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Parens Patriae Suits by a State under 42 U.S.C. 1983

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PARENS PATRIAE SUITS BY A STATE UNDER 42 U.S.C. § 1983

Ostensibly inspired by a concern for state autonomy, the Supreme Court has in the past decade sharply restricted the availability of 42 U.S.C. § 1983—a statute whose very purpose was to remedy civil rights violations "under color of" state law. How can civil rights protection be preserved while satisfying the Court's federalism concerns? This Note suggests that granting parens patriae standing under section 1983 will encourage civil rights enforcement by the states themselves. While such standing may contradict the original purpose of the statute, it offers effective civil rights enforcement without compromising state autonomy. This Note examines the history of section 1983 and analyzes its restrictive reading by the Supreme Court. It then explores the nature of the parens patriae remedy and discusses its applicability to civil rights litigation. The Note concludes that parens patriae standing, while not a panacea, can be a useful device for restoring the protections of section 1983.

INTRODUCTION

IN RECENT YEARS, the Supreme Court has limited the availability of federal civil rights protection.[1] Under notions of "equity, comity, and federalism,"[2] the Court has denied relief against individual state and municipal defendants.[3] Ironically, this concern for state autonomy restricts recovery under 42 U.S.C. § 1983[4]—a statute whose very purpose was to remedy civil rights

1. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (barring availability of § 1983 actions where state tort remedy exists); Stone v. Powell, 428 U.S. 465 (1976) (restricting availability of federal habeas corpus for state prisoners); Washington v. Davis, 426 U.S. 229 (1976) (restricting availability of federal equal protection actions by imposing requirement of discriminatory intent); Paul v. Davis, 424 U.S. 693 (1976) (barring civil rights actions for injury to reputation); Imbler v. Pachtman, 424 U.S. 409 (1976) (restricting availability of civil rights actions by recognizing absolute immunity for certain state officials); Rizzo v. Goode, 423 U.S. 362 (1976) (restricting availability of federal injunctions against state officials); Wood v. Strickland, 420 U.S. 308 (1975) (restricting availability of civil rights actions by allowing qualified good faith immunity to certain state officials); United States v. Kras, 409 U.S. 434 (1973) (restricting access to federal court through imposition of court fees upon indigents). *But see* Peters, *Municipal Liability After* Owen v. City of Independence *and* Maine v. Thiboutot, 13 URB. LAW. 407, 407–08 (1981) (Supreme Court, in its 1979–80 term, substantially increased potential local government liability under § 1983).

2. Mitchum v. Foster, 407 U.S. 225, 243 (1972); *see infra* notes 75–85 and accompanying text.

3. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976). *But see generally* Peters, *supra* note 1 (increased municipal liability).

4. 42 U.S.C. § 1983 (1976). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

violations "under color of" state law.[5]

Some commentators have suggested that the restrictive reading of section 1983 is based more on a concern for federal dockets than for states' rights.[6] In *Rizzo v. Goode*,[7] however, the Court declared that "principles of federalism" prohibit relief under section 1983 in all but the most extreme circumstances when the defendant is a city police department.[8] While the true intent of the decision is open to debate,[9] commentators view *Rizzo* as a nearly absolute bar to relief by individuals against municipal police forces.[10]

State courts and state governments have responded differently to the Court's new concern for "federalism." Some state courts have read into their state constitutions protections of individual rights which exceed those found by the Supreme Court in the federal Constitution.[11] A unique response by the state of Pennsylvania was recently approved by the Court of Appeals for the Third Circuit in *Pennsylvania v. Porter*.[12] There, the court held that a state may, as parens patriae,[13] seek injunctive relief under section 1983 against a municipality for violations of the civil rights of local residents.[14]

This Note examines the historical background of section 1983,[15] and evaluates the impact on the statute of cases such as *Rizzo*.[16] After concluding that *Rizzo's* federalism concerns may be unjustified,[17] the Note explores the nature of the parens patriae remedy.[18] The opinion in *Porter* is then analyzed to determine

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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.

5. *Id*; *see infra* notes 36–43 and accompanying text.

6. *See infra* note 71.

7. 423 U.S. 362 (1976).

8. *Id*. at 379.

9. *See infra* note 105 and text accompanying note 106.

10. *See infra* notes 103 & 115.

11. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

12. 659 F.2d 306 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

13. " '*Parens patriae*,' literally 'parent of the country,' refers traditionally to the role of state as sovereign and guardian of persons under legal disability." Alfred L. Snapp & Son v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 600 n.8 (1982) (quoting BLACK'S LAW DICTIONARY 1003 (rev. 5th ed. 1979)). For a more extensive treatment of parens patriae, see *infra* notes 118–38 and accompanying text.

14. *See infra* notes 143–96 and accompanying text.

15. *See infra* notes 23–70 and accompanying text.

16. *See infra* notes 71–115 and accompanying text.

17. *See infra* note 113 and accompanying text.

18. *See infra* notes 118–42 and accompanying text.

whether concerns for state autonomy are properly accommodated by allowing the state, rather than the individual, to bring an action under section 1983.[19]

Finally, the Note addresses some of the political and jurisprudential issues which are raised by allowing such a suit.[20] After noting the clash of interests between state and local governments inherent in a case like *Porter*,[21] the Note concludes with a discussion of the possible benefits which the parens patriae suit may confer on civil rights litigation.[22]

I. HISTORY OF 42 U.S.C. § 1983

Section 1983 was originally part of the Civil Rights Act of 1871,[23] passed in response to President Grant's request for emergency legislation to quell the state of anarchy existing in the South due to state inaction in the face of Ku Klux Klan atrocities.[24] The ineffectiveness of state courts in securing equal protection of the laws demanded a federal remedy to protect constitutional rights.[25]

Section 1, the least controversial portion of the Act,[26] created a private remedy for individuals who, "under color of" state action, were deprived "of any rights, privileges, or immunities secured by the Constitution."[27]

Beliefs that the Civil Rights Act would grant full equality to the freedman, and fears that it would destroy the sovereignty of the Southern States, were quickly dispelled by the federal courts,

19. *See infra* notes 144–96 and accompanying text.

20. *See infra* notes 197–202 and accompanying text.

21. *See infra* notes 199–202 and accompanying text.

22. *See infra* notes 203–05 and accompanying text.

23. Ch. 22, 17 Stat. 13 (current version at 42 U.S.C. §§ 1983, 1985–86 (1976)). The full title of the Act was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution, and for other purposes."

24. *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1153 (1977) [hereinafter cited as *Developments—Section 1983*]. President Grant's message read in pertinent part:

> A condition of affairs now exists in some of the states of the Union rendering life and property insecure, and the carrying of the mails and collection of the revenue dangerous. . . . That the power to correct these evils is beyond the control of state authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of the existing laws is sufficient for present emergencies is not clear.

Id. at n.106.

25. The congressional debates continually emphasize the inaction of state courts, alluding to their domination by the Klan. *Id.* at 1154–55.

26. *Id.* at 1155.

27. Ch. 22, 17 Stat. 13 (1871) (currently codified with identical language at 42 U.S.C. § 1983 (1976)).

which subordinated the protection of national civil rights to the protection of state sovereignty.[28] In *The Slaughterhouse Cases*,[29] the Supreme Court gave a restrictive meaning to the privileges and immunities clause of the fourteenth amendment—and thus to the parallel clause of the Act of 1871.[30] The Court rejected counsel's argument that the fourteenth amendment "consolidated the several [states] into a consistent whole"[31] and placed the states "under the oversight and restraining and enforcing hand of Congress."[32] Instead, the Court interpreted the privileges and immunities clause narrowly, holding that it protected only those rights which "owe their existence to the Federal government, its National character, its Constitution, or its laws."[33] A broader interpretation would destroy the autonomy of the states and make the Supreme Court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such acts as it did not approve as consistent with these rights, as they existed at the time of the adoption of this amendment."[34] Four years later in *United States v. Cruikshank*,[35] the Court reiterated its restrictive position, holding that the fourteenth amendment guaranteed the right to petition for redress of grievances only if the petition was directed to the federal government.

In addition to reading "privileges and immunities" so narrowly as to make it irrelevant, the federal courts also gave a strict

28. *Developments—Section 1983*, *supra* note 24, at 1161.

29. 83 U.S. (16 Wall.) 36 (1872).

30. J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957 at 83–85, 95 (1958).

31. 83 U.S. at 52.

32. J. SCHMIDHAUSER, *supra* note 30, at 83.

33. 83 U.S. at 79. The Court enumerated these "rights and privileges" as the right to peaceably assemble and petition for redress of grievances, the writ of habeas corpus, the right to use the navigable waters of the United States, rights secured by treaties with foreign nations, the right to become a citizen of any state by residence in that state, and those rights secured by the thirteenth and fourteenth amendments. *Id.* at 79–80.

34. *Id.* at 78. One commentator describes *The Slaughterhouse Cases* as "the most important single action, whether for good or evil, taken by the Supreme Court for the preservation of state autonomy." J. SCHMIDHAUSER, *supra* note 30, at 85. Others focus on the civil rights aspects of the case instead of its federal-state issues, concluding that the Court's narrow reading "effectively exclud[ed] almost all civil rights from [the 14th amendment's] purview." *Developments—Section 1983*, *supra* note 24, at 1157–58.

35. 92 U.S. 542 (1875). *Cruikshank* involved prosecution under the Act of May 31, 1870, ch. 114, 16 Stat. 140 (current version at 42 U.S.C. §§ 1971, 1981, 1987–91, 1993 (1976)), of three persons charged with disrupting a meeting of blacks in Louisiana and subsequently lynching two blacks. Since the meeting was not aimed at petitioning the United States government for redress of grievances, the Court held that the 14th amendment was inapplicable and overturned the convictions.

construction to "state action" under the fourteenth amendment and the corollary phrase "under color of" in section 1983. Thus, action by state officials without the state's sanction was not "state action,"[36] and only action in pursuance of state law or within executive discretion was found to be action "under color of" state law.[37]

The doubly restrictive reading of "privileges and immunities" and "under color of" made the fourteenth amendment and the Civil Rights Acts essentially meaningless.[38] Thus, the Supreme Court of Tennessee could hold that a state act making interracial marriage a felony was not affected by the thirteenth, fourteenth, or fifteenth amendments, or by the Civil Rights Acts.[39] Similarly, state court decisions upholding Jim Crow legislation remained unchallenged in federal courts,[40] and one federal court held that a plaintiff who alleged that the chief of police had assaulted and beaten her with a whip was without a cause of action under the Act of 1871.[41] It is not surprising that only twenty-one cases were brought under section 1983 from 1871 to 1920.[42] The federal judiciary's overriding concern for preserving state autonomy acted substantially to curtail protection of individual liberties.[43]

A. *The Expanding Scope of Section 1983*

The concern for preserving states' prerogatives, characterized

36. In Barney v. City of New York, 193 U.S. 430 (1904), the Supreme Court held that it lacked jurisdiction to grant an injunction preventing construction of a subway tunnel, which plaintiff alleged was being built in violation of a state statute. Since the construction was not authorized by statute, it was not state action, despite the fact that it was undertaken by the City of New York. *Id.* at 437–38. *See Developments—Section 1983*, *supra* note 24, at 1160 n.138.

37. Brawner v. Irvin, 169 F. 964 (C.C.N.D. Ga. 1909); United States v. Jackson, 26 F. Cas. 563, 563–64 (C.C.D. Cal. 1874) (No. 15, 459). *See Developments—Section 1983*, *supra* note 24, at 1160 n.138.

38. *See* P. PALUDAN, A COVENANT WITH DEATH 243 (1975).

39. Lonas v. Tennessee, 50 Tenn. (3 Heisk.) 287 (1871).

40. *See, e.g.*, Bowie v. Birmingham Ry. & Elec. Co., 27 So. 1016 (Ala. 1900).

41. Brawner v. Irvin, 169 F. 964 (C.C.N.D. Ga. 1909). The court stated that "the right of an individual to life, liberty, and property, and to be free from molestation, is primarily and originally the right of a citizen of the state of which the individual is an inhabitant." *Id.* at 966.

42. *Developments—Section 1983*, *supra* note 24, at 1161 n.139. The authors state that "as late as 1953, the statute was still relatively ineffective." *Id.*

43. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (holding §§ 1 and 2 of the Civil Rights Act of 1875 "repugnant to the Tenth Amendment" because they sought to prevent private discrimination and thus superseded state legislatures' control of private conduct). *See generally* J. SCHMIDHAUSER, *supra* note 30, at 83–88, 94–96, 98–100.

as "dual federalism,"[44] pervaded civil rights litigation throughout the first part of the twentieth century. Though the Court used the fourteenth amendment to strike down unconstitutional state laws,[45] it was not until 1941, in *United States v. Classic*,[46] that the criminal sanctions of the Civil Rights Acts[47] were applied to state officials who, in violating state laws, infringed on fourteenth amendment rights. In *Classic*, the Court held that if state officials misuse their positions and thereby violate federal laws, they act "under color of" state law.[48]

Four years later, in *Screws v. United States*,[49] the Court applied the same rule to local law enforcement officers who arrested, handcuffed, and beat to death a black man.[50] Justice Douglas stated in his plurality opinion:

> The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under "color of any law." He who acts under "color" of law may be a federal officer or a state officer. He may act under "color" of federal law or of state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when someone is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses.[51]

The *Screws* and *Classic* decisions thus repudiated the notion that the states have primary responsibility for federal civil rights enforcement. Furthermore, they shifted the federal courts' focus from preservation of "dual federalism" and state autonomy[52] to more vigorous protection of individual civil liberties. By expanding the scope of the fourteenth amendment, the Court broad-

44. *Developments—Section 1983*, *supra* note 24, at 1159–61.

45. Hague v. CIO, 307 U.S. 496 (1939) (Jersey City officials enjoined from harassing labor organizers; decision based on 1st and 14th amendments); Lane v. Wilson, 307 U.S. 268 (1939) (striking down Oklahoma statute which disenfranchised all who failed to register during 11-day period); Nixon v. Herndon, 273 U.S. 536 (1927) (Texas statute prohibiting blacks from voting in Democratic primary held unconstitutional).

46. 313 U.S. 299 (1941) (fraudulent counting of primary ballots by state officials).

47. The suit in *Classic* was brought under §§ 19 and 20 of the Act of March 4, 1909, ch. 321, 35 stat. 1092 (current version at 18 U.S.C. §§ 241, 242 (1976)).

48. 313 U.S. at 326.

49. 325 U.S. 91 (1945).

50. *Id.* at 93.

51. *Id.* at 108.

52. *See supra* notes 33–44 and accompanying text.

ened the scope of interests protected under section 1983.[53] The district and curcuit courts quickly applied *Screws* and *Classic* to the civil remedies of the Civil Rights Acts, thereby extending the reach of the Acts to noncriminal cases.[54]

Not until 1961, however, did the Supreme Court apply *Screws* and *Classic* in the context of section 1983 actions. In the landmark case of *Monroe v. Pape*,[55] which significantly enlarged the scope of section 1983,[56] the Court allowed a complaint against thirteen Chicago policemen who, plaintiff alleged, broke into and ransacked his home without a warrant.[57] The Court compared section 1983 with its criminal counterparts, upon which the actions in *Screws* and *Classic* were based. While acknowledging that intent to violate constitutional rights is a prerequisite under the criminal statutes, the Court held that the civil remedies of section 1983 are available without a showing of intent.[58] In addition, the *Monroe* Court provided direct access to federal court for all litigants deprived of their civil rights "under color of" state law. Justice Douglas, writing for the majority, found in the legislative

53. *Developments—Section 1983*, *supra* note 24, at 1169.

54. Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958) (damage award for assault by police officers); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957) (complaint alleging unlawful detention by police without pressing charges stated § 1983 cause of action); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953) (federal court had jurisdiction over complaint alleging warrantless search); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949) (federal court took jurisdiction over complaint alleging that police officers violated plaintiffs' rights by ejecting them from privately owned park open to public upon payment of fees); Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947) (injunction should issue to prevent enforcement of ordinance barring religious groups from use of public park); Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945) (complaint alleging unlawful imprisonment by law enforcement officials is cognizable under state and federal civil rights statutes), *cert. denied*, 332 U.S. 776 (1947).

55. 365 U.S. 167 (1961).

56. Dissenting from Monell v. Department of Social Serv., 436 U.S. 658 (1977), Justice Rehnquist labeled *Monroe* "the fountainhead of the torrent of civil rights litigation of the last 17 years." *Id.* at 724.

57. 365 U.S. at 187.

58. In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U.S. at 103. We do not think that gloss should be placed on [§ 1983]. The word "wilfully" does not appear in [§ 1983]. Moreover, [§ 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

365 U.S. at 187. By eliminating the analogy to the criminal laws, the Court reversed the common practice in the district courts of dismissing § 1983 complaints that failed to allege an intent to violate civil rights. *See* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 45, 46 (1977).

history of the Act of 1871 that Congress intended to supplant state law entirely by overriding discriminatory state laws and by providing a federal remedy where state laws were inadequate or where the state remedy, though adequate in theory, was inadequate in practice.[59] Justice Douglas stated that exhaustion of state remedies was not required before bringing a section 1983 action: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[60]

The *Monroe* decision thus heralded a new era in civil rights litigation. By transplanting *Screws* and *Classic* to the area of civil liability, the Court shifted the primary responsibility for civil rights enforcement to the federal courts. By ruling that federal remedies were entirely supplementary to state remedies, the Court provided direct access to the federal court system. By removing the state-of-mind requirement for section 1983 liability, the Court allowed federal court plaintiffs to survive a motion to dismiss simply by alleging facts showing that defendant's actions had deprived plaintiff of a federally guaranteed civil right. Coupled with the trend toward full incorporation of the Bill of Rights into the fourteenth amendment,[61] *Monroe* promised sweeping intervention by the federal courts into areas once considered exclusively reserved to the states.[62]

Monroe's impact was swift and dramatic. In 1960 roughly three hundred suits were filed under all of the Civil Rights Acts;[63] in 1972, approximately eight thousand suits were filed under section 1983 alone.[64] Since section 1983 is intended to remedy deprivations "under color of" state law,[65] it was perhaps inevitable that suits would be brought mainly against state officials and those empowered as agents of the state. Section 1983 plaintiffs have been granted standing to sue state executive officials,[66] state hospital

59. 365 U.S. at 173–74.

60. *Id.* at 183.

61. *See, e.g.*, Ristaino v. Ross, 424 U.S. 589 (1976); *In re* Winship, 397 U.S. 358 (1970); Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968).

62. *See, e.g.*, S. KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 83 (1965).

63. *Developments—Section 1983*, *supra* note 24, at 1136 n.7.

64. *Id.*

65. *See supra* note 4.

66. *E.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974).

district board members,[67] law enforcement officers,[68] municipal officials,[69] and school board members.[70]

B. *The Revival of "Dual Federalism"*

The increased scrutiny of state functions under section 1983, and the resulting burden on federal court dockets, has caused much concern in the last decade.[71] This concern has inspired a series of decisions drastically curtailing the scope of federal relief available under section 1983 and similar statutes.[72] Beginning as a respect for the autonomy of state judicial functions,[73] the principle that federal courts should not intervene in state affairs has spread until it now threatens to eliminate the very kind of federal judicial supervision which section 1983 was intended to provide.[74]

The opening salvo in what one commentator calls "a counter-assault on federal judicial power"[75] was fired in the case of *Younger v. Harris*.[76] Harris had been indicted under the California Criminal Syndicalism Act.[77] He filed a complaint in federal district court claiming that the Act inhibited his exercise of first amendment rights. A three-judge district court granted the injunction,[78] and District Attorney Younger appealed, claiming that the court's action violated the Anti-Injunction Act.[79]

Justice Black, writing for the majority, found that Congress had always "manifested a desire to permit state courts to try state cases free from interference by federal courts."[80] Justice Black

67. Heath v. Redbud Hosp. Dist., 436 F. Supp. 766 (N.D. Cal. 1977).

68. *E.g.*, Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

69. *E.g.*, Birnbaum v. Tressel, 347 F.2d 86 (2d Cir. 1965).

70. *E.g.*, Endicott v. Van Petten, 330 F. Supp. 878 (D. Kan. 1971).

71. *See, e.g.*, Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557; Remington, *State Prisoner Litigation and the Federal Courts*, 1974 ARIZ. ST. L.J. 549.

72. *See infra* notes 87–116 and accompanying text.

73. Younger v. Harris, 401 U.S. 37 (1971); *see infra* notes 75–83 and accompanying text.

74. *See infra* notes 111–15 and accompanying text.

75. Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1192 (1977).

76. 401 U.S. 37 (1971).

77. CAL. PENAL CODE §§ 11400-11401 (West 1982). The Act makes it a felony to aid or advocate the commission of crimes as a means of effecting political change.

78. 281 F. Supp. 507 (C.D. Cal. 1968).

79. 28 U.S.C. § 2283 (1976). The Act reads: "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."

80. 401 U.S. at 43. For an exhaustive critique of the historical and precedential un-

found support for this congressional policy in "the notion of 'comity,' that is, a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[81] The idea of "Our Federalism," he said, requires sensitivity to a system in which "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[82]

The enduring legacy of *Younger* is its concern with "Our Federalism" and its conception that there are areas of state activity beyond the reach of federal intervention.[83] The "vague undefined notions of equity, comity and federalism"[84] articulated in *Younger* remain available to prevent federal intervention, despite subsequent findings that such restraint is unwarranted.[85] If the federalism concerns in *Younger* had been confined simply to federal intervention in state judicial proceedings, the decision's impact on section 1983 would be less drastic.[86]

But the *Younger* abstention doctrine has not been so confined. In *Juidice v. Vail*,[87] the Court extended *Younger's* noninterference doctrine to contempt proceedings in state court.[88] The most far-reaching extension of the *Younger* doctrine, one which threatens to erode section 1983 altogether, is the 1976 case of *Rizzo v. Goode*.[89]

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derpinnings of Justice Black's *Younger* analysis, see Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 866–96 (1974).

81. 401 U.S. at 44.

82. *Id.*

83. This notion survived the Court's subsequent holding in Mitchum v. Foster, 407 U.S. 225 (1972), that § 1983 is an exception to the Anti-Injunction Act. After affirming that § 1983 was intended to allow federal courts to intervene in state court proceedings, the *Mitchum* Court concluded: "[W]e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id.* at 243; *see* Wechsler, *supra* note 80, at 877–80.

84. Brennan, *supra* note ll, at 502.

85. *See supra* note 83.

86. *See* Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 290-300 (1976).

87. 430 U.S. 327 (1977).

88. The Court reasoned that since "[t]he contempt power lies at the core of the administration of a State's judicial system," it is a legitmate state activity with which the federal government cannot interfere. *Id.* at 335. Justice Brennan, in a vigorous dissent, accused the Court of "stripping all meaningful content from 42 U.S.C. § 1983." *Id.* at 342.

89. 423 U.S. 362 (1976).

In a class action brought on behalf of minority citizens and residents of Philadelphia, *Rizzo's* plaintiffs sought broad injunctive relief for widespread police misconduct.[90] The district court found repeated civil rights violations, including arrests without probable cause, use of excessive force to subdue suspects, and harassment of Philadelphia's minority residents.[91] Finding that existing complaint procedures were inadequate,[92] the district court ordered the police department to draw up new procedures.[93] The Third Circuit unanimously affirmed, noting that the district court's order was "limited and moderate in tone indicating its faith in the ability and willingness of the police department to investigate and correct the transgressions of its errant members. Despite the assertions of the defendants, the court is not thrusting itself into the day to day operations of the police department."[94] In the face of this unanimous affirmation—and over objections voiced by the Commonwealth of Pennsylvania in its *amicus curiae* brief[95]—the Supreme Court reversed.

The Court challenged the district court opinion on three grounds. First, the Court asserted that no "case or controversy" existed.[96] In seeking the overhaul of police disciplinary procedures, the plaintiffs had based their claim not upon fear of future police misconduct but upon fear of misconduct stemming from police perceptions of those disciplinary procedures.[97] Somehow finding significance in this distinction, the Court declared that the plaintiffs "lacked the requisite 'personal stake in the outcome.' "[98] Nevertheless, the Court ruled that the case or controversy issue

90. Council of Orgs. on Philadelphia Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

91. The district court's findings of fact with regard to police abuse occupied 23 pages of its opinion. 357 F. Supp. at 1294-1316.

92. For example, no records of civilian complaints were kept by the police department unless complaints were made in writing. No forms were made available for filing such complaints. When a written complaint was submitted, "the general practice . . . [was] not to record [it]." *Id.* at 1292.

93. *Id.* at 1321.

94. Goode v. Rizzo, 506 F.2d at 547–48 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

95. *See* Rizzo v. Goode, 423 U.S. 362, 384 (1976) (Blackmun, J., dissenting). To the extent that *Rizzo* is based on a concern for federalism, the reversal over the protests of Pennsylvania is particularly puzzling. The state's brief was a signal to the Court that Pennsylvania welcomed federal intervention, yet the Court held that concern for states' rights prohibited intervention. *See infra* notes 101–10 and accompanying text.

96. 423 U.S. at 371-73.

97. *Id.* at 372.

98. *Id.* at 372–73 (citations omitted).

was not before it on appeal, since the defendants had failed to contest the plaintiffs' standing as a class.[99]

Next, the Court discussed the merits of the plaintiffs' section 1983 case. Writing for the majority, Justice Rehnquist objected to the premise that section 1983 imposed a constitutional duty on the police to eliminate future misconduct. He also rejected the premise that if such a duty existed, a pattern of police misconduct would indicate a "default" of that duty justifying federal intervention.[100] "We have never subscribed to these amorphous propositions, and we decline to do so now."[101] The Court held that equitable relief could not be granted because "the responsible authorities had played no affirmative part in depriving any members of the [plaintiff class] of any constitutional rights."[102]

Had the Court stopped there, *Rizzo* would have represented a holding that the level of proof for section 1983 claims against local agencies is very high[103]—a restrictive[104] but not fatal reading of the statute. This part of the *Rizzo* decision would have provided a presumption of nonliability in cases brought against supervisory officials, and thus restricted federal intervention into local municipal affairs.[105]

But the *Rizzo* Court intended more than a mere examination of the state-of-mind requirement in section 1983 suits. Certiorari was granted to decide whether the district court's injunction was

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99. *Id.* at 373.

100. *Id.* at 376.

101. *Id.*

102. *Id.* at 377.

103. The Court seems to have established that institutional violations can be shown only by proving either that superior authorities issued explicit instructions directing subordinates to commit unconstitutional acts, or that there existed a pattern of unconstitutional behavior by subordinate officials of such magnitude, duration, and scope that one would have to be blind not to characterize it as official policy.

Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 756–57 (1979).

104. In dissenting from the Court's restrictive view of § 1983 liability, Justice Blackmun noted that *Monroe* had identified neglect in enforcing federal rights as one of the evils to be cured by § 1983. 423 U.S. at 384–85. He characterized the Court's holding that supervisory officials were exempt from § 1983 liability for the acts of subordinates as "cast[ing] aside reasoned conclusions to the contrary reached by the Courts of Appeals of 10 Circuits." *Id.* at 385.

105. Durchslag, *supra* note 103, at 757. The level of liability required in § 1983 suits had varied widely in the federal courts since *Monroe*. *See* Kirkpatrick, *supra* note 58, at 46–49. Some circuit courts have read *Rizzo* as a burden of proof decision, minimizing the later federalism discussion. *See* Parker v. Turner, 626 F.2d 1, 6 (6th Cir. 1980); Bolding v. Holshouser, 575 F.2d 461, 466 (4th Cir.), *cert. denied*, 439 U.S. 837 (1978).

"an unwarranted intrusion by the federal judiciary into the discretionary authority committed to [state and local officials] by state and local law to perform their official functions."[106] The Court's concern that the federal judiciary had inserted itself into what was essentially a local controversy[107] led it to consider not only the appropriateness of this particular intervention, but also whether the federal courts could ever intervene in suits of this nature.[108] Echoing the concerns expressed in its *Younger* decision,[109] the Court held that "principles of equity . . . militate against the grant of an injunction [against state officials] *except in the most extraordinary circumstances.*"[110]

The *Rizzo* decision applied the *Younger* abstention doctrine in a new setting—not only are state judicial proceedings protected from federal intervention,[111] but state and local executive functions as well.[112] Thus, the Court has attempted to insulate state actors from the very kind of federal remedy which the Act of 1871 was intended to provide.[113] *Rizzo* reversed forty years of federal law and revived concern for state integrity as a legitimate defense in section 1983 suits.[114] Particularly in the area of police misconduct, it seems that federal injunctive relief will be granted only in the most extreme circumstances, if at all.[115]

Since the federal courts seem unwilling to interfere with governmental functions like police protection[116] traditionally reserved to the states,[117] the task of monitoring police departments may

106. 423 U.S. at 366.

107. *Id.* at 371.

108. *Id.* at 373–81.

109. *See supra* notes 80–82 and accompanying text.

110. 423 U.S. at 379 (emphasis added).

111. *See supra* notes 84–88 and accompanying text.

112. *See* Weinberg, *supra* note 75, at 1195 ("By a *coup de main* the *Rizzo* Court transplanted the doctrine of *Younger v. Harris*, which since 1971 has blocked federal injunctions against state *proceedings*, to the much more complex and sensitive area of federal injuntions against state *officials*.") (citations omitted).

113. *See supra* notes 49–62 and accompanying text.

114. *See supra* notes 29–43 and accompanying text.

115. Weinberg, *supra* note 75, at 1220 ("It now seems to be the view of the majority that neither isolated nor systematic police misconduct can be an appropriate subject for federal judicial supervision.") (citations omitted).

116. *See* National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

117. *Id.* at 852. *But see* EEOC v. Wyoming, 103 S. Ct. 1054, 1060 (1983):

> The principle of immunity articulated in *National League of Cities* is a functional doctrine, however, whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence" not be lost through *undue* federal interference in certain core state functions.

have fallen to the states. If federalism means a genuine concern for state prerogatives and is not simply a device for denying section 1983 relief altogether, the states should take a more active supervisory role in the area of civil rights. One possible vehicle for such supervision is the parens patriae role of the states.

II. THE PARENS PATRIAE SUIT

The parens patriae suit grew out of the English common law prerogatives of the King,[118] who was charged with the duty to "take care of such of his subjects, as are legally unable . . . to take proper care of themselves and their property."[119] Through the Chancery courts, the King acted as the general guardian of persons mentally incapable of suing on their own behalf.[120] He also had general superintendence of all charities.[121] In the United States, it has long been recognized that these prerogative powers are reserved to the states as sovereigns.[122] While a state may not sue as parens patriae to shield its citizens from federal law,[123] it may sue to assure that the *benefits* of federal law are not denied them.[124] The federal government's role as "ultimate parens pa-

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(emphasis added) (citations omitted).

118. Blackstone defines "prerogative" as:

> That special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies . . . something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others; and not to those which he enjoys in common with any of his subjects; for if once any prerogative of the Crown could be held in common with the subject, it would cease to be a prerogative any longer.

J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 4 (London 1820 & photo. reprint 1978) (quoting 1 W. BLACKSTONE, COMMENTARIES *239). This distinction between suits by a sovereign as general representative of his subjects (or citizens) and suits brought on behalf of private persons who also may sue (which are not parens patriae suits) is critically important in analyzing parens patriae actions. *See infra* notes 130–42 and accompanying text.

119. J. CHITTY, *supra* note 118, at 155.

120. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972) ("For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics,' . . .") (quoting 3 W. BLACKSTONE, COMMENTARIES *47).

121. J. CHITTY, *supra* note 118, at 161-62.

122. Fontain v. Ravenel, 58 U.S. (17 How.) 369, 393 (1854).

123. Massachusetts v. Mellon, 262 U.S. 447, 485 (1923) ("It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."); *see* Massachusetts v. Laird, 400 U.S. 886 (1970) (state has no right to challenge the draft). Refusal of standing in these cases is based on the Supreme Court's reluctance to decide essentially political questions. 17 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4047, at 157 (1978).

124. Alfred L. Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607-08 (1982)

triae" has been invoked defensively when states sue to prevent enforcement of federal laws.[125]

In addition to suits brought under the modern equivalent of the King's prerogative, parens patriae standing has been expanded to allow states to sue in a "quasi-sovereign" capacity.[126] The interests of the state as quasi-sovereign are distinct from its proprietary interests.[127] Proprietary interests are those which a state possesses as landowner;[128] since the states have yielded the right to use diplomacy or force to resolve their disputes,[129] they are granted standing to resolve grievances under the original jurisdiction of the Supreme Court.[130]

When suing as parens patriae and invoking quasi-sovereign interests, the states are not merely protecting their rights as landowners.[131] The requirement of a quasi-sovereign interest is directly linked to the King's prerogative,[132] and is intended to insure that the states, as parens patriae, are not bringing actions which

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(Puerto Rico had standing to sue under Wagner-Peyser Act and Immigration and Nationality Act of 1952 to enjoin preferential hiring and treatment of foreign laborers vis-à-vis Puerto Ricans; state may "seek to assure its residents that they will have the full benefit of federal laws"); *see also* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (Court considered state's 15th amendment claim, though rejecting it on the merits).

125. *See* Missouri v. Illinois, 180 U.S. 208, 241 (1908). The United States may sue to protect its proprietary interests. *See, e.g.*, United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) (United States may sue to protect its interest in allegedly fraudulent land patents). This requires proof of a direct interest similar to that required of any other plaintiff.

In United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D.N.Y. 1970), the United States was granted standing to sue as parens patriae for injunctive relief to prevent widespread denial of due process in civil proceedings. The case has been widely criticized. *See, e.g.*, *Recent Cases*, 84 HARV. L. REV. 1912, 1930–39 (1971); *Recent Decisions*, 37 BROOKLYN L. REV. 426, 426–33 (1971). Most courts ignore the case, holding that specific statutory authorization is required to confer standing upon the United States as parens patriae plaintiff. *See, e.g*, United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977).

126. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

127. *Snapp*, 458 U.S. at 602.

128. *Id.*

129. *See* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 669 (1959).

130. U.S. CONST. art. III, § 2, provides: "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction." However, Congress may grant concurrent jurisdiction to the lower federal courts, and has done so in 28 U.S.C. § 1332(a) (1976) (diversity jurisdiction). In 28 U.S.C. § 1251(a)(l) (1976), the Supreme Court is given original jurisdiction of all suits between two or more states.

131. This distinction has not always been clear to the federal courts. *See, e.g.*, Pennsylvania v. National Ass'n. of Flood Insurers, 520 F.2d ll, 22 (3d Cir. 1975); Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945) (blurring the concepts of proprietary and quasi-sovereign interests).

132. *See supra* note 118.

present "a mere 'collectivity of private suits.' "[133] While no precise definition of quasi-sovereign interests has been formulated,[134] the Supreme Court's decisions indicate that the requirement is intended to insure that the state "has an interest apart from that of the individuals affected."[135] In *West Virginia v. Pfizer*,[136] the court listed the kinds of interests which have supported parens patriae standing: "the 'health, comfort, and welfare' of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state."[137] That private citizens may have standing does not bar a parens patriae suit if the state can show an interest separate from that of the private parties.[138] Only in cases where the state is pursuing the interests of individual citizens instead of general state interests is parens patriae standing inappropriate.[139]

By bearing in mind the requirement of general injury to state interests and the prohibition of state suits to vindicate purely pri-

133. 17 C. WRIGHT & A. MILLER, *supra* note 123, § 4047, at 156–57 (quoting Pennsylvania v. New Jersey, 426 U.S. 660, 666 (1976)).

134. The Court recognized this problem in *Snapp*, noting that the vagueness of the quasi-sovereign prerogatives of states presented Article III standing problems. 458 U.S. at 602. While describing quasi-sovereign interests as consisting of "a set of interests that the state has in the well-being of its populace," the Court could not provide a more precise definition; it concluded that "[t]he vagueness of this concept can only be filled in by turning to individual cases." *Id.*

135. *Id.* at 605 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923)).

136. 440 F.2d 1079 (2d Cir. 1971).

137. *Id.* at 1089.

138. In almost any case invoking the general welfare as the source of state standing, the welfare of private individuals is bound to be involved. Individual economic interests are implicated in each of the quasi-sovereign interests enumerated by the *Pfizer* court. *See supra* text accompanying note 137. The pollution of interstate waters, for example, affects the rights of private landowners. Merely because individual residents have a cause of action, the state's interest in "the well-being of its populace," *Snapp*, 458 U.S. at 602, is not suspended. Regardless of wrongs to individuals, the state's duty to the public continues. Thus, because private actions and parens patriae actions seek to vindicate fundamentally different interests (private interests on one hand and the public interest on the other), they are not mutually exclusive. *Cf. Snapp*, 458 U.S. at 605 (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) ("[T]he State, as representative of the public, has an interest apart from that of the individuals affected.")); *id.* at 604 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) ("[T]he State has an interest independent of and behind the titles of its citizens. . . .")). Although the existence of a private action does not bar parens patriae suits for injunctive relief, damage suits by the state as parens patriae have been barred where private actions are available, in order to avoid duplicative recoveries. Hawaii v. Standard Oil Co., 405 U.S. 251, 263–64 (1972) (denying parens patriae standing under the private treble-damage provision of the antitrust laws, 15 U.S.C. § 15 (1976)).

139. *See Snapp*, 458 U.S. at 607 ("In order to maintain [a parens patriae action], the state must articulate an interest apart from the interests of particular private parties. . . ."); 17 C. WRIGHT & A. MILLER, *supra* note 123, § 4047, at 156–57.

vate rights, the nature of quasi-sovereign interests becomes clear. In suing as parens patriae, the state must seek to enforce or vindicate a duty owed to its citizens.[140] If the state can show that a defendant's actions impair its ability to conduct its own affairs and to fulfill the legitimate expectations of its citizens toward state government,[141] parens patriae standing should be granted.[142]

III. *PENNSYLVANIA V. PORTER*

Until 1979, parens patriae standing had never been granted to a state under section 1983. To determine whether such standing is appropriate, it is necessary to analyze the types of interests which a state might seek to protect through such a suit. The case of *Pennsylvania v. Porter*,[143] where such standing was first granted, offers an opportunity to examine these interests.

A. *Factual Background*

Porter came before the Third Circuit as an appeal from an injunction granted by the United States District Court for the Western District of Pennsylvania.[144] The sweeping injunction[145] was granted to remedy the actions of a Millvale, Pennsylvania policeman (Frank L. Baranyai), and the inaction of the borough council, chief of police, and mayor.[146] The district court found that Baranyai repeatedly beat, harassed, illegally arrested, and illegally detained Millvale citizens and visitors, and retaliated against borough residents who complained to the police chief and borough council.[147] Despite convictions on one count of simple

140. *Cf.* J. CHITTY, *supra* note 118; text accompanying note 119 (defining King's prerogative).

141. *Cf.* Tribe, *Unravelling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1076 (1977) (reading *National League of Cities* as recognizing "the existence of protected expectations—of rights—to basic government services.").

142. Distinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.

Snapp, 458 U.S. at 607-08.

143. 480 F. Supp. 686 (W.D. Pa. 1979), *aff'd*, 659 F.2d 306 (3d Cir. 1981), *cert. denied*, 458 U.S. at 1121 (1982).

144. *Id.*

145. *See infra* note 150 and accompanying text.

146. 480 F. Supp. at 688 (findings 5-8).

147. *Id.* at 689-90 (findings 19-23).

assault and two counts of official oppression,[148] as well as numerous citizen complaints, Baranyai was never suspended, reprimanded, or disciplined by the other defendants.[149] The district court enjoined all defendants from further illegal behavior, and restricted Baranyai to desk duty.[150]

Porter's factual resemblance to *Rizzo* is striking;[151] thus, the defendants moved to dismiss, asserting that *Rizzo* prevented the court from interfering with police operations.[152] But the motion to dismiss was denied.[153] The district court distinguished *Rizzo*, since in *Porter* individual defendants were named and a definite policy of intimidation by police officials was shown.[154] The court also held that balancing "federal equitable power and state administration of its own laws" was unnecessary because Pennsylvania had intervened as a plaintiff.[155]

The defendants then moved to dismiss Pennsylvania as a plaintiff.[156] The district court first inquired whether Pennsylvania could obtain sufficient relief in state court.[157] After finding that "procedures under Pennsylvania law are so cumbersome and ineffectual in a civil rights case as to leave citizens without an adequate remedy at law,"[158] the court upheld the state's standing to sue as parens patriae.

Standing was the main issue addressed by the Third Circuit on appeal. Though certain aspects of the district court's injunction

148. *Id.* at 690 (findings 31–33).

149. *Id.* at 691 (findings 34, 37–42).

150. 659 F.2d 306, 312 n.7 (3d Cir. 1981).

151. *See supra* notes 90–91 and accompanying text.

152. 480 F. Supp. at 693–94.

153. *Id.* at 694.

154. *Id.* This aspect of the district court ruling addressed the state-of-mind concerns of the *Rizzo* Court. *See supra* notes 101–05 and accompanying text.

155. 480 F. Supp. at 694. This aspect of the ruling addressed the federalism concerns of *Rizzo*. *See supra* notes 106–15 and accompanying text.

156. 480 F. Supp. at 694–95.

157. *Id.* at 695. This inquiry appears to be based on the theory that a § 1983 plaintiff must exhaust state remedies before federal relief is available. Such an approach is questionable in light of recent Supreme Court decisions. *See, e.g.*, Ellis v. Dyson, 421 U.S. 426, 433–34 (1975); Allee v. Medrano, 416 U.S. 802, 814 (1974).

158. 480 F. Supp. at 701. Under PA. STAT. ANN. tit. 53, §§ 46190–46191 (Purdon Supp. 1983), Baranyai had the right to a hearing before a civil service commission before removal or reduction in rank, and could appeal the commission's ruling in the courts. Since the mayor, the council, and the police chief were named defendants, and were the very persons authorized to suspend or remove Baranyai, PA. STAT. ANN., tit. 53 §§ 46121, 46124 (Purdon 1966 & Supp. 1983), it is unlikely that any disciplinary action would have been taken without court intervention. Thus, the case falls within *Monroe's* category of § 1983 actions justified because state laws are inadequate. *See supra* text accompanying note 59.

were modified,[159] Pennsylvania's standing as parens patriae was affirmed in a majority opinion by Judge Gibbons.[160]

Three judges dissented in part, claiming "a complete and utter absence of allegations and proof to sustain parens patriae standing."[161]

B. *Analysis of "Sovereign Interests"*

Judge Gibbons' analysis of Pennsylvania's standing to sue was supported by four other judges. The first interest cited in support of Pennsylvania's standing was its interest in upholding the Constitution. "The fourteenth amendment is the supreme law of the land in all of Pennsylvania," wrote Judge Gibbons.[162] Violations of the fourteenth amendment by local officials interfere with the duty of state officials to uphold the Constitution, and undermine public confidence in state and local government institutions.[163] Judge Gibbons' opinion echoed Justice Brandeis's dissent in *Olmstead v. United States*:[164]

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[165]

The problem with basing parens patriae standing on the state's duty to uphold the law is that such a standard is limitless. It is one thing to say that government must obey the law; it is another to impose upon government a sovereign duty to intervene whenever and wherever the law is broken. Few would deny, for example, that the state has an interest in the free flow of commerce within its borders;[166] yet few would argue that such an interest supports

159. The Third Circuit found that the record did not support an injunction against the borough council, and that Baranyai had left the employment of the Millvale Police Department. The section of the injunction which enjoined all defendants from "further engaging in [unconstitutional] conduct . . . or participating in violations of this injunction by Baranyai" was struck down, as was part of the injunction which forbade employing Baranyai, insofar as the injunction was directed at the borough council. 659 F.2d at 338.

160. *Id.* at 319.

161. *Id.* at 334 (Garth, J., dissenting).

162. *Id.* at 315.

163. *Id.*

164. 277 U.S. 438 (1928).

165. *Id.* at 485.

166. In fact, this interest has been the basis for parens patriae standing in some cases. *See, e.g.*, Georgia v. Pennsylvania R.R., 324 U.S. 439, 450–52 (1945) (antitrust).

the right of the state to intervene in breach of contract actions between private individuals and municipal employees. Quasi-sovereign interests evolve from duties and obligations of states to their citizens.[167] In most cases, the state has met its duty when it provides a forum for dispute resolution; its intervention as plaintiff is unnecessary.

The second state interest supporting Pennsylvania's standing, according to Judge Gibbons, was its interest in protecting the general health, safety, and welfare of its citizens. Citing *Pennsylvania v. West Virginia*[168] to support this proposition,[169] Judge Gibbons analogized the state's duty to protect its citizens from physical abuse to its duty to protect them from toxic wastes or unsafe automobiles.[170] Basing parens patriae standing on this analogy is also problematic; the state's duty to ensure the health, safety, and welfare is, if anything, less evident than its duty to enforce the fourteenth amendment. Moreover, it is the role of the legislature, not the executive (or the attorney general), to define the general health, safety, and welfare of the state, and to enact legislation to enable the attorney general to protect those interests.

Judge Gibbons added that the state should not have to rely on the happenstance of private suits to vindicate its citizens' section 1983 rights.[171] This portion of the opinion was apparently based upon the theory that the state should act to supplement federal enforcement of the Civil Rights Acts.[172] The problem here, as before, is that absent a clear enabling statute, no duty of prosecution, and hence no parens patriae standing, can be shown. Section 1983 was not intended to grant a cause of action to states; instead it was intended to remedy state action in violation of federal law.[173]

The real basis for granting parens patriae standing in *Porter* was the existence of a statute which enabled—in fact required—the state attorney general to bring suit for violations of

167. *See supra* notes 119–38 and accompanying text.

168. 262 U.S. 553, 592 (1923).

169. 659 F.2d at 315 n.11.

170. *Id.* at 315.

171. *Id.*

172. *See* Note, *Federal Jurisdiction—Suits by a State as Parens Patriae*, 48 N.C.L. REV. 963, 969 (1970). In the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), Congress endorsed the concept of "private attorneys general" in enforcing the Civil Rights Acts. An amicus brief filed in *Porter* argued that Pennsylvania's standing was analogous to that of a "private attorney general." Amicus Curiae Brief of the American Civil Liberties Union at 11-12, *Porter*.

173. *See supra* notes 49–62 and accompanying text.

state laws.[174] The effect of such a statute is to create legitimate expectations that the state as sovereign will act to protect the interests of its citizens.[175] Without an enabling statute, no sovereign power is conferred;[176] upon passage of the statute, a duty arises.[177]

Judge Garth's dissent asserted that the availability of private relief foreclosed parens patriae standing for Pennsylvania,[178] a position unsupported by Supreme Court decisions.[179] While the dissent correctly noted that the state may not volunteer to litigate purely personal claims,[180] parens patriae standing is nevertheless appropriate where the state is acting in pursuance of a sovereign duty or to vindicate a sovereign interest.[181] The current law on parens patriae standing and individual interests is perhaps best stated in *Puerto Rico ex rel. Quiros v. Bramkamp*:[182]

> [A] state seeking to proceed as *parens patriae* need not demonstrate the inability of private persons to obtain relief if *parens patriae* standing is otherwise indicated. Rather "[t]he arguments in favor of allowing such standing become less compelling, as it becomes more feasible to achieve complete relief through suits by the parties actually aggrieved."[183]

Individual relief in *Porter* was highly unlikely in view of the federalism concerns expressed in *Rizzo*.[184]

Judge Garth also objected to parens patriae standing because the harm was not widespread.[185] Such standing would be appropriate

> [w]hen *all* members of a community, state or federal, are sub-

174. PA. STAT. ANN. tit. 71, § 294(b) (Purdon 1962) (repealed 1980) provided: "The Department of Justice shall have the power, *and its duty shall be*, with the approval of the Governor: . . . (b) To take such steps, and adopt such means, as may be reasonably necessary to enforce the laws of the Commonwealth." (Emphasis added.)

175. *See supra* note 141.

176. "The absolute sovereignty of the will of the majority is the essence of democratic government." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 246 (J.P. Mayer ed. 1969).

177. Courts criticizing United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D.N.Y. 1970), have held that the attorney general may not sue for due process and other violations *in the absence of enabling legislation*. *See, e.g.*, United States v. City of Philadelphia, 644 F.2d 187, 201–03 (3d Cir. 1980). Where such enabling legislation exists, the sovereign will of the people has been expressed and the executive must give effect to that expression.

178. 659 F.2d at 328–29.

179. *See supra* note 138 and accompanying text.

180. 659 F.2d at 328. *See supra* note 139 and accompanying text.

181. *Snapp*, 458 U.S. at 607-08.

182. 654 F.2d 212 (2d Cir. 1981).

183. *Id.* at 217 (quoting Pennsylvania *ex rel.* Shapp v. Kleppe, 533 F.2d 668, 675 n.42 (D.C. Cir. 1976)).

184. *See supra* notes 106–10 and accompanying text.

185. 659 F.2d at 334.

> ject to injury. . . . I hasten to note, however, that *in this case*, the harm alleged . . . was limited to an exceedingly small number of the Millvale community—no more than fifty individuals—a far cry from *all* members of the [state] community.[186]

While considerable support exists for a community-wide harm requirement,[187] an examination of the underlying policy behind the requirement discloses an intent to prevent state intervention in essentially private suits.[188]

The problem with requiring state-wide (or community-wide) harm is that it confuses the *extent* of harm to quasi-sovereign interests with the *nature* of the interests themselves.[189] The argument, if pursued, would result in an impermissible disparity in treatment between cities and towns in the same state. If, for example, the residents of Philadelphia (population 1,688,210)[190] allege infringement of their voting rights (or the rights of a large percentage of the population), sheer numbers would create a case

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186. *Id.* at 330 (emphasis in original).

187. *See, e.g.*, Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Son, 632 F.2d 365, 369 (4th Cir. 1980) ("The decisions have generally agreed that a substantial portion of the population must be affected in order that the sovereign may represent them in a *parens patriae* capacity."), *aff'd*, 458 U.S. 592 (1982).

188. The community-wide harm requirement is a standard which merely seeks to ensure that the state's quasi-sovereign interests are at stake. *See Snapp*, 632 F.2d at 369 (describing scope of harm as a *measure* of quasi-sovereign interests). Quasi-sovereign interests are invariably described in community-wide terms. *See, e.g., Snapp*, 458 U.S. at 602 ("a set of interests that the state has in the well-being of its *populace*") (emphasis added). They may not be invoked unless the "injury to the state's economy or the health and welfare of its citizens . . . [is] sufficiently severe and *generalized*." Pennsylvania *ex rel.* Shapp v. Kleppe, 533 F.2d 668, 675 (D.C. Cir. 1976) (emphasis added). But the community- wide harm requirement is overly strict. A majority of citizens need not be harmed before a state's quasi-sovereign interests are implicated. *Id.* Thus, the community-wide harm requirement acts as much to *define* quasi-sovereign interests as to determine their applicability to a given set of facts.

The Supreme Court in *Snapp* impliedly rejected the community-wide harm requirement when it declined "to draw any definitive limits on the proportion of the population of the state that must be adversely affected by the challenged behavior." 458 U.S. at 607. Instead, the Court offered a general test for parens patriae standing:

> One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.

Id. The State would only employ its "sovereign lawmaking powers" where a broad general interest was at stake, *see id.* at n.14; it would not use its legislative powers merely to resolve a private dispute. Thus, parens patriae standing is appropriate not strictly in the face of community-wide harm, but whenever a general public interest is threatened.

189. *See supra* note 188.

190. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION—PENNSYLVANIA 31 (1982).

for parens patriae standing under the community-wide harm analysis. But if all the residents of Millvale (population 5000)[191] were to allege the same violations, parens patriae standing would be denied, since they represent less than one percent of Pennsylvania's total population.[192] The state of Pennsylvania should have the same duty to protect the voting rights of Millvale residents as it does to the residents of Philadelphia. This duty is owed to its citizens as a sovereign duty, and the state may properly employ parens patriae standing to enforce that duty. The general *nature* of the interest at stake, not strictly the number of citizens affected, invokes the quasi-sovereign interests of the state.[193]

In summary, the *Porter* court properly granted parens patriae standing. The strongest argument for allowing such standing is the existence of legislation authorizing the attorney general to sue.[194] In the absence of legislation, parens patriae suits under section 1983 become more problematic.[195] While the nonavailability of private relief and the existence of community-wide harm are indicators of whether parens patriae suits are appropriate, the presence of these factors is not an absolute prerequisite to state standing in section 1983 actions.[196] The crucial requirement is that the state be seeking to enforce a duty owed its citizens.

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191. *Snapp*, 659 F.2d at 331.

192. *See* Note, *supra* note 129, at 677:

> [T]he policy of looking to the number of persons directly affected in determining the jurisdictional question is open to criticism. Analytically . . . the injury to a state cannot be realistically separated from the injury to its citizens. Whether jurisdiction will be taken in proprietary cases depends upon the extent of harm suffered by the state—in effect, the harm to the state's citizens generally, and not upon whether the specified individuals might also have been directly affected. For this reason the *parens patriae* question should turn on the extent of harm experienced by the entire state rather than the number of persons that appear to be directly affected.

193. *See supra* note 188.

194. *See supra* note 174 and accompanying text. The attorney general's authorization was repealed by the Commonwealth Attorney's Act of October 15, 1980, 71 PA. CONS. STAT. ANN. § 732-503 (Purdon Supp. 1983), which reorganized the attorney general's office as an independent department of the state, 71 PA. CONS. STAT. ANN. §§ 732-201 to -206 (Purdon Supp. 1983). The Third Circuit did not consider whether the repeal affected the attorney general's power to bring the action in *Porter*, perhaps because the suit predated passage of the Commonwealth Attorney's Act.

195. *See supra* text accompanying notes 132-33. Common law and longstanding state policies may, however, create legitimate expectations justifying parens patriae standing. *See supra* notes 141-42 and accompanying text.

196. *See Snapp*, 458 U.S. at 607-08.

IV. USING PARENS PATRIAE TO RESOLVE FEDERALISM CONCERNS

While state use of parens patriae in section 1983 suits may contradict the statute's original purpose,[197] its usefulness in resolving the federalism concerns of *Rizzo* makes such an action worth considering. Before exploring the benefits of parens patriae standing, however, it is necessary to identify the problems created by *Rizzo*.

One commentator, arguing that federalism principles have no bearing on suits to vindicate individual rights, has drawn the following distinction:

> The essence of the individual rights claim is that no organ of government, national or state, may undertake the challenged activity. In contrast, an alleged constitutional violation of the federalism principle concedes that one of the two levels of government has power to engage in the questioned conduct; the issue is simply whether the particular level that has acted is the constitutionally proper one.[198]

Addressing federalism issues in suits to vindicate individual rights creates two problems. First, it forces courts to resolve the issue of which level of government may wield power before reaching the issue of whether any government may wield such power.[199] Second, the issue of federal-state relations, an essentially political issue, is decided in a dispute solely between private individuals and local officials.[200] Both problems can be resolved by granting parens patriae standing in section 1983 suits.

The first problem—confronting a threshold federalism question before reaching the substantive issue of individual rights—does not arise when the state itself seeks the protection of a federal statute. By suing in federal court, the state is asserting that its interest is compatible with the exercise of federal power. The state as plaintiff neatly resolves the federalism issue by ceding to the federal government the power to afford relief. This frees the

197. Section 1983 was originally enacted as a private remedy aimed at curbing state civil rights violations; that a state might seek relief as a plaintiff under the statute would have been unimaginable to the Congress of 1871. *See supra* notes 23–27 and accompanying text.

198. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1555 (1977).

199. *Id.* at 1559–60.

200. *Cf.* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 22 (1941) (in such disputes, states' rights claims ironically stem from "a vested . . . interest in federal impotency rather than a postive privilege of the states themselves.").

court to reach the underlying issue of whether a substantive right has been breached.

Parens patriae standing will also resolve the second problem—the bestowal of a federalism defense upon nonsovereign litigants such as municipal corporations and their officials. When the state as sovereign invokes the federal government's power, its political subdivisions cannot complain of federal intervention, since they lack the attributes of sovereignty.[201] Thus, parens patriae standing facilitates resolution of the real issue in a section 1983 suit—whether a federally protected right has been infringed.

Nevertheless, dangers lurk in permitting parens patriae standing in section 1983 suits. First, there is the risk that civil rights enforcement will be subordinated to political expediency. State suits against municipal defendants, for example, could create an unduly adversarial relationship; to preserve political harmony, state executives might forego vigorous prosecution of section 1983 claims. Second, parens patriae suits offer no remedy for civil rights violations by the state as sovereign. In such cases, federalism concerns are properly implicated, and will continue to thwart individual causes of action.[202]

Thus, parens patriae standing is not a panacea. Its only function is to allow the underlying issues—the nature and extent of the rights protected by section 1983—to be litigated free from the complications of federalism.

The benefit of granting parens patriae standing in section 1983 suits is elimination of the federalism barrier through enhanced state involvement in fashioning remedies. One legitimate concern of those who invoke federalism principles as a limitation on section 1983 is federal encroachment on local government decisionmaking.[203] As plaintiff, the state stands in a position to suggest appropriate types of relief to the courts and to supervise implementation of court orders.[204]

This role would permit the state to protect its position in the

201. Reynolds v. Sims, 377 U.S. 533, 575 (1964) ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities."); *accord*, Community Communications Co. v. City of Boulder, 455 U.S. 40, 50–51 (1982).

202. *See* Rizzo v. Goode, 423 U.S. 362, 378–80 (1976); *supra* notes 106–10 and accompanying text.

203. This concern motivated *National League of Cities*. *See* 426 U.S. at 855.

204. Durchslag, *supra* note 103, at 761.

federal system.[205] Claims of federal encroachment would lose their force once the state is permitted to protect its political prerogatives by acting as advisor to the courts. This active state participation would lend legitimacy to federal court orders.[206]

V. CONCLUSION

Although Congress enacted what is now section 1983 to provide federal civil rights enforcement in the wake of state neglect,[207] early Supreme Court decisions severely restricted its availability.[208] In the 1940's, the Court modified its view of the fourteenth amendment as a threat to state autonomy as the Court shifted its priorities from "dual federalism" to the protection of individual liberties.[209] In *Monroe*, the Court extended its revised fourteenth amendment analysis to section 1983 suits, facilitating access to federal court for civil rights claimants.[210]

Ten years later, with federal dockets growing ever more crowded, the Court retreated from *Monroe* and resurrected the "dual federalism" principle.[211] Indicating that certain areas of state activity are beyond the reach of federal intervention, the Court in *Rizzo* warned the lower federal courts against entering local controversies except in the most extreme circumstances.[212] The unfortunate effect of the decision, whether or not intended, is to deny federal relief for most civil rights violations.[213]

This Note suggests that the federalism concerns which bar section 1983 relief may be accommodated by allowing state civil rights enforcement through parens patriae standing.[214] While such standing may contradict the statute's original purpose,[215] it furthers the purposes of section 1983 without compromising state autonomy. By invoking its role as parens patriae, the state acts to

205. *See Snapp*, 458 U.S. at 607-08 ("[T]he State has an interest in securing observance of the terms under which it participates in the federal system.").

206. By providing another avenue for state control over municipalities and local officials, parens patriae standing might also enlarge the states' power to check local civil rights abuses. In addition to legislative supervision by restricting local budgets and seeking state court injunctions, states would be able to enforce § 1983 in federal court.

207. *See supra* notes 23–27 and accompanying text.

208. *See supra* notes 28–43 and accompanying text.

209. *See supra* notes 46–54 and accompanying text.

210. *See supra* notes 55–70 and accompanying text.

211. *See supra* notes 71–86 and accompanying text.

212. *See supra* notes 89–110 and accompanying text.

213. *See supra* notes 111–15 and accompanying text.

214. *See supra* notes 197–201 & 203–05 and accompanying text.

215. *See supra* note 197 and accompanying text.

fulfill its citizens' legitimate expectations of government protection[216] while pursuing its own interest in checking local abuses of power.[217] Though not without its drawbacks,[218] parens patriae standing in section 1983 suits will reconcile the divergent interests of the states, individual citizens, and the federal government. It will provide individual civil rights protection while preserving state autonomy, and lend legitimacy to federal intervention.[219]

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216. *See supra* notes 118–42 and accompanying text.
217. *See supra* note 206.
218. *See supra* notes 199–200 & 202 and accompanying text.
219. See *supra* notes 203–06 and accompanying text.