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THE PROCEDURAL ASSAULT ON THE WARREN LEGACY: A STUDY IN REPEAL BY INDICTION

Burt Neuborne*†

I. INTRODUCTION

Despite the passing of the Warren Court, its legacy of precedent remains intact. While the current Court's disagreement with Warren precedents has occasionally been explicit,¹ resulting in the overruling or severe limitation of a given decision,² the current Court has more often attacked Warren Court precedents indirectly by dismantling the structure of bench and bar necessary to implement them. Since the practical significance of the Warren legacy depends on the continued interplay between a vigorous civil rights-civil liberties bar and a federal judiciary sensitive to constitutional values, the spate of Supreme Court decisions in recent years threatening that interplay has made it increasingly difficult to transform Warren constitutional theory into practical reality. By limiting access to the federal courts and by weakening the public interest bar, the current Court is successfully undermining the institutional structure which made the Warren era possible and which keeps its surviving precedential legacy viable.

If, as I suggest, the substantive significance of a constitutional precedent depends upon the existence of a bar capable of enforcing it and a bench disposed to implement it, the Burger Court's procedural decisions have dramatically weakened the substantive significance of the body of surviving Warren precedent.

II. THE CORPORATE BAR AS HISTORICAL ANTECEDENT

1882 and 1898 were watershed years in American constitutional history. In 1882, in San Mateo County v. Southern Pacific

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† This paper is dedicated to my friend, Marvin M. Karpatkin, whose death in 1975 deprived the civil liberties bar of its most passionate and tireless voice. We continue to miss him deeply.


Roscoe Conkling argued before the Supreme Court that corporations were persons within the meaning of the due process clause and, thereby, enlisted the not inconsiderable battalions of the corporate bar in the service of the fourteenth amendment.\(^3\) In 1898, in *Smyth v. Ames*,\(^5\) the corporate bar persuaded the Supreme Court that the lower federal courts were the appropriate forums for the initial enforcement of the newly minted constitutional right to substantive due process.\(^6\) By linking a powerful and able cadre of lawyers with an institutionally receptive judicial forum, *San Mateo* and *Smyth* touched off a doctrinal explosion—the era of economic substantive due process.\(^7\)

It is currently fashionable to look back with horror at the bad old days of substantive due process. Certainly, it is not easy to admire decisions like *Lochner v. New York*\(^8\) and *Adkins v. Children's Hospital*\(^9\) and the vision of uncontrolled judicial power which made them possible.\(^10\) Whatever one may think of the merits of the substantive due process cases, however, much of our modern conception of the judiciary's role in enforcing constitutional limitations on governmental power,\(^11\) and all of our current

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4. Although Conkling's argument was initially launched in 1882 when *San Mateo* was initially argued before the Court, it was not explicitly accepted by the Supreme Court until *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). A printed copy of Conkling's argument has been preserved in the Hopkins Railroad Collection of Stanford University, entitled *San Mateo Case, Arguments and Decision*. The classic refutation of the Conkling position is Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *Yale L.J.* 371 (1937).
5. 169 U.S. 466 (1898).
6. Id. at 516. Although the corporate bar's struggle for access to the lower federal courts was tentatively won in *Smyth*, the jurisdictional struggle continued in the celebrated cases of *Ex parte Young*, 209 U.S. 123 (1908), and *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), resulting in total victory for corporate access to the lower federal courts to enforce substantive due process.
7. Graham, supra note 4, at 372.
8. 198 U.S. 45 (1905) (statutory limit on maximum number of hours of employment invalidated as a violation of freedom of contract).
11. *Meyer v. Nebraska*, 262 U.S. 390 (1923), for example, a classic substantive due process case, is the forerunner of much of the evolving law of the right to individual privacy. *See* Warren, *The New Liberty Under the Fourteenth Amendment*, 39 *Harv. L. Rev.* 431 (1925). *See also* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Nor is it merely chance that the first stirring of genuine judicial concern for first amendment values coincided with the apogee of substantive due process. This development can be traced through the following cases: *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United
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conception of the role of the lower federal courts as a forum of first resort for the protection of federal constitutional rights,\textsuperscript{12} is traceable to the romance between corporate lawyers and the federal courts made possible by Roscoe Conkling's coup.

During the era of substantive due process, the corporate bar, without access to the federal courts, would more likely than not have been far less successful in state courts which were increasingly sympathetic to state legislative attempts to regulate the economy.\textsuperscript{13} Conversely, the federal bench, whatever its predisposition, would have been less able to enunciate constitutional doctrine in the absence of the steady stream of fact patterns and legal analyses supplied by a vigorous and talented corporate bar.

Thus, the era of substantive due process provides a classic example of two principal factors which must coalesce as a prerequisite to sustained judicial activism: (1) a vigorous and well trained bar, capable of subjecting courts to constant intellectual pressure and (2) an institutionally receptive bench capable of enunciating and implementing constitutional doctrine in the face of popular dissatisfaction.

In the early years of the twentieth century, neither an organized bar nor an effective judicial forum existed in the civil rights-civil liberties area. Obvious economic constraints rendered the availability of counsel in civil rights-civil liberties cases an accidental phenomenon. Most criminal cases were disposed of in the absence of counsel. Affirmative civil litigation was the exclusive province of unpaid, volunteer counsel. Much is owed to legal pioneers like Clarence Darrow, Osmond Fraenkel, Charles Hous-

\textsuperscript{12} The current model of the role of the federal district courts as protectors of federal constitutional rights against state encroachment stems from the successful efforts of the corporate bar to enforce substantive due process rights in federal district court. See, e.g., Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Silver v. Louisville & N.R.R., 213 U.S. 175 (1909); \textit{Ex parte} Young, 209 U.S. 123 (1908).

\textsuperscript{13} Consider, for example, the litigation strategy of the Attorney General of Minnesota in \textit{Ex parte} Young, 209 U.S. 123 (1908), and the Los Angeles City Attorney in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), which sought to funnel substantive due process challenges into state rather than federal courts. See also Barney v. City of New York, 193 U.S. 430 (1904), where such litigation strategy was successful.
ton, William Hastie, Arthur Garfield Hays, and, most recently, Marvin Karpatkin, whose volunteer efforts secured rights for thousands of powerless persons. Reliance on volunteer counsel, however, had its obvious limitations. Availability was sporadic, and apart from the few dedicated giants, quality was uneven. More important, a volunteer civil rights and civil liberties bar, lacking an economic base, was unable to generate a substantial volume of litigation and thus was unable to exert sustained intellectual pressure on the judiciary. Since legal doctrine grows incrementally, the absence of a sustained volume of cases was a critical handicap in the development of civil rights doctrine.\footnote{Contrary to popular assumption, advances in constitutional doctrine rarely, if ever, spring from an isolated case. Rather, they are the cumulative result of numerous prior cases impinging on a given court. There should be a special award for the last lawyer to advance a newly emerging argument unsuccessfully, for without the cases which have gone before, the ultimate doctrinal breakthrough would rarely, if ever, occur.}

Moreover, prior to the Second World War, primary responsibility for the initial judicial enforcement of constitutional values in the civil rights and civil liberties area rested with state courts, staffed by judges traditionally less responsive to politically unpopular federal constitutional norms than their federal counterparts. The predictable consequence of a virtually nonexistent public interest bar\footnote{As used in this article, the concept of public interest bar includes an ideologically oriented practice in which attorneys seek to advance certain values which they deem particularly important. Generally, their fees are substantially lower than the prevailing rate for legal services.} and a skeptical judicial forum was the extremely slow growth of constitutional doctrine. By 1960, however, two dramatic changes had occurred on the American legal landscape.

First, a full-time, professionalized, public interest bar had emerged.\footnote{16. J. Casper, Lawyers Before the Warren Court 109-14 (1972).} The recognition of the right to appointed counsel in criminal proceedings, culminating in \textit{Gideon v. Wainwright},\footnote{17. 372 U.S. 335 (1963). The right to appointed counsel in criminal cases may be traced through Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in state proceedings whenever imprisonment possible); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in state felony cases); Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel in all federal criminal prosecutions); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in capital cases).} and the increasing complexity of criminal practice caused by the reform decisions of the Warren Court resulted in the emergence of a body of sophisticated, publicly supported lawyers who eschewed traditional careers in favor of an ideologically moti-
vated commitment to public interest law. Moreover, the legal and emotional climate of the Warren years stimulated young lawyers to attempt full-time careers as public interest lawyers seeking to implement the Warren vision of the law as an engine of social reform.\textsuperscript{18} The newly emergent public interest bar confronted the judiciary with a barrage of fact patterns and legal analyses which, for the first time, subjected judges to sustained intellectual pressure comparable to the pressure maintained by the corporate bar in support of its constituency.

Second, in response to the efforts of the public interest bar, the Supreme Court shifted the locus of decisionmaking in the area of personal constitutional rights from state courts to federal district courts. The demise in \textit{Monroe v. Pape}\textsuperscript{18} of Justice Frankfurter's insistence that state judicial remedies be exhausted prior to filing a federal civil rights complaint\textsuperscript{20} and the recognition in \textit{Fay v. Noia}\textsuperscript{21} of the primacy of lower federal courts in the enforcement of federal constitutional doctrine, provided access for the public bar to an institutionally receptive judicial forum uniquely suited to the implementation of politically unpopular federal constitutional norms.

Thus, by 1963 the configuration of bench and bar which had coalesced in 1900 to bring about the era of substantive due process had emerged once again, this time in the area of civil liberties. The result was a second doctrinal explosion which completely altered the face of constitutional law in America.

The era of substantive due process ended with its ultimate rejection on the merits by the New Deal Supreme Court. Apparently, no such fate awaits the Warren era. Instead, the current Court is embarked upon a more subtle course of repeal by indirection by undermining the configuration of bench and bar which is a precondition to effective enforcement of the Warren precedents. First, the Supreme Court has severely restricted access to the federal district courts by aggrieved individuals; second, the Court has limited the ability of a district court to provide effective

\textsuperscript{18} Obviously, lawyers embarking on a public interest law career owe an enormous debt to the pioneering efforts of the full-time legal staff of the NAACP and the volunteer legal resources of the ACLU, which provided both an organizational model and a benchmark of quality.

\textsuperscript{19} 365 U.S. 167 (1961).

\textsuperscript{20} For the development of Justice Frankfurter's views, see Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting); Snowden v. Hughes, 321 U.S. 1, 13 (1943) (Frankfurter, J., concurring); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941); Lane v. Wilson, 307 U.S. 268 (1939).

\textsuperscript{21} 372 U.S. 391 (1963).
remedies; and, third, the Court has struck a blow at the continued existence of a vigorous public bar by denying federal courts the power to award attorneys' fees in many cases.

III. Restrictions on Access to the Federal Courts

Attorneys seeking to protect federal constitutional rights against state encroachment are generally in agreement that federal courts provide the most effective forum for obtaining such relief. Thus, whether the plaintiff was a slaveholder seeking judicial enforcement of article IV, section 2 (the fugitive slave clause) in 1842, a freedman seeking enforcement of the fifteenth amendment in 1903, a corporation seeking enforcement of substantive due process in 1908, or a modern protestors seeking to enforce the first amendment in 1974 or in 1939, he has sought immediate access to the lower federal courts in the belief that the lower federal courts would provide the most effective forum in which to enforce a provision of the Constitution of the United States against state or local encroachment. An extended explanation for the heightened sensitivity of the federal courts to federal constitutional doctrine lies beyond the scope of this article.

22. Such a sweeping generalization is, of course, subject to qualification when applied to given courts and issues. Thus, for example, civil rights litigators in California have long viewed the California Supreme Court as a sympathetic forum, while the track record of the Court of Appeals for the Ninth Circuit has been less than encouraging. Similarly, state courts, construing their own constitutions, may find substantive rights not present in the Supreme Court's reading of the Constitution. Compare Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971), and Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976), with San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). Under such circumstances, resort to state court is obviously preferable. In the majority of situations, however, the generalization represents the considered judgment of the civil rights bar. For a discussion of the use of state courts as a primary forum for the protection of constitutional rights, see Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).


25. See, e.g., Ex parte Young, 209 U.S. 123 (1908).


27. The comparative advantage in constitutional enforcement exhibited by the federal trial bench over their state trial counterparts is attributable, in large part, to two elements present in constitutional adjudication. First, constitutional doctrine is likely to be extremely complex and difficult to apply. Second, a decision in favor of a constitutional claim will often force a court into a confrontation posture with a democratically chosen branch of the state government. Such confrontations often will find a court forced to appear to espouse a politically unpopular position. Given the institutional makeup of the state and federal trial benches, it should come as no surprise that federal trial courts struggle with such problems far more effectively than do their state brethren. For a discussion of the relative efficacy of state and federal trial courts as constitutional enforcement mechanisms, see Neuborne, The Myth of Parity, 90 Harv. L. Rev. (forthcoming 1977).
has been historically true, nevertheless, and it remains the fixed belief of most experienced civil rights lawyers, that ready access to a federal forum is of critical importance to the vigorous enforcement of federal constitutional rights. It is that ready access which has been the particular target of the current Supreme Court.

A. Standing and Causation-in-Fact

Until the 1972 Term of the Supreme Court, a majority endorsed a view of standing which posed little or no obstacle to the effective litigation of constitutional cases in the federal district courts. Standing was perceived as a convenient functional device to insure that litigants before the court were sufficiently motivated by self-interest to assure a vigorous adversary presentation of the issues. Beginning with Sierra Club v. Morton and

At the outset, it should be noted that the institutional comparison should not be between federal trial courts and state appellate courts, since corrective state appellate work, even if available, is no substitute for effective implementation of constitutional rights at the trial level. Thus, the appropriate point of comparison is between federal district judges and their counterparts on the state trial bench. When such a comparison is made, the advantages of the federal bench become apparent.

First, the federal trial judge is appointed for life and is free from majoritarian pressures in carrying out his functions. Many state trial judges, on the other hand, are elected, forcing judges to decide politically charged issues in a constitutional case against the background of potential majoritarian reprisal. Moreover, even those state trial judges who are appointed, ordinarily do not serve for life and are the appointive products of a local political structure with a strong institutional receptivity to perceived majoritarian wishes.

Second, the federal bench, because it is relatively small, maintains a level of competence in its appointee pool which, quite simply, dwarfs the competence level of the state pool. There are more judges in Southern California than in the entire federal system. As in any bureaucracy, it is easier to maintain quality levels when appointing a small number of officials than when staffing an enormous department.

Third, the elite tradition of the federal courts, although intangible, creates an elan and sense of responsibility and collegiality which Chief Judge Friendly has correctly identified as exerting a palpable influence on the quality of its work.

Fourth, although it is often overlooked, the mode of clerking exerts a significant impact on the quality and nature of judicial output. The traditional federal clerking pattern exposes federal judges to a steady flow of the brightest, most promising, recent graduates, while state trial clerks, when available at all, tend to be career bureaucrats, lacking the competence and idealism of federal clerks.

Fifth, docket pressures, although difficult in the federal system, are generally far more critical in state trial courts. See generally Neuborne, The Myth of Parity, 90 Harv. L. Rev. (forthcoming 1977).

29. See, e.g., Baker v. Carr, 369 U.S. 186, 204 (1962). The most vigorous articulation of standing as a functional aid in the proper operation of the adversary process (as opposed to a necessary outgrowth of the separation of powers) occurred in Flast v. Cohen, 392 U.S. 83 (1968), when Chief Justice Warren declared:

The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to
Laird v. Tatum, however, a majority of the Court adopted Justice Harlan's vision of standing as an incident of the separation of powers flowing directly from John Marshall's defense of judicial review, rather than the Warren-Douglas view of standing as merely a functional aid to concrete presentation of the issues. The Court's increasing preoccupation with standing as a barrier to judicial review culminated in Warth v. Seldin and Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO) when a majority of the Court dramatically restricted the category of persons who may complain to the federal courts about allegedly unlawful conduct.

In Warth five members of the Court ruled that minority residents of a ghetto in Rochester, New York, lacked standing to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

Id. at 100-01. The current Court has rejected Chief Justice Warren's assertion and instead views standing as quintessentially a problem in the separation of powers, flowing directly from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The most articulate expression of the current Court's view of the relationship between standing and separation of powers was enunciated in Justice Powell's concurrence in United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring).

31. 408 U.S. 1 (1972) (allegation of chilling of first amendment rights by Army surveillance of civilians failed to show injury in fact).

In large part, the renascence of standing as a separation of powers concept stems from the failure of the activist bar to have evolved an acceptable theory of judicial review which would free the process from the constraints of the model posed by John Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). So long as the Marbury model served as the primary apology for the phenomenon of judicial review, a renewed concern with separation of powers was virtually inevitable. Whether, after 174 years of judicial review John Marshall's rather strained defense of the practice remains its only justification seems questionable. Until an alternative theory of judicial review is advanced, however, which rationalizes the exercise of power by judges in broader terms, standing will continue to be properly analyzed as an incident of the separation of powers. Of course, to agree with Justice Powell that standing is a doctrine made necessary by separation of powers is not necessarily to agree with his application of the doctrine in particular cases.

33. For the Warren-Douglas view, see note 29 supra.
34. 422 U.S. 490 (1975).
challenge an alleged pattern of exclusionary suburban zoning practices because the named plaintiffs were unable to point to a specific housing project in which they might have resided but for the challenged zoning practices. Of course, the very existence of exclusionary zoning impeded any attempts at planning or constructing such housing, reducing Warth to a crude exercise in Catch-22.

In EKWRO the Court ruled that indigent persons who had been denied treatment by a private hospital lacked standing to challenge the legality of an Internal Revenue Service ruling which afforded the benefits of a "charitable" tax status to a private hospital despite the failure of the hospital to provide care to the poor. Once again, as in Warth, the Court reasoned that the plaintiffs lacked standing because they could not demonstrate that but for the challenged Internal Revenue Service ruling they would have received increased hospital care. Thus Warth and EKWRO appear to require civil rights plaintiffs to demonstrate, in order to establish standing, that the injury of which they complain was actually and wholly caused by the allegedly unlawful act they challenge.

A serious issue is raised by requiring the plaintiff in a civil rights case to prove that a defendant's allegedly unlawful acts were the sole cause of plaintiff's injury, either as a prerequisite to relief on the merits or as a requirement of standing. In order to recover on the merits in a traditional tort setting, a plaintiff must merely present some evidence that a defendant's acts were a substantial factor in causing his injury, leaving the ultimate decision on causation-in-fact to the finder of fact. Moreover, in making its decision on causation, the finder of fact is authorized to use common or ordinary experience in determining whether the

36. 422 U.S. 490, 516-17 (1975).
38. Id. at 45. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (EKWRO), is more ominous than Warth v. Seldin, 422 U.S. 490 (1975), since it purports to be compelled by article I limitations on the power of a federal court, rather than by the prudential considerations stressed by Justice Harlan in his dissent in Flast v. Cohen, 392 U.S. 83, 116 (1968), or by Justice Powell in his concurrence in United States v. Richardson, 418 U.S. 166, 180 (1974), and his opinion in Warth. While prudentially based decisions are subject to congressional reversal and are rather easily discarded by future Courts, a decision based on article III limitations on the federal judiciary is more likely to have a lasting impact.

existence of Fact A is likely to play a substantial factor in the occurrence of Fact B. Indeed, given the wrongful nature of the defendants' alleged activities in Warth and EKWRO, it is entirely possible that properly applied tort principles would justify a shift in the burdens of production and persuasion on the issue of causation-in-fact to the defendants. Finally, it is clear that if a defendant's acts were a substantial contributing cause of an injury, traditional tort principles would recognize the liability of the "partial" tortfeasor for the entire injury, so long as the causation relationship was "substantial." Thus, while the exclusionary zoning at issue in Warth might not have been the sole cause of residential segregation in Rochester's suburbs, and the change in tax policy at issue in EKWRO might not have been the sole cause of the failure of proprietary hospitals to deliver health services to the poor, both were clearly contributing causes which a finder of fact would have been entitled to treat as "substantial factors" in causing the plaintiff's injury. Accordingly, when measured against traditional tort principles, Warth and EKWRO impose a far more stringent causation burden on plaintiffs seeking constitutional redress in the federal courts than the causation burden imposed on a typical tort plaintiff. That such a stringent causation rule for recovery on the merits should exist in constitutional cases is unfortunate and probably incorrect; that such a stringent causation test should govern constitutional standing requirements is insupportable. Whatever one's views concerning

40. Id.
41. Most cases which have shifted the production burden on causation-in-fact have involved joint defendants, all of which acted wrongfully. See, e.g., Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927). See generally W. PROSSER, supra note 39, ch. 7, § 41, at 243. See also Clark v. Gibbons, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967) (res ipsa loquitur used to achieve a shift in the production burden). Where, as in civil rights cases, a defendant is alleged to have engaged in socially undesirable activity, a similar shift of the production burden on causation-in-fact would appear entirely appropriate. A similar process occurs in cases alleging racial discrimination where the mere assertion of statistical disparity acts to shift the production burden to the defendant. See, e.g., Castaneda v. Partida, 524 F.2d 481 (5th Cir. 1975) cert. granted, 96 S. Ct. 2846 (1976). Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), aff'd, 461 F.2d 1171 (5th Cir. 1971) (en banc).

42. Thus, Prosser notes that "if the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present." PROSSER, supra note 39, ch. 7, § 41, at 240. Prosser also notes that "instructions to the jury that they must find defendant's conduct to be 'the sole cause' or the 'proximate cause' of the injury are rightly condemned as misleading error." Id. ch. 7, § 41, at 239.
the appropriate standard of causation in constitutional cases, it is clear that causation-in-fact is an issue which goes to the merits of the question and not to the standing of the plaintiffs, and which should be decided by the finder of fact after a plenary trial. For the purposes of satisfying the threshold question of standing, no more than arguable causation should be required.\textsuperscript{43}

The unduly narrow vision of standing which emerges from cases such as \textit{Warth} and \textit{EKWRO} severely impedes the capacity of aggrieved persons to seek federal judicial review of allegedly unlawful activity. In the wake of such cases, many Americans suffer grievances but lack access to a federal court in order to seek orderly redress.\textsuperscript{44}

\textsuperscript{43} It is possible to read \textit{Warth} v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (\textit{EKWRO}), as refusals to consider requests for equitable relief in the absence of a showing that judicial intervention would alleviate plaintiff's plight. If \textit{Warth} and \textit{EKWRO} are disguised equitable remedies cases, it is doubly unfortunate to have characterized them as standing cases. Of what relevance is the probable efficacy of equitable relief to the question of damages or the possible issuance of a declaratory judgment? Yet, viewed as standing cases, \textit{Warth} and \textit{EKWRO} block a court from granting any relief, not merely ineffectual equitable relief. Moreover, it is a strange rule of law which precludes a court from grappling with unconstitutional activity merely because judicial intervention cannot guarantee complete alleviation of the problem. Taken to its extreme, such a doctrine would prevent federal courts from granting relief in public school desegregation cases whenever whites were likely to withdraw into segregated private academies, since the court's decree could not result in an integrated public school.

Finally, it may well be a futile exercise to seek a principled basis for cases like \textit{Warth} and \textit{EKWRO}, which may stand for nothing more than the refusal of a majority of the current Supreme Court to get involved in cases challenging exclusionary zoning or the tax structure. Standing may simply be the convenient straw grasped by the Court to avoid being drawn into areas it wishes to avoid. Compare Bickel, \textit{The Supreme Court, 1960 Term—Foreword: The Passive Virtues}, 75 \textit{Harv. L. Rev.} 40 (1961), with Gunther, \textit{The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review}, 64 \textit{Colum. L. Rev.} 1 (1964).

\textsuperscript{44} See also Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). Ironically, when confronted by plaintiffs advancing claims with which it is in substantive sympathy, the current Court is extremely liberal in finding standing. See, e.g., Craig v. Boren, 42 U.S.L.W. 4057 (Dec. 20, 1976) (vendors of 3.2 beer have standing to raise purchasers' rights); Singleton v. Wulff, 96 S. Ct. 2868 (1976) (doctors have standing to raise patients' rights); Procuin v. Martinez, 416 U.S. 396 (1974) (prison inmate has standing to raise rights of persons with whom he corresponds); Eisenstadt v. Baird, 405 U.S. 438 (1972) (seller of contraceptives has standing to raise rights of users). Furthermore, the facial overbreadth and vagueness doctrines continue to flourish in the first amendment area despite the Court's increased preoccupation with standing. See, e.g., Hynes v. Mayor & Council, 425 U.S. 610 (1976) (invalidating statute as facially vague); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (invalidating statute as facially overbroad). But see Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976). In non-first amendment contexts, vagueness and overbreadth claims have been conspicuously unsuccessful. See, e.g., United States v. Powell, 423 U.S. 87 (1975); Parker v. Levy, 417 U.S. 733 (1974).
B. Exhaustion of State Judicial Remedies

1. The Evolution of the Nonexhaustion Model

For ninety years after its enactment, the Civil Rights Act of 1871 was crippled by a series of conceptually based doctrinal disputes which required many plaintiffs to exhaust state judicial remedies as a prerequisite to seeking civil rights relief in the federal courts. During this period, the Supreme Court was confronted with three recurring fact patterns. In Case I situations, plaintiffs alleged that a state or local official, acting pursuant to or in compliance with unambiguous state law, had committed acts which violated plaintiff's federal constitutional rights. In Case II situations, plaintiffs alleged that a state or local official, purportedly acting pursuant to or in compliance with state law, but arguably acting in violation of state law, had committed acts which violated plaintiff's federal constitutional rights. In Case III situations, plaintiffs alleged that a state or local official, acting contrary to state law, had committed acts which violated a plaintiff's federal constitutional rights.

In Ex parte Young and Home Telephone & Telegraph Co. v. City of Los Angeles, the Supreme Court resolved Case I situations in favor of immediate access to the lower federal courts and

45. The modern codification of the Civil Rights Act of 1871 appears in 42 U.S.C. § 1983 (1970), which provides:

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


46. Celebrated examples of Case I situations are Lane v. Wilson, 307 U.S. 268 (1939); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); and Ex parte Young, 209 U.S. 123 (1908).

47. The paradigm Case II example is Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). See also Barney v. City of New York, 193 U.S. 430 (1904).


49. 473 F.2d 1090 (2d Cir. 1973).

50. 453 F.2d 1078 (2d Cir. 1972).
against a requirement of exhaustion of state judicial remedies.\textsuperscript{51} In both cases, however, the exhaustion issue was initially approached by the Court in a highly conceptual manner, setting an unfortunate intellectual precedent for future consideration of the exhaustion issue in \textit{Case II} and \textit{Case III} settings. Instead of openly confronting the exhaustion issue as one of policy and judicial discretion, the Court initially allowed the issue to turn on a highly conceptual definition of state action. Pursuant to the early \textit{Case I} analyses, if the challenged act constituted "state action," the prerequisites of the fourteenth amendment were satisfied and immediate access to a federal court was permissible. If, however, the challenged act failed to constitute state action, no cause of action existed under the fourteenth amendment and access to federal court was denied.\textsuperscript{52} Since, in a \textit{Case I} setting, little or no

\textsuperscript{51} In place of an exhaustion doctrine, Congress in the wake of \textit{Ex parte Young}, 209 U.S. 123 (1908), sought to serve values of federalism by prohibiting a single federal judge from issuing preliminary injunctive relief against a state regulatory statute on the basis of its unconstitutionality. Instead, the state statute was to be considered by a statutory three-judge court, with a direct appeal to the Supreme Court. The three-judge court requirement was extended in 1925 to permanent, as well as preliminary, injunctions. In 1948, 28 U.S.C. §§ 2281-2284 were codified in their final form.

Ironically, during the Warren era, the three-judge court, with its direct appeal to the Supreme Court, was widely employed as a device to enforce expansive notions of federal constitutional law upon recalcitrant states. The chequered history of the three-judge court in constitutional litigation was finally ended by the repeal, in August 1976, of three-judge court requirements in all but a few areas of law. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

\textsuperscript{52} Since the early \textit{Case I} situations involved causes of action arising directly out of the fourteenth amendment, no issue of congressional intent was presented. No attempt was made in the early \textit{Case I} situations to use the Civil Rights Act of 1871 as a cause of action because contemporaneous construction confined its scope to personal rather than property rights. See, e.g., Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900). Such a dichotomy between personal and property rights was rejected by the Supreme Court in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972). In looking directly to the fourteenth amendment as a cause of action for injunctive relief, cases such as \textit{Ex parte Young}, 209 U.S. 123 (1908), and Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), anticipated the Supreme Court's analysis in \textit{Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics}, 403 U.S. 388 (1971), when the fourteenth amendment was deemed to afford a cause of action for damages.

\textsuperscript{53} Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), was an ingenious attempt to inject an element of conceptual uncertainty into even \textit{Case I} settings. In \textit{Home Telephone} the plaintiff corporation mounted a substantive due process challenge in federal court against a rate schedule promulgated by the City of Los Angeles. The City, noting that only "state action" was properly cognizable by the federal courts under a cause of action springing directly from the fourteenth amendment, and noting that action in excess of constitutional authority had been deemed not to be state action for eleventh amendment purposes in \textit{Ex parte Young}, argued that if its rate schedule was violative of the federal constitution it was also violative of the identically worded due process clause of the California Constitution, and thus could not constitute "state action." The City
question exists concerning the state’s authorization of the challenged act, “state action” was clearly present in the early cases and exhaustion of state judicial remedies was deemed unnecessary. Thus, in *Lane v. Wilson*, Justice Frankfurter recognized no need to exhaust state judicial remedies prior to launching a federal challenge against allegedly unconstitutional actions taken pursuant to Oklahoma’s grandfather clause. Under the conceptual “state action” approach in *Case II* or *Case III* settings, however, serious issues of authorization under state law are almost always present—arguably rendering initial resort to state court necessary to determine whether the challenged acts are, in fact, state action.

In *Railroad Commission v. Pullman Co.*, Justice Frankfurter resolved a *Case II* situation in favor of exhaustion of state judicial remedies and against immediate access to federal courts. If the conceptual approach of *Ex parte Young* and *Home Telephone* is applied to *Case II* situations, exhaustion is required to clarify whether the challenged act was, in fact, authorized by the state. If the state judicial process deems the act to have been authorized by, or in compliance with, state law, state action is present and resort to federal court becomes appropriate. If, however, the state judicial process deems the act to have been unauthorized by, or in violation of, state law, resort to federal court becomes both unnecessary (since relief has been obtained under state law) and unavailable (since state action is lacking).

Under a less conceptual approach, *Pullman* abstention (*Case II* exhaustion) is justified by a preference for the avoidance of constitutional questions which requires a federal court to defer constitutional decisionmaking pending an exploration of possible nonconstitutional bases of decision in state court.

suggested that the plaintiff corporation’s only recourse was a challenge to the rate schedule in state court, with resort to federal court possible only if the state court upheld the rates under the California Constitution. The Court rejected the City’s argument, ruling that an act which is authorized under positive state law is “state action” regardless of whether it violates a state constitutional provision worded identically to its federal counterpart. The poverty of the purely conceptual approach to the exhaustion problem is revealed by the inability of the Court to deal satisfactorily with Los Angeles’ arguments in purely conceptual terms. Compare Chief Justice Burger’s abstention position discussed in the text accompanying notes 62-69 *infra*, with the position of the City of Los Angeles in *Home Telephone*.

55. *312 U.S. 496* (1941).
57. Under either explanation of *Pullman* abstention, a civil rights litigant is not...
In *Monroe v. Pape*, the Supreme Court, rejecting the conceptual approach urged by Justice Frankfurter, resolved Case III situations in favor of immediate access to federal courts and against a requirement of exhaustion of state judicial remedies. Eight members of the Court in *Monroe* rejected Justice Frankfurter's insistence that an official's act in violation of state law could not be deemed the action of the state for the purposes of constitutional adjudication. Instead, the majority construed section 1983 as authorizing immediate resort to a federal judicial forum whenever an official clothed with state power acts in derogation of federal constitutional rights, regardless of whether the official's acts violate positive state law as well. Thus, *Monroe* rejected the conceptual mold into which exhaustion analysis had

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59. More precisely, Justice Frankfurter argued in his dissent in *Monroe v. Pape*, 365 U.S. 167, 202 (1961), that actions in violation of state positive law could not be deemed actions "under color of state law" within the meaning of 42 U.S.C. § 1983. Since *Ex parte Young*, 209 U.S. 123 (1908), *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), and *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941), had all been brought on the basis of causes of action springing directly from the Constitution, *Monroe* was the Supreme Court's first occasion to consider the issue in the context of a congressionally created cause of action, although a similar question had been resolved in favor of an expansive reading of federal judicial power over criminal cases in *Screws v. United States*, 325 U.S. 91 (1945), and *United States v. Classic*, 313 U.S. 299 (1941). Little attempt has been made to explore whether any difference exists between the concept of state action required to support a cause of action founded directly on the fourteenth amendment and the concept "under color of state law" used in 42 U.S.C. § 1983. Orthodox analysis tends to equate the two concepts. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). It is conceivable, however, that "under color of state law" as construed by the *Monroe* majority is broader than the unadorned "state action" needed for constitutionally based causes of action. The possible distinction will take on practical significance if causes of action modeled on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), are recognized against entities which would not constitute "persons" under 42 U.S.C. § 1983. Since *Monroe* purports to be nothing more than a statutory construction case, the extent to which *Case II* and *Case III* settings constitute state action for the purposes of a *Bivens* cause of action sounding directly in the Constitution remains an open question.
been cast since *Ex parte Young*. In its place the Court in *Monroe* substituted a policy-oriented analysis which looked not to concepts of state action, but rather to the practical effect which exhaustion would have on the role of the lower federal courts as effective forums for the protection of constitutional rights. By enabling civil rights litigants to invoke section 1983 as a vehicle to gain immediate access to a federal forum for the adjudication of federal constitutional questions, *Monroe* became the lynchpin of modern constitutional litigation. As such, it has been a target of the recent Court's systematic attempt to reimpose an exhaustion requirement on civil rights litigants.

2. The Assault on the Nonexhaustion Model
   a. Chief Justice Burger's Expanded Vision of Abstention

Justice Frankfurter's dissent in *Monroe v. Pape* was no aberration. A significant tension exists between *Monroe's* assertion that state law remedies are irrelevant to section 1983 jurisdiction and the vision of federal jurisdiction which underlay Justice Frankfurter's decision in *Railroad Commission v. Pullman Co.*

Under a *Pullman* analysis, state courts are expected to play a significant role in determining whether a state law defense exists to the challenged official action and only if no such state law defense exists is a federal court to proceed to adjudicate the federal constitutional question. Under a *Monroe* regime, however, state courts play no role in applying state law and are bypassed by immediate access to a supervening federal forum.

If conceptual notions of state action are applied, *Pullman* declines to permit a federal court to adjudicate a constitutional claim until the uncertainty surrounding state authorization of the challenged act has been clarified by resort to state court. *Monroe*, on the other hand, authorizes adjudication of constitutional claims arising out of challenged acts which are clearly unauthorized by state law. If clearly unauthorized acts may be challenged immediately in federal court under *Monroe*, it is difficult to explain why actions merely of uncertain authorization should not present an *a fortiori* case for immediate federal adjudication.

If the preference for a nonconstitutional basis of decision-making is applied, *Pullman* requires a federal court to stay its hand while possible nonconstitutional state remedies are ex-

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61. 312 U.S. 496 (1941).
plored. Conversely, Monroe authorizes immediate federal adjudication despite the conceded existence of nonconstitutionally based state remedies. It seems anomalous, at the very least, to continue to require a Pullman plaintiff to pursue state remedies which may not exist, while authorizing a Monroe plaintiff to ignore state remedies which concededly do exist.

Throughout the Warren years an uneasy truce existed between Pullman and Monroe which called for exhaustion of state judicial remedies in Case II (Pullman) situations, but which exempted plaintiffs from exhaustion in Case I and Case III. Chief Justice Burger, perceiving the latent conflict between Pullman and Monroe, quickly attacked the uneasy truce and sought to use Pullman as a device to impose exhaustion on both Case I and Case III settings. Chief Justice Burger argued that since a primary purpose of the Pullman abstention doctrine was the avoidance of unnecessary federal constitutional adjudication, whenever a state law claim exists which would permit resolution of a case on nonconstitutional grounds, a federal court should abstain to permit state court exploration of the potential for a nonconstitutional basis of decision. In his dissent in Wisconsin v. Constantineau, Chief Justice Burger urged that the possibility of resolving a federal constitutional challenge on state constitutional grounds warranted abstention to permit state courts to pass on the state constitutional issue. Since most federal constitutional claims enjoy a state constitutional analogue, the Chief Justice's expanded vision of abstention would have required exhaustion of state judicial remedies in virtually every constitutional case brought under section 1983. Although the Chief Justice's abstention-exhaustion thesis appeared to ignore notions of federal jurisdiction settled since Home Telephone, it gained three adherents in its initial airing in Constantineau. In Harris County Commissioners Court v. Moore and Boehning v. Indiana State Employees Association, it appeared to gain strength when a majority of the Court required federal courts to abstain from deciding federal constitutional questions in order to permit state court exploration of potential state constitutional remedies. For-
Fortunately, however, the drift toward using abstention as a disguised basis for overruling *Monroe* came to an abrupt halt in *Examining Board of Engineers v. Otero* when a unanimous Court ruled that abstention was inappropriate merely to permit Puerto Rican Commonwealth courts to explore whether the exclusion of aliens from certain professions violated the equal protection clause of the Puerto Rican, as well as the United States, Constitution.

Thus, despite the Chief Justice's efforts, the uneasy truce between *Pullman* and *Monroe* remains in effect, with exhaustion of state judicial remedies required only in a *Case II* setting under the rubric of abstention. Under prevailing standards, when a challenged act may be in violation of state law or may be in excess of an official's authority as defined by state statute, *Pullman* requires abstention in order to exhaust possible state judicial remedies sounding in the state law in question. When a challenged act is clearly in violation of state law or is in excess of an official's statutorily defined authority, no abstention is required and no resort to state courts becomes necessary. The anomalous result of the uneasy truce, therefore, is to require exhaustion only of those state remedies which may not exist, but not to require exhaustion of those state remedies which certainly do exist.

In a case involving the discharge of a public school teacher in order to permit exploration of its validity under the "arbitrary and capricious" clause of the Indiana Constitution. Thus, the state constitutional provisions were not mere analogues of the federal right. Whether such cases involve the recognition of a new variant of *Case II* remains an open question. It is difficult to reconcile such a variant with *Monroe*.

66. 96 S. Ct. 2264 (1976).

67. Justice Rehnquist dissented on the merits of the case, but not on the question of jurisdiction.

68. Since the challenged activity in *Examining Bd. of Eng'rs v. Otero*, 96 S. Ct. 2264 (1976), was pursuant to clear authority under Puerto Rican statutory law, *Otero* is a classic *Case I* situation. Presumably, the Court's refusal to order abstention in *Otero* to permit exploration of a state constitutional remedy which is the analogue of the federal remedy will apply in *Case III* settings as well.

69. If exhaustion of clearly available remedies is not required under *Monroe v. Pape*, 365 U.S. 167 (1961), it is difficult to understand why exhaustion of concededly problematic remedies should be required under *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Perhaps the continued vitality of *Pullman* in *Case II* settings, despite its analytical incompatibility with *Monroe*, may be attributable to the increasing frequency of facial challenges to state statutes. If state laws are to be struck down by federal courts as facially invalid, some mechanism must exist to doublecheck the actual reach of the challenged statute, to say nothing of permitting state courts to save portions of the statute by a narrowing construction. Abstention in *Case II* settings provides just such a mechanism. Where the federal challenge is not based, however, on a facial unconstitutionality theory, but on an "as applied" analysis, less need for such a mechanism exists.
b. Justice Rehnquist’s Vision of Comity and Preclusion

i. Comity as an exhaustion device

The Chief Justice’s abstention assault on Monroe was a frontal one. Once its implications as a disguised exhaustion doctrine were perceived, it was rejected by the full Court. Justice Rehnquist’s assault on Monroe has been less obvious, but more dangerous. While the Burger abstention position would have resurrected and expanded Justice Frankfurter’s notion that exhaustion of available state judicial remedies is a prerequisite to constitutional adjudication in a federal court, it would have served merely to delay, not to preclude, federal adjudication of constitutional issues. Justice Rehnquist’s comity position, on the other hand, imposes a jurisdictional barrier on federal constitutional adjudication which not only defers adjudication pending exhaustion of state judicial remedies, but actually threatens to preclude a federal court from even a deferred adjudication.

Comity as a modern bar to federal constitutional adjudication flows from Younger v. Harris. Younger merely codified what most civil rights lawyers believed was compelled by 28 U.S.C. § 2283—and inherent in our federal system—that once a state criminal proceeding was underway, the action could neither be

70. 401 U.S. 37 (1971).
71. 28 U.S.C. § 2283 (1970) provides: “A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

Ironically, in Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court ruled that civil rights actions pursuant to 42 U.S.C. § 1983 were exceptions to the anti-injunction provisions of 28 U.S.C. § 2283. Thus, the Younger comity bar to interference with pending state criminal proceedings is based solely on amorphous notions of federalism.
removed to federal court nor be enjoined by a federal judge in the absence of extraordinary circumstances. Phrased in its initial form, therefore, the Younger comity bar merely required a state criminal defendant in a pending trial to exhaust state judicial remedies prior to seeking federal constitutional review pursuant to habeas corpus. Since that had long been the law, Younger did not pose a serious threat to Monroe and was consistent with Fay v. Noia.

Justice Rehnquist has not been content, however, to permit Younger to play such a modest role. Under his guidance, the doctrine has been expanded to impose the spectre of an exhaustion requirement across a wide variety of potential cases.

In Huffman v. Pursue, Ltd., Justice Rehnquist, writing for the Court, applied the Younger comity bar in connection with a civil action for injunctive relief against a movie theater charged with operating as a public nuisance. Stressing the similarity between nuisance abatement and criminal prosecution, Justice Rehnquist held that a defendant in each type of case must exhaust state judicial remedies prior to invoking federal judicial review. Moreover, in Vail v. Juidice, Justice Rehnquist extended the Younger-Huffman analysis to bar a federal court from passing on the constitutionality of pending state civil contempt proceedings. If Huffman presages the application of Younger to civil proceedings generally, it dramatically expands the number of situations in which persons suffering a violation of federal constitutional rights must exhaust state judicial remedies as a prerequisite to seeking federal relief.

Moreover, having tentatively expanded Younger into the civil area, the Court ruled, in Hicks v. Miranda, that civil rights plaintiffs in a Case I setting could be ousted from a pending federal action seeking adjudication of federal constitutional rights, simply by filing a proceeding in state court seeking to enforce the state law which is the target of the federal lawsuit. Under the Court’s ground rules, the filing of the state enforce-

75. Id. at 609.
75.2. In Vail, the Court noted that no Younger bar would preclude a challenge to threatened, as opposed to pending, contempt proceedings. However, the Court held that the challengers had not adequately pleaded the threat of a future proceeding, despite their apparent vulnerability to such a proceeding. Id. at 4272.
76. 422 U.S. 332 (1975).
ment action acts as a “reverse-removal” technique, remitting the federal constitutional issue to state court, and thus requiring a plaintiff who had sought to invoke immediate federal adjudication under Ex parte Young and Monroe to exhaust state judicial remedies instead. Thus, under the emerging Rehnquist view of comity, Monroe may be outflanked by the simple expedient of answering a Monroe challenge to a given law or practice with a state judicial proceeding designed to enforce the challenged law or practice.

Ironically, the Court’s comity-exhaustion doctrine operates most severely on Case I of the Frankfurter cosmology. According to Justice Frankfurter, the only civil rights plaintiff entitled to immediate access to a federal court was the plaintiff who challenged, as violative of the federal constitution, an existing or threatened official act clearly authorized by state law. Yet the clearly authorized official act is precisely the species of allegedly unconstitutional conduct most likely to be affected by the new comity-exhaustion bar. Once a plaintiff seeks to challenge as unconstitutional a clearly authorized official act in federal court, the state or local official involved may frustrate access to the federal forum by filing a retaliatory state enforcement proceeding pursuant to his clear authority and by invoking Hicks v. Miranda as a bar to further proceedings in federal court.

Once Hicks is invoked, the locus of constitutional decisionmaking, at least in the first instance, will have been shifted from a federal district court to a state trial judge.

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77. See, e.g., Lane v. Wilson, 307 U.S. 268 (1939).
78. 422 U.S. 332 (1975).
79. Of course, Hicks v. Miranda, 422 U.S. 332 (1975), permits frustration of pending federal actions only if no “proceedings of substance” have taken place. Unless the federal court issues a restraining order immediately upon the filing of the federal complaint, however, an energetic state defendant will almost always be in a position to answer a federal complaint with a state enforcement proceeding—thus short-circuiting the potential federal action prior to proceedings of substance. The only plaintiff who is immune to Hicks’ “reverse-removal” is one who has not yet engaged in activity which would render him vulnerable to a state enforcement proceeding, but who, nevertheless, possesses standing to challenge the threatened action. An example of such a successful plaintiff may be seen in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), where a bar owner refrained from offering topless dancers and challenged the ban in federal court. These bar owners who rendered themselves vulnerable to a state enforcement proceeding found themselves ousted from federal court under Hicks. Apparently, the price of avoiding comity is abstaining from constitutionally protected conduct pending a decision in federal court.

80. Justice Rehnquist’s comity doctrine would have only minimal impact on Case III in Frankfurter’s system, since when the official action at issue is clearly unauthorized by state law, a retaliatory state judicial enforcement proceeding is highly unlikely. Thus, Case III, the situation calling most strongly for exhaustion of state judicial remedies according to Frankfurter’s system, would continue relatively free of exhaustion requirements even under Rehnquist-comity.
ii. Comity as a preclusion device

At worst, Justice Frankfurter's abstention-exhaustion doctrines were merely decision-deferral techniques which postponed access to federal court pending exhaustion of state judicial remedies, but which recognized that should state proceedings prove unavailing, ultimate federal access would be appropriate. Comity, as applied by Justice Rehnquist, is considerably more than a decision-deferral technique. Rather, he has suggested, once a putative federal plaintiff is channeled by comity into a state forum, that subsequent resort to federal court at the conclusion of the state proceedings is unavailable under settled notions of res judicata.\textsuperscript{81} Rehnquist-comity, therefore, is not merely a mechanism for regulating the timing of federal review, as were Justice Frankfurter's theories and Chief Justice Burger's abstention doctrine. Instead, it is a device for precluding any federal district court adjudication of a wide spectrum of federal constitutional issues. Thus, while even Burger-abstention would recognize a substantial, albeit deferred, federal adjudicatory role, Rehnquist-comity precludes any federal role. If Chief Justice Burger would have overruled \textit{Monroe} by turning abstention into exhaustion, Justice Rehnquist would repeal section 1983 by a combination of comity.

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Of course, to the extent comity funnels a federal plaintiff into a state proceeding resulting in custody, subsequent federal judicial review may be obtained pursuant to habeas corpus under \textit{Fay} v. Noia, 372 U.S. 391 (1963). The existence of subsequent habeas review substantially mitigates the practical consequences of \textit{Younger} v. \textit{Harris}, 401 U.S. 37 (1971). With the expansion of \textit{Younger} to civil proceedings, the availability of habeas corpus as a device to secure ultimate federal review is highly questionable. Moreover, many criminal cases raising important constitutional questions, such as loitering, disorderly conduct and leafletting statutes, rarely result in custody, thereby rendering habeas corpus unavailable. The circuits are hopelessly divided and confused over the extent to which a § 1983 cause of action is subject to traditional preclusion constraints. \textit{See generally} N. Dorson, P. Bender & B. Neuborne, \textit{Political and Civil Rights in the United States 1617-18} (Lawyers ed. 1976).

The preclusion dilemma would be resolved if the Supreme Court were to recognize 42 U.S.C. § 1983 as an exception to res judicata, at least in cases where a plaintiff was involuntarily remitted to state courts in the first instance. A similar avenue of escape from res judicata has been fashioned in an abstention context. \textit{See} England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). This issue is pending in \textit{Maynard} v. Wooley, 406 F. Supp. 1381, \textit{prob. juris. noted}, 96 S. Ct. 3164 (1976) (No. 75-1453).
Repeal by Indirection
and preclusion. Only by strictly confining comity to pending
criminal cases, by refusing to permit it to act as a reverse-removal
device, and by recognizing it as a deferral, not a preclusion, tech-
nique, can the integrity of section 1983 be preserved.

The effect which Rehnquist-comity would have on accepted
notions of federal jurisdiction is illustrated by its impact on the
facts of *Ex parte Young*, where corporate attorneys obtained fed-
eral injunctive relief against the enforcement of an allegedly un-
constitutional Minnesota rate regulation statute. When the At-
torney General of Minnesota persisted in commencing state judi-
cial proceedings to enforce the rate statutes, he was held in con-
tempt for violating the federal injunction. In affirming the con-
tempt finding, the Supreme Court established the federal district
courts as a primary enforcement mechanism for federal constitu-
tional rights. 8

Under Justice Frankfurter's ground rules, *Ex parte Young*
was correctly decided. Since the Attorney General's action was
clearly authorized by state law, immediate access to federal court
to test its constitutionality under the due process clause was
available both under the Civil Rights Act of 1871 and as a cause
of action based directly on the fourteenth amendment.

Chief Justice Burger's vision of abstention would have re-
quired the corporate plaintiffs in *Ex parte Young* to exhaust state
judicial remedies under the Minnesota Constitution before invok-
ing federal constitutional
remedies. 83 Chief Justice Burger, how-
ever, would have permitted the plaintiffs to raise their federal
claims in federal court once state judicial remedies had been
exhausted.

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82. Ironically, under Walker v. City of Birmingham, 388 U.S. 307 (1967), the con-
tempt citation at issue in *Ex parte Young*, 209 U.S. 123 (1908), might well be affirmed
today without consideration of the legality of the underlying injunction. In *Walker* the
contempt citations of civil rights demonstrators who conducted a mass march in violation
of an unconstitutional injunction were upheld by the Supreme Court on the ground that
the demonstrators were obliged to seek to modify or vacate the injunction prior to violating
it. 388 U.S. at 320. In *Ex parte Young*, no attempt was made to vacate or modify the
injunction prior to its violation. Of course, in *Walker* the issuing court possessed unques-
tionable jurisdiction over the persons and subject matter involved, while in *Ex parte
Young* subject-matter jurisdiction was clouded by the eleventh amendment issue.
Whether the *Walker* doctrine operates on injunctions issued by courts possessing only
colorable subject-matter jurisdiction remains an open question.

83. It was precisely this view which was rejected by the full Court, although without
persuasive analysis, in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).
The current Court, aware of the radical implication of the Burger view, has rejected it.
See Examining Bd. of Eng'rs v. Otero, 96 S. Ct. 2264 (1976).
Justice Rehnquist's view of comity would have mandated a wholly different ending for *Ex parte Young*. Were the Rehnquist comity bar in effect in 1908, the initial federal complaint seeking injunctive relief would have been immediately answered by a state enforcement action, ousting the federal court under *Hicks v. Miranda*.*4 The federal constitutional issue would have been determined in the Minnesota courts (subject, of course, to Supreme Court review), with subsequent resort to the lower federal courts blocked by res judicata. Thus, while Justice Frankfurter would endorse *Ex parte Young* and Chief Justice Burger would modify it by deferring the role of the federal court, only Justice Rehnquist would abrogate *Ex parte Young* by eliminating any adjudicatory role for the federal district court.

C. The Contraction of Federal Habeas Corpus

If *Monroe v. Pape* is the lynchpin of modern affirmative constitutional litigation in the federal courts, *Fay v. Noia* is the key to the defensive assertion of federal constitutional rights in federal court. Pursuant to *Fay*, constitutionally questionable action by state or local officials which results in the custody of an individual is reviewable in federal district court when all state remedies have been exhausted.*8

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84. 422 U.S. 322 (1975). In *Ex parte Young*, 209 U.S. 123 (1908), the state enforcement proceeding was not commenced until after the issuance of the federal injunction. Thus, even under Rehnquist-comity, the federal injunction would probably have been respected. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). After *Hicks v. Miranda*, 422 U.S. 332 (1975), no competent attorney general would wait for the entry of the federal decree, but would have commenced retaliatory state proceedings prior to “proceedings of substance” in the federal action.

Although it appears bizarre, Justice Rehnquist has suggested that if *Ex parte Young* had been a declaratory judgment, rather than an injunction, a state court would have been free to disregard it. *Steffel v. Thompson*, 415 U.S. 452, 478-85 (1974) (Rehnquist, J., concurring). In addition, Justice Rehnquist has studiously avoided conceding that the federal judge in *Ex parte Young* possessed power to issue a final injunction against state enforcement, although he has recognized the power to issue preliminary injunctive relief. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).


87. The modern definition of the extent of restraint needed to trigger the concept of “custody” as the term is used in habeas corpus practice is discussed in *Hensley v. Municipal Court*, 411 U.S. 345 (1973). Whether the mere imposition of a fine is reviewable pursuant to habeas corpus remains an open question. A threat of restraint is present in such a situation, since the ultimate sanction for nonpayment of a fine is incarceration. *See generally* *Edmund v. Chang*, 509 F.2d 39 (9th Cir. 1975); *Furey v. Hyland*, 395 F. Supp. 1356 (D.N.J. 1975).

88. The nature of the exhaustion required in a habeas corpus situation differs markedly from the exhaustion required in an abstention setting. In a *Pullman* abstention
Not surprisingly, the current Court appears as determined to curtail access to federal courts via habeas corpus as it is to curtail access by way of the Civil Rights Act of 1871. Most recently, in *Stone v. Powell*, a majority of the Court ruled that federal district courts lack habeas corpus power to review the alleged use of unconstitutionally obtained evidence in state criminal proceedings if the petitioner received a fair, albeit erroneous, hearing on the fourth amendment claim in state court. *Stone* thus relegates the implementation of the exclusionary rule to the sole province of the state judiciary. Nowhere has the difference between state

setting, a prospective federal plaintiff is required to present state law claims to the state courts, but is forbidden, on pain of preclusion, from submitting federal law claims to the state courts. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). In a habeas corpus setting, a prospective petitioner is required to present all claims—state and federal—to the state courts initially. If unsuccessful, the petitioner is permitted to relitigate the federal claims pursuant to habeas corpus.

The nature of the exhaustion required in a comity setting remains clouded. Clearly, state law claims must be presented. Apparently, federal claims must be presented as well. Until the nature of the preclusion flowing from a comity-enforced state determination is clarified, however, it will be impossible to predict whether something analogous to an “England Reserve” will evolve in the comity area.

Since habeas-exhaustion is obligatory in all cases, while *Pullman* abstention-exhaustion is required only in *Case II* settings, civil rights lawyers seeking immediate access to federal court in *Case I* and *Case III* situations have sought to proceed pursuant to § 1983 whenever possible. When the result of a case will be the complete release of a person from custody, however, the Supreme Court has insisted that such litigation, involving “core habeas corpus” claims, unfold pursuant to the habeas route, with its concomitant habeas-exhaustion requirement. See *Preiser v. Rodriguez*, 411 U.S. 475 (1973). It is far from obvious whether a given claim sounds in “core habeas corpus” or whether it is cognizable under 42 U.S.C. § 1983 (1971).

Ironically, in a *Case II* setting, where an abstention delay can be anticipated, a plaintiff-petitioner may wish to proceed, if possible, by habeas corpus rather than § 1983. The delay in gaining access to federal court is no greater, and petitioner can raise the federal issues in state court with subsequent habeas corpus review available in federal court.

One caveat should be observed in anticipating federal habeas corpus review of state criminal convictions. Actual adjudication of a defendant’s appeal (or state habeas corpus proceeding) by the United States Supreme Court acts to preclude habeas corpus review of a conviction. See 28 U.S.C. § 2244(c) (1971). While it is clear that both a denial of certiorari and a divided affirmance do not constitute such an actual adjudication, a summary affirmance or dismissal for want of a substantial federal question may well bar subsequent habeas corpus review. Compare *Neil v. Biggers*, 409 U.S. 188 (1972), with *Hicks v. Miranda*, 422 U.S. 332 (1975). Thus, when planning an appeal of a state criminal conviction to the Supreme Court, due consideration should be given to whether it should be couched as a petition for certiorari rather than a direct appeal, even if such a direct appeal is available. While couching it as a direct appeal may marginally increase the odds of plenary review, it risks the loss of subsequent habeas review, since the routine mode of disposing of such direct appeals is an order of summary affirmance or dismissal for want of a substantial federal question.

89. 96 S. Ct. 3037 (1976).
90. Id. at 3052.
91. Subject, of course, to Supreme Court review pursuant to a writ of certiorari.
and federal courts in the enforcement of federal constitutional doctrine been more marked than in the area of the exclusionary rule. Despite the application of the exclusionary rule to the states in Mapp v. Ohio, many state trial courts were reluctant to implement it. Indeed, the history of federal habeas corpus during the past fifteen years has consisted, in large measure, of lower federal courts systematically correcting the failure of state trial and appellate judges to apply the spirit, as well as the letter, of the criminal justice reforms of the Warren era. Therefore, the refusal in Stone to permit continued access to a federal forum in exclusionary rule cases is more than an unfortunate experiment in the neutral allocation of judicial business. By relegating the exclusionary rule to a skeptical and unsympathetic forum, Stone has dramatically altered its substantive contours and lessened its practical significance.

Stone, then, stands as a paradigmatic example of the tendency of the current Court to effect substantive changes in the law indirectly by altering the procedures and forums available for the enforcement of the substantive rights in question. Stone does not alter the theoretical reach of the exclusionary rule—indeed, it purports to reaffirm it. Instead, it remits its development and application to an historically unsympathetic forum while removing the major check on the demonstrated tendency of that forum to undervalue fourth amendment claims. Moreover, as unfortunate as the Stone decision may be for the practical application of the exclusionary rule, it is even more ominous as a threat to the efficacy of habeas corpus jurisdiction as an effective federal check on unconstitutional state behavior. In deciding that federal district courts lack power to entertain collateral attacks on the ex-

Certiorari was granted in fewer than 10% of the petitions presented to the Court during the past several Terms. Moreover, the opportunity for factual development which is available during the habeas corpus process is, of course, not available on certiorari.


93. A random search of any volume of the Federal Supplement will reveal at least several instances of corrective federal action pursuant to habeas corpus.

94. Remitting the exclusionary rule to the mercies of state judges is consistent with the doubts held by several members of the current Court concerning the wisdom of an exclusionary rule at all. See Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971) (Blackmun, J., concurring in Mr. Justice Black's separate opinion); id. at 510 (White, J., concurring and dissenting). In fairness to Mr. Justice White, despite his oft-expressed disenchantment with the exclusionary rule, he dissented from its covert emasculation in Stone v. Powell, 96 S. Ct. 3037, 3071 (1976) (White, J., dissenting). See also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 441 (1971) (Burger, C.J., dissenting).
clusionary rule determinations of state courts, Justice Powell con-
ceded that the fourth amendment values at stake were of consti-
tutional dimension and that, ordinarily, constitutionally based
claims were cognizable pursuant to habeas corpus. Nevertheless,
Justice Powell asserted the power in Stone to weigh each consti-
tutional right to determine whether the right was worthy of the
extra judicial protection inherent in federal habeas corpus.

Under Justice Powell's analysis, certain constitutional rights
justify the additional expenditure of judicial resources inherent
in a federal collateral attack procedure, while other constitutional
rights are not worth the extra consideration. Presumably, the
Court will enlighten us further on the distinction between a first
class and a second class constitutional right. The suspicion exists,
however, that the subjective sympathy with which each Justice
views a given constitutional right ultimately will determine its
eligibility for federal habeas corpus review.

Under Justice Powell's test, federal habeas corpus protection
of constitutional rights is available only if and when the Supreme
Court agrees that the "extra" effort is justified. Such a test ig-
nores totally the existence of 28 U.S.C. § 2254, which constitutes
a congressional directive to federal courts to entertain all consti-
tutionally based habeas corpus petitions once state judicial reme-
dies have been exhausted. Astonishingly, one searches Justice
Powell's opinion in vain for a hint that a statutorily defined jurisdic-
tional question is before the Court.

Some insight into the war being waged by the current Court
against federal district court jurisdiction may be gained by con-
trasting Justice Powell's approach to congressional intent in
Stone with the Court's action in Aldinger v. Howard.95 In Aldinger
a majority of the Court ruled that the failure of Congress in 1871
to include municipalities within the meaning of the term "per-
son" in section 1983 precluded a federal district court from asserting
pendent or ancillary jurisdiction over a municipality in a con-
temporary civil rights case.96 In Aldinger, therefore, the Court
seized on a highly equivocal congressional hint as a justification
for denying federal jurisdiction. Conversely, in Stone the Court
ignored an explicit congressional directive in denying jurisdic-
tion. Apparently, to the current Court, where federal jurisdiction

95. 96 S. Ct. 2413 (1976). Aldinger is also relevant as a "remedies" case. See note
108 infra.
over constitutional cases is concerned, congressional intent is a one-way street.

D. The Expansion of the "Sub-constitutional Tort"

The cause of action created by section 1983 extends only to "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, wrongs committed by state or local officials which, although actionable, fail to rise to a constitutional dimension do not fall within the scope of federal judicial review as defined by section 1983. These wrongs must be redressed, if at all, in the state courts. By construing broad categories of concededly actionable state or local misconduct as sub-constitutional, the Supreme Court removes them from the purview of the federal district courts and further narrows access to a federal judicial forum by aggrieved individuals seeking redress for official wrongdoing.

There has always existed an uncertain line between official misconduct which is merely tortious (such as negligent operation of a police car) and conduct which is both tortious and unconstitutional (such as the illegal search and seizure in Monroe v. Pape). Clearly, as Monroe demonstrates, the mere fact that a given governmental act constitutes a state tort does not preclude it from violating the federal constitution as well. Nevertheless, the Court held in Paul v. Davis, with Justice Rehnquist writing for the majority, that the circulation of a flier by the Nashville Police Department wrongly branding plaintiff as an "active shoplifter" constituted only the state tort of defamation, rather than a deprivation of liberty or property under the fourteenth amendment. Accordingly, the Court held that relief must be sought solely in state court, subject to state immunity defenses.

Wholly overlooked in Justice Rehnquist's analysis in Paul v. Davis is the critical distinction noted earlier by the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal

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100. Id. at 712.
101. Id. Under Tennessee law, the defendant police officials enjoy immunity from suit for good faith actions taken within the scope of their employment, rendering relief in state court virtually impossible. Under federal immunity law, defendants would be held to a far stricter standard. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975). As a general matter, state immunity law appears to lag far behind federal law, rendering it all the more critical to secure access to a federal forum.
between general tort law, designed primarily to regulate relationships between private individuals, and constitutional law, designed to regulate relationships between individuals and the state. In Paul the so-called defamation committed by the Nashville Police Department could not have been committed by a private party. Private individuals would have had access to neither the information (arrest records) nor the means to disseminate it. Furthermore, the allegations of a private individual could not have had the impact of the identical allegation made by the police. Thus, the injury which plaintiff suffered in Paul was one which lay within the unique capacity of government to inflict. Despite the obvious differences between private slander and official stigmatization, Justice Rehnquist insisted upon merging the two concepts into a single state tort cognizable only in state court. Since even Justice Rehnquist conceded that wrongful official stigmatization is unlawful under state law, the sole effect of his opinion was to shift once again the focus of judicial review of an entire species of official misconduct from federal courts which historically have been sensitive to the issues, to state courts which traditionally have provided less vigorous protection against official abuse.

Justice Rehnquist's comity-preclusion position provides him with a potent vehicle to attack the exercise of section 1983 jurisdiction in Case I and Case II settings. His analysis in Paul now provides him with the analytical tool to attack section 1983 jurisdiction in a Case III setting as well. Where, as in Case III situations, the challenged official action is clearly violative of state law (as was the defamatory activity challenged in Paul), access to a federal court may be blocked merely by characterizing the wrong as a state tort, rather than as a deprivation of a constitutional right. Justice Rehnquist performed precisely such a feat in Paul by ruling that the destruction of a man's reputation by a local


103. For a discussion of the comity-preclusion position asserted by Justice Rehnquist as a bar to § 1983 jurisdiction, see text accompanying notes 81-82 supra. By applying comity to civil cases, by permitting the filing of a retaliatory civil enforcement proceeding to oust a federal court of § 1983 jurisdiction, and by giving the state proceeding preclusive effect, Justice Rehnquist's theories threaten the very survival of § 1983. His comity theory operates, however, only in Case I or Case II settings, where the official action in question is taken, at least arguably, pursuant to state positive law. It would seldom be relevant in Case III settings, since state enforcement proceedings would rarely, if ever, occur in situations where the challenged state or local action is clearly violative of state law.
police force did not impinge upon constitutionally protected values, but merely gave rise to a state tort action for defamation.\textsuperscript{104}

IV. Restrictions on the Power of the Federal Courts to Grant Effective Remedies in Constitutional Cases

In addition to restricting access to the federal courts, the Supreme Court has prevented the federal courts from granting effective relief in many cases which have survived the current assault on civil rights jurisdiction.

A. Restrictions on Compensatory Damages

In \textit{Edelman v. Jordan},\textsuperscript{105} Justice Rehnquist resurrected the eleventh amendment, quiescent since \textit{Ex parte Young},\textsuperscript{106} to prevent federal district courts from granting compensatory damages against state agencies.\textsuperscript{107} Since earlier decisions had already deprived federal courts of the power to award compensatory damages against municipalities in section 1983 cases,\textsuperscript{108} a successful

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\textsuperscript{104} Justice Rehnquist reached his conclusion despite Wisconsin v. Constantineau, 400 U.S. 433 (1971), which had invalidated a Wisconsin statute empowering local police to post and publish the names of “excessive drinkers” to whom liquor could not be sold. Apparently, to Justice Rehnquist, Constantineau’s “property right” to purchase liquor was worthy of constitutional protection, but his reputation was not—surely a questionable value orientation. For a critical analysis of Justice Rehnquist’s tendency to subordinate analysis to ideological commitment, see Shapiro, \textit{Mr. Justice Rehnquist: A Preliminary View}, 90 HARV. L. REV. 293 (1976).

\textsuperscript{105} 415 U.S. 651 (1974).

\textsuperscript{106} 209 U.S. 123 (1908).

\textsuperscript{107} In \textit{Fitzpatrick v. Bitzer}, 96 S. Ct. 2666 (1976), the Supreme Court substantially alleviated the potential impact of \textit{Edelman} by recognizing that Congress may, in effect, override eleventh amendment proscriptions by explicitly vesting federal courts with the power to award damages and attorneys’ fees against a state. The Court in \textit{Fitzpatrick} found Congress’ power to override the eleventh amendment in § 5 of the fourteenth amendment, which grants Congress the power to enforce the fourteenth amendment rights by appropriate legislation. After \textit{Fitzpatrick}, two questions remain: First, is 42 U.S.C. § 1983 a sufficiently explicit exercise of § 5 legislative power to overcome eleventh amendment defenses? Second, may \textit{Bivens} causes of action which are founded, not on § 6 statutes, but directly on § 1 of the fourteenth amendment, similarly supersede eleventh amendment defenses?

\textsuperscript{108} The Supreme Court’s refusal to permit federal courts to impose damage awards on municipalities in constitutional cases flows from Monroe v. Pape, 365 U.S. 167 (1961), where the Court construed the phrase “person” in § 1983 to exclude the City of Chicago. The narrow construction of “person” in § 1983 has been severely criticized as a misreading of highly equivocal legislative history. \textit{See} Kates & Kouba, \textit{Liability of Public Entities Under Section 1983 of the Civil Rights Act}, 42 S. CAL. L. REV. 131 (1972). In \textit{Moor v. County of Alameda}, 411 U.S. 693 (1973), the Court applied \textit{Monroe} to preclude jurisdiction over a municipality in federal court, even though it was fully suable as an entity in state court. In \textit{City of Kenosha v. Bruno}, 412 U.S. 507 (1973), the Court extended \textit{Monroe} to preclude the assertion of equitable § 1983 jurisdiction over municipalities and, thus, ended the practice of asserting equitable jurisdiction over a municipality under § 1983.
litigant in federal court may well be deprived of the ability to recover damages against the responsible governmental entity. Instead, he is remitted to a recovery against individual defendants who lack adequate resources and who are entitled to a good faith defense and a qualified immunity. Furthermore, the Court has clothed many of the individual defendants, such as judges, prosecutors, Members of Congress and state legisla-

coupled with a grant of compensatory damages “incident” to the grant of equitable relief. Finally, in Aldinger v. Howard, 96 S. Ct. 2413 (1976), the Court extended Monroe to its outer limits in ruling that federal courts lacked power to entertain pendent state claims against municipalities in cases involving § 1983 causes of action against “persons.”

109. Despite the Supreme Court’s consistent hostility, two possible approaches exist to support a damage award against a local governmental entity in a constitutional case. First, some courts have read the term “person” in § 1983 broadly, despite Monroe, to include school boards and similar arms of local government. See, e.g., Keckiesen v. Independent School Dist., 509 F.2d 1062 (8th Cir. 1975) (school board a “person”); Wright v. Arkansas Activities Ass’n, 501 F.2d 25 (8th Cir. 1974) (state athletic association a “person”); Forman v. Community Serv. Inc., 500 F.2d 1246 (2d Cir. 1974) (state funded corporation a “person”); Aurora Educ. Ass’n East v. Board of Educ., 490 F.2d 431 (7th Cir. 1973) (board of education a “person”); Gordonstein v. University of Del., 381 F. Supp. 718 (D. Del. 1974) (university a “person”); Marin v. University of P.R., 377 F. Supp. 613 (D.P.R. 1974) (university a “person”). In order to argue persuasively, care must be taken to explain why a school board should be treated differently from a municipality or a county for the purposes of § 1983 liability. The most persuasive distinction stresses the fact that the liability of municipalities and counties is almost always derivative, flowing from the unauthorized acts of agents. The liability of school boards, however, is often primary, flowing from a corporate act taken by board members who themselves constitute the board. Where the liability of the target entity is not derivative, but primary, it should be deemed a “person” for § 1983 purposes.


110. Under Monroe, of course, although governmental entities are not persons, the flesh and blood officials who carry out the challenged act under color of state law are suable as “persons.” Equitable relief against a § 1983 “person” is, almost always, sufficient. Damage recoveries are, however, another matter.


tors with complete immunity from damages. Thus, when a civil rights plaintiff seeks compensatory damages in a federal court, he is likely to be unsuccessful, even if the plaintiff wins on the merits.

B. Restrictions on Injunctions

The Supreme Court has linked its restrictions on damage awards with a drastic assault on the power of the federal courts to frame effective equitable relief in constitutional cases. In *Rizzo v. Goode*, the Court deprived the lower federal courts of the power to fashion flexible equitable decrees to deal with police abuse. In *Rizzo*, after a scrupulous and painstaking trial which documented twenty instances of unredressed police abuse, a federal judge ordered city officials, including the mayor, to institute a program for the resolution of civilian complaints against the police. The Supreme Court reversed, after chastising the trial judge for exceeding his appropriate role. *Rizzo* merely contin-


Even though the shootings had violated legal norms, no compensation to the Kent State victims was available because the degree of fault exhibited by the defendants was not sufficiently culpable to warrant shifting the loss from plaintiffs to defendants. The Kent State dilemma is a direct consequence of viewing such litigation in a bilateral perspective, involving a choice between individual plaintiffs and individual defendants as to where an acknowledged loss should fall. So long as the choice is limited to two sets of individuals, personal culpability will, and probably should, be required in order to justify shifting the loss from plaintiffs to defendants, especially when defendants are engaged in governmental activity. If, however, the litigation were perceived as multilateral, involving a decision as to how best to spread the loss, a different result would be possible in the Kent State case. Until the universe of potential defendants in constitutional cases is expanded to enable the joinder of defendants capable of spreading the loss, however, plaintiffs will continue to suffer damages as a consequence of concededly unconstitutional behavior, but will be unable to secure compensatory relief.

119. Id. at 381. The Court in *Rizzo* framed its analysis in "case" or "controversy" terms, asserting that since Mayor Rizzo had not been causally connected to the proven incidents of past police abuse, he could not be brought within the purview of the court's equitable decree seeking to avoid future incidents. The Court in *Rizzo* fully recognized, of course, the power of the district court to deal with the individuals who had actually participated in the abuses. Thus, *Rizzo* imposes a rigid set of restraints on the ability to frame prophylactic or broadly remedial decrees as an effective response to the conceded existence of a problem of constitutional dimensions. Prior to *Rizzo*, article III constraints had not been thought to be independently applicable to remedial decrees incident to the resolution of a conceded "case" or "controversy." Indeed, most affirmative equitable relief
ued a trend exemplified by *O'Shea v. Littleton*,\(^{120}\) in which the current Court reversed a similar imaginative decree aimed at controlling rampant racial discrimination in the administration of justice in Cairo, Illinois. If the current trend continues, federal judges will soon be deprived of the capacity to fashion meaningful relief to prevent future violations of the law.\(^{121}\)

### C. Restrictions on Class Actions

Finally, the current Court has exhibited a hostility towards the class action device, severely impairing its efficacy as a remedial tool. In 1966 the Federal Rules of Civil Procedure were amended to authorize individual litigants (whose separate claims might not be sufficient to justify the expense and uncertainty of judicial review) to aggregate their claims into a class action\(^{122}\) and thus match the legal resources available to corporations or the government. The class action promised the ability to provide legal redress to thousands of Americans who might otherwise lack the resources or the capacity to protect their rights individually. It also promised the emerging public interest bar the opportunity to provide legal services to far more persons than had been thought possible in a conventional procedural posture. From the beginning, however, the Supreme Court has narrowly restricted the use of class actions. The Supreme Court’s assault on class actions began in *Snyder v. Harris*,\(^ {123}\) when the Court ruled that members of a class could not aggregate their individual damages to satisfy the jurisdictional amount requirements of 28 U.S.C. §§ 1331 and 1332. Since one of the primary purposes of the class action procedure was to permit powerless individuals to aggregate into a powerful ad hoc entity for the purpose of litigating a specific claim, *Snyder* was a serious setback. After *Snyder*, poor persons, whose claims rarely if ever exceed $10,000 individually, were forbidden to aggregate their claims and thus were often excluded from federal court.\(^ {124}\) As damaging as *Snyder* was, how-

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124. Congress has recently alleviated the impact of *Snyder v. Harris*, 394 U.S. 332.
ever, *Zahn v. International Paper Co.* was worse. In *Zahn* the Court ruled that even if the named plaintiff individually satisfied the $10,000 jurisdictional amount, no class action would be permissible unless each member of the class satisfied the $10,000 jurisdictional amount. Thus, class actions have now been transformed, through the magic of a hostile Supreme Court, into a device which protects only those claims which are sufficiently large not to require class actions in the first place. Of course, where a jurisdictional basis other than diversity or federal question exists, aggregation is unnecessary since jurisdictional amount is not an issue. Even in these situations, however, the Court indicated a strong aversion to class actions. In *Eisen v. Carlisle & Jacquelin Co.*, for example, the Court required a plaintiff wishing to bring a class action for damages to notify each member of the class at his expense as a prerequisite to a grant of class action status. If, as it appears likely, the same rules are applied to injunctive or declaratory class actions, only the rich will be able to afford a class action, despite the fact that the original purpose of class actions was the equalization of litigation resources between rich and poor.

V. **Restrictions on the Power of the Federal Courts to Award Attorneys’ Fees to the Public Bar**

By restricting access to the federal courts and weakening the remedial powers of the federal courts, the Supreme Court has succeeded in partially dismantling one segment of the institutional structure responsible for keeping the Warren legacy alive. In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Su-

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126. *Id.* at 292.
128. The Supreme Court’s decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), purported to rest on a construction of Rule 23(c), applicable only to actions for damages pursuant to 23(b)(3). Thus, *Eisen* notice may not be required in a 23(b)(2) (injunction or declaratory relief) action. If the Second Circuit’s due process analysis prevails, however, notice will be required in both (b)(2) and (b)(3) actions as a matter of constitutional law.
Repeal by Indirection

Supreme Court undermined the second institutional component, the public interest bar, by denying federal courts the power to award attorneys' fees in public interest litigation in the absence of express congressional authorization. Initially the public interest bar was subsidized by foundations and in part by cause organizations, such as the American Civil Liberties Union and the National Association for the Advancement of Colored People. More recently, creation of the Office of Economic Opportunity Legal Services Corporation was an important step toward a permanent, economically viable public interest bar. The most promising source of support for an independent public interest bar, however, rests not with the foundations, not with cause organizations dependent on voluntary contributions, and not with the government. It remains with the traditional power of a court of equity to award counsel fees to a deserving attorney in a case which has benefitted society. Viewing the public interest bar as private attorneys general, the lower federal judiciary systematically awarded counsel fees in appropriate cases to lawyers whose efforts had vindicated the rights of the public. While substantial awards were not automatic and did not nearly approximate what could be earned in the private sector, court awarded fees did constitute an important source of financial support for the public bar.\[130\]

In *Alyeska Pipeline Service Co. v. Wilderness Society*,\[131\] the Supreme Court ended the practice of awarding attorneys' fees in public interest cases. In an ironic abuse of statutory construction, the Court reasoned that since Congress had repeatedly expressly approved the awarding of attorneys' fees in specific contexts, courts lacked the power to award such fees in the absence of express congressional approval.\[132\] Following such reasoning to its logical conclusion, when Congress wishes to approve a practice, it should never expressly authorize it in a given setting for fear that the Supreme Court will forbid it in all other situations. Whatever the merits of the reasoning in *Alyeska Pipeline*, it struck a sharp blow at the public interest bar by cutting off its most promising economic base.\[133\]

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132. Id. at 260-69.
133. Congressional response to *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), was swift, culminating in an express authorization for the award of attorneys' fees in cases brought pursuant to 42 U.S.C. § 1983 (1970), and related statutes...
VI. Conclusion

It is, of course, a truism that the value of a constitutional right is no greater than the procedures which exist to vindicate it. A constitutional right without a sympathetic forum in which to enforce it is problematic; a constitutional right without a lawyer to enforce it is illusory; and a constitutional right for which no remedy exists is downright dishonest. Yet, the sum and substance of the decisions of the current Supreme Court lead inexorably and dishearteningly to precisely this dilemma. Unfortunately, much of the procedural retrenching of today's Court appears to be a kind of intellectual guerilla warfare aimed at many of the more controversial substantive decisions of the Warren era. Rather than forthrightly confronting these decisions and seeking to reverse them openly, some members of the Court have apparently chosen to cripple them covertly by dismantling the apparatus needed for their enforcement. While reasonable persons may agree or disagree with many of the substantive decisions of the Warren Court, if they are to be reversed, it should be pursuant to an open process after full argument, rather than by the emasculation of the federal courts.

set out at R.S. 1977-1981. Wide areas remain, however, such as nontax-related litigation against the federal government, administrative litigation and litigation against state officials pursuant to 28 U.S.C. § 1331(a) (1970), in which attorneys' fees may no longer be awarded. See generally The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641.

On Jan. 24, 1977, pursuant to the new Act, the United States District Court (S.D.N.Y.) ordered the defendants in Beazer v. New York City Transit Auth. (72 Civ. 5307) to pay $375,000 in attorneys' fees to the Legal Action Center, which had successfully represented the plaintiffs in a challenge to the refusal of the New York City Transit Authority to employ persons receiving methadone treatment. The award was based on approximately 4500 hours of work, calculated at the following basic hourly rates:

- 2-4 years experience—$60.00 an hour
- 9-11 years experience—$100.00 an hour
- 15 years experience—$110.00 an hour

In addition to an hourly award, the court made an incentive award of approximately $75,000. In reaching his decision, Judge Thomas P. Griesa indicated that he had considered: (1) whether fees in civil rights cases should be awarded at the same rate as an antitrust or securities case; (2) whether the award should be reduced because plaintiffs' attorneys were salaried employees of a public interest law firm receiving outside funding; and (3) whether the award should be reduced because of the defendant's current financial difficulty. Defendant has indicated an intention to appeal from Judge Griesa's award of attorneys' fees.