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Another and Hopefully Final Look at the Property--Personal Liberty Distinction of Section 1343(3)

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I. INTRODUCTION

Recent years have witnessed increasing confusion and uncertainty over the proper scope of section 1343(3) of Title 28 of the United States Code, the jurisdictional courterpart of section 1983 of Title 42. Both provisions originated in the Civil Rights Act of 1871.[1] Section 1983 creates a cause of action to redress the deprivation, under color of state law, of any rights, privileges, or immunities secured by the Constitution or laws.[2] Section 1343(3) grants to the federal district courts original jurisdiction, irrespective of amount in controversy, over any civil action authorized by law that is commenced by any person: "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."[3] The confusion, both past and present, has centered around the problem of determining to what extent, if any, section 1343(3) should be governed by the judicial gloss it received in *Hague v. CIO.*[4] In that landmark Supreme Court decision, Justice Stone, in his concurring opinion, concluded that this jurisdictional section applied only when "the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights . . . ."[5] Justice Stone reasoned that by limiting the scope of 1343(3) jurisdiction to deprivations of personal rights, as opposed to property rights, the section could be reconciled with section 1331's requirement of a jurisdictional amount for general federal question jurisdiction.[6]

During the more than 30 years since *Hague*, lower federal courts have accorded Justice Stone's "property rights" exception a variety of

1. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.

2. 42 U.S.C. § 1983 (1964) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or any 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."

3. 28 U.S.C. § 1343(3) (1964).

4. 307 U.S. 496 (1939).

5. *Id.* at 531.

6. 28 U.S.C. § 1331(a) (1964) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

interpretations, ranging from rigid adherence to outright rejection.[7] At the same time, both the number and nature of civil rights claims brought in federal courts under section 1983 have increased significantly.[8] Partially as a consequence of this increase, the validity of the property-personal liberty distinction has continued to be the subject of considerable dispute. The Supreme Court, content until recently to avoid further discussion of the scope of 1343(3),[9] now appears determined to resolve the issue. The Court has noted probable jurisdiction in *Lynch v. Household Finance Corp.*,[10] which questions whether the Stone formula is a proper construction of 1343(3).[11] The Court's resolution of this jurisdictional issue undoubtedly will have a significant impact on the future course of civil rights litigation in federal courts.

This Note provides an up-to-date survey and analysis of the state of the law as reflected by recent lower court rulings on the scope of section 1343(3). The Note also examines the critical issues and policy questions that are raised by the *Lynch* appeal and recommends a course of action for the Court.

II. BACKGROUND: THE STATUTE AND ITS JUDICIAL GLOSS

Both the legislative history and early judicial treatment of the Civil

7. *Compare* Booth v. Lemont Mfg. Corp., 440 F.2d 385 (7th Cir. 1971) (§ 1343(3) only confers jurisdiction upon claims based upon infringement of personal rights, not property rights), *with* Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351 (N.D. Ill. 1965) (property rights are and should be protected by §§ 1983 and 1343(3)).

8. *See* note 206 *infra* and accompanying text.

9. The Supreme Court has affirmed per curiam 3-judge court dismissals of civil rights actions alleging deprivations of property rights. Hornbeak v. Hamm, 393 U.S. 9, *aff'g. mem.* 283 F. Supp. 549 (M.D. Ala. 1968); Alterman Transp. Lines v. Public Serv. Comm'n, 386 U.S. 262 (1967), *aff'g. mem.* 259 F. Supp. 486 (M.D. Tenn. 1966); Abernathy v. Carpenter, 373 U.S. 241 (1963), *aff'g. mem.* 208 F. Supp. 793 (W.D. Mo. 1962). In *Hornbeak*, however, 3 justices were of the opinion that probable jurisdiction should be noted. 393 U.S. at 9. The Court also has denied certiorari in cases in which the 1343(3) jurisdiction issue was present. *E.g.*, Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); Escalara v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970); Gray v. Morgan, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967); Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949); Hingle v. Perez, 312 F. Supp. 127 (E.D. La.), *aff'd mem.*, 434 F.2d 1037 (5th Cir. 1970), *cert. denied*, 402 U.S. 929 (1971). At the same time, the Court has assumed jurisdiction in a number of welfare cases without discussing the scope of § 1343(3). *See* notes 93-95 *infra* and accompanying text.

10. 318 F. Supp. 1111 (D. Conn. 1970), *prob. juris. noted*, 401 U.S. 935 (1971).

11. The Court may face the question in Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971), in which the lower court, without discussion, assumed § 1343(3) jurisdiction over a claim strikingly similar to the complaint in *Lynch*. *See* note 154 *infra* and accompanying text; *cf.* Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 402 U.S. 903 (1971).

Rights Acts are well documented.[12] Brief reference to these early developments, however, is an essential preface to the instant inquiry, as is a careful re-examination of both the rationale of Justice Stone's jurisdictional test, and the aftermath of *Hague*, culminating in the now famous Second Circuit decision in *Eisen v. Eastman*.[13]

A. Legislative History of 1343(3)

Section 1983 and its jurisdictional counterpart, section 1343(3), originated in the wave of civil rights legislation enacted by Congress following the Civil War. This era witnessed the adoption of three constitutional amendments[14] and the passage of five civil rights statutes,[15] all of which were motivated by an unmistakable congressional desire to ensure the emancipated Negro's freedom and equality.[16] One of the more notable pieces of reconstruction legislation was the Act of April 20, 1871, entitled "[a]n Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes."[17] Popularly known as the Ku Klux Klan Act, the statute sought to eliminate the lawless conditions existing in the Southern States.[18] Section one of the 1871 Act, the predecessor of

12. *E.g.*, H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); L. WARSOFF, EQUALITY AND THE LAW (1938); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

13. 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

14. The thirteenth amendment, adopted Dec. 18, 1865; the fourteenth amendment, adopted July 28, 1868; and the fifteenth amendment, adopted Mar. 30, 1870.

15. Civil Rights Act of Apr. 9, 1866, ch. 31, 14 Stat. 27; The Enforcement Act, ch. 114, 16 Stat. 140 (1870); the Amendments to the Enforcement Act, ch. 99, 16 Stat. 433 (1871); Civil Rights Act of Apr. 20, 1871, ch. 22, 17 Stat. 13; Civil Rights Act of March 1, 1875, 18 Stat. 335. For an authoritative treatment of the history of these Civil Rights Acts see Gressman, *supra* note 12.

16. *See, e.g.*, Virginia v. Rives, 100 U.S. 313, 318 (1879) (the primary purpose of the reconstruction legislation was "to place the colored race, in respect of civil rights, upon a level with whites") (Strong, J.); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872). *See generally* authorities cited note 12 *supra*.

17. Ch. 22, 17 Stat. 13. For a detailed examination of the congressional debates see Monroe v. Pape, 365 U.S. 167, 173-83, 195-98, 225-34 (1961). The legislative history of the 1871 Act also is discussed in Note, *Civil Procedure: Section 1343(3) Jurisdiction and the Property—Personal Right Distinction*, 1970 DUKE L.J. 819, 833-39; Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1491-92 (1969); Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 105-13 (1966).

18. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 172-79 (1961); Gressman, *supra* note 12, at 1334.

sections 1983 and 1343(3), created a civil cause of action to redress the deprivation under color of state law, of any rights, privileges, or immunities secured by the Constitution. These suits, requiring no jurisdictional amount, were authorized to be brought in either the district or circuit courts, which at that time exercised concurrent original jurisdiction. Congress was not creating any new substantive rights in adopting the 1871 Act, but instead was exercising its enforcement power under the enabling clause of the fourteenth amendment to secure the rights granted by that amendment.[19]

In 1875, Congress conferred general federal question jurisdiction on the district courts by enacting what is presently section 1331.[20] Also in that year Congress consolidated the various federal statutes at large under separate titles in the Revised Statutes in order to codify existing law.[21] In the process, the substantive provision of the 1871 Act, which became the present section 1983, was separated from its jurisdictional correlate, the present section 1343(3), and the jurisdictional provisions were placed in the Judicial Code of the Revised Statutes of 1875. Although the original substantive provision had referred only to the Constitution, the section appearing in the Revised Statutes was enlarged to provide a remedy for a deprivation of rights, privileges, or immunities secured by federal laws as well.[22] There is no readily apparent explanation for this change, but it has been suggested that the remedy was expanded in order to incorporate similar provisions of the earlier civil rights acts.[23] While the jurisdictional grant to the district courts was identical in scope with the expanded substantive provision,[24] circuit court jurisdiction was limited to claimed deprivations of rights,

19. Monroe v. Pape, 365 U.S. 167 (1961). "Section [1983] came onto the books as § 1 of the Ku Klux Act [*sic*] of April 20, 1871, ch. 22, 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that amendment." *Id.* at 171. (footnote omitted).

20. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The jurisdictional amount was increased from $500 to $2000 by the Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552; to $3000 by the Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091; to $10,000 by the Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415 (now codified in 28 U.S.C. § 1331 (1964)).

21. *See* United States v. Moore, 26 F. Cas. 1306 (No. 15, 804) (C.C.W.D. Ala. 1878). "The object was to consolidate and simplify the law, and the enactment of the Revised Statutes was not the enactment of a body of law as original legislation, but it was the enactment of a more convenient expression of the law as it existed on the first day of December, 1873." *Id.* at 1307. *See also* 2 CONG. REC. 129 (1873) (remarks of Mr. Poland, Chairman of the Committee on Revision of the Laws).

22. Rev. Stat. § 1979 (1875).

23. Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1, 5-6 (1970).

24. Rev. Stat. § 563(12) (1875).

privileges, or immunities secured by the Constitution or by "any Act of Congress providing for equal rights."[25] One theory advanced to explain the addition of the "equal rights" limitation on the circuit court jurisdiction is that it was intended to ensure jurisdiction over claims brought under the Civil Rights Act of 1866.[26] In any event, when Congress, in 1911, abolished the circuit courts' original jurisdiction and merged the two jurisdictional provisions into what is now section 1343(3), the "equal rights" limitation was retained in the revised jurisdictional grant to the district courts.[27] Although textually the cause of action granted by section 1983 appears broader than the jurisdiction conferred by section 1343(3), there is nothing to indicate that Congress intended a difference in scope.[28] Nevertheless, a number of courts have given section 1343(3) a literal reading and, in the absence of a constitutional claim, have refused to entertain jurisdiction over section 1983 suits alleging violations of federal statutes that are not "Act[s] of Congress providing for equal rights."[29] Apart from the property rights exception first articulated in *Hague*, however, the two sections usually have been given a coextensive reading in cases of claimed deprivations of constitutional rights.[30]

B. Early Judicial Developments

The unhappy fate of reconstruction legislation in the hands of the

25. *Id.* § 629 (16).

26. Civil Rights Act of Apr. 9, 1866, ch. 31, 14 Stat. 27; A full discussion of this theory can be found in Note, *supra* note 12, at 1292-93.

27. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087.

28. Legislative history sheds little light upon the reason Congress retained the limiting phrase "providing for equal rights" in the revised jurisdictional grant. *See* S. REP. NO. 388, 61st Cong., 2d Sess., pt. 1, at 15 (1910). For a discussion of several explanatory theories, as well as the problems engendered by this variance in language between the substantive and jurisdictional provisions, see Herzer, *supra* note 23, at 7-16 and Note, *supra* note 12, at 1292-93.

29. *E.g.*, McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969) (claim that state administration of welfare benefits conflicted with Social Security Act); Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969) (allegation that state statute reducing monthly welfare benefit payments violated Social Security Act), *rev'd on other grounds*, 397 U.S. 397, 402 (1970) (upholding pendent jurisdiction); McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951) (violation of Federal Communications Act). *But see* Bomar v. Keyes, 162 F.2d 136 (2nd Cir.), *cert. denied*, 332 U.S. 825 (1947) (civil rights jurisdiction sustained over school teacher's claim that her discharge from employment because of one month's absence while serving on federal jury violated Judicial Code) and the criticism of that decision in Note, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 145, 150-51 (1961) and Note, *supra* note 12, at 1291-93; *cf.* King v. Smith, 392 U.S. 309, 312 n.3 (1968) ("We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts").

30. *See* Eisen v. Eastman, 421 F.2d 560, 565 & n.8 (2d Cir. 1969), *cert. denied*, 400 U.S. 853 (1970).

Supreme Court is too well known to require recitation.[31] The Court frustrated the intent of Congress not only by emasculating the privileges and immunities clause of the fourteenth amendment,[32] but also by declaring several of the Civil Rights Acts unconstitutional.[33] As a result of these decisions, which severely limited the rights entitled to federal protection, the Civil Rights Acts fell into virtual disuse.[34]

In the few cases under section one of the 1871 Act that reached the Supreme Court, no attempt was made to define accurately what "rights, privileges, or immunities secured by the Constitution" were entitled to protection under the statute. In the companion cases *Carter v. Greenhow*[35] and *Pleasants v. Greenhow*,[36] decided in 1884, the Court denied civil rights jurisdiction over allegations that the state had impaired the plaintiffs' contract rights. The Court reasoned that since the right to nonimpairment of contracts was not "directly conferred," it was not "secured" by the Constitution within the meaning of the Civil Rights Act.[37] The Court, however, found it unnecessary to consider what rights are secured for purposes of the Act. Sixteen years later, in *Holt v. Indiana Manufacturing Co.*,[38] the Court refused to uphold civil rights jurisdiction over an action to enjoin state taxation of patent rights that allegedly violated federal patent law. Again avoiding the task of definition, the Court merely noted that: "[a]ssuming [sections 1983 and 1343(3)] are still in force, it is sufficient to say that they refer to civil rights only and are inapplicable here."[39] Subsequently, in *Truax v. Raich*[40] and *Crane v. Johnson*,[41] the Court upheld the jurisdiction of

31. *E.g.*, R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 40-47 (1947); Gressman, *supra* note 12, at 1336-43.

32. In Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court held that the privileges and immunities clause embraced only those rights arising from national citizenship such as the rights to be protected on the high seas and abroad, to travel to the national capital, and to sue in federal courts. United States v. Cruikshank, 92 U.S. 542 (1876), added another restriction by holding that the fourteenth amendment was a limitation only on the states and not private individuals.

33. *E.g.*, Civil Rights Cases, 109 U.S. 3 (1883) (invalidating provisions of the Civil Rights Act of 1875, 18 Stat. 335, which outlawed racial discrimination in public accommodations and places of amusement); United States v. Harris, 106 U.S. 629 (1882) (declaring unconstitutional § 2 of the Civil Rights Act of 1871, 17 Stat. 13, which made it a criminal offense to conspire to deprive any person of equal protection of the laws).

34. *See* Note, *supra* note 12, at 1286.

35. 114 U.S. 317 (1884).

36. 114 U.S. 323 (1884).

37. 114 U.S. at 322.

38. 176 U.S. 68 (1900).

39. *Id.* at 72.

40. 239 U.S. 33 (1915).

41. 242 U.S. 339 (1917).

district courts to entertain equal protection challenges to state statutes that resulted in discriminatory employment practices. In neither case, however, did the Court attempt to define the limits of the jurisdictional provision. Thus, in 1939, when the *Hague* case reached the Supreme Court, the scope of 1343(3)'s predecessor lacked any authoritative definition.

C. *Hague v. CIO*

In *Hague*, the plaintiffs brought suit in a federal district court to enjoin enforcement of city ordinances prohibiting the distribution of printed matter and the holding of public meetings without permit, alleging that the ordinances violated the union members' rights of free speech and peaceful assembly. Both the district court and the court of appeals found jurisdiction under what are now sections 1331 and 1343(3).[42] The Supreme Court reversed as to section 1331, since the plaintiffs had failed to establish the requisite jurisdictional amount.[43] Although no opinion commanded a majority, the Court upheld jurisdiction under 1343(3).

Justice Roberts, writing the lead opinion,[44] held that the reference in the jurisdictional provision to "any right, privilege, or immunity secured by the Constitution" should be interpreted to cover only alleged violations of the privileges and immunities clause of the fourteenth amendment. Since, however, the plaintiffs had been prohibited from disseminating information about the National Labor Relations Act, he concluded that their privileges and immunities of national citizenship had been abridged and affirmed jurisdiction on this basis.[45]

Justice Stone, in his concurring opinion,[46] declined to hinge the decision on the privileges and immunities clause of the fourteenth amendment. Instead, he concluded that the rights of speech and assembly are secured to all persons, regardless of citizenship, by the due process clause of the fourteenth amendment and that violations of these rights under color of state law are actionable under the Civil Rights statute. Turning to the jurisdictional question, Justice Stone thought it necessary to reconcile the parallel existence of what are now sections 1331 and 1343(3). He was certain that when the 1875 Congress created

42. 101 F.2d 774 (3d Cir. 1939), *aff'g* 25 F. Supp. 127 (D.N.J. 1938).

43. 307 U.S. at 507-08.

44. *Id.* at 500.

45. *Id.* at 512-13.

46. *Id.* at 518. Justice Stone was joined on the jurisdictional aspect by Chief Justice Hughes and Justice Reed.

general federal question jurisdiction by enacting the predecessor of section 1331, it had not intended to abolish the jurisdiction already authorized by what is now section 1343(3). Not only is the latter section clearly limited to suits arising under section one of the Civil Rights Act of 1871, the present section 1983, but also a subsequent amendment to the federal question jurisdiction provision excluded 1343(3) actions from the jurisdictional amount requirement.[47] Since, before the creation of federal-question jurisdiction suits could be brought under 1343(3) without any requirement of jurisdictional amount, Justice Stone believed that Congress, by retaining both provisions in the Judicial Code, desired the earlier 1343(3) practice to continue. He, therefore, reasoned that neither provision could be interpreted as abolishing the other and concluded that:

> By treating [1343(3)] as conferring federal jurisdiction of suits brought under the Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous, and give to each a scope in conformity with its history and manifest purpose.[48]

Later in his opinion, Justice Stone articulated what has been accepted generally as the property rights exception to 1343(3) jurisdiction: "[W]henever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under [section 1343(3)] of the Judicial Code to entertain it without proof . . . [of an] amount in controversy. . . ."[49] That this later language correctly states the distinction he intended would seem to be evident from the opinion itself. Significantly, Justice Stone noted with approval the Court's earlier decisions in *Raich* and *Crane*, upholding 1343(3) jurisdiction over suits challenging discriminatory employment practices. In discussing these cases he observed that "[i]n both the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money."[50] It seems clear, however, that both the loss of employment benefits and claims for damages for such deprivations of personal liberty as assault and false imprisonment are capable of valuation. It is apparent, therefore, that it was not Justice Stone's intention that federal courts decline 1343(3)

47. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1091, amended what is now 28 U.S.C. § 1331 (1964) as follows: "[T]he foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the . . . succeeding paragraphs of this section."

48. 307 U.S. at 530.

49. *Id.* at 531-32.

50. *Id.* at 531.

jurisdiction in all cases in which the subject matter could in some way be valued. A number of the better reasoned decisions applying the Stone formula have adopted this position, limited the property rights exception to instances of damage or loss of physical property, and taken jurisdiction in cases having deprivations of rights that are capable of pecuniary valuation.[51] As will be seen, however, even under this approach, the distinction is difficult to apply and often leads to inconsistent results.

D. The Aftermath of Hague

Although the property-personal liberty distinction announced in *Hague* has occasioned much criticism by jurists[52] and scholars[53] alike, it has survived, and many courts continue to follow it with varying degrees of consistency.[54] In only one decision,[55] has a district court flatly rejected the distinction and this holding has been disapproved by the Seventh Circuit.[56] In a number of cases, however, the Stone formula has been ignored completely or at least not mentioned,[57] while in other

51. *E.g.*, National Land & Inv. Co. v. Specter, 428 F.2d 91, 98-100 (3d Cir. 1970); Eisen v. Eastman, 421 F.2d 560, 564 n.7 (2d Cir. 1969). *But cf.* Appellants' Jurisdictional Statement at 13, in Lynch v. Household Fin. Corp., 318 F. Supp. 1111, *prob. juris. noted*, 401 U.S. 935 (1971) ("The dispositive portion of [Justice Stone's] opinion, therefore, is not the language which the Second Circuit has wrenched from its context, but rather his statement that § 1343(3) '*at least* must be deemed to include suits in which the subject matter is one incapable of valuation.' 307 U.S. at 530 (emphasis supplied)" (footnote omitted)).

52. *E.g.*, Penn v. Stumpf, 308 F. Supp. 1238, 1245 (N.D. Cal. 1970); Collins v. Bolton, 287 F. Supp. 393, 401 (N.D. Ill. 1968); Hornbeak v. Hamm, 283 F. Supp. 549, 554-56 (M.D. Ala. 1968) (dissenting opinion); Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 354, 357 (N.D. Ill. 1965).

53. *E.g.*, Laufer, *Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction—A Reappraisal*, 19 BUFFALO L. REV. 547 (1970); Note, *Section 1343 of Title 28—Is the Application of the "Civil Rights-Property Rights" Distinction to Deny Jurisdiction Still Viable?*, 49 B.U.L. REV. 377 (1969); Note, *Civil Procedure: Section 1343(3) Jurisdiction*, *supra* note 17; Note, *supra* note 12; Note, *The "Property Rights" Exception to Civil Rights Jurisdiction—Confusion Compounded*, 43 N.Y.U.L. REV. 1208 (1968).

54. *E.g.*, Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968) (action by corporation to recover bank deposit held by receiver); Bussie v. Long, 383 F.2d 766 (5th Cir. 1967) (class action by taxpayers); McManigal v. Simon,382 F.2d 408, 410 (7th Cir. 1967), *cert. denied*, 390 U.S. 980 (1968) (dispute between members of corporation and its governing body); Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967) (action by prisoner to recover property unlawfully taken by sheriff); Martin v. King, 298 F. Supp. 420 (D. Colo. 1969) (claim that action by town marshall in impounding plaintiff's livestock violated due process).

55. Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 354 (N.D. Ill. 1965) ("Neither logic nor policy compels the conclusion that property rights are less deserving of protection under the Constitution and Civil Rights Act than are human freedoms").

56. Ream v. Handley, 359 F.2d 728, 731 (7th Cir. 1966) (action against state officials, alleging slander of title to realty, dismissed for want of 1343(3) jurisdiction).

57. *E.g.*, Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970) (termination of tenant's leasehold interest in federal housing project without notice or hearing); Blume v. City

cases, the courts simply have avoided the distinction by classifying the property right as one of personal liberty.[58]

An examination of the various approaches taken by the courts makes it clear that Justice Stone's test is "considerably easier to state than to apply."[59] The formula's major weakness is that it ignores the difficulty of distinguishing between property rights and personal rights when the loss of property clearly affects valuable personal interests. The inherent difficulty in the characterization is illustrated by the first cases under section 1343(3) that reached the Supreme Court following the *Hague* decision. In the companion cases of *Douglas v. City of Jeannette*[60] and *Murdock v. Pennsylvania*,[61] members of the Jehovah's Witnesses challenged the constitutionality of a city ordinance prohibiting solicitation of merchandise without a license, on the ground that the ordinance denied their rights of free speech and religion. The Court upheld jurisdiction under the *Hague* test, concluding that the first amendment claim alleged a deprivation of personal liberty. As the dissenting opinions suggest, however, the cases could be viewed just as accurately as challenges to the validity of a municipal ordinance that regulated sales of goods; then, the rights infringed would have been only property rights.[62]

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of Deland, 358 F.2d 698 (5th Cir. 1966) (appropriation of property without due process); McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964) (alternate holding) (state land commissioner's sale of land challenged as impairment of contract obligation); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (discriminatory denial of liquor license); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) (teacher's claim against city council for impairment of contract right to salary and denial of equal protection); Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948) (alleged deprivation of property without due process); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947) (discriminatory revocation of liquor license); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946) (architect's claim of discrimination in denying building permits); *see* Supreme Court decisions discussed at note 93 *infra* and accompanying text.

58. *E.g.*, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (suit challenging landlord's preemptory seizure of tenant's personal property pursuant to state landlord lien statute); Esclara v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) (constitutional challenge to termination of tenant's leasehold interest without notice or opportunity to be heard); Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969) (depriving prisoner of funds necessary to make bail); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (dictum) (migratory farm worker's claim for wages); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) and Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (constitutional challenges to seizures of property pursuant to landlord's or innkeeper's liens); Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970) and Roberge v. Philbrook, 313 F. Supp. 608 (D. Vt. 1970) (constitutional challenges to reduction of welfare benefits).

59. Eisen v. Eastman, 421 F.2d 560, 564 (2d Cir. 1969).

60. 319 U.S. 157 (1943).

61. 319 U.S. 105 (1943).

62. *Id.* at 119 (Reed, J., dissenting); *id.* at 139 (Frankfurter, J., dissenting); *id.* at 179 (Jackson, J., concurring and dissenting). At least one other federal court has entertained jurisdiction

Undoubtedly, Stone's formulation has found its most consistent application in cases challenging the constitutionality of state taxation statutes. Courts generally have held, although not without dissent,[63] that these actions cannot be maintained under section 1343(3).[64] Moreover, the Supreme Court has affirmed per curiam several lower court dismissals of civil rights actions attacking state taxation statutes.[65] These results have been criticized, however, and with some justification.[66] There would appear to be no reason why the right to be free from discriminatory taxation is any less of a "personal right" than are a number of other rights that, although capable of pecuniary valuation, are typically characterized as personal for purposes of the *Hague* distinction.[67] On the other hand, it is arguable that tax assessment cases should be outside federal court jurisdiction irrespective of how they fit the Stone formula, since congressional policy has long favored federal abstention in state taxation cases and has so provided in section 1341.[68] As a result, it has been suggested that many of the tax cases could be disposed of pursuant to this congressional mandate, without resorting to the property-personal liberty distinction.[69] Closely akin to the tax cases are those actions addressed solely to the deprivation of property. Most courts have treated these claims as involving only property rights and thus outside the scope of section 1343(3).[70]

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under § 1343(3) in a case in which the plaintiff complained of a restriction on his right to solicit funds. Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961) (charitable association's challenge to municipal ordinance).

63. *E.g.*, Hornbeak v. Hamm, 283 F. Supp. 549, 554 (M.D. Ala. 1968) (dissenting opinion).

64. *E.g.*, Bussie v. Long, 383 F.2d 766 (5th Cir. 1967); Gray v. Morgan, 371 F.2d 172 (7th Cir. 1966), Buckingham v. Lord, 326 F. Supp. 218 (D. Mont. 1971); Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala. 1968); Alterman Transp. Lines v. Public Serv. Comm'n, 259 F. Supp. 486 (M.D. Tenn. 1966); Detroit Edison Co. v. East China Township School Dist., 247 F. Supp., 296 (E.D. Mich. 1965), *aff'd*, 378 F.2d 225 (6th Cir.), *cert. denied*, 389 U.S. 932 (1967); Abernathy v. Carpenter, 208 F. Supp. 793 (W.D. Mo. 1962). *Contra*, Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351 (N.D. Ill. 1965).

65. Hornbeak v. Hamm, 393 U.S. 9 (1968); Alterman Transp. Lines v. Public Serv. Comm'n, 386 U.S. 262 (1967); Abernathy v. Carpenter, 373 U.S. 241 (1963).

66. Note, *Section 1343 of Title 28*, *supra* note 53; Note, *The "Property Rights" Exception to Civil Rights Jurisdiction*, *supra* note 53.

67. *E.g.*, Gold v. Lomenzo, 425 F.2d 959 (2d Cir. 1970) (real estate agent's license); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (liquor license); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970) (employment).

68. 28 U.S.C. § 1341 (1964) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *See* Matthews v. Rodgers, 284 U.S. 521 (1932). *See also* Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (opinion of Brennan, J.).

69. Note, *The "Property Rights" Exception to Civil Rights Jurisdiction*, *supra* note 53, at 1214.

70. *E.g.*, Spears v. Robinson, 431 F.2d 1089 (8th Cir. 1970) (suit against state to recover face amount of bond and interest); Ream v. Handley, 359 F.2d 728 (7th Cir. 1966) (action alleging

When elements of both property rights and personal rights are involved, however, the Stone test breaks down. In this class of cases, the courts frequently have found a means to uphold jurisdiction. Many courts, for example, have sustained civil rights jurisdiction over suits alleging discrimination in the issuance of business licenses. While the denial or revocation of a business license would appear to affect only a property interest, the courts have tended to view these cases as deprivations of the plaintiff's right to engage in a business of his choice.[71] Thus jurisdiction has been asserted over due process and equal protection challenges involving liquor licenses,[72] building permits,[73] and garbage collection franchises.[74] Similarly, cases involving discrimination in employment usually are held cognizable under Stone's interpretation of 1343(3).[75] Although loss of employment is arguably a mere deprivation of property in the form of wages, most courts have followed the early Supreme Court decision in *Raich* and considered the right to work to be a personal right.

The cases upholding jurisdiction over claims alleging discriminatory treatment in licensing and employment might be explained on the basis that the plaintiff has been deprived of his right to be treated equally, a personal right independent of the interest affected.[76] Unlike a deprivation of due process, in which a specific substantive interest is infringed, a denial of equal protection is said to abridge both a substantive interest and the individual's right to be treated equally. This analysis, although initially appealing as a possible explanation for numerous decisions that have upheld 1343(3) jurisdiction without mentioning the property-personal liberty distinction, encounters serious obstacles. For one thing, a number of courts have expressly noted that for purposes of the Stone distinction, the equal protection and due process clauses have no substantive content of their own, independent

slander of title to realty); Hingle v. Perez, 312 F. Supp. 127 (E.D. La. 1970) (alleged unlawful destruction of real property).

71. *See, e.g.*, Eisen v. Eastman, 421 F.2d 560, 565 (2d Cir. 1969) ("These [cases] can be viewed about equally well as complaining of a deprivation of the personal liberty to pursue a calling of one's choice or of the profits or emoluments deriving therefrom").

72. *E.g.*, Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947).

73. Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946).

74. Mansell v. Saunders, 372 F.2d 573 (5th Cir. 1967).

75. *E.g.*, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (summary dismissal of physician from public hospital); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) (salary dispute); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 372 U.S. 825 (1947) (discharge of school teacher).

76. Note, *The Civil Rights Act and Mr. Monroe*, *supra* note 29, at 162.

of the injury that might result from their violation.[77] On the other hand, it is arguable that if the right to equal protection can be elevated to a position of independence from the underlying substantive interest, so also should be the right to due process. Moreover, there is language in *Monroe v. Pape*[78] that would indicate that the rights to equal protection and due process both have status as independent civil rights. In that landmark case, decided in 1961, the Court upheld a section 1983 action for damages against police officers who had conducted a warrantless search and arrest. Justice Douglas, speaking for a majority of eight, stated that an "[a]llegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of [section 1983]."[79] Significantly, the Court neither mentioned the *Hague* distinction nor distinguished between property rights and personal rights. This omission prompted one writer to conclude that "[a]s a result of the *Monroe* decision, it seems unlikely that the district courts can avoid becoming forums for litigating every invasion of personal and property interests alleged to be a denial of due process."[80] Subsequent decisions, the most notable of which is discussed in the section that follows, indicate, however, that the *Hague* rule survived *Monroe* without significant change.

E. Eisen v. Eastman

In 1969, the Second Circuit, speaking through Judge Friendly in *Eisen v. Eastman*,[81] reaffirmed its allegiance to Justice Stone's test. The *Eisen* opinion is highly significant because of the careful scrutiny it accorded *Hague* and because of the numerous decisions that have relied on its interpretation of Justice Stone's formula.[82]

Eisen concerned an action by a landlord against a city rent and rehabilitation director, alleging that a reduction of maximum rents chargeable under the city's rent control law violated the landlord's constitutional right not to be deprived of property without due process of law. The district court held, for erroneous reasons,[83] that the action

77. *E.g.*, Bradford Audio Corp. v. Pious, 392 F.2d 67, 72 (2d Cir. 1968); Roberge v. Philbrook, 313 F. Supp. 608, 612 (D. Vt. 1970).

78. 365 U.S. 167 (1961).

79. *Id.* at 171.

80. Note, *The Civil Rights Act and Mr. Monroe, supra* note 29, at 160; *cf.* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Note, *Limiting the Section 1983 Action, supra* note 17.

81. 421 F.2d 560 (2d Cir. 1969).

82. The case is cited more frequently by courts wishing to dispel any doubts over the continuing vitality of the Stone distinction. *E.g.*, Weddle v. Director, 436 F.2d 342 (4th Cir. 1970); National Land & Inv. Co. v. Specter, 428 F.2d 91 (3d Cir. 1970).

83. The district court opinion is unreported.

could not be maintained under the Civil Rights Act. The appeals court affirmed, but upheld the denial of jurisdiction under section 1343(3) because the complaint alleged injury to a property right only.

Judge Friendly noted at the outset that the increasing incidence of civil rights suits in federal courts, brought by plaintiffs who prefer litigating in the federal forum to pursuing their state remedies, had prompted the court to examine the jurisdictional questions in greater depth than the disposition of the case demanded.[84] Turning to the property-personal liberty distinction of *Hague*, he concluded that "[t]here seems to be something essentially right about it, especially if one accepts, as we do, his premise that the overlap between 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) should be explained in some rational way."[85] Moreover, the judge found that Justice Stone's definition encompassed virtually all the cases[86] in which the Supreme Court had sustained jurisdiction under section 1343(3). He therefore concluded, "although with a good deal less than complete assurance," that Justice Stone's *Hague* formulation, generously construed, should continue to be regarded as the law in the Second Circuit.[87]

One commentator observed shortly after the decision in *Eisen* that "[p]erhaps Judge Friendly was aware that one may 'generously construe' any test to such an extent that it is no longer meaningful and then may be unceremoniously discarded."[88] It is believed, however, that the judge's holding generously construed the test simply to reflect what the weight of decisions makes abundantly clear—that Stone's formula must be generously construed if it is to be workable at all. As already noted, a number of courts, rather than generously construing the test, have ignored it altogether. It seems most unlikely, however, that Judge Friendly either envisions or advocates discarding this limitation on civil rights jurisdiction since his introductory remarks in *Eisen*, as well as statements in later opinions,[89] indicate a deep concern over problems of judicial administration in federal courts. *Eisen*, therefore, should be viewed as an unequivocal approval of the *Hague* distinction and a number of courts have so interpreted it. Significantly, the lower court ruling in *Lynch* was based expressly on *Eisen*, and this presumably prompted the Supreme Court's noting of probable jurisdiction.

84. 421 F.2d at 561-62.

85. *Id.* at 565.

86. For a discussion of the one Supreme Court case that might be an exception see notes 90-92 *infra* and accompanying text.

87. 421 F.2d at 566.

88. Note, *Civil Procedure: Section 1343(3) Jurisdiction*, *supra* note 17, at 839.

89. *See* note 202 *infra* and accompanying text.

III. RECENT DEVELOPMENTS

Since the *Eisen* decision the courts have continued to grapple with the property-personal liberty distinction. Several courts have expressed new doubts concerning both the validity and utility of the test. On the other hand, a significant number of courts purport to approve the rule without question. Recent decisions, however, indicate that few courts feel bound to a mechanical application of the test. As a result, considerable confusion over the proper scope of section 1343(3) continues to exist. In addition to the kinds of civil rights actions already discussed, current 1343(3) litigation encompasses a substantial body of new claims, the most notable of which are of the welfare and *Sniadach* variety. The most recent developments in each of these areas will be discussed in turn.

A. The Welfare Cases

Judge Friendly noted in *Eisen* that the one Supreme Court case that was difficult to fit within Justice Stone's formula in *Hague* is *King v. Smith*.[90] There the Court expressly found section 1343(3) jurisdiction over a welfare recipient's challenge to Alabama's "substitute father" regulation, under which the state had terminated her benefits because she had been visited by a man, and had had sexual relations with him. Without explanation, the Court stated in a footnote that "[j]urisdiction was conferred on the court by 28 U.S.C. §§ 1343(3) . . . ."[91] Judge Friendly suggested that *King v. Smith* might be reconciled with *Hague* on the theory that the regulation not only caused economic loss to the petitioner's children, "but also infringed their 'liberty' to grow up with financial aid for their subsistence and her 'liberty' to have [her suitor] visit her on weekends."[92]

Since *Eisen*, there have been a number of Supreme Court decisions on various aspects of the Aid to Families with Dependent Children (AFDC) program in which the Court assumed, without discussion, that the requirements for 1343(3) jurisdiction had been met.[93] The broadest

90. 392 U.S. 309 (1968).

91. *Id.* at 312 n.3.

92. 421 F.2d at 564. The Supreme Court's subsequent decision in Dandridge v. Williams, 397 U.S. 471 (1970), would appear to cast considerable doubt on the proposition that children have a constitutional right to subsistence. Similarly, with all due respect to Judge Friendly, it is not believed that the freedom to participate in illicit sexual relations can be viewed as a federally protected right.

93. *E.g.*, Wyman v. Rothstein, 398 U.S. 275 (1970); Lewis v. Martin, 397 U.S. 552 (1970); Dandridge v. Williams, 397 U.S. 471 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Solman, 396 U.S. 5 (1969) (per curiam); Shapiro v. Thompson, 394 U.S. 618 (1969).

statement relating to jurisdiction is found in *Rosado v. Wyman*,[94] in which the Court noted: "[O]nce petitioners filed their complaint alleging the unconstitutionality of [a New York Welfare Statute], the District Court . . . was properly seized of jurisdiction over the case under §§ 1343(3) and (4) . . . ."[95]

Recent lower court rulings on challenges to state administration of public assistance programs have varied considerably in their treatment of the jurisdictional issue. A few decisions do not mention the *Hague* limitation on 1343(3) jurisdiction.[96] Other courts have concluded that the recent Supreme Court decisions on the merits in welfare cases are dispositive of the question.[97] Nonetheless, a number of decisions, notably in the Second Circuit, have reasoned that the absence of a specific reference to *Hague* in Supreme Court welfare decisions does not mean that the Court has abandoned the Stone formula sub silentio.[98] Accordingly, these courts have examined case by case the nature of the welfare recipient's claim to determine if it involves elements of personal liberty. Drawing upon the language in recent Supreme Court opinions, a number of courts have postulated that a termination or denial of welfare benefits can and often does result in more than just economic loss.[99] The problem in welfare cases then, as in general 1343(3) cases, lies in determining when the loss becomes a deprivation of a personal right.[100] One district court, for example, held that unless a welfare recipient demonstrates that the denial of welfare assistance threatens his subsistence, jurisdiction cannot be founded on section 1343(3).[101] The difficulty with this approach is clearly illustrated

94. 397 U.S. 397 (1970).

95. *Id.* at 403. The Court further noted that "we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." *Id.* at 422.

96. *E.g.*, Stinson v. Finch, 317 F. Supp. 581 (N.D. Ga. 1970); Jenkins v. Georges, 312 F. Supp. 289 (W.D. Pa. 1969).

97. *E.g.*, Ojeda v. Hackney, 319 F. Supp. 149 (N.D. Tex. 1970); Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970); Kaiser v. Montgomery, 319 F. Supp. 329 (N.D. Cal. 1969).

98. *E.g.*, Johnson v. Harder, 318 F. Supp. 1274, 1276 (D. Conn. 1970), *rev'd*, 438 F.2d 7 (2d Cir. 1971).

99. *E.g.*, Roberge v. Philbrook, 313 F. Supp. 608, 615 (D. Vt. 1970).

100. *Compare* Russo v. Shapiro, 309 F. Supp. 385, 391 (D. Conn. 1969) (jurisdiction upheld over constitutional challenge to welfare department policy limiting maximum grants for school clothing, reasoning that children have a "liberty . . . to have clothing to wear to school"), *with* Middagh v. Harder, Civil No. 13, 661 (D. Conn. Mar. 10, 1970) (jurisdiction refused over challenge to welfare department policy denying any school clothing allowance to dependent children who had received income from summer employment, concluding that the children had not been deprived of a liberty).

101. Campagnuolo v. Harder, 319 F. Supp. 414, 417 (D. Conn. 1970), *rev'd*, 440 F.2d 1225 (2d Cir. 1971).

by the recent case of *Johnson v. Harder*.[102] There a mother and her children, who were AFDC recipients, challenged the state welfare department's practice of including Old Age, Survivors and Disability Insurance benefits that certain members of the family were receiving in calculating the monthly AFDC award to the entire family unit. The district court held that the suit was not cognizable under section 1343(3), reasoning that since the controversy was whether the family was entitled to receive *more* by virtue of its dual eligiblity than the state had determined was essential for subsistence, no right of personal liberty was affected.[103] The Second Circuit Court of Appeals reversed.[104] That court recognized that it was again facing the problem posed in *Eisen* of reconciling federal court jurisdiction over welfare cases with the *Hague* limitation. Citing Judge Friendly's analysis of *King v. Smith* in *Eisen*, as well as later Supreme Court decisions, the court concluded: "Since welfare cases by their very nature involve people at a bare subsistence level, disputes over the correct amounts payable are treated not merely as involving property rights, but some sort of right to exist in society, a personal right under the Stone formula."[105]

This statement, along with a supporting footnote,[106] seems to indicate that the Second Circuit had determined to exempt all welfare cases from the "property rights" limitation on section 1343(3) jurisdiction.[107] The court's more recent decision in *Roberts v. Harder*,[108] however, has revived the confusion by refusing jurisdiction over an AFDC recipient's challenge to the state welfare department's policy of allocating a portion of her assistance grant directly to her landlord. The court concluded that since the department's arbitrary action did not reduce the total amount of assistance available to the plaintiff, her claim did not fit the *Johnson* jurisdiction formula.[109] Whatever else may be said of this result, it undermines the desirable certainty that *Johnson* purported to bring to this area of civil rights litigation.[110]

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102. 318 F. Supp. 1274 (D. Conn. 1970).

103. *Id.* at 1277.

104. 438 F.2d 7 (2d Cir. 1971).

105. *Id.* at 12.

106. "We realize that questions may be raised as to whether the expansion of the Stone formula to include all welfare cases is justifiable while upholding the continuing validity of *Hague*." *Id.* n.6.

107. *See, e.g.*, Wilczynski v. Harder, 323 F. Supp. 509 (D. Conn. 1971). In upholding jurisdiction over a constitutional challenge to state action in reducing medical payments, the court cited *Johnson* and observed that "[t]he hitherto troublesome problems of fitting all welfare cases within § 1343(3) . . . have now been resolved for the district courts in this circuit." *Id.* at 513 (footnote omitted).

108. 440 F.2d 1229 (2d Cir. 1971).

109. *Id.* at 1230.

110. *Cf.* Campagnuolo v. Harder, 440 F.2d 1225 (2d Cir. 1971).

B. *Licensing and Employment Cases*

As previously observed, the courts readily have assumed 1343(3) jurisdiction over suits alleging discriminatory or unfair licensing and employment practices even though they purport to be following the *Hague* limitation on jurisdiction. With one notable exception,[111] the most recent decisions have continued this practice.

A 1970 Second Circuit decision in an occupational licensing case is especially noteworthy. In *Gold v. Lomenzo*,[112] the court upheld jurisdiction under 1343(3) to entertain an action to enjoin the suspension of a real estate broker's license. Judge Friendly, speaking for the majority, stated simply that "we are content to follow the prevailing view sustaining civil rights jurisdiction in such cases . . . ."[113] Judge Hays, dissenting, concluded that the case clearly lacked the elements of personal liberty essential for 1343(3) jurisdiction.[114] In his view, the plaintiff, whose license had been suspended because of excessive commission charges, had only to return the illegally obtained fees in order to have his license restored—a step that solely injured his property. Thus, he reasoned that this situation was clearly distinguishable from that court's earlier decision in *Birnbaum v. Trussel*[115] in which civil rights jurisdiction was sustained on the ground that a doctor's removal from a hospital staff position under charges of racial prejudice was bound to injure the physician permanently in his medical career.

More recently, the Second Circuit further refined its position regarding 1343(3) jurisdiction over alleged deprivations of employment opportunity. In *Tichon v. Harder*,[116] the plaintiff, a probationary employee with the Connecticut Department of Welfare, sought damages and declaratory and injunctive relief against dismissal from her position in violation of procedural due process. Despite the suggestion in *Eisen* that jurisdiction should be entertained in these cases because they complain of a "deprivation of the personal liberty to pursue a calling of one's choice,"[117] the district court denied relief and the court of appeals affirmed. Significantly, the appeals court noted at the outset that a claim of denial of procedural due process has no independent jurisdictional significance under section 1343(3).[118] The *Hague* test

111. *See* notes 116-23 *infra* and accompanying text.
112. 425 F.2d 959 (2d Cir. 1970).
113. *Id.* at 961.
114. *Id.* at 962-63.
115. 371 F.2d 672 (2d Cir. 1966).
116. 438 F.2d 1396 (2d Cir. 1971).
117. 421 F.2d at 565.
118. 438 F.2d at 1399. *But see* Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.) discussed at page 1011 *infra*.

focuses instead on the interest claimed to be injured by the denial of procedural due process. Reviewing prior cases in which the court had assumed jurisdiction over discharges from public employment,[119] the court concluded that not every dismissal under circumstances denying procedural due process presents a basis for jurisdiction under 1343(3). The court held, therefore, that for purposes of civil rights jurisdiction the impact of a dismissal must be of such substantial injury to the employee's reputation that it will destroy effectively his ability to engage in his occupation.[120] Interestingly, the *Tichon* court cited the Supreme Court's recent decision in *Wisconsin v. Constantineau*[121] for the proposition that, in some circumstances, injury to reputation alone is sufficient to sustain section 1343(3) jurisdiction. That case challenged a state statute that authorized police to post public notices prohibiting the sale of alcoholic beverages to persons allegedly possessing undesirable character traits; the Court struck down the statute on the ground that the failure to provide notice and a hearing to affected individuals violates due process. Jurisdiction was based on section 1343(3).[122] The court in *Tichon*, however, reasoned that the damage to good name, reputation, honor, and integrity at stake in *Constantineau* is not inherent in every employment dismissal case.[123] The Second Circuit has just given further consideration to the propriety of section 1343(3) jurisdiction over a claim alleging damage to reputation, although not in connection with a dismissal from employment. In *Dale v. Hahn*,[124] the plaintiff challenged the constitutionality of a New York mental health statute under which her conservator had been appointed without notice or hearing. Since the plaintiff sought, as a portion of the relief requested, the recovery of money expended by the conservator, the district court held, as one ground for dismissal, that section 1343(3) jurisdiction was improper.[125] The court of appeals reversed and upheld jurisdiction on the ground that the stigma and consequences to

119. The court distinguished *Birnbaum* on the ground that Miss Tichon "had no profession or occupation and no accumulated reputation as a competent worker which the state arbitrarily destroyed; and she was not discriminated against by reason of race." 438 F.2d at 1402.

120. 438 F.2d at 1402 & n.9. In an afterthought, the court admitted that the plaintiff might well be entitled to relief on the merits, but observed that "the conception of jurisdiction under § 1343(3), which is limited to deprivations of those constitutional and federal statutory rights of personal liberty not dependent for their existence on property rights, and which is founded on important policies of federalism, denies the [plaintiff] a forum in federal district court." *Id.* at 1403.

121. 400 U.S. 433 (1971).

122. *Id.* at 434 n.1, 438 n.4.

123. 438 F.2d at 1401 n.8.

124. 311 F. Supp. 1293 (S.D.N.Y. 1970), *rev'd*, 440 F.2d 633 (2d Cir. 1971).

125. 311 F. Supp. at 1302-03.

reputation resulting from conservatorship involved more than a property right; the adverse impact of the appointment on the plaintiff's personal liberty would exist regardless of the alleged illegal use of her money.[126] In light of these recent cases, it would appear that in appropriate circumstances damage to reputation will support section 1343(3) jurisdiction in the Second Circuit, and in cases of alleged summary dismissal from public employment, it may well be the decisive consideration.[127]

The jurisdictional test adopted by the Second Circuit for dismissals of public employees undoubtedly will undergo additional modification in its application to cases alleging discriminatory hiring practices. In the latter situation the complaint sounds in equal protection and an accurate measurement of the impact on a plaintiff's future livelihood will be more difficult. A recent California decision took a dim view of the property rights exception in a case of alleged discrimination in hiring public employees. In *Penn v. Stumpf*,[128] the plaintiff alleged that tests given to applicants for positions with the police department were discriminatory. In upholding 1343(3) jurisdiction, the district court criticized Stone's formula and stated that, if faced with the problem as a matter of first impression, it would reject a strict property-personal liberty test of civil rights jurisdiction. The court held, however, that even under this test the plaintiff's claim established 1343(3) jurisdiction since employment is far more precious than a mere property right.[129]

C. *Miscellaneous Deprivations of Property*

Other recent cases have applied the Stone formula for 1343(3) jurisdiction to various kinds of property deprivations. The Court of Appeals for the Third Circuit, for example, has followed *Eisen* and approved the *Hague* rule in *National Land & Investment Co. v. Specter*,[130] a case in which corporate stockholders sought to enjoin state investigative and criminal proceedings that threatened their business venture. Some lower court decisions in that circuit, however, both before and after *Specter*, have refused to permit the Stone formula to defeat jurisdiction over alleged unconstitutional deprivations of property.[131]

126. 440 F.2d at 636.

127. *Cf.* Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971) (jurisdiction entertained over public school teacher's claim that his discharge was arbitrary).

128. 308 F. Supp. 1238 (N.D. Cal. 1970).

129. *Id.* at 1245-46.

130. 428 F.2d 91, 98-100 (3d Cir. 1970).

131. *See, e.g.*, Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1971).

The Fourth Circuit, in *Weddle v. Director, Patuxent Institution*,[132] overruled an earlier decision and adopted the *Hague* test as the law of the circuit. Although convinced that a custodial officer's seizure of personal property from a juvenile offender deprived the youth of his property without due process, the court held that it lacked jurisdiction to entertain the suit under 1343(3). The Eighth Circuit also reaffirmed the *Hague* test in *Spears v. Robinson*[133] by upholding the dismissal of a suit against a state for interest on a bond. Recent decisions by the Seventh Circuit[134] and a district court in the Ninth Circuit[135] have unequivocally held that the Stone formula precludes 1343(3) jurisdiction over claims alleging deprivations of mere property rights. Similarly the *Hague* distinction has had recent advocates in the Fifth Circuit. In *Hingle v. Perez*,[136] a Louisiana district court dismissed for lack of 1343(3) jurisdiction an action by property owners alleging illegal destruction of their real property by public authorities. The court noted the troublesome history of Stone's formulation, but concluded that the distinction facilitates the proper allocation of litigation to a suitable forum.[137] That the Fifth Circuit is far from achieving unanimity over the scope of Stone's property rights exception is illustrated by the court's decision in *Gomez v. Florida State Employment Service*.[138] This was an action by migratory farm workers alleging deprivations of wages and benefits. The district court dismissed for want of jurisdiction under 1343(3), but the court of appeals reversed. In dictum, the court expressed doubts concerning the *Hague* distinction, but reasoned that, in any event, it was unnecessary to determine the extent property rights are outside section 1343(3), since the essence of the plaintiffs' claim is the denial of essentially personal rights affecting subsistence and livelihood.[139]

Mention should be made also of recent cases dealing with terminations of leases in public housing projects. Several courts, notably the Second Circuit in *Escalera v. New York City Housing Authority*[140]

132. 436 F.2d 342 (4th Cir. 1970); *accord*, Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967) (similar facts). *Contra*, Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969) (similar facts).

133. 431 F.2d 1089 (8th Cir. 1970).

134. Booth v. Lemot Mfg. Corp., 440 F.2d 385 (7th Cir. 1971) (action challenging municipality's failure to reassess leases of public property to reflect current value).

135. Buckingham v. Lord, 326 F. Supp. 218 (D. Mont. 1971) (alleged discriminatory taxation).

136. 312 F. Supp. 127 (E.D. La. 1970), *aff'd mem.*, 434 F.2d 1037 (5th Cir. 1970).

137. *Id.* at 129.

138. 417 F.2d 569 (5th Cir. 1969).

139. *Id.* at 579 nn.36 & 37.

140. 425 F.2d 853 (2d Cir. 1970).

and the Fourth Circuit in *Caulder v. Durham Housing Authority*,[141] have assumed 1343(3) jurisdiction over claims that a termination prior to a hearing violates due process. In *Caulder* the court assumed jurisdiction without discussion,[142] reasoning that a tenant's interest in his leasehold is analogous to that of a welfare recipient in his monthly check. The Second Circuit, however, sustained jurisdiction in *Escalera* on a puzzling basis. The court acknowledged the validity of Stone's property-personal liberty distinction for civil rights jurisdiction but then predicated jurisdiction on the plaintiff's alleged "deprivations of procedural due process, a civil right . . . ."[143] While no one may quarrel with this result, the court's inconsistent approach can only cloud further what is already a misunderstood and misused rule of law.[144]

D. Sniadach Progeny

In the 1969 landmark case of *Sniadach v. Family Finance Corp.*,[145] the Supreme Court held that prejudgment garnishment of an alleged debtor's wages, without notice or opportunity to be heard, violates the due process clause of the fourteenth amendment. The Court based its decision on the fact that wages are a special form of property whose loss can create severe hardships. As a result there has been much speculation concerning the extent that *Sniadach* might be extended to other kinds of debtor's property.[146] Relying on the *Sniadach* decision, numerous suits have been instituted challenging various state procedures for prejudgment seizure of debtor's property. Significantly, a number of these actions have been brought in federal courts raising a threshold question of jurisdiction under 1343(3). Since these suits complain primarily of a deprivation of property without due process, it might be expected that the courts would refuse to exercise 1343(3) jurisdiction because of the Stone limitation. With a few notable exceptions,[147] however, the courts generally have found little difficulty in sustaining jurisdiction over these actions.

One of the first federal court decisions extending *Sniadach* was

141. 433 F.2d 998 (4th Cir. 1970).

142. 433 F.2d at 1001.

143. 425 F.2d at 864; *cf.* McGuane v. Chenango Court, Inc., 431 F.2d 1189, 1190 (2d Cir. 1970); McQueen v. Druker, 317 F. Supp. 1122, 1132-33 (D. Mass. 1970).

144. *See, e.g.*, Bradford Audio Corp. v. Pious, 392 F.2d 67, 72 (2d Cir. 1968) (for purposes of 1343(3) jurisdiction, an allegation of a denial of procedural due process has no independent jurisdictional significance); *accord*, Tichon v. Harder, 438 F.2d 1396, 1399 (2d Cir. 1971).

145. 395 U.S. 337 (1969).

146. Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970); 68 MICH. L. REV. 986 (1970).

147. *See* note 159 *infra* and accompanying text.

Klim v. Jones,[148] in which a California district court declared that state's Innkeepers' Lien Law unconstitutional. Jurisdiction was found to exist under both sections 1331 and 1343(3). In discussing 1343(3) jurisdiction, the court intimated doubts concerning the efficacy of the property-personal liberty distinction, but concluded that, in any event "it will not bar the plaintiff's claim in the present action since his claim is not for 'mere' property, but rather for property which is his means of employment and support and hence incapable of pecuniary measure."[149] In *Hall v. Garson*,[150] the Fifth Circuit upheld 1343(3) jurisdiction over a suit challenging the constitutionality of a landlord's lien statute. While the court expressed doubts about the Stone test itself, it deemed it unnecessary to pass on the scope of the asserted "property exemption" of *Hague*. Instead the court found that the rights infringed were not merely the rights to use the property seized by the landlord, but the right of the tenant to be secure in his home and free from invasion of that home without prior procedural protection.[151] A similar result was reached by a New York three-judge district court in *Laprease v. Raymours Furniture Co.*,[152] which upheld a conditional vendee's claim that prejudgment attachment of a debtor's household necessities without prior notice and hearing violates the due process clause of the fourteenth amendment. The court, however, used the presence of a fourth amendment claim as its basis for concluding that the Stone distinction was inapposite.[153] In a case presenting almost identical facts, a Florida district court, in *Fuentes v. Faircloth*,[154] assumed 1343(3) jurisdiction without discussion, but denied relief on the merits.

In contrast with these cases, several courts have faced the question more directly and have refused to permit the property-personal liberty distinction to defeat 1343(3) jurisdiction over *Sniadach* claims. In *Santiago v. McElroy*,[155] for example, a Pennsylvania district court struck down that State's statute authorizing a landlord's distraint and sale of a tenant's chattels without notice and hearing, on the ground that the procedure was violative of procedural due process. After noting its uncertainty over whether property rights are exeluded from 1343(3),

148. 315 F. Supp. 109 (N.D. Cal. 1970).

149. *Id.* at 115.

150. 430 F.2d 430 (5th Cir. 1970).

151. *Id.* at 438.

152. 315 F. Supp. 716 (N.D.N.Y. 1970).

153. *Id.* at 721. The court also cited *Escalara* for the proposition that a deprivation of procedural due process is a sufficient basis for 1343(3) jurisdiction.

154. 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

155. 319 F. Supp. 284 (E.D. Pa. 1970).

the court went on to find that the plaintiff's claims involved more than mere property rights. The court reasoned that the dispossession of household goods may leave the low income family without the necessities of life and render their personal rights meaningless. The court concluded: "We think . . . that recent Spreme Court rulings dealing with welfare rights decide, at the very least, that the deprivation of this kind of property, i.e., property necessary to keep a family at subsistence level, is covered by 28 U.S.C. 1343(3)."[156] More recently, a Maryland district court sustained jurisdiction over a retail installment purchaser's claim that the State's replevin procedures were unconstitutional.[157] Citing *Santiago*, the court reasoned that the plaintiff's right to possess essential household goods was sufficiently personal to avoid the *Hague* limitation on 1343(3) jurisdiction.

Many of these cases seem to indicate that the specialized nature of property is not only crucial in determining whether *Sniadach* is apposite, but it also may be dispositive of the threshold jurisdictional question. In *Kerrigan v. Boucher*,[158] for example, the Connecticut federal district court concluded that an alleged unconstitutional deprivation of personal belongings, which included the plaintiff's artificial dentures, eye glasses, clothing, household furnishings and other effects, pursuant to the state's boarding house lien law, was cognizable under section 1343(3). On the other hand, in a recent Florida case, in which a conditional buyer challenged the procedures whereby his automobile was repossessed, the district court concluded that "[a]n automobile is no more than a piece of property and § 1343(3) does not confer jurisdiction on this court for alleged deprivation of property rights."[159] The court obviously was unimpressed by the plaintiff's allegation that the automobile was a specialized kind of property. It was by similar reasoning, although the property involved was money in checking and savings accounts, that the Connecticut District Court dismissed the complaint in *Lynch v. Household Finance Corp.*[160]

156. *Id.* at 291; *accord*, Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971) (action challenging constitutionality of Pennsylvania replevin procedures authorizing immediate repossession of debtor's property by creditors under writ of execution issued without notice or hearing). Having concluded that § 1343(3) jurisdiction was proper, in light of the fourth amendment claim, the court observed: "We need not be concerned with an evaluation of the advantages or disadvantages of a broad or narrow construction of Justice Stone's *Hague* formulation at this point since there is alleged in this complaint a valid basis for Federal jurisdiction. As we view the remaining allegations, apart from the Fourth Amendment, they state, as alleged, grounds in some respects similar to those recently ruled upon by the Supreme Court." 326 F. Supp. at 131-32 (citations omitted).

157. Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971).

158. 326 F. Supp. 647 (D. Conn. 1971).

159. McCormick v. First Nat'l Bank, 322 F. Supp. 604, 605 (S.D. Fla. 1971).

160. 318 F. Supp. 1111 (D. Conn. 1970), *prob. juris. noted*, 401 U.S. 935 (1971).

IV. LYNCH V. HOUSEHOLD FINANCE CORP.

The *Lynch* appeal to the Supreme Court poses a formidable challenge to the property rights exclusion of section 1343(3). The case dramatically illustrates both the conceptional and practical difficulties that are inherent in Justice Stone's formula and the appeal calls for a policy decision of far-reaching significance to federal judicial administration. For these reasons, the case itself, the issues raised by the appeal, and the underlying policy question merit thorough consideration.

A. The Lower Court's Opinion

In the lower court, class actions were brought by owners of a savings account and of a checking account, respectively, seeking declaratory and injunctive relief on the ground that their constitutional rights were impaired by the Connecticut prejudgment attachment and garnishment statutes.[161] The due process claim was based on *Sniadach*. The facts alleged in the respective complaints were taken as true by the court in ruling on the defendants' motion to dismiss. In the *Lynch* action,[162] the plaintiff was a hospital employee earning 69 dollars a week, which she used to support herself and her children. Two years earlier, she had authorized her employer to withhold ten dollars weekly from her wages for deposit in the hospital credit union. The plaintiff alleged that the deposited wages were used for necessary medical, rent, food, and clothing expenses. The defendant Household Finance Corporation, in conjunction with a suit on a note against plaintiff in state court, secured a writ of garnishment that subsequently was served on the hospital credit union. The garnishment of plaintiff's savings account took effect on service of the writ, without notice to the plaintiff or opportunity to be heard. Thereafter the plaintiff was unable to draw

161. Connecticut's prejudgment attachment and garnishment procedures are contained in CONN. GEN. STAT. REV. §§ 52-279 to -346 (1968). Under these provisions attachment or garnishment of an alleged debtor's real and personal property is authorized in a civil action in which a creditor is seeking money damages. The levy is initiated by the creditor's attorney, who, in his capacity of Commissioner of the Superior Court, signs and issues the writ of attachment or garnishment, together with a summons and complaint. No court order is required for the issuance of the writ except in the case of garnishment or forcign attachment of a checking account in excess of $5,000. Attachment or garnishment is effected by scrvice of the writ, along with the summons and complaint, by the sheriff upon the person who either has possession of the debtor's property or is indebted to the debtor. The officer serving the writ also is required to serve the debtor with a copy of the writ and accompanying papers. Once the debtor's property is attached, the attachment may be dissolved upon the debtor's securing a bond with surety.

162. Brief for Appellant at 6, 7, Lynch v. Household Fin. Corp., 318 F. Supp. 1111 (D. Conn. 1970).

upon the deposited wages to meet necessary expenses, was too poor to afford a surety bond to procure release of the garnishment, and as a result suffered severe hardships. In the companion case, *Toro v. Camposano*,[163] a landlord had garnished, without notice or hearing, the plaintiff's checking account into which the plaintiff regularly deposited the modest wages she used for necessary family expenses. As a result of the garnishment, the plaintiff experienced serious difficulties, including damage to her credit and reputation, and exposure to possible criminal prosecution for overdrawn checks. Both plaintiffs, as low income wage earners, were forced to endure these hardships although they allegedly had valid defenses to the creditors' state court suits. Confronted with the impractical choice of either settling the creditors' claims or suffering their assets to remain frozen until trial on the merits in state court, the plaintiffs invoked the protection of the Civil Rights Act in federal court.

The three-judge panel dismissed both actions for lack of subject matter jurisdiction.[164] Although the court admitted that there was no question of the substantiality of the constitutional claim,[165] it held that *Eisen* was dispositive of the threshold question of 1343(3) jurisdiction. In analyzing the plaintiffs' claims, the court observed:

> Interference with a Connecticut resident's right to the uninterrupted use of her bank account, like the interdiction of a New Yorker's right to rely upon an undiminished amount of rental income from his property, has to do almost entirely with the loss of money; it involves, at most, only an incidental deprivation of personal rights in the sense of "personal liberty, not dependent for its existence upon the infringement of property rights."[166]

The court reasoned that access to funds held in savings and checking accounts is virtually indistinguishable from simple ownership of the money. As a result, the court concluded that unless the right to own or use the money is closely linked to expenditures used to secure or protect personal rights, it is outside the protection of 1343(3). Otherwise, any plaintiff could claim that money taken under color of state law was marginal to his subsistence and thus negate *Eisen*. Finally, the court stressed the impracticality of defining a class of plaintiffs who would be so adversely affected by garnishment of savings accounts that their

163. *Id.* at 7, 8 (*Toro* and *Lynch* were consolidated for disposition by the court).

164. As an alternative ground for dismissal, the court held that the actions were barred by the anti-injunction statute, 28 U.S.C. § 2283 (1964) which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 318 F. Supp. at 1114, 1115.

165. 318 F. Supp. at 1115.

166. *Id.* at 1114 (court cites *Hague* and *Eisen*).

rights of personal liberty could be said to be infringed. Interestingly, the opinion indicates that deprivations of property, including money, which threaten an individual's subsistence are an exception to the property rights exclusion from section 1343(3) jurisdiction.[167] Undoubtedly, in certain situations the garnishment of savings or checking accounts will threaten a debtor's subsistence and the facts alleged in the *Lynch* complaint seem to depict such a situation. The court, however, appears to have based its dismissal on what it considered to be the impractical task of defining a suitable class of plaintiffs. Thus it is arguable that the case should not be read as holding that prejudgment garnishment of a debtor's bank account can never infringe upon a right of personal liberty that will support jurisdiction under section 1343(3). Nevertheless, the dismissal of the instant actions has triggered an appeal that promises to resolve questions of far greater scope than the narrow factual determination made by the lower court.

B. The Issues on Appeal

The appellants have raised two issues in their appeal from the district court's dismissal of their complaints.[168] The only one important to the present inquiry is whether the district court erred in dismissing the actions for want of section 1343(3) subject matter jurisdiction. To answer this question requires the resolution of several additional questions: first, whether Justice Stone's *Hague* distinction is a proper construction of section 1343(3); secondly, assuming the Stone formula is correct, whether it applies to property that is essential for subsistence; and thirdly, assuming the first and second questions are answered affirmatively, whether the district court improperly concluded that the plaintiffs' bank accounts are not subsistence property.

The question whether Justice Stone properly interpreted the jurisdictional provisions of the Civil Rights Act probably will be treated as a matter of first impression by the Supreme Court. Although the

167. "Unless such a right to own or use one's money is closely linked by custom to an expenditure to secure or protect a right which is in some sense 'personal' and incapable of monetary valuation, as might be the case with welfare payments and wages, it is outside the protection of § 1343(3)." *Id.*

168. Both parties also have briefed extensively the question whether the actions are barred by 28 U.S.C. § 2283. Brief for Appellant at 35-44 and Brief for Appellee at 23-49, Lynch v. Household Fin. Corp., 318 F. Supp. 1111 (D. Conn. 1970). Apart from the problem of determining if the instant garnishments are "proceedings in a state court," the Court apparently will be pressed to decide whether an action brought under § 1983 is an "expressly authorized" exception to the anti-injunction ban of § 2283. *See* Younger v. Harris, 401 U.S. 37, 54-55 & nn.1 & 2 (1971) (Stewart, J. concurring); Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation*, 83 HARV. L. REV. 1870 (1970).

Court has affirmed per curiam several dismissals of civil rights actions for want of jurisdiction under Stone's construction of section 1343(3),[169] it has conspicuously avoided discussing the question. Moreover, the Court has sustained 1343(3) jurisdiction in a sufficient number of cases involving property rights to raise doubts concerning the *Hague* test.[170] In any event, even a cursory examination of lower court decisions points up the need for clarification.

Since there is nothing on the face of section 1343(3) to support Justice Stone's property-personal liberty distinction, it is appropriate first to inquire whether there is anything in the legislative history of the Civil Rights Act of 1871, or other reconstructional legislation, to indicate that Congress intended to exclude property rights from the scope of 1343(3) jurisdiction. Significantly, the Supreme Court has traced the origin of sections 1983 and 1343(3) to the Civil Rights Act of 1866,[171] which clearly recognized property rights among the civil rights that it protected.[172] In the recent case of *Jones v. Alfred H. Mayer Co.*,[173] the Court stated that the purpose of the 1866 Act was to "affirmatively secure for all men, whatever their race or color, what [Senator Trumbull] called the 'great fundamental rights': 'the right to acquire property, the right to go and come at pleasure, the right to enforce rights in courts, to make contracts, and to inherit and dispose of property.' "[174] Since section 1343(3) speaks of rights secured by any "Act of Congress providing for equal rights," it seems clear that it was intended to encompass those property rights secured by the Act of 1866. More is the persuasive evidence, including the the voluminous record of congressional debates,[175] that the Civil Rights Act of 1866 was

169. *See* note 65 *supra* and accompanying text.

170. Cases cited note 93 *supra* and accompanying text.

171. Monroe v. Pape, 365 U.S. 167, 171, 183-85 (1961); Hague v. CIO, 307 U.S. 496, 508 n.10 (1939) (opinion of Roberts, J.).

172. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted by § 18 of the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified in 42 U.S.C. §§ 1981, 1982 (1964)) provides in relevant part: "That all persons born in the United States . . . are hereby declared to be citizens . . . and . . . shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ."

173. 392 U.S. 409 (1968) (holding 42 U.S.C. § 1982 (1964) to bar all racial discrimination, private as well as public, in the sale or rental of property).

174. *Id.* at 432.

175. Monroe v. Pape, 365 U.S. 167, 171 (1961); Hurd v. Hodge, 334 U.S. 24, 32-33 (1948); Hague v. CIO, 307 U.S. 496, 509-10 (1939) (opinion of Roberts, J.); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 75-78, 90-91, 94-97 (1908); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 183-85 (1951); Gressman, *supra* note 12, at 1331-32.

incorporated in section one of the fourteenth amendment.[176] As Justice Harlan, concurring in *United States v. Arizona*,[177] recently commented: "Section 1 [of the fourteenth amendment] must have been seen as little more than a constitutionalization of the 1866 Civil Rights Act, concededly one of the primary goals of that portion of the Amendment."[178] As its very title indicates, the 1018 Civil Rights Act of 1871, from which the present sections 1983 and 1343(3) derive, was intended to enforce the provisions of the fourteenth amendment, which included the rights secured by the 1866 Act. Senator Edmunds, then chairman of the Senate Committee on the Judiciary, described the Act of 1871 as follows: "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any state law or under color of any state law, and it is merely carrying out the principles of the [Civil Rights Act of 1866] which has since become part of the Constitution [the fourteenth amendment]."[179] In addition, abundant evidence indicates that the Congress which enacted the 1871 Act was responding to lawless conditions in the South that threatened both life and property.[180] Finally, the Supreme Court's thorough discussion of the 1871 Act in *Monroe v. Pape* supports the conclusion that Congress did not intend to exclude property rights from the Act's sweeping protection.[11] Instead, the Court found that the purpose of the 1871 Act was to provide a remedy for the deprivation, under color of state law, of *any* right secured by the fourteenth amendment.[182]

In the face of this overwhelming evidence of congressional intent, it would appear that the only other possible explanation for the

176. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (remarks of Rep. Eliot); CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (remarks by Rep. Garfield).

177. 400 U.S. 112 (1970).

178. *Id.* at 162; *accord,* Shelley v. Kraemer, 334 U.S. 1, 10 (1948), in which the Court observed: "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

179. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871).

180. The Civil Rights Act of 1871 was the response of Congress to President Grant's message of Mar. 23, 1871, in which he stated: "A condition of affairs now exists in some states of the Union rendering life and property insecure . . . . The proof that such a condition of affairs exists in some localities is now before the Senate . . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States . . . ." CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

181. 365 U.S. 167, 171-83 (1965).

182. *Id.* at 171.

property-personal liberty distinction is its parallel existence with the general federal question jurisdiction of section 1331. It is questionable, however, whether the coexistence of the two jurisdictional provisions requires explanation since a construction of section 1343(3) that accords with the intent of the Congress that enacted it clearly does not render section 1331 superfluous. Section 1343(3) is carefully confined to alleged deprivations under color of state law and is, therefore, narrower in scope than section 1331. The former section's legislative history only reflects a congressional purpose to maintain federal vigilance over unconstitutional state actions, whereas section 1331's purpose extends well beyond the sphere of state action. Suits against federal officials, for example, are the exclusive province of section 1331. Similarly, there is no evidence that the 1875 Congress intended that the predecessor of section 1331 limit the civil rights jurisdiction it created four years earlier. On the contrary, the Act of 1875, creating general federal question jurisdiction, traditionally has been heralded as an expansion of federal judicial power—a "revolutionary development."[183] Significantly, Justice Douglas, speaking for the majority in *Wisconsin v. Constantineau*,[184] recently characterized the general federal question jurisdiction conferred by section 1331 as an *enlargement* of federal jurisdiction.[185] This view accords with the Court's earlier discussion of federal judicial power in *Zwickler v. Koota*.[186] It should be observed also that in the past, when Congress has decided that specific controversies are more appropriate for state forums, it has expressly restrained the federal judicial hand. Federal jurisdiction to enjoin enforcement of state tax laws, for example, is explicitly restricted by section 1341 of the Judicial Code.[187] There is nothing to indicate, however, that Congress has determined that suits authorized by the Civil Rights Act of 1871 to redress unconstitutional deprivations of property should be routed to state forums.

The foregoing discussion would seem to suggest that the Stone property-personal liberty distinction was not only uncalled for, but is clearly erroneous. It would be improper, however, to dismiss Justice Stone's deliberate and thorough discussion of civil rights jurisdiction

183. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928). *See generally* H.M. HART & H. WECHSLER, THE FEDERAL COURT AND THE FEDERAL SYSTEM 727-33 (1953); C. WRIGHT, FEDERAL COURTS § 17 (2d ed. 1970); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-45 (1942).

184. 400 U.S. 433 (1971).

185. *Id.* at 438 n.4.

186. 389 U.S. 241, 245-48 (1967).

187. *See* note 68 *supra* and accompanying text.

as wholly devoid of either logic or purpose. On the contrary, the responsibility for the erroneous exclusion of property rights from the scope of section 1343(3) might well be attributed to the failure of modern courts to take into account that Justice Stone was a product of his time. Many of these courts have given his language in *Hague* a literal reading and, as a result, have stripped his property-personal liberty distinction of its historical contours. It will be recalled that when Justice Stone wrote his *Hague* opinion, the Court had just abandoned its guardianship of private economic interests.[188] When called upon to judge the reasonableness of legislative judgments in areas of taxation and commercial regulation, which private interests challenged on due process grounds, the Court with increasing frequency exercised judicial restraint, invoking the principle of presumed constitutionality. At the same time, however, the Court, largely at Stone's insistence, found itself in what Learned Hand described as the "logical dilemma" of shouldering special responsibilities for the protection of so-called personal liberties.[189] As Professor Wechsler commented, "[I]t is the paradox of the period, if paradox it be, that new areas of constitutional protection were emerging even as the power to govern was being sustained."[190] It is probable, therefore, that Justice Stone's distinction between property rights and personal liberty is closely related to his conception of where the line should be drawn between judicial deference to legislative judgments concerning regulation of commercial interests, such as corporations, and the "narrower scope for the operation of the presumption of constitutionality" when personal rights are affected.[191]

188. *See generally* A. MASON, HARLAN FISKE STONE 511-35 (1956).

189. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 699 (1946).

190. Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 793 (1946).

191. In United States v. Carolene Prods., 304 U.S. 144, 152-53 (1938), Justice Stone stated that "[r]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." To this proposition he added a caveat in what has become a famous footnote: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than most other types of legislation . . . .

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities whether prejudice against discrete and insular

This interpretation would seem entirely consistent with Professor Reich's view that the property rights-personal liberty distinction had its origin in the development of enormous private power in the modern corporation.[192] Significantly, *Holt v. Indiana Manufacturing Co.*,[193] the one example Justice Stone cited in *Hague* for the proposition that "property rights"are excluded from section 1343(3), was a case in which a corporation challenged the constitutionality of state taxation of its patent rights. In any event, it is difficult to believe that the author of the famed *Carolene Products* footnote[194] intended that his language in *Hague* would be seized upon by modern courts as a pretext for denying access to a federal forum to litigants such as the plaintiffs in *Lynch*. Perhaps it was this realization that prompted one court to state: "From these words [Justice Stone's concurrence in *Hague*] have some later courts concluded, perhaps unfortunately, that actions would lie under the Civil Rights Act only if a 'personal liberty,' and not a 'property right,' were involved. This is not what Mr. Justice Stone intended to say, nor does this conclusion follow necessarily from his words."[195]

Since the construction modern courts have given Justice Stone's property-personal liberty distinction encounters serious textual and historical obstacles, it would appear that the Supreme Court might well reject the Stone formula outright. If the Court declines to do so, it will be faced with the question whether and to what extent the property rights exception of *Hague* is itself to be subjected to an exception for property that is essential for subsistence. It is far too late in the day not to recognize that in many situations the loss of property rights—whether wages, government largess, or chattels held under a conditional sales contract—means a corresponding loss of personal freedom.[196] A number

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minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152-53 n.4 (citations omitted).

192. Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964).

193. 176 U.S. 68 (1900).

194. *See* note 191 *supra* and accompanying text.

195. Penn v. Stumpf, 308 F. Supp. 1238, 1245 n.12 (N.D. Cal. 1970).

196. Professor Reich in discussing the functions of property stated that: "One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual . . . . Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master . . . .

"Thus, property performs the function of maintaining independence, dignity and pluralism in society . . . . The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property." Reich, *supra* note 192, at 771.

of recent Supreme Court decisions already discussed[197] recognize that subsistence property rights are appropriate subjects for 1343(3) jurisdiction, and lower court decisions continue to add to the list of property that might be considered essential for liberty.[198]

The difficulty with retaining the Stone formula subject to an exemption for subsistence property is well illustrated by the *Lynch* case. This approach leaves to individual judges the determination whether a plaintiff's subsistence is threatened by the property deprivation alleged. The *Lynch* court, for reasons that are less than convincing, concluded that plaintiffs' personal liberty was not sufficiently harmed by the garnishments. That another court might reach a different subjective conclusion can hardly be doubted. Similarly, what may not be subsistence property for one plaintiff may be essential for another. The automobile is an excellent example. One of the most recent lower court decisions flatly rejected the contention that the loss of an automobile was the kind of unconstitutional deprivation upon which section 1343(3) jurisdiction could be based.[199] Yet it is not unlikely that the loss of an automobile eventually could result in the loss of subsistence property in the form of wages or employment for workers who must travel long distances to find jobs.[200] Although clearly preferable to a rigid property-liberty distinction, a "flexible" Stone test also is objectionable for the uncertainty and confusion that it inevitably would produce. The recent lower court decisions just surveyed underscore this objection. For these reasons, at least, some Supreme Court Justices may conclude that even the retention of a Stone formula that excludes subsistence property from its operation is undesirable. It is abundantly clear, however, that the fate of the property rights exception to section 1343(3) could hinge on more than the statute's legislative history. It is very possible that the policy question raised by this appeal will be the dominant consideration.

C. The Policy Question Before the Court

The policy decision confronting the Court is one of judicial administration. If the Court resolves to discard the *Hague* limitation on 1343(3) jurisdiction, federal courts will be opened to a number of litigants for whom access would otherwise be denied. Conversely, a

197. Cases cited note 93 *supra* and accompanying text.

198. *E.g.*, Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn. 1971) (personal belongings included artificial dentures, eye glasses, shaving equipment, undergarments, suit, radio, television set, and coin collection).

199. McCormick v. First Nat'l Bank, 322 F. Supp. 604, 605 (S.D. Fla. 1971).

200. *Cf.* Klim v. Jones, 315 F. Supp. 109, 115 (N.D. Cal. 1970) discussed at notes 148 & 149 *supra*.

sound endorsement of Stone's formula will route many constitutional claims to state forums. The arguments in favor of curtailing federal jurisdiction are receiving increasing support. As one federal judge recently commented:

> [A]ppeals to nineteenth-century history and the personal motivation of the Reconstruction Congressmen who supported the civil rights statutes are of little assistance. Interpretation of still mooted questions of federal jurisdiction today can more sensibly be focussed on the problem of the proper allocation of litigation to a suitable forum. Section [1331] remains as a Congressional direction that, in the main, federal courts should not spend their time on cases involving less than $10,000 even though federal rights are at issue.[201]

One of the most recent and undoubtedly most vigorous expressions of concern over the volume of civil rights litigation in federal courts comes from Judge Friendly. In a statement that perhaps sheds additional light on his opinion in *Eisen*, the judge warned:

> [T]he framers of the Act of 1871 could hardly have intended it to become the standard method of constitutional attack upon state action although, until then, the lower federal courts had scarcely been available for that purpose at all . . . . Suits under that statute should not be lightly brought. Apart from the burden they impose on federal judges and their abrasive effect on federal-state relations, counsel should never forget . . . that "it must prejudice the occasional meritorious application to be buried in a flood of worthless ones" . . . . There is thus a responsibility, resting upon all counsel but especially those for civil rights organizations, not to swell the tidal wave of actions under the civil rights statute by bringing suits for declaratory or injunctive relief when no need for this exists.[202]

Also instructive are the Chief Justice's recent comments concerning the doctrine of abstention and its role in judicial administration. In *Wisconsin v. Constantineau*,[203] his dissenting opinion strongly urged that lower federal courts stay their hand in what he described as non-urgent state cases. In discussing the civil rights case before the Court, which challenged the constitutionality of a state statute that had not been construed by the state courts, the Chief Justice observed that "it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of case on a three-judge federal court, and then by direct appeal, on this Court."[204]

The views just quoted, to which many others of a similar vein could be added,[205] reflect deep concern over the problem of judicial administration in the federal courts. They are not without foundation.

201. Hingle v. Perez, 312 F. Supp. 127, 129 (E.D. La. 1970).

202. Negron v. Wallace, 436 F.2d 1139, 1141 (2d Cir. 1971) (citations omitted).

203. 400 U.S. 433, 439-43 (1971).

204. *Id.* at 443.

205. *E.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427 (1971) (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

Actions under the Civil Rights Act have grown from 296 in the year 1961 to 3,985 in 1970, an increase of 1,246 percent.[206] The increase between the years 1969 and 1970 alone was 62.5 percent. These statistics, although they by no means tell the whole story, demonstrate the urgency of the problem facing the federal judiciary.[207] For this reason, there could be a strong temptation for some members of the Court to uphold the *Hague* limitation on 1343 (3) jurisdiction.

The other side of the policy question pertains to the fate of the litigants who, if the Stone test is approved, would repair to state courts with their constitutional claims. There are good reasons to believe that state courts are not always satisfactory forums for the vindication of federal rights.[208] That there is an inherent potential for bias when state judges are asked to rule on actions of other state officials admits to little doubt.[209] It is highly unlikely, therefore, that state court adjudication of civil rights cases can ever approach the disinterested fairness and impartiality that obtains in the federal forum. Chief Justice Burger would appear to be in disagreement with the views just expressed. He recently observed that "no one could reasonably think that [state court judges] have less fidelity to due process requirements of the Federal Constitution than we do . . . ."[210] Conceding to state judges the high degree of fidelity to the federal constitution of which the Chief Justice speaks, the institutional setting in which they operate cannot be ignored. Many state judges are either elected or appointed by an elected governor. As a result, their decisions are not immune from political scrutiny. Federal judges, on the other hand, are wholly detached from state

206. 1970 DIRECTOR OF ADM. OFFICE OF THE UNITED STATES COURTS ANN. REP., table 12b. The incidence of state prisoner petitions has shown even more explosive growth. *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1041 (1970).

207. *But see* Chevigny, *supra* note 80, at 1354 (suggesting that the federal caseload of § 1983 cases may be transitional).

208. *E.g.,* Houghton v. Shafer, 392 U.S. 639, 640 (1968) (per curiam) ("it seems likely that to require petitioner to appeal to state officials would be to demand a futile act"); Monroe v. Pape, 365 U.S. 167, 180 (1961) ("It is abundantly clear that one reason the [Civil Rights Act of 1871] 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").

209. In a closely analogous context Professor Amsterdam stated: "Since the inception of the government, federal courts have been employed in cases 'in which the State tribunals cannot be supposed to be impartial and unbiased,' for, as Hamilton wrote in *The Federalist,* '[t]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes.'" Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. PA. L. REV. 793, 802 (1965) (citations omitted).

210. Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (dissenting opinion).

governmental operations and, by reason of their life tenure, are insulated from local pressures. It should be recalled that the potential for state court bias against out-of-state litigants prompted Congress to provide for diversity of citizenship jurisdiction.[211] Similar considerations gave rise to federal removal jurisdiction.[212] So, too, the expanded federal habeas corpus jurisdiction has resulted, at least in part, from the failure of state courts to provide adequate protection to criminal defendants' constitutional rights.[213] Significantly, Justice Traynor, undoubtedly one of the most distinguished state court judges of this century, noted in this context that: "There is some poetic justice in compelling state courts to resolve in more than provincial terms the problems of policing the community without oppressiveness. Had all state courts taken the initiative in that regard there would have been less need for the United States Supreme Court to become involved in policing the police."[214]

Apart from considerations of partiality, it also should be recognized that state judges are less likely to be familiar with the intricacies of federal constitutional law than federal judges. The latter not only possess more expertise in that area, but undoubtedly are more knowledgeable of the latest precedents established by the Supreme Court and the courts of appeals. As a result, there is a greater likelihood of uniform application of federal constitutional law to civil rights actions brought into federal courts. Illustrative of the variant treatment Supreme Court precedents receive in state courts are recent decisions, on the merits,[215] interpreting the high Court's ruling in *Sniadach*. The Wisconsin Supreme Court, for example, has invalidated that state's procedure for prejudgment garnishment of bank accounts.[216] The Supreme Court of Arizona, however, has refused to extend *Sniadach* to property other than wages.[217] Lack of uniformity among the 50 state judicial systems eventually may be cured by Supreme Court review, but the availability of certiorari is subject to well-known limitations.[218]

211. *See, e.g.*, ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-100 (1969); Amsterdam, *supra* note 209, at 802-03. *But see*, Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

212. *E.g.*, City of Greenwood v. Peacock, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting); *see* Amsterdam, *supra* note 209.

213. *See Developments in the Law—Federal Habeas Corpus, supra* note 206, at 1057-62.

214. Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 33 U. CHI. L. REV. 657, 660 (1966).

215. These decisions are to be distinguished from *Lynch*, wherein the court never reached the merits.

216. Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

217. Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969).

218. *See* H.M. HART & H. WECHSLER, *supra* note 183, at 727-33.

Lower federal courts, on the other hand, are subject to close appellate scrutiny by the eleven federal courts of appeals. While this will not guarantee absolute uniformity, the cohesive influence is more likely to promote consistency in the area of federally protected rights than are the diverse appellate procedures of the state courts.[219] When significant differences do arise among the federal circuits, expeditious reconciliation by the Supreme Court will normally follow.

The foregoing discussion suggests that federal rights are best protected in federal forums. That Congress has enacted a number of statutes, in addition to the Civil Rights Acts, which exclude selected federal question cases from section 1331's jurisdictional amount, supports this conclusion.[220] So also does the American Law Institute's recommendation that the jurisdictional amount be abolished altogether in federal question cases.[221] Professor Wechsler's observation of almost a quarter century ago would, therefore, seem appropriate today. In discussing the Civil Rights Acts, he stated:

> There Congress has declared the historic judgment that within this precious area . . . there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern.[222]

Significantly, the language just quoted was cited with approval by Justice Brennan in a recent discussion of the inappropriateness of federal court abstention in civil rights cases.[223] Similarly, in *Wisconsin v. Constantineau*,[224] the Court flatly rejected the suggestion that federal courts should stay their hand until state courts have passed on a statute unconstitutional on its face. These cases suggest that at least some members of the Court are convinced that in certain circumstances the federal judiciary must give due respect to a suitor's choice of a federal forum for the determination of his federal constitutional claim,

219. There are, to be sure, instances when federal court adjudication lacks consistency, one of the most notable examples being the jurisdictional question under discussion. As one federal judge recently commented: "[A] district court considering its § 1343(3) jurisdiction in the Fifth Circuit is not writing on a clean slate, but rather on a palimpsest." Kitchen v. Crawford, 326 F. Supp. 1255, 1257 (N.D. Ga. 1970).

220. *See* H.M. HART & H. WECHSLER, *supra* note 183, at 730-31; Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 217 (1959); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 225-26 (1948).

221. ALI STUDY, *supra* note 211, at 24-25, 172-76.

222. Wechsler, *supra* note 220, at 230.

223. Perez v. Ledesma, 401 U.S. 82, 119 n.13 (1971) (concurring in part and dissenting in part).

224. 400 U.S. 433, 439 (1971).

irrespective of the availability of state court remedies.[225] It is equally clear, however, that other members of the Court hold widely divergent views concerning the proper role of the federal courts in our federal system. As a result, judicially imposed restrictions in the developing areas of federal jurisdiction are by no means a remote possibility.[226] In a series of decisions this past term, most notably *Younger v. Harris*[227] and *Samuels v. Mackell*,[228] the Court placed a new and limiting construction on the *Dombrowski* rule[229] concerning federal court intervention in state criminal trials. The Chief Justice, moreover, foreclosed any doubts concerning his conception of the federal judiciary's role when he recently stated that "[t]his Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve."[230]

Whether the unconstitutional deprivations that presently fail to meet the Stone test of jurisdiction will be viewed as sufficiently "urgent" to merit adjudication in federal court remains to be seen. In any event, it is clear that the all-important policy question underlying this determination will call on the court to balance the advantages to the federal judiciary of limiting jurisdiction in a highly litigious area on the one hand, against the disadvantages to the litigants who would be routed to state courts for vindication of their federal constitutional rights on the other. The balance struck may well be dispositive of the *Lynch* appeal, irrespective of how the substantive issues are resolved.

V. CONCLUSION

Following his examination in *Eisen* of the history of Justice Stone's property-personal liberty distinction, Judge Friendly remarked, "We must confess we are not altogether sure just where this leaves us."[231] This writer, however, approaches his conclusion with greater certainty. For reasons that follow, it is firmly believed that the Supreme Court should reject the Stone test for jurisdiction under section 1343(3).

Congress provided in the Civil Rights Act of 1871 that federal

225. *Accord*, Zwickler v. Koota, 389 U.S. 241, 248 (1967).

226. *See* Snyder v. Harris, 394 U.S. 332 (1969) (forbidding the aggregation of separate claims to provide requisite jurisdictional amount in federal diversity actions, notwithstanding 1966 amendment to FRCP relating to class actions).

227. 401 U.S. 37 (1971).

228. 401 U.S. 66 (1971).

229. Dombrowski v. Pfister, 380 U.S. 479 (1965).

230. Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (dissenting opinion).

231. 421 F.2d at 565.

courts should be available to redress deprivations, under color of state law, of *any* rights, privileges, or immunities secured by the Constitution. The far-reaching language contained in the present sections 1983 and 1343(3) was no "mere slip of the legislative pen."[232] In the absence of unmistakable congressional intent to dilute the meaning of this language, the jurisdictional provision should be given "the scope that its origins dictate."[233] Significantly, there is nothing in the legislative history of the 1871 Act which suggests that "property rights" are to be excluded from federal civil rights jurisdiction. On the contrary, legislative history demonstrates that sections 1983 and 1343(3) were intended to afford protection against unconstitutional deprivations of both personal and property rights. Moreover, apart from Justice Stone's concurring opinion in *Hague*, the Supreme Court's interpretation of these sections is in accord with this view.[234] There also is nothing on the face of section 1331, standing alone or read together with section 1343(3), to indicate that it was intended to limit the scope of the latter provision. Similarly, section 1331's legislative history does not support this contention.[235] More importantly, the two sources of jurisdiction serve distinctly different purposes. It seems clear, therefore, that it is unnecessary to reconcile the parallel existence of the two provisions. Finally, it is doubtful that Justice Stone ever envisaged that his language in *Hague* would lead to the limitations that modern courts have imposed on section 1343(3).[236]

The property-personal liberty jurisdictional test is not only an incorrect construction of section 1343(3), but it is also unworkable. Courts applying the distinction are required to determine on a case-by-

232. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 427 (1968).

233. *Cf.* United States v. Price, 383 U.S. 787, 801 (1966).

234. This assumes that the per curiam affirmances of lower court dismissals of tax cases, discussed at note 65 *supra*, are distinguishable on the grounds that federal jurisdiction to enjoin enforcement of state tax laws is expressly restricted by 28 U.S.C. § 1341 (1964).

235. *See* Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-45 (1942).

236. Justice Stone was trying to prevent § 1343(3) from being eclipsed by § 1331, not vice versa. Note, *Civil Procedure: Section 1343(3) Jurisdiction*, *supra* note 17, at 837. This is not to suggest that no limitations on § 1343(3) would be proper. Clearly, Justice Stone was of the opinion that corporations were not within the contemplation of the Congress that enacted the 1871 Act. *See* notes 188-95 *supra* and accompanying text. Similarly, the Third Circuit Court of Appeals has persuasively argued: "We doubt that Congress ever intended that a corporation . . . should be able to invoke § 1983 and its jurisdictional counterpart to enjoin state investigative and criminal proceedings." National Land & Inv. Co. v. Specter, 428 F.2d 91, 99-100 (3d Cir. 1970). It might well be appropriate for Congress to address the question whether § 1343(3) should be available to corporations. The problem with the judicially created property rights exception, however, is that, while it may have the merit of excluding certain corporate interests from the protection of the statute, it also excludes legitimate claims of individuals like the plaintiffs in *Lynch*.

case basis whether a litigant has suffered a deprivation of liberty or merely property. This highly subjective test has led to unpredictable and wholly inconsistent results. Employment and licensing cases plainly demonstrate the patent irrationality of this approach. In the Fifth Circuit, for example, arbitrary denials of liquor licenses are cognizable under section 1343(3).[237] In the Second Circuit, however, an arbitrary denial of the right to work—"the most precious liberty that man possesses"[238]—is actionable under section 1343(3) only when the court is satisfied that the plaintiff's reputation has been sufficiently damaged by his summary dismissal from public employment.[239] Interestingly, the summary garnishments in *Lynch* clearly damaged the plaintiffs' reputations by causing outstanding checks to bounce. Yet the court concluded that the plaintiffs' subsistence was not sufficiently threatened by this loss of deposited wages to warrant federal jurisdiction. This decision, along with others already discussed, illustrates the futility of attempting to delinate "subsistence property." Civil rights jurisdiction must be predicated on firmer grounds than these subtle and irrational distinctions. It is submitted, therefore, that the Stone test, no matter how flexible or how generously construed, has no place in the jurisdictional law of the federal courts.

It also is believed that policy considerations should not dissuade the Court from discarding the Stone formula. Admittedly, the federal judiciary is faced with an administrative crisis. Undoubtedly, both Congress and the public should give serious consideration to the admonitions of the Chief Justice. It is equally clear, however, that the Court should not uphold an erroneous rule of law merely to reduce the federal caseload. What Justice Harlan recently stated concerning the Court and judicial administration seems readily applicable here. In a case presenting policy questions similar to those in *Lynch*, he wrote:

> Judicial resources . . . are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.[240]

It is all too apparent that many courts are using the Stone test for section

237. *E.g.*, Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

238. Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

239. Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971).

240. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 398 (1971) (Harlan, J., concurring) (recognizing federal cause of action for damages under the fourth amendment).

1343(3) jurisdiction as a tool of judicial administration. As a result, they are automatically closing the federal courthouse doors to victims of unconstitutional state action, without regard for the merits of their claims. In *Lynch*, low-income wage earners were barred from vindicating in a federal forum the very rights that the Supreme Court established for them in *Sniadach*. Ironically, had these plaintiffs alleged summary garnishment of bank accounts containing 10,000 dollars, the court would have entertained their constitutional claims.[241] This incredible result should convince the Supreme Court that the demise of Justice Stone's property-personal liberty distinction is long overdue.

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241. That access to federal court is, in some circumstances, determined on the basis of wealth raises questions concerning the constitutionality of the jurisdictional amount requirement. *See* Murray v. Vaughn, 300 F. Supp. 688, 695 (D.R.I. 1969). *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Johnson v. Harder, 438 F.2d 7, 12 n.6 (2d Cir. 1971); Bynum v. Connecticut Comm'n on Forfeited Rights, 410 F.2d 173 (2d Cir. 1969). *But see* Goldsmith v. Sutherland, 426 F.2d 1395, 1398 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970).