



6-1-1971

# Federal Jurisdiction -- The Property Rights Exception to Civil Rights Jurisdiction Under Section 1343(3)

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## Recommended Citation

R. B. Tucker Jr., *Federal Jurisdiction -- The Property Rights Exception to Civil Rights Jurisdiction Under Section 1343(3)*, 49 N.C. L. REV. 819 (1971).

Available at: <http://scholarship.law.unc.edu/nclr/vol49/iss4/20>

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Carolina General Assembly to achieve the dual objective of insuring that trustees maintain a high standard of responsibility and at the same time assist North Carolina taxpayers in contests with the government.

The General Assembly has demonstrated its awareness of the possible tax consequences to the settlor who incorporates all of the powers in North Carolina General Statutes section 32-27. But the admonition that “[n]o power . . . shall be exercised by such fiduciary in such a manner as, in the aggregate, to deprive the trust or the estate . . . of [a] tax exemption, deduction or credit . . . ,”<sup>55</sup> is probably totally ineffective as a tax avoidance device because it not only provides no standard by which the trustee may govern his conduct but also provides no standard by which the courts may supervise a fiduciary’s management of a trust.

Any statute that would limit the discretionary powers of a trustee to compliance with usual or common law fiduciary principles or which would impose active supervision of trusts by the courts is bound to negate part of the freedom that many estate planners seek in setting up trusts with broad management powers. Yet when one considers the need for continued fiduciary responsibility and the added incentive of protection from tax liability, the price may not be high at all.

MIKE CRUMP

### **Federal Jurisdiction—The Property Rights Exception to Civil Rights Jurisdiction Under Section 1343(3)**

Section 1343 of Title 28 of the United States Code vests the federal district courts with

original jurisdiction of any civil action authorized by law to be commenced by any person:

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- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .<sup>1</sup>

Section 1343(3), available regardless of the amount in controversy, is important to potential litigants who desire a federal forum for the

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<sup>55</sup>N.C. GEN. STAT. § 32-26(b) (1966).

<sup>1</sup>28 U.S.C. § 1343 (1964).

resolution of constitutional issues but are unable to meet the threshold jurisdictional amount requirement of the general federal question jurisdictional grant.<sup>2</sup> The most problematical aspect of section 1343(3) is the restriction, spawned by Justice Stone in *Hague v. CIO*,<sup>3</sup> excluding suits to redress deprivations of "property rights."<sup>4</sup> That restriction, not found in the language of the statute, has plagued the federal courts since its inception in 1939,<sup>5</sup> has driven some courts to great lengths to avoid dealing with the issue,<sup>6</sup> and has led to directly contradictory results.<sup>7</sup> This note examines the origin and development of the "property rights" exception.

Although originating in the Civil Rights Act of April 20, 1871,<sup>8</sup> section 1343(3) was first subjected to meaningful scrutiny by the Supreme Court in *Hague*, in which jurisdiction was sustained under that statute in an action brought to enjoin interference by city officials with dis-

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<sup>2</sup> 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 or costs, and arises under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1331(a) (1964). Section 1331(a) is derived from the Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. For a general discussion of the Act of 1875, see Aycock, *Introduction to Certain Members of the Federal Question Family*, 49 N.C.L. Rev. 1, 23 (1970).

<sup>3</sup> 307 U.S. 496 (1939).

<sup>4</sup> See p. 821-22 *infra*.

<sup>5</sup> In *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), after reviewing the cases in the area, Judge Friendly remarked: "We must confess we are not altogether clear just where this leaves us." *Id.* at 565.

<sup>6</sup> *E.g.*, in *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970), the court characterized a landlord's lien statute as authorizing unreasonable invasions of the human right of privacy in order to avoid the "property rights" jurisdictional issue, while never mentioning the privacy consideration in the discussion of the merits of the constitutional attack on the statute.

<sup>7</sup> Compare, *e.g.*, *Euge v. Trantina*, 422 F.2d 1070 (8th Cir. 1970), with *Blume v. City of Deland*, 358 F.2d 698 (5th Cir. 1966).

<sup>8</sup> Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The substantive provision of this Act is now found in 42 U.S.C. § 1983 (1964). For a general discussion of section 1983, see Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70 (1964).

Most courts agree that section 1343(3) is the jurisdictional companion of section 1983 and that the two sections are coextensive, at least in the sense that section 1343(3) will afford jurisdiction for any suit brought under section 1983. See, *e.g.*, *AFL v. Watson*, 327 U.S. 582, 590 (1946) (dictum); *National Land & Inv. Co. v. Specter*, 428 F.2d 91, 93-100 (3d Cir. 1970). If sections 1343(3) and 1983 are coextensive, any restriction on section 1343(3) would also be a restriction on the substantive section 1983. But see *McCall v. Shapiro*, 416 F.2d 246, 250 (2d Cir. 1969), indicating that section 1343(3) may be narrower than section 1983. See also *Rosado v. Wyman*, 397 U.S. 397, 403 (1970), and *Hall v. Garson*, 430 F.2d 430, 438 (5th Cir. 1970), which indicate that 28 U.S.C. § 1343(4) (1964) affords jurisdiction for suits under section 1983.

semination of literature concerning, and assembly for discussion of, the National Labor Relations Act.<sup>9</sup> In his concurring opinion,<sup>10</sup> Justice Stone viewed the jurisdictional issue as requiring definition of the extent of the overlap<sup>11</sup> between the 1871 Act and the Act of 1875,<sup>12</sup> which had extended general federal question jurisdiction to the lower federal courts. Justice Stone reasoned that neither statute should be taken as abrogating the other, and in his attempt to harmonize them he initially stated that this was best done by construing section 1343(3) to confer "federal jurisdiction of suits brought under the Act of 1871 in which the *right asserted is inherently incapable of pecuniary valuation.*"<sup>13</sup> Precedent supporting this distinction was found by comparing *Holt v. Indiana Manufacturing Co.*,<sup>14</sup> in which the Court had denied jurisdiction under section 1343(3) in a suit to enjoin taxation of patent rights, with *Truax v. Raich*,<sup>15</sup> in which the Court had sustained section 1343(3) jurisdiction in an action brought by an alien employee to enjoin enforcement against his employer of a statute prohibiting employment of work forces comprised of more than twenty per cent aliens.<sup>16</sup> Had Justice Stone concluded his opinion without more, one might logically have thought that the crucial aspect of *Truax* was the discrimination against aliens. But Justice Stone proceeded to approve *Crane v. Johnson*,<sup>17</sup> in which the Court sustained section 1343(3) jurisdiction in a suit brought by a doctor, who healed by mental suggestion, to enjoin enforcement of a statute requiring examination for licensing. The statute was alleged to deny equal protection by exempting certain practitioners who used prayer to heal. At this

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<sup>9</sup> 307 U.S. at 501-04.

<sup>10</sup> Unfortunately, there was no opinion of the Court on the jurisdictional issue, or on the merits, for that matter. Justice Roberts, with whom Justice Black concurred, thought that section 1343(3) originated in the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27, and that it afforded jurisdiction in suits by United States citizens to redress deprivations of their rights, privileges, and immunities as such. Finding a claim set out under the privileges and immunities clause of the fourteenth amendment, Justice Roberts had little difficulty sustaining jurisdiction. 307 U.S. at 508 & n.10, 512. The dissenters did not discuss jurisdiction. *Id.* at 532-33.

<sup>11</sup> 307 U.S. at 529-30. Justice Stone noted that the language of the Act of 1871 extended broadly to secure to all persons—whether citizens or not—any right, privilege, or immunity secured by the Constitution, and rejected the argument that the term "secured" in section 1343(3) means created rather than protected. *Id.* at 519, 525-27.

<sup>12</sup> See note 2 *supra*.

<sup>13</sup> 307 U.S. at 530 (emphasis added).

<sup>14</sup> 176 U.S. 68 (1900).

<sup>15</sup> 239 U.S. 33 (1915).

<sup>16</sup> 307 U.S. at 530-31.

<sup>17</sup> 242 U.S. 339 (1917).

point one might have concluded that to Justice Stone the common denominator in *Crane* and *Truax* was the right to work, which, surprisingly, was viewed as being incapable of pecuniary valuation. However, after citing *Crane* with approval Justice Stone shifted the emphasis from the ability to assign a monetary value to the right to the personal nature of that right; he thought it important to note that in both *Crane* and *Truax* the right asserted was one of "personal freedom" arising under the equal protection clause, and that "in 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."<sup>18</sup> The shift was completed when Justice Stone ended his opinion with the assertion that

[t]he conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a *suit in equity in the federal courts* to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever 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 courts under [section 1343(3)] to entertain it without proof [of an] amount in controversy . . . .<sup>19</sup>

Although Justice Stone's distinction has been expressly rejected in isolated cases,<sup>20</sup> and, more frequently, ignored<sup>21</sup> or prudently circumvented,<sup>22</sup> the majority of the lower courts have attempted to discern and follow his principle, with the consequent expenditure of a great deal of judicial time and energy. Unfortunately, the result is a general state of confusion flowing from a basic failure to agree on what "property rights" are.<sup>23</sup> For the

<sup>18</sup> 307 U.S. at 531.

<sup>19</sup> *Id.* at 531-32 (emphasis added).

<sup>20</sup> *E.g.*, in *Joe Louis Milk Co. v. Hershey*, 243 F. Supp. 351 (N.D. Ill. 1965), the court remarked that "[n]o difference in constitutional protection between property rights and human rights is expressed in the language of § 1343 itself," and that "[n]either 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 . . . ." *Id.* at 354.

<sup>21</sup> *E.g.*, *Blume v. City of Deland*, 358 F.2d 698 (5th Cir. 1966); *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953).

<sup>22</sup> *E.g.*, *McGuire v. Sadler*, 337 F.2d 902 (5th Cir. 1964).

<sup>23</sup> At least one potential issue has been resolved, for it seems settled that section 1343(3) affords jurisdiction in suits for damages as well as in those for injunctive relief. *E.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). This balm exists despite the fact that both Justice Stone's opinion in *Hague* and section 1343 itself could be read as implying exclusion of damage actions. Justice Stone spoke of the maintenance of a "suit in equity" and of rights "not susceptible of valuation in

most part individual courts have seized upon one or the other, but not both, of Justice Stone's apparently nonidentical initial and final formulations of his distinction as the correct expression of the section 1343(3) jurisdictional grant. Thus one of the two prevailing statements of the section 1343(3) test requires the right asserted to be "incapable of pecuniary valuation,"<sup>24</sup> and the other formulation demands that the right be one of "personal liberty, not dependent for its existence upon the infringement of property rights."<sup>25</sup> In addition, differently phrased tests have been applied,<sup>26</sup> and the confusion is compounded by the occasional interchangeable use of the tests<sup>27</sup> and by the tendency of courts to give the complaint an expansive or narrow reading depending on what result seems desirable.<sup>28</sup>

As is to be expected, uniform results generally obtain in cases in which the right asserted passes muster under *either* or *neither* of the two principal tests. Thus when the action is for damages for a mere economic loss, section 1343(3) jurisdiction is denied.<sup>29</sup> On the other extreme, when the suit is brought for injunctive relief against unconditional denials of rights traditionally denominated "civil," such as the rights of free speech and assembly involved in *Hague*, the courts find no difficulty in sustaining jurisdiction.<sup>30</sup> The midpoint is marked by the troublesome cases in which either test may reasonably be thought to require either a finding

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money." 307 U.S. at 331-32. Sections 1343(1) and (2) grant jurisdiction in suits "to recover damages." Section 1343(4) grants jurisdiction in suits to "recover damages or to secure equitable or other relief." But section 1343(3) affords jurisdiction in suits "to redress" deprivations of rights. 28 U.S.C. § 1343 (1964).

<sup>24</sup> *Alterman Transp. Lines, Inc. v. Public Serv. Comm'n*, 259 F. Supp. 486, 492 (M.D. Tenn. 1966), *aff'd per curiam*, 386 U.S. 262 (1967).

<sup>25</sup> *Eisen v. Eastman*, 421 F.2d 560, 564 (2d Cir. 1969), *quoting* *Hague v. CIO*, 307 U.S. 496, 531 (1939).

<sup>26</sup> *E.g.*, *Escalera v. New York City Housing Auth.*, 425 F.2d 853, 864 (2d Cir.), *cert. denied*, 39 U.S.L.W. 3149 (U.S. Oct. 13, 1970) ("civil rights"); *Ream v. Handley*, 359 F.2d 728, 731 (7th Cir. 1966) (no section 1343(3) jurisdiction to protect "property or monetary rights").

<sup>27</sup> *E.g.*, *McCall v. Shapiro*, 416 F.2d 246, 249-50 (2d Cir. 1969).

<sup>28</sup> *E.g.*, in *Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 39 U.S.L.W. 3149 (U.S. Oct. 13, 1970), a suit to enjoin eviction from public housing, the court characterized the claim as being the deprivation of "procedural due process, a civil right, which may ultimately lead to the loss of a property right, to wit, tenancy in public housing projects." *Id.* at 864.

<sup>29</sup> *E.g.*, *City of Boulder v. Snyder*, 396 F.2d 853 (10th Cir. 1968), *cert. denied*, 393 U.S. 1051 (1969); *Ream v. Handley*, 359 F.2d 728 (7th Cir. 1966).

<sup>30</sup> *E.g.*, *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) (interference by policemen with photographers' right to record news); *Dawley v. City of Norfolk*, 260 F.2d 647 (4th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959) (suit to compel removal of the word "colored" from courthouse restrooms).

or denial of jurisdiction. One example is *Gold v. Lomenzo*,<sup>31</sup> in which section 1343(3) jurisdiction was sustained in an action to enjoin the suspension of a real estate brokerage license. In *Gold*, Judge Friendly remarked that "a challenge to the revocation of a license to engage in an occupation '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.'" <sup>32</sup> Judge Friendly's statement was rendered in the context of his application of the test requiring the right asserted to be one of "personal liberty."<sup>33</sup> However, if the right in *Gold* is not viewed merely as the deprivation of economic benefits, it may be classified as incapable of monetary valuation as well as a right of personal liberty. Some courts have aided their inquiry in close cases by drawing a distinction according to plaintiff's purpose in bringing the suit,<sup>34</sup> although the great majority of the cases never mention that purpose, and it has been said to be irrelevant.<sup>35</sup>

Notwithstanding the general confusion, results may be accurately predicted in several specific analytical categories of cases.<sup>36</sup> One instance is the area of state taxation, where Justice Stone's distinction and the result in *Holt* have clearly prevailed, although not wholly without resistance.<sup>37</sup> Since 1962, the Supreme Court has affirmed, without comment, three district court decisions applying the property rights exception to deny section 1343(3) jurisdiction in suits attacking, respectively, the application of income taxation,<sup>38</sup> the application of ad valorem taxation,<sup>39</sup>

<sup>31</sup> 425 F.2d 959 (2d Cir. 1970).

<sup>32</sup> *Id.* at 961, quoting *Eisen v. Eastman*, 421 F.2d 560, 565 (2d Cir. 1969).

<sup>33</sup> In *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), decided before *Gold*, Judge Friendly had concluded that the proper section 1343(3) test is whether the "right asserted is one of personal liberty." *Id.* at 564 & n.7.

<sup>34</sup> *E.g.*, *Pierre v. Jordan*, 333 F.2d 951, 957-58 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965).

<sup>35</sup> *Adams v. City of Colorado Springs*, 308 F. Supp. 1397, 1401-02 (D. Colo.), *aff'd per curiam*, 399 U.S. 901 (1970).

<sup>36</sup> Several important classes of suits other than those discussed in the text are well settled. Thus, section 1343(3) affords jurisdiction in suits to apportion, *Baker v. Carr*, 369 U.S. 186 (1962); to protect the right to attend integrated schools, *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); and to protect the right of residents of a federal enclave to vote, *Evans v. Cornman*, 398 U.S. 419 (1970).

<sup>37</sup> Chief Judge Johnson, dissenting in *Hornbeak v. Hamm*, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 9 (1969), felt that denying jurisdiction in an action to compel uniform assessment and valuation for ad valorem taxation purposes was tantamount to finding that state taxation procedures are not subject to the fourteenth amendment. *Id.* at 556.

<sup>38</sup> *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962), *aff'd per curiam*, 373 U.S. 241 (1963).

<sup>39</sup> *Alterman Transp. Lines, Inc. v. Public Serv. Comm'n*, 259 F. Supp. 486 (M.D. Tenn. 1966), *aff'd per curiam*, 386 U.S. 262 (1967).

and the administration of ad valorem taxation.<sup>40</sup> The lower courts have followed these results.<sup>41</sup>

There is an obvious overlap between income or ad valorem taxation and a requirement of a license, purchased for a fee, as a condition precedent to a specified activity. But there seems to be a crucial difference in the two under section 1343(3), just as there is a constitutional difference under the commerce clause.<sup>42</sup> In *Douglas v. City of Jeannette*,<sup>43</sup> the Court sustained jurisdiction under section 1343(3) in a suit brought by Jehovah's Witnesses to enjoin the application to them of a license tax on door-to-door solicitation as a denial of freedom of religion, speech, and press. Since the license could have been purchased for money, *Douglas* may be read as casting doubt on the validity of the "incapable of pecuniary valuation" test, and thus as lending credence to the "personal liberty" test. On the other hand, if the rights asserted in *Douglas* are classified simply as freedom of religion, speech, and press, jurisdiction would probably be sustained under either of the two tests. Thus *Douglas* may also be read as requiring an expansive reading of the complaint in identifying the right asserted and a disregard of the nature of the invasion of that right. After *Douglas*, the courts properly have had little difficulty sustaining jurisdiction in actions attacking the denial of licenses required for noncommercial pursuits;<sup>44</sup> section 1343(3) jurisdiction also has been sustained in the cases seeking to enjoin denials of licenses and permits required for commercial activities.<sup>45</sup>

<sup>40</sup> *Hornbeak v. Hamm*, 283 F. Supp. 549, (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 9 (1969).

<sup>41</sup> *E.g.*, *Bussie v. Long*, 383 F.2d 766 (5th Cir. 1967); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967).

With respect to the taxation cases, it should be remembered that ordinarily all of the subject property would never be taken. In addition, the strong policy against interference with state taxation, embodied in 28 U.S.C. § 1341 (1964), must be considered.

*Fuller v. Volk*, 351 F.2d 323 (3d Cir. 1965), raises an interesting issue. Therein jurisdiction was denied under section 1343(3) in a suit by taxpayers and parents to enjoin a school board plan to eliminate de facto segregation and to enjoin expenditures to implement the plan. Would a suit brought by one who has standing only as a taxpayer ever nestle into section 1343(3)? The answer would probably be yes in at least one situation. When the attack is under the establishment of religion clause of the first amendment, the essence of the objection would be the use to which the money is put, rather than the taking of it. *See, e.g.*, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

<sup>42</sup> Compare *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), *with Nippert v. Richmond*, 327 U.S. 416 (1946).

<sup>43</sup> 319 U.S. 157 (1943).

<sup>44</sup> *E.g.*, *Wall v. King*, 206 F.2d 878 (1st Cir.), *cert. denied*, 346 U.S. 915 (1953) (suspension of driver's license).

<sup>45</sup> *E.g.*, *Gold v. Lomenzo*, 425 F.2d 959 (2d Cir. 1970) (license for real estate

Somewhat the same considerations obtain in the employment cases as in those concerning permits for commercial activities. Both recognize, impliedly or expressly,<sup>46</sup> that the right to pursue one's chosen occupation is not a "property right." Thus section 1343(3) jurisdiction has been upheld in actions to compel reinstatement after alleged racial discrimination in the failure to renew employment contracts,<sup>47</sup> and after dismissal alleged to have denied procedural due process.<sup>48</sup> The difference that has been recognized at least once between dismissal and a mere reduction in salary<sup>49</sup> suggests that the problem may be one of degree. However, a more obvious distinction is that dismissal operates to preclude the income-producing conduct itself, while a salary reduction merely makes the conduct less economically beneficial.

Like the employment cases, the welfare cases involve loss of economic benefits. Yet jurisdiction under section 1343(3) is uniformly upheld in them. Unfortunately, the Supreme Court has not seen fit to discuss the scope of section 1343(3) in the recent rash of welfare cases decided by it, other than to render an occasional general remark. In *Goldberg v. Kelly*,<sup>50</sup> the Court sustained section 1343(3) jurisdiction in an action brought to redress the alleged denial of procedural due process in the termination of welfare benefits. Although section 1343(3) was not discussed, the Court did take note of the potential deprivation of "essential food, clothing, housing, and medical care," and of the fact that such terminations "may deprive an *eligible* recipient of the very means by which to live."<sup>51</sup> In *Dandridge v. Williams*<sup>52</sup> the Court, without comment, sustained jurisdiction in a suit attacking, on equal protection grounds, a ceiling placed on welfare benefits without regard to actual need or family size. Finally, in *Rosado v. Wyman*<sup>53</sup> the Court sustained jurisdiction under section 1343(3) in an action challenging, on equal pro-

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brokerage); *Parks v. Allen*, 409 F.2d 210 (5th Cir. 1969) (license for operation of a retail liquor store).

<sup>46</sup> *E.g.*, in *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970), the court remarked that even if the property rights exception is accepted, "plaintiff's claim to a denial of employment is in the nature of a right far more precious than 'mere property' and certainly incapable of precise pecuniary measure." *Id.* at 1245-46.

<sup>47</sup> *Harkless v. Sweeny Indep. School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3297 (U.S. Feb. 12, 1971).

<sup>48</sup> *Taylor v. New York City Transit Auth.*, 433 F.2d 665 (2d Cir. 1970).

<sup>49</sup> *Kochhar v. Auburn Univ.*, 304 F. Supp. 565 (M.D. Ala. 1969).

<sup>50</sup> 397 U.S. 254 (1970).

<sup>51</sup> *Id.* at 264.

<sup>52</sup> 397 U.S. 471 (1970).

<sup>53</sup> 397 U.S. 397 (1970).

tection grounds, a New York statute providing for smaller welfare payments to Nassau County residents than to New York City residents. These cases would support the proposition that the circumstances and probable effect of a "taking of property" are entitled to consideration in determining section 1343(3) jurisdiction, and clearly recognize the reality that a "taking of property" always interferes with "personal rights" to some degree. Moreover, since *Dandridge* and *Rosado* did not involve complete withdrawal of benefits, it is arguable that the degree of interference is immaterial in sensitive areas such as welfare administration.

Eviction from and termination of leases in public housing are apt to visit the same type of hardship on the plaintiff as denial of welfare benefits, although perhaps statistically to a lesser degree. Here, too, section 1343(3) jurisdiction has been sustained.<sup>54</sup>

Thus, the cases discussed, as well as others,<sup>55</sup> indicate that one may, with some confidence, consider plaintiff's personal circumstances in determining whether plaintiff has been denied a "personal right" *because of* the deprivation of a "property right." Yet the crucial issue remains: how is it to be determined whether the right allegedly denied is a "personal" one within the protection of section 1343(3)?

Obviously it is not enough that plaintiff alleges a violation of broad and general prohibitions, such as the due process and equal protection clauses of the fourteenth amendment. The Supreme Court has both sustained and denied section 1343(3) jurisdiction when the plaintiff was relying on the equal protection clause,<sup>56</sup> and the same is true with respect

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<sup>54</sup> *E.g.*, *Caulder v. Durham Housing Auth.*, 433 F.2d 998 (4th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3314 (U.S. Jan. 19, 1971) (No. 1227); *Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 39 U.S.L.W. 3149 (U.S. Oct. 13, 1970).

<sup>55</sup> *E.g.*, in *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), a suit to enjoin the lowering of rent ceilings under a city rent control law, Judge Friendly, after concluding that the proper test was whether the "right asserted is one of personal liberty," *id.* at 564 & n.7, held that section 1343(3) did not afford jurisdiction because plaintiff had *alleged only the loss of money*. *Id.* at 566. On the other hand, in *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970), a suit brought by a painter to redress the seizure of personal papers and painting implements by his landlord under an innkeepers' lien law, the court sustained section 1343(3) jurisdiction, reasoning that plaintiff's "claim is not for 'mere' property, but rather for property which is his means of employment and support and hence is incapable of pecuniary measure." *Id.* at 115. *See also* *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970). *But see* *Lynch v. Household Finance Corp.*, 318 F. Supp. 1111 (D. Conn. 1970).

<sup>56</sup> *Compare, e.g.*, *Hornbeak v. Hamm*, 393 U.S. 9 (1969), *aff'g per curiam* 283 F. Supp. 549 (M.D. Ala. 1968), *with* *Rosado v. Wyman*, 397 U.S. 397 (1970).

to the due process clause.<sup>57</sup> Thus, under the prevailing approach, the court must first characterize the right asserted in terms more narrow than the broad prohibition underlying the right, and then apply its test to determine whether the right is one of "personal liberty" or "property."

The difficulties attendant to such an analysis are amply illustrated by *Adams v. City of Colorado Springs*.<sup>58</sup> Therein property owners and voters sued to enjoin a proposed annexation on the ground that the statute establishing the annexation procedure denied equal protection when it afforded prospective annexees in certain areas a vote on the proposal but denied it to those in other areas. Although defendants asserted that plaintiffs were concerned only with increased taxation, the district court characterized the complaint as setting up the deprivation of "a substantial personal right—the right to equal treatment in the distribution of the voting franchise," and upheld jurisdiction under section 1343(3).<sup>59</sup> Since some persons were permitted to vote because they were property owners, the right asserted in *Adams* could be characterized as the right to exercise the incidents of ownership of property. Or, as defendants wished, it could be described as the right not to pay increased taxes for unwanted city services. It is obvious that in any case there is a wide range of possible descriptions of the right involved. And in many cases that range could include both those that seem "personal" or "incapable of pecuniary valuation" and those that seem to be "property rights."<sup>60</sup> Such is the present potential for uncertainty and inconsistency.

A suggestion for avoidance of the unsatisfactory existing approach may be found in the very origin of the problem—Justice Stone's opinion in *Hague*. Unfortunately, the courts have neglected that portion of the opinion in which Justice Stone discussed *Truax* and *Crane*. Arguably, Justice Stone used his phrases in the disjunctive and thought that a complaint sets out "a right of personal liberty not susceptible of valuation in money" whenever "the gist of the cause of action is not damage or injury to property."<sup>61</sup> Adoption of the latter phrase as the section 1343(3) test would immediately eliminate the disparity in results due to the real or supposed differences in the "personal liberty" and "incapable of pecuniary valuation" tests. Moreover, by recognizing, as the welfare cases clearly

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<sup>57</sup> Compare, e.g., *Alterman Transp. Lines, Inc. v. Public Serv. Comm'n*, 386 U.S. 262 (1967), *aff'd per curiam* 259 F. Supp. 486 (M.D. Tenn. 1966), with *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

<sup>58</sup> 308 F. Supp. 1397 (D. Colo.), *aff'd per curiam*, 399 U.S. 901 (1970).

<sup>59</sup> *Id.* at 1401-02.

<sup>60</sup> See p. 824 & note 32 *supra*.

<sup>61</sup> See p. 822 & note 18 *supra*.

suggest, that the gist of a cause of action may be something other than a mere wrongful reduction in plaintiff's net economic worth *because of the effect of a "taking of property,"*<sup>62</sup> this rule would offer the distinct advantage of reconciling many of the otherwise apparently inconsistent results.

It is submitted that the rule suggested is to be preferred over the existing state of disagreement and confusion. It is not at all clear that Justice Stone did not have it in mind, and it should be remembered that for the most part Justice Stone was arguing positively to sustain jurisdiction in *Hague*, rather than negatively to deny it.<sup>63</sup> As noted earlier, the language of section 1343(3) does not require the property rights exception.<sup>64</sup> Moreover, the Supreme Court has broadly interpreted 42 U.S.C. § 1983—the substantive companion of section 1343(3)—<sup>65</sup> to embrace all rights guaranteed by the fourteenth amendment.<sup>66</sup> Finally, it is arguable that the Civil Rights Acts themselves cast doubt on the property rights exception.<sup>67</sup>

Even the need to harmonize sections 1331 and 1343(3), which concerned Justice Stone, is more apparent than real. The most expansive reading of section 1343(3) would not make section 1331 superfluous, since by its terms section 1343(3) extends only to state, not federal, action. Moreover, the total repeal of the jurisdictional amount requirement in section 1331 has been forcefully advocated,<sup>68</sup> since its application is virtually limited to cases involving state action,<sup>69</sup> for which federal

<sup>62</sup> See pp. 826-27 *supra*.

<sup>63</sup> 307 U.S. at 527-32.

<sup>64</sup> One recent case seems to have arrived at a correct result guided solely by the language of the statute. See *Caulder v. Durham Housing Auth.*, 433 F.2d 998 (4th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3314 (U.S. Jan. 19, 1971) (No. 1227).

<sup>65</sup> See note 8 *supra*.

<sup>66</sup> *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

<sup>67</sup> *E.g.*, section two of the Act of 1871 specifically punished conspiracies aimed at preventing enforcement of the Act by injuring the *property* or person of a United States officer, juror, etc., charged with a duty under the Act. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. Therefore, section one, from which section 1343(3) is derived and which is broader than section two, should be construed to protect property also. For arguments that the Civil Rights Acts preclude recognition of the property rights exception see Laufer, *Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction—A Reappraisal*, 19 BUFFALO L. REV. 547, 559-61 (1970); Note, *The "Property Rights" Exception to Civil Rights Jurisdiction—Confusion Compounded*, 43 N.Y.U.L. REV. 1208, 1211 (1968).

<sup>68</sup> ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 489-92 (1969); Wright, *Federal Question Jurisdiction*, 17 S.C.L. REV. 660, 661-64 (1965).

<sup>69</sup> Wright, *supra* note 68, at 663-64.

courts are especially appropriate, and its elimination would have no significant impact on the workload of the federal courts.<sup>70</sup>

Finally, the rule suggested offers an opportunity to settle this area of conflict quickly and with certainty. As Justice Brandeis once remarked, "in most matters it is more important that the applicable rule be settled than that it be settled [correctly] . . . ."<sup>71</sup> The Supreme Court should take advantage of one of the opportunities certain to arise to establish a definite rule. And if it fails to do so, Congress should.

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### Municipal Corporations—Public Purpose—Taxation and Revenue Bonds to Finance Low-Income Housing

In *Martin v. North Carolina Housing Corp.*<sup>1</sup> the North Carolina Supreme Court upheld the statute establishing the Housing Corporation as a "public agency . . . empowered to act on behalf of the State . . . for the purpose of providing residential housing 'for sale or rental to persons and families of lower income.'"<sup>2</sup> In so holding, the court resolved in favor of the Housing Corporation challenges regarding public purpose, lending of credit, creation of debt, delegation of legislative authority, and property tax exemption, arising under various sections of the North Carolina Constitution.<sup>3</sup>

The dissent singled out the noteworthy holdings of the case: public purpose and tax exemption. In the latter regard the court in *Martin* upheld the statutory tax exemption of the bonds to be issued by the Housing Corpo-

<sup>70</sup> *Id.*

<sup>71</sup> *Burnet v. Coronado Oil & Gas*, 285 U.S. 393, 406 (1932).

<sup>1</sup> 277 N.C. 29, 175 S.E.2d 665 (1970).

<sup>2</sup> *Id.* at 34, 175 S.E.2d at 667. The Housing Corporation was to issue self-liquidating, tax-exempt revenue bonds and use the proceeds to purchase federally insured mortgage and construction loans. The Housing Corporation would also establish a housing development fund with grants and loans from industry, foundations, and government to be used for project development loans, downpayment assistance to needy families, and uninsured loans to builders and developers for land development and residential construction. N.C. GEN. STAT. §§ 122A-1 to -23 (Supp. 1969).

<sup>3</sup> N.C. CONST. art. V, § 3, limiting the power of taxation to public purposes; art. VII, § 6, limiting the power of a municipal corporation to pledge its faith; art. V, § 4, limiting the power of the General Assembly to lend the credit of the State; art. I, § 8, defining the separation of the powers of government; and, art. V, § 5, defining the scope of the exemption of property from taxation.