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Personal Property Rights

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on this subject upholds jurisdiction.[122] And the result of interpreting the statute in this manner is manifestly desirable.[123]

PERSONAL PROPERTY RIGHTS

Three recent Second Circuit cases have illuminated the shadowy contours of federal jurisdiction under Title 28, section 1343(3) of the United States Code which states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.[124]

All three cases have relied on Justice Stone's formulation that the Civil Rights' statutes confer jurisdiction only when "the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights."[125] All three cases concern rights secured by the Constitution and not rights secured by federal laws. This dis-

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This objective was approved in Rosado v. Wyman, 397 U.S. 397 (1970):

> We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to the resolution of the pendent claim.

397 U.S. at 405.

[122] 28 U.S.C. § 1338(b) (1964) states:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws.

Except for section 1338(b) pendent jurisdiction has been a judicial doctrine. The American Law Institute included statutory treatment of pendent jurisdiction in its suggested revision of title 28. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1313(a) (Tent. Draft No. 5, May 2, 1967):

> [T]he court shall have jurisdiction to determine all claims arising under State law that arise out of the same transaction or occurrence or series of transactions or occurrences as the federal claim, defense, or counterclaim, if such a determination is necessarily in order to give effective relief on the federal claim or counterclaim or if a substantial question of fact is common to the claims arising under State law and to the federal claim, defense, or counterclaim.

[123] With the state courts complaining about their small budgets and large case loads, it would not be unreasonable for the federal courts to assume their obligation to absorb their share of the cases. Moreover, the objective of a "just, speedy, and inexpensive determination of every action" will be better served if an entire dispute can be resolved by one court.

[124] 28 U.S.C. § 1343(3) (1970). This section has no jurisdictional amount requirement, unlike the general federal question statute, 28 U.S.C. § 1331 (1970), which requires that the amount in controversy exceed the sum or value of $10,000.

[125] Hague v. C.I.O., 307 U.S. 496, 531 (1939) (Stone, J., concurring). Justice Stone's formulation is criticized in Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285, 1288-91 (1953).

tinction is relevant since it avoids the problem of the disparity in language between section 1343(3) which confers judisdiction and section 1983 which creates a federal cause of action.[126] The latter grants a cause of action for "deprivation of rights secured by federal laws"[127] while the former limits jurisdiction to "rights secured by any act of Congress *providing for equal rights.*"[128]

The first case, *Johnson v. Harder*,[129] concerned a mother who claimed that a reduction in her welfare benefits was a denial of due process and the equal protection of the laws. Here the court faced the problem of applying Justice Stone's formulation to a concrete fact situation. While welfare payments are money benefits and, as such, comprise only a property right, their denial deprives an eligible recipient of the very means by which to live.[130] Aware of this dual nature of welfare payments, the court held:

> Since welfare cases by their very nature involve people at a bare subsistence level, disputes over the correct amounts payable are treated not merely as involving property rights, but some sort of right to exist in society, a personal right under the Stone formula.[131]

In *Johnson*, the court distinguished its earlier ruling in *Mc Call v. Shapiro*[132] which had denied federal jurisdiction. In that case, the appellant raised a due process claim as to the termination of her Aid For Dependent Children (AFDC) benefits at the district court level. On appeal, she relied solely on the statutory claim that the state regulations conflicted with federal provisions.[133] Subsequently, in *Johnson*, similar

126 42 U.S.C. § 1983 (1970). In cases involving constitutional claims the disparity in language is not a factor. See Eisen v. Eastman, 421 F.2d 560, 565 n.8 (2d Cir. 1969).

Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900), held that the predecessors of both section 1343(3) and section 1983 applied only to "civil rights." Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, is the common source of both sections. But see Monroe v. Pape, 365 U.S. 167, 170 (1961), where Justice Douglas stated that the ". . . history of the section of the Civil Rights Act presently invoked [42 U.S.C. section 1983] does not permit such a narrow interpretation." Cf. Note, *Limiting The Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1487 (1967).

For an analysis of the legislative history of sections 1343(3) and 1983 see Herzer, *Federal Jurisdiction over Statutorily-Based Welfare Claims*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1, 4-8 (1970).

127 42 U.S.C. § 1983 (1970).

128 28 U.S.C. § 1343(3) (1970) (emphasis added).

129 438 F.2d 7 (2d Cir. 1971).

130 Language used in several welfare cases indicates the importance attached to these benefits by the Supreme Court. Public assistance "involves the most basic economic needs of impoverished human beings." Dandridge v. Williams, 397 U.S. 471, 485 (1970). A state's action "may deprive an *eligible* recipient of the very means by which to live" or render his situation "immediately desperate." Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

131 438 F.2d at 12.

132 416 F.2d 246 (2d Cir. 1969).

133 It appears that the Second Circuit will deny jurisdiction to a welfare claimant

constitutional claims were preserved and fully raised on appeal. The court altered its earlier position by stating that if "a colorable constitutional claim has been raised, jurisdiction will properly lie."[134]

The most consistent application of the property — personal rights distinction has been in cases involving taxation where the courts have been uniform in dismissing these actions for lack of section 1343 jurisdiction.[135] In *Eisen v. Eastman*[136] a landlord brought an action challenging a reduction in the maximum rents chargeable under a city rent control law. The court of appeals held that since the complaint alleged

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who bases his action solely on a conflict between a state regulation and the Social Security Act: "To assume jurisdiction here (of statutory welfare claims) would be to accept a federal court review power over almost every ruling of the [state] Commissioner in the day to day operation of state welfare laws, regardless of the amount involved." Mc Call v. Shapiro, 416 F.2d 246, 250 (1969). *But see* Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964) which argues that the legislative purpose of sections 1983 and 1343(3) was to alter the balance of power between federal and state authorities so that federal courts could more effectively protect federal rights. There are strong policy considerations which support federal jurisdiction over non-constitutional welfare claims. Both federal and state administrative forums are inadequate to decide claims based upon a conflict between state and federal provisions. On the federal level, the Department of Health, Education and Welfare (HEW) has been reticent to apply its own sanction — a complete termination of funds to those states whose welfare programs operate contrary to federal law. Furthermore, there is no formal means, no procedure for the filing of complaints or appeals, by which a dissatisfied individual can bring his claim before the federal agency. Although state fair hearing procedures exist on the state level, they do not generate a binding body of law delineating the permissible scope of administrative discretion. In any event, there are inherent advantages in providing a federal forum to review questions based primarily on conformity to federal law. *See* Herzer, *Federal Jurisdiction over Statutorily-Based Welfare Claims*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1, 9-11 (1970); Note, *Federal Judicial Review Of State Welfare Practices*, COLUM. L. REV. 84, 92-94 (1967).

134 438 F.2d at 12. (A colorable constitutional claim together with a statutory claim will provide a basis for federal jurisdiction and may enable the court to decide the case on the statutory claim. The doctrine of pendent jurisdiction permits such a result.)

In *Rosado v. Wyman*, 414 F.2d 170 (2d Cir. 1969), appellees made two principal claims: one based on a violation of the Social Security Act, the other based on a violation of the equal protection clause in that the state statute provided for lower payments to residents of Nassau County than to residents of Queens County. A majority of the court ruled that federal jurisdiction did not exist but Judge Feinberg, in his dissenting opinion, would have upheld the court's jurisdiction on the theory of pendent jurisdiction, even though the constitutional claim had become moot. The Supreme Court reversed the majority decision of the Second Circuit and stated: "For essentially those reasons stated in the Opinion of the District Court and Judge Feinberg's dissent, we think the District Court correctly exercised its discretion by proceeding to the merits." Rosado v. Wyman, 397 U.S. 397, 401 (1970). In this welfare case, Judge Feinberg said that pendent jurisdiction was justified by "the saving of judicial time once the case had gone as far as it had, by concern for fairness to the litigants, and by the appropriateness of having a *federal* court decide the issue whether congressional conditions to receipt of *federal* funds are met." 414 F.2d at 185. *See generally* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933).

135 *See, e.g.*, Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 9 (1968); Alterman Transportation Lines v. Public Service Commission, 259 F. Supp. 486 (M.D. Tenn. 1966), *aff'd per curiam*, 386 U.S. 262 (1967).

136 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

only the loss of money, jurisdiction under the Civil Rights Act was not established. While the decision in *Eisen* is clear-cut, its dicta that cases involving discharges from public employment "can be viewed about equally well as complaining of a deprivation of the personal liberty to pursue a calling of one's choice or of the profits or emoluments deriving therefrom,"[137] may have the effect of opening the floodgates to new litigation seeking federal jurisdiction. However, in two recent cases, *Tichon v. Harder*[138] and *Canty v. Board of Education*,[139] the Second Circuit has stuck its finger in the dike. In both cases, probationary employees were discharged for unsatisfactory work from positions of public employment. In both cases, petitioners relied on general notions of procedural due process under the fourteenth amendment rather than alleging specific violations of rights protected by the first eight amendments to the Constitution. In both cases, federal jurisdiction was denied.

In the *Tichon* case, the court handed down a seemingly ironclad rule:

> When the underlying interest allegedly injured by the [employment] discharge is one unprotected by any of the first eight amendments, exclusive of protection of property, it is difficult to characterize the claim as one involving "a right of personal liberty" because it becomes more apparent that the only interest at stake is a claimed right to a particular job, an interest easily measured in monetary terms and uneasily equated with "personal liberty."[140]

The court distinguished this case from the situation existing in *Johnson* by saying that,

> "Unlike welfare recipients, who exist at a bare subsistence level, it cannot be said that an employee's rights to the profits from his job entail "some sort of right to exist in society."[141]

The court retreats somewhat from this strong position when it subsequently states that:

> "[I]n the absense of a clear, immediate and substantial impact on the employee's reputation which effectively destroys his ability to engage in his occupation, it cannot be said that a right of personal liberty is involved."[142]

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137 421 F.2d at 565.

138 438 F.2d 1396 (2d Cir. 1971).

139 448 F.2d 428 (2d Cir. 1971).

140 438 F.2d at 1400. *See, e.g.*, Slochower v. Bd. of Education, 350 U.S. 551 (1956) (exercise of fifth amendment privilege against self incrimination); Wieman v. Updegraff, 344 U.S. 183 (1952) (first amendment interest). 135 F.2d 1031 (5th Cir. 1970); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

141 438 F.2d at 1400.

142 *Id.* at 1402.

The *Tichon* and *Canty* cases suggest that, as a general rule, a discharge from employment case will not be given federal jurisdiction under section 1343(3).[143] There are two possible exceptions to this rule: (1) an employee who has become established in an occupation or profession and has created a reservoir of standing and reputation for skill, honesty and trust, and (2) an employee who is dismissed for racial bias or discrimination, a charge which "permanently brands the person accused as one who is unable to put public and professional duty above personal bias."[144]

There are two potential obstacles to adjudication of constitutional claims in the federal courts even if jurisdiction would otherwise exist under section 1343(3). Under the judicially developed doctrine of abstention, a federal court could refrain from exercising its jurisdiction in order to allow the state courts to resolve issues of state law which might render a determination of the constitutional issues unnecessary.[145] However, it seems unlikely that this doctrine would apply to welfare cases since the meaning of a welfare regulation is usually clear on its face and its applicability to a given plaintiff is not likely to be uncertain. Furthermore, a federal decision would not disrupt a regulatory scheme in which the state has a substantial interest because the questions presented are generally federal (relating to social security regulations) and state statutory regulations are adoptions of the federal program. Most importantly, a welfare claimant suffers immediate and irreparable harm when his benefits are cut off. Under such circumstances, an untimely delay is uncalled for.[146]

A second obstacle to federal jurisdiction is the doctrine of exhaustion of administrative remedies.[147] This doctrine would attach to both employment and welfare cases. This doctrine exists whenever a state

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143 *Cf.* Gold v. Lomenzo, 425 F.2d 959 (2d Cir. 1970) (A real estate broker had his license revoked for charging excessive fees). The general rule established in the *Tichon* and *Canty* cases is in accord with the dissenting opinion in *Gold.*

144 Birnbaum v. Trussell, 371 F.2d 672, 679 (2d Cir. 1966).

145 The abstention doctrine has been held appropriate even when the federal suit is brought under section 1343 to challenge a deprivation of civil rights. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959). In a dissenting opinion, Justice Douglas argued that a suit brought under the Civil Rights Act is never a proper vehicle for the abstention doctrine. *See also,* Wechsler, *Federal Jurisdiction And the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 230 (1948).

146 *See generally,* Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84, 97-101 (1967).

147 *See* McNeese v. Bd. of Education, 373 U.S. 668 (1963). It has been argued that *McNeese* abolished the requirement of exhaustion of adequate state administrative remedies in all cases brought under Section 1983. Note, *Exhaustion of State Remedies Under the Civil Rights Act,* 68 COLUM. L. REV. 1201, 1203 n.15 (1968). *But see* Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970).

has provided for a speedy appeal to a higher administrative officer. Exhaustion of state administrative remedies is not required when the remedy is inadequate or either certainly or probably futile.[148]

[148] A case is currently before the Supreme Court to determine whether the exhaustion of state administrative remedies is a prerequisite to a high school teacher's filing of a Civil Rights suit challenging his dismissal for refusing to shave his beard. Ball v. Kerrville School Dist. Bd. of Trustees, *petition for cert. filed*, 40 U.S.L.W. 3056 (U.S. May 24, 1971) (No. 70-199).