

Symposium on Federal Jurisdiction and Procedure

Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivation of Constitutional Rights

Ivan E. Bodensteiner

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Ivan E. Bodensteiner, *Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivation of Constitutional Rights*, 8 Val. U. L. Rev. 215 (1974).

Available at: <https://scholar.valpo.edu/vulr/vol8/iss2/2>

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



FEDERAL COURT JURISDICTION OF SUITS AGAINST "NON-PERSONS" FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS

IVAN E. BODENSTEINER*

INTRODUCTION

During the 1973 term the United States Supreme Court decided two cases restricting the scope of the term "person" as used in 42 U.S.C. § 1983.¹ In *Moor v. County of Alameda*² the plaintiffs brought an action for damages only³ against the County of Alameda, the sheriff and several deputies, claiming they were injured by the defendants during a disturbance at People's Park. Plaintiffs attempted to state a cause of action under 42 U.S.C. §§ 1983 and 1988.⁴ The Court, however, relying on *Monroe v. Pape*,⁵ concluded that § 1983 was "unavailable to these petitioners insofar as they seek to sue the County."⁶ Since *Moor* was an action for damages only, not equitable relief, the decision was not an extension of *Monroe* except to make it clear that a county should be treated the same as a municipality for § 1983 purposes. A month later, in *City*

* Assistant Professor of Law and Director of the Legal Aid Clinic, Valparaiso University School of Law.

1. 42 U.S.C. § 1983 provides:

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

2. 411 U.S. 693 (1973).

3. *Id.* at 695 n.2.

4. 42 U.S.C. § 1988 provides in part:

The jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

5. 365 U.S. 167 (1961).

6. 411 U.S. at 710.

of *Kenosha v. Bruno*,⁷ the Court had to face the question it had avoided in *Monroe* and *Moor*, i.e., whether a municipality is a "person" within the meaning of § 1983 for purposes of equitable relief.

The plaintiffs in *Bruno* brought civil rights actions for declaratory and injunctive relief against the cities of Racine and Kenosha, Wisconsin, alleging they had been denied liquor licenses by the cities in violation of the fourteenth amendment procedural due process provisions. A three-judge district court,⁸ relying on two Seventh Circuit cases holding that *Monroe* was limited to actions for damages,⁹ granted equitable relief. In reversing the district court, the Supreme Court stated:

Since, as the Court held in *Monroe*, "Congress did not undertake to bring municipal corporations within the ambit of" § 1983, *id.*, at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding it had jurisdiction of appellees' complaints under § 1343.¹⁰

After holding that "the District Court was therefore wrong in concluding it had jurisdiction of appellee's complaints under § 1343,"¹¹ the Court remanded the case for the district court to consider the "availability of § 1331 jurisdiction."¹² Justice Brennan, in a concurring opinion, stated:

[S]ince the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot

7. 412 U.S. 507 (1973).

8. *Misurelli v. City of Racine*, 346 F. Supp. 43 (E.D. Wis. 1972).

9. *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Adams v. City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961).

10. 412 U.S. at 513.

11. *Id.* 28 U.S.C. § 1343 reads as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

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

12. 412 U.S. at 514. 28 U.S.C. § 1331(a) reads as follows:

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.

be based on 28 U.S.C. § 1343. *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961). . . . If appellees can prove their allegation that at least \$10,000 is in controversy, then § 1331 jurisdiction is available, *Bell v. Hood*, 327 U.S. 678 (1946); cf. *Bivens v. Six Federal Narcotics Agents*, 403 U.S. 388 (1971), and they are clearly entitled to relief.¹³

Assuming for purposes of this article that the Court was correct in its holdings in *Moor* and *Bruno* that counties¹⁴ and municipalities are not "persons" within the meaning of § 1983 for purposes of either equitable relief or damages, it would appear that plaintiffs can still obtain both types of relief against counties and municipalities by stating a cause of action directly under the United States Constitution rather than § 1983. *Bruno* certainly supports this in its holding that the plaintiffs can obtain relief if the jurisdictional amount requirement of § 1331 is met. Indeed Justice Brennan, in concurring, cites *Bell v. Hood*¹⁵ and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹⁶ after asserting that § 1331 jurisdiction is available if there is \$10,000 in controversy,¹⁷ thereby clearly implying that a cause of action exists under the fourteenth amendment.

In view of the clear language of § 1343(3), the disturbing aspect of *Bruno* is the Court's conclusion that since the plaintiffs could not state a cause of action under § 1983, jurisdiction could not be based on § 1343. This is found in both the majority¹⁸ and concurring¹⁹ opinions but neither offers any explanation as to why jurisdiction cannot be based on § 1343. This conclusion, it is submitted, is erroneous since § 1343(3) expressly provides jurisdiction "to redress the deprivation, . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ." ²⁰

As discussed below, plaintiffs can, therefore, obtain both equi-

13. 412 U.S. at 516.

14. Even though *Bruno* concerned only a municipality, in light of *Moor* it is quite apparent that the result would be the same in a suit against a county.

15. 327 U.S. 678 (1946).

16. 403 U.S. 388 (1971).

17. 412 U.S. at 516.

18. *Id.* at 513.

19. *Id.* at 516.

20. 28 U.S.C. § 1343(3) (emphasis added).

table relief and damages from counties and municipalities,²¹ if they have a constitutional claim, by stating a cause of action directly under the Constitution and alleging jurisdiction under § 1343(3), and § 1331(a) where the jurisdictional amount is met. The fact that there may be jurisdiction under both § 1343(3) and § 1331(a) is not unusual and entirely consistent with the holding in *Lynch v. Household Finance Corp.*,²² where the Court concluded that § 1343 covered actions to secure property as well as personal rights even though § 1331 would often be available when property rights were at issue. In the following sections this approach will be examined by looking separately at three factors: stating a claim under the Constitution, jurisdiction under § 1331(a) and jurisdiction under § 1343(3). The purpose of this article is not to attempt an exhaustive analysis of any of these three factors, but rather to demonstrate that *Moor* and *Bruno* do not insulate counties and municipalities from suits for deprivation of constitutional rights and that *Bruno* is wrong in its suggestion that jurisdiction cannot be based on § 1343(3) when a cause of action is not stated under § 1983.

STATING A CAUSE OF ACTION DIRECTLY UNDER THE CONSTITUTION

Any discussion of this topic must begin with *Bell v. Hood*²³ which was a suit against agents of the Federal Bureau of Investigation seeking damages for violations of the fourth and fifth amendments because of alleged unconstitutional arrests, searches and seizures. The Supreme Court, while holding that a federal district court has jurisdiction under § 1331 of a claim for damages against federal officers for violation of constitutional rights, "reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for

21. Counties and municipalities are also subject to equitable relief and damages in actions brought pursuant to 42 U.S.C. §§ 1981 and 1982. Section 1982 would clearly cover actions challenging racial discrimination in housing, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and § 1981 would cover actions challenging racial discrimination in employment, *Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HAR. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972), by either a county or city. See also *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). In such actions jurisdiction would definitely be conferred by 28 U.S.C. § 1343(4). *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 412. Since the requisite state action would be present in a suit against a county or city, there is no reason to believe jurisdiction would not also be available under § 1343(3).

22. 405 U.S. 538 (1972).

23. 327 U.S. 678 (1946).

damages consequent upon his unconstitutional conduct."²⁴ In *Bell v. Hood* the Court was able to avoid the "cause of action" problem because the district court had dismissed for want of federal jurisdiction on the ground that the case did not arise under the Constitution or laws of the United States.²⁵ The Supreme Court held that the district court had jurisdiction to determine whether a cause of action had been stated²⁶ and remanded the case to the district court to make that determination.²⁷ Several years later the "cause of action" issue was again avoided by the Supreme Court in *Wheeldin v. Wheeler*²⁸ on the ground that the plaintiff, who claimed a violation of fourth amendment rights caused by the service of a subpoena to appear before the House Un-American Activities Committee,²⁹ did not allege facts constituting a violation of the fourth amendment.³⁰

Finally, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*³¹ the Court was squarely confronted with the question of whether or not a plaintiff could state a cause of action directly under the Constitution.³² The answer to this question is relevant to at least two very important areas of litigation. The first involves suits against federal officials who violate rights secured by the United States Constitution. Since, as Justice Black pointed out in his dissent in *Bivens*,³³ Congress has not passed anything comparable to § 1983 applicable to federal officials, there is no

24. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

25. *Bell v. Hood*, ____ F. Supp. ____ (S.D. Cal.), *aff'd* 150 F.2d 96 (9th Cir. 1945).

26. 327 U.S. at 682.

27. On remand the district court took jurisdiction and "[b]eing of the opinion that neither the Constitution nor the statutes of the United States give rise to any cause of action in favor of plaintiffs upon the facts alleged," granted the motion to dismiss for failure to state a claim upon which relief could be granted. *Bell v. Hood*, 71 F. Supp. 813, 820-21 (S.D. Cal. 1947).

28. 373 U.S. 647 (1963).

29. Plaintiff claimed abuse of process alleging that the defendant federal officer had no authority to issue the subpoena and that the mere service of the subpoena cost him his job. 373 U.S. at 648.

30. *Id.* at 649-50.

31. 403 U.S. 388 (1971).

32. Another way of framing the question is whether a remedy for violation of a federal right can be "created" or "implied" when the Constitution or statute establishing the federal right does not explicitly establish a remedy. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

33. 403 U.S. at 427.

remedy available in the federal courts unless it is possible to state a cause of action under the Constitution.³⁴ The second important area involves suits for violations of constitutional rights against entities, such as counties and municipalities, which the Supreme Court has held are not "persons" under § 1983.³⁵ Again, if § 1983 is not available, there is no remedy available in the federal courts unless it is possible to state a cause of action under the Constitution.³⁶ Suits falling into this category would include police-brutality actions,³⁷ actions challenging the sufficiency of a county public-defender system,³⁸ suits challenging a license denial,³⁹ suits alleging racial discrimination in police-hiring practices⁴⁰ and various other types of cases.⁴¹ Even though individual county and municipal officials can still be sued under § 1983, it is desirable to name the county or municipality as a defendant, particularly where the plaintiff seeks damages.

In *Bivens* the plaintiff sued several agents of the Federal Bureau of Narcotics claiming they had violated his fourth amendment rights in the process of making an arrest at his home. The district court dismissed the complaint for lack of subject matter jurisdiction under § 1331 and alternatively for failure to state a claim upon which relief can be granted.⁴² On appeal the Second Circuit held that under *Bell v. Hood* "it is clear that the district court had jurisdiction under § 1331 to determine whether this complaint,

34. The "cause of action" problem should not be confused with jurisdiction; *Bell v. Hood* clearly held that jurisdiction of such suits is available under § 1331(a) if the jurisdictional amount is met.

35. See *Moore v. County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

36. As we will see below, jurisdiction over this second type of suit is available under both § 1331(a) (if the jurisdictional amount is met) and § 1343(3).

37. *Ryan v. New Castle County*, 365 F. Supp. 124 (D. Del. 1973); *Boyd v. Adams*, 364 F. Supp. 1180 (N.D. Ill. 1973); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972); *Payne v. Mertens*, 343 F. Supp. 1355 (N.D. Cal. 1972).

38. *Noe v. County of Lake*, Civil No. 73 H 157 (N.D. Ind., Nov. 1, 1973).

39. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

40. *Smith v. City of Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973).

41. *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973) (action to enjoin further clearance of residential property in city); *Nyberg v. City of Virginia*, 361 F. Supp. 932 (D. Minn. 1973) (action to compel municipal hospital to provide facilities for abortions); *Veres v. County of Monroe*, 364 F. Supp. 1327 (E.D. Mich. 1973) (action alleging violation of civil rights in mental commitment proceeding).

42. 276 F. Supp. 12 (E.D.N.Y. 1967).

unambiguously founded upon the Fourth Amendment, states a good federal cause of action,"⁴³ but agreed that the complaint was properly dismissed for failure to state a claim.⁴⁴ Jurisdiction in *Bivens* was asserted under § 1331(a).⁴⁵ In reversing the dismissal for failure to state a cause of action, the Supreme Court stated:

The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); *Jacobs v. United States*, 290 U.S. 13, 16 (1933). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). *Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, supra*, pp. 390-395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.⁴⁶

Bivens, then, clearly establishes that a cause of action can be stated directly under the Constitution without resort to any act of Congress such as § 1983.⁴⁷ Any doubt about whether *Bivens* extends to amendments other than the fourth was removed by the Court in *Bruno* because that was an action based on the fourteenth amendment and the Court indicated there would be § 1331 jurisdiction over the city in that case if the amount in controversy exceeded \$10,000.⁴⁸ Since the Court in *Bruno* had already ruled out § 1983

43. 409 F.2d 718, 720 (2d Cir. 1969).

44. *Id.* at 720.

45. As Justice Harlan pointed out, plaintiff also attempted to state a claim under § 1983 with § 1343 jurisdiction, however, this route was not available because the defendants were federal officials. 403 U.S. at 398 n.1.

46. 403 U.S. at 397 (emphasis added).

47. This conclusion does not make § 1983 superfluous because it may still be the only basis of an action based solely on a federal statute, such as an action by a welfare recipient to enforce rights under the Social Security Act, 42 U.S.C. § 601, *et seq.* (1970).

48. The ruling in *Bruno* eliminates the need for a lengthy discussion on this issue; one could certainly argue that there is absolutely nothing in the Constitution which makes the fourth amendment different from others for cause of action purposes. *See, e.g., Butler v. U.S.*, 365 F. Supp. 1035 (D. Ha. 1973).

because the city was not a "person," the cause of action against the city would have to arise under the Constitution. Justice Brennan in his concurring opinion was more explicit regarding the cause of action because he cited *Bivens* when stating that if the amount in controversy exceeded \$10,000, "then § 1331 jurisdiction is available . . . and they are clearly entitled to relief."⁴⁹ Thus, by combining *Bivens* and *Bruno*, the only possible conclusion is that a cause of action can be stated directly under any of the amendments to the United States Constitution. This extension of *Bivens* to amendments other than the fourth had begun in the lower federal courts even prior to *Bruno*,⁵⁰ and has continued after *Bruno*.⁵¹

In addition to establishing that the *Bivens* rationale applies to actions under any of the amendments to the Constitution, *Bruno* conclusively establishes its application to actions against entities not considered "persons" under § 1983. *Bruno* did, of course, involve a municipality. Prior to *Bruno* at least two courts faced with claims against municipalities based on *Bivens* dismissed the municipalities; however, neither explicitly held that a claim could not be stated against a municipality directly under the Constitution. In *Payne v. Mertens*,⁵² an action against a city and several police officers seeking damages incident to a search of a home, the court dismissed the city because the "[p]laintiffs have cited no authority holding that an action for redress of Fourth Amendment rights can be advanced against a municipality for the acts of its agents."⁵³ The plaintiff in *Washington v. Brantley*⁵⁴ claimed violations of fifth,

49. 412 U.S. at 516.

50. See *Sullivan v. Murphy*, 478 F.2d 938, 960 (D.C. Cir. 1973), cert. denied, 94 S. Ct. 162 (1973) (fifth amendment); *Gomez v. Wilson*, 477 F.2d 411, 419 (D.C. Cir. 1973) (fifth amendment); *Moore v. Koelzer*, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); *Scheunemann v. United States*, 358 F. Supp. 875, 876 (N.D. Ill. 1973) (fifth amendment). Another court clearly suggested that if the plaintiff had chosen to state a *Bivens* type claim in his complaint, *Bivens* would apply to claims under both the fifth and eighth amendments. *James v. United States*, 358 F. Supp. 1381, 1386-87 (D.R.I. 1973). In this case the plaintiffs chose to proceed only under the Federal Tort Claims Act in an effort to recover damages resulting from the death of a member of the United States Navy while in the custody of a security guard.

51. *Butler v. U.S.*, 365 F. Supp. 1035 (D. Ha. 1973) (first and fifth amendments); *Amen v. City of Dearborn*, 363 F. Supp. 1267, 1270 (E.D. Mich. 1973) (fifth and fourteenth amendments); *Noe v. County of Lake*, Civil No. 73 H 157 (N.D. Ind., Nov. 1, 1973) (fifth, sixth, eighth and fourteenth amendments).

52. 343 F. Supp. 1355 (N.D. Cal. 1972).

53. *Id.* at 1358.

54. 352 F. Supp. 559 (M.D. Fla. 1972).

sixth, seventh, eighth and fourteenth amendment rights by a police officer and joined the city in an action for damages. After deciding that the city was not a person for purposes of § 1983, the court, while recognizing that *Bivens* applies to a violation of *any* constitutionally protected interest⁵⁵ and that *Bivens* is not limited to federal officials,⁵⁶ concluded that "there can be no liability of a municipality for damages under a *Bivens* theory when in legal contemplation a municipality stands in the place of the state."⁵⁷ Both *Mertens* and *Brantley* were decided prior to *Bruno*. At least two post-*Bruno* cases, *Amen v. City of Dearborn*⁵⁸ and *Noe v. County of Lake*,⁵⁹ have applied the *Bivens* rationale to a city and county respectively. *Amen* was an action to enjoin the clearance of certain residential areas of Dearborn, Michigan on the ground that it constituted a taking of property without due process of law. Without explanation, the court indicated that even though the city was not a "person" under § 1983, "the court would still have jurisdiction over the City under § 1331."⁶⁰ In *Noe* the plaintiffs sought damages and injunctive relief requiring the county to provide a constitutionally adequate public defender system to represent indigents appearing in the county criminal courts. The court refused to dismiss the county under *Moor* and *Bruno*, explicitly holding that a cause of action had been stated against the county pursuant to the rationale of *Bivens*.

Having established that a cause of action can be stated against a county or municipality under any amendment to the United States Constitution, the next problem is establishing jurisdiction in the federal district courts. It is important to keep in mind that cause of action and jurisdiction are two separate and distinct require-

55. However, in reaching this holding, the Court reasoned in such a manner that it may be argued, notwithstanding the *ratio decidendi* of the case, that *Bivens* recognizes a cause of action for damages for violation of *any* constitutionally protected interest.

Id. at 564.

56. However, this distinction [between federal officials and those acting under color of state law] is not persuasive since, for example, the Fourth Amendment is applicable to the states through the Fourteenth Amendment, (citations omitted), and the Fourteenth Amendment is itself directly, facially applicable to the states.

Id. at 564.

57. *Id.* at 565.

58. 363 F. Supp. 1267 (E.D. Mich. 1973).

59. Civil No. 73 H 157 (N.D. Ind., Nov. 1, 1973).

60. 363 F. Supp. at 1270.

ments, even though the two are often confused. Below we will look at two available sources of jurisdiction over such suits.

JURISDICTION UNDER 28 U.S.C. § 1331(a)

In view of *Bivens* and *Bruno* it is quite apparent that the federal courts have § 1331 jurisdiction over causes of action stated directly under the Constitution. That section reads:

(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.

As noted in *Bruno* by both the majority⁶¹ and Justice Brennan in concurring,⁶² the only possible question concerning § 1331(a) jurisdiction is whether or not the jurisdictional amount is met. In most litigation in which the plaintiff will want to state a cause of action directly under the Constitution, however, the matter at issue does not easily lend itself to traditional concepts of monetary valuation. For example, what is the monetary value of a particular constitutional right such as right to counsel, freedom from unreasonable searches or right to due process? Moreover, often the matter at issue is worth more than \$10,000 to the defendant but less than \$10,000 to each individual plaintiff.⁶³ Because of the obvious importance of the jurisdictional amount issue, we will briefly examine the approach courts have taken in some recent cases.⁶⁴

The Supreme Court, in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,⁶⁵ established the rule for federal courts to follow in deciding whether to dismiss a case for failure to meet the jurisdictional amount requirement.

61. 412 U.S. at 514.

62. *Id.* at 516.

63. See *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, ___ U.S. ___, 94 S.Ct. 505 (1973).

64. Other articles have dealt more extensively with the question of jurisdictional amount in injunctive and civil rights cases: See, e.g., Burke, *What Price Jurisdiction?: The Jurisdictional Amount in Injunctive Suits Against Federal Officials*, 24 HASTINGS L.J. 215 (1973); Strausberg, *The Jurisdictional Amount Requirement and Actions to Enjoin Deprivation of Constitutional Rights by Federal Officials: The Lynching Effect*, 17 How. L.J. 867 (1973); Comment, *A Federal Question Question: Does Priceless Mean Worthless?*, 14 St. Louis U.L.J. 268 (1969).

65. 303 U.S. 283 (1938).

The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. *It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.*⁶⁶

In establishing this "legal certainty" rule the Supreme Court did not, however, offer any guidelines to apply in evaluating certain rights where precise measurement is difficult nor did it determine whether one looks to the value to the plaintiff, cost to the defendant or the underlying economic basis of the complaint. These questions are particularly relevant in view of the Court's holdings in *Snyder v. Harris*⁶⁷ and *Zahn v. International Paper Co.*⁶⁸

Snyder v. Harris establishes that in class actions involving separate and distinct claims aggregation of claims is impermissible and if none of the named plaintiffs states a claim exceeding \$10,000, federal diversity jurisdiction cannot be established over the action. Most recently, in *Zahn v. International Paper Co.*, the Court held that even though the named plaintiffs each state separate and distinct claims exceeding \$10,000 in a diversity suit, a class action "is maintainable only when every member of the class, whether an appearing party or not, meets the \$10,000 jurisdictional amount requirement of 28 U.S.C. § 1332(a)."⁶⁹ After these two cases, particularly *Zahn*, it will no longer be possible to name only plaintiffs who can in good faith allege the \$10,000 jurisdictional amount requirement and obtain relief for all members of the class regardless of whether or not the members of the class can meet the jurisdictional amount requirement.⁷⁰

Lower federal courts have been employing at least three different approaches⁷¹ in civil rights type cases which tend to mitigate the

66. *Id.* at 288-89 (emphasis added).

67. 394 U.S. 332 (1969).

68. ____ U.S. ____, 94 S.Ct. 505 (1973).

69. 94 S.Ct. at 512 (dissenting opinion).

70. Even though *Zahn* involved a diversity action under § 1332, the Court makes it quite clear that the test established would apply to § 1331 actions also. 94 S.Ct. at 512 n.11.

71. This does not include the two exceptions to nonaggregation recognized by the Court in *Snyder*; i.e., 1) "in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and 2) in cases in which two or more plaintiffs unite

limitation imposed by *Snyder*.⁷² The first is illustrated by *Cortright v. Resor*,⁷³ an action brought by a member of the Armed Forces claiming his proposed transfer from New York to Texas had been cancelled as the result of his engaging in activities protesting United States involvement in Vietnam. A motion to dismiss for lack of the requisite amount in controversy was denied by Judge Weinstein who noted: "[Free] speech is almost by definition, worth more than \$10,000 so that the allegation of jurisdiction based upon § 1331 ought not to be subject to denial."⁷⁴ This approach not only recognizes that constitutional rights have monetary value,⁷⁵ but nearly assumes the right in question has value in excess of \$10,000 if so alleged by the plaintiff. Several courts have followed a middle course agreeing that constitutional rights have monetary value and allowing plaintiffs to allege and prove that the value of the particular right involved exceeds the required jurisdictional amount.⁷⁶ In courts following this course, plaintiffs alleging in excess of \$10,000 would always survive a motion to dismiss which is certainly the most crucial stage. Although the *Cortright v. Resor* presumption that constitutional rights exceed \$10,000 in value is the most favorable to plaintiffs, the middle course does enable plaintiffs to survive a motion to dismiss and appears to meet the "legal certainty" test.

Other cases have held that rights secured by federal statutory programs, although incapable of exact valuation, were of sufficient

to enforce a single title or right in which they have a common and undivided interest." 394 U.S. at 335. Regarding the second exception, *see also*, *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311 (1st Cir. 1969) and *Bass v. Rockefeller*, 331 F. Supp. 945 (S.D.N.Y. 1971).

72. As will become evident below, there is no reason to believe these approaches will not survive *Zahn* also.

73. 325 F. Supp. 797 (E.D.N.Y. 1971), *rev'd*, 447 F.2d 245 (2d Cir. 1971); the Second Circuit reversed on the merits but did not disturb the finding of § 1331 jurisdiction because it held jurisdiction was also conferred by 28 U.S.C. § 1361.

74. 325 F. Supp. at 810. *See also* *Murray v. Vaughn*, 300 F. Supp. 688, 695-96 (D.R.I. 1969).

75. Some courts have refused to accept the argument that constitutional rights are capable of monetary valuation; *see, e.g.*, *Goldsmith v. Sutherland*, 426 F.2d 1395, 1398 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970); *Giancana v. Johnson*, 335 F.2d 366, 369 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); *Boyd v. Clark*, 287 F. Supp. 561, 564 (S.D.N.Y. 1968), *aff'd without reaching § 1331 jurisdiction question*, 393 U.S. 316 (1969).

76. *Hartigh v. Latin*, 485 F.2d 1115, 1116-17 (3d Cir. 1973); *Sullivan v. Murphy*, 478 F.2d 938, 960 (D.C. Cir. 1973), *cert. denied*, 94 S.Ct. 162 (1973); *Gomez v. Wilson*, 477 F.2d 411, 421 n.56 (D.C. Cir. 1973); *Spock v. David*, 469 F.2d 1047, 1059 (3d Cir. 1972); *Klinkhammer v. Richardson*, 359 F. Supp. 67, 70 (D. Minn. 1973); *McCurdy v. Steele*, 353 F. Supp. 629, 637-38 (D. Utah 1973); *Fifth Avenue Peace Parade Comm. v. Hoover*, 327 F. Supp. 238, 241-42 (S.D.N.Y. 1971).

value to confer jurisdiction. In *Marquez v. Hardin*⁷⁷ the plaintiffs sought to enforce rights under the National School Lunch Act and the court held that the value of the right in question, the right to good health and full physical and mental development, exceeded \$10,000.⁷⁸ Similarly in *Martinez v. Richardson*,⁷⁹ a case involving rights under the federal medicare program,⁸⁰ the court decided the jurisdictional amount issue by posing the following inquiry:

How can it be said with a degree of legal certainty that less than \$10,000 is at issue in this controversy what with the astronomical costs of medical services and the particularly high cost of home medical service, if indeed such service can be obtained.⁸¹

The value of the right to good health was used as an alternate basis for finding jurisdictional amount in *Bass v. Rockefeller*.⁸² At issue in *Bass* was welfare recipients' right to medical benefits, and the court there stated: "Certainly the right to exist in society as relatively healthy people is worth more than \$10,000."⁸³

A second approach is to look to the value of the matter at stake in the litigation or the value of what the plaintiffs seek to protect in the litigation. For example, in *National Ass'n for Community Development v. Hodgson*,⁸⁴ the plaintiffs, four organizations representing unemployed persons, sought to enjoin the use of \$200,000 of Department of Labor funds by the defendants for lobbying purposes. Admittedly, no plaintiff was entitled to any of the money and there was no attempt to aggregate. Rather, plaintiffs argued that the underlying economic basis for the suit was \$200,000 and this was the proper measure of the jurisdictional amount under § 1331.⁸⁵ The court agreed. This same principle was advanced very forcefully by the court in *Comprehensive Group Health Serv. Bd. of Dir. v. Tem-*

77. 339 F. Supp. 1364 (N.D. Cal. 1969).

78. *Id.* at 1370. This case demonstrates the importance of characterizing the right in the broadest terms possible; as the court correctly pointed out, the denial of lunches is much more than a denial of several meals.

79. 472 F.2d 1121 (10th Cir. 1973).

80. Social Security Act, 42 U.S.C. § 1395, *et seq.* (1970).

81. 472 F.2d at 1125.

82. 331 F. Supp. 945 (S.D.N.Y. 1971).

83. *Id.* at 953 n.6.

84. 356 F. Supp. 1399 (D.D.C. 1973).

85. *Id.* at 1406-07.

ple U.:⁸⁶

[T]he law has long been that in injunction actions where the amount in controversy is a jurisdictional issue, the courts should look to the value of that which the plaintiffs are trying to protect. See *Glenwood Light & Power Co. v. Mutual Light Heat & Power Co.*, 239 U.S. 121, 36 S. Ct. 30, 60 L.Ed. 174 (1915); *John B. Kelly, Inc. v. Lehigh Nav. Coal Co.*, 151 F.2d 743 (3rd Cir. 1945), cert. denied, 327 U.S. 779, 66 S. Ct. 530, 90 L.Ed. 1007 (1946).⁸⁷

Looking to the underlying economic basis is particularly attractive in injunctive actions seeking to limit or direct the use of funds because the plaintiff very often will have either no claim to any of the funds or a claim of less than \$10,000.⁸⁸

Finally, a few courts have accepted a cost-to-the-defendant approach to the jurisdictional amount requirement. This is very similar to the "underlying economic basis" theory and in some cases the two clearly overlap. In *Tatum v. Laird*⁸⁹ the Court of Appeals for the District of Columbia set out cost to the defendant as one way of measuring jurisdictional amount. The plaintiffs in *Tatum* sought an order enjoining the operation of the army's civilian intelligence system and the production and destruction of all records pertaining to the intelligence system. The district court's dismissal of the complaint was reversed and the case remanded because the cost to the army of complying with a decree might exceed \$10,000. Although *Bass v. Rockefeller*⁹⁰ is better described as an example of a court allowing aggregation based on a finding of a common and undivided interest in a fund,⁹¹ the court there did point out that the cost to

86. 363 F. Supp. 1069 (E.D. Pa. 1973).

87. 363 F. Supp. at 1094. See also *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 367 F. Supp. 594, 598 (N.D. Ill. 1973), where the court looked to the value of the benefit to be conferred upon the plaintiff if he prevails.

88. See, e.g., *North City Area-Wide Council, Inc. v. Romney*, 469 F.2d 1326, 1328 n.1 (3d Cir. 1972); *Common Cause v. Democratic Nat. Comm.*, 333 F. Supp. 803, 807 (D.D.C. 1971).

89. 444 F.2d 947, 951 n.6 (D.C. Cir. 1971), *rev'd without reaching the question or jurisdiction, sub nom. Laird v. Tatum*, 408 U.S. 1 (1972).

90. 331 F. Supp. 945 (S.D.N.Y. 1971), *remanded with instructions to dismiss as moot*, 464 F.2d 1300 (2d Cir. 1971).

91. The court found the situation to be "legally indistinguishable from those cases heretofore discussed in which trust beneficiaries asserted a common and undivided interest in the proper administration and preservation of a single fund." *Id.* at 952.

the State if it could not implement a proposed cutback in Medicaid would exceed \$10,000.⁹² Looking to the viewpoint of the defendant is certainly not universally accepted. But, as Charles Wright points out, it would seem to be the desirable rule since the purpose of a jurisdictional amount requirement is "to keep trivial cases away from the court."⁹³ If this is the purpose of the jurisdictional amount requirement, certainly the obvious question is whether cases involving constitutional rights can ever be considered trivial? *Cortright v. Resor* suggests that the answer is no. Use of this approach is obviously most appropriate in injunctive actions where the benefit to the plaintiff is less than the loss to the defendant if the relief is granted.

While these approaches are enjoying some success in several lower courts, the Supreme Court has not yet squarely faced the issues raised by them. Certainly a plaintiff stating a claim under the Constitution will want to allege § 1331 jurisdiction; however, especially in view of *Zahn*,⁹⁴ it would be wise to also allege jurisdiction under § 1343 when suing defendants who have acted under color of state law.

JURISDICTION UNDER 28 U.S.C. § 1343(3)

Even though it is arguable under the theories and approaches discussed in the preceding section that there is § 1331 jurisdiction over most cases where a claim is stated directly under the Constitution, it is nevertheless extremely important that courts also recognize the availability of § 1343(3) jurisdiction over such cases.⁹⁵ Section 1343(3) states:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

92. 331 F. Supp. at 952. *Bass v. Rockefeller* is discussed in *Comprehensive Group Health Serv. Bd. of Dir. v. Temple U.*, 363 F. Supp. 1069 (E.D. Pa. 1973), and was applied as an alternate means of sustaining jurisdiction. *Id.* at 1095-96.

93. C. WRIGHT, *FEDERAL COURTS* § 34 at 119 (1970).

94. Even though *Zahn* involved § 1332, the majority made it clear that its rationale would apply equally to § 1331 cases. 94 S.Ct. at 512 n.11. The dissent questions this, 94 S.Ct. at 513 n.5, but there is little reason to believe the result from this Court would be different in a § 1331 case.

95. This is true because the jurisdictional amount arguments outlined above are not necessarily universally accepted and it is not yet known exactly how the lower courts will apply *Zahn* to class actions under § 1331.

.

(3) *To redress the deprivation*, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .⁹⁶

On its face this section clearly gives the federal district courts jurisdiction of an action against a county or municipality alleging a deprivation of a constitutional right and stating a claim directly under the Constitution. Nothing could be more clear or unambiguous. Why, then, the statement in *Bruno* that "[t]he District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343?"⁹⁷ Possibly the Court was confusing cause of action (§ 1983) and jurisdiction (§ 1343) or the Court may have been implying that because of the common origin of the two, § 1343 confers jurisdiction only where a cause of action has been stated under § 1983.⁹⁸ Whatever the reason for the Court's statement, there appears to be no justification or authority for the summary exclusion of § 1343 in such cases.

As the Supreme Court noted in *Lynch v. Household Finance Corp.*,⁹⁹ "[this court] has traced the origin of § 1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27." What is now § 1983 was modeled after § 2 of the 1866 Civil Rights

96. 28 U.S.C. § 1343 (1970) (emphasis added).

97. 412 U.S. at 513. Justice Brennan in concurring stated: "[n]evertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U.S.C. § 1343."

98. It has been suggested that § 1343(3) applies only to § 1983 actions because the words "authorized by law" as used in § 1343 refer to § 1983.

An analysis of federal power under section 1343(3) must begin with the words 'authorized by law.' These words refer to section 1983 and require that the plaintiff state a cause of action within the scope of that section as a prerequisite to establishing jurisdiction under section 1343(3).

Comment, *The Civil Rights Acts and Mr. Monroe*, 49 CALIF. L. REV. 145, 148 (1961). No authority is given for the statement and indeed it would seem quite obvious that the Constitution is "law", especially in view of the Supremacy Clause, Article VI, which refers to the Constitution and laws of the United States as the "supreme Law of the Land." (emphasis added).

The fact that a § 1983 action could be brought in a state court without relying on § 1343(3) for jurisdiction supports the argument that these two sections do not have to be used together. See *Testa v. Katt*, 330 U.S. 386 (1947).

99. 405 U.S. 538, 543 (1972).

Act,¹⁰⁰ which provided criminal penalties for violations of § 1 of the 1866 Civil Rights Act.¹⁰¹ It was originally enacted as § 1 of the Civil Rights Act of 1871¹⁰² and provided a civil remedy where the Act of 1866 provided criminal penalties. Both the substantive provision (now § 1983) and the jurisdictional provision (now § 1343(3)) appear in § 1 of the 1871 Act. In 1875 the substantive portion of § 1 became separated from the jurisdictional portion and appeared as § 1979 of the Revised Statutes.¹⁰³ The substantive provision "was enlarged to provide protection for rights, privileges or immunities secured by federal law"¹⁰⁴ as well as those secured by the Constitution. In 1934 it was codified as 8 U.S.C. § 43¹⁰⁵ and later became 42 U.S.C. § 1983, retaining the exact language of Rev. Stat. § 1979.

100. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (now 18 U.S.C. § 242 (1970)).

101. Section 1 of the 1866 Civil Rights Act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of April 1, 1866, ch. 31, § 1, 14 Stat. 27.

102. Section 1 of the 1871 Civil Rights Act reads as follows:

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, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

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

103. REV. STAT. § 1979 (1875).

104. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543-44 n.7 (1972).

105. Act of June 30, 1926, ch. 712, 44 Stat. 777.

What is now § 1343(3) also has its origin in the 1866 Civil Rights Act.¹⁰⁶ Section 3 of the 1866 Act gave the district and circuit courts jurisdiction over civil actions brought to enforce the provisions of § 1.¹⁰⁷ Similar language then appeared in § 1 of the Civil Rights Act of 1871.¹⁰⁸ In 1875 the Revised Statutes separated the jurisdictional from the substantive and contained two separate jurisdictional provisions, § 563(12)¹⁰⁹ concerning district courts, and § 629(16)¹¹⁰ concerning circuit courts.¹¹¹ The two were not identical¹¹² and in 1911, when Congress abolished the original jurisdiction of the circuit courts, the § 629(16) language survived as § 24(14) of the Judicial Code, 28 U.S.C. § 42(14),¹¹³ and finally became 28 U.S.C. § 1343(3) in 1948. The language has remained substantially the same since the adoption of § 629(16) in 1875.

This history of § 1983 and § 1343(3) makes it quite obvious that even though both appeared together in § 1 of the Act of 1871 and remained together for a period of four years until the adoption of the Revised Statutes in 1875, the concept of giving the federal courts original jurisdiction over suits to redress deprivations of rights identical to those secured by the fourteenth amendment (§ 1 of 1866 Act) predates the enactment of a statutorily created cause of action by four years. Chronologically the steps were as follows: (1) in 1866 Congress passed the predecessor of the fourteenth

106. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543-44 n.7 (1972). *See also* *Hague v. Committee for Industrial Organization*, 307 U.S. 476, 508 n.10 (1939).

107. Section 3 provides:

[T]he district courts of the United States . . . shall have . . . cognizance . . . concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act. . . .

Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27. Section 1 of the 1866 Act was the predecessor of the fourteenth amendment with essentially the same provisions; the fourteenth amendment was introduced the same year because "of doubts as to the power to enact the legislation, and because the policy thereby evidenced might be reversed by a subsequent Congress. . . ." *Hague v. Committee for Industrial Organization*, 307 U.S. 476, 509 (1939).

108. *See* note 102, *supra*.

109. REV. STAT. § 563(12) (1875).

110. REV. STAT. § 629(16) (1875).

111. Until 1911 there were district and circuit courts, both with original jurisdiction.

112. Section 563(12) provided jurisdiction over suits to redress deprivations of rights secured by the Constitution or by "any law of the United States," while § 629(16) covered rights secured by the Constitution or "any law providing for equal rights of citizens of the United States."

113. Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1092.

amendment, § 1 of the Civil Rights Act of 1866, and in § 3 of that Act gave district and circuit courts jurisdiction over suits to enforce the provisions of § 1; (2) in 1868 the fourteenth amendment became law; (3) in 1871 Congress passed the Act to enforce the fourteenth amendment and in § 1 provided a cause of action and continued the jurisdiction established in § 3 of the 1866 Act; and (4) in 1875 the cause of action provision and the jurisdictional provision were separated. Clearly, then, in 1866 a civil action could have been brought against a city or county pursuant to § 3 of the 1866 Civil Rights Act to enforce the provisions of § 1 of the 1866 Civil Rights Act. Nowhere is there any indication that Congress, when it enacted the jurisdictional provision of § 1 of the 1871 Civil Rights Act, intended to narrow the jurisdictional provision of 1866. Thus it would seem obvious that while § 1343(3) was intended to provide jurisdiction over *all* § 1983 actions, it was never intended *solely* for § 1983 actions.¹¹⁴ Certainly, at the very minimum, there is nothing in the history of § 1343(3) that would prevent the courts from giving it the meaning which appears clearly on its face—that it provides jurisdiction over all actions to redress the deprivation of constitutional rights where there is "state action." Just as the Court pointed out in *Lynch* that "[n]either the words of § 1343(3) nor the legislative history of that provision distinguish between personal and property rights,"¹¹⁵ so here, neither the words of § 1343(3) nor its legislative history require a restriction to § 1983 actions.

As noted by the Second Circuit in *Eisen v. Eastman*,¹¹⁶ § 1343(3) has received little attention from the Supreme Court. Usually it has been discussed in the context of questions concerning § 1983 and whether § 1343 provides jurisdiction for all § 1983 cases.¹¹⁷ The two cases which have discussed § 1343(3) most extensively, *Hague v. Committee for Industrial Organization*¹¹⁸ and *Lynch v. Household Finance Corp.*,¹¹⁹ did so in an attempt to resolve

114. There is some evidence that members of Congress, while considering § 1 of the 1871 Civil Rights Act, felt the cause of action provision was unnecessary because the provisions of the fourteenth amendment were self-executing. *Monroe v. Pape*, 365 U.S. 167, 198 (1961) (Harlan, J., concurring).

115. 405 U.S. at 543.

116. 421 F.2d 560, 563 (2d Cir. 1969), *cert. denied* 400 U.S. 841 (1970).

117. See, e.g., *Mitchum v. Foster*, 407 U.S. 225 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *King v. Smith*, 392 U.S. 309 (1968); *Monroe v. Pape*, 365 U.S. 167 (1961).

118. 307 U.S. 476 (1939).

119. 405 U.S. 538 (1972).

the question of whether § 1343(3) provides jurisdiction when the plaintiff is asserting property rights as opposed to personal rights. *Lynch* laid this dispute to rest by giving § 1343(3) the "meaning and sweep that [its] origins and [its] language dictate"¹²⁰ concluding that it provided jurisdiction over both types of cases—those asserting property rights as well as those asserting personal rights. This author is aware of no case in which the Supreme Court has given a satisfactory explanation for the summary conclusion in *Bruno* that § 1343(3) jurisdiction was not available because the municipality was not within the ambit of § 1983.

Given the clear language of § 1343(3), its history dating back to the 1866 Civil Rights Act and the absence of any authoritative Supreme Court explanation to the contrary, the unwarranted conclusion in *Bruno* regarding § 1343(3) is unfortunate to say the least. The opinion in *Bruno* makes it quite apparent that the Court did not consider the § 1343(3) jurisdictional issue independent from the § 1983 cause of action issue. This is not surprising because of the tendency to both confuse and combine consideration of jurisdiction with cause of action. It would, however, be extremely unfortunate to have an issue of such importance decided by default without any real consideration of the merits. For this reason, plaintiffs stating a cause of action directly under the Constitution would be well advised to assert § 1343(3) jurisdiction when the requisite state action is present. *Lynch* is certainly precedent for interpreting § 1343(3) consistent with its words¹²¹ and the broad purposes and concepts of its origins.¹²² Since the original grant of jurisdiction in 1866 covered everything within the scope of § 1 of the 1866 Civil Rights Act, the statute embodying what two years later became the fourteenth amendment, why now, contrary to the express language of § 1343(3), restrict jurisdiction to exclude suits seeking to redress deprivations within the scope of the fourteenth amendment? By presenting the issue squarely before the district courts in litigation against municipalities and counties, the question will eventually reach the Supreme Court in a posture that will require direct consideration on the merits.

120. *Id.* at 549.

121. *Id.* at 543.

122. *Id.* at 545, 549.

CONCLUSION

While conceding that *Monroe v. Pape*, *Moor v. County of Alameda* and *City of Kenosha v. Bruno* have made it more difficult to state a claim against municipalities and counties by eliminating § 1983 as the basis for such a cause of action, there remains a very definite alternate method of securing federal court jurisdiction over such entities when the plaintiff is alleging deprivation of constitutional rights. The first problem is to state a cause of action, absent § 1983. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* and *Bruno* supply the solution by establishing that a cause of action can be stated directly under the United States Constitution. Any question about whether the *Bivens* rationale was limited to the fourth amendment and federal officials was implicitly resolved by *Bruno* which involved the fourteenth amendment and action under color of state law. Thus a cause of action against federal or state officials and entities can be stated directly under any of the amendments to the United States Constitution.

After stating a cause of action, the next step is to establish jurisdiction. Here there are two possibilities. The general federal question provision, 28 U.S.C. § 1331, is always available if the plaintiff can satisfy the jurisdictional amount requirement. Even though cases involving constitutional rights do not easily lend themselves to traditional concepts of monetary valuation, lower courts have employed several different approaches to the jurisdictional amount problem. One approach is for the court to assume that constitutional rights are by definition worth more than \$10,000, or in the alternative, allow the plaintiff to survive a motion to dismiss and prove that the value of the particular right involved exceeds \$10,000. A second approach looks to whether the value of the matter at stake in the litigation exceeds \$10,000; if it does, the jurisdictional amount requirement is satisfied even though the plaintiff is entitled to very little money or no money at all. Finally, some courts have looked to the cost to the defendant of complying with the order sought by the plaintiffs. If the cost to the defendant could exceed \$10,000, the court has jurisdiction. These approaches mitigate the limitations imposed on class actions by *Snyder v. Harris* and *Zahn v. International Paper Co.*

The other possible source of jurisdiction is 28 U.S.C. § 1343(3). In *Bruno* the Court expressly found that § 1343(3) jurisdiction was

not available because the municipality was not a person under § 1983. This unexplained conclusion, however, seems to be contrary to the express language and purpose of § 1343(3). Although § 1983 and § 1343(3) are usually considered together, the fact remains that they are separate provisions with different functions. Federal court jurisdiction over civil rights actions dates back to § 3 of the 1866 Civil Rights Act. Section 1983 also has its origins in the Civil Rights Act of 1866, but did not appear as the civil counterpart of the 1866 Act until the Civil Rights Act of 1871. Thus the history of the two sections, 1983 and 1343(3), is not identical and there is nothing in the history of either which mandates the conclusion that § 1343(3) is limited to § 1983 actions. Rather, under *Lynch v. Household Finance Corp.*, § 1343(3) should be interpreted consistent with its words and the broad purposes and concepts of its origins. Section 1343(3) jurisdiction would, of course, impose no jurisdictional amount requirement and completely avoid the restrictions of *Snyder v. Harris* and *Zahn v. International Paper Co.* on class actions.

Federal court plaintiffs should, therefore, continue to name municipalities and counties as defendants in suits to redress deprivations of constitutional rights. Only by carefully pleading a cause of action directly under the Constitution and asserting § 1331 and § 1343(3) jurisdiction can it be assured that the reprieve provided municipalities and counties by *Monroe*, *Moor* and *Bruno* will be short-lived.