1971

Federal Jurisdiction under the Civil Rights Act -
The Case against the Personal-Property Rights Distinction

Frank L. Tamulonis
FEDERAL JURISDICTION UNDER THE CIVIL RIGHTS ACT — THE CASE AGAINST THE PERSONAL-PROPERTY RIGHTS DISTINCTION

I. INTRODUCTION

In section one of the Civil Rights Act of 1871, Congress provided a substantive cause of action and conferred federal jurisdiction for every person who has been deprived, under color of state law, of any rights, privileges or immunities secured by the Constitution and laws of the United States. Section one of that Act was the common source of what is now 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3). In subsequent revisions of the Act, these provisions were separated, and the language of the jurisdictional section, which in its original form was merely a prophylactic jurisdictional grant, was expanded to closely parallel the language of the substantive provisions. Despite the fact that sections 1983 and 1343(3) are couched in virtually


   Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States . . . . 17 Stat. 13.

2. Deprivation of rights, privileges, and immunities secured by the Constitution or laws of the United States can occur in three ways — through the law itself, through enforcement of the law by state officials, or through state administrative action.


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

5. 28 U.S.C. § 1343(3) (1970), gives the federal courts original jurisdiction, without any requirement of amount in controversy, over any civil action authorized by law:

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

6. In the statutory revisions of 1874, the substantive and jurisdictional sections of the 1871 Act were separated. The jurisdictional section is now included in the Judicial Code. For subsequent legislative history of section one of the 1871 Civil Rights Act, see Comment, Section 1343 of Title 28 — Is The Application Of The "Civil Rights-Property Rights" Distinction To Deny Jurisdiction Still Viable?, 49 B.U.L. Rev. 377, 381–83 (1969).
the same language, the former has been construed in a manner as broad as its language, while the latter has been narrowly interpreted to apply only where the deprivation of the right asserted is “inherently incapable of valuation.” This is a statement of the famous personal–property rights distinction of Mr. Justice Stone in his separate opinion in *Hague v. CIO*.

Under the personal–property rights distinction of *Hague*, jurisdiction to hear a cause of action under section 1983 is conferred upon the federal courts by two provisions of the Judicial Code. Where the deprivation asserted is one of personal rights, the federal courts have jurisdiction under 28 U.S.C. § 1343(3) irrespective of the amount in controversy. On the other hand, where the deprivation asserted is one of property rights, jurisdiction is conferred by 28 U.S.C. § 1331. Under this section, jurisdiction in the federal courts arises where a federal question — one arising under the Constitution, laws or treaties of the United States — is involved, and where the amount in controversy exceeds $10,000. Since the language of both sections 1983 and 1343(3) is substantially the same, the question arises as to why deprivations of property rights under color of state law must be brought under section 1331, where the $10,000 jurisdictional amount must be alleged and proved.

The basic purpose of this Comment is to analyze the scope of section 1343(3). In so doing, it is essential to dissect the underlying rationale of the *Hague* formulation and examine its application in the federal courts. Furthermore, this Comment will propose as an alternative a broader construction of section 1343(3), based upon the scope of its substantive section, and sensitive to new concepts of property rights, changing relationships between government and its citizens, and particularly Judge Friendly’s conclusion in *Eisen v. Eastman* that the *Hague* formulation should be “generously construed.”

---

7. The significant difference between the language of the two sections is that section 1343(3) deals with the deprivation of any right secured by the Constitution or “any law providing for equal rights,” while section 1983 deals with the deprivation of any right secured by the “Constitution and laws.” For an analysis of the significance of this difference, see Comment, supra note 6, at 381-83.

8. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court interpreted this section of the 1871 Act as applying to all rights guaranteed by the fourteenth amendment.


11. Personal rights, in the context of this Comment, refer to rights which are inherently incapable of valuation. Examples of such rights are freedom of speech, freedom of assembly, and the right to vote.

12. 28 U.S.C. § 1331 (1970), provides:
   (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.


14. Id. at 566.
II. DEVELOPMENT OF THE PERSONAL-PROPERTY RIGHTS DISTINCTION

A. The Civil Rights Acts and Their Initial Interpretation:
1871-1939

In the post-Civil War Reconstruction era, Congress passed three constitutional amendments for the purpose of counteracting the discriminatory "Black Codes" enacted in the South. In order to enforce the provisions of these amendments, Congress passed into law the Civil Rights Acts, among them the Civil Rights Act of 1871 which contained section 1893 and its jurisdictional counterpart, section 1343(3). A series of subsequent Supreme Court decisions strictly construed the fourteenth amendment and these Civil Rights Acts, virtually emasculating their effect. Although sections 1893 and 1343(3) were left intact, they were essentially unused as a consequence of these decisions, the Supreme Court having discussed the scope of the latter provision only twice prior to the Hague case in 1939.

15. U.S. CONST. amends. XIII, XIV, XV. Section one of the fourteenth amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.


17. Congress was given the power to enforce each amendment by appropriate legislation. U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2.


19. The Civil Rights Act of April 20, 1871, 17 Stat. 13, was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." This act was designed to protect the rights and status of the newly emancipated Negro. The Act never attained fulfillment of its goals due to the fact that most of its provisions were either repealed or limited by court decision. See generally Gressman, supra note 16. 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970) are two of the very few significant provisions which managed to endure until the present day.

20. The most significant of these decisions limiting the fourteenth amendment were the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), which held that only national citizenship received protection from the privileges and immunities clause, and that the rights conferred by national citizenship did not include all rights conferred by state citizenship. Another significant decision was United States v. Cruikshank, 92 U.S. 542 (1875), which held that the provisions of the fourteenth amendment referred exclusively to state action and not to any action of private individuals.

21. See D. CURRIE, FEDERAL COURTS 427 (1968). The first case was Carter v. Greenhow, 114 U.S. 317 (1885), which held that no cause of action was stated under section 1893 by a complaint based upon the refusal of a collector to accept bond coupons in satisfaction of taxes. The Court stated:

The rights alleged to be violated are the right to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceedings to collect such taxes. ... These rights the plaintiff derives from the contract with the State contained in the act of March 28, 1879, and the bonds and coupons issued under its authority. ... [The constitutional prohibition of laws impairing the obligation of contracts], so far as it can be said to confer upon, or secure to, any person, any individual
In the initial interpretation of the scope of the "rights, privileges, and immunities" clause of section 1343(3), the Supreme Court indicated that the right must be one "directly conferred" by the Constitution, and additionally, in *Holt v. Indiana Manufacturing Co.*, held that the predecessor to section 1343(3) referred only to civil and not property rights.

This distinction remained effective for thirty-nine years until Mr. Justice Stone redefined the scope of section 1343(3) in his separate opinion in *Hague*.

**B. Hague v. CIO**

In *Hague*, suit was brought in a federal court alleging that city ordinances restricting the distribution of printed material and the holding of public meetings constituted a deprivation of the first amendment rights of freedom of speech and assembly. In deciding whether the district court had jurisdiction to redress this deprivation, five Justices filed separate opinions, none of which represented a majority of the Court. The lead opinion by Mr. Justice Roberts bypassed the jurisdictional issue entirely, holding that the reference in the statute to "any right, privilege, or immunity secured by the Constitution of the United States" was limited to the privileges and immunities of national rather than state citizenship.

---

rights, does so only indirectly and incidentally. . . . [t]he individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. *Id.* at 322. In the other case, a companion to *Carter*, the Court followed *Carter* and dismissed a similar complaint under the predecessor to section 1343(3). *Pleasants v. Greenhow*, 114 U.S. 323 (1885).

---

22. 176 U.S. 68 (1900). Plaintiffs brought a cause of action alleging that the imposition of state taxes upon federally granted patent rights violated the patent laws and the due process and equal protection clauses.

23. The case was dismissed for lack of jurisdiction under the predecessor to section 1343(3). The Court held:

Assuming that [these provisions] are still in force, it is sufficient to say that they refer to civil rights only and are inapplicable here.

If state legislation impairs the obligations of a contract, or deprives of property without due process of law, or denies the equal protection of the laws . . . remedies are found in the [general federal question statute.]

*Id.* at 72.


25. Mr. Justice Roberts delivered the lead opinion in which Mr. Justice Black concurred. A separate opinion on the jurisdictional question was filed by Mr. Justice Stone, with whom Mr. Justice Reed concurred. A separate concurring opinion was delivered by Chief Justice Hughes. Justices McReynolds and Butler dissented for reasons other than jurisdiction. Justices Douglas and Frankfurter took no part in the decision of the case.

26. 307 U.S. at 512-13. In so holding, Mr. Justice Roberts relied on the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) and United States v. Cruikshank, 92 U.S. 542 (1875). See note 20 supra. Justice Roberts reasoned that the reference in section 1343(3) to "any right, privilege, or immunity secured by the Constitution of the United States" only covered actions alleging violations of the clause in section 1 of the fourteenth amendment which states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Thus, he concluded that section 1343(3) was limited to the privileges and immunities of national citizenship. The interpretation was passed over by subsequent Supreme Court cases. See, *e.g.*, Baker v. Carr, 369 U.S. 186, 200 & n.19 (1962); Douglas v. City of Jeannette, 319 U.S. 157, 161–62 (1943). See generally D. CURRIE, supra note 21, at 427-28.
In his separate opinion, Mr. Justice Stone was faced with the
dilemma of assessing the effect of the 1875 Judiciary Act, which estab-
lished federal question jurisdiction subject to an amount in controversy re-
quirement — now 28 U.S.C. § 1331 — on the previously enacted section
1343(3). Justice Stone noted:

Since all of the suits thus authorized are suits arising under a
statute of the United States to redress deprivation of rights, privileges
and immunities secured by the Constitution, all are literally suits
"arising under the Constitution or laws of the United States". Thus, the problem with which Mr. Justice Stone thought he was faced
was that the broader language of section 1331 could be read to eclipse the
language of section 1343(3) and, in effect, require a specific amount in
controversy for all federal question cases. Justice Stone, however, found
this result to be undesirable in that there are many rights secured by
the Constitution which are not capable of monetary valuation. He felt
that reading section 1331 to override section 1343(3) would dictate that
suits could not be maintained for the deprivation of such basic rights as
freedom of speech or assembly. In order to reconcile what he considered
to be an apparent overlap, thus avoiding this result, Justice Stone found
that jurisdiction existed in the district court under section 1343(3), with-
out regard to the amount in controversy, "whenever the right or immunity
is one of personal liberty, not dependent for its existence upon the in-
fringement of property rights. . .".

It is submitted that Justice Stone's reconciliation of section 1331 and
section 1343(3), and his subsequent articulation of the personal–property
rights distinction, was unnecessary and therefore not justifiable. Section
1343(3) is a special federal question jurisdictional statute — separate
and distinct from the general federal question statute — and therefore
any action brought thereunder should be exempt from any jurisdictional
amount requirement under section 1331. It is further submitted that
section 1343(3) should extend to provide federal jurisdiction wherever
a substantial, non-frivolous cause of action is brought which satisfies the
language of the substantive section 1983. Nonetheless, the personal–
property rights distinction has endured to the present day and has been
given continued vitality by Circuit Judge Friendly in Eisen v. Eastman.

Furthermore, this interpretation was apparently rejected by all of the Justices in Monroe v. Pape, 365 U.S. 167 (1961). Mr. Justice Roberts' jurisdictional holding
was rejected by both the majority opinion, 365 U.S. at 170-71, and by the dissent,
365 U.S. at 205-06.

27. 18 Stat. 470 (1875).
28. 307 U.S. at 529.
29. Id. at 531.
30. For a listing of the special federal question statutes which provide federal
jurisdiction without the jurisdictional amount requirement, see C. Wright, Federal
31. 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970). It appears
that Judge Friendly's approach in Eisen has been implicitly adopted by the Third and
Since *Hague*, the concept of property rights has drastically changed, and many cases have arisen under section 1343(3) where the elements of both personal liberty and property rights are intertwined. As a result of these changes, the *Hague* test has been exceedingly difficult to apply and has produced inconsistent results not only among the circuit courts but in the Supreme Court as well.

**C. Application of the Hague Formula in Federal Courts:**

*1939–1971*

Abstractly stated, the *Hague* formula appeared to constitute a satisfactory, functional test for federal court jurisdiction under section 1343(3). Indeed, it has proved to be so in cases where the alleged deprivations clearly involve either personal or property rights. Federal courts, however, have experienced serious difficulty when attempting to apply the *Hague* formula to hybrid cases; i.e., cases where elements of personal rights and property rights are intermingled. Such hybrid cases generally involve rights which are personal in nature, but capable of pecuniary valuation as well. A brief history of the cases decided subsequent to *Hague* clearly indicates the difficulty in applying the test; a difficulty which has led to inconsistent results between and within the circuits.


33. See note 37 infra.

34. See note 119 infra.

35. Examples of such rights are licenses and public employment. When there has been a denial or revocation of a license or a discharge from public employment without due process, there is a deprivation of both personal rights and property rights.


37. On one hand, the *Hague* formulation has been recently affirmed and followed in several circuits: Weddle v. Director, 436 F.2d 343 (4th Cir. 1970); National Land & Inv. Co. v. Specter, 428 F.2d 91 (3d Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967); Gray v. Morgan, 371 F.2d 172 (7th Cir. 1966), cert. denied, 386 U.S. 1033 (1967); Ream v. Handley, 359 F.2d 728 (7th Cir. 1966); Fuller v. Volk, 351 F.2d 323 (3d Cir. 1965).

Several circuits, however, have taken a more "latitudinarian" view: Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969); Gomez v. State Employment Serv., 417 F.2d 569 (5th Cir. 1969); Berry v. Allen, 411 F.2d 1142 (6th Cir. 1969); Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Mansell v. Saunders, 372 F.2d 573 (5th Cir. 1967); Blume v. City of Deland, 358 F.2d 698 (5th Cir. 1966); McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Wall v. King, 206 F.2d 878 (1st Cir.), cert. denied, 346 U.S. 915 (1953); Cobb v. City of Maiden, 202 F.2d 701 (1st Cir. 1953); Sulzer v. Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947). But see Bussie v. Long, 383 F.2d 766 (5th Cir. 1967).

Mr. Justice Stone's formula was initially accepted and applied by the federal courts. These courts, when faced with a lack of the appropriate amount in controversy, found jurisdiction in deprivations which were exclusively of personal rights, and denied jurisdiction in deprivations which were exclusively of property rights. The Supreme Court has upheld jurisdiction under the Civil Rights Act in two early cases involving personal rights, but did not engage in any discussion of section 1343(3) or *Hague*. Additionally, the Court has found no problem in sustaining jurisdiction under section 1343(3) insofar as any subsequent cases have dealt with personal rights.

In the late 1940s and early 1950s, lower federal courts began to abandon the strict application of Mr. Justice Stone's distinction and found jurisdiction even where the right, although inherently capable of valuation, was personal. Such hybrid cases involved the denial of licenses, discharge from public employment, and denial of applications for permits. Later, several lower courts found jurisdiction even in cases which clearly should have been classified as property rights. Disregard for the *Hague* distinction has continued, and in several recent cases other federal courts have readily found jurisdiction in typical property rights situations.

41. See, e.g., McNeese v. Board of Educ., 373 U.S. 668 (1963) (right to attend an integrated school); Baker v. Carr, 369 U.S. 186 (1962) (right to have equal effect given to one's vote); Monroe v. Pape, 365 U.S. 167 (1961) (right to be free from unreasonable searches and arrests); Tenney v. Brandhove, 341 U.S. 367 (1951) (right to freedom of speech and of petition for redress of grievances); Smith v. Allwright, 321 U.S. 649 (1944) (right to vote and to have an equal effect given to one's vote); Douglas v. City of Jeannette, 319 U.S. 157 (1943) (right to distribute literature free from a municipal license tax).
42. See Wall v. King, 206 F.2d 878 (1st Cir.), cert. denied, 346 U.S. 915 (1953); Walton v. City of Atlanta, 181 F.2d 693 (5th Cir.), cert. denied, 340 U.S. 823 (1950); Glicker v. Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947).
43. See, e.g., Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947). This case involved a cause of action by a teacher against her principal for an unlawful discharge because of time spent as a federal juror. The case is often cited for the proposition that section 1343(3) has the same scope as section 1983.
44. See, e.g., Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946). In *Burt*, section 1343(3) jurisdiction was recognized in an architect's damage action against city building officials for purposeful discrimination in rejecting his application or imposing upon him unlawful conditions while not doing so to others.
45. Such cases involved impairment of contract: Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); Pyatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla. 1951); *aff'd* per curiam, 342 U.S. 936 (1952); and administration of estates: Bottone v. Lindsay, 170 F.2d 705 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949).
46. In Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964), the court upheld federal jurisdiction under section 1343(3) in a workmen's compensation case. In McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964), section 1343(3) jurisdiction was sustained in a case where title to land was contested. Also, in Blume v. City of Deland, 358 F.2d 698 (5th Cir. 1966), section 1343(3) jurisdiction was sustained in an
Although jurisdiction under section 1343(3) has consistently been sustained in certain cases, the courts have found difficulty in justifying their action in light of the Hague test. An attempt has been made to reconcile these results with Justice Stone's formula on the ground that "these [cases] can be viewed about equally as well as complaining of a deprivation of the personal liberty to pursue a calling of one's choice or of the profits or emoluments deriving therefrom." Such a rationale, however, does not appear to meet a literal reading of the Hague formulation, for such rights are capable of monetary valuation and they are dependent for their existence upon the infringement of property rights.

The most consistent and most defensible utilization of the personal-property rights distinction to deny section 1343(3) jurisdiction has been in challenges to state and local taxation. Dismissal of these cases is by property owners, alleging that in demolishing their buildings without giving valid notice, the city appropriated their property without due process of law.

47. The federal cases have found section 1343(3) jurisdiction in virtually all cases involving denials or revocations of licenses. See Gold v. Lomenzo, 425 F.2d 959 (2d Cir. 1970); Berry v. Allen, 411 F.2d 1142 (6th Cir. 1969); Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968); Mansell v. Saunders, 372 F.2d 573 (5th Cir. 1967); Wall v. King, 306 F.2d 892 (1st Cir.), cert. den., 346 U.S. 915 (1953); Walton v. City of Atlanta, 181 F.2d 693 (5th Cir.), cert. den., 340 U.S. 823 (1950).


49. Justice Stone's separate opinion outlined two tests that could be used. The first test states:

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

307 U.S. at 530.

The second test states:

The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under [the predecessor to section 1343(3)]. . .

307 U.S. at 531-32.

Judge Friendly adopted this latter approach in Eisen v. Eastman, 421 F.2d at 564.

justified on two grounds: initially, there is a federal statute denying jurisdiction to federal courts where a decision by such courts would interfere with a state's legitimate taxation function; secondly, in formulating his Hague distinction, Mr. Justice Stone relied on Holt v. Indiana Manufacturing Co., a case involving taxation which was dismissed for lack of jurisdiction under a predecessor to section 1343(3). Despite the soundness of these considerations, hybrid cases have posed problems in matters of state taxation. The only case which confronted and apparently repudiated the Hague distinction had the validity of a tax in issue. More recently, in Adams v. Colorado Springs, property owners and voters brought an action to enjoin the annexation of the unincorporated community in which they resided. In upholding section 1343(3) jurisdiction, the district judge refused to consider plaintiff's motives in bringing the action, finding that the plaintiff had been deprived of a substantial personal right — the right to equal treatment in the distribution of the franchise.

D. Eisen v. Eastman — The Hague Formulation

"Generously Construed"

In Eisen v. Eastman, a landlord challenged the constitutionality of New York City's rent control law, alleging jurisdiction under section

51. 28 U.S.C. § 1341 (1970). This section provides:
The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.


53. Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351 (N.D. Ill. 1965). In rejecting the Hague formulation, the district court maintained:

No difference in constitutional protection between property rights and human rights is expressed in the language of § 1343 itself, nor can any meaningful distinction be made or justified between rights "secured" by the Constitution and rights "arising under" or "protected" by the Constitution. Neither logic nor policy compels the conclusion that property rights are less deserving of protection under the Constitution and Civil Rights Act than are human freedoms. It appears, under current statutory interpretation, that the right of an individual or a corporation not to be deprived of property without due process of law is a "right * * * secured by the Constitution" within the meaning of § 1343(3).


55. Id. at 1402. The court stated:

In the instant case, plaintiffs allege the deprivation of a substantial personal right — the right to equal treatment in the distribution of the franchise. It is true that plaintiffs may stand to suffer increased taxation as a result of the annexation, but this is insufficient to preclude this suit under 28 U.S.C. § 1343...

Some courts have looked behind allegations that personal rights are involved and have dismissed suits brought under 28 U.S.C. § 1343(3) finding that plaintiff's motives were the protection of property rights [citations omitted]. The weighing of conflicting motives is difficult and in a case like the present is impractical. Where, as here, the face of the complaint alleges discrimination in the distribution of the franchise, jurisdiction may be predicated upon 28 U.S.C. § 1343, and no showing of jurisdictional amount is required.

1343(3). In affirming the dismissal of the complaint, Judge Friendly engaged in a detailed discussion of the Hague test. In his examination of Hague, Judge Friendly noted the absence of a majority opinion, the difficulty in applying the formulation, and the possibility that the formulation could bar challenges to the administration of a state's welfare plan in select cases. However, despite the infirmities, the Eisen court reluctantly upheld the Hague distinction. Judge Friendly found the Hague formulation an essentially reasonable construction which reconciled the broad “overlap” between sections 1331 and 1343(3). By way of dicta, he implied that abolition of the formula could conceivably result in an even greater burden on the federal courts. Moreover, he felt that to construe section 1343(3) to the full extent of its plain language would require that Carter, Holt, Hague and other cases be overruled, an act beyond the ken of a lower federal court.

In affirming the Hague formulation, the Eisen court rejected Mr. Justice Stone's more restrictive statement that the right must be inherently incapable of pecuniary valuation, and adopted in its stead a broader test — that section 1343(3) jurisdiction exists when the deprivation is of a right which is personal in nature, not based on infringement of property rights. Similarly, the Eisen court maintained that the Hague formula should be “generously construed.” Perhaps by this language Judge Friendly meant that all doubts would be resolved in favor of jurisdiction. However, since Eisen dealt with a pure property right, it gave little guidance to the district courts in the Second Circuit as to what constitutes “generous” construction.

The effect of Eisen became immediately apparent in several distinct areas. First, it was cited by other circuits in order to justify the continued application of the Hague formulation. Additionally, the Eisen holding that the Hague formulation should be “generously construed” was interpreted by the courts within the Second Circuit in a manner

57. Id. at 563.
58. Id. at 566 n. 10. The court stated:
   The chief disadvantage we perceive in adhering to Justice Stone's formula is that it apparently would bar from the federal courts actions alleging the unconstitutionality of a state's handling of a welfare plan where the plaintiff could neither show an infringement of personal liberty or violation of “any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States,” 28 U.S.C. § 1343(3), nor meet the $10,000 jurisdictional amount required by 28 U.S.C. § 1331.
59. Id.
60. Id. at 565.
61. Id. at 561 n.1.
62. Id. at 566 & n.9.
63. See note 49 supra.
64. 421 F.2d at 564.
65. Id. at 566.
66. In Eisen, plaintiff alleged only that he was deprived of pure property rights in the reduction of rent in his buildings.
consistent with prior decisions which held that the denial of a license or the discharge from public employment constituted personal rights within the meaning of the Hague formula. Finally, a problem has arisen due to the statement in Eisen that claims challenging the constitutionality of state welfare regulations and administrative action apparently would require the jurisdictional amount where plaintiff could not show infringement of a personal liberty.

Because this last problem contains the most important ramifications, some inconsistencies in the Eisen decision with respect to this area should be noted. For example, the Eisen court had some difficulty in reconciling the Supreme Court decision of King v. Smith with the Hague formula. In King, the Court sustained jurisdiction under section 1343(3) without discussion in a challenge to Alabama’s “substitute father” welfare regulation. Judge Friendly concluded that the case came within the Hague test, since the regulation “not merely caused economic loss to Mrs. Smith’s children, but also infringed their ‘liberty’ to grow up with financial aid for their subsistence and her ‘liberty’ to have Mr. Williams visit her on weekends.” Conversely, Judge Friendly cited McCall v. Shapiro, a case where welfare benefits were denied and jurisdiction rejected under section 1343(3). Additionally, in making its pronouncement that certain claims alleging the unconstitutionality of a state’s administration of its welfare plan could be barred from federal courts, the Eisen court cited Rosado v. Wyman. The Supreme Court, however, has subsequently reversed Rosado and, commenting on the jurisdictional issue, stated that

68. See, e.g., Gold v. Lomenzo, 425 F.2d 959 (2d Cir. 1970).
69. See Taylor v. Transit Authority, 309 F. Supp. 785 (E.D.N.Y. 1970), where the court stated: The Courts of this Circuit have been told to use Justice Stone’s Hague formulation, “generously construed” [citing Eisen]. In light of this instruction, it must be concluded that this Court has jurisdiction to decide the issues [of plaintiff’s removal from public employment].

Id. at 789. See also Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970).
72. Alabama participates in the Aid to Families with Dependent Children (AFDC) program, and in 1964, it passed its “substitute father” regulation. Under this rule, AFDC payments are denied to the children of a mother who “cohabits” in or outside her home with an able-bodied man, a “substitute father” being considered a non-absent parent within the federal statute. Mrs. Smith’s AFDC aid was terminated under this rule on the ground that a Mr. Williams came to her home on weekends and had sexual relations with her.
73. 421 F.2d at 564.
75. 421 F.2d at 566 n.10.
76. 414 F.2d 170 (2d Cir. 1969), rev’d, 397 U.S. 397 (1970). In Rosado, an action by New York welfare recipients challenged the constitutionality of the New York law relating to AFDC payments. The Second Circuit rejected the plaintiffs’ contentions: (1) that their claim under AFDC provisions creates a cause of action under 42 U.S.C. § 1983; and (2) that the Social Security Act is a law providing for equal rights.
once petitioner alleged the unconstitutionality of the state welfare statute, the district court was properly vested with jurisdiction under section 1343(3).\textsuperscript{78} Similarly, in \textit{Dandridge v. Williams}\textsuperscript{79} and \textit{Goldberg v. Kelly},\textsuperscript{80} the Court, without extended discussion of jurisdiction, decided challenges to the administration of state welfare programs on the merits.\textsuperscript{81} It is clear from these cases that the Supreme Court will ignore the \textit{Hague} formulation where \textit{substantial} property rights are at stake, and where it simply chooses to decide the merits. It is also evident that the Court views welfare benefits as being at least as essential as other more traditional entitlements flowing from the state.

Confronted with \textit{Eisen}'s perception concerning jurisdiction in some welfare cases, which is apparently inconsistent with results reached in recent Supreme Court decisions, the district courts have been unable to arrive at a uniform conclusion. One court has reasoned that the Supreme Court in \textit{Rosado} did not abandon sub silentio Mr. Justice Stone's test since no specific reference was made to \textit{Hague}.\textsuperscript{82} Thereafter, in applying the \textit{Hague} formula to a welfare case, this court found that the right to administration without constitutional infirmities is not a right of personal liberties where the plaintiff's subsistence is not at stake.\textsuperscript{83} Conversely,

\textsuperscript{78} Id. at 403. The Court stated:

[O]nce petitioners filed their complaint alleging the unconstitutionality of [a New York statute], the District Court . . . was properly seized of jurisdiction over the case under §§ 1343(3) and (4). . . . This is the broadest statement of the Supreme Court relating to section 1343(3) jurisdiction in welfare cases.

\textsuperscript{79} 397 U.S. 471 (1970).

\textsuperscript{80} 397 U.S. 254 (1970).

\textsuperscript{81} In \textit{Goldberg}, the Supreme Court stated:

It may be realistic today to regard welfare entitlements as more like “property” than a “gratuity.” Much of the existing wealth in this country takes the form of rights that do not fall within the traditional common-law concepts of property. It has been aptly noted that society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. . . . Many of the most important of these entitlements now flow from government. . . . Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

\textit{Id. at 262 n.8, citing Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also Gomez v. State Employment Serv., 417 F.2d 569, 579 n.37 (5th Cir. 1969); Reich, supra note 32.}


\textsuperscript{83} \textit{Id. at 418. See also Roberts v. Harder}, 320 F. Supp. 1313 (D. Conn. 1970).

The court stated:

Although administratively significant, payment of the rent by a welfare recipient herself is not relevant to the basic purpose of welfare assistance. Certainly the alleged right to receive shelter only in the form of direct money payments to the welfare recipient does not “involve the most basic economic needs of impoverished human beings,” \textit{Dandridge v. Williams}, 397 U.S. 471, 485 . . . (1970), or “the very means by which to live” or render the plaintiff’s situation “immediately desperate,” \textit{Goldberg v. Kelly}, 397 U.S. 254, 264 . . . (1970) (emphasis added).

\textit{Id. at 1316.}
in *Russo v. Shapiro*, another district court upheld jurisdiction under section 1343(3), even though the *Eisen* standards were not met, on the ground that the case before it could not be factually distinguished from *King v. Smith*. Similarly, a district court in the First Circuit sustained jurisdiction, finding that "welfare benefits are the staff of personal independence and security to those who receive them." Thus, although the *Eisen* decision solved some persistent problems in applying the *Hague* formulation, it created new difficulties of its own. In order to ascertain the continuing viability of the *Hague* formula, the arguments both in favor of and against its abolition should be analyzed at this juncture.

### III. The Viability of the Hague Formulation — Arguments Pro and Con

#### A. Arguments Favoring the Formulation

The major argument in favor of the validity of the *Hague* formula is that the "overlap" between sections 1331 and 1343(3) must be reconciled in some rational way. Mr. Justice Stone's distinction was based on the premise that the language of section 1331 could be read to completely envelop section 1343(3). In order to avoid the conclusion that a federal cause of action would not lie for some deprivations of personal liberty unless the jurisdictional amount requirement were met, Mr. Justice Stone created the personal–property rights distinction. As the distinction gained wide acceptance in some circuits, the courts, believing it to be the absolute limit of section 1343(3) jurisdiction, followed the *Hague* formulation on the ground that to do otherwise would lead to widespread circumvention of the amount in controversy requirement where property rights were involved.

It has been posited, however, that Mr. Justice

---

84. 309 F. Supp. 385 (D. Conn. 1969). In *Russo*, an action was brought by welfare mothers and their school age children against the state welfare commission seeking a declaration that the welfare director's directive limiting back-to-school allowances to $30 per child was unconstitutional. After jurisdiction was sustained, the action was dismissed on the merits.

85. The district court in *Russo* stated that the allegation of a denial of equal protection, merely because plaintiffs were limited in their amount of aid, would ordinarily be insufficient to secure federal jurisdiction under section 1343(3) since the deprivation was one of essential property rights. 309 F. Supp. at 390. Notwithstanding this feature in the alleged deprivation, the court found that there existed a sufficient factual analogy to *King* and upheld jurisdiction. *Id.* at 391.

86. Roberge v. Philbrook, 313 F. Supp. 608 (D. Vt. 1970). Recipients of welfare assistance under the state Aid to Needy Families with Children program (ANFC) brought an action challenging the program on the ground that the plan for ANFC distributions contained a standard of need calculation for recipients which did not reflect current necessities, while the same standard under another program did reflect current need. Therefore, plaintiffs claimed to have been denied equal protection of the laws.

87. *Id.* at 615–16.


Stone’s construction of section 1343(3) was merely to convince the Court of its continuing vitality, despite the sweeping language of section 1331. It appears as though he was simply setting the minimum areas of section 1343(3) jurisdiction by creating this distinction.

Other courts, accepting the Hague formulation as the outer limit of section 1343(3) jurisdiction, recognized that the 1875 Judiciary Act revolutionized the concept of the federal judicial system by establishing blanket federal question jurisdiction subject to the amount in controversy requirement. Thus, federal jurisdiction would exist without regard to the amount in controversy only where Congress has provided a specific exception. These courts have argued, however, that since no such exception was provided for alleged deprivations of property rights under section 1343(3), the jurisdictional amount is required in such cases. This rationale, however, has overlooked the fact that section 1343(3) is such an exception and that an amendment to section 1331 in 1911 provided that the requirement of a jurisdictional amount should not be construed to apply to cases within section 1343(3). Since Congress did in fact provide a specific exception for cases falling within section 1343(3), it was therefore unnecessary for Mr. Justice Stone to construe that provision as he did in order to “reconcile” it with the language of section 1331.

90. This argument is based on the fact that his primary concern was whether the jurisdictional amount need be alleged for the individual plaintiffs in Hague, rather than what were the outer boundaries of the section. Comment, supra note 6, at 383.
91. 18 Stat. 470 (1875).
92. See, e.g., McCall v. Shapiro, 416 F.2d 246, 249 (2d Cir. 1969).
94. See, e.g., McCall v. Shapiro, 416 F.2d 246, 249 (2d Cir. 1969). By implication, the court, citing Hague, seemed to concede that cases alleging deprivations of rights of personal liberty could be heard without meeting the amount in controversy requirement. Unless such cases could be brought under section 1343(3), they could not otherwise be heard under section 1331 since they are incapable of valuation.
95. Act of March 3, 1911, 36 Stat. 1087. Mr. Justice Stone was cognizant of this amendment, which further supports the proposition that he was not defining the outer limits of section 1343(3) jurisdiction. He stated:

The Act of March 3, 1911, 36 Stat. 1087, 1091, amended [§ 1331] of the Judicial Code so as to direct that “The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.” Thus, since 1873, the jurisdictional acts have contained two parallel provisions, one conferring jurisdiction on the federal courts, district or circuit, to entertain suits “arising under the Constitutional laws of the United States” in which the amount in controversy exceeds a specified value; the other, now [§ 1343(3)] of the Judicial Code, conferring jurisdiction on those courts of suits authorized by the Civil Rights Act of 1871, regardless of amount in controversy.

307 U.S. at 528-29 (separate opinion).

96. Although Justice Stone was cognizant of this amendment, it is somewhat unclear why, despite this amendment, he felt it necessary to argue that section 1343(3) was not abolished by section 1331. 307 U.S. at 529-30. It is submitted that the Hague formulation was intended to be a restatement of the Supreme Court construction of section 1343(3) prior to 1911. See Holt v. Indiana Mig. Co., 176 U.S. 68 (1900). The Hague formulation is, however, considerably more restrictive than the language in Holt.
A second argument, underlying the general acceptance of Justice Stone's distinction, is that claims alleging deprivations of property rights valued at under $10,000 should not be brought in federal courts. To construe this section otherwise, it is argued, would precipitate a flood of inconsequential litigation resulting in a substantial burden upon the federal courts. Although this argument is rarely articulated in cases dealing with the Hague distinction, it is nevertheless consistent with the traditional reluctance of the federal courts to construe legislation in a manner which could result in an increased volume of litigation.

A third argument posited in support of retention of the Hague formula is that permitting federal jurisdiction in cases alleging deprivation of property rights under color of state law would result in extensive federal supervision over the judicial, legislative and administrative functions carried on by the states. Such interference, it is argued, would tend to disturb the delicate balance between the state and federal courts. The maintenance of this balance is of primary concern in the area of jurisdiction, especially where, as in section 1343(3), state and federal jurisdiction is concurrent. To further protect this balance, the federal judicial doctrines of abstention and exhaustion of state remedies


In Eisen, Judge Friendly took note of this argument, and it may have been an underlying rationale in his reaffirmance of the Hague formulation. He maintained that:

Civil rights cases commenced in the district courts doubled from 1195 in the fiscal year 1967 to 2479 in the fiscal year 1969. Appeals likewise doubled, from 174 to 364. The figures do not permit a determination how many of these were what would have been regarded as "genuine" civil rights cases in an earlier day.

421 F.2d at 561-62 n.1 (citation omitted).


100. In actions brought under section 1983 and its jurisdictional counterpart section 1343(3), the power of a federal court to abstain from hearing and deciding such a case on the merits is closely restricted. Zwickler v. Koota, 389 U.S. 241, 248-49 (1967). It is now widely recognized that cases involving questions of civil rights are the least likely candidates for abstention. Holmes v. Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Wright v. McMann, 387 F.2d 519, 524-25 (2d Cir. 1967).


101. Ordinarily, under the exhaustion doctrine, the plaintiff is required to exhaust his adequate, available state remedies before proceeding into federal court. See generally Comment, Exhaustion of State Remedies Under the Civil Rights Act, 68 COLUM. L. REV. 1201 (1968).

In order to bring an action in a federal court alleging a violation by a state officer of a constitutionally protected right, the plaintiff must exhaust his state
have emerged. However, insofar as the effect of these doctrines has been restricted in cases involving the civil rights acts, it is submitted that the elimination of the personal-property rights distinction in such instances would not disturb this balance.

B. Arguments Against the Hague Formulation

Initially, it had been argued that the personal-property rights distinction was not an accurate construction of section 1343(3) in the light of the language, legislative history and spirit of the 1871 Act. The language of this jurisdictional provision — "any right . . . secured by the Constitution of the United States or by any Act of Congress providing for equal rights . . ." — does not readily provide a basis for this distinction. Furthermore, the legislative history of the 1871 Act is replete with references to the necessity of protecting the property of Negroes in the South during the tumultuous reconstruction period. Similarly, the spirit of the Act is manifested by its title: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes." The fourteenth amendment, of course, provides that no state shall deprive any person of life, liberty,

administrative remedies. He is not required, however, to exhaust his judicial remedies. See C. WRIGHT, supra note 100, § 49, at 186-88. Compare Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), with Bacon v. Rutland R.R., 232 U.S. 134 (1914). See also Metcalf v. Swank, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). Monroe apparently eliminated the exhaustion requirement without qualification in holding that under section 1983 the federal remedy is supplementary to the state, and the state remedy, if any, need not be first sought and refused before the federal one is invoked. 365 U.S. at 183. But see Metcalf v. Swank, 327 F.2d 131 (2d Cir. 1964), where the court stated: "relief is not to be denied under the Federal Civil Rights Statutes because of failure to exhaust available state remedies of either an administrative or a judicial nature." Id. at 135.

102. Comment, supra note 6, at 381-84. See also Laufer, supra note 36, at 551; Note, supra note 98, at 1289.


104. 17 Stat. 13 (1871). Senator Edmunds, Chairman of the Senate Committee on the Judiciary, has said:

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become part of the Constitution, viz., the Fourteenth Amendment.

and property, without due process of law. In construing the predecessor to section 1343(3) more narrowly than was necessary, Mr. Justice Stone appeared concerned not with the language or the legislative history of the original Act, but with its effect upon the later blanket federal jurisdictional grant. Thus, the validity of this restrictive interpretation by Justice Stone tends to depend upon a necessity to reconcile these two parallel jurisdictional provisions. However, as was noted previously, such a need did not actually exist since cases falling within section 1343(3) are specifically exempted from the requirements of section 1331.

A second argument maintains that since both section 1983 and its jurisdictional implementation have as their common source section one of the 1871 Civil Rights Act, and since both closely parallel each other in language, both provisions should be construed in like manner. The predecessor to section 1343(3) was enacted specifically to provide federal jurisdiction of suits to redress only those deprivations of rights secured by an act of Congress providing for equal rights, while section 1983 provides a remedy for deprivations of rights secured by the laws. This was done in some early cases. See, e.g., Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); Pleasants v. Greenhow, 114 U.S. 323 (1885); Carter v. Greenhow, 114 U.S. 317 (1885) (companion case to Pleasants).

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13 (1871), is the common source of both statutes. Eisen v. Eastman, 421 F.2d 560, 563 n.5 (1969), cert. denied, 400 U.S. 841 (1970). For the text of section one of the 1871 Act as originally enacted, see note 3 supra. For a history of the codification and revision of this provision, see Comment, supra note 6, at 381–84.

There is, however, a substantial split of authority as to whether a naked claim that there has been a deprivation of property resulting from a denial of due process or equal protection without more constitutes a section 1983 cause of action. For cases holding that section 1983 encompasses a denial of due process, see Nelson v. Hall, 368 F.2d 103 (9th Cir. 1966); Ortega v. Ragen, 216 F.2d 561 (7th Cir.), cert. denied, 349 U.S. 930 (1954); McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); Bottone v. Lindsley, 170 F.2d 705 (10th Cir.), cert. denied, 336 U.S. 944 (1948). For a case holding that section 1983 encompasses a denial of equal protection, see Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957). In Agnew, the court explicitly followed the concurring opinion of Mr. Justice Stone in Hague, where he stated:

> It will be observed that the cause of action, given by the section [1983] in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment.

307 U.S. at 526.

Other cases support the proposition that denial of due process and equal protection without more do not have substantive content of their own within section 1343(3). See, e.g., Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969); Roberge v.
note that one case holding that this section encompasses denials of this nature relied upon the following statement of Justice Stone in *Hague*:\textsuperscript{111}

It will be observed that the cause of action, given by the section [1983] in its original as well as its final form, extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clauses.\textsuperscript{112}

Furthermore, the Supreme Court itself has stated by way of dicta that the right to due process in the taking of property constitutes a *fundamental civil right*.\textsuperscript{113} Moreover, there is language in *Monroe* indicating that the rights to equal treatment and due process have status as independent civil rights.\textsuperscript{114} On this basis, it is submitted that since section 1983 has been interpreted to provide a remedy for the deprivation of rights secured by the fourteenth amendment,\textsuperscript{115} it necessarily follows that section 1343(3) be read to provide jurisdiction under section 1983 in cases of constitutional deprivation by state action. It is further submitted that it is only logical to extend this construction beyond fourteenth amendment deprivations so that *any* deprivation falling under section 1983 would be within the jurisdiction of federal courts by virtue of section 1343(3).

A third argument against the *Hague* formulation is that many valuable constitutional rights do not readily lend themselves to classification within the lines of Mr. Justice Stone's distinction. A practical application of the test, as previously indicated in Part II, is particularly difficult when elements of both property rights and rights of personal liberty are involved. This has proved to be especially true in recent years as a result

---

\textsuperscript{111} *Agnew v. City of Compton*, 239 F.2d 226, 230 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957).

\textsuperscript{112} *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court stated: It can not be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

\textsuperscript{113} *Id.* at 10 (dictum).


\textsuperscript{115} *Id.* See note 110 *supra*.
of the expanding concepts of due process and equal protection, personal and property rights. Because of these evolving concepts of personal and property rights, the courts, by necessity, have broad discretion in classifying such rights and applying the Hague distinction. It is not surprising, therefore, that divergent opinions exist not only between and within the circuit courts, but ostensibly within the Supreme Court as well. As a result of this difficulty in application, those courts which have followed Mr. Justice Stone's distinction have done so with reservations and, as indicated, it has been impossible to maintain uniformity in decisions concerning important questions of federal rights.

Another argument urged is that the personal-property rights distinction constitutes a bar to litigation in federal courts to a class of cases, clearly within the purview of section 1983, in which the federal courts have a special interest. Because there is concurrent jurisdiction between the state and federal courts in such cases, it is necessary to set forth the policy reasons underlying the proposition that the federal judiciary should generally be the first resort for the protection of federal rights. Initially, since the major function of the federal courts is to vindicate federal rights, these courts have therefore developed an expertise in the interpretation and application of federal law. Secondly, there is the necessity in cases involving federal rights for uniformity of decisions throughout the United States. Thirdly, there is the poten-

116. See notes 110 to 115 and accompanying text supra.
117. See note 86 supra.
118. See note 37 supra.
119. The Supreme Court has not relieved the confusion in applying the Hague distinction, since it has reached different conclusions in two classes of cases involving property rights. In the tax area, the Court has affirmed those cases denying section 1343(3) jurisdiction. See, e.g., Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala.), aff'd, 393 U.S. 9 (1968); Alterman Transp. Lines, Inc. v. Public Serv. Comm'n, 259 F. Supp. 486 (M.D. Tenn. 1966), aff'd, 386 U.S. 262 (1967); Abernathy v. Carpenter, 208 F. Supp. 793 (W.D. Mo. 1962), aff'd, 373 U.S. 241 (1963). However, in cases involving welfare rights, the Court has sustained jurisdiction under section 1343(3) without discussion. See, e.g., Rosado v. Wyman, 397 U.S. 397 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970). In these cases, the Court did not indicate whether the Hague distinction had been overruled or whether welfare rights had been classified as personal rights for the purpose of the distinction. For a discussion of this classification of cases, see Roberge v. Philbrook, 313 F. Supp. 608, 612-15 (1970).
120. This reluctance is indicated in National Land & Inv. Co. v. Specter, 428 F.2d 91, 99 (3d Cir. 1970), where the court stated: Without professing absolute certainty about the matter, we, too, are inclined toward the Stone view that the Civil Rights Act was not designed to support a cause of action, the "gist" of which is damage or injury to property.
Judge Friendly, in Eisen, indicated that the court reached its decision "with a good deal less than complete assurance, that Justice Stone's Hague formulation, generously construed, should continue to be regarded as the law of this circuit." 421 F.2d at 566.
122. ALI STUDY, supra note 121, at 164-65.
123. Id. at 165-67.
tial danger of misinterpretation and lack of proper regard for these rights by state courts, especially where state interests are in conflict.\textsuperscript{124} For these reasons, it is desirable that every case where a principal element is the application or interpretation of federal law, involving either personal or property rights, be heard in a federal forum, notwithstanding the amount in controversy.\textsuperscript{125}

Finally, where a claim for deprivation of a property right valued at less than $10,000 is alleged, the cause of action is currently dismissible for want of jurisdiction. In justifying this approach, it has been argued that jurisdiction is provided for the protection of the parties, and where only a small amount is involved, the parties generally will not be harmed if they are denied that protection and federal law is misapplied by the state courts.\textsuperscript{126} This rationale, however, completely bypasses the hardship on the poor where jurisdiction is denied under section 1343(3); deprivation of property to individuals of limited financial means can have as deleterious an effect as an infringement on a personal liberty.\textsuperscript{127} In classifying a denial of welfare payments as a deprivation of personal rights, one federal court\textsuperscript{128} has reasoned:

A loss of a few dollars a month to those on or below the poverty level creates real restraints on personal freedom and endangers the basic qualities of life without which liberty is little more than a concept.\textsuperscript{129}

In 1871, the purpose of the Civil Rights Act was to protect those who were unable to protect themselves from deprivations of rights under color of state action—the newly-emancipated Southern Negro.\textsuperscript{130} In the light of the changes in our society since then, it is ironic that those who are presently least able to protect themselves from such deprivations, namely, the poor, are denied such protection.

\section*{IV. Proposals for a New Approach}

The preceding arguments indicate that the personal–property rights distinction stands on questionable historical, pragmatic, and policy grounds. It is submitted that the \textit{Hague} formulation does not constitute an accurate interpretation of the 1871 jurisdictional provision, and is obsolete and should be abolished. If not abolished, the distinction should at least be applied in a manner which would appropriately cope with present day realities. There are two distinct approaches to achieve this result: one is judicial; the other is legislative.

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} at 167–68.
\item \textsuperscript{125} \textit{Wright, Federal Question Jurisdiction, 17 S. Car. L. Rev. 660, 661–63 (1965)}.
\item \textsuperscript{126} \textit{ALI Study, supra} note 121, at 173–74.
\item \textsuperscript{127} \textit{Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 357 (N.D. Ill. 1965)}.
\item \textsuperscript{128} \textit{Roberge v. Philbrook, 313 F. Supp. 608 (D. Vt. 1970)}.
\item \textsuperscript{129} \textit{Id.} at 613.
\item \textsuperscript{130} \textit{See note} 103 \textit{supra}.
\end{itemize}
A. The Judicial Approach

This approach consists of judicially abandoning the personal–property rights distinction and clarifying the scope and coverage of section 1343(3). Such action is clearly justified by the current split between those circuits following the Hague formulation and those taking a more latitudinarian view.\textsuperscript{131} Although there are recent circuit court decisions reaffirming the Stone formula, these have done so with reluctance. To do otherwise would require that Hague, Holt and other cases be overruled.\textsuperscript{132} Another justification for abandoning the distinction is the fact that the Supreme Court itself has clouded the issue with several incongruent decisions. On the one hand, it has apparently sanctioned denial of section 1343(3) jurisdiction in tax cases, while on the other, it has overruled denial of such jurisdiction where welfare issues were presented.\textsuperscript{133} It is submitted that the Supreme Court ought to place its imprimatur on a broader construction of section 1343(3) which would confer jurisdiction on the federal courts wherever a substantial, non-frivolous cause of action is alleged under section 1983.

Should the Supreme Court decline to expand the scope of section 1343(3) and continue to ignore the personal–property rights distinction where it sees fit, the lower courts must at least refine this distinction and provide guidelines in applying the test. The Eisen court attempted to do this by holding that Mr. Justice Stone's test, if "generously construed,"\textsuperscript{134} should continue to be applied. However, it is submitted that this court created further confusion by failing to define what it meant by this phrase.

A possible solution arises from Hague itself which manifested the fact that the personal–property rights distinction could not be mechanically applied with any reasonable expectation of success. In Hague, Mr. Justice Stone discussed Truax v. Rauch,\textsuperscript{135} a "hybrid" case involving the right to a livelihood and unmolested employment. By looking at the substance of that cause of action, he concluded that it concerned what was primarily a personal right.\textsuperscript{136} Since then, lower courts have traditionally viewed such hybrid cases as either personal or property rights and have utilized this "characterization of the substance approach" as an escape device to avoid harsh or untoward results.\textsuperscript{137} Such an approach is clearly result-oriented, and because it gives the judge broad discretion and flexibility in making his characterization, it has produced results which are not always consistent.

\textsuperscript{131} See note 37 supra.
\textsuperscript{132} Eisen v. Eastman, 421 F.2d 560, 566 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970). In this regard, Judge Friendly stated: "[T]hat would be too tall a piece of construction for an inferior federal court."
\textsuperscript{133} See note 119 supra.
\textsuperscript{134} 421 F.2d at 566.
\textsuperscript{135} 239 U.S. 33 (1915) (state statute restricting employers to hiring only a specified percentage of aliens held unconstitutional).
\textsuperscript{136} 307 U.S. at 531.
Notwithstanding this infirmity, under the generous construction approach, the federal courts would continue to characterize the substance of the cause of action. However, when any element of a personal right is involved, the cause of action would be resolved in favor of granting jurisdiction under section 1343(3). The courts would also consider whether the right, although alleged in pecuniary terms, so effects the person claiming the deprivation because of his status, that it constitutes constructive deprivation of a fundamental personal liberty. It is submitted that this is what the Eisen court meant, or at least ought to have meant, when it stated that the Hague formulation was still viable if "generously construed."

B. The Legislative Approach

The amount in controversy requirement has been criticized as being largely illusory and as having no significant impact on the burden imposed upon the federal courts. Relying on this rationale, the American Law Institute has proposed abandoning the amount in controversy in all cases arising under federal law. Under this proposal, section 1343(3) would be repealed, and claims under that section would be brought under the general federal question provision with no need to allege the jurisdictional amount.

In discussing section 1343(3) and the personal–property rights distinction, the American Law Institute noted that the amount in controversy requirement, as it applies to suits contesting the constitutionality of state statutes and where a deprivation of a property right is alleged, constitutes an undesirable limitation on federal court jurisdiction. Under this approach, Congress could enact this proposal whereupon all cases which would have ordinarily arisen under section 1343(3) would then be encompassed by the amended section 1331 with no need to allege any jurisdictional amount. Thus, it would no longer be necessary to reconcile

138. See p. 322 supra.
139. ALI Study, supra note 121, at 491 (Appendix D).
140. Id. at 516-17 (Appendix I).
141. Id. at 490. In regard to section 1343(3) and the Hague formulation, the ALI was of the opinion that:
This is a workable reconciliation of the two statutes, and insofar as it dispenses with a monetary requirement where suit is to redress a right that cannot be valued in terms of money, it is clearly desirable. Douglas v. City of Jeannette, 319 U.S. 157 (1943). Whether it is sound, however, to bar from federal courts cases involving constitutional issues because a property right of less than $10,000 is involved is more doubtful.
142. Id. at 24. The proposed section of Title 28 of the Judicial Code would read:
§ 1311.
General federal question jurisdiction; original jurisdiction; exclusive jurisdiction. (a) Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction without regard to amount in controversy of all civil actions, including those for a declaratory judgment, in which the initial pleading sets forth a substantial claim arising under the Constitution, laws, or treaties of the United States.
the "overlap" between the two formerly enacted sections — the primary and, it is submitted, erroneous justification for the Hague formulation.\footnote{148}

V. Conclusion

It can be seen that the two foregoing approaches to the problem exemplify a trend toward a more expansive granting of jurisdiction under section 1343(3). However, it is submitted that in the final analysis the Hague formulation should be abandoned for the following reasons: first, it represents a questionable construction of the outer limits of section 1343(3) jurisdiction and is inconsistent with the legislative history of the 1871 Act; second, its application has become increasingly difficult and its utility as a rule of thumb has diminished as the concepts of due process and constitutionally protected freedoms have expanded;\footnote{144} lastly, and perhaps most importantly, it tends to deprive certain individuals of a federal forum for controversies involving civil rights, the impact of which falls most heavily upon the poor since they are least likely to suffer losses sufficient to meet the jurisdictional amount in controversy requirement. So long as the personal-property rights distinction continues to exist, notwithstanding its most "generous" construction, these factors will continue to plague both court and claimant alike because too much is left to the discretion of the judge. True, Congress could take the initiative and enact a proposal such as the one set forth by the American Law Institute. However, since this represents a blanket proposal, it could potentially meet with opposition from legislators. In any event, one cannot be assured of its rapid passage. Therefore, it appears that the Supreme Court is the most plausible place to turn to find the solution. Not being bound by convention, the Court can make its decisions as broad or narrow as is necessary and thereby not hamper itself by any present necessity to abolish the amount in controversy requirement in all cases. The Court should react, as it has in cases involving other civil rights statutes,\footnote{145} and construe section 1343(3) to "accord it a sweep as broad as its language,"\footnote{146} more closely following the language of its substantive counterpart — section 1983. In so doing, the Court would abolish any further need for the personal-property rights distinction formulated by Justice Stone in Hague v. CIO.

Frank L. Tamulonis*