need or actual and bona fide absence -- it is conceivable that the state welfare agency could interpret those exceptions broadly enough to avoid any federal constittu onal or statutory question. The agency could establish clearer standards which would make the six-month waiting period a mere guideline or a "reasonable time period as a rebuttable evidentiary guide to determine what constitutes a 'continued absence,'" or which would give the classification a "reasonable basis so as to bring it within the permissible constitutional and statutory limits of Dandridge. In these circumstances, it is arguable that the federal courts should abstain in order to give the state agency a chance to construe the regulation so as to take into account the sensitive problems

of local concern and so as, perhaps, to save the regulation from being susceptible to a substantial constitutional or federal statutory challenge.

Of course, as discussed in Part II of this memorandum, such abstention principles should ordinarily not apply to administrative remedies because the construction of a state regulation by an administrative agency is not finally conclusive, as is the construction by a state court. But in the welfare area, as you recognized in your dissent in Damico, Congress has provided that the state's AFDC plan must "provide for granting . . . a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness." 42 U.S.C. §602(a)(4). The Indiana plan approved by the HEW Secretary apparently includes both the six-month requirement and the hearing procedure. In these circumstances, perhaps we can conclude here, as you did in your dissent in Damico, that not requiring exhaustion of

administrative remedies "ignores the highly successful federal-state working relationship in this area. The right of these appellants to receive AFDC funds involves not only questions of state law [here, administration], but also the propriety of that law [here, regulation] under federal statutory law. For determination of these questions Congress has specified a state forum in the first instance. [To hold] . . . that 42 U.S.C. §1983 may be used to bypass 42 U.S.C. §602 is a disservice to both of those important statutes." 389 U.S. at 420.

But even assuming that administrative remedies are inadequate here and that abstention does not apply to administrative remedies, there is another possible disposition of this case favoring exhaustion -- to require appellants to exhaust their state judicial remedies, whether after exhausting administrative remedies or in a new action in the Indiana courts. Of course, exhaustion of state judicial remedies is never required unless there are complex and sensitive problems of

state concern, or unless there is the possibility of a saving construction in the state courts. See Part II of this memo, supra. But here there are such complex and sensitive local problems, as there are in most welfare cases, and there is the possibility that the state courts could construe the regulation in the same way as was described above with respect to an administrative construction, and could thus save it frim being subject to a substantial challenge on federal constitutional or statutory grounds. And of course such a construction of the regulation by the Indiana courts would be a final and authoritative construction and hence the abstention doctrine would apply. Accordingly, we might remand this case to the district court, holding that while it has jurisdiction under §1343(3), it should decline to exercise that jurisdiction until appellants have exhausted their state judicial remedies.