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Patsy v. Florida International University, _ F.2d _ (5th Cir. 1981).

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PATSY V. FLORIDA INTERNATIONAL UNIVERSITY, _ F.2d _ (5th Cir. 1981).

For the past twenty years the Supreme Court has consistently permitted civil rights plaintiffs to bring suits in federal court for violations of section 1983[1] without first exhausting their state administrative remedies. In *Patsy v. Florida International University*,[2] a reverse discrimination case, the Court of Appeals for the Fifth Circuit, sitting en banc, rejected that blanket rule in favor of a more flexible rule requiring exhaustion of state administrative remedies as a prerequisite to an action under section 1983, absent a showing that the administrative remedies were either unconstitutional or inadequate.

Georgia Patsy, a white woman employed as a secretary by Florida International University, alleged that the university had discriminated against her on the basis of race and sex in rejecting her applications for job promotions for which she was qualified. She argued that the university's active program of recruitment and promotion of minorities was discriminatory and thus barred under section 1983. Patsy asked the federal court to promote her to the next available position she was qualified for or, alternatively, to award her $50,000 in damages. She admittedly had not exhausted the state administrative remedies available to her. The district court dismissed her claim for failure to exhaust those remedies. The Fifth Circuit reversed. On rehearing en banc, the court of appeals vacated the decision and remanded to the district court for a determination of the adequacy of the state administrative remedies.

Writing for the majority, Judge Roney concluded that although the Supreme Court has repeatedly stated[3] that "exhaustion of administrative remedies is not required in section 1983 cases,"[4]

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1. 42 U.S.C. § 1983 (1976) (originally enacted as § 1 of the 1871 Civil Rights Act).

2. No. 79-2965, slip op. 2888 (5th Cir. Jan. 22, 1981).

3. *Id.* at 2893.

4. *Id.* at 2895-96, (quoting *Developments in the Law Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1137-56 (1977)); *see* Barry v. Barchi, 443 U.S. 55 (1979) (New York statute ordering summary suspension of harness racing trainers without pre-suspension hearing did not violate Due Process Clause as long as there was timely post-suspension hearing); Gibson v. Berryhill, 411 U.S. 564 (1973) (licensed optometrists need not exhaust state administrative remedies before bringing suit under § 1983 claiming state regulatory scheme was unconstitutional because regulatory board was biased); Wilwording v. Swenson, 404 U.S. 249 (1971) (*per curiam*) (state prisoners challenging prison conditions need not exhaust state administrative remedies before bringing suit under § 1983 in federal court); Damico v. California, 389 U.S. 416 (1967) (*per curiam*) (welfare claimants challenging constitutionality of state welfare law and regulations need not exhaust state administrative

the Court has not foreclosed the development of a flexible analytical rule sensitive to the adequacy or inadequacy of available state administrative remedies. In all of those cases, Roney noted, the state administrative remedies were inadequate.[5] Because the Court had not decided a case in which the state administrative remedies were adequate, any blanket "no-exhaustion rule" was inconclusive.

To support this conclusion, the majority traced several Supreme Court cases on section 1983 that considered the exhaustion question, to determine whether the Court intended to develop such a "sweepingly broad and inflexible rule."[6] The majority inferred[7] the lack of such intent from *Barry v. Barchi*,[8] in which the Supreme Court recently said, "exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of the [plaintiff's] lawsuit.' "[9] Roney insisted that this comment, read in the context of past statements of the Court's exhaustion doctrine, leads to the conclusion that the Supreme Court would permit a more flexible approach toward a requirement of exhaustion of administrative remedies under section 1983.

A more flexible rule, he continued, would comport with the congressional intentions underlying the Civil Rights Act of 1871,[10] as construed by the Supreme Court in *Monroe v. Pape*:[11] "(1) to override certain kinds of state laws that were inconsistent with federal law; (2) to provide a federal remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy was available in theory but not in practice."[12] A rule requiring exhaustion of adequate state administrative remedies, the majority asserted, would be consistent with the second and third purposes of the Act.

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remedies to bring suit under § 1983 in federal court); McNeese v. Board of Educ., 373 U.S. 668 (1963) (black students challenging constitutionality of segregated public school need not exhaust state administrative remedies, which were probably inadequate, before bringing suit under § 1983 in federal court).

5. *Patsy*, slip op. at 2895.

6. *See* cases cited note 4 *supra*. *See also* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 544-47 (1974).

7. *Patsy*, slip op. at 2894.

8. 443 U.S. 55 (1979).

9. *Id.* at 63 n.10, (quoting Gibson v. Berryhill, 411 U.S. 564, 575 (1973)).

10. Ch. 22, 17 Stat. 13 (1871). For an examination of the legislative history of this statute, § 1 of which is presently codified as 42 U.S.C. § 1983, see *Developments in the Law - Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1137-56 (1977).

11. 365 U.S. 167 (1961).

12. *Id.* at 173-74.

Judge Roney discussed various policy reasons for preferring a flexible rule to a blanket no-exhaustion rule. A flexible rule would allocate judicial time more wisely, by requiring that at least some disputes be settled in the administrative system. Requiring exhaustion would also assure that a suit reaching the court was ripe for review. An exhaustion rule would encourage states to develop adequate and sufficient procedures to avoid interference by the federal judiciary. Both plaintiffs and defendants could conserve their resources more effectively than they can in the present system. And finally, Judge Roney concluded that such a rule would ensure the avoidance of any constitutional collision between the actions of a state government and the Federal Constitution, if at all possible.[13]

Having concluded that a flexible rule would comport with Supreme Court decisions since 1961 and with the legislative intentions of the Civil Rights Act, the majority set out five minimum criteria to guide the trial court in reviewing the adequacy of the available state administrative remedies:

> *First,* an orderly system of review or appeal must be provided by statute or written agency rule. *Second,* the agency must be able to grant relief more or less commensurate with the claim. *Third,* relief must be available within a reasonable period of time. *Fourth,* the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. *Fifth,* interim relief must be available, in appropriate cases, to prevent irreparable injury and to preserve the litigant's rights under section 1983 until the administrative process has been concluded.[14]

Judges Rubin and Hatchett, joined by five other judges, vehemently dissented. The blanket rule of no-exhaustion was neither dicta nor unnecessary, argued the dissenters. The rule ensured for civil rights plaintiffs, often indigent, the swiftest and least costly

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13. *Patsy,* slip op. at 2902. Quoting a law review comment, Roney expressed his concern that the federal judiciary be particularly sensitive to preserving spheres of state autonomy:

> [A] federal court adjudicating a suit under the Civil Rights Act must consider the implications of division of responsibility under a federal system of government. The development of the exhaustion doctrine represented, at least in part, an attempt to minimize intergovernmental friction by deferring to the maximum extent possible to the interest of the states in ordering and regulating their own affairs.

Comment, *Exhaustion of State Remedies Under the Civil Rights Act,* 68 COLUM. L. REV. 1201, 1206-07 (1968).

14. *Patsy,* slip op. 2903.

form of relief, a recognition that the states were often slow in providing remedies for constitutional deprivations. The Supreme Court in *Wilwording v. Swenson*,[15] Judge Rubin continued, had stated clearly that "[t]he remedy provided by [the Civil Rights Act] 'is supplementary' to the state remedy and the latter need not be first sought and refused before the federal one is invoked."[16]

Writing a separate dissent, Judge Hatchett catalogued the Supreme Court's frequent declarations that section 1983 does not require exhaustion of administrative remedies.[17] The majority, Hatchett argued, had neglected the critical fourth purpose underlying section 1983—that the federal remedy provided by the Act would be supplementary and fully independent. Thus, the no-exhaustion rule repeatedly applied by the Supreme Court recognized the important role that Congress had intended the federal courts to play in protecting constitutional rights. That role, Hatchett contended, will be seriously diluted by the majority's adoption of a flexible exhaustion rule. "Exhaustion of state administrative remedies simply has no place in the civil rights context,"[18] he concluded.

The majority and the dissenters have read the same Supreme Court decisions with totally different presumptions, thereby drawing different conclusions. To the dissenters, the Supreme Court could not have been clearer in its assertions of a blanket no-exhaustion rule. For the majority to dismiss those statements as mere dicta seems to the dissenters not only a misreading of the law of the past twenty years, but also a dangerous swipe at federal protection of civil rights. To the majority, the observation that the Supreme Court decisions certainly suggest a blanket no-exhaustion rule is not fatal to the argument for the consistency of a flexible rule. The Court, the majority's argument contends, was never presented with a case in which the administrative remedies were adequate—thus any statement suggesting a blanket rule can be no more than perhaps persuasive dicta. A flexible rule, the majority concludes, will nevertheless still achieve the goals underlying the civil rights legislation.

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15. 404 U.S. 249 (1971).

16. *Patsy*, slip. op. at 2905-06.

17. *See* cases cited note 4 *supra*. The Supreme Court did not qualify its language in those cases by taking account of the existence of inadequate remedies. As the majority points out, however, the administrative remedies in those cases were in fact either inadequate or nonexistent.

18. *Patsy*, slip op. at 2919.

Georgia Patsy almost certainly will appeal this case to the Supreme Court. What effect the Fifth Circuit's decision will have, if allowed to stand, depends largely on the commitment of the district judges to scrutinize the adequacy of the administrative remedies available to the civil rights plaintiffs. The majority suggests that the exhaustion requirement and the minimum standards it provides will give the states incentive to develop speedy and effective administrative procedures. If the trial courts share the majority's expressed commitment to the spirit of the civil rights legislation and strictly scrutinize the effectiveness of the administrative remedies available to the particular plaintiff, the majority's hopes may be realized. Otherwise, Judge Hatchett's prediction of chilled civil rights litigation may well come true.

The majority opinion pragmatically implies that potential relief within the state administrative system may not be colorblind. In effect, the decision suggests that a white plaintiff claiming reverse discrimination may well have a better chance of obtaining state relief than black claimants have traditionally had. Though not saying so explicitly, the majority thus recognizes that Congress passed the Civil Rights Act of 1871 (the "Ku Klux Klan Act") specifically to protect blacks harassed by the Ku Klux Klan and unable to get protection or redress from the states.[19] If the majority is correct, then their decision may well relieve the federal court of the burden of reverse discrimination suits for which effective state redress exists, while preserving federal forums for litigants who cannot in fact get effective state relief.

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PAYTON V. UNITED STATES, _ F.2d _ (5th Cir. 1981).

Twenty-seven years ago in *Dalehite v. United States*[1] the Supreme Court held that the negligent actions of government officials resulting in a fatal nitrate fertilizer explosion did not subject them to liability under the Federal Tort Claims Act,[2] because their ac-

19. *See, e.g.*, Justice Douglas's discussion of the background of the Civil Rights Act in Monroe v. Pape, 365 U.S. 167, 172-83 (1960).

1. 346 U.S. 15 (1953).
2. 28 U.S.C. § 1346(b) states, in part: