Patsy v. Florida International University: Exhaustion in Section 1983 Actions—The Fifth Circuit Establishes a New Rule

In *Patsy v. Florida International University*,[1] the United States Court of Appeals for the Fifth Circuit in an en banc rehearing vacated a previous panel decision of the Fifth Circuit[2] and held that, absent the existence of any traditional exceptions to the general exhaustion rule, state administrative remedies that are found to be adequate and appropriate must be exhausted before a section 1983[3] action may proceed in federal court.[4] After setting forth specific minimum standards to be met before available state administrative remedies would be deemed adequate and appropriate,[5] the court remanded the case, directing the district court to determine whether plaintiff's administrative remedies were adequate and appropriate. The Fifth Circuit Court determined that a blanket no-exhaustion rule had not been mandated by the Supreme Court and that the circuit was free to develop a flexible, analytical exhaustion rule.[6]

Plaintiff, Georgia Patsy, a white female, was employed as a secretary at Florida International University (FIU). After plaintiff's applications for employment openings at FIU had been rejected a number of times, plain-

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1. 634 F.2d 900 (5th Cir.) (en banc), *cert. granted sub nom.* Patsy v. Board of Regents, 102 S. Ct. 88 (1981). Circuit Judge Roney delivered the opinion of the court. Circuit Judge Alvin B. Rubin filed a dissenting opinion in which Vance, Frank M. Johnson, Jr., Hatchett, and Sam D. Johnson, Circuit Judges, joined. Circuit Judge Kravitch filed a dissenting opinion, and Circuit Judge Hatchett filed a dissenting opinion in which Alvin B. Rubin, Vance, Frank M. Johnson, Jr., and Thomas Clark, Circuit Judges, joined.

2. Patsy v. Florida Int'l Univ., 612 F.2d 946 (5th Cir. 1980).

3. 42 U.S.C. § 1983 (Supp. III 1979) provides:

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

4. 634 F.2d at 912.

5. *Id.*

6. *Id.* at 914. *Patsy* implicitly overrules Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975), a panel decision which held that exhaustion of state administrative remedies was not a prerequisite to section 1983 actions.

tiff brought a section 1983 action against defendant, the Board of Regents of the State of Florida, alleging that she clearly was qualified for the jobs but uniformly had been rejected on the basis of her race and sex. Plaintiff contended that FIU actively sought individuals from minority groups to hire and to promote, that FIU segregated applicants' files on the basis of race and sex, and that by doing so, FIU had engaged in a pattern and practice of discrimination in violation of the laws and the Constitution of the United States. Defendant moved to dismiss on the ground that plaintiff had not exhausted available administrative remedies within the state university system. The district court granted defendant's motion to dismiss and plaintiff appealed.[7] On appeal, the Fifth Circuit Court of Appeals, in a panel decision,[8] reversed and remanded, holding that "[e]xhaustion of administrative remedies is not a prerequisite of a § 1983 suit."[9] Subsequently, the Fifth Circuit sitting en banc vacated the earlier panel decision and adopted "a more flexible rule that would require exhaustion in appropriate cases."[10]

The courts initially developed the doctrine of exhaustion of administrative remedies in an effort to "promote administrative competence and orderliness of procedure."[11] It long has been a settled rule of the courts that a party is not entitled to judicial relief until administrative remedies have been exhausted.[12] The courts require exhaustion of administrative remedies for numerous reasons. According to the Supreme Court in *McKart v. United States*,[13] the exhaustion requirement permits an administrative agency to exercise its discretion and apply its expertise. It also allows the

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7. All facts, which were drawn primarily from the allegations of the parties, are taken from the court's opinion, 634 F.2d at 902.

8. 612 F.2d at 946.

9. *Id.*

10. 634 F.2d at 902.

11. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 5.10, at 145 (1979) [hereinafter cited as S. NAHMOD].

12. *See* Myers v. Bethlem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). *See also* Franklin v. Jonco Aircraft Corp., 346 U.S. 868 (1953); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947).

The rule requiring exhaustion of administrative remedies applies to state administrative remedies as well as federal ones. *See* Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 246-47 (1952). *See also* Illinois Commerce Comm'n v. Thompson, 318 U.S. 675 (1943); First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450 (1924).

13. 395 U.S. 185 (1969). In *McKart*, petitioner was convicted for repeated failures to report as ordered by the Selective Service Board for a preinduction physical examination. Petitioner's defense to the criminal prosecution was that he was exempt from selective service under the "sole-surviving-son" exception. At trial, the district court held that this defense was unavailable because of petitioner's failure to exhaust administrative remedies within the Selective Service System concerning this defense. The Supreme Court reversed, holding that petitioner's failure to exhaust administrative appeals did not foreclose his ability to raise the defense in a criminal proceeding. *Id.* at 200.

agency to develop the necessary factual background upon which decisions should be based. Exhaustion avoids the premature interruption of the administrative process by giving the agency a chance to discover and correct its own errors. The court in *McKart* also noted that exhaustion will improve the efficiency of the administrative process and will conserve scarce judicial resources because the complaining party may be successful in vindicating his rights at the administrative level and thus would eliminate the need for judicial action.[14] Finally, the Court stated that the exhaustion requirement would eliminate the possibility "that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.[15]

The policies of comity and federalism also are applicable when a federal court is asked to intervene before state administrative remedies have been exhausted. Under these policies, the federal courts desire to avoid strained relationships with state governments.[16] Recognizing that the state has a legitimate interest in local regulation and in the provision of administrative remedies, the federal courts desire to avoid the needless friction caused by circumvention of state remedies through federal intervention.[17]

The doctrine of exhaustion of state administrative remedies is subject to several exceptions. First, exhaustion is not required when the administrative remedy in question is found to be inadequate.[18] Second, exhaus-

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14. *Id.* at 193-95.

15. *Id.* at 195.

16. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Younger v. Harris, 401 U.S. 37 (1971). In *Younger,* Justice Black, in discussing the judicial policy of comity, stated:

> The concept does not mean blind deferrence to "State's Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.

401 U.S. at 44.

17. *See* Alabama P.S.C. v. Southern Ry. Co., 341 U.S. 341, 350 (1951); Buford v. Sun Oil Co., 319 U.S. 315 (1943).

18. An administrative remedy may be found to be inadequate if the plaintiff is subjected to the risk of irreparable injury due to unreasonable delay, if there is no remedy available to the plaintiff, or if the available remedy is not commensurate with the plaintiff's claim. *See, e.g.,* Walker v. Southern Ry. Co., 385 U.S. 196 (1966) (administrative remedy resulting in potential 10 year delay in final decision need not be exhausted); Frozen Food Express v. United States, 351 U.S. 40 (1956) (when no remedy is available to appeal administrative action, then action is subject to judicial review); Public Utils. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) (when agency is without authority to grant relief requested, then administrative remedies need not be exhausted). *See generally* 3 K. DAVIS, ADMINISTRATIVE

tion is not required when compliance with state administrative requirements would be futile.[19] Third, exhaustion is not required when the claimant challenges the constitutionality of the legislation authorizing the administrative act or when the administrative act itself is challenged as unconstitutional.[20] The exceptions to the general exhaustion rule result from careful balancing of policy considerations for and against exhaustion in each specific situation. Accordingly, prediction of court application of the exhaustion doctrine in a specific case is extremely difficult.[21]

Prior to *Monroe v. Pape*,[22] most federal courts considered the doctrine of exhaustion of administrative remedies to be applicable to cases brought under section 1983.[23] In *Monroe*, an Illinois resident brought a section 1983 action against the city of Chicago and against individual police officers for an alleged unconstitutional search of his home. The alleged misconduct violated Illinois law as well as section 1983. The Supreme Court held that exhaustion of available state remedies was not required prior to the institution of a section 1983 action in federal court.[24] In holding that state judicial exhaustion was not required, the Court examined the legislative intent behind the enactment of section 1983 and discerned three goals that Congress hoped section 1983 would accomplish: first, that section was designed to override state laws inconsistent with federal law; second, it was to provide federal remedies in cases in which state remedies were inadequate; and third, it was to provide federal remedies in cases in which state remedies were available in theory, but not in practice.[25] Although, the language of the holding in *Monroe* was

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LAW TREATISE § 20.07 (1958 & Supp. 1978).

19. *See* City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934) (administrative remedies need not be exhausted when it is clear the claim will be rejected).

20. *See* Public Utils. Comm'n v. United States, 355 U.S. 534 (1958) (administrative remedies need not be exhausted when claimant challenges constitutionality of legislative act) Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975) (exhaustion of administrative remedies is not required when administrative procedures are challenged as unconstitutional). *See generally* 3 K. DAVIS, *supra* note 18, at § 20.04.

21. 3 K. DAVIS, *supra* note 18, at § 20.01.

22. 365 U.S. 167 (1961).

23. *See* Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959); Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Peay v. Cox, 190 F.2d 123 (5th Cir. 1951). *See generally* Comment *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 570 (1975).

24. 365 U.S. at 183. The Supreme Court also held that a municipality could not be sued as a "person" under section 1983. This part of the *Monroe* decision subsequently was overruled by Monell v. Department of Social Servs., 436 U.S. 658, 690, 701 (1978).

25. 365 U.S. at 173-74. The court in *Monroe* also stated that: "The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. This statement by the Supreme Court has been construed by some lower courts to be a critical fourth purpose of § 1983. *See* Comment, *supra* note 23, at 571-72.

worded broadly enough to include administrative remedies as well as judicial remedies, it must be noted that *Monroe* was concerned only with exhaustion of judicial remedies. The question of exhaustion of state administrative remedies was not before the court.[26]

In 1963, the Supreme Court, in *McNeese v. Board of Education*,[27] encountered the issue of exhaustion of both state administrative and judicial remedies. In *McNeese*, a group of black students brought a section 1983 action seeking the desegregation of an Illinois public school system. The district court dismissed plaintiffs' complaint for failure to exhaust administrative remedies and the court of appeals affirmed. After concluding that the available state administrative remedy was inadequate, the Supreme Court reversed, and, citing *Monroe*, held that exhaustion of remedies provided by the Illinois education law was not necessary.[28] The Court in *McNeese*, by its citation of *Monroe*, seemingly extended *Monroe* to include administrative remedies as well as judicial remedies, but because the administrative remedy in *McNeese* was held inadequate, exhaustion would not have been required under the traditional exceptions to the exhaustion rule.[29]

After *McNeese*, the Supreme Court apparently continued to hold that exhaustion was unnecessary in section 1983 cases. These later cases did not lay the problem to rest, however, because in each case, there existed a traditional exception to the general exhaustion rule. For example, in *Damico v. California*,[30] a state welfare law was challenged as unconstitutional in a section 1983 action by welfare claimants. The Supreme Court, citing *McNeese* and *Monroe*, held that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy."[31] The Court's quotation from *McNeese* inserted the words "an administrative" in brackets. Some courts have construed this insertion by the Court in *Damico* to establish a clear no-exhaustion rule for section 1983 cases.[32] It should be noted, however, that exhaustion would not have been required under an application of the general exhaustion rule because the constitutional challenge constitutes a traditional exception to the rule.

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26. 365 U.S. at 183; *see* Comment, *Exhaustion of State Administrative Remedies and Section 1983 Cases*, 41 U. CHI. L. REV. 537, 542-43 n.27 (1974).

27. 373 U.S. 668 (1963).

28. 373 U.S. at 676.

29. *Id.* at 671. Some courts have read *McNeese* as totally eliminating the exhaustion of administrative remedies in section 1983 cases. *See* notes 35 and 36 *infra*.

30. 389 U.S. 416 (1967) (per curiam).

31. *Id.* at 417 (quoting from McNeese v. Board of Educ., 373 U.S. 668, 671 (1963)) (brackets in original).

32. For circuit courts of appeals cases construing *McNeese* and *Monroe*, see notes 41-50 *infra*.

In *Houghton v. Shafer*,[33] a state prisoner filed a section 1983 action seeking the return of lawbooks that had been confiscated by prison officials. The district court dismissed the suit for failure to exhaust state administrative remedies, and the court of appeals affirmed the dismissal. The Supreme Court (per curiam), after noting that administrative appeals would have been futile, reversed and stated that "[i]n any event, resort to these remedies is unnecessary in light of our decisions in *Monroe* . . . *McNeese* . . . and *Damico*."[34] Again, the exhaustion of administrative remedies would not have been required under the general exhaustion rule because of futility.

Moreover, the Supreme Court on numerous other occasions stated that administrative remedies need not be exhausted, but on all these occasions, either the issue of exhaustion of administrative remedies was not before the court and thus these statements were dictum,[35] or the administrative remedy to be provided was plainly inadequate.[36] The Supreme Court further added to the confusion by suggesting, in *Gibson v. Berryhill*,[37] that the question remained *open* whether section 1983 plaintiffs in some instances might be required to exhaust state administrative remedies. In *Gibson*, Alabama optometrists brought a section 1983 action against the state licensing board claiming that their remedy was inadequate due to bias on the part of members of the board. The Court held that exhaustion of the administrative remedy was unnecessary due to inadequacy. The Court noted that previous Supreme Court decisions had held that state administrative remedies need not be exhausted in section 1983 actions, but then stated, "Whether this is invariably the case . . . is a question we need not now decide."[38] More recently, the Supreme Court again declined to rely on a rigid, blanket no-exhaustion rule in *Barry v. Barchi*.[39] In that case, plaintiff filed a section 1983 action challenging the

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33. 392 U.S. 639 (1968).

34. *Id.* at 640.

35. *See* Ellis v. Dyson, 421 U.S. 426 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam).

36. Gibson v. Berryhill, 411 U.S. 564 (1973); Carter v. Stanton, 405 U.S. 669 (1972); King v. Smith, 392 U.S. 309 (1968).

37. 411 U.S. 564 (1973).

38. *Id.* at 574-75. This language did not escape Justices Brennan and Marshall who, in their concurring opinion, refused to agree that the question remained open. *Id.* at 581 (Marshall, J., concurring).

39. 443 U.S. 55, 63 n.10 (1979). Other indications that the Court disfavored a rigid no-exhaustion rule may be found in City of Columbus v. Leonard, 443 U.S. 905 (1979), in which Justice Rehnquist, joined by Chief Justice Burger and Justice Blackman in a dissent from a denial of certiorari, argued that the time had come to reexamine critically the *Monroe* no-exhaustion rule. Also, in his concurrence in Runyon v. McCrary, 427 U.S. 160 (1976), Justice Powell expressed his dismay at the apparent accidental drift into extreme interpretations of the Civil Rights Acts. Justice Powell stated that "[t]he most striking example is the proposi-

constitutionality of a New York statute. In determining that exhaustion of administrative remedies was unnecessary, the Court, citing *Gibson*, relied upon a traditional exception to the general exhaustion rule.

In the absence of a clearly articulated rule by the Supreme Court concerning whether exhaustion of state administrative remedies is required in section 1983 cases, it is not surprising that the circuit courts of appeals for the United States are divided on the issue.[40] The First,[41] Second,[42] Seventh,[43] and Ninth[44] Circuits have taken the position that the Supreme Court has not laid down an iron-clad no-exhaustion rule in section 1983 cases and have determined that exhaustion may be required in some instances. The Third,[45] Fourth,[46] Sixth,[47] Eighth,[48] and Tenth[49] Circuits have determined that exhaustion is never required prior to the bringing of a section 1983 action. Prior to *Patsy*, the Fifth Circuit followed the latter determination. In *Hardwick v. Ault*,[50] a prisoner's section 1983 action against prison officials for alleged unconstitutional conditions of confinement was dismissed pending exhaustion of state administrative remedies. On appeal to the Fifth Circuit, the court reversed the district court's dismissal, holding that state administrative remedies need not be exhausted prior to filing a section 1983 action.[51]

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tion . . . that 42 U.S.C. § 1983 does not require exhaustion of administrative remedies under any circumstances. This far-reaching conclusion was arrived at largely without the benefit of briefing or argument." 427 U.S. at 186 n.*.

40. In all Supreme Court cases articulating the no-exhaustion rule, either the administrative remedy provided would not have been required to be exhausted in any event because of traditional exceptions to the general exhaustion rule or the issue of exhaustion of state administrative remedies was not before the Court. *See* Comment, *supra* note 26, at 543-47; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1246 (1977). It also should be noted, however, that the Supreme Court has never expressly required exhaustion of state administrative remedies in a section 1983 case. *See* S. NAHMOD, *supra* note 11. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.01, at 668-69 (Supp. 1970).

41. *See* Palmigiano v. Mullen, 491 F.2d 978 (lst Cir. 1974); Raper v. Lucey, 488 F.2d 748 (lst Cir. 1973).

42. *See* Gonzalez v. Shanker, 533 F.2d 832 (2d Cir. 1976); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

43. *See* Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978).

44. *See* Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974); *see also* Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976).

45. *See* Ricketts v. Lightcap, 567 F.2d. 1226 (3d Cir. 1977).

46. *See* McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976).

47. *See* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

48. *See* Simpson v. Weeks, 520 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979).

49. *See* Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975).

50. 517 F.2d 295 (5th Cir. 1975).

51. *Id.* at 297.

The court in *Patsy* began its analysis by reviewing the exhaustion doctrine in general. The court noted that the rule was long settled that administrative remedies must ordinarily be exhausted. The court examined the basic policy consideration favoring the exhaustion doctrine, as set forth in *McKart*,[52] and then pointed out that, when state administrative remedies were involved, policies of federalism and comity also should be considered. The court next acknowledged and reviewed the traditional exceptions to the exhaustion doctrine.[53]

The court then began a case by case review of Supreme Court cases concerning exhaustion in 1983 actions. After surveying all the relevant Supreme Court cases, the court concluded that there were no cases in which the Supreme Court had ever specifically held that exhaustion was never required in any section 1983 case.[54]

In analyzing the Supreme Court decisions, the court of appeals began by distinguishing *Monroe*. The court stated that *Monroe* concerned only state judicial remedies and that the "question of exhaustion of administrative remedies was not before the court."[55] The subsequent decision in *McNeese* did concern exhaustion of administrative remedies, but the court, in *Patsy*, quickly distinguished *McNeese* by pointing out that the administrative relief was inadequate and would not have been required under the general exhaustion rule.[56] The court found support for its proposition that the Supreme Court had not laid down a blanket no-exhaustion rule in *Barry* and *Gibson*. In analyzing the *Barry* decision, the court found it significant that the Supreme Court had not relied upon a blanket no-exhaustion rule but instead had relied upon a traditional exception to the exhaustion doctrine. The court reasoned that, "By going to the trouble of finding and using traditional exceptions to the exhaustion rule, the justices plainly did not adhere to a rigid rule that exhaustion is never required in 1983 cases."[57] The court then noted that *Gibson* expressly left open the question of whether the no-exhaustion rule applied to all section 1983 cases and instead had relied upon a traditional exception.[58] After acknowledging that the Supreme Court on previous occasions had stated that exhaustion in section 1983 cases was not required, the court distinguished those cases by noting that either the traditional exceptions for inadequacy or futility were applicable or the issue of exhaustion of administrative remedies was not before the court, and thus any statement

52. 634 F.2d at 902-03.
53. *Id.*
54. *Id.* at 903-04.
55. *Id.* at 904.
56. *Id.*
57. *Id.* at 905.
58. *Id.* at 906.

concerning exhaustion was mere dictum.[59] Although the court in *Patsy* was unable to find a Supreme Court decision to support its proposition that exhaustion *could* be required in appropriate cases, it likewise was unable to cite a decision setting forth a blanket no-exhaustion rule that would *prevent* the court from taking a flexible approach.[60] The court then reviewed cases from the circuit courts of appeals. The court pointed out the conflict of authority among the circuit courts and reasoned that the existence of conflicting cases, standing uncorrected by the Supreme Court, further supported the proposition that a flexible, analytical exhaustion rule would be permitted.[61]

Having determined that a flexible, analytical approach was permissible, the court surveyed the relevant policies disfavoring and favoring exhaustion in section 1983 cases. The court rejected the argument that exhaustion of state administrative remedies would thwart congressional intent behind the enactment of section 1983. In considering the first goal of section 1983—to override state laws inconsistent with federal law—the court reasoned that Congress' real quarrel was not with the state statutes but with the states' discriminatory enforcement of those statutes. Moreover, the court stated that exhaustion was appropriate, even when state law was inconsistent with federal law, in order to develop a factual record and to use the expertise of the agency. In considering the second and third goals of section 1983—to provide a federal remedy when the state remedy was inadequate or when the state remedy was unavailable as a practical matter—the court stated that requiring the exhaustion of adequate and appropriate administrative remedies would be entirely consistent with legislative intent. The court reasoned that if the state administrative remedy was found to be adequate by the court, then it naturally followed that the second and third aims of Congress would not be thwarted by requiring exhaustion.[62]

The court also rejected the argument that the very nature of section 1983 claims entitled a plaintiff to federal adjudication. The court observed that administrative remedies, unlike judicial remedies which create res judicata and collateral estoppel, would merely postpone a plaintiff's day in federal court and in no way would prevent the plaintiff from bringing a section 1983 action once the administrative remedy was exhausted.[63]

The court in *Patsy* then looked at the numerous policies that favored exhaustion. The court observed that requiring exhaustion would lead to a

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59. *Id.*
60. *See* notes 35 & 36 *supra.*
61. 634 F.2d at 907.
62. *Id.* at 908-09.
63. *Id.* at 910.

more efficient allocation of judicial resources. Exhaustion in some instances would eliminate completely the need for federal adjudication because of administrative action favorable and satisfactory to the claimant. Exhaustion also would allow the agency to use its expertise in the area and to develop a detailed and accurate factual record.[64] The court stated that exhaustion would allow the agency to correct its own mistakes, possibly made by some "lower echelon functionary" and thus would assure that any section 1983 action brought in federal court would be ripe for adjudication. According to the court, only after the agency has failed or refused to take corrective action should a section 1983 plaintiff be allowed to proceed to federal court. The court reasoned that exhaustion would give the administrative agency an incentive to comply with federal requirements and, in so doing, would improve administrative procedures.[65]

Finally, the court stated that the fundamental principles of federalism and comity supported exhaustion of state administrative remedies. The court pointed out that the state had a legitimate interest in establishing local administrative agencies and in the regulation of its own affairs. The court stated that the state had a constitutionally based right to exercise its autonomy until the state's law collided with federally protected rights, and this "collision should come, if at all, at the end of state action, not at the beginning."[66]

After weighing all the relevant policy considerations, the court concluded that the policies favoring exhaustion far outweighed those policies against exhaustion. Accordingly, the court held that exhaustion of adequate and appropriate state remedies was required, provided that no traditional exceptions to the exhaustion doctrine were present.[67] The court then set down minimum standards to be met in determining whether a particular administrative remedy was adequate and appropriate. According to the court, the remedy must provide an orderly system of review, the remedy must provide relief commensurate with the plaintiff's claim and available within a reasonable period of time, the remedy "must be fair, . . . not unduly burdensome, and . . . not be used to harass or otherwise discourage legitimate claims,"[68] and finally, the remedy must provide some form of interim relief when the plaintiff risks irreparable injury.[69]

Consequently, since the district court did not make a determination of the adequacy of the available state administrative remedy, the court re-

64. *Id.*
65. *Id.* at 911.
66. *Id.*
67. *Id.* at 912.
68. *Id.*
69. *Id.* at 912-13.

manded the case to the district court. The court also granted plaintiff leave to amend her complaint.[70]

Seven circuit judges in three separate opinions dissented from the majority's ruling, two of which are worthy of note.[71] In the first dissent, Judge Rubin stated that the majority simply had disregarded clear and unequivocal directions from the Supreme Court, which on numerous occasions had stated that exhaustion was not necessary in section 1983 cases. Judge Rubin noted that the Court in *Monroe* had stated that the federal remedy was supplementary to the state remedy and that the state remedy need not be sought first. He argued that Congress intended that exhaustion of state remedies not be required and that this congressional intent was evidenced by Congress' distrust of the state's willingness to redress constitutional deprivations at the time of the enactment of section 1983. Judge Rubin concluded by stating that he recognized that there were many logical reasons for requiring exhaustion, but that an inferior court could not substitute its own judgments in the place of clear congressional intent and Supreme Court decisions to the contrary.[72]

Judge Hatchett, in a lengthy dissent, argued that the Supreme Court on numerous occasions had stated categorically that exhaustion in section 1983 cases was unnecessary.[73] Judge Hatchett traced through the early history of section 1983 and pointed out that section 1983 virtually laid "dormant as a result of restrictive judicial construction until the Supreme Court's 1961 decision in *Monroe*."[74] He argued that the Supreme Court in *Monroe* had espoused a critical fourth purpose behind the enactment of section 1983: to provide a federal remedy supplementary to state remedies. Judge Hatchett accused the majority of all but ignoring this important fourth purpose and argued that this purpose clearly was thwarted by the exhaustion requirement.

Judge Hatchett then argued that the principles set forth in *Monroe* were extended to state administrative remedies in *McNeese* and post-*McNeese* decisions. He contended that *McNeese* and its progeny clearly articulated a no-exhaustion rule.[75] Judge Hatchett argued that the majority's reliance upon *Gibson* was misplaced because subsequent Supreme Court decisions clearly have reestablished and reenforced the blanket no-

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70. *Id.*

71. Judge Kravitch in a one paragraph dissent acknowledged that there were compelling arguments favoring exhaustion, but nevertheless felt that the Fifth Circuit was bound by the no-exhaustion rule authorized by the Supreme Court.

72. 634 F.2d at 914-16.

73. *Id.* at 916.

74. *Id.* at 917.

75. *Id.* at 918.

exhaustion rule.[76] Judge Hatchett also pointed out that, in *Barry*, the Supreme Court had an opportunity to overrule its no-exhaustion rule, but chose not to do so. He contended that the Court's refusal to retreat from it's no-exhaustion rule clearly indicated that the Court still adhered to it.[77]

Judge Hatchett suggested that the principles of federalism and comity deserve no consideration because Congress intended that section 1983 serve as a buffer between section 1983 plaintiffs and the states.[78] He argued that Congress intentionally sought to upset the balance between state and federal governments so that federal constitutional rights could be adequately protected by the federal courts. Therefore, Judge Hatchett reasoned that the majority's reliance upon the notions of federalism and comity was misplaced and frustrated congressional intent.[79] Finally, Judge Hatchett argued that exhaustion would discourage truly aggrieved plaintiffs from vindicating their rights because of the delay inherent in the exhaustion of state administrative remedies. Judge Hatchett contended that forcing a section 1983 plaintiff to exhaust time-consuming administrative remedies would result in a chilling effect on civil rights litigation in contravention of clear congressional intent and clear Supreme Court decisions.[80]

The decision in *Patsy* appears to conflict with language of previous Supreme Court decisions. The Supreme Court in *McNeese* and its progeny[81] seemed to articulate that exhaustion of state administrative remedies is not required as a prerequisite to a section 1983 action. In fact, as noted by the majority, the Supreme Court, in *Gibson*, appeared to be making room for exhaustion of administrative remedies in some instances. Although the majority could find no cases requiring the exhaustion of adequate state remedies, neither could it find cases that did not require exhaustion of adequate state remedy. There are no cases deciding this specific issue. Hence, the majority has made a good case for the proposition that, in fact, no blanket exhaustion rule exists.

After determining that no Supreme Court decisions precluded the exhaustion of adequate state administrative remedies, the majority advanced compelling arguments in favor of exhaustion.[82] In fact, the Su-

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76. *Id.* at 919-21, *see* notes 35 & 36 *supra*.

77. *Id.* at 922-23.

78. *Id.* at 923-24. Judge Hatchett stated: "I am of the opinion, shared by others, that it is 'very doubtful that considerations of friction-avoidance have any place in civil rights litigation in light of the history and purposes of section 1983.' " 634 F.2d at 926 n.10 (quoting Comment, *supra* note 23, at 587).

79. 634 F.2d at 924.

80. *Id.* at 925-26.

81. *See* notes 26 and 32-33 *supra*.

82. In fact, Judges Rubin and Kravitch in their respective dissents acknowledged that

preme Court in *McKart* specifically approved all the arguments advanced favoring the exhaustion doctrine. These arguments, coupled with the principles of federalism and comity, all lead to the unavoidable conclusion that exhaustion of administrative remedies in section 1983 cases should be required.

The dissenting judges' argument that exhaustion frustrated the fourth purpose behind the enactment of section 1983, which was to provide a supplemental remedy, misses the mark, however, because the exhaustion of administrative remedies will in no way preclude the institution of a section 1983 action but merely will postpone it. Exhaustion of administrative remedies will not frustrate congressional intent because a section 1983 action always may be brought upon the completion of administrative remedies.

In addition, it should be noted that the majority held that only adequate and appropriate administrative remedies need be exhausted. Judge Hatchett's fear that exhaustion will frustrate the congressional intent that federal courts serve as a barrier between states and section 1983 plaintiffs is unfounded because no state administrative remedy need be exhausted until the federal courts deem it to be adequate and appropriate.

Furthermore, the majority does not stand alone in its conclusion that a flexible exhaustion rule is permitted. Four other circuits have determined that the Supreme Court has not set down an airtight no-exhaustion rule and have indicated that a more flexible exhaustion approach would be appropriate. The majority properly has noted that decisions from the circuits, standing uncorrected by the Supreme Court, also lend considerable support to the majority's proposition that there is no such rigid no-exhaustion rule.

The *Patsy* decision appears to be a good one. The Fifth Circuit carefully weighed all the relevant policy considerations and wisely determined that exhaustion of state administrative remedies in section 1983 cases should be required. Indeed, exhaustion promotes judicial efficiency, prevents unnecessary and premature interruption of the administrative process, and respects the fundamental principles of federalism and comity. Exhaustion allows agencies to use their expertise and to correct their own errors, thus assuring that the controversy is ripe for adjudication. Exhaustion strengthens the administrative agency's effectiveness by avoiding systematic circumvention of adequate administrative remedies and does so without depriving a section 1983 plaintiff of his right to bring an action in federal court upon the exhaustion of state administrative remedies.

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there were many very good reasons for requiring exhaustion.

Interestingly, the majority relied heavily upon the fundamental notions of federalism and comity in support of its decision. The decision in *Patsy* may be read as reflecting a genuine shift in the Fifth Circuit's perspective and as a demonstration of the Fifth Circuit's growing confidence in the state's willingness and ability to vindicate constitutional deprivations. In addition, since plaintiff has applied for and has been granted certiorari to the Supreme Court of the United States,[83] a Supreme Court affirmance could be read as a shift in the Court's direction and as a reflection of a new faith and belief in the constitutionally based concept of federalism.

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83. 102 S. Ct. 88 (1981).