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PRIVATE DISCRIMINATION ACTIONS FILED IN FEDERAL COURT: NONSUBSTANTIVE MATTERS AFFECTING LIABILITY AND RELIEF

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I. INTRODUCTION

Confusion regarding who may be held liable and what relief may be sought is evident in the inconsistent and conflicting decisions of the federal courts in private actions which charge unlawful discrimination under color of state law. The cause of the confusion has little to do with whether in fact the plaintiff has been the victim of discrimination but may be attributed to the piecemeal development of what may be termed nonsubstantive matters which nevertheless substantially affect the issues of liability and relief.

The original and ultimate sources of authority for such discrimination suits are the thirteenth and fourteenth amendments which were ratified in 1865 and 1868, respectively.¹ Pursuant to section 2 of the thirteenth amendment and section 5 of the fourteenth amend-

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1. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

... ...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

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ment, Congress, from time to time, has enacted legislation designed to enforce the rights these amendments protect. A study of the legislative history of the applicable statutes persuasively implies that Congress did not enforce these amendments comprehensively nor has the intermittent interpretation of these statutes by the federal courts manifested a discernable pattern or principle of enforcement.

With few exceptions, these statutes are limited in application to a particular kind of discriminatory conduct and there is consider-able overlap in the protections they afford. Indeed, even where the

2. The passage of this legislation spans over a hundred years. The most important of the acts from the standpoints of scope, substantive protection and creation of a private right of action with provisions for remedies are summarized below under their statutory codifications:
   42 U.S.C. § 1981 (1970) is based upon the Civil Rights Act of 1870 and ensures racial equality under the law;
   42 U.S.C. § 1982 (1970) is based upon the Civil Rights Act of 1866 and protects against racial discrimination in the sale or lease of property;
   42 U.S.C. § 1983 (1970) is based upon the Civil Rights Act of 1871 and protects against constitutional deprivations of rights, privileges and immunities under color of state law;
   42 U.S.C. § 1985 (1970) is based upon the Civil Rights Acts of 1861 and 1871 and guards against conspiracies to deny equal protection of the laws;
   42 U.S.C. § 1986 (1970) is based upon the Civil Rights Act of 1871 and creates a cause of action for willful or negligent failure to prevent a conspiracy actionable under § 1985;
   42 U.S.C. § 1988 (1970 & Supp. V 1975) is based upon the Civil Rights Acts of 1866 and 1870 and authorizes district courts, where they deem it necessary to furnish suitable remedies, to apply the common law and statutory law of the state where the court sits to supplement the relief otherwise available in §§ 1981, 1983 and 1985 actions;
   42 U.S.C. §§ 2000a to 2000a-6 (1970) are based upon the Civil Rights Act of 1964 and protect against discrimination in places of public accommodation, in places wherein operation affect commerce and in places supported by state action;
   42 U.S.C. §§ 3601 to 3631 (1970 & Supp. V 1975) are based upon the Fair Housing Act of 1968 and prohibits discrimination in the sale or rental of housing;
   42 U.S.C. § 1971 (1970) is based upon the Civil Rights Act of 1870 and protects against discrimination with regard to the right to vote; and
4. 42 U.S.C. §§ 1981, 1983, 1985 and 1986 (1970) protect against a wide variety of discriminatory conduct; however, detailing of the substantive protections of these or other civil rights statutes is beyond the scope of this article.
same kind of discriminatory conduct is in issue, the questions of who may be held liable and what relief may be sought may vary depending upon what statute one relies.\(^6\)

The confusion is not only attributable to the thirteenth and fourteenth amendments and the acts of Congress passed pursuant thereto, but also to their application in related areas of law and policy. One area is federal jurisdiction. Although all the summarized statutes derive their authority from the thirteenth and fourteenth amendments, the Constitution itself does not invoke jurisdiction to hear such matters. Congress, pursuant to its constitutional authority, determines the jurisdiction of the district courts through enabling statutes; the two most often used are 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The confusion concerning the interplay between these jurisdictional statutes, the thirteenth and fourteenth amendments and the aforementioned discrimination statutes adds to the overall confusion surrounding the issues of liability and relief.

The effect of the eleventh amendment is another piece in the liability and relief puzzle which is in a state of flux, further contributing to the confusion. Presenting additional complications are the doctrines of sovereign immunity and the role of the federal courts, vis-a-vis Congress, in exacting liability and fashioning remedies for constitutional wrongs.

This article cannot provide an underlying principle embodying all the nonsubstantive factors affecting the issues of liability and relief in a federally filed private action to redress discrimination under color of state law; likely one does not exist. Nor can it set out definitively, assuming a meritorious claim, who, among the responsible parties, may be held liable and what relief may be obtained.

\(^6\) E.g., 42 U.S.C. § 1983 (1970) protects, inter alia, against racial and sexual discrimination in employment when the defendants are acting under color of state law. The state and local entities themselves are not liable under section 1983, but rather the responsible officials are held liable and may be subject to injunctive relief and, if acting in bad faith, out of pocket compensatory and punitive damages. See text on Section 1983 at Part IV infra. Alternatively, Title VII of the Civil Rights Act allows back pay and attorneys' fees against state and local entities as well as against the federal government and employers in the private sector, as a means of redressing employment discrimination but neither compensatory damages, outside of back pay and attorneys' fees, nor punitive damages may be obtained thereunder.
There are too many factual contingencies and too many related issues that remain unresolved. The purpose is to limit discussion to the most often used statutory and constitutional means for seeking redress and examine the more troublesome nonsubstantive considerations that bear on the issues of liability and relief, pointing out the pitfalls to be avoided and devices to be utilized to maximize, or minimize from the defendant’s standpoint, the chances of holding parties liable and obtaining meaningful relief.

II. ELEVENTH AMENDMENT

There has been an abundance of scholarly theorizing about the eleventh amendment, but the amendment’s evolving and increasingly complex nature, and the consequential impact on the issues of liability and relief in privately filed discrimination actions in federal court against a state necessitates additional discussion.

Generalizing from a functional view, the eleventh amendment shields the state from private actions in federal court. But this general functional definition has many qualifications and its application has proven to be a complex undertaking for the judiciary.

A. Unconstitutional State Statute Not Protected

A significant qualification was given birth by the Supreme Court

7. The eleventh amendment was ratified on January 8, 1798, and reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

For a discussion of the historical basis and evolvement of the eleventh amendment from a theoretical standpoint, see generally C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972); Callison, Interpretation of the Eleventh Amendment (A Case of the White Knight’s Green Whiskers), 5 HOUSTON L. REV. 1 (1967); and Comment, State Sovereign Immunity: No More King’s X?, 52 TEX. L. REV. 100 (1973).

8. Although the scope of this article is limited to private rights of action, it is important to note that suits by the United States are not barred by the eleventh amendment. See United States v. Mississippi, 380 U.S. 128, 140-41 (1965). Nor are suits barred which are brought by one state against another. See Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821).

While the eleventh amendment by its terms does not bar suits against the state by its own citizens, an unconsenting state is nevertheless immune from suits brought in federal court by its own citizens as well as by citizens of another state. E.g., Edelman v. Jordan, 415 U.S. 651 (1974).

Also basic, but extremely important, the eleventh amendment is no bar to private actions against the state in state court though other immunities may be applicable under state law.
in *Ex parte Young.* As logic would dictate, the eleventh amendment precludes circumvention of its protection by obtaining money damages from the state through suits against state officials. The logic was cut short, however, by the *Ex parte Young* doctrine that the immunity is no bar to a private action forcing state agents to conform their conduct to the mandates of the Constitution even though to do so may be in derogation of state law. Hence, when the officials, who are responsible for effectuating unconstitutional state law, policies or directives, are the named parties defendant, the suit is deemed to fall outside the scope of the immunity, though in actuality the state, through its officials, is subject to federal jurisdiction for the limited purpose of affording prospective equitable relief.

**B. Limitation Upon Relief From Unconstitutional State Statute**

The fiction created in *Ex parte Young* understandably added to the confusion surrounding the issue of when the state is a real party in interest for eleventh amendment purposes. *Edelman v. Jordan* allayed some of the confusion in holding that a retroactive award of monetary relief in a private action filed in federal court is, in practical effect, indistinguishable from an award of money damages

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10. *Edelman v. Jordan,* 415 U.S. 651 (1974). In Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824), Chief Justice Marshall found that the amendment was applicable only when the state was a party of record. Later cases came to the more logical conclusion that the eleventh amendment barred liability and relief insofar as the state was a real party in interest. Hans v. Louisiana, 134 U.S. 1 (1890); *In re Ayres,* 123 U.S. 443 (1887).


12. Generally speaking, and without regard to the substance of the action, unconstitutional conduct of state officials may fall into one of two classes: (1) conduct under color of state law but not authorized or directed by the state, and (2) conduct not only under color of state law but authorized or directed by the state. Both classes of conduct fall outside the eleventh amendment immunity insofar as prospective injunctive relief and damages paid out of the personal pockets of the defendant, officials, are concerned. In the first class of conduct the non-applicability of the immunity is understandable as the conduct is in derogation of the official's duty and prohibition of the same would not affect the state in exercising its authority or carrying out its directives through its agents. In the second class of conduct, however, its prohibition would, and may significantly, affect the authority of directives of the state and thus in essence amounts to the exercise of jurisdiction over the state through its agents. This being the case, logic would dictate that the latter class of conduct would fall within the immunity of the eleventh amendment. The law as laid down in *Ex parte Young,* however, is otherwise.

against the state. *Edelman* held that such an award is barred by the eleventh amendment notwithstanding the fact that the suit concerns unconstitutional behavior. But the Court went on to say:

State officials, in order to shape their official conduct to the mandate of the Court’s decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary affect on the state treasury is a permissable and often inevitable consequence of the principle announced in *Ex parte Young*, supra.14

Hence, *Edelman* interprets the eleventh amendment, in a suit claiming a denial of a constitutional right, as allowing prospective injunctive relief against state officials regardless of the indirect cost to the state but as barring any direct payment of funds from the state to the plaintiff regardless of whether it carries the label of equitable restitution or money damages.15

C. When Is A State A Real Party In Interest

Read in light of *Ex parte Young* and *Edelman*, the eleventh amendment issue is settled by a determination of what constitutes direct payment of funds from the state. Thus far the Supreme Court has made this much certain: If private parties are seeking relief in federal courts which involves direct payment to plaintiff from out of the general public funds of the state treasury then the state is a real party in interest with respect to this relief and the eleventh amendment immunity applies.16 Beyond this limited answer uncertainty remains, though numerous federal courts, in conflicting decisions, have attempted to round out the rule.17 Therefore, if the relief

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14. *Id.* at 668.
15. *Id.*
17. An excellent detailing of the multifarious judicial attempts to determine the applicability of the eleventh amendment where the state is not a named party can be found in Note, *A Practical View of the Eleventh Amendment - Lower Court Interpretations and the Supreme Court's Reactions*, 61 Geo. L. Rev. 1473, notes 60-114 and accompanying text (1973). It would be pointless to reiterate what is contained therein; however, the text and the footnotes cited above should be read to make oneself generally informed as to the problem. It will become evident, however, that not only is there general uncertainty as to when the state is a real party in interest but there is also uncertainty as to what test or tests are to be applied to
sought in a particular case requires payment other than directly out of the general public funds of the state treasury, the case law in the jurisdiction involved should be examined before drawing conclusions as to the applicability of the eleventh amendment.

The foregoing qualifications define the general attributes of the immunity in private suits seeking redress from the state for constitutional wrongs. There are, however, two substantial qualifications of a different nature that also apply to such actions: the doctrine of waiver and the abrogation of the immunity by acts of Congress passed pursuant to overriding provisions of the Constitution.

D. The Doctrine of Waiver

The doctrine of waiver in simplest terms means that the state consents to be sued in federal court and thereby relinquishes its immunity afforded by the eleventh amendment. In application, however, the doctrine is not so simple since what constitutes waiver must first be determined.

There are two judicially recognized classes of waiver—expressed waiver and implied waiver. The former is somewhat easier to comprehend than the latter and will therefore be discussed first.

1. Express Waiver

A state may, by its constitution, by statute or where otherwise silent on the issue, by judicial decision, consent to be sued in

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answer this question. Also note that the Note was written prior to Edelman which puts a limiting gloss on the cases cited which grant retroactive monetary relief.

There are, however, a few areas of certainty that should be mentioned such as Supreme Court holdings that neither municipalities nor counties are immunized by the eleventh amendment. Mount Health City School Dist. Bd. of Educ. v. Doyle, 97 S. Ct. 568, 572 (1977) and Moor v. County of Alameda, 411 U.S. 693 (1973).

Notwithstanding the uncertainty as to the applicable test to determine whether a political entity is deemed to be an agency of the state, some factors that have been considered by some courts may nevertheless be helpful: (1) Is the agency performing a governmental or propriety function? (2) Is it separately incorporated? (3) What degree of autonomy does it have over its operations? (4) Does it have the power to enter into contracts? (5) Is its property immune from state taxation? and, (6) Has the sovereign immunized itself from the agency's operations? Gordenstein v. Univ. of Delaware, 381 F. Supp. 718 (D. Del. 1974).


20. Id. See also Interstate Const. Co. v. Regents of the Univ. of Idaho, 199 F. 509 (D. Idaho 1912).
federal court and thereby waive its eleventh amendment rights. Waiver may be as to all matters or as to a limited class of matters.\textsuperscript{21} In either case, the intent to submit to suit in federal court must be clear and unambiguous\textsuperscript{22} and whether a state has in fact waived its immunity and consented to be sued is a question of state law.\textsuperscript{23}

When a state, by statute or otherwise, clearly authorizes its officials to represent its interests in court but does not specify as to federal court, a general appearance on behalf of the state by an official so authorized will constitute a waiver of the eleventh amendment's protection as to that suit.\textsuperscript{24} When a state does not authorize its officials to represent its interests in court said officials do not by general appearance or otherwise waive the state's eleventh amendment rights.\textsuperscript{25} Under such circumstances, the eleventh amendment issue can be raised at any stage of the proceedings, even for the first time on appeal, by counsel or by the court \textit{sua sponte}.\textsuperscript{26}

2. Constructive Waiver

The above traditional understanding of the doctrine of waiver was upset by the Supreme Court in \textit{Parden v. Terminal Railway Company}.\textsuperscript{27} Using the following rationale, the Court found that the State of Alabama impliedly consented to be sued in federal court under the Federal Employer's Liability Act (FELA):\textsuperscript{28}

By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to the suit. \ldots We thus agree that "[T]he state is liable,

\begin{footnotesize}
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\item \textsuperscript{21} Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462 (1945).
\item \textsuperscript{22} Id. at 468.
\item \textsuperscript{23} Id. at 467.
\item \textsuperscript{24} Gunter v. Atlantic Coast Line R. R. Co., 200 U.S. 273 (1906).
\item \textsuperscript{25} Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-69 (1945).
\item \textsuperscript{26} Id. at 467.
\item \textsuperscript{27} 377 U.S. 184 (1964).
\item \textsuperscript{28} 45 U.S.C. §§ 51-60 (1970).
\end{itemize}
\end{footnotesize}
upon the theory that, by engaging in interstate commerce by rail, it has subjected itself to the commerce power of the federal government.”

Perhaps behind *Parden* was the unarticulated idea that where a state ventures outside its traditional role and takes on the character of a private enterprise conducting business in a federally regulated area the eleventh amendment is left behind. In other words, a state can transmute itself into a private entity, but the eleventh amendment will not follow, and when the state chooses to do so, it goes beyond the scope of that amendment’s protection.

Unfortunately, the Court did not explain itself in these terms. Instead, it announced that the issue of waiver in the context of the case was a federal question, and, on the basis of the aforementioned rationale, found that Congress intended for the eleventh amendment immunity to be lifted by the FELA and that the state, by participation in the regulated area, in effect, consented to be sued thereby waiving its eleventh amendment protection.

The Supreme Court had an opportunity to clarify *Parden* in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare,* but, as most commentators agree, the Court failed. The Court’s overriding concern appeared to be that the state was acting within its proper and traditional role as a state and thus was within the scope of the eleventh amendment.  

29. 377 U.S. at 192-93 (citations and quotations omitted).
30. *Id.*
33. State employees were seeking overtime compensation under the Fair Labor Standards Act (FLSA) § 16(b), 29 U.S.C. § 216b (Supp. V 1975). The FLSA specifies that state employees may bring suit in any court of competent jurisdiction but does not specify federal court. On the other hand, the FELA relied upon in *Parden* does not specify that a state may be a defendant but does specify that relief may be had in federal court. Neither statute speaks directly to the eleventh amendment issue. To say that Congress intended abrogation by enactment of the FELA but did not so intend by enactment of the FLSA is judicial speculation. But even more tenuous is the connection made by both *Parden* and *Employees of the Dept. of Public Health & Welfare* between the very question of congressional intent to subject a state to suit and that of the state’s waiver of its eleventh amendment rights.
amendment's protection. But the Court did not speak in these terms. Instead, it found that Congress did not intend for the state to forfeit its immunity by acting within the coverage of the Fair Labor Standards Act (FLSA) and thus the state did not waive its eleventh amendment protection. 31

Next came down Edelman wherein the Court, citing appropriate authority, stated that “[i]n deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only when stated ‘by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.’” 32 Edelman apparently was speaking of the traditionally understood express waiver, not of the constructive or implied waiver created in Parden and tailored in Employees of Department of Public Health & Welfare. Edelman was based on section 1983 which, unlike the FELA and FLSA, specifically excludes states from liability as they are not “persons” under the statute. 33 The failure to apply the constructive waiver doctrine apparently rests on this distinction.

Constructive waiver then will not be found where the federal statute relied upon clearly precludes the state from liability. When the statute is not clear on this point, the issue of constructive waiver is left to be resolved by considering the amorphous guidelines of Parden and Employees of Department of Public Health & Welfare.

Congress' intent to subject the state to suit has bearing on whether a cause of action against the state was statutorily created but it has no bearing, in any logical sense, on whether a state has consented to be sued. The result is anomalous: express consent to be sued in federal court will constitute a waiver of eleventh amendment rights only when the state's intent is clear and unambiguous; implied consent may be found regardless of the state's intent, indeed, directly contrary to its intent.

36. See, e.g., Sykes v. California, 497 F.2d 197, 201 (9th Cir. 1974); Meyer v. New Jersey, 460 F.2d 1252 (3d Cir. 1972). Although the Supreme Court has not dealt precisely with this issue no lower court has found a state to be a person under section 1983.
Suffice it to say that the doctrine of waiver remains uncertain. Much has been written on the subject and counsel should consult these resources and the case law in the jurisdiction involved when the issue may be in question.

E. Abrogation of the Eleventh Amendment by Act of Congress Pursuant to that Amendment

Perhaps the most significant qualification of the eleventh amendment was pronounced in the recent case of Fitzpatrick v. Bitzer. The issue in that case was whether, in derogation of the eleventh amendment's shield of immunity, Congress has power to permit entry against the state of an award of money damages to a private individual as a means of enforcing the substantive guarantees of the fourteenth amendment. The suit was brought under Title VII of the Civil Rights Act of 1964, which was enacted pursuant to section 5 of the fourteenth amendment. Title VII expressly authorizes federal courts to award back pay and attorneys' fees against a state government found to have violated the substantive provisions of the act.

The Court in Fitzpatrick held that:

[T]he Eleventh Amendment, and the principles of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts.

37. See note 1 supra.
41. 427 U.S. at 456 (citations omitted).
The Court in Fitzpatrick distinguished Edelman and delimited that ruling to the absence of congressional authorization to sue a state in a section 1983 action, a state not being a "person," while such authorization was clearly present in Title VII. This congressional authorization distinction was relatively meaningless in contrasting Parden with Edelman\(^4\) because the issue in Parden was purportedly waived by the state. The same distinction in contrasting Edelman and Fitzpatrick is significant because here we are talking about Congress' power to abrogate the eleventh amendment pursuant to constitutional authority. In such a case the focus is properly on congressional intent while the focus in Parden should have been on the state's intent, assuming waiver was really the issue.

Although Fitzpatrick is limited to its facts, the implication thereof is that any act of Congress passed pursuant to section 5 of the fourteenth amendment which expressly allows for relief against the state abrogates the eleventh amendment to the extent of the relief from the state which the statute so authorizes. Conversely, Fitzpatrick implies that the creation of a private right of action by act of Congress passed pursuant to section 5 of the fourteenth amendment which does not expressly authorize relief from a state does not have the effect of abrogating the eleventh amendment.

If Fitzpatrick is read correctly, the Court has endowed Congress with a reservoir of power, for the most part untapped, to emasculate the eleventh amendment immunity by mere legislation enacted under authority of section 5 of the fourteenth amendment.

Moreover, if the logic of the Fitzpatrick holding is followed in analogous contexts, the Court will be constrained to find that Con-

\(^4\) Note that both Title VII and section 1983 derive their authority from section 5 of the fourteenth amendment. The distinction between the two on the eleventh amendment issue is not literarily mandated by the Constitution, but Fitzpatrick has apparently interpreted section 5 as providing that the relationship between the eleventh and fourteenth amendments with regard to statutes passed pursuant to the latter is a function of congressional intent. Also keep in mind that the statutes in issue in the Parden and Employees of Department of Public Health & Welfare cases were based on the commerce clause which was adopted prior to the eleventh amendment and thus presents a weaker basis for the authorization of Congress to override the eleventh amendment. Perhaps this is why the Supreme Court in Parden and Employees of Department of Public Health & Welfare, though looking at congressional intent, felt constrained to create the constructive waiver doctrine.
gress has the same power with respect to acts passed pursuant to the enforcement clause of the thirteenth amendment. Although this amendment, read as a whole, does not expressly embody the limitations on state authority as does the fourteenth amendment,\textsuperscript{43} it is well settled that the provisions of the thirteenth amendment impose limitations on private action and state, as well as federal, authority.\textsuperscript{44} Thus, Congress would appear to have power to abrogate the eleventh amendment, by an act of Congress passed pursuant to what must be considered the overriding provisions of the thirteenth or fourteenth amendments.

F. Summary of the Eleventh Amendment

A basic point is that the eleventh amendment issue should be considered in every private discrimination suit filed in federal court wherein the state is a named party or is possibly a real party in interest. To date no act of Congress, including Title VII, has abrogated a state's eleventh amendment immunity in its entirety. In all such cases the amendment's possible effect upon the issues of liability and relief requires thought.

Since all discrimination cases are ultimately based on the charge of unconstitutional conduct, and thereby come under the doctrine of \textit{Ex parte Young}, a plaintiff should take the precaution of naming all responsible officials as parties defendant. By so doing, at the very least, prospective injunctive relief may be obtained.\textsuperscript{45} Further, some

\textsuperscript{43} U.S. Const. amend. XIV states "no state shall . . . ."

\textsuperscript{44} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968).

\textsuperscript{45} \textit{Ex parte Young} does not make it clear whether a state official must be sued in his individual or official capacity in order to obtain injunctive relief with regard to his duties as a state official. One would think that he would be properly sued in his official capacity as his behavior in this capacity is the subject of the suit, but the language of the case hints to the contrary. 209 U.S. 123, 160 (1908). The Court said that when a state official comes in conflict with the Constitution he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." \textit{Id. But see Monell v. Department of Social Services,} 532 F.2d 259 (2nd Cir. 1976), which states "[t]here is no doubt that municipal and state officials sued in their official capacities, are 'persons' within the meaning of § 1983 when they are sued for injunctive or declaratory relief." \textit{Id. at 264.}

Thonen v. Jenkins, 517 F.2d 3, 7 (4th Cir. 1975); Dyson v. Lavery, 417 F. Supp. 103, 109 (E.D. Va. 1976). Rule 9 of the Federal Rules of Civil Procedure may make the issue moot in that it states, "it is not necessary to aver capacity" of a party except to the extent required to show jurisdiction. The issue is not definitively resolved, however, and to be safe counsel should sue the official in both his individual and official capacity.
lower federal courts have found, that as against such defendants, attorneys’ fees would not be barred. The courts’ reasoning has been that as with prospective injunctive relief, the effect upon the state is ancillary in nature.48

Aside from the eleventh amendment issue, if plaintiff is seeking damages from out of the personal pocket of the official, a suit against said defendant in his individual capacity would be the proper averment for this purpose.


However, Edelman, while not speaking directly to the issue of attorneys’ fees, cast doubt on earlier case holdings that such an award paid out of state funds does not affect the eleventh amendment.


There is an important distinction between the ancillary relief rationale exemplified in Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) and the rationale enunciated in Fitzpatrick v. Bitzer, 427 U.S. 445 (1977). In the former, the rationale is that an award of attorneys’ fees would not affect the eleventh amendment. In Fitzpatrick, the Court reasoned that Title VII abrogated the eleventh amendment to the extent of allowing back pay and attorneys’ fees.

Recently several district courts have awarded attorneys’ fees against the state holding that various statutes enacted pursuant to the enforcement clause of the fourteenth amendment in conjunction with the Attorneys’ Fees Awards Act has abrogated the eleventh amendment to the extent of allowing attorneys’ fees. Finney v. Hutto, 548 F.2d 740, 742 (8th Cir. 1977) (section 1983 action); Wade v. Mississippi, 424 F. Supp. 1242, 1254-57 (N.D. Miss. 1976) (section 1981 action which is based upon the thirteenth amendment, yet the court argues as if it were based upon the fourteenth amendment). Fitzpatrick, which was heavily relied upon in all of these cases, focused on the fact that congressional authorization to sue the state was clearly present in Title VII. See also Oliver v. Kalamazoo Bd. of Educ., 73 F.R.D. 30, 37-39 (W.D. Mich. 1976) involving the attorneys’ fees statute, 20 U.S.C. § 1617, (Supp. V 1975) which clearly allowed such an award against the state in suits under Title VI of the Civil Rights Act. Such is not clearly present in the Attorneys’ Fees Awards Act nor in the civil rights statutes relied on in these cases. For example section 1983, the basis of the suit in Finney v. Hutto, 548 F.2d 740, 742 (8th Cir. 1977), applies to discrimination under color of state law but excludes the state itself as a party defendant. The Attorneys’ Fees Awards Act does not express an intent to amend section 1983 to allow an award of attorneys’ fees from the state. Indeed the Attorneys’ Fees Awards Act can be read consistently with section 1983 without amending the person requirement in that attorneys’ fees can be obtained from the responsible government officials if they act in bad faith. Fitzpatrick distinguished Edelman, a section 1983 action, by emphasizing that under Title VII congressional authorization to sue
As noted, *Ex parte Young* and *Edelman* teach that where the relief sought requires direct payment of funds to the plaintiff, the issue of whether the state or its agencies is a real party in interest will turn on examination of the source of the funds. Where the monies do not come directly out of general public funds of the state treasury, counsel on either side of this issue may find precedent to support his position.

Once the conclusion is drawn that the state is a real party in interest, one must consider the applicability of the doctrine of waiver and keep in mind that its application is more complex than a reasonable understanding of the term would indicate. When the state acts, unlike a state in a federally regulated area, and when Congress has created private rights of action, implied waiver may be found.

To reiterate, the effect of the eleventh amendment upon the issues of liability and relief may vary depending upon what statute is relied upon by the plaintiff. Because the same substantive claim may create a cause of action under different statutes, counsel should give thought to all possible bases upon which relief may be granted. For instance, an employment discrimination claim may be brought under either Title VII, section 1981 or section 1983. Title VII, for the aforementioned reasons, abrogates the immunity to the extent of affording the relief of back pay and attorneys' fees against the state. To date sections 1981 and 1983 have not been found to abrogate the immunity for any purpose except, possibly, for award of attorneys' fees. The state for back pay and attorneys' fees was "clearly present." 427 U.S. at 452. It would be a distortion of *Fitzpatrick* to say that merely by creating a cause of action pursuant to its authority under the thirteenth and fourteenth amendments, Congress thereby implicitly abrogates the eleventh amendment. It is submitted that express intent to hold the state liable for attorneys' fees should be clear from the statute. But the case law thus far does not appear to reflect this view.

The significance of *Fitzpatrick* to the discrimination statutes other than Title VII is not crucial to the question of attorneys' fees which, depending on the reading of *Edelman*, may be recoverable in any event under the ancillary relief rationale, but it is of utmost importance to the question of damages which in no instance may be construed as ancillary relief not affronting the eleventh amendment. For example, the *Fitzpatrick* doctrine raises, but does not answer, the issue of whether damages are awardable against the state in a section 1981 action, assuming, as many courts do, that the state is a proper party under that statute.

In short, *Fitzpatrick* opens the door for re-evaluation of all the discrimination statutes with respect to the plausibility of exacting money damages from the state in derogation of the eleventh amendment.
fees. Thus, when considering the eleventh amendment, it is essential to be aware and understand the nature of the various laws upon which a particular discrimination claim may be based in order to maximize the potential to establish liability and obtain relief.

Finally, a defense of immunity under the eleventh amendment, when applicable, is jurisdictional in nature and may be raised at any time by any party or by the court, *sua sponte*, providing appearance, as earlier discussed, does not constitute a waiver of this right.

### III. Section 1983

Section 1983, 47 passed pursuant to the enabling clause of the fourteenth amendment 48 creates a federal cause of action against persons acting under color of state law who violate the rights guaranteed by the fourteenth amendment 49 and federal law, including the right to be free from invidious discrimination. 50 In comparison to its sister civil rights statutes, sections 1981 and 1982, section 1983 is broader in scope as to substantive protection and narrower in scope as to those subject to liability. 51 Unlike claims under the former two

47. 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 citizens 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.


Section 1 of the Civil Rights Act of 1871 (Ku Klux Act of 20 April 1871, 17 Stat. 13), codified as 42 U.S.C. § 1983 (1970) was given birth in an attempt to cure the pervasive lawlessness in the reconstruction South. Newly emancipated Negro citizens, as well as white citizens who supported and advocated Negro rights, were afforded minuscule protection from violence by the Ku Klux Klan and, in many instances, local and state officers. Although the need for section 1983 was great, it lay practically dormant, as did most of the early civil rights legislation, until the 1950's.

For accounts of the conditions and atrocities that gave rise to section 1983 see CONG. GLOBE, 42d Cong., 1st Sess. App. (1871) and Monroe v. Pape, 365 U.S. 167 (1961).

48. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

49. U.S. CONST. amend. XIV, § 1 is quoted in full in note 1 supra.

50. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

51. Section 1981, traceable to section 1 of the Civil Rights Act of 1866, was passed pursu-
sections, a section 1983 complaint must allege, in addition to juris-
diction, violation of a pre-existing federal right and action under
color of state law in order to withstand a motion to dismiss. In
other words, section 1983 does not, at least in theory, establish new
federal rights but rather creates a federal cause of action protecting
already existing rights from violations by persons acting under color
of state law. Nevertheless, section 1983 creates an independent
cause of action unaffected by restrictions of overlapping statutes.

Federal jurisdiction under this section is easily attainable. There
is no amount in controversy requirement, nor is it necessary for a
section 1983 litigant to exhaust his available remedies under state
law. Even though state courts have concurrent jurisdiction, litig-

ant to the enabling clause of the thirteenth amendment and was enacted before the fourteenth
amendment was even formally proposed. Since the thirteenth amendment may be violated
in the absence of state action, section 1981 reaches discriminatory actions taken by private
parties.

Section 1982 also had its origin in the Civil Rights Act of 1866 and was reenacted, after
the adoption of the fourteenth amendment, in an act of May 31, 1870. This section finds
constitutional support not only in the implementing clause of the fourteenth amendment, but
in the implementing clause of the thirteenth amendment as well. Hence, this section in its
application need not be limited to state action or color of law cases. The rights under these
statutes, however, are not as broad as the rights protected by the fourteenth amendment.

52. The appropriate jurisdiction basis for a section 1983 claim is 28 U.S.C. § 1343(3)(1970)
which provides the following:
The district courts shall have original jurisdiction of any civil action authorized by law
to be commenced by any person: . . . (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 Con-
gress providing for equal rights of citizens or of all persons within the jurisdiction of
the United States.

54. Although theoretically section 1983 protects against violations of preexisting rights, the
recent upsurge of section 1983 suits has brought out heretofore unasserted aspects of these
rights with the effect of broadening the traditional understanding of their nature.
56. See note 52 supra.
58. In McNeese v. Board of Educ., 373 U.S. 668, 671 (1963), the Supreme Court held that
exhaustion of state administrative remedies was not a prerequisite to seeking relief under
section 1983.
59. As early as 1876 the Supreme Court held that states are not precluded from taking
jurisdiction over a federal claim when the controlling federal statute does not expressly or
impliedly place exclusive jurisdiction in a federal court. Claflin v. Houseman, 93 U.S. 130
(1876). For recent cases recognizing concurrent state jurisdiction over section 1983 claims, see,
gants rarely assert this privilege, because a federal forum is generally preferable.60

As is true with the other civil rights statutes, various procedural hurdles to exacting liability and obtaining relief will confront the practitioner proceeding under section 1983.

A. "Person" Problems

One hurdle often encountered under section 1983 is whether the defendant is a "person"61 within the meaning of the statute.

Relying heavily on section 1983's legislative history, the Supreme Court in Monroe v. Pape62 began what was to become a long line of cases which attempted to define this statutory term.63 In Monroe, the Court concluded that in a suit for money damages under section 1983 a municipal corporation is not a "person" within the meaning of the section, at least for the purpose of such a suit.64 This case was followed by Moor v. County of Alameda,65 in which the Supreme Court held that counties, like municipalities, are "nonpersons" within the meaning of section 1983. As both Monroe and Moor concerned only actions for damages, many lower courts were interpreting these decisions as not precluding equitable actions against governmental entities.66 However, in City of Kenosha v. Bruno,67 the

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For a case in which a section 1983 action was actually brought in a state court, see Hirych v. State, 376 Mich. 384, 136 N.W.2d 910 (1976).

60. Since an action under section 1983 is, in many instances, an action against a state official, a federal forum is normally preferable to a state forum. Additionally, the federal judiciary is better attuned to handling civil rights cases and evidentiary rules enjoy a more liberal construction in federal courts.

61. The defendant must be a "person" within the meaning of section 1983. Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975).


63. In Monroe, Mr. Justice Douglas dismissed as being surplusage the definition of "person" provided by the Dictionary Act, Ch. 71, § 2, 16 Stat. 431 (1871), which stated, "the word person may extend and be applied to bodies politic incorporate . . . ." 365 U.S. at 191. It is worthy to note that the Civil Rights Act of 1871 and Dictionary Act of 1871 were before Congress for consideration at the same time and it would therefore seem unlikely that the members intended that the same meaning should not apply to the word "person."

64. 365 U.S. at 191.


66. Several cases had held that Monroe did not bar suits under section 1983 against municipalities for injunctive relief. E.g., Garren v. City of Winston-Salem, 439 F.2d 140, 141 (4th Cir. 1971); Harkless v. Sweeney Independent School District, 427 F.2d 319, 321-23 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971). Mr. Justice Douglas stated in his dissent in Moor
Supreme Court disposed of the issue by holding that a municipality is not a "person" within the meaning of the statute in both damage and equitable actions.\(^68\) Hence, the aggrieved party will be precluded from joining either a municipality or a county as a party defendant in a section 1983 action regardless of the relief sought.

In addition to municipalities and counties, the "person" requirement may preclude suit against various other political entities depending on the judicial circuit in which the case is tried.\(^69\) The practical effects of this hurdle are not as substantial as appears at first blush. Lower courts have held that though a governmental entity may not be a "person" within the purview of section 1983, officials of that entity are and may be sued in their official capacities. The plaintiff, however, will normally be restricted to equitable relief,\(^70\) since the official is an agent of the state. Damages, therefore, would come from the state coffers and the eleventh amendment immunity precludes such recovery.\(^71\) Paralleling this principle, the

that despite the overtones of *Monroe* the Supreme Court had never expressly held that section 1983 barred suits in equity against municipalities. 411 U.S. at 723.


\(^68\) It is important to note that the Court in *Kenoshia* did not exclude the possibility that a city can be properly named defendant under the general federal question jurisdiction statute, 28 U.S.C. § 1331 (1970) if the $10,000 statutory requirement was met. 412 U.S. at 514.

\(^69\) Among the list of "nonpersons" added by the lower courts are the following: e.g., school boards, Adkins v. Duval County School Bd., 511 F.2d 690, 691 (5th Cir. 1975), and Huntley v. State Bd. of Educ., 493 F.2d 1016, 1017 n.2 (4th Cir. 1974); universities, Prostrollo v. University of S.D., 507 F.2d 775, 777 n.1 (8th Cir. 1974), cert. denied, 421 U.S. 952 (1975), and Blanton v. State Univ. of N.Y., 489 F.2d 377, 382 (2d Cir. 1973); arms of the state government, Cheramie v. Tucker, 493 F.2d 586, 587-88 (5th Cir.), cert. denied, 419 U.S. 868 (1974). See Note, *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 1, 258 (1973), which states: "There seems little doubt that the reasoning of *Bruno* is not limited to municipalities but applies to all agencies of state and local government." See also Patterson v. Ramsey, Civil No. Y-75-964, at 7 (D. Md., March 29, 1976) (school board not a person under section 1983); Meyer v. New Jersey, 460 F.2d 1252 (3d Cir. 1972) (state not a person); Olson v. California Adult Auth., 423 F.2d 1326 (9th Cir.), cert. denied, 398 U.S. 914 (1970) (state agencies which are but arms of the state government are not persons for purposes of section 1983); Francis v. Davidson, 340 F. Supp. 351 (D. Md. 1972). As the language of section 1983 restricts suits brought under it to persons acting pursuant to state or territorial law, federal agencies and personnel are not normally liable under it. It may be possible to bring these defendants within the ambit of section 1983, however, if it can be shown that there existed a joint conspiracy or concert of action by federal and state personnel. Kletschka v. Driver, 411 F.2d 436, 448-49 (2d. Cir. 1969).

\(^70\) Burt v. Board of Trustees, 521 F.2d 1201, 1205-06 n.6 (4th Cir. 1975).

\(^71\) Although the principles of the eleventh amendment immunity parallel those of the person requirement of section 1983, they are distinct legal concepts and should be treated as
“person” requirement precludes use of local officials as a conduit to recover damages from the coffers of the locality.

Plaintiff may recover damages from the responsible official sued in his individual capacity, providing plaintiff establishes that the defendant acted in bad faith in performing his official duties resulting in the unconstitutional discrimination. Since a good faith defense is often difficult for a plaintiff to overcome, however, obtaining a personal monetary judgment is unlikely. There are, however, alternative avenues for obtaining full and effective relief from violations of the same rights as those protected under section 1983. These alternatives are discussed later in this article.

B. Immunities

The civil rights acts in general, and section 1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar and both the language and the purpose of section 1983 are seemingly inconsistent with the application of such immunities. In section 1983 suits, an indispensable element of the plaintiff’s case is a showing that the defendant acted under color of state law. This test can rarely be satisfied in the case of anyone other than a state official; therefore, to hold that all state officials in suits brought under section 1983 enjoy an immunity similar to what they might enjoy in suits brought under state law would practically constitute a judicial repeal of the Civil Rights Acts. Nevertheless, the federal courts have narrowed the scope of these acts by applying certain common law notions of official immunity from suit. These courts have acted

such to avoid confusion that may prejudice the case. For example, a state agency may be deemed to have waived its eleventh amendment immunity but nevertheless may be immune from suit under section 1983 because of the person requirement.


73. One of the earliest immunities established under section 1983 was legislative immunity. See Tenney v. Brandhove, 341 U.S. 367 (1951). The Supreme Court in an opinion by Justice Frankfurter held that the immunity of legislators for acts within the legislative role was not abolished. Unworthy purpose or bad faith were noted in the opinion not to destroy the privilege. The Court reasoned that since Congress had historically viewed legislative freedom and flexibility as of critical importance to the democratic scheme of government, it would have expressly stated that legislators were personally liable in section 1983 suits had it so intended. Id. at 376. But see Eslinger v. Thomas, 476 F.2d 225, 230 (4th Cir. 1973); Nelson
sparingly, however, in the incorporation and treatment of these immunities. Moreover, there is a diversity of judicial opinion concerning the purview of particular immunities; thus, the case law in the jurisdiction in question should be consulted. The important point is that federal courts have the final say regarding the applicability of such immunities in section 1983 suits brought before their bar; they may be adopted or abrogated, in whole or in part, as justice requires.

If the defendant is protected by an immunity, the practitioner must determine whether it is a qualified immunity as enjoyed by executive officers, school board members, and policemen, or whether it is an absolute immunity as enjoyed by judges, legislators, and prosecutors. An absolute immunity protects a defendant

v. Knox, 256 F.2d 312, 314-15 (6th Cir. 1958). One of the first immunities to follow the legislative immunity discussed above was judicial immunity:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . . This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences . . . ." His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

Pierson v. Ray, 386 U.S. 547, 553-54 (1967)(citations omitted). As Pierson involved damages, the Supreme Court has not yet decided whether judicial immunity applies to equitable actions under section 1983. Federal courts have discussed the issue. E.g., Peckham v. Scanlon, 241 F.2d 761, 763 (7th Cir. 1957); Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955) (judges are immune from equitable relief under section 1983).

Closely related is quasi-judicial immunity. See Note, Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions, 1976 Duke L.J. 95 (1976). Included within this classification have been such officers as clerks of court, parole board members, prison officials, court reporters, jurors, sheriffs and police officers.


74. See Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

75. For an excellent discussion of immunities under section 1983, see McCormack, Immunities of State Officials Under Section 1983, 8 Rut.-Cam. L.J. 65 (1976).


77. Burt v. Board of Trustees, 521 F.2d 1201, 1206 (4th Cir. 1975).


79. The immunity afforded judges for official acts is absolute despite the absence of a constitutional provision comparable to the one protecting legislators. See Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

80. Legislators enjoy an absolute immunity when acting within the scope of their legislative duties. Tenney v. Brandhove, 341 U.S. 367 (1951). Such immunity is explicitly conferred on
without regard to his purpose, motive or the reasonableness of his conduct, whereas the protection of a qualified immunity hinges upon the defendant’s good faith and the reasonableness of his behavior. If the defendant falls within the latter, the practitioner must then determine if the defendant’s conduct meets the criteria necessary to trigger the immunity.

Although public policy reasons justify both absolute and qualified immunities of certain defendants from damages, the overwhelming weight of authority is against extending the immunity doctrine to a case seeking injunctive relief.

C. Statute of Limitations

As no federal statute provides a limitation period for section 1983, the controlling period is ordinarily the most appropriate one provided by state law. Hence, as a general rule of thumb, the applicable period of limitations is the one which state courts would apply if the action were brought in a state court under state law. Al-

federal congressmen by the Constitution “for any Speech or Debate in either House.” U.S. Const. art. I, § 6. This section has been broadly construed by the courts.

81. Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1974), aff’d, 424 U.S. 409 (1976). The Court noted: “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.” 424 U.S. at 424-25.

82. But see Wood v. Strickland, 420 U.S. 308 (1975), in which the Supreme Court held that the official must not only be acting in good faith, “with a belief that he is doing right,” but also his actions cannot be justified by ignorance of “settled, indisputable law.” Id. at 322. Accordingly, if the official knew or reasonably should have known that his actions would violate a person’s constitutional rights, or “if he took the action with the malicious intention” of violating constitutional rights, he should not be immune from section 1983 liability. Id. at 321-22.

83. A complaint against a judge under section 1983 seeking equitable relief alone might well be successful. In Mitchum v. Foster, 407 U.S. 225 (1972), where an injunction under section 1983 was upheld against state court proceedings the Court, per Justice Stewart, stated, “it is clear from the legislative debate surrounding passage of section 1983’s predecessor that the act was intended to enforce the provisions of the Fourteenth Amendment against state action . . . whether that action be executive, legislative or judicial.” Id. at 240. The Court of Appeals for the Second Circuit states: “[N]o sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff’s civil rights by state judges acting in their official capacity.” Erdmann v. Stevens, 458 F.2d 1205, 1206 (2d Cir.), cert. denied, 409 U.S. 889 (1972).


85. Hileman v. Knable, 391 F.2d 596, 597 (3d Cir. 1968). Many federal courts apply a
though state law is the primary guide in this area, it is not the exclusive one. Considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the particular federal right upon which the section 1983 action is based.\textsuperscript{86}

D. Relief Available

Notwithstanding the "person" problems, plaintiff may rely on federal or state statutory or common law remedies, which best effectuate full and satisfactory relief.\textsuperscript{87} Furthermore, research has revealed several cases wherein a political entity was deemed a "person" within the meaning of section 1983.\textsuperscript{88} Although the cases did not deal with the issue of the recovery of damages, logic dictates that such relief would be available from political entities. As mentioned earlier, damages are also available from the responsible officials if acting in bad faith.\textsuperscript{88}

In addition to compensatory damages,\textsuperscript{89} punitive damages may be available against such officials. But note that the bad faith test for compensatory damages awarded from said official’s pockets may differ from the bad faith test for obtaining punitive damages from the same.\textsuperscript{91}

\textsuperscript{87} See generally text and notes of section 1983 Part IV infra.
\textsuperscript{88} E.g., Keckeisen v. Independent School Dist., 509 F.2d 1062, 1065 (8th Cir. 1975) (school district found to be a "person" for section 1983 purposes); Wright v. Arkansas Activities Ass’n., 501 F.2d 25, 28 (8th Cir. 1974) (voluntary association of schools is a "person"); Aurora Educ. Ass’n East v. Board of Educ., 490 F.2d 431, 435 (7th Cir. 1973) (school board is a "person" under section 1983).
\textsuperscript{89} Wood v. Strickland, 420 U.S. 308 (1975), see note 82 and accompanying text supra.
\textsuperscript{90} Whether or not actual damages have been proven, nominal damages may be recovered as the constitutional rights of a citizen are considered to be so valuable to him that an injury is presumed to flow from the deprivation itself. As stated in United States ex rel. Motley v. Rundle, 340 F. Supp. 807, 811 (E.D. Pa. 1972): "In most cases when a public official denies rights that the citizen felt were secure under our Constitution, the result is hurt feelings, outrage, embarrassment or humiliation and nominal damages may be awarded for these natural consequences of lawless action by state officials."
\textsuperscript{91} Although no case speaks directly to this point, it appears, and justifiably so, that the "bad faith" test for punitive damages is more rigorous than the "bad faith" test articulated in Wood v. Strickland, 420 U.S. 308 (1975), for out of pocket compensatory damages. As stated by the Supreme Court in Wood:
The Civil Rights Attorneys’ Fees Awards Act of 1976\textsuperscript{92} provides federal courts with discretionary authority to award attorneys’ fees to prevailing parties when proceeding under section 1983. Although not explicit in the language of the statute, the legislative history discloses that Congress intended payment from the responsible entity rather than out of the pockets of the officials thereof. However, in a suit involving state officials as defendants, it is not yet clear whether such awards can be made in light of the eleventh amendment.\textsuperscript{93}

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[t]he official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student’s constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students’ daily lives than by the presence of actual malice.

\textit{Id.} at 321. In holding that the bad faith test contains both “subjective” and “objective” elements, the Court went on to establish a bad faith standard regarding out of pocket damages by holding:

a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

\textit{Id.} at 322. The bad faith test regarding punitive damages as enunciated by the Federal District Court of New Jersey in Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), appears to be more rigorous. As stated by that court, “[p]unitive damages should not be awarded in a § 1983 proceeding unless there is a showing that the proscribed action has been a constant pattern or practice of behavior of defendants and that such practice has been willful and in gross disregard for the rights of plaintiff.” \textit{Id.} at 170. In accord with this standard is Lee v. Southern Home Sites Corp., 429 F.2d 290 (6th Cir. 1970), in which the following was held:

The general rule as to punitive damages, repeatedly found in the reported cases, is that they may be imposed if a defendant has acted willfully and in gross disregard for the rights of the complaining party. Since such damages are punitive and are assessed as an example and warning to others, . . . they are not a favorite in law and are to be allowed only with caution and within narrow limits . . . .

\textit{Id.} at 294.


93. See generally notes and accompanying text on the eleventh amendment Part II supra. \textit{Compare}, Note, The Civil Rights Attorneys’ Fees Awards Act of 1976, 34 WASH. & LEE L. REV. 205, 221 (1977) wherein it is stated that such award can be made even though it will ultimately be paid from state funds. This note finds support for such position in S. REP. No. 1011, 94th Cong., 2d Sess. 1 (1976), which reads in part as follows:

in such cases it is intended that the attorneys’ fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party.)
IV. THE OTHER 1980'S

A. Section 1981

Much of what has been said about section 1983 also applies to section 1981 so the focus herein is limited to the distinctions that are important for the purposes of this article.

Section 1981 is narrower in scope of substantive protection than section 1983 but it is broader in scope as to those subject to liability. A literal reading of section 1981 discloses no restrictions as to exacting liability and obtaining relief. There is, however, a split of judicial opinion over whether state and local governmental entities are subject to suit thereunder, that is, whether the "person" requirement of section 1983 applies to section 1981.

94. 42 U.S.C. § 1981 (1970) states in pertinent part: "All persons . . . shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." Jurisdiction for this section is invoked pursuant to 28 U.S.C. § 1343(4) (1970) which, unlike 28 U.S.C.A. § 1331(a) (1970), does not require a minimum amount of value in controversy. It is important to note that section 1981 creates an independent cause of action for various acts of racial discrimination. See note 95 infra. See also Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Even when the act of discrimination is covered by other statutes that require exhaustion of state remedies or administrative pre-requisites, as does Title VII for example, these qualifications need not be satisfied to state a claim under section 1981. Gibson v. Kroger Co., 506 F.2d 647 (7th Cir. 1974), cert. denied, 421 U.S. 914 (1975). Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1975); Hill v. American Airlines, Inc., 479 F.2d 1057, 1060 (5th Cir. 1973). But see Brown v. General Services Admin, 425 U.S. 820 (1976). (This case involved federal employees and thus is not within the scope of this article). When, however, an action is dismissed for failure to meet administrative pre-requisites of the statute relied on in the complaint, plaintiff cannot raise the issue of section 1981 jurisdiction for the first time on appeal. Gibson v. Kroger Co., 506 F.2d 647, 653 (7th Cir. 1974).


Although several courts have found the "person" restriction applicable, research has revealed only one case that gives reasons for so holding. In Bennett v. Gravelle, the court reasoned as follows:

Sections 1981 and 1988, like 1983, were designed to hold individuals liable for infringing upon another's civil rights. In 1871, when Congress was debating the merits of section 1983, section 1981 had already been law for five years and had been repassed the previous year. In its consideration of section 1983, Congress specifically rejected a proposal to hold municipalities liable for the acts of its officials in depriving persons of their civil rights. The reason for rejecting this proposal was not that such liability already existed under section 1981, but that imposing this liability upon the community was antagonistic to the basic policies of Congress . . . .

As clearly indicated in the legislative history, the primary purpose of section 1983 was to provide a federal remedy otherwise unavailable for asserting damages for deprivation of civil rights . . . . Accordingly, an interpretation of section 1981 which authorizes damage actions against states and municipalities deprives section 1983 of its essential significance.

There is substantial and well reasoned authority holding to the contrary. For example, Maybanks v. Ingraham, citing but refuting Gravelle reasoned thusly:


99. Id. at 215 (emphasis added).


In the first place, the word "person" which in § 1983 has been held conclusively not to apply to municipalities, appears in § 1981 only to describe those who are protected by the statute, not those who are proscribed from its violation. In the second place, the scope and application of § 1981 is vastly different from that of § 1983.

One essential difference is that § 1981, like § 1982, is based on and intended to enforce the Thirteenth Amendment, and applies, therefore, to actions against private persons as well as those acting under color of law. Section 1983, on the other hand, enacted to implement the Fourteenth Amendment and applying, therefore, only to cases where state action is involved, is of more limited application . . . .

. . . Surely this is sensible, for if purely private citizens are subject to liability under §§ 1981 and 1982, it would seem anomalous to exempt government, the upholder of law, from similar responsibility for racial discrimination.102

The issue remains unresolved in most federal circuits. Therefore, counsel should know, not only the arguments for each side,103 and when and how they are raised,104 but he should also know the consequences depending upon which way the issue is resolved.

There is no dispute that section 1981 supports a cause of action by a private plaintiff against defendants in the private sector for both injunctive relief and money damages.105 Hence, if the Maybanks construction prevails, holding the "person" requirement inapplicable, the same relief should be available against the state and local governing bodies, unless barred by the eleventh amendment.106

The Maybanks line of cases puts a gloss upon section 1981 which,
read in light of Fitzpatrick v. Bitzer,¹⁰⁷ arguably leads to the conclusion that section 1981 abrogates the eleventh amendment immunity to allow injunctive relief and money damages against the state. Fitzpatrick found that in Title VII, passed pursuant to, and cloaked with the authority of, the fourteenth amendment, congressional intent to hold the state liable in back pay and attorneys' fees was clearly present, therefore abrogating the eleventh amendment to that extent. The logic of Fitzpatrick under the Maybanks construction, which may be read as creating, inter alia, a cause of action for money damages against the state under section 1981, may be extended to section 1983 which, paralleling Title VII, was passed pursuant to the enforcement clause of the thirteenth amendment. To date, research indicates that only one of the Maybanks line of cases involved suit against a state agency thus bringing the eleventh amendment in issue.

In Wade v. Mississippi Co-op Extension Service,¹⁰⁸ the court, relying on cases that held the section 1983 "person" requirement inapplicable to section 1981, concluded that state officials sued in their official capacities were proper parties defendant in an action for money damages under section 1981. The court further held that the Civil Rights Attorneys' Fees Awards Act of 1976,¹⁰⁹ which provides for attorneys' fees under section 1981, abrogated the eleventh amendment immunity to the extent of allowing an award of attorneys' fees out of state funds despite the absence of express authorization in the statute as Fitzpatrick, if read correctly, requires. Instead, the court relied upon what it termed "clear and unequivocal legislative history" to allow for said fees against the state.

Ironically, the court also held that damages under section 1981 were barred by the eleventh amendment because similar legislative

¹⁰⁷. 427 U.S. 445 (1976). But extending the holding of Fitzpatrick, a Title VII case, to section 1981 may cause some unanticipated consequences. Included in the rights safeguarded by section 1981 is protection against employment discrimination. See, e.g., Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Thus, it not only overlaps the coverage of Title VII, while avoiding the exhaustion requirements and administrative pre-requisites thereof (see note 94 supra) but, under Fitzpatrick, it would also allow broader based damages (see note 105 supra) against the state than that allowed by Title VII. Such a result is likely unintentional as it would appear to undermine the congressional intent present in Title VII to limit relief against the state for employment discrimination to backpay and attorneys' fees.


intent was not present in the history of section 1981. Yet the cases relied upon by Wade to find the "person" requirement inapplicable suggest, as do the other cases in the Maybanks line, that the legislative history of section 1981 does indeed exhibit congressional intent to hold the state, as well as private and federal defendants, liable for money damages. In short, the question of whether damages and/or attorneys' fees may be awarded against the state under the Maybanks construction of section 1981, as with the question of the viability of the Maybanks construction itself, cannot be definitively answered.

If the Gravelle construction prevails, that is, if the "person" requirement applies to section 1981 in suits redressing discrimination under color of state law, the plaintiff will be left to the devices available under section 1983 which would be a suit against the responsible officials for declaratory and injunctive relief and, when bad faith is shown, for out of pocket compensatory and punitive damages. Also note that alternative avenues of relief such as other antidiscrimination statutes with overlapping coverage and suits directly under the thirteenth or fourteenth amendments should be considered.

Lastly, as mentioned, section 1981 is included in the Attorneys' Fees Awards Act of 1976. Whether its inclusion allows for attorneys' fees against state and local governments depends on whether the "person" requirement is deemed to apply to that section and on the eleventh amendment considerations.

B. Section 1982

Section 1982 is narrower in scope of substantive protections than section 1981 but with regard to the matters discussed in this arti-

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110. See text discussing damages under section 1983, Part III supra.
111. E.g., 42 U.S.C. § 2000e (employment discrimination); 42 U.S.C. § 3601 (housing discrimination). But note that alternative statutes may contain qualifications to exacting liability and obtaining relief that are not required under section 1981.
112. See text discussing suit directly under the Constitution, Part VI infra.
114. See Wade v. Mississippi, 424 F. Supp. 1242, 1254-56 (N.D. Miss. 1976) and discussion in text thereon at note 108 supra. See also text discussing eleventh amendment, Part II supra.
cle these statutes are almost indistinguishable. Because section 1982 protects against racial discrimination in the sale or lease of property, there is overlap of coverage between this section and the Fair Housing Act of 1968. Each statute, however, states an independent cause of action and claims under one statute are neither limited nor enhanced by the fact that they are also actionable under the other statute.

As true with section 1981, section 1982 read literally does not disclose any restrictions as to who may be sued and as to what remedies are available. Nevertheless, the cases cited with respect to applicability of the "person" requirement to section 1981 suggest that the considerations raised therein apply equally to section 1982. The discussion under section 1981 about damages, attorneys' fees and the eleventh amendment is likewise equally applicable to section 1982.

Finally, the statute of limitations under this section, as under sections 1981, 1983 and 1985, is the controlling time period that would ordinarily be the most appropriate one under state law.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.


116. For discussion of their common origin and consequent analogous construction see Baker v. F&F Investment Co., 489 F.2d 829, 833 (7th Cir. 1973).

117. 42 U.S.C. §§ 3601 to 3631 (1970 & Supp. V 1975). The Fair Housing Act, comparable to Title VII, has exhaustion requirements and administrative prerequisites and time limitations that are not required by suit under section 1982. See 42 U.S.C. § 3601, 3610(d) and 3612(a) (1970). This article does not attempt to exhaust the advantages and disadvantages of suit under this section, thus further study in light of the considerations addressed herein is well advised.


120. See text and accompanying notes on section 1981, Part IV A supra.

C. Sections 1985 and 1986

What has been said about nonsubstantive matters in suits under section 1983 is generally true in suits under sections 1985 and 1986. These statutes use the word "person" in a context analogous to that of section 1983 and, consequently, the courts have found that the language invokes the same restrictions as to parties liable. As with section 1983, these statutes create independent causes of action without exhaustion requirements and unaffected by restrictions in statutes with overlapping coverage. The effects of the eleventh amendment and sovereign and official immunities are essentially the same. Unlike section 1983, these statutes contain express provision for damages, but damages are nevertheless obtainable under section 1983 and the distinction is of no apparent consequence with regard to the availability of other types of relief. Like section 1983, the statute of limitations for section 1985 is deter-


123. 42 U.S.C. § 1986 (1970), having the same constitutional basis as section 1985, creates a federal cause of action against responsible parties who have knowledge but through negligence fail to prevent commission of a section 1985 conspiracy. The jurisdictional bases are the same as in section 1985 referenced in the preceding note.


mined by reference to the limitation period of the forum state governing similar state claims.\textsuperscript{129} Section 1986 contains an express limitation period of one year\textsuperscript{130} which will usually amount to a shorter period than that allowed for a related claim under section 1985.

D. \textit{Section 1988}

Section 1988 provides for application of the forum state's common law and statutory remedies where those of the federal civil rights statutes are inadequate.\textsuperscript{131} This section is procedural only; it neither confers jurisdiction nor creates rights in itself.\textsuperscript{132} Thus, once liability and a right to relief is established, section 1988 permits utilization of state remedies in absence of, or in conjunction with, federal remedies, whichever best serves the policies expressed in the federal statutes being enforced.\textsuperscript{133} Although sections 1981 to 1988, with minor exception,\textsuperscript{134} make no express provision for relief, the Supreme Court in a section 1982 case concluded that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies."\textsuperscript{135} Hence, the law of the forum state, through section 1988, may serve as a basis for awarding declaratory, injunctive, compensatory and punitive remedies under these statutes.\textsuperscript{136} Important

\textsuperscript{129} \textit{E.g.}, Peterson v. Fink, 515 F.2d 815, 816 (8th Cir. 1975).

\textsuperscript{130} 42 U.S.C. \textsection 1986 (1970) provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." This incorporation presents a potential procedural pitfall. Normally under the Federal Rules of Civil Procedure the defendant must affirmatively plead the statute of limitations in his motion to dismiss or else the defense is waived. Where the limitation period is incorporated into the statute itself, however, it is said to affect the right rather than the remedy and as such the plaintiff must plead in the complaint that he has brought suit within the statutory period in order to state a claim under the statute. Of course, the court may permit leave to amend the complaint in response to a motion to dismiss on this basis, but with correct pleading plaintiff's counsel need not be caught in this embarrassing and potentially prejudicial situation.


\textsuperscript{133} Moor v. County of Alameda, 411 U.S. 693, 703 (1973).


\textsuperscript{136} 42 U.S.C.A. \textsection 1988 (Supp. 1977) has been amended to incorporate the Civil Rights Attorneys' Fees Awards Act of 1976 allowing under certain civil rights statutes the prevailing party, other than the United States, reasonable attorneys' fees. For a listing of the statutes it covers and discussion of related issues, see text on eleventh amendment, Part II \textit{supra}.
tantly, however, section 1988 may not be used to circumvent limitations upon liability and relief in derogation of either the express wording or judicial construction of the statutes it is intended to complement.\textsuperscript{137}

V. Title VII\textsuperscript{138}

Since Title VII's sole function is to aid in the redress of certain types of employment discrimination,\textsuperscript{139} it is narrower in scope of substantive protection than sections 1981 to 1988. As enunciated by the Supreme Court in Johnson v. Railway Express Agency Inc.,\textsuperscript{140} Title VII did not repeal pre-existing remedies for discrimination in private employment. As a result thereof, suits directly under the Constitution\textsuperscript{141} and sections 1981 to 1988 may prove formidable alternatives even though their language does not expressly prohibit employment discrimination.\textsuperscript{142}

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\textsuperscript{137} Moor v. County of Alameda, 411 U.S. 693, 700-02 (1973) (Court refused use of section 1988 to circumvent the section 1983 "person" requirement by use of state law imposing vicarious liability upon municipalities.)

\textsuperscript{138} Title VII (Equal Employment Opportunity) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1970), and its 1972 amendments, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975) make it unlawful for any employer, employment agency, labor organization or joint labor-management committee to discriminate against any individual in hiring, discharging or advertising jobs and in terms, conditions and privileges of employment on the basis of race, color, religion, sex or national origin. It also makes it unlawful for any one of the aforementioned persons, companies or agencies to discriminate against an employee or applicant for employment because he opposed any practice made unlawful by the Act or because he tried to enforce and secure his rights under the Act.

The 1972 amendments expanded the class of employers subject to Title VII. By modifying the definitions of person, employer and employee, the 1972 amendments thus extended coverage of Title VII to the previously unprotected employees of state and local governments. In actions involving such state and local governments and their employees, the federal enforcement power was granted to the Department of Justice, rather than to the EEOC. The individual's right to file a civil suit against an offending state employee, upon the Attorney General's failure to do so, was nevertheless maintained. Thus, the 1972 amendments to Title VII explicitly provide that a private individual may bring suit against a state employer in federal court.

\textsuperscript{139} As stated by the Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971), "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers which have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30.

\textsuperscript{140} 421 U.S. 454, 459 (1975).

\textsuperscript{141} See text Part VI infra.

\textsuperscript{142} The drafters of Title VII emphasized that it was not intended to be an exclusive remedy, but rather was designed to supplement those remedies already at the disposal of an
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Under Title VII, however, the "person" problems regarding who may be held liable are nonexistent; however, unlike these alternative statutes, Title VII requires the aggrieved party to comply with a series of procedural prerequisites to bringing suit in federal court.\(^{143}\)

A. Filing of Changes With the EEOC

To initiate the procedure either the potential plaintiff or a member of the Equal Employment Opportunities Commission (EEOC)\(^{144}\) must file a notice\(^{145}\) of charges\(^{146}\) with the Commission setting forth the aggrieved employee. The purpose of [the 1972 Amendments] is to correct certain deficiencies in title VII and strengthen the national policy against employment discrimination. It is not our purpose to repeal existing civil rights laws.

As originally passed in 1964, title VII provided an administrative procedure before implementing the individual's right to sue directly in court under the constitutional guarantees against discrimination. [The 1972 Amendments] corrects many of the shortcomings of that original 1964 act, but it is an improvement which is premised on the continued existence and vitality of other remedies for employment discrimination.

The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it.


143. Although Title VII actions must be brought in the appropriate U.S. District Court, 42 U.S.C. § 2000e-5(f)(3) (Supp. V 1975), it is important to note that a potential Title VII case rarely commences at the EEOC level. Generally, if the individual's home state or locality has a law prohibiting the alleged discriminatory practice, the individual must file a charge there first. 42 U.S.C. § 2000e-5(c) (Supp. V 1975). Sixty days after filing with the state or locality, but not less than 180 days after the alleged violation, the individual may then file a charge under Title VII with the EEOC. 42 U.S.C. § 2000e-5(c), (e) (Supp. V 1975).


145. Title VII requires that the charge be "in writing under oath." 42 U.S.C. § 2000e-5(b) (Supp. V 1975). The requirement of "a writing under oath" is treated as procedural; the original "complaint" is often simply an unsworn letter setting out the complainant's grievance, but the EEOC regulations allow technical defects in the charge to be remedied by amendment relating back to the date of the original charge. 29 C.F.R. § 1601.11 (1976). The plaintiff can verify or add to his statements at a later time and preserve the filing date of his original charge.

146. A rule of construction has developed that a party defendant to a suit under this section against whom no charge has previously been filed with the Commission cannot be held liable for any damages resulting from the discrimination. Le Beau v. Libby-Owens-Ford Co., 484 F.2d 798, 799 (7th Cir. 1973) (international union not named in charge and not appearing before the EEOC was properly dismissed as defendant); Bowe v. Colgate-Palmolive Co., 416
the alleged violation\textsuperscript{147} within 180 days of the alleged unlawful employment practice.\textsuperscript{148} The EEOC then has a period of 10 days in which they must serve notice of these charges upon the employer or agency.\textsuperscript{149} Thereafter, where practicable, the EEOC must investigate and determine within 180 days of filing whether or not there is reasonable cause to believe that the charges are true.\textsuperscript{150}

This 180 day filing requirement is in many instances the albatross of what could be a very strong Title VII action as it is a jurisdictional prerequisite to filing suit in the federal court.\textsuperscript{151} State statutes of


\textsuperscript{148} Id. in the case of federal employees, the notice must be filed within 30 days of the alleged violation. 42 U.S.C. §§ 2000e-5(e), 2000e-5(f)(1), 2000e-16(c) (Supp. V 1975).


\textsuperscript{150} 42 U.S.C. § 2000e-5(b) (Supp. V 1975). If the EEOC has not secured a conciliation agreement within 30 days after the charge has been filed, the EEOC may file an action in the appropriate District Court. 42 U.S.C. § 2000e-5 (f)(1) (Supp. V 1975), amending 42 U.S.C. § 2000e-5 (1970). The likelihood, however, of the EEOC securing such an agreement in 30 days is highly unlikely. If no action has been filed by the EEOC and no conciliation agreement has been entered into 180 days after the charge has been filed, the charging party may request a notice of right-to-sue. Id. Otherwise notice is not issued until a dispositive decision has been reached on the case: i.e., there has been a finding of no reasonable cause, conciliation efforts have failed, or a decision has been made not to file suit. Most courts have upheld the EEOC regulations on the rationale that the charging party would otherwise be forced to choose between filing a private suit immediately, perhaps missing the chance to conciliate the case, and waiting for a possible EEOC-instituted suit at a later date.

\textsuperscript{151} See, e.g., Terry v. Bridgeport Brass Co., 519 F.2d 806, 808 (7th Cir. 1975); East v. Romine, Inc., 518 F.2d 332, 336-37 (5th Cir. 1975); Jefferson v. Peerless Pumps Hydrodynamic, Div. of FMC Corp., 456 F.2d 1359, 1360-61 (9th Cir. 1972).
limitations are not applicable since there are limitations specifically enumerated within the Act.\(^\text{152}\)

The requirement that notice must be filed within 180 days of the alleged unlawful employment practice may be circumvented if the alleged discriminatory practice is *continuing in nature.*\(^\text{153}\) Courts have held that failure to file charges with the EEOC within the 180 day period in situations involving a continuing violation will not bar a subsequent suit in federal court unless the charge was not filed within 180 days after the employer terminated the challenged practice.\(^\text{154}\) Even though an employee has been discriminated against in his employment and even if said discrimination is continuing in nature, once employment is terminated the employee cannot serve notice beyond 180 days.\(^\text{155}\) Similarly, termination of employment

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155. In United Air Lines, Inc. v. Evans, 97 S. Ct. 1885 (1977), the Supreme Court was confronted with a female air flight attendant who had failed to file a timely claim against the airline for violation of Title VII when her employment was terminated in 1968 pursuant to a later invalidated policy which required termination of her employment because she got married. The Court held that petitioner, United Air Lines, had not committed a present, continuing violation of title VII by refusing to credit respondent, after rehiring her in 1972, with pre-1972 seniority absent any allegation that petitioner's seniority system discriminated against former female employees or victims of past discrimination. In enunciating its holding, the Court stated the following:

Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats *former employees* who were dis-
either through discharge or resignation is not in itself a continuing violation.\textsuperscript{156}

An argument can be made that equitable modifications such as tolling and estoppel apply to the 180 day time requirement so that the limitation period does not begin to run until the facts supporting a discrimination charge are apparent or should be apparent to a person with a reasonably prudent regard for his rights similarly situated to plaintiff. The Fifth Circuit Court of Appeals so held in \textit{Reeb v. Economic Opportunity Atlanta, Inc.}\textsuperscript{157} in which it stated that the 180 day period within which charges must be filed with the EEOC is not jurisdictional in the sense that compliance with it \textit{vel non} determines the jurisdiction of the district court without respect to other circumstances. The court also held that where the employer is charged with actively seeking to mislead the plaintiff as to the facts supporting a charge of discrimination, the ninety day period did not begin to run until the facts that would support a charge of discrimination became, or should have become, apparent.\textsuperscript{158}

Even though an aggrieved party has not filed charges with the EEOC or, in the alternative failed to file within the statutory period, he will still be able to participate in a class action\textsuperscript{159} and recover, so long as some member of his injured class made the charge common to all and thus gave notice to the EEOC and the defendant so that voluntary compliance and conciliation functions could be attempted.\textsuperscript{160} The named plaintiffs, however, must have filed charges within the statutory period and cannot represent those persons who could not have filed a charge with the EEOC at the time plaintiffs filed their charges.\textsuperscript{161}

\footnotesize{charged for a discriminatory reason any differently than former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.}

\textit{Id.} at 1889.

\textsuperscript{156} Terry \textit{v. Bridgeport Brass Co.}, 519 F.2d 806 (7th Cir. 1975).

\textsuperscript{157} 516 F.2d 924 (5th Cir. 1975).

\textsuperscript{158} \textit{Id.} at 930.


B. Filing Suit in the Federal Court

Once the aggrieved party has properly filed with the EEOC, he must obtain a right-to-sue letter prior to filing suit in the federal court. If after investigation the EEOC determines that there is no reasonable cause to believe that the charges are true, they must be dismissed and both the employer and the aggrieved party notified. This notification to the plaintiff constitutes his right-to-sue letter. Conversely, if the EEOC finds reasonable cause to believe that the charges are true, then it is to make every effort to eliminate the unlawful practice by informal methods of conferences, conciliation and persuasion. The EEOC is empowered to bring suit itself against the employer if it is unable to obtain voluntary compliance with the law.

When the employer is a governmental or political entity, the EEOC must refer the case to the Attorney General who may bring suit. The potential plaintiff or plaintiffs aggrieved may intervene as of right in any suit brought by the EEOC or the Attorney General. If neither the EEOC nor the Attorney General decides to bring suit, the aggrieved party must then be notified by letter of his right to bring suit. This is true even if the charges were filed by a member of the EEOC. Once the right-to-sue letter is issued by the EEOC, the aggrieved party then has 90 days within which to file his complaint in federal court.

The courts are divided on the issue of when the 90 day period begins to run. The Second Circuit Court of Appeals has held that when the EEOC has made a determination of no reasonable cause, the limitation period begins to run when the EEOC notifies the plaintiff of its dismissal of the charge. Hence, an EEOC regulation which provided that plaintiff could request after notification of dismissal a notice of right-to-sue was invalid to the extent that it had

167. Id.
168. Id.
169. Id.
170. Id.
the effect of extending the 90 days indefinitely until the aggrieved party requested the notice of right-to-sue.\textsuperscript{171} The Eighth Circuit is in direct conflict, however, as it has held that the 90 day period would begin to run upon official notification to the complainant after determination by EEOC not to file suit. Thus, according to the Court of Appeals for the Eighth Circuit, where the first letter from the EEOC advised the plaintiff that conciliation had failed, but not that the Commission had decided not to file suit, it did not constitute statutory notice initiating the 90 day period. The court went on to say that even if the statute could be considered to require the issuance of a notice of a right-to-sue upon the failure of conciliation, the aggrieved party is entitled to actual and effective notification of his right-to-sue. Thus, where the first letter explicitly informed the plaintiff that the 90 day period would not begin to run until receipt of a second letter at the plaintiff's request, the first letter was not effective notification and could not serve to initiate the running of the limitation period.\textsuperscript{172} Several district courts have been in agreement with the Second Circuit, however, in holding that the 90 day period commences with notice of failure to conciliate, despite misleading advice from the EEOC that the time period would not begin to run until receipt of the requested notice of right-to-sue.\textsuperscript{173}

C. Alternative Jurisdictional Considerations

As stated earlier, sections 1981 to 1988 may prove to be formidable alternatives to Title VII. Additionally, the aggrieved party should consider pleading pursuant to the Fair Labor Standards Act\textsuperscript{174} as well as directly under the Constitution. Different considerations come into play, however, when deciding under which jurisdictional ground to proceed.

\textsuperscript{171} DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir.), on rehearing, 520 F.2d 409 (2d Cir. 1975).

\textsuperscript{172} Tuff v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975).


An aggrieved party may be time barred from seeking redress pursuant to Title VII if the 180 day period for filing charges with the EEOC or the 90 day period for filing suit in the federal court has expired. He may still have time to proceed under the Civil Rights statutes, however, as a cause of action thereunder runs as long as the applicable state statute of limitations which is normally a number of years.\footnote{175}

The remedy sought by the aggrieved party is an important consideration. Punitive damages are recoverable under the Civil Rights Act while Title VII plaintiffs are normally limited to backpay awards and attorneys' fees.\footnote{176}

Another consideration is the different burdens complaining parties must satisfy depending upon the constitutional or statutory provision under which they proceed. An aggrieved party suing pursuant to Title VII must merely show a discriminatory impact.\footnote{177} It is not necessary to prove discriminatory intent as good faith and lack of discriminatory intent are, for the most part, useless concepts in a Title VII lawsuit. Policies and practices, neutral on their face and implemented without discriminatory intent, are nevertheless subject to scrutiny by the courts under Title VII.\footnote{178} The measure

\footnote{175. No federal statute of limitations exists regarding the Civil Rights Act; hence, the period of limitations is governed by the period set forth in the most analogous state action.}

\footnote{176. The Supreme Court in Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), stated that the remedy of back pay, given a finding of unlawful discrimination, should be withheld only if its award would frustrate Title VII's central purpose of eradicating discrimination throughout the economy and that the absence of bad faith is not a sufficient reason for denying back pay. However, "back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g) (Supp V 1975). It is important to note that Title VII abrogates the eleventh amendment to the extent of allowing back pay and attorneys' fees. See text Part II supra. For an in-depth analysis of seeking redress for employment discrimination under the Civil Rights Acts, see Brooks, Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination, 62 CORNELL L. REV. 258 (1977).


178. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), black employees of the Duke Power Company brought a class action in the U.S. District Court for the Middle District of North Carolina against their employer, alleging that Duke Power, by requiring a high school diploma and a satisfactory score on a standardized intelligence test for promotion to certain jobs heretofore limited to white employees, violated Title VII. The District Court dismissed their complaint. On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed in part the lower court's dismissal and held that six black employees hired prior to the adoption of the high school diploma requirement were entitled to injunctive relief. The Fourth Circuit
that is applied is whether or not those neutral policies and practices have the consequence or the effect of discriminating on the basis of race, color, sex, national origin or religion. If the policy or practice has a disparate impact on a protected Title VII class, that policy or practice is in violation of Title VII and can be voided on the court’s order.

While the showing of a discriminatory impact is sufficient to establish a prima facie case under Title VII, the Supreme Court has declined to permit an aggrieved party redress for a claim of employment discrimination when proceeding directly under the Constitution unless the discriminatory impact is accompanied by proof of discriminatory intent. In Washington v. Davis, the Supreme Court denied a constitutional cause of action based solely on claims of discriminatory impact and lack of job-relatedness against the questioned employment test. Although it rejected the constitutional

held, however, that employment testing need not be job related, provided that such tests not be designed, intended or used to discriminate against minority employees. The Supreme Court reversed. The Court held that the requirements for promotion established by the Duke Power Company violated Title VII because neither standard utilized by Duke was shown to be significantly related to successful job performance, both requirements operated to exclude black employees at a substantially higher rate than white aspirants for promotion, and the jobs in question previously had been filled only by white employees pursuant to a long standing policy of preferential treatment for white employees.

The significance of Duke Power lay in the Court’s determination that practices, procedures, or tests, though neutral on their face and neutral in terms of intent, cannot be maintained if such practices operate to perpetuate the effects of past practices of discrimination. “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Id. at 432.

179. Once a complaint is filed in the district court the aggrieved plaintiff need only establish a prima facie case of discrimination to shift the burden of proof to the employer. Establishing a prima facie case is normally accomplished through the use of three basic types of statistics. They are demographic, concentration and comparative statistics. Demographic statistics compare the composition of the work force to the population at large. Concentration statistics are a measure of the numerical balance of protected class members, vis-à-vis other employees, as they are distributed throughout the organization. An activity’s overall demographic statistics come into focus when both the demographic and concentration statistics appear satisfactory. Comparative statistics are essentially a measure of the rate at which employees of various and different classes are able to take advantage of the benefits of an employment situation. For example, if 30 percent of the applicants for promotion opportunities are qualified blacks, promotions should reflect a rate of 30 percent blacks. Any one of these statistical analyses can establish a prima facie case; however, if the plaintiff can show a disparity through the use of more than one of these analyses, the employer’s burden of proof becomes much heavier.

claim that the employment test violated the respondents' rights under the due process clause of the fifth amendment, the high Court did not say that a disproportionate impact alone could never form the basis of such a claim. The Court stated that where the relevant facts, in their totality, infer an invidious discriminatory purpose that cannot be explained on nonracial grounds, a claim based on the violation of constitutional rights may be justified. While, as the concurring opinion points out, the line between discriminatory purpose and discriminatory impact may not be clear or very critical in every situation, this decision indicates an intent to restrict the testing of claims to Title VII standards.

Lastly, although beyond the scope of this article, it is noteworthy that if the aggrieved party is a federal employee, he is limited to Title VII in seeking redress for employment discrimination. The Supreme Court, in Brown v. General Services Administration,\(^\text{181}\) ruled that section 717 of the Equal Employment Opportunities Act of 1972\(^\text{182}\) constitutes the exclusive individual remedy for job-related racial discrimination against federal employees.\(^\text{183}\)

VI. Suit Directly Under the Fourteenth Amendment

The various acts of Congress passed pursuant to the fourteenth (and thirteenth) amendment contain several qualifications which limit the exacting of liability and the obtaining of relief. Among the

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181. 425 U.S. 820 (1976). In Brown, a federal employee sought review in a federal court 42 days after receipt of a final adverse decision of the Civil Service Commission on his race discrimination in employment claim, for which he had based jurisdiction on Title VII and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 to 2202 (1970). The district court dismissed the action for failure to file within the statutory period (then 30 days). The Second Circuit affirmed the dismissal, holding that Section 717 provides the exclusive judicial remedy for federal employment discrimination. The Second Circuit also ruled that if Section 717 did not pre-empt other remedies, then the federal employee's complaint was still properly dismissed because of his failure to exhaust available administrative remedies. In affirming, the Supreme Court pointed to the Senate and House Committee Reports and to remarks of Senator Cranston and Senator Williams which collectively expressed a belief that the 1972 Amendments would, for the first time, give federal employees the right to sue the federal government for employment discrimination.


183. But see text infra Part VI regarding suing directly under the Constitution. Notwithstanding the Brown decision it is conceivable that federal employees may still be able to obtain immediate relief by suing directly under the Constitution in cases of employment discrimination.
qualifications of significant consequence are, for example, the "person" requirement of section 1983\textsuperscript{184} and the administrative prerequisites of Title VII.\textsuperscript{185} Theoretically, by filing suit directly under the fourteenth amendment, in lieu of relying on the statutes passed pursuant thereto, these and other statutory qualifications would be avoided. The only remaining limitations, therefore, would be those found in the Constitution itself. Such limitations include the eleventh amendment immunity and article III of the Constitution regarding judicial authority and, by virtue of federal statute, limitations on the jurisdiction of federal courts.\textsuperscript{186} This theoretical concern has arisen in a number of recent federal court cases wherein various local governmental entities charged with violating section 1983, but unreachable thereunder, were alternatively sued directly under the fourteenth amendment. The decisions have been inconsistent and conflicting.\textsuperscript{187}

A. The Biven's Doctrine

The genesis of the disarray is Bivens v. Six Unknown Named Federal Narcotics Agents.\textsuperscript{188} Bivens was an action for damages filed

\begin{itemize}
  \item \textsuperscript{184} See Part III supra.
  \item \textsuperscript{185} See Part V supra.
  \item \textsuperscript{186} 28 U.S.C. § 1331(a) (1970).
  \item \textsuperscript{188} 403 U.S. 388 (1971).
\end{itemize}
in federal court against federal narcotics agents by a private plaintiff who alleged unconstitutional conduct in connection with the search, arrest and interrogation of the plaintiff. On certiorari, the Supreme Court held that a violation of the fourth amendment's command against unreasonable search and seizures, by a federal agent acting under color of federal authority, gave rise to a federal cause of action within the meaning of 28 U.S.C. § 1331(a)\textsuperscript{189} for both equitable relief and money damages.

Mr. Justice Brennan in delivering the majority opinion stated:

Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. . . ." The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress. . . . [W]e have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from

\textsuperscript{189} The Constitution itself does not invoke federal jurisdiction. Congress determines the jurisdiction of the federal courts through enabling statutes. 28 U.S.C. §§ 1331(a) and 1343 (1970) are, \textit{inter alia}, the bases of jurisdiction for civil rights matters.

28 U.S.C. § 1331(a) (1970) states "district courts shall have original jurisdiction for all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. § 1343 (1970) reads in pertinent part, "the district court shall have original jurisdiction over any civil action authorized by law to be commenced by any person . . . (3) [t]o redress the deprivation under color of any State law . . . of any right . . . secured by the Constitution . . . or by Act of Congress providing for equal rights of citizens . . . [and] (4) [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights. . . ."

Section 1331(a) clearly invokes federal jurisdiction for suit brought directly under the Constitution providing the jurisdictional amount be met. Section 1343(4) clearly invokes federal question jurisdiction under the civil rights statutes. There has been some scholarly and judicial debate as to the effect of section 1343(3). It appears to invoke federal jurisdiction in suits filed directly under the Constitution as well as under the civil rights statutes. If this reading is correct, in suits filed directly under the Constitution to redress deprivations of civil rights, the jurisdictional amount requirement of section 1331(a) could be avoided. The weight of authority appears to hold contra, but the question has not been definitively decided. A good starting point for study of the issue can be found in Comment, \textit{ImPLYING A Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine}, 36 Md. L. Rev. 123, 126, n.19 (1976). [hereinafter referred to as \textit{ImPLYING A Damage Remedy}].
the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.\textsuperscript{190}

In a concurring opinion, Mr. Justice Harlan explained fully when an award of money damages should be considered by the courts in cases analogous to \textit{Bivens}:

To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. . . ." But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

\textit{The question, then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted . . . .} In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range a legislature would consider with respect to an express statutory authorization of a traditional remedy . . . .\textsuperscript{191}

B. Section 1983 v. Fourteenth Amendment: Case Still Pending

In \textit{Mount Healthy City School District Board of Education v. Doyle},\textsuperscript{192} the Supreme Court had an opportunity to decide whether the restrictions of section 1983 apply to a suit invoking federal jurisdiction pursuant to 28 U.S.C. § 1331(a) and alleging a cause of action for injunctive relief and money damages directly under the fourteenth amendment.\textsuperscript{193} The Court reserved judgment but the opinion was nevertheless instructive. Plaintiff, an untenured teacher whose contract was not renewed, sued the County School Board for damages and reinstatement alleging, \textit{inter alia}, violation

\textsuperscript{190} 403 U.S. at 399-97.
\textsuperscript{191} 403 U.S. at 407 (citations omitted) (emphasis added).
\textsuperscript{192} 429 U.S. 274 (1977).
\textsuperscript{193} Prior to \textit{Mount Healthy}, the Supreme Court alluded to the propriety of avoiding the section 1983 "person" requirement by going the section 1331(a) route in City of Kenosha v. Bruno, 412 U.S. 597 (1973). The Court reserved the question of whether the lower court had jurisdiction against a municipality under section 1331(a) in conjunction with the fourteenth amendment until the trial court established whether the jurisdictional amount was met.
of his fourteenth amendment rights. The district court rested its jurisdiction solely on section 1331(a). The Board contended that since the substance of the suit is covered by section 1983 the statutory restrictions thereof should apply regardless of the jurisdictional basis of the suit. The Court held, however, that when a suit is brought under 28 U.S.C. § 1331, "jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes." 194

The Court affirmed and extended Bivens insofar as holding that section 1331(a) invokes federal jurisdiction to hear cases directly under the fourteenth as well as the fourth amendment. In line with Bivens, it further established that notwithstanding countervailing considerations such as section 1983, there are no inherent procedural or jurisdictional prohibitions to permitting a federal cause of action directly under the fourteenth amendment by a private plaintiff seeking equitable relief and money damages. Hence, although Mount Healthy did not answer the issue presented, it did clarify and narrow its framework by holding, and thus eliminating from consideration, the following: (1) whether section 1331(a) provides a juris-

194. The Court's reasoning was as follows:

The Board has raised this question for the first time in a document filed after its reply brief in this Court. Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction . . . . And if this were a § 1983 action, brought under the special jurisdictional provision of 28 U.S.C. § 1343 which requires no amount in controversy, it would be appropriate for this Court to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged . . . . However, where an action is brought under § 1331, the catch-all federal question provision requiring $10,000 in controversy, jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes, unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . . ." Bell v. Hood, 327 U.S. 678, 682, (1946) . . . .

Here respondent alleges that the Board had violated his rights under the First and Fourteenth Amendments and claimed the jurisdictionally necessary amount of damages. The claim that the Board is a "person" under § 1983, even assuming the correctness of the Board's argument that the § 1331 action is limited by the restrictions of § 1983, is not so patently without merit as to fail the test of Bell v. Hood, supra. Therefore, the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the Court raises on its own motion. The related question of whether a school district is a person for purposes of § 1983 is likewise not before us. We leave those questions for another day, and assume, without deciding, that the respondent could sue under § 1331 without regard to the limitations imposed by 42 U.S.C. § 1983 . . . .

429 U.S. at 278-79.
dictional basis for federal suits filed directly under the fourteenth amendment; (2) whether the fourteenth amendment provides a substantive basis for a federal cause of action; and (3) whether federal courts have inherent power to provide equitable relief and money damages to vindicate interests protected thereunder.

In view of Mount Healthy the issue which remains unresolved is: what effect do the restrictions of statutes passed pursuant to the enforcement clause of the fourteenth (and analogously the thirteenth) amendment have upon suits filed directly thereunder?

To reiterate, a number of federal courts have grappled with this issue and decisions have come down on both sides, most drawing heavily on Bivens. The test to be applied in weighing the opposing considerations is uncertain. The "necessary and appropriate" language of Justice Harlan's concurring opinion in Bivens has been adopted by some of the courts.196

Among the arguments advanced for engraving the restrictions of section 1983 upon a federal suit filed directly under the fourteenth amendment are as follows: section 1983, as construed by the United States Supreme Court,197 focusing on the legislative history,198 establishes "affirmative action" by Congress to preclude state and local governmental entities from liability for violations of section 1983. Bivens says that such action is a factor counseling against fashioning independent judicial remedies. Further, the Supreme Court has twice found that this preclusion from liability could not be circum-

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195. The issue above also has relevance to what effect restrictions of statutes passed pursuant to the enforcement clause of the thirteenth amendment have upon suits filed directly thereunder; 42 U.S.C. §§ 1981 and 1982 (1970), for example, are based upon the thirteenth amendment and there is a split of authority as to whether the "person" requirement of section 1983 applies to suits under these sections. See Part IV supra. Unless this issue is definitively resolved in the negative, the question of whether the restrictions of these statutes apply to suits filed directly under the thirteenth amendment will continue to have practical significance.


198. The Supreme Court interpreted the legislative history as indicating an intent to protect political subdivisions of the state from having their coffers depleted by civil rights actions for money damages.
vented. In *Moor v. County of Alameda* the Court refused to allow use of section 1988, which provides, *inter alia*, for supplementing relief under section 1983 with common law remedies from the forum state, to avoid section 1983's "person" requirement and exact damage from the county. Similarly, in *Aldinger v. Howard*, the Court refused to exercise pendent jurisdiction in connection with a section 1983 claim, over a state governmental entity regarding a state law claim wherein damages were obtainable, reasoning that to do so would subvert congressional intent in enacting section 1983.

Section 1983 was passed pursuant to the enforcement clause of the fourteenth amendment. Although *Mount Healthy* dispells the notion that Congress, by virtue of the enforcement clause, is the exclusive agent by which a cause of action under the fourteenth amendment may be created, it nevertheless suggests that the courts should give special deference when Congress acts pursuant there to, particularly when lack of deference would substantially undermine the legislation. Allowing suit for money damages directly


In deference to congressional intent respecting the coverage of section 1983 the Court in *Aldinger* foreclosed this route:

> Parties such as counties, whom Congress excluded from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them back within that power merely because the facts also give rise to an ordinary civil action against them under state law. In short, as against a plaintiff's claim of additional power over a "pendent party," the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress.

427 U.S. at 17.

201. This is in keeping with the more general principle that when judicial action is directed toward the fashioning of constitutional common law rather than true constitutional decisions, deference to the superior policy making decision of Congress is appropriate. *Implying a Damage Remedy* note 189, *supra* at 141.

202. When Congress acts pursuant to the enforcement clause of the fourteenth amendment to carry out its objectives, it dictates that the judiciary should give special deference to legislation that results from this constitutional mandate. This is not to say that every facet of such legislation, particularly restrictions as to liability or relief, attains the level of constitutional law.
under the fourteenth amendment would render section 1983 meaningless except to the extent of the jurisdictional amount requirement of section 1331(a) and even this may be but a surreptitious saving factor. 203

Deference to state authority is also pertinent. The doctrines of federalism and comity come into play and weigh against the propriety of federal courts exacting damages from state or local governmental entities. 204

But what about Bivens? To begin with, Bivens came under the fourth amendment which has no clause delegating its enforcement to Congress. Bivens involved federal agents which precluded the considerations of federalism and comity. In Bivens there was no affirmative action by Congress, and there was no effective statutory remedy to redress the abridgment of clearly established fourth amendment rights. 205 The Court also found that state tort law remedies were inadequate. 206 Contrawise, section 1983 arguably provides affirmative and effective relief for fourteenth amendment violations. Declaratory and injunctive relief 207 and, if bad faith is shown, out of pocket compensatory and punitive damages 208 are obtainable through the responsible governmental officials. Further, the erosion of sovereign immunity at the state and local levels has made damage remedies in state courts widely available in discrimination cases. 209

Arguments have been advanced for the position that money damages are awardable against state and local governmental entities in a federal suit directly under the fourteenth amendment regardless of statutory restrictions to the contrary. In Bivens, the Court did affirm earlier precedent that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any avail-

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203. See note 187 supra, and accompanying text.
204. The significance of these concepts is well summarized in Younger v. Harris, 401 U.S. 37 (1971).
206. Id. at 391.
able remedy to make good the wrong done."210 Further, the immunity of state and local governmental entities, as noted, is not explicit in section 1983 but was construed by the Supreme Court through interpretation of the statute's legislative history. Even assuming the Court's historical interpretation to be correct, its present relevance has been discredited by at least one court.211

Perhaps the most convincing argument against engrafting the restrictions of section 1983 upon the fourteenth amendment is the dicta in the Supreme Court decision of Katzenback v. Morgan,212 which held that Congress should not have the power to foreclose a direct remedy for damages under the fourteenth amendment by enacting a statute whose restrictions in effect supersede and thereby limit remedies otherwise available for effective vindication of constitutional rights. The Court in Katzenback emphasized that section 5 of the fourteenth amendment is only affirmative in nature and cannot be used to dilute equal protection and due process decisions of the judiciary. As Justice Brennan, in delivering the opinion of the Court, stated, "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate or dilute these guarantees."213

C. Ramifications and Practical Effects of the Present Posture of the Law

No matter which way the issue is resolved, its ramifications and practical effects upon liability and relief in federal suits by private plaintiffs alleging discrimination under color of state law will be significant and far reaching. If filing suit directly under the four-

211. Sanabria v. Village of Monticello, 424 F. Supp. 402, 409 (S.D.N.Y. 1976). It is noteworthy that entities which would be considered nonpersons under section 1983 are nevertheless subject to liability and damages under other civil rights statutes. For example, back pay is allowed under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5 (Supp. V 1975) and according to some courts, damages are allowed under 42 U.S.C. § 1981 and § 1982 (1970). See Part IV supra. This would appear inconsistent with the reasoning as indicated in the legislative history of section 1983, to financially protect such entities. Perhaps this is suggestive of the larger problem of lack of comprehensive consideration of this area of the law either by Congress or by the courts.
213. Id. 651, n.10 (emphasis added).
teenth amendment may be utilized to avoid the "person" requirement of section 1983, theoretically, the same means may be employed to avoid restrictions of other civil rights statutes whose source of authority is the Constitution. Perhaps this approach may be undertaken by plaintiffs in federal suits on a statute by statute basis urging that if the relief sought is "necessary and appropriate," as suggested in Bivens, statutory restrictions to the contrary may be ignored. To be sure, such a piecemeal approach, controlled by the exigencies of the particular cases, would dictate against comprehensive and definitive consideration of the issue, thus prolonging the uncertainty and confusion over the utility of the civil rights statutes. If the various statutory restrictions were to be engrafted upon suits filed directly under the fourteenth amendment a problem may arise as to which restrictions are applicable. Discriminatory conduct may create various statutory causes of action having incongruous restrictions.\textsuperscript{214} It appears that anything short of comprehensive re-evaluation of this area of law will fall short of establishing consistency and clarity.

Of practical significance, the controversy has focused on the person requirement of section 1983\textsuperscript{215} which translates into the issue of whether or not money damages may be exacted from political subdivisions of the state. This is true for various reasons. Declaratory and injunctive relief may be obtained through the responsible officials who are persons acting under color of state law for the purposes of section 1983. If the responsible officials are found to have acted in bad faith,\textsuperscript{216} they may be subject to pay compensatory and punitive damages out of their own pockets. But they may not be used under

\textsuperscript{214} For example, an employment discrimination claim may be cognizable under both Title VII and section 1983. Title VII's administrative prerequisites to filing an action are not required by section 1983 while section 1983's person requirement is not a limitation under Title VII.

\textsuperscript{215} Both 42 U.S.C. §§ 1985 and 1986 (1970) use the word "person" in a context analogous to that of section 1983 so the controversy has practical significance to these statutes as well. See Sykes v. California, 497 F.2d 197 (9th Cir. 1974); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974). Since several courts have found that the "person" requirement of section 1983 applies to sections 1981 and 1982 (see Part IV supra) whether suit filed directly under the Constitution avoids this requirement also may have relevance to these sections. Many courts, however, have held that the person requirement is not applicable to these sections thus obviating the necessity of suing directly under the fourteenth amendment in lieu thereof.

\textsuperscript{216} Wood v. Strickland, 420 U.S. 308 (1975).
section 1983 as a conduit to invade the coffers of the governmental entity itself. Note further that the practical relevance of the controversy is limited to political subdivisions that are not deemed to be part of the state government wherein a damage remedy in any event is barred by the eleventh amendment.\textsuperscript{217}

Another practical consideration is the jurisdictional amount requirement of section 1331(a). There is no such requirement under section 1343(c), the enabling statute for section 1983, but there is a $10,000 jurisdictional amount requirement under section 1331(a), the enabling statute for suit directly under the fourteenth amendment. This seemingly formidable obstacle may not be so in actuality. If all that is sought is declaratory or injunctive relief, this requirement has no actual significance because such relief can be obtained through the responsible officials under section 1983. Moreover, courts have held that injunctive relief may be valued for the purpose of determining jurisdictional amount.\textsuperscript{218} Therefore, coupling the value of injunctive relief to an otherwise deficient damage claim may bolster it to meet the jurisdictional amount requirements.\textsuperscript{219}

\textsuperscript{217} See text discussing eleventh amendment, Part II supra. Note that when the eleventh amendment is deemed to be waived, the state or state agencies may be the subject of the "person" requirement controversy.

\textsuperscript{218} E.g., Jackson v. American Bar Association, 538 F.2d 829 (9th Cir. 1976); Chavez-Solido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (civil rights action under fourteenth amendment); Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974) (civil rights action brought under fourteenth amendment).

\textsuperscript{219} Cf. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) wherein the Court stated:

Petitioner's first jurisdictional contention, which we have little difficulty disposing of, asserts that the $10,000 amount in controversy required by that section is not satisfied in this case . . . [T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction . . . . We [think] this rule requires disposition of the jurisdictional question tendered by the petition in favor of the respondent. At the time Doyle brought this action for reinstatement and $50,000 damages, he had already accepted a job in a different school system paying approximately $2,000 per year less than he would have earned with Mt. Healthy Board had he been rehired. The District Court in fact awarded Doyle compensatory damages in the amount of $5,158 by reason of income already lost at the time it ordered his reinstatement, it is for only compensatory damages and not reinstatement, it was far from a "legal certainty" at the time of suit that Doyle would not have been entitled to more than $10,000.

429 U.S. at 276.
Mount Healthy teaches that the defense of failure to state a claim upon which relief may be granted because the defendant is not a “person” within the meaning of section 1983 must be alleged at the district court level against the section 1983 claim and, to be safe, against claims under the fourteenth amendment or such defense may be waived against either claim on appeal. 220 Conversely if section 1331 (a) is not alleged as a jurisdictional basis for suit under the fourteenth amendment at the district court level, it may not ordinarily be raised for the first time on appeal. 221

In short, plaintiff’s counsel should allege independently every plausible constitutional and statutory basis for relief accompanied by invocation of the appropriate jurisdictional statutes and defense counsel should likewise allege every comparable defense in his answer and/or motion to dismiss.

VII. CONCLUSION

This article has attempted to examine the more troublesome non-substantive considerations affecting the issues of who may be held liable and what relief may be sought in privately filed federal actions seeking redress for discrimination under color of state law. The focus has been on the most often used statutory and constitutional means of obtaining this end. To be sure, many of the considerations discussed in this article are in a state of flux; but, amidst the confusion there are some certainties and discernable alternatives that deserve comment.

Unless the practitioner is expert enough to know for certain that he may obtain full relief under a particular statute and thus avoid inundating the court with unnecessary claims, he should avail himself of every plausible jurisdictional and substantive basis for relief and make every plausible defendant a party sued in both their individual and official capacities. The present state of the law requires the practitioner to be creative.

The restrictions as to jurisdictional amount, the “person” restric-
tion of §§ 1983, 1985, 1986, the eleventh amendment bar, the Title VII exhaustion requirements, administrative prerequisites and time constraints and the various other procedural and jurisdictional barriers to exacting liability and obtaining relief appear to be avoidable in many instances by use of the right combination of properly pleaded statutory and constitutional claims. As the content of this article has illustrated, proper, timely and inclusive pleadings, whether from plaintiff's or defendant's standpoint, may determine who and to what extent a party prevails.

Each avenue of relief must be considered in light of its inherent restrictions, the type of discrimination in issue, the type of defendants sought to be held liable, the nature of relief sought and the various nonsubstantive matters discussed herein. Of most importance, the effect of these matters upon the issued liability and relief may vary with the law relied on as well as with the other considerations mentioned in the previous sentence. Moreover, in many instances, the affect is uncertain. Does, for example, the "person" requirement of section 1983 apply to sections 1981 and 1982 or to suit directly under the Constitution? Does the Fitzpatrick ruling extend to suits against the state under sections 1981 and 1982?

Unfortunately, the state of the law is such that whether the private plaintiff or defendant acting under color of state law will prevail and the extent of meaningful relief or exoneration, as the case may be, depends all too much upon intricacies and inconsistencies in the law, rather than on the merits of the case.

Accepting this fact, lawyers on both sides have an obligation to educate themselves thoroughly on the nonsubstantive matters that may determine or substantially affect the course of the suit. As veteran civil rights practitioners already know, this article has just scratched the surface. To those newcomers to whom it is mainly addressed, the bulk of work is ahead.