ELIMINATION OF THE EXHAUSTION REQUIREMENT IN SECTION 1983 CASES: *PATSY v. BOARD OF REGENTS*

Courts have long required parties to exhaust administrative remedies[1] before commencing a judicial action.[2] The exhaustion doctrine

1. Abelleira v. District Court of Appeals, 17 Cal. 2d 280, 292, 109 P.2d 942, 949 (1914) (". . . where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act."). *See* U.S. v. Radio Corp. of America, 358 U.S. 334, 346 (1959) (exhaustion required if a claim first becomes "cognizable" by an administrative agency); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

2. Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 246-47 (1952) (exhaustion of state remedies must precede federal declaratory judgment action); Illinois Commerce Comm'n v. Thompson, 318 U.S. 675, 686 (1943) (equitable remedy denied because of failure to exhaust administrative remedy); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310 (1937) (before a court of equity can award extraordinary relief, administrative remedies must be exhausted); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 208-09 (1929) (required exhaustion of agency remedies prior to hearing in federal court).

In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938), the Court expressed the necessity of exhausting administrative remedies. The Court stated that the rule that judicial relief for any injury depends upon prior exhaustion of all administrative remedies has been applied with greater familiarity in equity cases. *See* Gorham Mfg. v. State Tax Comm'n, 266 U.S. 265, 269-70 (1924) (a taxpayer who fails to exhaust his administrative remedies in arriving at a proper tax assessment cannot thereafter bring a judicial action questioning the assessment's validity); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 230 (1908) (a railroad must exhaust its administrative remedies before a bill in equity to enjoin enforcement of a new rate structure could be brought); Pittsburgh Ry. Co. v. Board of Pub. Works, 172 U.S. 32, 44-45 (1898) (the collection of state assessed taxes could not be stopped by a federal court injunction until all administrative remedies were exhausted).

The Court in *Myers* also noted, however, that "because the rule is one of judicial administration—not merely a rule governing the exercise of discretion—it is applicable to proceedings at law as well as suits in equity," 303 U.S. at 46 n.9. *See* Anniston Mfg. Co. v. Davis, 301 U.S. 337, 343 (1937) (the Revenue Act of 1936 required exhaustion of administrative procedure before refunds under the Agricultural Adjustment Act of 1933 could be granted); First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450, 455 (1924) (bank exhausted state administrative remedies as a prerequisite to bringing suit in federal court to recover taxes paid under protest).

For additional analysis regarding exhaustion of remedies in general, see K. DAVIS,

serves to ensure that decisions are made in an orderly fashion and by the forum possessing the greatest competence.[3] In addition, federal courts invoke the doctrine when state administrative remedies are available because of a concern for comity between the states and the federal government.[4] On numerous occasions, however, the Supreme Court has relaxed the exhaustion requirement in cases brought under

---

ADMINISTRATIVE LAW TREATISE §§ 20.01-.05; W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 999-1055 (7th ed. 1979); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 426-28 (1965); S. NAHMOD, CIVIL RIGHTS LITIGATION: A GUIDE TO SECTION 1983 ch. 5 (1979); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 858-911 (1976); Layten & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 322-31 (1967); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1684 (1977).

3. *See* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 538 n.9 (1974).

Justice Holmes expressed the first principle in United States v. Sing Tuck, 194 U.S. 161 (1904): "[I]t is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." *Id.* at 168. *See also* United States v. Morgan, 307 U.S. 183, 190-91 (1939) (judicial review through the administrative process should proceed in an orderly fashion); N.L.R.B. v. Rexall Chem. Co., 370 F.2d 363, 365-66 (1st Cir. 1967) (the doctrine of exhaustion of administrative remedies is based upon "fairness and orderly procedure"); L. JAFFE, *supra* note 2, at 424-32.

The court in Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973), discussed the second principle. "The exhaustion requirement, as it applies to administrative agencies . . . is grounded in substantial concerns not only in fairness and orderly procedure . . . but also of competence. Courts are not best equipped . . . to judge the merits . . . and the objections to them. Specialized agencies are created to serve that function." *Id.* at 415.

The Supreme Court in McKart v. United States, 395 U.S. 185 (1969), summarized the policies underlying the exhaustion doctrine. These policies include: (1) keeping the administrative process free from "premature interruptions;" (2) letting the administrative agency acquire the requisite "factual background" required for decision making; (3) allowing the agency to use its acquired skills and expertise in adjudication; (4) providing for the most prompt resolution of the issues; (5) preserving executive and administrative autonomy; (6) promoting administrative efficiency and judicial economy; (7) improving agency effectiveness and morale. *Id.* at 193-95.

For further discussion of the principles underlying the doctrine of exhaustion of remedies, see K. DAVIS, *supra* note 2, at § 20.01; J. LANDIS, THE ADMINISTRATIVE PROCESS 153 (1938); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 3-9, 111-20 (3d ed. 1973).

4. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 229 (1908) ("considerations of comity and convenience" counsel exhaustion of state administrative remedies before federal court intervention in ratemaking proceeding). *Cf.* Younger v. Harris, 401 U.S. 37 (1971). *See also* Koury, *Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 LOYOLA L. REV. 659 (1979).

section 1983[5] without clearly articulating the scope of the exception.[6] In *Patsy v. Board of Regents*,[7] the Court clarified the previous ambiguity by prescribing an absolute no-exhaustion rule for section 1983 actions.[8]

Georgia Patsy, a female secretary employed by Florida International University, brought a section 1983 action after the University rejected several promotion applications.[9] The district court dismissed the case for failure to exhaust state administrative remedies.[10] The Court of Appeals for the Fifth Circuit,[11] sitting *en banc*, held that the Supreme Court's decisions construing the exhaustion doctrine in section 1983 cases where state administrative remedies were available

5. 42 U.S.C. § 1983 (Supp. IV 1980), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. The Act was derived from a message to Congress by President Grant on March 23, 1871. Monroe v. Pape, 365 U.S. 167, 172-73 (1961) (citing Cong. Globe, 42d Cong., 1st Sess. 244 (1871)). Section 1983 provides a federal remedy when a person's constitutional or federal statutory rights are deprived under color of state law. The "color of state law" requirement was refined and its scope expanded after United States v. Classic, 313 U.S. 299, 326 (1941). The Court in *Classic* rejected an argument that § 1983 reached only state authorized conduct, and held that any "misuse of power" by a state official acting under the authority of his office is an action "under color" of state law. *See* Screws v. United States, 325 U.S. 91, 111 (1945) (construed "under color" of law to mean "under pretense of law"). *See also* Recent Decisions, *Exhaustion of Adequate and Appropriate State Administrative Remedies is a Prerequisite for Judicial Review Under Section 1983*, 51 MISS. L.J. 283, 284 n.10 (1980) ("under color" of law includes acts of public officials: (1) exercised "beyond the scope of authority," (2) "conducted in a manner prohibited by the Constitution," or (3) exercised "within a scope of authority that was constitutionally void").

6. *See infra* notes 28-50 and accompanying text.

7 102 S. Ct. 2557 (1982).

8. *See infra* notes 57-74 and accompanying text.

9 102 S. Ct. at 2559. Patsy alleged discrimination on the basis of race and sex. *Id.*

10. *Id.* The district court dismissed Patsy's claim in an unreported decision.

11. Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981) (*en banc*), *vacating*, 612 F.2d 946 (5th Cir. 1980). A Fifth Circuit panel had earlier reversed the district court's dismissal, holding that exhaustion of administrative remedies was not a prerequisite of an action under § 1983. 612 F.2d at 947.

established a flexible exhaustion rule.[12] Under this rule, federal courts could exercise jurisdiction despite the plaintiff's failure to exhaust state remedies only in certain limited circumstances.[13] The Supreme Court reversed the Fifth Circuit's decision, holding that claims brought under section 1983 avoid the exhaustion requirement.[14]

The exhaustion of administrative remedies doctrine arises from the judiciary's desire to postpone the exercise of its powers until the most appropriate stage in the litigation process.[15] Nevertheless, courts have identified several situations where particular circumstances override the policy concerns underlying the doctrine.[16] Similarly, federal courts have relaxed exhaustion requirements in section 1983 cases in order to avoid frustrating Congress' purpose in enacting the

12. 634 F.2d at 906. The *en banc* court's decision provides an insightful review of the Supreme Court's exhaustion decisions. *See id.* at 902-908.

13. *Id.* at 912. The court concluded that "adequate and appropriate state administrative remedies must be exhausted before a section 1983 action is permitted to proceed in federal court, absent any of the traditional exceptions to the general exhaustion rule." *Id.* The court indicated, however, that the state administrative remedy must meet "certain minimum conditions" before it could serve to delay a federal action under § 1983. These minimum requirements included:

> *First*, an orderly system of review or appeal must be provided by statute or written agency rule. *Second*, the agency must be able to grant relief more or less commensurate with the claim. *Third*, relief must be available within a reasonable period of time. *Fourth*, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. *Fifth*, interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under section 1983 until the administrative process has been concluded.

Id. at 912-13 (emphasis in the original).

14. 102 S. Ct. at 2568. For a further discussion of the Supreme Court's decision in *Patsy*, see notes 57-79 and accompanying text.

15. *See supra* note 3.

16. Courts have identified seven exceptions to the doctrine:

(1) In Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 82-83 (1958), the Court stated that before requiring exhaustion of the administrative remedy, the agency must first have jurisdiction over the dispute. In this case, the local administrative remedy did not apply to an interstate carrier because the Interstate Commerce Commission had sole jurisdiction. *See also* Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919) (the district court had jurisdiction even though the I.C.C. remedies had not been exhausted, because the I.C.C. exceeded its authority in the issuance of an order).

(2) Inadequate administrative remedies do not require exhaustion. Walker v. Southern Ry., 385 U.S. 196, 198-99 (1966) (a railroad employee did not have to exhaust administrative remedies because an inadequate administrative remedy delayed the resolution of some disputes for over ten years). *See also* Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456, 462-63 (1943) (state administrative remedies are

provision.[17] Complicating the analysis in section 1983 cases, however, are the countervailing policies which limit federal court intervention in proceedings before state forums.[18]

Section 1983 claims subject to state judicial remedies traditionally have escaped the exhaustion doctrine.[19] This exception stems from federal courts' concern for the res judicata effect of state court findings of fact.[20] The Supreme Court in *Monroe v. Pape*[21] articulated a

---

inadequate where no state ruling or law could resolve the federal questions presented); K. DAVIS, *supra* note 2, § 20.07.

(3) Judicial remedies do not require exhaustion. *See* Bacon v. Rutland Ry., 232 U.S. 134, 137 (1914) (since judicial remedies, unlike their administrative counterparts, carry collateral estoppel and res judicata effects, exhaustion affects any subsequent review). For a general discussion on judicial remedies, see 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64 (C. Wright ed. 1960).

(4) Legislative acts involving constitutional issues avoid exhaustion. *See* Public Util. Comm'n v. United States, 355 U.S. 534, 539-49 (1958) (interstate carriers avoid the exhaustion requirement when state administrative rules restrain federal movement). *See also* K. DAVIS, *supra* note 2, § 20.04.

(5) Unconstitutional administrative remedies avoid exhaustion. *See* Fuentes v. Roher, 519 F.2d 379, 386-88 (2d Cir. 1975) (claims subject to unconstitutional administrative remedies escape exhaustion).

(6) Any administrative remedy causing irreparable harm avoids exhaustion. Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923) (administrative remedies causing excessive delay and irreparable harm escape exhaustion); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196 (1924) (public utilities escape exhaustion if enjoining rate increases causes irreparable harm).

(7) Claims subject to futile administrative procedures escape the exhaustion requirement. *See* City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 34 (1934) (federal courts allow an immediate hearing in those cases involving futile appeals to the tax commission).

17. *See infra* notes 21-23 and accompanying text.

18. *See supra* note 4 and accompanying text.

19. *See infra* notes 20-21 and accompanying text.

20. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 101-02 (1973) (judicial remedies carry res judicata and collateral estoppel effects, thereby limiting the extent of any further review).

The Court stated the general rule that § 1983 claims subject to state judicial remedies avoid the exhaustion requirement in Lane v. Wilson, 307 U.S. 268 (1939). Justice Frankfurter stated that "[b]arring only exceptional circumstances . . . or explicit statutory requirements . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts." *Id.* at 274. *See also* Hathorn v. Lovorn, 102 S. Ct. 2421, 2428 (1982) (exhaustion of state judicial remedies is not required when federal courts have concurrent jurisdiction); Zeffiro v. First Penn. Banking and Trust Co., 634 F.2d 290, 298-99 (3d Cir. 1980) (unless expressly stated by Congress, federally created rights need not first be exhausted in state courts), *cert. denied*, 102 S. Ct. 2295 (1982).

21. 365 U.S. 167 (1961), *rev'd in part*, 436 U.S. 658 (1976).

second rationale for avoiding the exhaustion requirement. The Court there determined that Congress intended section 1983 to serve the broad purpose of supplying a federal remedy when an adequate state remedy is unavailable in practice.[22] Appearing to go beyond this objective, the Court held that the provision furnished a "supplementary" federal remedy even where available state judicial remedies have not been exhausted.[23]

Unlike their treatment of state judicial remedies, federal courts for many years generally required exhaustion of state administrative remedies in cases brought under section 1983.[24] In establishing this rule in *Prentis v. Atlantic Coast Line Co.*,[25] the Court, speaking through Justice Holmes, cited as its rationale "[c]onsiderations of comity and convenience."[26] The Court also noted that administrative adjudications are not subject to res judicata claims.[27]

In *McNeese v. Board of Education*,[28] however, the Court appeared to extend the *Monroe* no-exhaustion rationale to cases involving state administrative remedies. In *McNeese*, students brought a section 1983 action alleging racial discrimination in an Illinois public

22. *Id.* at 173-74. This position had already been proposed in Lane v. Wilson, 307 U.S. 268 (1939), where a black petitioner claimed a fifteenth amendment violation after state officials, acting under state law, refused to allow the petitioner to register to vote. In *Monroe*, however, the Court failed to cite *Lane*. *See* Comment, *supra* note 3 at 542-43 n.27 ("The only plausible reason for the Court's failure to cite *Lane* is that it chose to state the issue in broader terms than the earlier case permitted; so as to encompass all state remedies within its statement of the exhaustion principle . . .").

23. 365 U.S. at 183. The Court stated: "The federal [§ 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* Note, however, that the Court in *Monroe* did not lessen the necessity of first exhausting state administrative remedies. *See* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1498-1501 (1969).

24. Lower federal courts throughout the 1950's consistently required exhaustion of administrative remedies in section 1983 cases. *See, e.g.*, Williams v. Dalton, 231 F.2d 646, 648-49 (6th Cir. 1956) (when a state court has committed an individual for being insane, the state "corrective" remedies must be exhausted before resorting to the federal courts); Cooper v. Hutchinson, 184 F.2d 119, 124 (3d Cir. 1950) (state administrative remedies must be exhausted before out-of-state lawyers, who had their authority improperly revoked, can seek relief in the federal courts). *See also* Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285, 1287 (1953); Comment, *supra* note 3, at 542 n.25, 26.

25. 211 U.S. 210 (1908).

26. *Id.* at 229.

27. *Id.* at 227.

28. 373 U.S. 668 (1963).

school.[29] The court of appeals affirmed the district court's dismissal of the case on the ground that plaintiffs had failed to exhaust available administrative remedies.[30] Reversing the lower courts, Justice Douglas, writing for the Court, initially indicated that section 1983 empowered federal courts to grant relief for civil rights violations without first exhausting state remedies.[31] Later in the opinion, however, Justice Douglas appeared to qualify this expansive holding by emphasizing the inadequacy of the state administrative remedy.[32] In particular, he stated that it was unlikely that the plaintiff's state remedy was "sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights."[33] The Court's use of this traditional exception to the exhaustion requirement undercuts the Court's earlier language which had suggested that the no-exhaustion rule applied in all section 1983 actions.[34]

The Court's subsequent decisions display a similar degree of equivocation. The Court continued to suggest that it would not require exhaustion of state administrative remedies in section 1983 cases,[35] while simultaneously basing its decision on a determination that the state remedy was inadequate.[36] Had the Court indeed

29. *Id.* at 669.

30. 305 F.2d 783 (7th Cir. 1962), *rev'd*, 373 U.S. 668 (1968).

31. 373 U.S. at 671. Justice Douglas stated, "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Id.*

32. *Id.* at 674-75.

33. *Id.*

34. An absolute no-exhaustion rule precludes the use of all exceptions to the exhaustion doctrine—therefore any mention of an exception is inappropriate, irrelevant, and nonapplicable. Justice Harlan dissented in *McNeese*, arguing that the available state remedy was adequate and effective. *Id.* at 676-81.

35. *See, e.g.*, Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967).

36. Over the past twenty years since *Monroe,* the Supreme Court decided fifteen major cases involving the application of the exhaustion doctrine to section 1983 claims, culminating with Patsy v. Board of Regents of the State of Florida, 102 S.Ct. 2557 (1982). *See infra* notes 57-79 and accompanying text for discussion of *Patsy*. Until *Patsy*, the Supreme Court never stated with any consistency that section 1983 actions did not require exhaustion when an exception applied. *See* Patsy v. Florida Int'l Univ., 363 F.2d 900, 912-13 (5th Cir. 1981), *en banc* (reversed prior circuit precedent by concluding that "adequate and appropriate" state administrative remedies require exhaustion before federal courts can hear section 1983 actions); Secret v. Brierton, 584 F.2d 823, 825-26 (7th Cir. 1978) (requiring state prisoners after being denied personal tangible articles of little monetary value, to exhaust prison grievance procedures before venturing into federal court); Brooks v. Center Township, 485 F.2d

adopted a no-exhaustion rule inquiry into the adequacy of the state remedy would have been logically inappropriate.[37] The Court used a different rationale to avoid the exhaustion requirement in *King v. Smith*.[38] The Court there ruled that a plaintiff bringing a section 1983 action need not first exhaust administrative remedies where the alleged constitutional violation was "sufficiently substantial."[39]

In *Gibson v. Berryhill*,[40] the Court recognized that the traditional rule requiring exhaustion of administrative remedies had been relaxed in some situations, but it stopped far short of adopting an absolute no-exhaustion rule. In *Gibson*, a group of Alabama optometrists brought an action seeking injunctive relief under section 1983 claiming the state licensing board, which was scheduled to hear a charge pending against the plaintiffs, was biased.[41] The Court held that exhaustion of the administrative remedy was not required, reasoning that the unconstitutional organization of the licensing board denied plaintiffs adequate and impartial relief.[42]

Significantly, however, the Court indicated in dictum that exhaus-

---

383, 386 (7th Cir. 1973) (if state welfare recipients have their benefits cut off without a pretermination hearing, requiring them to first exhaust state administrative remedies is unconstitutional). *See also* Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352 (1970); Note, *supra* note 23 at 1494; Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 YALE L.J. 143 (1969).

37. *See supra* note 34.

38. 392 U.S. 309 (1968).

39. *Id.* at 312 n.4. The Court in *King* refused to require exhaustion of state administrative remedies by welfare recipients in a section 1983 action, ruling that "a plaintiff in an action brought under the Civil Rights Act . . . is not required to exhaust administrative remedies, where the constitutional challenge is sufficiently substantial." *Id.* This statement suggests that insubstantial constitutional challenges do require exhaustion. Nevertheless, it also proffers the notion that certain circumstances do require exhaustion in section 1983 cases. *See* Houghton v. Shafer, 392 U.S. 639 (1968), where the Supreme Court, in reversing a dismissal for failure to exhaust state administrative remedies, declared exhaustion unnecessary in light of its prior decisions. *Id. See also* Comment, *supra* note 3, at 545 n.39.

In Carter v. Stanton, 405 U.S. 669 (1972), the Supreme Court reversed the district court's dismissal for failure to exhaust administrative remedies stating that "exhaustion is not required under such circumstances." *Id.* at 671. In light of these holdings, there seems little doubt that subsequent actions under section 1983 would escape the exhaustion requirement. Subsequent decisions, however, contradict the presence of a total no-exhaustion doctrine in section 1983 cases (*see infra* notes 40-54 and accompanying text).

40. 411 U.S. 564 (1973).

41. *Id.* at 566-71.

42. *Id.* at 574-75.

tion was not required in section 1983 cases stating a claim actionable independently of the state administrative proceeding.[43] Because of the impermissible constitution of the licensing board, Justice White, writing for the Court, saw no need to decide the further question of whether applicability of the exhaustion doctrine may be appropriate if the state provides an administrative remedy under which no deprivation of the plaintiff's civil rights occurs until completion of the proceedings.[44] Justice Marshall, joined by Justice Brennan, disagreed with the majority's dicta in a concurring opinion, stating that section 1983 actions avoid any exhaustion requirement.[45]

That the Supreme Court recognized only a limited exception to the

43. *Id.* The Court stated:

> Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983. Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy . . . was for all practical purposes identical with the merits of appellees' lawsuit.

Id. (footnote and citations omitted).

44. *Id.*

45. *Id.* at 481.

Other decisions from this period evidence the Court's equivocation on the exhaustion requirement. In Steffel v. Thompson, 415 U.S. 452 (1974), the Court stated: "When federal claims are premised on 42 U.S.C. section 1983 and 28 U.S.C. section 1343a(3) . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Id.* at 472-73. Similarly, in Ellis v. Dyson, 421 U.S. 426 (1975), the Court declared: "Exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, an action under section 1983 is free of that requirement." *Id.* at 432-33. Both *Steffel* and *Ellis* dealt with the enjoinment of state criminal prosecutions, thus making any discussion on exhaustion dictum. *Cf.* Preiser v. Rodriguez, 411 U.S. 475 (1973). In *Preiser*, respondents (prison inmates) participated in a conditional-release program where each inmate received good-behavior credits which reduced their prison terms. After losing their credits, respondents brought a section 1983 action seeking restoration of those credits. The district court declared that writs of habeas corpus are "adjunct to claims under section 1983 and do not require exhaustion of state remedies." *Id.* at 477. The Supreme Court reversed,

exhaustion requirement was again suggested in *Barry v. Bachi*.[46] In *Barry*, the Court faced a section 1983 claim involving a license suspension by the New York State Racing and Wagering Board.[47] The plaintiff, a horse trainer, had his license temporarily suspended after officials found that his horse had been illegally drugged.[48] The Court held the state statute granting the Board suspension powers unconstitutional because it failed to provide a timely post-termination hearing.[49] Rejecting defendant's claim that the plaintiff had impermissibly failed to exhaust available state procedures, the Court narrowly ruled that "existing authority" did not require exhaustion where the plaintiff's claim essentially involved a challenge to the adequacy of the administrative remedy.[50] Hardly adopting an absolute no-exhaustion rule, the Court, as it had done in *McNeese* and *Gibson*, relied on a traditional exception to the exhaustion doctrine in reaching its decision.

The Court's inability to provide a clear and consistent rule left a cloud of ambiguity surrounding the exhaustion requirement in section 1983 cases.[51] Courts of appeals adopted differing exhaustion requirements. Several circuits interpreted the Supreme Court's

---

reversed, stating respondent's sole remedy lay under the habeas corpus statute and could not, therefore, avoid exhaustion. *Id.* at 498-500.

The Court's holding in *Preiser* indicates a significant change in the treatment of habeas corpus writs from its position in Wilwording v. Swenson, 404 U.S. 249 (1971). The Court in *Wilwording* treated a writ of habeas corpus the same as a section 1983 claim. *Id.* at 252-53 (Burger, C.J., dissenting). *See* Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969), *rev'd*, 451 F.2d 730 (2d Cir. 1971), *aff'd on rehearing en banc*, 456 F.2d 79, 80 (2d Cir. 1972) (treated a writ of habeas corpus as a section 1983 action for exhaustion purposes). *See also* Comment, *supra* note 3, at 546 n.45.

In Allee v. Medrano, 416 U.S. 802 (1974), the Court refused to require exhaustion of state administrative remedies and, thereby, provided for immediate access to a federal forum. *Id.* at 814. *But cf.* Runyon v. McCrary, 427 U.S. 160 (1976), where Justice Powell stated in his concurrence that the Court took an extreme view with regard to the legislative intent behind section 1983. *Id.* at 186. "The most striking example is the proposition . . . that 42 U.S.C. section 1983 does not require exhaustion of administrative remedies under any circumstances." *Id.*

46. 443 U.S. 55 (1979).

47. *Id.* at 61.

48. *Id.* at 59.

49. *Id.* at 69.

50. *Id.* at 63, n.10.

51. The Court's inability to articulate a coherent exhaustion rule with respect to state administrative remedies in § 1983 cases resulted in a sharp division among the circuits. *See infra* notes 52-54 and accompanying text.

decisions to establish a complete no-exhaustion rule.[52] Other circuits, perhaps best exemplified by the Fifth Circuit's *en banc* decision in *Patsy*,[53] took a more cautious approach by divining a "flexible" exhaustion rule requiring exhaustion of state administrative remedies in the absence of a traditionally recognized exception.[54] In support of this view, the Fifth Circuit in *Patsy* argued that exhaustion furthered

52. The Third, Fourth, Sixth, Eighth and Tenth Circuits adopted a no-exhaustion rule for actions under section 1983. For an examination of the Third Circuit's position, see United States *ex rel.* Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3d Cir. 1977) (section 1983 actions always escape exhaustion of state administrative remedies); Hoch v. Board of Educ., 534 F.2d 1094, 1097 (3d Cir. 1976) (since *McNeese* and its progeny, exhaustion of state administrative agencies is not required). *See also* Record Museum v. Lawrence Township, 481 F. Supp. 768, 772 (D.N.J. 1979) (under section 1983 ". . . state remedies need not be exhausted as a prerequisite to federal jurisdiction").

Fourth Circuit: Davis v. Southeastern Community College, 574 F.2d 1158, 1160 n.4 (4th Cir. 1978) ("precondition to suit" under section 1983 does not include exhaustion of administrative agencies); Strader v. Troy, 571 F.2d 1263, 1269 (4th Cir. 1978) ("exhaustion is not required in actions under section 1983"); McCray v. Burrell, 516 F.2d 357, 364 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976).

Sixth Circuit: Jones v. Metzger, 456 F.2d 854, 856 (6th Cir. 1972) ("Claims for relief under the federal civil rights act are not subject to exhaustion requirements."). *See also* Sambo's of Ohio, Inc. v. City Council of Toledo, 466 F. Supp. 177, 181 (W.D. Ohio 1979) (". . . in an action under section 1983 . . . the plaintiffs are not required to exhaust state remedies"); Jorden v. Johnson, 381 F. Supp. 600, 601 n.1 (E.D. Mich. 1974), *aff'd mem.*, 513 F.2d 631 (6th Cir.), *cert. denied*, 423 U.S. 851 (1975) (". . . the Supreme Court has indicated that no exhaustion requirement should be read into the Civil Rights Act").

Eighth Circuit: Green v. Ten Eych, 572 F.2d 1233, 1240 (8th Cir. 1978) ("The Eighth Circuit . . . has continued to follow the principle of non-exhaustion of state administrative remedies . . . ."); Simpson v. Weeks, 570 F.2d 240, 241 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979) ("exhaustion of administrative remedies is not a prerequisite to a suit under section 1983"); Wolder v. Rahm, 549 F.2d 543, 544 (8th Cir. 1977) (the district court incorrectly required exhaustion of state administrative remedies).

Tenth Circuit: Clappier v. Flynn, 605 F.2d 519, 528 (10th Cir. 1979) (access to a federal forum is available without first exhausting state administrative remedies in § 1983 cases); Gillette v. McNichols, 517 F.2d 888, 890 (10th Cir. 1975) (". . . exhaustion of state administrative remedies is not required of a party seeking relief under the federal Civil Rights statutes"); Spence v. Latting, 512 F.2d 93, 98 (10th Cir.), *cert. denied*, 423 U.S. 896 (1975) ("the doctrine of exhaustion of remedies . . . is usually inapplicable in a section 1983 action.").

53. 634 F.2d 900 (5th Cir. 1981) (en banc), *rev'd*, 102 S. Ct. 2557 (1982).

54. For a discussion of the Fifth Circuit's decision in *Patsy*, see *supra* notes 11-13 and *infra* notes 55-56 and accompanying text. The First, Second, Seventh and Ninth Circuits adopted a "flexible" approach similar to the Fifth Circuit approach in *Patsy*. For an examination of the relaxed exhaustion approach adopted by the First Circuit,

the notions of federalism and comity,[55] and additionally that the Supreme Court's pronouncements failed to evince a clear rejection of the well-entrenched exhaustion doctrine in section 1983 cases.[56]

On certiorari to the Supreme Court, a majority of the justices rejected the Fifth Circuit's exhaustion analysis and held that section 1983 actions do not require exhaustion of state administrative remedies.[57] While the Court in *Patsy* finally provides a clear and unambiguous expression of its position on the exhaustion requirement, the decision remains curious in light of the Court's prior decisions in this area and the method used by Justice Marshall, the opinion's author, to support the conclusion.[58]

In the first stage of its analysis, the Court determined that prior case precedent supported its no-exhaustion rule.[59] Justice Marshall

---

see Guerro v. Mulhearn, 498 F.2d 1249, 1252 (1st Cir. 1974) (the general rule of no-exhaustion in suits under § 1983 excludes habeas corpus writs from its application).

Second Circuit: Blanton v. State Univ. of New York, 489 F.2d 377, 383-84 (2d Cir. 1973) (exhaustion of state administrative remedies, absent a present exception to the rule, adheres to Supreme Court precedent); James v. Board of Educ., 461 F.2d 566, 570 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972) (". . . a Civil Rights plaintiff must exhaust state administrative remedies"); Eisen v. Eastman, 421 F.2d 560, 567-69 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970) (required exhaustion of administrative remedies, but cautions against "wooden application"). *See also* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1275-77 (1975).

Seventh Circuit: Secret v. Brierton, 584 F.2d 823, 825 (7th Cir. 1978) (prisoners bringing civil rights actions must exhaust administrative remedies); Elmwood Properties, Inc. v. Congelman, 418 F.2d 1025, 1027 (7th Cir. 1969), *cert. denied*, 397 U.S. 1063 (1970) (". . . when . . . an exhaustion of remedies will eliminate any possible constitutional problems, then that route should be followed."). *See also* Campos v. F.C.C., 487 F. Supp. 865, 866 (N.D. Ill. 1980) (only cases subject to exceptions to the exhaustion doctrine avoid its requirement).

Ninth Circuit: Morrison v. Jones, 607 F.2d 1269, 1275 (9th Cir. 1979), *cert. denied*, 446 U.S. 962 (1980) (lack of service of process prevented the requisite exhaustion); Wagle v. Murray, 546 F.2d 1329, 1332 n.10 (9th Cir. 1976), *vacated on other grounds*, 431 U.S. 935 (1977) (applied a no-exhaustion doctrine solely to section 1983 cases involving a license revocation proceeding where the state law does not deprive the respondent of anything until after the proceeding).

The Fifth Circuit was subdivided to create the Eleventh Circuit on Oct. 1, 1981. The "flexible" exhaustion approach created by the Fifth Circuit in *Patsy* was adopted by the new Eleventh Circuit in Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). As a final tally, six circuits favor the "flexible" exhaustion approach, while five favored a complete no-exhaustion approach.

55. 634 F.2d at 903.

56. *See id.* at 905-08.

57. 102 S. Ct. 2557, 2568 (1982).

58. *See infra* notes 59-74 and accompanying text.

59. 102 S. Ct. at 2560.

explained that not since *McNeese* had the Court made exhaustion a prerequisite to section 1983 claims.[60] Interestingly, Justice Marshall cited *McNeese, Gibson*, and *Barry*, along with other cases as support for an established no-exhaustion rule.[61] Conceding that the decision in these cases might be explained on other grounds,[62] Justice Marshall nevertheless declined to discuss the variance in the application of the exhaustion doctrine among these cases.[63] The *Patsy* Court thus ignored the numerous inferences in earlier decision which suggested only limited exceptions to exhaustion of state remedies in section 1983 actions.[64]

The Court next reviewed section 1983's legislative history for expressions of congressional intent.[65] Justice Marshall's perusal of the congressional debates preceding passage of the Civil Rights Act of 1871 uncovered several "recurring themes" which supported a no-exhaustion rule.[66] In particular, the debates demonstrated that Congress had concluded that the states had proven unable and unwilling to protect constitutional rights[67] and, therefore, the protection of such rights resides primarily within the federal courts.[68]

Apparently realizing the tenuous persuasiveness of inferring a basis for its holding from section 1983's legislative history,[69] the Court looked to section 1997e of the Civil Rights of Institutionalized Per-

---

60. *Id.* Justice Marshall wrote that "[b]eginning with *McNeese* . . . we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." *Id.*

61. *Id.*

62. *Id.* Justice Marshall conceded that "[r]espondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*. Therefore, we do not address the question presented in this case as one of first impression." *Id.*

63. *Id.*

64. *See supra* notes 35-51 and accompanying text.

65. 102 S. Ct. at 2561-64.

66. *Id.* at 2561.

67. *Id.* at 2562.

68. *Id.* at 2561-63.

69. *See id.* at 2563-64: "We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies." *Id.*

son's Act[70] for additional support.[71] Congress enacted this statute to ensure that the United States Attorney General had standing to enforce incarcerated individuals' constitutional rights.[72] Section 1997e establishes a limited exhaustion requirement for prisoners bringing a section 1983 action.[73] Justice Marshall reasoned that in enacting the provision Congress tacitly acknowledged that section 1983 actions, unless otherwise qualified by statute, do not require exhaustion of administrative remedies.[74]

Dissenting, Justice Powell drew a quite different conclusion from Congress' enactment of section 1997e.[75] Rather than construing the provision to suggest a no-exhaustion rule in section 1983 cases, Powell contended that the large number of section 1983 actions brought in federal court by state prisoners constituted the primary concern prompting Congress to include section 1997e.[76] In further support of his interpretation of section 1997e's import, Powell noted that Congress had on prior occasions refused to enact legislation providing for a general no-exhaustion rule.[77]

---

70. Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997 (Supp. IV 1980)).

71. 102 S. Ct. at 2564-66.

72. *Id.* at 2564, *citing* Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 787.

73. 102 S. Ct. at 2564.

74. *Id.* Justice Marshall wrote:

> In considering whether an exhaustion requirement should be incorporated into the bill, Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law . . . With the understanding that exhaustion generally is not required, Congress decided to adopt the limited exhaustion requirement of § 1997e . . .

Id.

75. *Id.* at 2577-79.

76. *Id.* at 2578-79.

77. *Id.* at 2579. "Also revealing as to the limited purpose of section 1997e is Congress' consistent refusal to adopt legislation imposing a general no-exhaustion requirement." *Id.*

Justice Powell also argued that the eleventh amendment prohibited Patsy's suit. *Id.* at 2569-76 (Powell, J., dissenting). The eleventh amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Powell concluded that the Board of Regents, as an instrumentality of the State, had not waived its immunity under the eleventh amendment not to be sued in federal court. Powell went on to suggest that, "absent consent, the judicial power of the United States, 'as defined by . . . the Eleventh Amendment, simply does not extend

The majority in *Patsy* reasoned that the paramount role of the federal courts in protecting civil rights convinced Congress to endorse a no-exhaustion rule for section 1983 actions.[78] Despite this conclusion, section 1997e requires prisoners to exhaust administrative claims in some cases before initiating a claim in federal court.[79] Given that section 1997e requires exhaustion, it seems reasonable to conclude that Congress believed that the exhaustion doctrine did not adversely affect the duty of federal courts to protect constitutional rights. The enactment of section 1997e's exhaustion requirement reflects a congressional concern with the overburdening of federal courts resulting from civil rights claims that in many cases could be satisfied through an administrative proceeding. Viewed in this way, the Court's holding only frustrates Congress' desire to limit overcrowding in federal courts by relaxing one of the traditional prerequisites to a section 1983 suit.

The *Patsy* Court attempted to support its no-exhaustion rule for section 1983 cases with prior precedent, legislative history, and recent expressions of congressional intent. The suspect nature of the Court's conclusion is evidenced by its failure to explain adequately inconsistent prior holdings and reliance on a recent congressional expression that signifies a need for exhaustion in civil rights cases. The Court's apparent ill-confidence in the capacity of state administrative agencies to adjudicate civil rights claims may have the practical result of flooding federal dockets with section 1983 claims. Thus, the Court in *Patsy* announced a steadfast rule providing for an inefficient allocation of judicial resources in situations where administrative agencies may possess the ability to justly resolve the issues.

Clark D. Elwood

---

to suits against one of the States' by a citizen of that state." *Id.* at 2574 (Powell, J., dissenting). The eleventh amendment is jurisdictional, thereby allowing the State to raise its defense not to be sued for the first time on appeal, United States v. Sherwood, 312 U.S. 584, 586 (1941). Powell maintained that because of this jurisdictional nature, the Court should have addressed the eleventh amendment issue after the Board raised it in its petition for certiorari, 102 S. Ct. 2557, 2572 (Powell, J., dissenting).

The majority dismissed the eleventh amendment argument in a footnote stating, "where, as here, the Board of Regents expressly requested that we address the exhaustion question and not pass on its potential Eleventh Amendment immunity, and, as a consequence, the parties have not briefed the issue, we deem it appropriate to address the issue that was raised. . . ." *Id.* at 2577 n.19.

78. 102 S. Ct. at 2568.

79. *Id.* at 2565.