ORIGINAL

In the

Supreme Court of the United States

JULIA GONZALES, ETC., Petitioner,	)	
vs.	)	No. 77-5324
JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, et al., Respondents.	)	

Washington, D. C.
October, 2, 1978

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Petitioner :

vs :

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JAMES F. YOUNG, DIRECTOR, HUDSON COUNTY WELFARE BOARD, ET AL :

Respondents :

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Washington, D. C.

Monday, October 2, 1978

The above-entitled matter came on for argument at 1:45 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS E. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THEODORE A. GARDNER, ESQ., Hudson County Legal Services Corp., 628 Newark Avenue, Jersey City, New Jersey 07306; on behalf of the Petitioner

STEPHEN SKILLMAN, ESQ., Assistant Attorney General of New Jersey, Trenton, New Jersey; on behalf of Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-5324, Julia Gonzalez versus James F. Young, Director, Hudson County Welfare Board.

Mr. Gardner, you may proceed whenever you are ready.

ORAL ARGUMENT OF THEODORE A. GARDNER, ESQ.

ON BEHALF OF THE PETITIONER

MR. GARDNER: Thank you, Mr. Chief Justice.

May it please the court: Gonzalez versus Young was set in tandem argument with the Chapman case which immediately preceded it. I noted the Court's questions and I would like to address myself to them directly.

Mr. Justice Stevens and Mr. Justice White seem to have some difficulty with an expansive interpretion of the "and laws" provisions in 1983. I submit that that perception is contrary to what Congress is all about when it enacted 1983.

I submit further that that perception is contrary to the wording of the statute.

Let me go back for a minute if I may. In the period 1868 to 1871 the Federal government was faced with the situation where several states rights groups contended that notwithstanding the Federal Constitution, the ultimate legal authority to determine questions of Federal law reposed in the states. This was at a time when the Freedmen's Bureau Act was not being enforced.

As a result of that situation, President Grant went

before the Congress and effectively said, "The laws of the Federal government are not being enforced. Congress has to act pursuant to the Fourteenth Amendment." In regard to that, Congress enacted the Civil Rights Act of 1871 which is the precursor of 1983 and 1343.

It was in point of fact Congressional concern about non-enforcement of Federal rights by the direct inter-position of state power that in fact was the focus of the entire juridical mechanism that we now know as 1983 and 1343.

Viewed in that light, there is not one reason to interpret 1983 in a restrictive manner. In truth, to narrowize 1983 debases and banalizes the entire Congressional problem that was addressed in 1871.

We must keep in mind here that we are not asking this Court to interpose its judicial power between private parties nor between situations involving simply Federal law and non-$10,000 questions. What we are talking about here is the federalistic antagonism between states and the Federal government.

Let us for a minute just dwell on the facts of the --

QUESTION: Did the 1871 statute have the words "and laws" in it?

MR. GARDNER: The 1871 statute only used the word "constitution". It was not until the amendment in 1874 that the "and laws" was included. I do not believe that is significant

for the following reasons:

Number one, in 1871 Congress could only act pursuant to Section 5 of the Fourteenth Amendment. Accordingly, when Congress spoke in 1871 of rights arising under the Constitution, they were clearly referring both to the Constitution itself and to the implementing legislation.

Number two, the Constitution through the Fourteenth Amendment directed to the states of necessity incorporates the privileges and immunities of citizens of the United States. From as long ago as the Slaughterhouse cases it has been made clear that the rights of citizens of the United States spring both from the Constitution and from the Federal statute.

Number three, in point of fact, at the time that 1983 was enacted in 1871 solely with the Constitutional wording, it took cognizance of the nexation with the Supremacy Clause, which in fact spoke of the primacy of Federal law.

So what you had, Mr. Justice White, was in 1871 Congressional concern about both the Constitutional rights and rights under Federal statutes. And in point of fact, this was made clear several years later.

QUESTION: Rights under Federal statutes enforcing the Constitution.

MR. GARDNER: Those rights, Mr. Justice White, would include of necessity all rights under Federal law for the three reasons that I mentioned.

Number one, they would necessarily embrace the privileges and immunities of citizens of the United States.

Number two, they would embrace any substantive statutes that were passed by Congress pursuant to Section 5 of the Fourteenth Amendment.

And number three, they would embrace the Supremacy Clause, which itself embraces all Federal statutes. So I think --

QUESTION: Well, if you think that you do not need the "and laws" language, you have real trouble with Swift versus Wickham, do you not?

MR. GARDNER: I feel that we need the "and laws" language today. I feel that the lack of the "and laws" language for that three-year hiatus, that is, from 1871 to 1874 --

QUESTION: Under your view, you do not need it in your case?

MR. GARDNER: Yes, you do not need it if you read "and laws" as being redundant. I do not read it necessarily as being --

QUESTION: Well, do you not read it as being redundant?

MR. GARDNER: No, not necessarily. I do not think it is redundant. What I am saying is that Congress at that time included its concept of the Constitution -- both Constitution and laws. But I do not think it is redundant.

QUESTION: Well, do you rely on the "and laws" provision

in this case at all?

MR. GARDNER: Yes, I do. I rely on it to the extent that this case clearly deals with the Federal statutory right. And in point in fact, I did not plead any other Constitutional basis for jurisdiction and indeed that is precisely why the case --

QUESTION: Well, do you not plead the Supremacy Clause claim?

MR. GARDNER: Yes. The Supremacy Clause claim is of necessity included in the pleadings because it comes under 1343.

QUESTION: If you are right about your Supremacy Clause claim, what do you need "and laws" about?

MR. GARDNER: If I am right about my Supremacy Clause claim, I do not need the "and laws".

QUESTION: You have at least two alternative arguments?

MR. GARDNER: I have two alternative arguments.

And what I am saying is that there are three arguments.

QUESTION: But if you are right about the one, the "and laws" words are redundant?

MR. GARDNER: Yes, that is correct.

Mr. Justice Rehnquist, in answer to your question about Swift versus Wickham, I think that that case in fact supports our position.

In Swift you had the following problem: As a result of ex parte Young it was decided that the Federal courts could interpose themselves and enjoin actions by state officials. This gave rise to a political situation. Under what circumstances are the Federal courts to sit and enjoin state statutes?

In a sort of compromised situation, there was enacted a three-judge court procedure, which was enacted solely to allay the state's fears that a single Federal District Court judge would have the power to in a sense interpose himself into the mechanism of state government.

Now during the progeny, if you will, or the paradigm of that legislation, we find that the Court carved out several exceptions, and one of them was where there is a conflict between Federal law and State law, the Court basically said, "This is not so uniquely a state problem; that states would be all that concerned about it and would require us in a sense to convene a three-judge court. Rather this is by its very nature, i.e., by the existence of the Federal statute, a Federal matter."

And accordingly, the Court said there is probably not the same kind of state concern that would exist if we were dealing solely with an isolated state statute. Now I submit that that rationale --

QUESTION: I do not think I follow you there. You say that we are dealing only with a Federal statute, but you

are dealing with a Federal statute that is claimed to override or preempt a state statute.

MR. GARDNER: But what I am saying is that in the cases under Swift, the exception to the convocation of the three-judge court occurred when you had both the Federal statute and a state statute, as opposed to simply a state statute.

QUESTION: Do you not have a Federal statute and a state statute here?

MR. GARDNER: Yes, you do. And I am saying that there is not the same state concern in those situations. And that is precisely why this type of case is redressable and should be brought in Federal court.

What I am saying it does not upset at all the delicate balance of federalism. It is not as though the state court was in a sense interposing itself again in matters of pure state law. What you have is a subsuming Federal statute. And which body is most geared to, if you will -- has the most natural repository of experience with Federal law. It is the Federal courts.

I do not mind pointing out in terms of practicality that as a Welfare attorney, when you go into a state court and start asking at the outset for a Federal judge to interpret a Federal statute, you run into very many difficulties.

Let me just cite a few. For instance, in the State of New Jersey where I practice, you are often met with the

argument that Federal statute -- that must mean that HEW is an indispensible party. We do not have jurisdiction over a Federal agency. Go to Federal court. That is in the Atchison case which is in the Appendix to my brief.

QUESTION: Those state courts nor you could give the Federal court jurisdiction.

MR. GARDNER: No. I believe that Congress gave the Federal courts jurisdiction.

QUESTION: No. You are now saying that the State courts of New Jersey give us jurisdiction.

MR. GARDNER: If I was saying that, I did not mean to. What I was pointing out was that I think that the state courts, in point of fact, view this case in the same way that we are urging it should be viewed, and that is the repository for the interpretation of the Federal statute should be the Federal courts. That is all I was trying to say.

QUESTION: Now give me the decision of any court that said that?

MR. GARDNER: The name of the case is in the Appendix to my Petitioner's brief. It is Atchison versus the Departments of Institutions and Agencies of the State of New Jersey. And there was a conflict there urged between a Federal --

QUESTION: Is that a part of this case?

MR. GARDNER: No. It applies in terms of its rationale.

QUESTION: Why is it that a Federal judge can read English better than a State judge?

MR. GARDNER: I do not think that that is the point, Mr. Justice --

QUESTION: Well, is not the Constitution written amendments?

MR. GARDNER: Yes, it is, Mr. Justice Marshall. I think that though the Federal courts have a certain experience dealing with the Federal statutes, dealing with the Federal mechanisms. And I think that in terms of Article 3, Section 2 of the Constitution, the Federal judiciary power clearly extends to cases dealing both with the --

QUESTION: My point is that you say that Federal judges understand the Constitution better than State judges.

MR. GARDNER: I do not think I was saying that. I thirk what I was saying was that Federal judges are more experienced than learned -- with the interpretation of Federal statutes than are State judges.

I was saying that when the focal point --

QUESTION: Now do you also think that State judges are better abled to understand State laws than Federal judges?

MR. GARDNER: I do not think that --

QUESTION: Do you?

MR. GARDNER: No, I do not think that is the problem.

QUESTION: Because if you do, please join us on the

civil cases.

MR. GARDNER: I think that that is sort of like placing me in somewhat of a bind.

QUESTION: I am trying to get some reason other than your theory that a Federal judge knows more Federal law than a State judge.

MR. GARDNER: I think he does. I think a Federal judge does know more Federal law than a State judge.

QUESTION: The day that he arrives on the bench?

MR. GARDNER: No, certainly not. But I think that there is the experiential level. And I think that that is not -- that, of course, is not the juridical reason why this case should be decided in favor of the petitioners. I am merely stating that that is a practical reason --

QUESTION: Well, I am trying to urge you to get to that point.

MR. GARDNER: Yes. I think that, in point of fact, though the Federal judiciary is more equipped to interpret Federal statutes.

In addition to the New Jersey problem that I mentioned, you have a problem, for instance, in Mississippi where there is no right to go into State court on an appeal in one of these types of situations.

So what I am saying is that there really is not what might be termed a viable alternative to having a Federal

statute interpreted other than Federal court. And I would ask the Court that when they consider the language of this statute of 1983 and 1343 to please keep that in mind, and to not act as though well this is in some sense an academic exercise unrelated to the realities of the practice.

QUESTION: The Supremacy claim, you can always bring it here if it is turned down by the State courts.

MR. GARDNER: That would be the only circumstance on an appeal. That would be the only constitutional -- but as we argued in this case, we believe that the jurisdiction rests even apart from the Supremacy, Mr. Justice Rehnquist, and that would be through the interconnection of the "and laws" clause of 1983 and the Act of Congress providing for the protection of equal rights in the Act, of Congress providing for the protection of civil rights.

So I think there are three alternative ways in which jurisdiction could be interpreted here, and we feel that all three of them are valuable and it would not justify our clients to simply be forced to rely on each instance under an appeal on the Supremacy Clause from the State Supreme Court, from the Federal Supreme Court, particularly since you have in issue Federal statutes.

QUESTION: Well, I thought that you were saying really there is not any alternative if in some areas -- that you simply cannot your Federal question adjudicated unless you are allowed

to have the jurisdiction in the Federal court.

MR. GARDNER: Well, of course, at the present time it is very, very difficult because some of the arising under-cases have been interpreted to exclude for constitutional reasons the Supremacy Clause. And if in point in fact the only thing that we were left with in the constitutional sense, that is the only thing that would give us a clear right of action in terms of an appeal to the United States Supreme Court, was the Supremacy Clause issue, it could be difficult.

But certainly, if we were trying to appeal to the Supreme Court on the grounds of a conflict 1983, 1343 and laws, we have to go by cert, and as you can well imagine, that is very difficult. So again, I think that is a point.

QUESTION: Well, that is a burden that a lot of litigants have to take.

MR. GARDNER: No. I understand that. And there is certainly a mechanism and a reason for that, but I think that nowhere will you find that you have a situation where you have a direct Federal statute in conflict with the State statute, and having a Federal court say we really do not have jurisdiction over that.

I mean, I believe in the case prior Mr. Justice Stewart said, well, when we are dealing with the Federal statute, we are of necessity dealing with the question of Federal law.

This is not, I urge you to remember, a $10,000

consideration -- in the $10,000 area Congress said this: If you have a right under a Federal statute, Congress may decide to not give jurisdiction for reasons of judicial administration and the like.

That is a far different question than the delicate balance of federalism which is subsumed in our case and that is, has Congress ever indicated that it will not afford a citizen of the United States a cause of action and jurisdiction in Federal court when their depravation of the Federal right is by virtue of intervening State action.

I submit the Congress has not only not said that, but has said exactly the contrary, in 1983 and in 1343.

But let us move, if we will for a minute, to an argument that was touched on previously, 1343(4).

QUESTION: Are you through, Mr. Gardner, with your discussion of 1343(3)?

MR. GARDNER: I am not through, no.

QUESTION: I am not quite sure whether you take the position that the words "and laws" in 1983 are broader or co-extensive than the words "by any Act of Congress providing equal rights" in 1343(3)?

MR. GARDNER: I categorically take the position that they are broader and they have to be broader.

QUESTION: So there is a gap between the two?

MR. GARDNER: Well, I am saying that there is not a

gap if you read "providing for the protection of civil rights" as being co-extensive with 1983. I do not think that gap exists.

I certainly think that the words "and laws" in 1983 embrace all Federal statutes. Do you see that difference? So in saying "and laws" is broader than Act of Congress providing for the equal rights of citizens, I am not admitting to a gap between 1343 and 1983 at all.

QUESTION: Because you say that part of the function of 1983 is to provide for equal rights of citizens. And it has additional functions, and those additional functions may be the jurisdiction to perform those additional functions by subparagraph (3).

MR. GARDNER: Yes. It is somewhat the rationale that was accepted in both Bass and in Gomez, and again it tracks back to what Congress was all about in 1871 to twist protection of Federal statutes.

I mean, it seems to me if at the bottom of this case, if you accept the interpretation of my adversaries, you are of necessity arriving at a conclusion that somehow Congress back then was only interested in what might be called two statutes: the Enforcement Act of 1866 and the Civil Rights Act of, I believe, it was 1870, which dealt with this question of racial equality.

But I think again the history does not support that, because the Thirteenth Amendment dealt clearly with racial

equality, and the Thirteenth Amendment extended to private parties. It did not even need State action. It was to any, if you will -- any depravation of rights because of racial equality. Now if we were here today with the Thirteenth Amendment, okay, then I would not be able to argue the "and laws" embraced all Federal statutes.

But the game changed between 1866 and 1870 with the Fourteenth Amendment. And the problem there was that they wanted -- Congress wanted Federal rights to be vindicated. And what they said was we will limit the breadth of our juridical interests by saying it has got to be State action that interferes with you, but with that limit, there are no other limits vis-a-vis the nature of the rights.

QUESTION: So you would say that whenever you have a claim against the State agency or a person acting under State law in which you assert a Federal basis for your claim, you never need to inquire whether Congress intended to imply a private cause of action?

MR. GARDNER: Yes. And in point of fact, I disagree with previous counsel. I think that situation exists even in -- as applied situation. I think there would be just simply too much --

QUESTION: Well then, civil rights is just surplusage?

MR. GARDNER: Mr. Justice Marshall, civil rights is in surplusage in 1343(3) and (4) because 1983 is the quintescence,

if you will, of the Civil Rights Act. That is why it is not surplusage.

QUESTION: Then why is it there? You say you do not need it.

MR. GARDNER: Yes, you still need 1983. You never need subparagraph (4) because there is jurisdiction under subparagraph (3). Yes, that is a wholly different issue. If you can view it is such an add-on jurisdictional conduit, but that is not necessary if we get through 1343(3).

But I think it is very important if --

QUESTION: But you need the phrase "Act of Congress providing for equal rights of citizens" in (3) or "Act of Congress for providing for the protection of civil rights" in (4) in order to generically invoke 1983?

MR. GARDNER: Correct, in order to invoke them for purposes of jurisdiction.

QUESTION: And then when you invoke 1983, you see exactly what it says, and it says something beyond what its genous would imply?

MR. GARDNER: Yes. And as I think this Court noted in the footnote in Lynch and I think Mr. Justice Fortas, when he was talking in price dealing with 241, the plain English language says "and laws". I mean it does not restrict -- it does not say every person by the constitution and laws providing for the protection of civil rights.

And that is interesting because --

QUESTION: Well, Congress never needed to add for that?

MR. GARDNER: Pardon?

QUESTION: Congress never -- it was unnecessary for Congress to add the section.

MR. GARDNER: Exactly. I think that Congress did not have to if you accept my interpretation of (3). If you do not accept my interpretation of (3), then, of course, from my viewpoint Congress did need to. And what is very interesting about that question is that seems to be --

QUESTION: Well, if you do not accept your interpretation of (3), then you cannot accept your interpretation of (4) either in the sense that civil rights is not just an automatic reference to 1983.

MR. GARDNER: Well, I think that that brings up a whole different issue. I do not agree with that statement. I think that your recent for non-acceptance of (3) might be that -- and I am just doing this arguendo -- might be that it does not satisfy the Equal Rights Bill.

But I think if it did not satisfy the equal rights of (3), it clearly satisfies the civil rights of (4) for a number of reasons:

Number one, Jones versus Mayer back in 1972 a companion statute dealing with the right of the purchase.

And I think that this Court just last term indicated very clearly that 1983 is in fact a civil rights act. In Moore versus County of Almeda, when 1988 was distinguished, the Court specifically said 1988 is not an Act providing for the protection of civil rights, unlike 1983. In Rachel versus Georgia when we were dealing with removal, the Court said the precursor to the removal statute is not an act providing for the protection of civil rights like 1983.

So what we have is a litany of acceptance of the proposition that 1983 is in point of fact, in point of syntax, in point of history, an act providing for the protection of civil rights.

So to that extent, Mr. Justice Stewart, even if you did not accept my argument under (3) for the reasons that it does not flesh with equal rights, it would not follow that it does not satisfy (4). I only wanted to make clear that if you accept my argument with (3), it does not make much difference for our purposes.

QUESTION: No, but your argument on (4) has the same problem with it because you then have to say "and laws" in 83 is broader than the civil rights issue. So you get into the same --

MR. GARDNER: Mr. Justice Stevens, both arguments --

QUESTION: Requires that "and laws" be a broader term set --

MR. GARDNER: Exactly. It is truly like, if you will, two issues with the same sub-issues. You cannot get around the "and laws", but I say to you again that it does say "and laws".

QUESTION: Has any court ever adopted this line of reasoning?

MR. GARDNER: Yes. I believe that Justice Learned Hand in Bomar versus Keyes accepted this line of reasoning where the problem was with a New York school teacher who went on jury duty pursuant to a Federal statute and then lost her job and brought an action under 1983 and 1343. And if I recall in that case, the court said that it is clear that these statutes were meant to deal with Federal rights, Federal statutory rights.

So I think that there is support. I also think that in Edelman versus Jordan, Mr. Justice Rehnquist noted, that it is somewhat clear that 1983 embraces Civil Rights Act under example as provisions.

QUESTION: Well, is it not one thing to say that 1983 embraces Civil Rights, in the sense that it creates a cause of action for people who have been damaged by violation of some substantive right created elsewhere?

MR. GARDNER: But I think that the quote that I was referring to embraces the Social Security Act. In Edelman versus Jordan the court noted that 1983 embraces the Social Security Act under its "and laws" clause.

And I am saying that that rationale would support my

answer to Mr. Justice Stewart's request.

QUESTION: To get back to your treatment of 1983, does it necessarily follow that 1983 is itself a law protecting civil rights? Could not one argue that it is simply an Act which gives you a cause of action if some civil right created elsewhere has been infringed?

MR. GARDNER: I do not think it can be clearly argued that way because that misperceives the entire rationale of this court in examining Board versus Flores, where it noted there complementary germination.

And number two, the key wording of the statutes does not require the creation of. It talks about "secured by" and "protection of", which is of necessity what 1983 in the Fourteenth Amendment was all about.

QUESTION: Mr. Gardner, which case was it where we said that civil rights included welfare?

MR. GARDNER: In Edelman versus Jordan, I believe that the Court indicated that the Social Security --

QUESTION: I did not say indicated, but I said held.

MR. GARDNER: It was not in the holding.

QUESTION: There is none.

MR. GARDNER: But there is none specifically other than --

QUESTION: Do we not have to hold that for you to win?

MR. GARDNER: You have to hold that for me to win on 1343(4). You do not have to hold that specifically for me to win on 1343(3). If you want to make that by application --

QUESTION: But do you not have to do that to get under 1983?

MR. GARDNER: 1983, if we satisfy the "and laws", okay, then all we would have to satisfy would 1343(3) or (4). We would not have to satisfy both.

QUESTION: Well, 1983 is talking about civil rights.

MR. GARDNER: 1983 was talking about the depravation of Federal rights.

QUESTION: The depravation of civil rights. This Court has said that about 80 million times.

MR. GARDNER: It is generically a Civil Rights Act, but it embraces the depravation of Federal rights by State interposition.

QUESTION: Well, do we not have to find that denial of welfare is a denial of rights guaranteed by 1983?

MR. GARDNER: You have to find that the Social Security Act is in fact included within the phrase "and laws". That is all you have to find. You do not have to go any further and characterize it.

QUESTION: You do not want to agree -- 1983, you do not want to agree to that? You do not have to.

MR. GARDNER: No, I do not agree with it. I think

that you have to find that 1983 through its "and laws" conduit embraces the Social Security Act. I do not think you have to go further and get into a characterization of welfare being Civil Rights and the like.

QUESTION: Before you sit down, do the court's opinions in the Rachel case or the Peacock case bear on this at all?

MR. GARDNER: Rationale wise, not holding wise in the Peacock case.

QUESTION: They involve the removal statute, a different statute.

MR. GARDNER: Specifically, I think it is interesting that in Rachel versus Georgia the court refused to expand 1443 to include a broad brush because they said Congress did not do in 1443 what it did in 1983, which is really our argument.

They said that Congress might have done it if they had so chosen, but they did not do it. And accordingly when Congress was dealing with this rather restrictive removal mechanism, they limited it to rights guaranteed not by the Fourteenth Amendment but by the Thirteenth Amendment, and you are into the question of racial equality, which is really what our adversaries are trying to do in this case -- to try to slide the entire Court into Rachel versus Georgia in a kind of obscuring manner and say by the racial equality argument and that is the end of it, because obviously the Social Security

Act does not provide for racial equality.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Skillman.

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.

ON BEHALF OF RESPONDENTS

MR. SKILLMAN: Mr. Chief Justice, and may it please the court:

I think it might be useful at the outset to note the specific allegations of the complaint which bring these jurisdictional issues before the Court today. I note them not because they are important to the disposition of the jurisdictional issues as such, but because they may be useful just by way of illustration.

In brief, the complaint alleges that the petitioner was mugged after cashing her monthly Welfare and Social Security checks and that, as a result, she was unable to pay her rent or her gas and electric bill.

The complaint further alleged in rather general terms that as a result of the inability to pay either of these bills that the plaintiff was "within approximation of dispossession" since she cannot pay her rent and "in imminent danger of having her gas and electricity terminated."

It was further alleged that, despite these circumstances, the local welfare officials have refused to grant the family emergency assistance.

Upon this position having been taken by the local welfare official, the complaint was filed directly in Federal District Court based on these allegations, which claim, first, that the denial violated the provisions of Federal law, the same provisions recently interpreted by this Court last June in Quern v. Mandley; and secondly, that this action violated the New Jersey regulations governing emergency assistance.

The critical part of those State regulations provide that: "When an actual state of homelessness exists or is manifestly imminent, the County Welfare Board shall authorize payment of the actual cost with adequate emergency care." My point is that it could not be said with certainty, at least on the face of the complaint, that this case failed to satisfy the governing State regulations.

And despite the circumstance, a complaint was filed directly in Federal District Court. And today we are confronted with the rather difficult questions concerning the reach of the jurisdictional sections of the 1871 Civil Rights Act in this perspective.

QUESTION: The merits of this controversy insofar as the claim is a conflict between State and Federal law were decided adversely to the complainant in Quern against Mandley, were they not?

MR. SKILLMAN: I would say they have been conclusively adjudicated adversely to the petitioners, Your Honor, yes.

QUESTION: In that case?

MR. SKILLMAN: I would say so.

QUESTION: You have another claim, of course, that this violated State law itself?

MR. SKILLMAN: Yes, there was that pending State claim which -- and I think that that claim is also frivolous at this point, not on the face of the complaint, but in light of the affidavit that was filed in a motion for summary judgment, it is quite clear at this juncture that there is no substantial pendant claim either.

Section 1343(3) is the primary jurisdictional section that is relied upon by the petitioner as conferring jurisdiction on the Federal District Court over this action. This section has two quite separate bases of jurisdiction.

The first is the depravation of any right, privilege or immunity secured by the Constitution.

And the second is the depravation of any right, privilege or immunity secured by any act of Congress providing for equal rights of citizens.

The petitioner in two disjunctive arguments relies upon both of these sub-provisions of 1343(3). The Constitutional Supremacy Clause argument relying upon the depravation of any right, privilege or immunity secured by the Constitution is in effect an argument that every time Congress enacts a new statute, it creates a new right, privilege or immunity secured

against depravation by State action through the Supremacy Clause.

However, as the Third Circuit properly noted in its opinion, when Congress enacts a statute creating rights, it is that statute and not the Supremacy Clause that confers any rights or privileges or immunities that the individual may claim. Now the Supremacy Clause becomes relevant if the State through its legislative actions seeks to take action that will thwart the operation of that Federal legislation -- that is inconsistent with that Federal legislation.

Yet it remains the Federal legislation that confers the right that may be claimed by the particular individual. So on its face the "secured by the Constitution" language just does not apply.

Furthermore, if the Constitutional portion of 1343(3) were read as broadly as urged by the petitioner, there would be absolutely no need for the statutory part of this section. District Court jurisdiction would extend to every State action case based on any Federal statute and there would be no need for Congress in 1343(3) to have gone ahead and also conferred jurisdiction based upon a more limited class of Federal statutes "providing for equal rights of citizens."

In other words, the second part of 1343(3) would be surplused. It would be redundancy if the petitioner's Supremacy Clause argument were correct.

QUESTION: But 1343(4) would not?

MR.SKILLMAN: Well,1343(4) presents somewhat different questions that I would like, if I may, address later on.

I think it is appropriate then to turn to the second part of 1343(3) and I think that this also really gets to the 1343(4) argument as well.

The critical language of 1343(3) is that there must be an act of Congress "providing for equal rights." Now we think it is clear that neither the language of this provision providing for equal rights, its historical origins in 1871, nor its relationship to other jurisdictional sections, including 1331, supports its use in a case claiming solely a violation of the Federal Social Security Act.

QUESTION: Well, that is not what they are claiming. Would you think 1983 falls within that definition, an act of Congress providing for equal rights?

MR. SKILLMAN: No, Your Honor, we think that 1983 provides a cause of action where you can find some other legislation that provides the substantive cause of action.

QUESTION: It itself is not an act of Congress providing for equal rights?

MR. SKILLMAN: Not by itself.

QUESTION: And you have to make that argument, do you not? You have to take that position and successfully assert it in order for you to prevail, do you not, in this

branch of your argument?

MR. SKILLMAN: I think that is certainly a critical part of our argument, whether its acceptance is a pre-condition to -- it is certainly a critical part of our argument, yes, sir.

QUESTION: Mr. Skillman, right on that point, there were some cases if I recall correctly in which jurisdiction was predicated on a constitutional claim and then pendant to the constitutional claim an attack was made on the State Welfare Program of one kind of another, and jurisdiction was sustained on the pendant jurisdiction theory. So you did not even need 1343(3).

Can you tell me what the statutory basis for the Federal cause of action in those cases was? Was it not 1983?

MR. SKILLMAN: I think what the Court has done -- and without articulating any -- in those cases is to imply from the Social Security Act itself a cause of action in Federal District Court for at least a declaratory judgment which was what was issued in those cases.

There is no discussion about it in the cases and I think it is assumed that the pendant claim was one over which there was a cause of action that could be pursued in Federal Court.

QUESTION: Do you think the Court has to disavow those cases to sustain your position?

MR. SKILLMAN: No, not at all.

QUESTION: In other words, you concede there is some kind of Federal cause of action here, if not under 1983, at least it is implied under the Social Security Act?

MR. SKILLMAN: Well, I think that there is certainly at this point a pretty long line of cases, which in the pendant jurisdiction context have at least issued declaratory judgments and have recognized a cause of action for declaratory judgment. Whether or not damages, for example, would be appropriate in that same context is a different question, and I do not know that that has ever been addressed.

QUESTION: But injunctive relief has been given in some of those cases, I believe.

MR. SKILLMAN: I believe that not only declaratory relief, but also injunctive relief, I believe, has been granted.

QUESTION: But you say that the Federal basis for the cause of action in those cases should not properly be considered 1983, but should be considered an implied cause of action predicated on the underlying statute, even though the court never discussed it or analyzed it?

MR. SKILLMAN: I think that is correct.

QUESTION: I do not quite understand that. If "and laws" in 1983 covers all statutes, covers all Federal statutes -- do you need to say that?

MR. SKILLMAN: But we very strongly argue against that proposition. I mean, we think that "and laws" in 1983

must be read in light of its companion jurisdictional statute, 1343(3), and not extend to every statute that has been enacted by --

QUESTION: Well, first of all, you say that 1983 is not an act of Congress providing for equal rights of citizens, and is not an act of Congress providing for the protection of civil rights, but that it is merely an act of Congress that authorizes the cause of action, based on something else?

MR. SKILLMAN: Based on substantive rights found elsewhere.

QUESTION: And 1343, as everybody agrees, is no more than a jurisdictional statute.

MR. SKILLMAN: That is correct.

QUESTION: But that 1983 is -- no more than authorizes a cause of action?

MR. SKILLMAN: That is correct.

QUESTION: That that cause of action must be based upon something else?

MR. SKILLMAN: That is correct.

QUESTION: And that, therefore, 1983 does not fall within the definition of 1343(3) or (4)?

MR. SKILLMAN: That is correct.

QUESTION: I want to be sure I have your position. Do you say the words "and laws" in 1983 are -- have the same limitation as the words in 1343(3)?

MR. SKILLMAN: Yes. They were originally enacted at the same time.

QUESTION: I understand that. If you say that, you really do not have to say that 1983 is only an authorization for cause of action? You really have two alternative arguments?

MR. SKILLMAN: That is correct. That is the reason I said in response to Mr. Justice Stewart's question that I thought it was a critical part of our argument, but not necessarily a pre-condition.

QUESTION: But if you are right in either respect, you prevail?

MR. SKILLMAN: Yes, sir.

QUESTION: Did Rosado versus Wyman articulate the basis for jurisdiction over the statutory claim?

MR. SKILLMAN: I do not believe so. I think that it spent some amount of time on the question whether or not the pendant statutory claim could survive once the constitutional issue had been mooted by the changes in New York's practices, but I do not know that it ever articulated where the cause of action came from.

If it did, Your Honor, I missed it on reading the case and I do not believe that it has.

I think that the critical way out of what has been described in this case as a circularity, whether you start with 1343(3) and read the "and laws" provision of 1983 in terms of

providing for equal rights of the provision of 1343(3) or whether you start the other way and read "and laws" as in some way expanding the language of 1343(3) is to look to the historical basis of the statute as first enacted in 1871.

At that time, the focus, the intention was certainly to provide a mechanism for the enforcement of the Thirteenth and the Fourteenth Amendment. And both the Thirteenth and Fourteenth Amendment had conferred power upon Congress to enact legislation that would implement those rights created by and recognized by the Thirteenth and Fourteenth Amendment.

And I think that the common assumption in 1871 was that there was to be considerable Congressional activity in implementation of the Thirteenth and Fourteenth Amendments. And that, through the Reconstruction Period, did not come to pass. There was not the amount of legislation that would have been expected in 1871, but the question is: Why add the words "and laws" and what was meant by the term "and laws" in 1983?

It was predicated on the assumption that the Thirteenth and Fourteenth Amendments would be implemented through significant Congressional legislation. And we submit that 1983 should be read in light of this historical context in which it was enacted, as well as in light of the providing for equal rights language of 1343(3) which both we and the petitioners agree were complementary provisions.

QUESTION: So you would not go so far as to say that

1983 reaches all claims under any Federal statute that might be fairly said to enforce some constitutional provision, since they have to be enforcing the Civil War Amendments?

MR. SKILLMAN: Thirteenth and Fourteenth Amendments and I think more doubtful but probably also the Fifteenth Amendment.

QUESTION: Well then, you did not need (4), did you?

MR. SKILLMAN: Well, there may have been uncertainties about the Fifteenth Amendment. And that may have been the reason for (4). It puts the phrase "including the right to vote". So that may be a possible explanation for why (4) was added.

But (4) is a bit of a mystery. I think when that legislation was originally drafted --

QUESTION: Do you think to have cause of action -- to have jurisdiction under 1343(4), do you agree that you must refer in the first place to 1983? Is that the statute which satisfies "the authorized by law" requirement?

MR. SKILLMAN: Well, if your question is: Is there any other statute besides 1983 which also might service that function, I do not know. I do not know of any, but I cannot say categorically that there is not any.

QUESTION: So you think that any action under 1343(4) must involve State action?

MR. SKILLMAN: That is a good question.

QUESTION: Well, if you require 1983, it does, does it not?

MR. SKILLMAN: Yes. But if it were possible to imply a cause of action from some other Federal civil rights' statute that was not dependent on State action, then there would be some room for 1343(4) to operate. I am speaking in the abstract. I cannot identify the statute.

I do think though that in the legislative history of the 57 Civil Rights Act that there were initially substantive provisions that were drafted, that did not make their way into the final Bill. So that I think that 1343(4) may have been intended to clearly establish jurisdiction to eliminate any possible questions as to 1343(3) applying to new substantive provisions that did not find their way into the eventual legislation.

It is a very shrouded kind of legislative history.

I would like to make one final point, if I may. The argument is made and it is made primarily by the Respondents in the Texas case argued previously that providing for equal rights language of 1343(3) should be given a very expansive reading because this is desirable as a matter of policy that somehow Federal courts are better able to deal with Federal questions than State courts.

And the suggestion is that in practical effect this kind of an expansive reading of 1343(3) would have the same

effect as deleting the jurisdictional amount requirement of 1331 with respect to cases in which the State is a defendant. I think there are significant differences though between proposals that have been before Congress to delete the jurisdictional amount requirement of 1331 and what would be the practical effect of accepting the petitioner's arguments as to 1343(3).

First, there is the point that we discussed previously that the 1331 leaves open the question of implying a cause of action from some other Federal statute, and in implying the cause of action from some other Federal statute, such as the Social Security Act, it is possible to imply a right to secure declaratory or injunctive relief, and at the same time not to imply a cause of action for money damages, such as would be recognized under 1343(3) and 1983.

Secondly, the law under 1983 has evolved, such that there is a very limited room, if any, for the operation of the doctrine of exhaustion of administrative remedies. This Court noted in Gibson v. Berryhill that that issue was not one that is closed; that there may still be some circumstances under which exhaustion administrative remedies may be required in 1983 actions, but at the present time -- and it dealt with at least by many of the lower Federal courts the doctrine is practically non-existent in a 1983 case.

What that would mean as a practical matter is that

if you accept the petitioner's argument, any Welfare case in which the cause of action is pleaded as being predicated on Federal law could be brought in Federal District Court, even if ultimately it turns out that the issues are essentially factual and that they are capable of resolution in terms solely of State law.

And I take this case, at least on the face of the complaint, as an example. It may have turned out at some later stage that significant issues as to conflict between Federal and State law, Quern v. Mandley, emerged, but on the face of the complaint and on the face of the Jersey regulations this might have been a case where the $163 in Welfare benefits, which was what was in issue, could have been resolved very easily within the State Welfare administrative mechanism.

QUESTION: And that would apply to the whole class?

MR. SKILLMAN: Well, the possible existence of a class is something that, I think, only emerged at some point beyond the face of the complaint, Your Honor. But it would be a possibility for at least a sub-portion of that class, I think is what I am saying.

Ultimately, it may have turned out that there were some and in fact we now know that there were some petitioners who would not qualify for benefits under the Jersey regulation that might have qualified for benefits under the Federal statute, if this Court's decision in Quern v. Mandley had come out the

other way.

But as to this particular petitioner and some other part of the sub-class, they may have been able to receive their emergency assistance benefits quickly and without regard to the ultimate resolution of that conflict issue in Quern v. Mandley.

And my point is that this overly-expansive reading of 1983 and 1343(3) urged by the petitioners with its concomitant, generally prevailing rule of no requirement of exhaustion of administrative remedies would preclude resort to the simpler and easier means of disposing of many such controversies.

Thank you.

QUESTION: Mr. Skillman, before you sit down, in Edelman against Jordan on page 675 the Court said: "It is, of course, true that Rosado against Wyman, 397 U. S. 397, held that suits in Federal Court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of the participating states."

Now if that statement is correct, does that not knock out one-half of your double -- you have two answers to the problem. Does not that foreclose the argument that the words "and laws" is no broader than the words "act of Congress providing for equal rights"?

MR. SKILLMAN: I am not sure I picked up the full quote, Your Honor.

QUESTION: The full quote is: "It is, of course, true that Rosado against Wyman held that suits in Federal Court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states."

Now I assume the Social Security Acts are not equal rights statutes. Therefore, if this statement is true, and if 1983 provides the cause of action for welfare claims against the State, necessarily the court is here saying that the words "and laws" in 1983 are broader than the act of Congress providing for equal rights.

MR. SKILLMAN: Well, I do not know the exact context in which that sentence appears, but on its face I would have to agree with that.

QUESTION: So that one branch of your argument would require the court to disavow this statement in effect?

MR. SKILLMAN: At least the statement.

QUESTION: Unless it is a correct description of the holding in Rosado?

QUESTION: Well, is that a correct description in the holding in Rosado? There was a constitutional claim in Rosado.

MR. SKILLMAN: There was a constitutional claim in Rosado and there was a --

QUESTION: But you do not think that really makes any

difference on this point, I gather from what you have said, that you still have to inquire about the cause of action.

MR. SKILLMAN: I think that you still have to find a cause of action even though -- even on the pendant claim, you still have to find the cause of action, but I think that that was found in the Social Security Act itself in Rosado.

QUESTION: But if there is a substantial equal protection claim under the Fourteenth Amendment of the Constitution, then clearly under Hagans against Lavine and other cases you can have a pendant statutory claim.

MR. SKILLMAN: As to jurisdiction, there is no question about it. But if the question is cause of action, there may still be a question about it.

QUESTION: Well, there really is a question, is there not?

MR. SKILLMAN: Hagans and Lavine left that very question open.

And I would suggest to you that it found a cause of action, at least for a declaratory injunctive relief, in the Social Security Act itself. And it certainly has become common in the last decade or so to imply causes of action from constitutional and statutory provisions.

QUESTION: Hagans came several years after Rosado?

MR. SKILLMAN: Yes, sir.

QUESTION: How about Hagans and Edelman?

MR. SKILLMAN: I think Hagans was later, but I would not want to say that with total assurance. They are close in time.

Thank you.

MR. CHIEF JUSTICE BURGER: You have just one minute left if you wish to use that.

REBUTTAL OF THEODORE A. GARDNER, ESQ.

ON BEHALF OF PETITIONER

MR. GARDNER: The jump was from Rosado to Hagans and Hagans noted the question. This case squarely presents the question: What do you do when you do not have, as you had in Hagans, the Fourteenth Amendment claim under equal protection?

It was quite simple to resolve Hagans because of what was pleaded there, but I think that this case presents the issue four-square, and I would suggest that the resolution which we seek is appropriate because 1983 speaks about constitution and laws. Hagans basically said we have the constitution. So we do not have to worry about the "and laws" problem.

But I suggest that today you do have to worry about it because you do not have that Fourteenth Amendment equal protection. And I submit that the plain wording of the statute and its legislative history indicate a Congressional concern for the vindication of Federal rights under Federal statutes and, accordingly, on the first prong the "and laws" embraces all Federal statutes and on the second prong 1983 is

itself an act providing for the protection of equal rights under 1343(3) and an act providing for the protection of --

QUESTION: But have you answered his argument that it is an Act which provides a remedy rather than creating any new rights and therefore is not a statute which "secures rights" within the meaning of the jurisdictional --

MR. GARDNER: I think that the analysis by Mr. Justice Brennan in Guest and I think that the analysis by Mr. Justice Fortas in Price and the analysis by Mr. Justice Stone in Hague versus C.I.O. where they are interpreting very similar language in a criminal conspiracy statute, that is secured by the Constitution and they say we find no succor for the position that the words "secured by" mean "created by". Rather "secured by" can embrace both "created by, warranted by, finding its manifest in embraced", et cetera, and I submit that under that type of an analysis, it unduly restricts the statute to resist and to limit it only to --

QUESTION: You would say it, to put it a little differently I suppose, that a statute creating a new remedy is an example of a statute securing a right?

MR. GARDNER: Exactly. And that is precisely what Congress was attempting to do pursuant to Section 5 of the Fourteenth Amendment, giving the tumultuity of the historical age.

QUESTION: And you have to be right on this, do you

not, in order to even support your alternative Supremacy Clause argument?

MR. GARDNER: Yes, I do, because of the "authorized by law" section of 1343(3); as counsel in the previous case stated and I associate myself with his position, we would be unable to directly connect the Supremacy Clause to either 1343(3).

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:44 p.m., the above-entitled case was submitted.)