Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction—A Reappraisal

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INTRODUCTION

TWO of the more frequently invoked federal jurisdictional statutes are 28 U.S.C. sections 1331 and 1343(3). The pertinent provisions of the former confer original jurisdiction on federal district courts "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." Thus, where a federal question is properly alleged, and the minimum amount of damages is sought, a district court has the power to entertain the suit. Section 1343(3), on the other hand, does not require allegation of a jurisdictional amount, if the suit is brought "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." Although these two statutes are relatively straightforward by themselves, there has been confusion among the courts as to the role each plays in determining federal jurisdiction. Some courts have resolved this problem, as did Mr. Justice Stone in Hague v. Congress of Industrial Organizations, by holding that section 1343(3) applies only to civil

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   (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.
   (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

   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.


rights claims based on the deprivation of a personal liberty inherently incapable of pecuniary valuation. The wording of that statute, however, does not indicate as restrictive a coverage as Justice Stone and his followers have given it. Several courts have applied a much broader interpretation of section 1343(3), accepting jurisdiction where claims based on violation of property rights and for amounts less than $10,000 were alleged. These tribunals apparently reasoned that since the statute itself drew no distinction between the types of rights protected, it was not within their province to do so judicially.

The difficulties posed by either view are obvious. Acceptance of Justice Stone's test, which distinguishes property rights and personal liberties, and grants federal jurisdiction only when there is a deprivation of a "personal right inherently incapable of pecuniary valuation," would be to significantly alter the actual language of section 1343(3). Applying section 1343(3) broadly, without making Justice Stone's distinction, raises a very real conflict between the scope of that section and section 1331 by eliminating a minimum jurisdictional amount requirement from a large number of federal question cases. While it may be argued that such was the intent of section 1343(3), many courts, as this article notes, deny that section 1343(3) was intended to have so great an impact. Finally, determination of what constitutes a "civil right" has left many jurists wondering whether section 1343(3) applies only to "color" discrimination, or encompasses a wider range of complaints alleging unequal treatment of various groups by a governmental body. This confusion is reflected in the apparently conflicting decisions of courts granting jurisdiction in certain types of "discrimination" cases, while denying it in others where, aside from the superficial facts, there is no discernible reason for different treatment. Where section 1343 is held inapplicable, the failure to allege the minimum jurisdictional amount under section 1331 is fatal. Thus the importance of section 1343 to those asserting a federal question claim whose value is either immeasurable or less than $10,000 is readily apparent. Despite the importance of section 1343, conflicting judicial interpretation renders difficult plaintiff's pre-trial attempt to determine whether that section affords jurisdiction in the individual case.

The purpose herein is primarily to present the problem as it appears to the courts today. While proposed alternatives to Justice Stone's theory are mentioned, the function of this article is not to supply answers to the questions raised, but to probe the various existing theories and examine past treatment of the difficulties presented.

JUSTICE STONE AND HAGUE v. C.I.O.

In Hague v. Committee for Industrial Organization, plaintiffs, a membership corporation, and members of an unincorporated labor union, brought suit

5. See, e.g., McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949); Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351 (N.D. Ill. 1965).
in a federal court, seeking to enjoin enforcement of a city ordinance by various city officials. They alleged that defendants, acting under a law prohibiting the leasing of a hall for a public gathering to advocate obstruction of the government without a permit from the local police chief, had prevented them from holding a meeting of their union. Plaintiffs contended that no "overthrow" discussion was contemplated, and that the denial of their application for a permit resulted from the hostile attitude of the town officials toward the union. Furthermore, plaintiffs claimed they were discriminated against under an ordinance forbidding the distribution of leaflets and pamphlets in public streets. The alleged purpose of both the assembly and the pamphlets was to enlighten people of their rights under the National Labor Relations Act. Jurisdiction was claimed under sections 24(1), (12) and (14) of the Judicial Code.7 (Sections 24(1) and 24(14) are presently codified as 28 U.S.C. sections 1331 and 1343(3), respectively). The district court, finding jurisdiction under sections 24(1), (12) and (14), held for the plaintiffs, and the Court of Appeals affirmed as to sections 24(1) and (14). The Supreme Court affirmed as to the individual plaintiffs, basing jurisdiction solely upon section 24(14), but dismissed as to the corporate plaintiff. However, the majority could not agree on the grounds for affirmance.

Justice Roberts, writing for himself and Justice Black, saw the issue involved as a narrow one, based on an interpretation of the rights, privileges and immunities covered by section 24(14).

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgment by §1 of the Fourteenth Amendment; and whether R.S. 1979 and §24(14) of the Judicial Code afford redress in a federal court for such abridgment.8

Observing that the avowed purpose of the petitioners was to discuss the provisions of the National Labor Relations Act, and stating that "the right peaceably to assemble and to discuss these topics, . . . is a privilege inherent in the citizenship of the United States,"9 Justice Roberts had little difficulty holding that section 24(14) of the Judicial Code conferred jurisdiction on the district court.10 Since a United States citizen had the right and privilege to use public areas to communicate and disseminate views on national legislation, the attempts of local officials, acting under color of state law, to deny this right, violated the privileges and immunities clause of the fourteenth amendment.11

Justice Stone, while agreeing that jurisdiction properly lay under section

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8. 307 U.S. at 512.
9. Id.
10. Id. at 513.
11. Id. at 514-16.
24(14), could not concur in Justice Roberts’ analysis. Expanding the holding of the case as he saw the issue, Stone said that the freedom of speech itself was the critical factor, not simply the right to discuss publicly federal legislation. Observing that freedom of speech was a natural and fundamental right of all persons within the jurisdiction of the United States, secured by the due process, not the privileges and immunities, clause of the fourteenth amendment, Justice Stone concluded that the individual plaintiffs were authorized to sue under section 1 of the Civil Rights Act of 1871. To Justice Stone, the question then became: Does section 24(14) grant federal jurisdiction for a suit based on the violation of rights secured by the due process clause of the fourteenth amendment and authorized by section 1 of the Civil Rights Act of 1871? Answering affirmatively, Justice Stone set forth his rationale in terms at once both so concise and so confusing that courts today have been either unwilling or unable to reconcile the implications of his reasoning.

Commencing with the assumption that the parallel existence of sections 24(1) and 24(14) must be reconciled, Justice Stone argued that the jurisdictional amount requirement depended upon the classification of the right claimed as “personal” or “property,” under section 1 of the Civil Rights Act of 1871. While the actual language of section 1 did not draw such a distinction, the conclusion, to Stone, seemed “inescapable... that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under section 24(14) of the Judicial Code” without proof that the jurisdictional amount is met.

Although this distinction seemed clear enough, Stone’s authority, Raich v. Truax, does not, upon close inspection, stand for the proposition that property rights are not protected by section 24(14). In Raich, plaintiff sued in federal court to enjoin enforcement of an Arizona statute against his employer. The statute prohibited employment of less than 80% native-born United States citizens by employers of more than five persons, and provided a fine of $100 and not less than 30 days in jail for employers violating the Act. Plaintiff, who

12. Id. at 519.
13. By so holding, Justice Stone rejected Justice Roberts’ attempt to expand the narrow definition of the “privileges and immunities of a United States citizen” laid down in the Slaughter House Cases, 16 Wall. 36 (1873).
14. 307 U.S. at 527. The Civil Rights Act of 1871, 17 Stat. 13, § 1, provides:
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... .
15. Id. at 525, 527.
16. Id. at 528-30.
17. Id. at 531-32.
18. Id.
feared the loss of his job because of the Act, claimed the statute violated the equal protection clause of the fourteenth amendment. Finding jurisdiction under section 24(14), the district court agreed and the Supreme Court affirmed. While it is true that an equitable, rather than legal, remedy was sought, and the right alleged was equal protection under law, the court ignored the fact that the law penalized the employer, not the employee-plaintiff, that the constitutional rights of the former were those violated, if, in fact, violation had occurred, and, finally, that although equitable relief was sought, the gravamen of the complaint was that the plaintiff might lose a source of economic benefit if the statute was enforced. Viewed in this light, Raich becomes subject to a far different interpretation from that which Stone gave it; Raich might support a proposition that where non-monetary relief is sought to protect property rights, jurisdiction will lie under section 24(14).

Unsatisfied with the "personal-property" distinction alone, Stone added that section 24(1) and section 24(14) could, in fact, be harmonized "by treating section 24(14) as conferring federal jurisdiction of suits brought under the Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation." Unfortunately, Stone did not explain whether or not this meant that jurisdiction over suits for any violation of personal rights for which money damages were sought had to be based on section 24(1). If Stone's rationale is extended logically, section 24(14) would confer jurisdiction only where a claim is based on a violation of personal liberty secured by section 1 of the Civil Rights Act which is inherently incapable of pecuniary valuation. While this interpretation does harmonize the concurrent existence of sections 24(1) and 24(14), it appears to be contrary to both the language and the spirit of section 24(14) and the Civil Rights Act of 1871, which are intended to provide a forum for the redress of any right "secured by the Constitution or laws of the United States." Consequently, it is not at all surprising that courts have been incapable of uniform interpretation or application of section 24(14) and now, section 1343(3).

THE STONE THESIS AND JUDICIAL INTERPRETATION

Case analysis of the interpretation and application of section 1343(3) and its predecessor, section 24(14) of the Judicial Code, 28 U.S.C. section 41(14), reveals a confused history which defies rational classification. Stone's "personal-
property” distinction was based on the belief that there was no other way to reconcile section 24(1) with section 24(14).26 Their coexistence, he observed must be taken as legislative recognition that there are suits authorized by § 1 of the Act of 1871 which could be brought under § 24(14) after, as well as before, the amendment of 1875 without compliance with any requirement of jurisdictional amount. . . .27

The suits referred to involved alleged infringements of “personal rights, inherently incapable of pecuniary valuation.” Lower courts immediately applied Stone’s test, finding jurisdiction where freedom of speech, press and religion28 were involved, and denying it where removal of property without due process was claimed.29

A weakness of the Stone test appeared, however, in companion decisions handed down by the Supreme Court four years after Hague.

In Murdock v. Pennsylvania,30 petitioners had been convicted of violating a Pennsylvania statute which forbade door-to-door solicitation of merchandise without procuring a license.31 Petitioners, members of Jehovah’s Witnesses, claimed that their right to freedom of speech, press and religion was denied by the state law. The Court, by a majority of one, reversed the convictions, holding that the license tax was in violation of the freedom of religion clause of the first amendment. Aware of the difficulties presented by the “non religious” nature of the statute at issue, the Court said

[W]hen a religious sect uses ‘ordinary commercial methods of sales of articles to raise propaganda funds,’ it is proper for the state to charge ‘reasonable fees for the privilege of canvassing.’ Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital.32

While noting that the statute did not discriminate, it did, nevertheless, hinder petitioners’ free exercise of religion by impeding the sect’s normal means of financial support.

The dissenting opinions, however, characterized the issue as the validity of a license tax on the sale of goods.33 In the absence of a showing of discrimination, the tax, they pointed out, was valid.34

Douglas v. City of Jeannette35 involved identical facts, except that peti-

27. Id.
30. 319 U.S. 105 (1943).
31. “That all persons canvassing for or soliciting within said Borough, orders for goods . . . wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited” without first obtaining a license, shall be guilty of a violation of the statute. Id. at 106.
32. Id. at 110.
33. Reed, J., Id. at 119 (dissent); Frankfurter, J., Id. at 139 (dissent).
34. Id. at 118, 136.
35. Id. at 157.
tioners, not yet convicted, sought an order in a federal district court restraining the state prosecution. As in Murdock, the Witnesses argued that the statute violated their freedom of speech, press and religion. The trial court held that it had jurisdiction under section 24(14), but denied the relief sought. The court of appeals affirmed. Relying on Hague, the Supreme Court held that jurisdiction lay under section 24(14), since the action was based on an alleged violation of the freedom of speech, press and religion, but affirmed the refusal to grant relief on the ground that a federal court could not interfere with a threatened criminal action lawfully brought in good faith.

While no one would quarrel with the argument that first amendment freedoms are personal, the conclusion that a license tax on solicitations for sale of goods violates that amendment because its scope includes religious matters, and hence violates a civil right, is questionable at best. The dissenting opinion of Justice Reed, in Murdock, raises substantial doubt as to whether the issue is religious or purely commercial in nature. Perhaps it is both, in the sense that the sale of religious matter is one essential source of revenue necessary to maintain the finances of the religion. It does not seem, therefore, to be strictly a matter of interference with religion by the municipality, but rather a question of the validity of a governmental ordinance which seeks to regulate without discrimination, commercial activity and, in so doing, affects solicitation by a religious sect. Furthermore, the Supreme Court did not discuss Justice Stone's "inherently incapable of pecuniary valuation" requirement. The fact that commercial interests may have been at stake did not seem to concern the majority, though the fact that equitable, rather than monetary damages, were sought makes the jurisdictional finding in Jeannette and Murdock seem proper. But by failing to deal with this element of the case, the Court not only indicated a willingness to emphasize certain characteristics of a particular suit in order to grant or deny jurisdiction under section 24(14), but also left the status of Justice Stone's "inherently incapable" requirement in doubt.

The tenth circuit, citing Jeannette and Hague, further clouded the issue by finding jurisdiction under section 24(14), even though damages were sought for an alleged violation of the right to trial by jury, and two years later the fifth circuit, also citing Justice Stone's opinion in Hague, held that the right to work was protected by section 1343(3), since it was guaranteed under the

36. Id. at 161.
37. Id. at 163-64.
38. Id. at 117-34.
39. In response to examination by the State, one "zone servant" of the Witnesses stated that the only function of the distributors was to pass out religious literature, but he added that for one dollar, a person could subscribe to the "Watchtower," the sect's official publication, and for a quarter more, could receive certain other magazines. It is not clear whether the Witnesses were simply distributing religious literature, or soliciting subscriptions for their magazine. See Douglas v. City of Jeannette, Trial Transcript, at 37.
40. Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949).
due process clause of the fourteenth amendment. Thus, federal jurisdiction, without regard for allegation of a jurisdictional amount, was found both where money damages were sought and where the right involved was capable of financial valuation, and in both instances Hague was cited as authority for the holding.

In 1953, the first circuit in effect rejected Stone's "inherently incapable of pecuniary valuation" test by granting jurisdiction under section 1343(3) to a petition by public school teachers seeking injunctive and monetary relief for an alleged breach of their employment contract. Hague was not mentioned, despite the fact that the decision appeared to be patently contrary to Justice Stone's opinion.

It would be misleading, however, to describe these three lower court decisions as indicative of a trend toward repudiation of the "inherently incapable" test, for many courts have reaffirmed its vitality. In a recent case denying jurisdiction under section 1343(3), where the suit was brought seeking an injunction for an alleged violation of equal protection in a state tax-assessment statute, a federal district court in Tennessee stated that section 1343 "may be thought of as a remedy in cases where the right asserted is incapable of pecuniary valuation..." The Supreme Court affirmed, leaving in doubt the status of this test, a situation which, in light of the numerous conflicting decisions throughout the federal court system, is intolerable.

Equally dubious is the present status of Justice Stone's distinction between personal and property rights. Justice Stone reached his conclusion deductively,

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42. Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953).
43. Several courts have recently also rejected this aspect of Stone's test. See, e.g., Blume v. City of Deland, 358 F.2d 698 (5th Cir. 1966); Lucero v. Donovan, 258 F. Supp. 979 (C.D. Cal. 1966).
44. Since the submission of this article, the second circuit, in an opinion by Judge Friendly, reaffirmed its belief in the validity of the Stone thesis "although with a good deal less than complete assurance." Eisen v. Eastman, 421 F.2d 560, 566 (2nd Cir. 1969). In affirming the trial court's position that section 1343(3) did not confer jurisdiction in a suit brought against a New York City District Rent and Rehabilitation Director by a landlord who claimed that forced reduction in the rent he could charge was a violation of his civil rights, the court noted that the action was based upon an alleged infringement of property rights. Section 1343(3), the court held, was properly confined to personal rights. After reviewing the application of the Stone test in other cases, the court concluded that the distinction made in Hague between section 1331 and section 1343(3) was essentially correct, since it explained "in some rational way," the overlap between the statutes. Id. at 565. Since only monetary harm was alleged, the plaintiff had to meet the $10,000 jurisdictional minimum to bring suit in a federal court. (Agreeing with the lower court's opinion that the claim exceeded that amount, the Second Circuit affirmed the dismissal of the petition on the merits.)
46. 386 U.S. 262 (1967). See also Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); Detroit Ed. Co. v. East Twnship. School Dist. No. 3, 247 F. Supp. 296 (E.D. Mich. 1965), aff'd, 378 F.2d 225 (6th Cir. 1967), cert. denied, 399 U.S. 952 (1967). But see Blume v. City of Deland, 358 F.2d 698 (5th Cir. 1966). In Blume the fifth circuit held jurisdiction lay under § 1343(3), where plaintiff alleged removal of his property by the state without due process of law, even though the only relief sought was $10,000 in money damages.
through a seemingly superficial analysis of two early cases dealing with the question of jurisdiction under section 24(14). In *Holt v. Indiana Manufacturing Company*, plaintiff sought to restrain a state official from taxing property held under letters of patent from the United States, claiming that the tax was a deprivation of a right secured by a law of the United States. Jurisdiction was alleged under section 24(14). The Supreme Court affirmed the circuit court's reversal of the trial court's judgment for the plaintiff. Without citing any authority for its position, or explaining its rationale, the Court simply announced: "Assuming that [the provisions of the Civil Rights Act of 1871] are still in force, it is sufficient to say that they refer to civil rights only and are inapplicable here." The Court did not elaborate. Stone's interpretation of his other primary authority, *Raich v. Truax*, is unsatisfactory, and the validity of the *Holt* decision is under judicial criticism today in those courts disagreeing with the "property-personal" distinction. Unfortunately, most opinions have simply cited Stone's words with approval, or have disregarded the *Hague* decision entirely.

Where violation of a personal right is alleged, courts have had no difficulty finding jurisdiction under section 1343(3), when an equitable remedy is sought. Thus, jurisdiction was assumed where a Negro lawyer sought an injunction forcing the removal of the word "Colored" from rest rooms in a Virginia state courthouse; where suits were brought alleging discrimination in school districting; where an injunction was requested to enjoin members of a state legislature from harassing Negro lawyers and their clients because of race; and where a graduate of a non-accredited law school demanded a permanent injunction against enforcement of a state statute requiring all candidates taking the Arizona Bar Exam to hold a degree from an accredited law school. Similarly, those courts adhering to the Stone test have had little trouble denying jurisdiction without proof of the requisite dollar amount where

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47. 176 U.S. 68 (1900).
48. Id. at 72.
49. See accompanying text notes 19-22, supra.
52. See, e.g., McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).
property rights were asserted. These include taxpayer suits alleging denial of equal protection or due process under state taxing statutes;\(^7\) a suit to recover property allegedly levied upon and sold without due process;\(^6\) a suit in which a property owner sought to enjoin the formation and financing of a waterworks company in her district;\(^5\) and a suit to enjoin enforcement of a city milk ordinance.\(^6\) The general attitude of these courts is that

\[\text{Section 1343(3)}\] confers jurisdiction without proof of pecuniary valuation, if the suit is one to enjoin the deprivation of rights or immunities of personal liberty secured by the Constitution. . . .\(^6\)

The more difficult case arises when a court is faced with the alleged deprivation of a right classifiable as either “property” or “personal.” Douglas v. City of Jeannette\(^6\) is one example. In Jeannette the Court avoided any jurisdictional difficulties by blandly concluding that the right asserted was personal. This conclusion, however, is by no means compelled by the facts of the case.\(^3\) Another example of this judicial sleight-of-hand is found in Adams v. City of Park Ridge.\(^4\) In Adams a charitable organization sued to enjoin enforcement of a statute forbidding solicitation and collection of funds for charitable purposes without permission from the city council. As one such organization was specifically exempted from the prohibitions of the act, the plaintiff claimed the statute violated the equal protection clause of the fourteenth amendment. Suit was brought under section 1983\(^5\) and jurisdiction alleged under section 1343 (3). Confining discussion to the abstract personal rights involved, the court found section 1343 (3) applicable.\(^6\) The fact that the underlying purpose of the suit was to enable plaintiff to raise money was never considered. Similar difficulties exist in opinions dealing with alleged statutory infringements of the right to


60. Minor v. City of Keokuk, 92 F. Supp. 833 (D. Iowa 1950). But the court did find federal jurisdiction under § 1331, since the damages claimed exceeded the required jurisdictional amount.

61. Id. at 835 (emphasis added).

62. See text accompanying notes 35-39, supra.

63. Id.

64. 293 F.2d 585 (7th Cir. 1961).


Civil Action for deprivation of rights.

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.

This section is usually cited as the basis for subject-matter jurisdiction in section 1343(3) cases.

66. 293 F.2d at 588.
work. Pre-*Hague* decisions were split as to whether section 24(14) conferred jurisdiction for such claims. In a decision denying jurisdiction under section 24(14), a district court said the right to work was a "natural right," and not a right, privilege or immunity secured (i.e., "created") by the Constitution, and hence did not fall within the ambit of civil rights protected by section 24(14) though plaintiffs claimed denial of equal protection. The same court, two years later, citing its earlier decision with approval, found jurisdiction in a case involving a statute requiring a minimum percentage of United States native born employees in businesses of more than five workers. Without alluding to the rationale of its first decision, the court simply held that section 24(14) conferred jurisdiction where a claim was based on a denial of equal protection of the laws, under the fourteenth amendment. The Supreme Court, agreeing that such discrimination was unconstitutional for the reasons asserted by the plaintiff, affirmed.

A 1950 fifth circuit decision, *Walton v. City of Atlanta*, relying on Stone's distinction between property and personal rights, found jurisdiction under section 1343(3) in a suit based on an alleged violation of the right to work, by holding that a personal, not a property right, was at issue. While such a decision is correct under *Raich* and permissible under a literal application of Justice Stone's "personal-property" test, it does not at all follow the spirit of Justice Stone's opinion in *Hague* and, if accepted, casts grave doubt on the viability of that test. Clearly, the right to work is capable of pecuniary valuation, unlike privacy or the freedom of speech, press and religion. On the other hand, it is not, strictly speaking, a "property right" as is the right to own land, or freedom from the unfair assessment of taxes. In defining the "right to work" as personal, a court may conform its decision to the Stone rationale, but, by using an arbitrary classification to support the view that a right which has a definable economic value should be protected under section 1343(3), it destroys the spirit of the test, without denying its efficacy. This approach, in effect, enables individual courts to accept or decline jurisdiction of suits, under the Stone thesis, by taking a broad or narrow view of the allegations in the complaint, and classifying the right involved accordingly. While this approach may satisfy the exigencies of an immediate case, it is certainly less than candid. Perhaps a court should instead inquire into the validity of the theory into which it seeks to fit its decision.

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69. *Id.* at 511-12.
71. *Id.* at 283.
72. Truax v. Raich, 239 U.S. 33 (1915).
73. 181 F.2d 693 (5th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950).
74. *Id.* at 694.
Some decisions have rejected the Stone test entirely, either sub silentio or explicitly. The most outspoken criticism of the "property-personal" distinction appears in Joe Louis Milk Company v. Hershey, an Illinois district court opinion granting section 1343(3) jurisdiction to a claim based on allegedly unfair "back insurance premiums assessments" under state law. After acknowledging the distinctions set forth in Hague, the court observed:

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

This position has apparently been rejected by the seventh circuit where a district court has held that section 1343(3) does not confer jurisdiction in a suit involving alleged denial of due process and equal protection in the application of a state income tax against non-residents earning money within the state. Without mentioning Joe Louis, the court asserted: "Thus far, at least, it is quite clear that the courts have generally treated [section 1343(3)] as applicable to personal liberty rather than a property or monetary claim."

One of the most obvious examples of the present precariousness of the Stone test appears in a fifth circuit case, Bussie v. Long. Plaintiff-taxpayers sued various members of the Louisiana Tax Commission, seeking a mandatory injunction requiring the defendants to assess taxes on certain property in a uniform manner. After acknowledging that several decisions by the fifth circuit had held section 1343(3) applicable to property rights, the court denied jurisdiction. It was held that the property rights involved in this case were not "civil rights" as contemplated by section 1983, the "Civil Rights Statute;" and, while admitting that "[t]here is a . . . fine line between [cases holding that section 1343(3) is applicable to property rights] and the instant case," the court concluded "we do not believe that their holdings can be extended to a

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75. See, e.g., McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953); cf. Lucero v. Donovan, 258 F. Supp. 979 (C.D. Cal. 1966) (money damages granted under § 1343(3)).
77. Id.
78. Id. at 354.
80. 383 F.2d 766 (5th Cir. 1967).
81. McGuire v. Sadler, 337 F.2d 902 (5th Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).
cause of action involving tax assessments in view of [Holt and Hague].”
Where the line should be drawn and what really distinguished those cases in which it had permitted section 1343 to apply for recovery on property claims, the court did not indicate. While the court did state that the particular right allegedly infringed was not a “civil right,” thereby precluding section 1343(3) jurisdiction, this is not a satisfactory basis for distinguishing tax assessment cases from those in which a plaintiff claims a violation of due process in the denial of his application for a liquor license. Thus it appears that Bussie accomplished little other than leaving the status of Justice Stone’s doctrine in the fifth circuit in greater doubt than ever.

A review of the cases, then, reveals the existence of a serious conflict in both the status and validity of the Stone test. Some courts have followed the standard unquestioningly, while others have rejected it entirely. The courts which reject the test apparently are unconcerned with reconciling the co-existence of sections 1331 and 1343(3), but this issue must be considered, for the problem is inherent in the application of section 1343(3).

AN ANALYSIS OF SECTION 1343(3)

The confusion surrounding the interpretation and application of section 1343(3) stems not only from Justice Stone’s opinion in Hague v. C.I.O., distinguishing between personal and property rights, but also from the obscure language and definition of the “rights secured” by the Civil Rights Act of 1871, upon which section 1343(3) is based and from which the purpose of the statute must be derived. Although it seems clear that the rights “secured” by the Constitution do not refer simply to those “created” by that instrument, but include also those “natural and fundamental” rights “protected” by it, the extent of the coverage of jurisdictional statutes based on actions arising under “civil rights” laws is still unclear. This lack of clarity is, of course, a result of the failure of Congress to define succinctly what it meant by “civil rights” and to indicate clearly whom the Civil Rights Acts were intended to apply to.

82. 383 F.2d at 769.
83. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).
86. See Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969).
88. See Justice Stone’s opinion in Hague v. C.I.O., 307 U.S. 496 (1939). But see Simpson v. Geary, 204 F. 507, 511-12 (D. Ariz. 1913), in which a district court held that the right to contract, being a “natural right,” was not a right “secured”—i.e., created—by the Constitution, and thus unless a state law violating this right was based on discrimination, a federal court had no jurisdiction under § 24(14).
89. See, e.g., Baines v. City of Danville, 357 F.2d 756 (4th Cir. 1966), aff’d, 384 U.S. 890 (1966) (“Civil rights” requirement for removal under § 1443) (majority and dissent); and the cases discussed throughout this paper.

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protect. In a masterful opinion, with regard to the delineation of the scope of the actual language of the Civil Rights Acts of 1866, 1870, 1875 and 1871, Chief Judge Haynsworth of the fourth circuit reasoned that the first three acts were aimed solely at the protection of specifically enumerated rights guaranteed by law to Negroes, and, deductively, that the last-mentioned act was intended to protect those rights guaranteed by the laws and Constitution to all persons within the jurisdiction of the United States from infringement under color of state law. Judge Haynsworth arrived at this conclusion by arguing that the omission of the word “Constitution” from the phrase “deprivation of any rights . . . secured by the Constitution and laws” in the jurisdiction-conferring sections of the Acts of 1866, 1870 and 1875, as well as its appearance in the fourteenth amendment, indicates a deliberate attempt by Congress to distinguish between civil rights protected by law, and rights secured by the Constitution. While the argument regarding the inclusion or exclusion of constitutional rights in the Acts of 1866, 1870 and 1875 is not crucial to this article, what is relevant is that if Haynsworth is correct, it is logical to assume from the language of section 1 of the Civil Rights Act of 1871, that the rights protected include those enumerated in the Acts of 1866 and 1870 and any other civil rights act as well as those “secured” by the Constitution. Hence, the distinction between “property rights” and “personal rights” drawn by Justice Stone is without merit, for section 1 of the Civil Rights Act of 1866 guarantees to former slaves the

same right . . . 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 engaged 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.

Although judicial opinion leaves no doubt that section 1343(3) is based on section 1 of the Civil Rights Act of 1871, the language of the former explicitly grants jurisdiction for the redress of the “deprivation . . . of any right, privilege or immunity secured . . . by any Act of Congress providing for equal rights . . . of all persons within the jurisdiction of the United States.” This language indicates that section 1 of the 1866 Act, now codified in 42 U.S.C. sections 1981-

90. Id.
91. Id. at 763.
92. Id. at 763-64. Judge Sobeloff, dissenting, argued that “laws of the United States” was intended to include rights secured by the Constitution, since the drafters of all the Civil Rights Acts had desired to give the broadest possible scope to the phrase “equal protection of the rights of citizens.” Id. at 774-83.
82,96 is included, since it is an "Act of Congress providing for equal rights." If the "property rights" of Negroes are protected from deprivation under color of law, and hence under the literal coverage of section 1343(3), it is obvious that property rights of whites must be similarly protected, for to refuse application of section 1343(3) to the property rights of whites would be to deny equal protection of the laws under the Constitution. Hence, either the jurisdictional statute is unconstitutional, or all persons must be granted trials when alleging a substantial claim based on deprivation of a property right under a civil rights statute. Regardless of how this issue is resolved, what is important to note is that in either event, upon a literal reading of section 1343(3), jurisdiction does not hinge upon the distinction between "property rights" and "personal rights."97 Perhaps, then, those decisions rejecting Justice Stone's thesis98 are correct, and section 1343(3) applies to the deprivation of any civil right guaranteed by the laws and Constitution of the United States, regardless of its classification as a "personal liberty" or "property right." But, if this particular distinction is cast aside, how may the concurrent existence of sections 1331 and 1343 be reconciled, the concern which led Justice Stone to his conclusion in *Hague*?

**AN EXAMINATION OF THE INTERRELATION OF SECTIONS 1331 AND 1343(3)**

One question raised by Stone's effort to reconcile sections 1331 and 1343(3) is whether a real conflict exists. Textually section 1331 has a far broader sweep than section 1343(3). As long as the jurisdictional amount in controversy is met, a court has power, under section 1331, to entertain any suit which "arises under the Constitution, laws, or treaties of the United States." Section 1343(3), however, confers jurisdiction, regardless of the amount in controversy, only "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 the equal rights" of any person within the jurisdiction of the

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    All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
    All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
United States.99 Thus, the wrong alleged must be one made under color of state law and in violation of a guarantee of equal rights. The literal coverage of section 1343(3) seems to distinguish it from section 1331 to a certain extent, even without regard to the "property-personal" distinction.

A further distinction between section 1331 and 1343(3) appears with respect to the implied remedial powers of the court under these statutes. Section 1331 speaks in terms of a financial injury—that is, jurisdiction is founded upon the claim that certain monetary harm has been inflicted upon the plaintiff. Sections 1343(1), (2) and (4) confer federal jurisdiction where any person seeks to "recover damages." Section 1343(3) confers jurisdiction "to redress the deprivation" of rights. Significantly absent from this latter provision is the phrase "to recover damages." While this does not necessarily limit the remedial power of federal courts so as to exclude the ability to award damages under section 1343(3),100 the implication exists that that section was designed to protect infringed rights for which some remedy other than damages is sought. Thus, regardless of whether the right allegedly deprived under color of state law is "personal" or "property" section 1343(3) confers jurisdiction where the relief sought is non-monetary. The interpretation, which seemingly finds support in McGuire, Cobb and Joe Louis, and Judge Johnson's dissent in Hornbeak v. Hamm,102 rejects Justice Stone's "personal-property" distinction, yet successfully reconciles the coexistence of sections 1331 and 1343(3). It also rejects Justice Stone's "inherently incapable of pecuniary valuation" theory. Under this new test, the court must examine the nature of the relief sought, not the possible value of the right allegedly infringed, to determine if section 1343(3) confers power on the court to entertain the substantive issues. Unlike the Stone test, a court could find section 1343(3) jurisdiction even where the right asserted has a monetary value, if the relief sought is equitable. One problem with this standard is that it may preclude jurisdiction where less than $10,000 is the only relief sought under a substantial civil rights claim. Another difficulty under this new theory would arise where both equitable and legal remedies were sought under section 1343(3) and the damages claimed were less than the jurisdictional amount.

Numerous alternatives are available, though, admittedly, none seems wholly satisfactory: (1) A court might take jurisdiction with respect to the non-monetary relief sought, and claim lack of jurisdiction to decide the question

99. (Emphasis added.) Section 1343(4), providing for jurisdiction to entertain suits "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote" does not protect constitutional rights. See Judge Haynsworth's analysis of the coverage of various civil rights acts in Baines v. City of Danville, 357 F.2d 756, 759-64 (4th Cir. 1966).

100. Some courts have, in fact, awarded damages under § 1343(3). See, e.g., Lucero v. Donovan, 258 F. Supp. 979 (C.D. Cal. 1966); cf. Bottoine v. Lindsley, 170 F.2d 704 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949), in which jurisdiction to entertain a suit in which plaintiff sought money damages found under § 24(14); but judgment for the defendant on the merits.

101. See note 96, supra.
of damages. But this is foolish, since no purpose would really be served by try-
ing a case in full and then denying appropriate remedies, even though the right
to them is clear. Surely partial denial of jurisdiction will not significantly reduce
the work load of the court, and accepting total jurisdiction will not materially
alter or increase the docket from the "partial jurisdiction" situation. (2) A
court might look at the facts of each case and determine if the primary purpose
of the plaintiff is to secure equitable relief or to recover damages. If the former,
jurisdiction could be granted under section 1343(3); if the latter, jurisdiction
could be denied if the proper amount is not met. While this may prevent un-
warranted complaints, the courts may find themselves flooded by petitions seek-
ing injunctive and monetary relief under section 1343(3), causing an overload
of work to determine the true nature of the relief sought. Furthermore, uniform-
ity would be generally impossible to achieve. The advantage, however, would
be that a plaintiff who had a valid claim for the infringement of a right which
had some monetary value, but who desired primarily injunctive relief, would
not be precluded from full recovery because his damages claim did not exceed
$10,000. (3) A court might disregard implied distinctions arising from the
language of section 1343(3), and simply find jurisdiction under that statute
whenever a plaintiff sought to redress the deprivation of a secured right,
privilege or immunity. Having found such jurisdiction, the court could award
such relief as it might deem appropriate, since section 1343(3) does not ex-
plicitly limit the remedial powers of the federal courts. This approach, how-
ever, disregards any possible contrary congressional intent which may be implied
from a comparison of the actual language of section 1343(3), and other juris-
dictional statutes.102 Unfortunately, courts have not discussed these possibilities,
and it is impossible to state, in the abstract, which, if any, of these alternatives
is preferable. It does seem clear, however, that as the number of courts which
reject the "property-personal" distinction increases, judicial considerations of
this problem must be forthcoming. Then competing theories can be applied, their
validity evaluated, and a new interpretation of the scope of section 1343(3),
and its relation to section 1331 determined.

CONCLUSION

It appears that Justice Stone's concern for reconciling the coexistence of
section 24(1) and section 24(14) of the Judicial Code, now embodied in 28
U.S.C. sections 1331 and 1343(3), led to his formulation of the "property-
personal" right distinction and the "inherently incapable of pecuniary valuation"
test limiting the scope of section 24(14) applicability. Justice Stone's theory has
been accepted by some courts, in varying degrees, and rejected entirely by
others. Its validity depends upon the necessity for distinguishing and separat-

102. § 1343(4), for example, explicitly confers jurisdiction on federal courts to award
damages and "to secure equitable and other relief. ..." No such broad remedial grant
appears in the language of § 1343(3), though, admittedly, all of these remedies may be
necessary to "redress" the deprivation of a secured right.
ing the coverage of these jurisdictional statutes, and Justice Stone's conclusion that his view was, in fact, the correct one. As several cases indicate, however, acceptance of these requirements is dubious. Unfortunately, the failure of those courts rejecting the Stone test to elucidate the underlying rationale for their position that section 1343(3) confers jurisdiction regardless of the nature of the right involved, and their refusal to recognize any apparent conflict between sections 1331 and 1343(3) leaves Justice Stone's analysis unchallenged. While the language of section 1343(3) renders Justice Stone's position vulnerable, until judicial consideration is given to the resolution of any possible conflict between section 1331 and section 1343(3), his thesis will probably be uncritically accepted by the majority of the courts.