The Emerging State Court § 1983 Action: A Procedural Review

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The Emerging State Court § 1983 Action: A Procedural Review

STEVEN H. STEINGLASS*

Although actions under § 1983 have traditionally been a federal court remedy, an increasing number of litigants have turned to the state courts to pursue claims under § 1983. In light of this trend, the author presents a comprehensive examination of state court § 1983 actions—focusing on the choice of the state forum as a tactical decision, the power and duty of state courts to hear § 1983 actions, and the specific procedural and remedial issues that will arise in state court § 1983 litigation.

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I. INTRODUCTION

State courts have emerged in recent years as the forum choice for an increasing number of plaintiffs1 suing state and local officials under 42 U.S.C. § 1983.2 Given the origin of this statute in the Reconstruction-era Civil Rights Act of 18713 and its modern his-

1. For a statistical summary of the increase in reported state court § 1983 actions between 1969 and 1983, see infra note 269 and the accompanying text and table; see also Appendix, Tables I & II.

2. Because the codification of Title 42 has not been enacted into positive law, see O'Neill, Preface to United States Code at VII (1982), the authoritative citation for 42 U.S.C. § 1983 (1982) is to Revised Statutes § 199, but the references in this article will be to the more commonly used "§ 1983," which provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


3. Although § 1983 has its roots in the criminal provision contained in § 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, the civil remedy is derived from § 1 of the Civil
tory,\(^4\) this trend is surprising. Nonetheless, the Supreme Court has sanctioned and encouraged this trend by holding that state courts have concurrent jurisdiction over \$ 1983 actions\(^5\) and by authorizing the award of attorney fees in state court \$ 1983 actions.\(^6\)

Litigants seeking affirmative relief under federal law in cases against state or local governments and their officials generally prefer federal courts,\(^7\) and \$ 1983 has been the principal modern remedy for asserting such claims.\(^8\) As the Supreme Court becomes less willing to construe federal law to protect individual rights,\(^9\) however, litigants have been turning to state law and state courts as alternative sources of judicial protection.\(^10\) The resulting explosion

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Rights Act of 1871, ch. 22, \$ 1, 17 Stat. 13 (current version at 42 U.S.C. \$ 1983), which authorized a private cause of action against persons who acted under color of state law to deprive others of federal constitutional rights and provided federal court jurisdiction over such actions. These provisions were part of a larger statute enacted to deal with the terror of the Ku Klux Klan. Because part of the problem was the state judicial system, Congress enacted new federal causes of action that a federal court could hear. Previously, federal courts would not have had subject matter jurisdiction over such private causes of action except in diversity cases. See generally Developments in the Law—Section 1983 and Federalism, 90 HARV. L. REV. 1133, 1150-55 (1977) (discussing the history, substance, and other aspects of \$ 1983).

4. See infra notes 28-51 and accompanying text.
8. See infra notes 209-59 and accompanying text.
9. Although the Burger Court has not produced the wholesale rejection of precedents protecting individual federal rights some had sought and others feared, see generally The Burger Court: The Counter Revolution That Wasn’t (V. Blasi ed. 1983), in many areas, the Court has been less willing than its predecessor to use federal law to protect individual rights. Nevertheless, a final accounting of the impact of the Burger Court remains to be done. For critical comments on its performance in protecting individual rights, see Morrison, Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights, 30 RUTGERS L. REV. 841 (1977); Tushnet, "...And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court, 1972 Term, 1974 WIS. L. REV. 177; Comment, Civil Rights in the Burger Court Era, 10 AKRON L. REV. 327 (1976); Comment, Cases that Shock the Conscience: Reflections on Criticism of the Burger Court, 15 HARV. C.R.-C.L. L. REV. 713 (1980).
10. A widely respected federal judge has characterized the Supreme Court’s imposition of procedural restrictions on access to federal courts and the narrowing of substantive constitutional protections as producing an era of federal court passivity that provides new opportunities for a return to the “Old Federalism” in which state courts through state constitutions played an important role in protecting fundamental rights. Newman, The “Old Federalism”: Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity, 15 CONN. L. REV. 21, 21-22 (1982). For an important review of recent developments in state constitutional law, see Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324 (1982) [hereinafter cited as Developments]. See also Howard, State Courts and Constitutional Rights in the Days of the Burger Court, 62 VA. L. REV. 873 (1976); Wilkes, The New Federalism in Criminal Procedure,
of interest in state law, especially state constitutional law, has led


Part of the impetus for the expanded use of state constitutions for the protection of individual liberties has come from Justice Brennan, who has urged state courts to use state law to fill the void Supreme Court decisions narrowly construing individual rights have created. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 989 (1977). The state judiciary's efforts to call attention to the use of state constitutions have also not been confined to judicial opinions; state appellate court judges have used the law reviews to encourage this development and announce their receptivity to claims based on their state constitutions. See, e.g., Abrahamson, Reincarnation of State Courts, 36 Sw. L.J. 951 (1982) (Justice, Supreme Court of Wisconsin); Carson, "Last Things Last": A Methodological Approach to Legal Arguments in State Courts, 19 Willamette L.J. 641 (1983) (Associate Justice, Oregon Supreme Court); Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379 (1980) (Associate Justice, Oregon Supreme Court); Douglas, State Judicial Activism—The New Role for State Bills of Rights, 12 Suffolk U.L. Rev. 1123 (1978) (Associate Justice, Supreme Court of New Hampshire); Mosk, The New States' Rights, 10 Calif. L. Enforcement 81 (1976) (Justice, California Supreme Court); Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L. Rev. 705 (1983) (Justice, New Jersey Supreme Court); Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491 (1984) (Justice, Washington Supreme Court); Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 14 Suffolk U.L. Rev. 887 (1980) (Associate Justice, Supreme Judicial Court of Massachusetts).

11. For a suggestion of the range of state constitutional issues that state courts have addressed and the number of states whose courts have recently been willing to find independent meaning in their constitutions, see Collins, State Constitutional Law, National Law Journal, March 12, 1984, at 25-32, (Special Section). The recently held National Conference on Developments in State Constitutional Law, the co-sponsors of which included the National Center for State Courts and the Conference of Chief Justices, suggests the extent to which state constitutional law has become part of the official agenda of the state courts. Attendance at this conference, which was held in Williamsburg, Virginia, on March 9-10, 1984, included justices of state courts of last resort from more than thirty states. Telephone interview with B.D. McGraw, Staff Attorney for the National Center for State Courts (August 27, 1984); see also Developments in State Constitutional Law (B.D. McGraw ed. 1984) (conference papers).

As a review of the recent literature on state constitutional law makes clear, see Tart, Bibliographic Essay, in State Supreme Courts: Policy Makers in the Federal System 201-09 (M. Porter & G. Tarr, eds. 1982), the focus of the study of state constitutional law has changed markedly. Earlier scholarship often concerned state constitutional conventions as well as structural matters, particularly those relating to the relationship between state and local governments and the power of state governments, especially in the area of finances. See, e.g., R. Dishman, State Constitutions: The Shape of the Document (1960); W. Graves, Major Problems in Constitutional Revision (ed. 1960); J. Wheeler, Salient Issues of Constitutional Revision (ed. 1961); see also Graves, Selected Bibliography, in Major Problems in Constitutional Revision 283-98 (1960). Commentators have rarely addressed the role of state constitutions in protecting individual rights. But see Greenberg, Adjudication of State Constitutional Questions in the New York Court of Appeals, 40 Cornell L.Q. 537 (1955); Paulsen, State Constitutions, State Courts and First Amendment Freedoms, 4 Vand. L. Rev. 620 (1951).

The popular legal press has also responded and articles by Professor Ronald K. L. Collins on State Constitutional Law are now a regular feature of the National Law Journal.
the 1980’s to be characterized as “the decade of the state courts.”

Less attention has been focused on the role of state courts in enforcing federal law. Although the Burger Court has often reaffirmed the obligation of state courts to enforce federal law, expressing confidence in the ability of the state judiciary to decide federal issues, the Court’s deference has generally been used to justify decisions limiting access to federal courts. Thus, many litigants assert federal claims in state courts because they have no alternative.

But a growing number of litigants for whom federal trial courts are still open choose to file § 1983 actions in state courts. Appellate decisions in all but a few states expressly or by implication permit their trial courts to exercise jurisdiction over § 1983 actions. As a result, § 1983 actions are being routinely litigated in

Finally, the national media has noted these developments. See, e.g., State Judiciaries Are Shaping Law that Goes Beyond Supreme Court, N.Y. Times, May 19, 1982, at 1; Barbash, Role-Reversal in Judicial System: State Courts Expanding Individuals’ Rights, Wash. Post, Apr. 2, 1984, at A1.


13. A federal judge participating in a Symposium on “The Rediscovery of the Connecticut Constitution” cosponsored by the University of Connecticut Law School and the Connecticut Civil Liberties Union has cautioned participants that in the rush to “rediscover” state constitutions they should not ignore the role of the national constitution as the “primary guarantor of individual rights.” The judge further noted that it was the failure of the state courts in protecting individual rights that led to the expanded role of the federal courts during the era of the Warren Court. Cabranes, The Need for Continued Federal Protection of Individual Rights, 15 Conn. L. Rev. 31, 34-35 (1982).

This Symposium, like much current scholarship on state courts and state constitutions, focuses almost exclusively on the application of state constitutions in response to decisions of the Burger Court. See, e.g., Note, Private Abridgement of Speech and State Constitutions, 90 Yale L.J. 165 (1980). One commentator has criticized this use of state law as being instrumentalist and as viewing state law “as a utilitarian device for perpetuating the constitutional expansionism wrought by the Warren Court.” See Collins, Reliance on State Constitutions—Away from a Reactionary Approach, 9 Hastings Const. L.Q. 1, 2 (1981). Advocates of such independent reliance on state law urge that state courts address state constitutional issues before reaching federal constitutional issues, see Linde, supra note 10 at 387-92, and that state courts not treat Supreme Court constitutional decisions as presumptively valid and then attempt to justify the basis of their disagreement. See Williams, In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S.C. L. Rev. 353, 389-402 (1984). If widely adopted, however, these approaches could alter the role of federal law and the federal courts in establishing a floor of minimum constitutional guarantees. It is also impossible to consider fully the role of state courts without reviewing their responsibility for developing federal law and the relation between state and federal law. See Developments, supra note 10, at 1331-67. For a discussion of the role of state courts as forums for affirmative private enforcement of federal constitutional law, see Comment, Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole, 12 Harv. C.R.-C.L. L. Rev. 63 (1977).

14. See infra note 58.

15. A report by the Federal Judicial Center’s Prisoner Civil Rights Committee found
that as of October 1, 1979, appellate courts in 19 states had explicitly recognized jurisdiction over § 1983 cases, had implicitly recognized it in 4 states, had avoided it in 9 states, and had not decided any relevant cases in 18 states. Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, 109-14 (1980).


This article examines the growing use of § 1983 in state courts. Part II addresses the choice of forum decisions. Doctrinal limitations on the power of federal courts to exercise jurisdiction or provide full relief have often been minimized, giving rise to a myth of federal court superiority. Federal courts may often be the "correct" choice for litigants with an option, but limitations on federal judicial power—whether constitutional, statutory or judicial—frequently make state courts the more attractive forum.

The state of the relevant substantive and remedial law, as well as ad hominem and other tactical considerations, may also make state courts more desirable in particular cases. In reviewing the nature of § 1983 and its development as the preferred remedy for enforcing federal rights against state and local defendants in federal courts, even when remedies based directly on federal or state law are available, Part II also suggests why § 1983 is likely to become an equally important remedy in similar litigation in the state courts.

Part III briefly examines the power and duty of state courts to hear § 1983 actions and the limitations on the application of state policies to federal claims litigated in state forums. States may not discriminate against federal causes of action but that is not the extent of their obligation. The late Professor Hart, addressing state court enforcement of federal rights, observed that "federal law takes the state courts as it finds them." He also argued, however, that state rules need not be applied when they "are . . . so rigor-


In three states, Hawaii, Nebraska, and Virginia, there are no reported appellate court decisions raising claims under § 1983. Finally, in one state, Tennessee, there is an explicit rejection of state court jurisdiction over § 1983 cases. See Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). Although the basis of that rejection has been undercut, see infra notes 283-84 and accompanying text, there is also evidence of § 1983 litigation in the Tennessee state courts. See infra note 285.

16. See infra notes 268-70 and accompanying text.
17. See infra notes 88-149 and accompanying text.
18. See infra notes 76-87 & 150-208 and accompanying text.
19. See infra notes 209-82 and accompanying text.
20. See infra notes 283-331 and accompanying text.
ous as, in effect, to nullify the asserted rights." If state court defendants can interpose state law defenses to § 1983 claims, the nascent use of § 1983 in state courts may be aborted before its full potential is realized.

Part IV expands on this general framework. It identifies specific issues which can arise in state court § 1983 litigation and reviews state policies that impose limitations on § 1983 as well as those that can make state court § 1983 actions a better remedy from the plaintiffs’ perspective. The extent to which state courts are required to make it a better remedy is also analyzed.

Part V identifies some of the implications that the growth in state court § 1983 litigation may have on the private enforcement of federal law and on our dual judicial system. Even strong supporters of broad access to federal courts often applaud the willingness of state courts to use federal law to protect individual rights, especially if access to federal courts has been limited. Not all state courts, however, wish to play this role. Some have narrowly construed § 1983 and its companion attorney fees provision or have imposed state policies to defeat or limit § 1983 actions. Others have held that § 1983 is not available in state courts if it is unavailable in federal courts or, conversely, have refused to hear § 1983 actions if a federal forum is available.

This expansion of state § 1983 litigation will add new pressures on an already heavily burdened Supreme Court to maintain the uniformity of federal law. It will also present federal courts

22. See infra notes 445-78, 552-99, 755-70 and accompanying text.
23. See infra notes 771-802 and accompanying text.
with new and unusual issues of removal jurisdiction as defendants increasingly seek to veto plaintiffs’ forum choices. Finally, the emergence of the state court § 1983 action may be used to justify a retreat from the primary role the lower federal courts have played in enforcing individual rights under § 1983. Justice Rehnquist has already relied on the availability of the state court § 1983 action to support the exclusion of certain § 1983 damage actions from federal courts. Although a full review of the impact that the emergence of viable state court remedies to protect fundamental rights may have on the role of federal courts and federal law is beyond the scope of this article, given the legislative history of § 1983 and its modern resurgence it would be ironic indeed if the availability of § 1983 actions in state court resulted in limitations being placed on the use of § 1983 in federal courts. Nonetheless, the emergence of state courts as forums for the enforcement of § 1983 is a significant development that has not previously been reviewed in depth.

II. CHOICE OF FORUM AND § 1983

The United States Supreme Court’s seminal decision in Monroe v. Pape laid the groundwork for the development of § 1983 as the principal modern vehicle for the private enforcement of federal law against state and local governments and their officials. The Monroe decision not only contributed to the expanded role of federal law in protecting individual rights but also guaranteed direct access to a federal forum in § 1983 actions whether or not state law authorized the challenged conduct or provided remedies to redress it. The subsequent rejection of the personal-prop-

27. See Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100 (1981).
29. Private defendants may also be sued under § 1983 when they act in concert with state officials or when their actions are imputed to the state. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Dennis v. Sparks, 449 U.S. 24 (1980).
31. Monroe’s major impact for damage actions was its interpretation of § 1983 “against the background of tort liability that makes a man responsible for the natural consequences of his actions,” Monroe, 365 U.S. at 187, to create a species of “constitutional tort” available without a showing of specific intent. See Shapo, Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond, 70 N.W.U. L. Rev. 277 (1975). Nevertheless, the important principles Monroe established concerning the definition of the “color of law” requirement to include unauthorized state action and the no-exhaustion rule were equally applicable to suits for injunctive relief.


Although this personal-property rights distinction was advanced to preserve § 1343(a)(3), which some had argued had been impliedly repealed by § 1331, see The Supreme Court—1971 Term, 86 Harv. L. Rev. 201, 203 n.17 (1972), and to liberate first amendment and similar constitutional rights from the jurisdictional amount requirement, the distinction came to be a limitation on federal court jurisdiction. Justice Stone’s concern was that such rights might be considered incapable of valuation, and thus would fail the jurisdictional amount test. Hague, 307 U.S. at 529. Justice Stone apparently assumed that absent the distinction, § 1343(a)(3) would not be construed to reach all § 1983 claims, because such a construction would effectively eliminate the jurisdictional amount requirement of § 1331. Leaving aside the accuracy of Justice Stone’s judgment on how the Court would have construed § 1343(a)(3) absent his distinction, the jurisdictional amount requirement would have continued to apply in general federal question cases against federal and private defendants.

In Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Court unanimously rejected Justice Stone’s distinction. Although the Court had never embraced it, a number of lower federal courts had used the distinction, and its demise removed a limitation on § 1983 actions that was the source of great confusion. Several cases from the Second Circuit, where the distinction had been most warmly embraced, illustrate the difficulty in applying the distinction. See, e.g., Roberts v. Harder, 440 F.2d 1229 (2d Cir. 1971), vacated and remanded, 405 U.S. 1037 (1972) (remanding for reconsideration in light of Lynch); Johnson v. Harder, 438 F.2d 7, 12 (2d Cir. 1971); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969).

sions stripping municipalities of their absolute immunity from suit under § 1983 and denying them a qualified immunity for their official actions also encouraged the use of § 1983. Finally, Congress’s authorization of attorney fees to prevailing parties in § 1983 actions, and its rejection, to date, of legislative proposals to restrict § 1983 have contributed to the substantial increase in the use of this remedy.

The removal of procedural barriers to litigation on the merits characterizes the modern history of § 1983 litigation. The Supreme Court, however, has not construed § 1983 to reach all violations of
federal law. In addition to decisions limiting the underlying rights enforceable through § 1983 and narrowly construing the state action requirement, the Court has recognized defenses based on the lack of standing, official immunities, the eleventh amendment, respondeat superior, preclusion, classical abstention, equitable abstention, and comity. The argument that § 1983 itself overrides these defenses, even if they are otherwise applicable in federal courts, has been rejected. Despite these limitations on the reach of § 1983, the federal court § 1983 action is now firmly entrenched as the principal remedy for asserting federal claims against state or local defendants.

39. Although the Court rejected a construction of § 1983 that would have excluded violations of federal statutes not providing for equal rights, see Maine v. Thiboutot, 448 U.S. 1 (1980), it has approved implied limitations on the statutory claims that can be raised under § 1983. See Middlesex Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); see also Note, Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes, 82 Colum. L. Rev. 1183 (1982) (discussing the comprehensiveness test which precludes the § 1983 action when it is invoked to remedy the violation of a statute already containing comprehensive remedial provisions). The Court has also implied limitations on the use of § 1983 to raise certain constitutional claims. See Smith v. Robinson, 104 S. Ct. 3457 (1984) (Education of the Handicapped Act is the exclusive means to raise equal protection challenges involving the education of handicapped children).


51. Although § 1983 is the principal general remedy, there are often more carefully tailored remedies tied to specific substantive statutes. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Title VII prohibition of employment discrimination subjects states to suit in federal court); Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir.) (Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021, 2022 (1982), authorizes suits against states),
An increasing number of lawyers, however, defy conventional wisdom and file § 1983 actions in state courts. To understand why this is happening, it is necessary to consider both why state courts are chosen and why cases are framed in terms of § 1983. Such an analysis demonstrates that in many cases a state trial court can be a more hospitable forum for § 1983 litigation than its federal court counterpart.


52. Until recently, the use of § 1983 has been confined primarily to the federal courts and evidence of § 1983 cases in the state courts prior to 1969 is sparse. In 1957, one notewriter expressed the view that statutes enforcing civil rights are exclusively within federal court jurisdiction for reasons of national policy, see Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 HARV. L. REV. 509, 512-13 n.27 (1957), and another notewriter in 1969 was unable to locate any successful state court § 1983 actions. Unfortunately, the latter Note did not indicate whether they had found any state court § 1983 actions other than the two unsuccessful cases they cited. Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 HARV. L. REV. 1486, 1497-98 n.82 (1969).

In addition to the two actions identified in the 1969 Note, see Hrych v. State Fair Comm'n, 376 Mich. 384, 136 N.W.2d 910 (1965) (summary judgment properly granted defendant in police abuse case); Krieger v. State, 54 Misc. 2d 583, 283 N.Y.S.2d 86 (Ct. Cl. 1966) (amount of work required of individual involuntarily committed did not amount to involuntary servitude), pre-1969 cases in which claims were made under § 1983 include: Caruso v. Abbott, 133 Cal. App. 2d 304, 284 P.2d 113 (1955) (doubt expressed as to availability of § 1983 in funeral directors' challenge to distribution of county business, but plaintiffs permitted to amend); Harris v. Shanahan, 192 Kan. 183, 387 P.2d 771 (1963) (apportionment of state legislature violated state constitution; § 1983 claim not reached); Thompson v. Ward, 409 S.W.2d 807 (Ky. Ct. App. 1966) (writ of mandamus granted to require consideration of indigent prisoner's request to proceed in forma pauperis in state court § 1983 action); Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962) (successful equal protection challenge to legislative apportionment, but § 1983 held not to be available because it created no rights); Richardson v. Thompson, 390 S.W.2d 830 (Tex. Civ. App. 1965) (denial of vending license was proper where plaintiff could not show she was certified to operate a vending stand or that she was blind); State v. Mitchell, 152 W. Va. 448, 164 S.E.2d 201 (1968) (summary judgment for defendant in false arrest, false imprisonment § 1983 suit reversed because of genuine issue of fact). Although the parties asserting federal rights through § 1983 prevailed in their appeals in a number of these cases, the presence of the § 1983 claims was not essential to these results.

A 1951 Comment found only 21 reported § 1983 cases between 1871 and 1920, none of which originated in state court. Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?, 26 IND. L.J. 361, 363-66 (1951). The Comment, however, overlooked Giles v. Teasley, 193 U.S. 146 (1904), which may be the first state court § 1983 case to have reached the Supreme Court. Giles involved two § 1983 actions that plaintiffs had filed in state court to challenge voting restrictions in the Alabama Constitution of 1901 which had disenfranchised blacks. Although the Supreme Court decision does not refer specifically to § 1979 of the Revised Statutes, which was adopted in the 1874 codification of § 1 of the Civil Rights Act of 1871 and which is now contained in 42 U.S.C. § 1983 (1982), it is clear from the arguments and briefs that the plaintiffs relied on this statute. For a further discussion of unsuccessful earlier efforts to overturn this policy, see Giles v. Harris, 189 U.S. 475 (1903), and the discussion of Giles in Schmidt, Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause, 82 COLUM. L. REV. 835, 849-51 (1982).
A. The Use of State Courts to Enforce Federal Rights and the Myth of Federal Court Superiority

The controversy concerning the proper distribution of judicial power between state and federal courts, which has existed since the First Congress enacted the Judiciary Act of 1789, has contributed to a unique and complex overlapping of federal and state court jurisdictions. This overlapping of jurisdictions has inevitably led to conflicts, and both Congress and the Court have served as arbiters in defining the jurisdiction of the inferior federal courts. While control of federal court jurisdiction rests with Congress, subject to the constraints of article III, Congress has often failed to act or has acted in broad terms. As a result, Congress, in effect, has delegated to the Supreme Court the responsibility for resolving many difficult issues of federal court jurisdiction.

During Chief Justice Burger's tenure, the Supreme Court has given increased attention to the obligation of state courts to enforce federal law when defining the jurisdiction and role of the federal courts. Although the Burger Court's recognition of such an obligation is hardly a new development, its use as a justification for limiting federal court jurisdiction departs from the approach of the Warren Court. Unwilling to assume that state courts are less

54. See generally Hart, supra note 21.
55. Challenges have been made to the propriety of federal courts refusing to exercise jurisdiction properly conferred. See Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 117 (1981) (Brennan, J., concurring) ("Where Congress has granted the federal courts jurisdiction, we are not free to repudiate that authority." 454 U.S. at 124.); see also Fischer, The Concept of Mandatory Jurisdiction, 41 Ohio St. L.J. 861 (1980) (discussing the origins and current utility of mandatory jurisdiction); Tushnet, Constitutional and Statutory Analyses in the Law of Federal Jurisdiction, 25 U.C.L.A. L. Rev. 1301 (1978) (discussing the constitutional and statutory allocation of authority to determine federalism questions). Nonetheless, there is little question that the Court has acted to limit the jurisdiction of the federal courts when direct legislative support for such restrictions was weak or nonexistent. See, e.g., Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941). But cf. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927 (1983) (federal court deference to parallel state court proceedings proper only in exceptional circumstances). The Court has also claimed a special role to justify its power to revise the jurisdictional and remedial aspects of habeas corpus. See Wainwright v. Sykes, 433 U.S. 72 (1977).
58. Although piecemeal review of state criminal proceedings was unavailable prior to the Burger Court, see Pugach v. Dollinger, 365 U.S. 458 (1961); Stefanelli v. Minard, 342
capable of interpreting and applying federal law than federal courts, the Court in recent years has relied upon this assumption of parity to limit access to federal courts in cases raising federal issues.\(^{59}\)

The validity of this assumption has been challenged in *The Myth of Parity*\(^{60}\) by Burt Neuborne, who argues that federal trial courts are more competent than state trial courts in enforcing federal constitutional rights. Neuborne claims that lawyers seeking expansive definition and vigorous application of federal law have his-

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The Burger Court has also resurrected the *Pullman* abstention doctrine which had fallen into disuse, see Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 *Harv. L. Rev.* 604 (1967), introduced principles of preclusion in § 1983, see *Allen v. McCurry*, 449 U.S. 90 (1980), and deferred to state statutes of limitations and related policies in the name of federalism. Board of Regents v. Tomanio, 446 U.S. 478 (1980); see also Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 *Hofstra L. Rev.* 545, 545 (1977) (arguing that "the Burger Court's procedural decisions have dramatically weakened the substantive significance of the body of surviving Warren precedents").


59. In *Stone v. Powell*, 428 U.S. 465 (1976), the Court held that despite the absence of a preclusion bar, habeas corpus petitioners could not raise fourth amendment claims in federal courts when they had a full and fair opportunity to raise those issues in state courts. Justice Powell's opinion for the Court characterized the arguments of the habeas petitioners as stemming from a basic mistrust of the state courts based on institutional differences between state and federal courts. Although he acknowledged that "some state judges in past years" had unsympathetic attitudes toward federal constitutional rights, he was unwilling to assume such attitudes persisted. Justice Powell was also unwilling to assume federal courts had any greater expertise in applying federal constitutional law. 428 U.S. at 493-94 n.35.

Justice Brennan's dissent, in which Justice Marshall concurred, relied primarily on the mandatory nature of the congressionally conferred habeas jurisdiction. He responded to Justice Powell's claim that there are no significant institutional differences between state and federal judges by suggesting that the federal habeas statutes reflect the congressional judgment that federal judges with life tenure will perform with greater independence and skill than state judges under popular pressures. 428 U.S. at 525-26. In making these arguments and attributing these views to Congress, however, Justice Brennan did not challenge Justice Powell's assessment of the state courts, and stated that there is "no general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states." 428 U.S. at 526.

historically preferred federal trial courts because of their institutional superiority.\footnote{61} He characterizes the assumption of parity that has influenced Supreme Court forum allocation decisions as a dangerous myth. At worst, Neuborne views the assumption as a pretext for channeling disfavored federal cases to state judicial systems with full knowledge that federal guarantees will not be applied as vigorously. More charitably, he suggests that the Court may be unwittingly relying upon a myth that has the same results.\footnote{62}

The debate concerning the relative competence of the state and federal judicial systems is addressed primarily to those who allocate federal court jurisdiction.\footnote{63} It is not directed to the choice of forum decisions of particular litigants, despite its obvious implications for those decisions; and as Neuborne concedes, it may be futile to try to prove that one system is uniformly better than the other.\footnote{64}

\footnote{61. Neuborne argues that the institutional superiority of federal courts stems from the technical competence, psychological set, and insulation from majority pressures of federal judges. \textit{Id.} at 1120-28.}

\footnote{62. \textit{Id.} at 1105-06.}

\footnote{63. Professor Fischer has challenged the propriety of the Court's use of institutional competence as a basis for forum allocation decisions. Fischer, \textit{Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation between State and Federal Courts}, 34 \textit{U. MIAMI L. REV.} 175 (1980). Neuborne's response is that, proper or not, perceptions of the competence of state courts influence the Court's forum allocation decisions. Neuborne \textit{supra} note 24, at 725 n.1. Nevertheless, even if the relative competence of federal and state courts is not a proper basis for the judiciary to make forum allocation decisions, Congress can surely consider it. Thus, it is still necessary for Neuborne's critics to challenge him on his terms.}

\footnote{64. In response to criticism of his position, Neuborne has declared that the debate over the "relative efficacy of state and federal courts as constitutional enforcement forums may have reached an impasse." Neuborne, \textit{supra} note 24, at 725. Nonetheless, although acknowledging the futility of trying to establish that one forum is uniformly superior, he maintains his subjective belief that federal trial courts are a "better" forum. \textit{Id.} at 729. \textit{But see} Solimine & Walker, \textit{Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity}, 10 \textit{HASTINGS CONST. L.Q.} 213 (1983). Solimine and Walker challenge Neuborne's analysis and attempt to demonstrate empirically parity between state and federal courts by looking to the results in state appellate and federal district court cases in a random selection of published opinions involving first amendment, fourth amendment, and equal protection issues. Their study, however, is flawed because of the courts they compare, \textit{see infra} note 65, and their assumption that the federal claims they study are randomly filed in state and federal courts and have an equal likelihood of appearing in published decisions. For example, one cannot assume that searches that violate the fourth amendment appear with the same frequency in criminal cases in the state and federal systems or that the quality of state and federal prosecutors does not affect the nature of the issues presented for judicial determination. It is plausible that better trained federal law enforcement officers err less often; and thus, the same percentage of claims upheld may demonstrate a lack of parity. Further, one cannot assume that similar first amendment cases appear in state and federal courts. For example, state court first amendment cases may include more libel actions while federal courts may hear more affirmative first amendment claims.}
In urging that federal trial courts remain open,\textsuperscript{65} Neuborne supports, as I do, a model of concurrent jurisdiction that permits plaintiffs to make initial choice of forum decisions.\textsuperscript{66} Neuborne recognizes that a state court may be preferable when its applicable substantive law is better or when access to federal courts is limited. Neuborne, however, still prefers federal courts when there is "substantive parity," because he considers federal procedural doctrines more hospitable to the enforcement of federal rights.\textsuperscript{67} Al-

Finally, their study ignores the role of counsel in making forum choices and the role of federal trial judges in deciding which opinions to submit for publication.

65. Neuborne's comparison of federal trial courts to state trial courts rather than to state appellate courts seems correct. Trial courts have broad discretion to frame issues and influence the outcome of cases. They also make effectively unreviewable decisions on the admissibility of evidence, fact-finding, and interim relief. See Wyzanski, \textit{A Trial Judge's Freedom and Responsibility}, 65 \textit{Harv. L. Rev.} 1281 (1952). Moreover, recent changes in the nature of litigation and amendments to the Federal Rules of Civil Procedure have expanded the trial judges' role and their ability to affect the outcome of litigation. See Resnik, \textit{Managerial Judges}, 96 \textit{Harv. L. Rev.} 374 (1982); see also the 1983 Amendments to the Federal Rules of Civil Procedure.

Professor Fischer, who argues that trial courts should not be looked at apart from their appellate super structures, has criticized Neuborne's emphasis on trial courts. Fischer, \textit{supra} note 63, at 182-84. While Fischer is correct that there will be cases in which the identity of the appeals court will influence the choice of forum, Jerome Frank has characterized the view that appellate courts will be able to achieve justice by correcting erroneous decisions on appeal as the "upper-court myth." Jones, \textit{The Trial Judge—Role Analysis and Profile}, in \textit{The Courts, The Public And The Law Explosion} 130 (H. Jones ed. 1965). Although factors relating to the respective appellate courts will influence litigants choosing between two judicial systems, especially when their interpretations of governing law differ, differences in state and federal appellate court procedures are relatively minor and unlikely to be a significant factor in influencing choice of forum decisions. Cf. Hazard, Book Review, 96 \textit{Harv. L. Rev.} 758, 759 (1983) (reviewing R. \textit{Stern, Appellate Practice} (1981)). Solimine & Walker, \textit{supra} note 64, at 234-36, also have criticized Neuborne's focus on trial courts, arguing that the entire state and federal judicial systems, including their appellate structures, are the proper focus of study. Although they are correct that entire judicial systems should be studied, Neuborne's focus on trial courts legitimately considers the initial reception likely to be given federal claims. \textit{See also infra} note 162. Despite their position that entire judicial systems should be compared, Solimine and Walker, in the empirical part of their study, compare state court appellate decisions with federal trial court decisions. They do this because of the difficulty in obtaining state trial court opinions, but by ignoring state trial courts, they undermine the empirical basis of their conclusions about parity.

66. Professor Bator has recently reminded us that structural matters such as separation of powers and federalism also involve constitutional values, see Bator, \textit{The State Courts and Federal Constitutional Litigation}, 22 \textit{Wm. & Mary L. Rev.} 605, 632-35 (1981), and Professor Fischer has observed that Neuborne is result-oriented and selective about the federal rights he wants vigorously enforced and has defined "competence" accordingly. Fischer, \textit{supra} note 63 at 180 n.16. These observations are correct, and Neuborne has effectively conceded them by identifying the particular federal rights he views as important as "end values" or individual federal rights such as those protected under the first amendment, as contrasted to "means values" such as federalism and separation of powers. Neuborne, \textit{supra} note 24, at 727-29.

67. Neuborne, \textit{supra} note 24, at 733.
though he identifies improvements necessary for states to achieve "procedural parity," he is unwilling to risk the constitutional rights of "several waves of [state court] litigants" to improve the state courts. In criticizing the competence of state courts, Neuborne overstates the extent to which federal courts are a better forum for parties with federal claims and contributes to a myth of federal court superiority that unnecessarily discourages the use of the state courts.

The option of choosing state courts should not be rejected out-of-hand. The size of the federal court caseload makes it important to find additional resources to protect individual federal rights. The recent growth of the federal judiciary has not had a significant impact on its caseload, and it is too facile to suggest, as Neuborne does, that if caseload pressures are too heavy, Congress should abolish "archaic heads" of federal jurisdiction. An overworked federal judiciary, unable to cope with its cases, inevitably fails—at least by default—to protect federal rights in too many cases. State courts offer the hope of an expansion of judicial resources to protect federal rights.

Further, the state judiciary, which has played a subordinate role in protecting civil rights and civil liberties during the past half century, has recently become a significant force in protecting those individual rights. Largely in response to Supreme Court decisions narrowing federal safeguards, many state courts have begun to develop independent interpretations of state law, and have begun to play a new and important role in protecting individual rights.

This part identifies differences between state and federal judicial systems that make the former a more attractive forum for protecting individual rights. The myth of federal court superiority should not lead lawyers to reject summarily state court options. While consistent with conventional wisdom and much historical experience, such reflexive choices are inconsistent with today's

68. Id. at 736-37.
69. Neuborne, supra note 7, at 1130.
70. Id. at 1129.
71. See infra notes 80-83 and accompanying text.
72. See, e.g., Fair Assessment in Real Estate Ass'n v. MôNary, 454 U.S. 100, 117, 124 n.11 (1983) (Brennan, J., concurring); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976); Mitchem v. Foster, 407 U.S. 225, 238-42 (1972); see also Sheran, State Courts and Federalism in the 1980's, 22 WM. & MARY L. REV. 789, 790-91 (1981) ("It was the failure of state courts to deal effectively with governmental intrusions upon the rights of the individual which led to the decisions of the United States Supreme Court during the Warren era making access to
reality. Choice of forum decisions in particular cases should be based on a careful assessment of factors such as those identified below. Reliance on outdated, sentimental, or wishful thinking about the role of the federal courts risks ignoring state forums that may be more likely to provide relief.

Choice of law considerations, including justiciability and other doctrines that affect the ability of federal courts to hear cases and provide full relief, strongly influence choice of forum decisions. This is especially true when limitations on the jurisdiction and remedial power of federal courts are inapplicable in state courts and have no state counterparts. Important nondoctrinal and tactical considerations, including differences between the potential decision-makers—the judge and the jury—and their respective roles as well as differences between the rules governing litigation also influence choice of forum decisions.

This review of state and federal courts identifies differences between the respective systems. Whether lawyers responsible for choice of forum decisions believe these differences are significant is an empirical question beyond the scope of this article. The differences, however, can have a potentially significant impact in particular cases, and recent increases in the use of state courts to raise § 1983 claims suggest that many lawyers have been considering them.

1. CHOICE OF LAW

Identifying the preferred body of law in litigation against state and local defendants influences choice of forum decisions but is
not determinative.\textsuperscript{76} Federal courts can hear many state law claims under pendent jurisdiction\textsuperscript{77} and state courts generally have concurrent jurisdiction to hear federal claims;\textsuperscript{78} thus, either forum may be able to enforce the substantive law generated by the other. Nevertheless, the relevant procedural or collateral rules associated with the different bodies of law may differ based on the forum in which the case is being heard, and may significantly influence the forum choice.\textsuperscript{79} Finally, the appellate court's construction of the governing substantive and remedial law can also differ and may have a significant impact on choice of forum decisions.

76. Although state and federal substantive law is customarily interpreted similarly in state and federal courts, Professor Sager has suggested that the underenforcement of certain federal constitutional standards because of considerations of federalism justifies a narrower scope of Supreme Court review when state courts rule in favor of a party asserting a federal constitutional claim. Sager, \textit{Fair Measure: The Legal Status of Underenforced Constitutional Norms}, 91 Harv. L. Rev. 1212 (1978). Justice Stevens appears to have embraced this suggestion, see Michigan v. Long, 103 S. Ct. 3469, 3489 (1983) (Stevens, J., dissenting); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 477 (1981) (Stevens, J., dissenting), but the full Court has not accepted it. Nonetheless, given the ability of state courts to base judgments on state grounds that confer greater rights than federal law, one might have expected the Court to be more willing to tolerate these state court decisions by not selecting them for review. This has not proven to be the case, however, and the Supreme Court has moved in the opposite direction by adopting doctrinal changes that enable it to play a more active role in reaching out to decide federal issues that may have been the basis of state court decisions. See Michigan v. Long, 103 S. Ct. at 3476 (adopting a presumption that state court decisions citing both federal and state cases are based on federal law unless the state court expressly states the contrary). Moreover, in recent years the Court has significantly increased the number of cases in which it has reviewed and reversed state court judgments interpreting federal law expansively to uphold federal claims. See infra note 797.

Although the decision to raise federal issues in state forums may have the surprising effect of inviting Supreme Court review, it is unlikely to discourage litigants with federal claims from choosing state courts they believe will be more sympathetic. In fact, the increasingly activist approach of the Supreme Court in reviewing state court decisions and expanding federal rights will encourage the selection of forums more likely to hear joined state and federal claims, as well as efforts by litigants to convince state courts to base their judgments on independent and adequate state grounds. Ironically, \textit{Michigan v. Long} provides state courts with clear directions on how to insulate state law decisions from Supreme Court review.


79. The experience of the federal courts in diversity cases since \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64 (1938), demonstrates that litigants understand the impact that procedural differences can have on the outcome of litigation and will act accordingly in seeking the forum most likely to apply favorable policies.
When the Supreme Court's construction of federal law precludes or limits relief, litigants can pursue identical claims on the basis of state law. This has been done during the past decade in cases involving school financing, access to publicly funded abortions, exclusionary zoning, and dissemination of literature at private shopping centers. Although pendent jurisdiction often makes federal trial courts available, such actions are typically filed in state courts. Similarly, when federal law permits relief and fed-


82. See Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983). Compare Warth v. Seldin, 422 U.S. 490 (1975) (plaintiffs lack standing to attack zoning ordinance) with Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (residents in substandard housing had standing to bring action challenging system of land use regulations). State court litigation of exclusionary zoning cases, however, is not simply a reaction to the limitations on standing developed in Warth; such cases had previously been litigated in state courts. See R. Harrison, State Court Activism in Exclusionary-Zoning Cases, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 55 (M. Porter & G. Tarr, eds. 1982).


84. See, e.g., Aladdin's Castle, Inc. v. City of Mesquite, 713 F.2d 137 (5th Cir. 1983) (on rehearing) (Texas Constitution prohibits ordinance limiting minors access to coin-operated amusement establishments), on remand from, 455 U.S. 283 (1982). Efforts to raise state
eral jurisdiction is not exclusive, plaintiffs may pursue their federal claims in either state or federal courts. In such cases the choice of forum decision can depend on the construction of federal law by the relevant appellate courts. Few litigants will select a federal court in the face of unfavorable controlling precedents in their circuits. Nor will they voluntarily submit federal claims to state court systems that have authoritatively rejected their position. State courts, however, need not follow the federal court of appeals that covers their state; likewise, federal trial courts are not required to follow the construction of federal law by the courts of the state in which they sit. Both state and federal courts make independent judgments as to the meaning of federal law, and as long as the Supreme Court’s interpretation of the controlling law does not preclude relief, litigants will determine which forum has or is likely to construe the relevant law more favorably to them and will select their forum accordingly.  

86. See United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971); see also Comment, The State Courts and the Federal Common Law, 27 Ala. L. Rev. 73 (1963) (discussing the attitude of the judiciary in several states toward following lower federal court decisions on federal matters). For a recent case in which a state court refused to accord any special weight to decisions of its federal circuit and followed an approach to the issue of attorney fees from a circuit that was more favorable to the plaintiff, see Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 305-08, 340 N.W.2d 704, 712-13 (1983). The issue of whether state courts should give precedential value to lower federal court cases is different from the application of principles of preclusion against parties who have had issues decided against them. See infra notes 677-79 and accompanying text. See generally C. Wright, THE LAW OF FEDERAL COURTS 677 nn.45-46 (4th ed. 1983), and authorities cited.

87. In choosing a forum, litigants will look not only to differences in the construction of the underlying substantive law but also to related collateral or remedial doctrines. The complexity of § 1983 may lead litigants to avoid forums that have construed elements of the cause of action unfavorably. For example, a majority of federal courts interpret the standard of culpability under § 1983 to impose liability for negligent conduct, while others require a showing that the defendant acted intentionally or recklessly. See Gildin, The Standard of Culpability in Section 1983 and Bivens Actions: Prima Facie Case, Qualified Immunity and the Constitution, 11 Hofstra L. Rev. 557, 567-69, nn.66-67 (1983). Thus, a plaintiff with a § 1983 claim based on negligent conduct might avoid district courts in the Seventh Circuit, because that circuit has consistently held that § 1983 requires proof of intentional or reckless disregard of the plaintiff’s rights. Id. at 569 n.67.
2. DOCTRINAL LIMITATIONS ON FEDERAL COURTS

Doctrinal limitations on the cases that can be heard in federal courts influence choice of forum decisions. As courts of limited jurisdiction, federal courts are subject to constitutional and statutory limitations on the cases they hear and the relief they can provide. In addition, the Supreme Court has developed prudential and other limitations on the power of federal courts to hear cases that are otherwise within their jurisdiction.

On the other hand, these federal limitations do not govern state courts, which may hear cases and grant relief when federal courts cannot. Nevertheless, state judicial systems reflect many of the same historical and social forces that molded the federal judicial system; and many federal doctrines have state counterparts. Consequently, access to state courts may be equally limited. Despite the issues raised by state restrictions that limit the ability of state courts to enforce federal rights, in some cases, state courts will hear federal claims and provide full relief when federal courts cannot. Nevertheless, the extent of their willingness to do so is still unclear.

a. Case or Controversy Requirements

The most significant of the doctrines restricting access to federal courts is the constitutional and prudential limitation of the “case or controversy” requirement, particularly the standing requirement. Plaintiffs must have standing at the time a suit is filed and when the case is to be decided. In order to have standing the plaintiffs must demonstrate they were injured in fact.

88. C. Wright, supra note 85, at 22-23.
89. Id. at 70-74.
90. See, e.g., City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1671 (1983) (“[T]he state courts need not impose the same standing or remedial requirements that govern federal court proceedings. The individual states may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis.”).
91. See generally J.W. Hurst, The Growth of American Law 85-107 (1950) (discussing the role of the courts in the process of lawmaking). With the exception of advisory opinions that about one fourth of the states have authorized, state courts apply concepts of separation of powers to limit their judicial business to bona fide law suits. Id. at 180-83. But see infra notes 102-06 for cases that state courts can hear which federal courts cannot.
93. But see Roe v. Wade, 410 U.S. 113, 124-25 (1973) (exceptions to the mootness doctrine permit the merits of the claim to be reached when the challenged policy may again affect the plaintiff).
94. Schelesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United
that the defendant caused the complained of injury, and that the granting of judicial relief will have a substantial probability of redressing the injury. Plaintiffs do not have standing to press generalized grievances about the operation of government, and citizens suing solely in their capacity as citizens do not have standing to challenge illegal governmental actions, although federal taxpayers may challenge federal spending programs in establishment clause cases. Finally, the Court has permitted organizational and other types of third party standing in a limited number of circumstances but has been unwilling to approve a "public action" even when the functional requirements of article III have been met.

States, on the other hand, have wide latitude in organizing their judicial systems and may ignore federal justiciability limitations whether the limitations are at the constitutional core of the "case or controversy" requirement or part of judicially developed prudential limitations. Although many state courts have judicially adopted similar justiciability requirements, the practices


101. The "case or controversy" requirement of article III of the United States Constitution is by its terms only applicable to federal courts, and most state constitutions simply delegate to the legislature the power to prescribe jurisdiction of the trial courts. See, e.g., Alaska Const., art. IV § 1; Cal. Const., art. 6 § 10; Wis. Const., art. 7 § 8. Nevertheless, to the extent that principles of standing have roots in the doctrine of separation of powers, states may read the same limitations into their state separation of powers doctrines. See, e.g., Sandoval v. Ryan, 535 P.2d 244, 246 (Colo. Ct. App. 1975) (Colorado courts consider issues of standing and mootness "in light of a common law concept of justiciability ... "). Life of the Land v. Land Use Comm'n, 63 Hawaii 166, 623 P.2d 431 (1981) (despite absence of "case or controversies" limitation, judicial power to resolve public disputes limited by "justiciability" considerations). But see Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107, 275 A.2d 433, 437 (1971) ("Unlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of our judicial power to actual cases and controversies ... "). Nevertheless, we will not render advisory
of the states vary widely. For example, some states permit the rendering of advisory opinions,\footnote{103} while others make wide use of state and local taxpayers actions without requiring a showing of an injury beyond that suffered by all taxpayers.\footnote{103} Some permit a broader use of third party standing,\footnote{104} while many state courts hear matters of public interest without a showing of injury, causation, or redressability\footnote{106} and without regard to whether the interest

opinions or function in the abstract... nor will we entertain proceedings by plaintiffs who are 'mere intermeddlers'... or are merely interlopers or strangers to the dispute.'"); Conrad v. City and County of Denver, 656 P.2d 662 (Colo. 1983) (en banc) (standing permitted under Colorado law though unavailable in federal courts).

In many cases state courts have approached issues such as mootness by simply relying on federal case law. See, e.g., Beaver v. Chaffee, 2 Kan. App. 2d 364, 579 P.2d 1217 (1978); Calaway v. Foxhall, 603 S.W.2d 363 (Tex. Civ. App. 1980); Rissler v. Giardina, 289 S.E.2d 180 (W. Va. 1982).


104. See, e.g., Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (social worker terminated because of refusal to participate in early morning raids on homes of welfare recipients may raise rights of recipients in his own proceeding for reinstate-}
statement); State Bd. for Community Colleges and Occupational Educ. v. Olson, 687 P.2d 429, 434-36, 440-41 (Colo. 1984) (faculty advisor to student-run newspaper has third party standing to raise rights of students in challenging termination of funding); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (plaintiffs challenging state restrictions on abortion funding permitted to raise free exercise claim under state constitution because New Jersey standing rules are more liberal than federal rules which rejected similar standing in Harris v. McRae, 448 U.S. 297 (1980)).

of the party bringing the action is moot. As a result, access to state courts may be available when access to federal courts is not available. Such access to state courts, however, will depend on whether state law limits such access and, if so, whether such limitations are proper.

b. Eleventh Amendment

The ability of federal courts to protect federal rights is also limited by the eleventh amendment. Absent state consent or congressional abrogation, private litigants may not sue states in federal court. The fiction of Ex Parte Young permits prospective injunctive relief against state officials but not retroactive relief when it must come from the state treasury. While Congress has sometimes required states to submit fully to federal court jurisdiction, the Supreme Court has imposed strict requirements before finding such waivers. Further, § 1983 does not override the

106. See, e.g., Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc) (female student's challenge to charitable trust for "deserving boys" attending private universities permitted despite her graduation because the question was one of great public importance and involved public rights), cert. denied, 444 U.S. 831 (1979); Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981) (Utah courts may litigate issues that are moot to litigant but are of wide concern, affect the public, and are likely to recur in a similar manner); Milwaukee Professional Firefighters Local 215 v. City of Milwaukee, 78 Wis. 2d 1, 15, 253 N.W.2d 481, 488 (1977) (constitutional issues will be decided in action otherwise moot). But see Hamilton v. McAuliffe, 277 Md. 336, 353 A.2d 634 (1976) (case of shooting victim who challenged the authorization of a blood transfusion as violating his privacy and religious rights is moot because he did not allege a continuing violation of his rights).

After the Supreme Court decision in DeFunis v. Odegaard, 416 U.S. 312 (1974), vacating and remanding, 82 Wash. 2d 11, 507 P.2d 1169 (1973), the Supreme Court of Washington reinstated its earlier judgment that the law school admissions policy violated neither the state nor federal constitutions. DeFunis v. Odegaard, 84 Wash. 2d 617, 628, 529 P.2d 438, 444 (1974) ("[T]he fact that an issue is moot does not divest this court of jurisdiction to decide it. We will retain an appeal and decide issues, even though moot, if they present matters of substantial public interest, particularly where final determination of the issue is essential in guiding the conduct of public officials.").

107. When state law permits broader access to state courts than is available under federal justiciability standards, state court judgments may be insulated from Supreme Court review. See infra note 756.

108. On the reviewability of state court decisions that do not reach the merits of controversies either by interpreting narrowly federal justiciability standards or by applying state law to preclude access to state courts when federal standards are met, see infra notes 759-69 and accompanying text.


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state's eleventh amendment immunity. Thus, absent specific statutes subjecting states to suit in federal court, states are generally immunized from damage actions in federal courts for violations of federal law.

Because the eleventh amendment is not applicable in state courts, some plaintiffs unable to obtain full relief in federal court have bifurcated their claims and sought retroactive relief in state court. Other plaintiffs have avoided federal courts entirely and have filed all their claims in state courts. Moreover, the use of state courts to raise federal claims is encouraged when parties have viable state law claims that cannot be heard in federal courts.

114. See supra note 51 and accompanying text.
115. The impact of these limitations has been particularly severe for persons dependent on government largesse, especially beneficiaries of public assistance programs which have been characterized by poor state compliance with federal requirements and "reluctant" federal enforcement. See, e.g., Rosado v. Wyman, 397 U.S. 397, 423, 425-32 (1970) (Douglas, J., concurring); see also Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967) (discussing the inadequacy of the federal administrative forum in resolving issues of state conformity with federal welfare requirements). States have been given a financial incentive to ignore federal law, because even when prospective injunctive relief is available in federal court, retroactive relief is not.


119. The eleventh amendment does not permit federal courts to entertain pendent state claims for injunctive relief against officials of unconsenting states. See Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984). Although the Pennhurst Court expressly limited its holding to claims for injunctive relief against state officials and did not overrule cases involving damage claims, see 104 S. Ct. at 913 n.19, 914 n.21, the Court was silent about claims for declaratory relief, and it is unclear whether the Court will extend its holding. See Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61, 81-83 (1984). As a result of Pennhurst, plaintiffs who wish to have their federal and state claims heard in a single proceeding will be forced into state courts. On the other hand, plaintiffs who wish to preserve access to federal courts for their federal claims but are unwilling to abandon their state claims will have to accept the additional costs and risks of bifurcating their claims. See infra notes 680-87 and accompanying text. The Court in Pennhurst acknowledged that the decision could lead to "federal claims being brought in state court, or in bifurcation of claims." 104 S. Ct. at 919-20.
Most states, however, retain doctrines of state sovereign immunity which limit the relief available in state courts. The attractiveness of state forums, therefore, will depend on whether states maintain such limitations and, if so, whether state immunity doctrines may validly limit federal rights.

c. Comity and Equitable Abstention

Another set of limitations on federal courts falls under the broad heading of comity and includes legislative and judicial restrictions on federal judicial power. These limitations reflect a view of judicial federalism that makes state courts the initial arbiters of federal issues with only Supreme Court review available to protect federal interests. Their cumulative effect reduces the ability of inferior federal courts to protect federal rights.

Legislative restrictions on the power of federal courts to grant injunctive relief to stay state court proceedings have been a constant feature of the federal judicial system. Congress has also limited the power of federal courts in cases involving the collection of state taxes and state public utility rate orders. Nevertheless, the federal courts have been given a backup role when state courts do not provide "plain, speedy and efficient" remedies.

The Supreme Court has used congressional restrictions on federal courts to develop additional limitations on federal courts. The

120. See Civil Actions against State Government, its Divisions, Agencies and Officers 805-38 (W.H. Winborne ed. 1982).
121. See infra text accompanying notes 445-78.

123. The equity jurisdiction of the federal courts was first limited in 1789, "where plain adequate and complete remedy may be had at law." Act of Sept. 24, 1789, ch. 20, § 16, 1 Stat. 82. See Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 526 & n.35 (1981). The Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335, expressly limited the ability of federal courts to stay state court proceedings, and this provision is now codified at 28 U.S.C. § 2283 (1982). It provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Although the traditional view of the roots of this limitation has been challenged, see Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78 Colum. L. Rev. 330, 346 (1978), the 1948 codification of the Judicial Code makes clear that § 2283 is a general limitation on the power of federal courts to enjoin state proceedings.

126. See supra note 124-25.
anti-injunction statute, although not applicable to suits under § 1983, has influenced the judicial development of a broad doctrine of deference in the name of "Our Federalism"—equity, comity and federalism. This deference has significantly limited federal court actions seeking to enjoin or otherwise interfere with state judicial proceedings. Similarly, under the influence of the Tax Injunction Act, the Court has refused to permit federal courts to enter declaratory judgments in damage suits involving state tax matters. Finally, the Court has relied on the availability of the statutory habeas corpus remedy to prohibit federal court § 1983 litigation that seeks relief at the "core" of habeas—cases seeking to affect the fact or duration of confinement.

Federal trial courts defer to state courts even when state judicial proceedings are only indirectly involved. This deference is based on the assumption that state proceedings are the proper forum for raising federal claims. When state court defendants do not have the opportunity to raise federal issues pending in state court proceedings, or when state court proceedings have been subverted because of "bad faith" prosecutions or the use of "patently" invalid statutes, federal courts are not required to defer. In other cases, the Court has relied on considerations of equity, comity, and federalism to prevent federal courts from presuming that state courts are unable or unwilling to perform their duty. Thus, federal courts may be unable to hear or provide full relief in

127. See supra note 123.
130. See Zeigler, A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction, 1983 Duke L.J. 987, 1039-43 (discussing situations in which Younger and its progeny have limited access to federal courts).
134. See, e.g., Hernandez v. Quern, 471 F. Supp. 516 (N.D. Ill. 1978), aff'd per curiam, 440 U.S. 951 (1979). The trial court reached the merits of the validity of the Illinois attachment procedures because the state court defendants were denied an opportunity to raise their federal issues in the pending state court proceeding. Although the Tax Injunction Act permits consideration of state equitable remedies in determining the availability of the federal remedy, see Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 508 n.7 (1981) (Stevens, J., dissenting), the Court has not expanded Younger to require similar consideration of state equitable remedies, including § 1983. But cf. Rosewell, 450 U.S. at 511 n.14 (expressly leaving open the impact of state court § 1983 actions on federal judicial power in tax cases).
cases raising federal claims, and those cases will be channeled into the state courts.

State court defendants may desire injunctive relief in federal court because they want a different judge to decide the federal issues in an independent plenary proceeding. By transforming state defenses into affirmative actions, state defendants can isolate their federal issues and engage in discovery that may be unavailable in state courts. These state defendants may also seek interim relief, obtain immediate recourse to the appellate courts as of right, and qualify for attorney fees.

When federal court relief is unavailable, however, litigants may look to state courts, and there is no federal interest that precludes states from providing suitable remedies. Moreover, despite the difficult questions raised by the prospect of state courts enjoining state judicial proceedings, states can grant such injunctions when federal courts cannot. For example, some states maintain extraordinary writ practices through which both “coordinate” trial courts and supervising appellate courts provide piecemeal review equivalent to injunctions against state proceedings.¹³⁷ Thus, some state defendants who cannot obtain relief in federal court may obtain equivalent injunctive relief in state court against prosecutions under allegedly invalid state statutes.¹³⁸

State court defendants may also file federally created § 1983 causes of action in state courts seeking equitable relief not available in federal court.¹³⁹ This may be true whether equitable relief is

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¹³⁹. Although no state court decisions have been found that explicitly address the application of Younger considerations to state court § 1983 actions, a number of state court § 1983 actions have been brought in circumstances which suggest that Younger limitations on federal courts influenced the choice of forum decision. See, e.g., Pringle v. City of Covina, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981) (preliminary injunction sought to enjoin city from instituting threatened action against theatre under city's adult entertainment zoning ordinance); Ingraham v. University of Me., 441 A.2d 691 (Me. 1982) (injunctive action by former university student alleging prosecutorial abuse in prosecution designed to keep him off campus); Boyle v. Registrar of Motor Vehicles, 368 Mass. 141, 331 N.E.2d 52 (1975) (suit to enjoin the revocation of a driver's license as a result of a state court proceeding); Krause v. White, 612 S.W.2d 639 (Tex. Civ. App. 1981) (§ 1983 action filed in probate court in response to petition for temporary guardianship and challenging constitutionality of guardianship proceedings).
unavailable in federal court because of limitations on the jurisdiction of federal courts or because of limitations on their injunctive power. On the other hand, if relief is unavailable from federal courts because the federal cause of action precludes it, state courts will also be unable to hear those federal causes of action. Thus, some federal causes of action barred in federal court can be heard in state court, but the availability of state court equitable relief will depend upon why federal relief is unavailable.140

d. Pullman Abstention

Federal courts may also refrain from exercising jurisdiction when the resolution of a vague issue of state law may either avoid or modify a constitutional issue. In such cases, Pullman abstention141 requires federal courts to stay proceedings while the plaintiff seeks an authoritative state court interpretation of state law. Although such cases are not dismissed, the attendant delay may lead litigants to avoid the federal forum in the first place.142

Recent developments, including the Supreme Court's approach to the due process safeguards of the fourteenth amendment,143 the "discovery" of state constitutional provisions without federal counterparts,144 and the application of preclusion to §
1983 have heightened the impact of the *Pullman* abstention doctrine in making the federal forum less attractive. These developments increase the possibility of abstention and the risks of bifurcating claims. Because of liberal joinder rules and pendent jurisdiction, both federal and state courts can often hear joined claims in a single proceeding, and *res judicata* effectively prevents litigants from pursuing their federal and state claims in separate forums. The inclusion of pendent state claims in federal court actions, however, can direct attention to state law issues and invite courts to resort to the *Pullman* abstention doctrine. On the other hand, the bifurcation of claims, even when federal courts cannot grant full relief, may not prevent state courts from refusing to hear part of a claim that could have been fully heard in state court because of state prohibitions against splitting causes of action. Thus, in some jurisdictions, parties who want to pursue both state and federal claims in a single proceeding may be discouraged from using the federal forum. State courts, however, do not have doctrines analogous to the *Pullman* abstention doctrine, and absent jurisdictional barriers to their exercise of concurrent jurisdiction, they can hear all claims in one proceeding without regard to their state or federal character.

3. NON-DOCTRINAL CHOICE OF FORUM CONSIDERATIONS

Litigants making choice of forum decisions consider *ad hominem* differences in the identity of potential decision-makers—the judge or jury—as well as differences in their roles. Litigants also consider the tactical implications of the different policies that govern litigation, including differences in the available remedies.

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145. See infra notes 659-64 and accompanying text.
146. See infra notes 664 & 678.
147. Abstention can be invoked when a claim is not based on state law, but state law needs to be construed. See, e.g., Carey v. Sugar, 425 U.S. 73 (1976) (federal court should abstain from addressing constitutionality of state statute to give state court an opportunity to construe the statute to provide the safeguards being sought). The inclusion of state law claims, however, makes abstention more likely.
148. See infra note 684.
149. But see Zorick v. Tynes, 372 So. 2d 133 (Fla. 1st DCA 1979) (complexity of federal statutes is a factor in state court’s refusal to reach merits of federal claim).
150. Empirical studies that have been done on choice of forum decisions have generally been in the area of diversity. These studies, however, have not distinguished between per-
a. The Decision-Makers—Ad Hominem Choice of Forum Considerations

i. Judge-shopping

When both state and federal forums can entertain a federal claim and provide full relief, the most important factors influencing the choice of forum decision concern the attitudes of the trial judges to whom the case may be assigned.\textsuperscript{151} Justice Cardozo once wrote that “In the long run there is no guarantee of justice except the personality of the judge.”\textsuperscript{152} Additionally, survey research suggests that the sympathy and philosophy of judges rather than their “quality” is the major choice of forum influence.\textsuperscript{153}

Differences among judges that might be assigned a particular case exist within judicial systems as well as between them, and litigants can structure their cases not only to affect the choice of forum but also to influence which judge will hear their case. Litigants’ ability to do this in federal question cases\textsuperscript{154} will often

\textsuperscript{151} See Marvell, Galfo & Rockwell, Court Selection: Student Litigation in State and Federal Courts 13 (1982) [hereinafter cited as Student Litigation]. This was the most sophisticated empirical study of choice of forum decisions. The authors studied 1632 cases raising education issues filed between 1977 and early 1981 in state and federal courts. They concluded that the major factor influencing choice of forum decisions in these cases was the lawyers’ views of the attitude and sympathies of the trial judges to whom the cases were likely to be assigned. They also attempted to identify perceptions of differences between the systems and the importance attached to them. These conclusions should be applicable to federal question cases not involving education. The study, however, did not examine differences in prevailing interpretations of the relevant law or jurisdictional and justiciability limitations on federal courts.

\textsuperscript{152} B. Cardozo, The Nature of the Judicial Process 16-17 (1921) (quoting Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft, trans. 9 Modern Legal Philosophy Series 65).

\textsuperscript{153} Student Litigation, supra note 151, at 76-80. To the extent that the “quality” of federal judges was identified as the basis for the forum choice, most respondents identified familiarity with federal law as the major component of quality.

\textsuperscript{154} In diversity cases, the complete diversity requirement results in choice of party decisions having choice of forum implications. Cf. World-Wide Volkswagen Corp. v. Wood-
depend on the geographic organization and size of the trial bench, venue rules, and policies concerning the assignment, recusal, and substitution of judges.

Although recent increases in the number of authorized federal judgeships will eliminate the last remaining single judge federal district, there will still be nine federal districts with only two federal judges and twenty with only three.155 Thus, in many parts of the country, litigants have a good idea which federal judge or judges will be assigned their case. Litigants can then evaluate those judges in terms of their individual traits rather than the characteristics of their judicial system. Moreover, venue rules will often give plaintiffs suing state agencies or officials in multi-district states the ability to structure litigation to choose or avoid a particular district.156 Finally, related case rules permit plaintiffs to characterize or structure cases in a way to influence which federal judge will be assigned the case.157

On the state level, single judge courts of general jurisdiction are still common, especially in rural areas,158 and litigants with cases properly venued in such districts generally know which judge will hear their case. Moreover, unlike federal statutes, which permit disqualification of judges only in narrow circumstances involving allegations of prejudice or appearances of partiality,159 some


155. See 28 U.S.C. § 133 (1982), amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. The Act increased the number of authorized district court judgeships by 54 permanent and 8 temporary appointments. The number of districts with two or three judges takes into consideration four districts that share judges with other districts but not the presence of senior judges who still actively hear cases.

156. By limiting defendants to those who reside in one district, a plaintiff with a grievance against a state agency may avoid litigating a claim in the district in which it arose. See 28 U.S.C. § 1391(b) (1982).

157. The Civil Cover Sheet completed by parties filing federal cases seeks information concerning "related" cases, and related cases are often assigned to the same judge. See, e.g., N.D. OHIO L.R. Civ. P. 7.09(4)(c) (permitting case assignment other than by lot, for related civil cases which include a case that "involves the same issue or issues of fact or grows out of the same transaction or subject matter as a pending civil suit . . . .").

158. In the rural areas of most states, trial courts of general jurisdiction operate in multi-county areas. As the area served by each judge increases, however, the number of persons served decreases. Some rural states assign two judges to each geographic area, while others use single-judge districts. See E.K. STOTT, JR., T.J. FETTER & L.L. CRITES, RURAL COURTS: THE EFFECT OF SPACE AND DISTANCE ON THE ADMINISTRATION OF JUSTICE 11, 33-35 (1977).

159. See 28 U.S.C. §§ 144, 455(a) (1982). See generally Hjelmfelt, Statutory Disqualific-
state substitution rules permit judge-shopping by giving both parties at least one absolute veto over the assigned judge. Thus, even in multi-judge state districts plaintiffs may control or at least influence the selection of the judge. On the other hand, in urban areas, where there are a large number of judges, the plaintiff's ability to structure cases to affect the assignment of the judge will be reduced. As a result, litigants will often be guided in their choice of forum decisions by their collective judgments about the local state and federal bench. Finally, the federal removal statute permits state court defendants to veto the plaintiff's choice of judge by removing claims under federal law to federal courts.

One of the arguments for choosing federal courts to hear cases involving federal rights is that federal courts are institutionally superior to state courts. It is said that federal judges better understand and are more responsive to movements in the direction of federal law. State court judges, on the other hand, are said to be more removed from federal law. They decide federal issues less often and lack the intellectual skills and aids necessary to determine the state of the law and to anticipate legal trends. Even when these generalizations are true, responsiveness to federal law is a mixed blessing. When the Supreme Court is expanding federal
rights, federal trial courts in tune with that movement may be ahead of the Supreme Court in anticipating or charting new directions. But in an era when the Court is increasingly cutting back the scope of individual protections under federal law, plaintiffs who desire to resist this trend may not prefer judges better able and willing to anticipate and respond to trends in federal law.

Put less delicately, litigants may not always want the most competent judge.165 Regardless where they sit, intelligent judges can better understand and anticipate movements in the law than their less gifted colleagues and may be more likely to reject a legal theory despite the existence of supporting case law. Of course, judges who are both skilled and sympathetic are the most desirable choice. These judges can best understand and resist trends other judges might feel obliged to follow. On the other hand, despite the intellectual challenge, most practicing lawyers do not want to appear before highly skilled but unsympathetic judges. When the choice is between equally unsympathetic judges, however, many lawyers probably would prefer judges who are less competent.

Assuming state judges are not as skilled as federal judges of equal sympathy and lack the law clerks or other aids available in the federal system, parties, relying on federal law that is inconsistent with the trend which a more careful review might identify, may prefer state judges. On the other hand, when the issue is resistance to or avoidance of arguably controlling Supreme Court decisions, a sympathetic judge who does not understand or appreciate a subtle argument may be a poor choice.

Finally, the comparison between an independent, life-tenured federal judiciary and a popularly elected state judiciary nervous about its job security is not always accurate. The process used to select federal judges is not apolitical. Despite the opportunity independence may provide for "growth," federal judges reflect their

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165. Professor, now Judge, Posner and a colleague illustrate the difficulty of measuring the elusive concept of quality in their attempt to develop a theory of judicial behavior. In comparing the performance of state and federal appellate judges in diversity cases, they selected as their measure of quality the output of appellate judicial decision-making, i.e., precedents. The quality of precedents was measured by the frequency with which they were cited, their continued citation over time, and their inclusion in law school case books. Landes & Posner, Legal Change, Judicial Behavior, and the Diversity Jurisdiction, 9 J. LEGAL STUD. 367 (1980). But see Komesar, Legal Change, Judicial Behavior, and the Diversity Jurisdiction: A Comment, 9 J. LEGAL STUD. 387 (1980) (critiquing the Landes & Posner article). Of course, litigants looking for the "better" forum are not concerned with quality in this sense but rather are searching for the judge most likely to provide a favorable outcome. See Neuborne, supra note 24, at 727.
background and experience.\textsuperscript{166} Furthermore, federal judges are under pressures that cannot be ignored.\textsuperscript{167} While the insulation of the federal bench may be an advantage in controversial cases involving counter-majoritarian values, all federal cases do not involve such issues. Some cases raise popular issues for which the insulation and independence of federal courts could be a disadvantage,\textsuperscript{168} and not all federal cases are on the cutting edge of the law. Many involve low visibility issues based on established federal law, and any institutional advantage of article III judges may be insignificant. Moreover, in some state court systems, judges have life tenure;\textsuperscript{169} other states have judicial selection practices or traditions that insulate their judiciary from majoritarian pressures.\textsuperscript{170} Finally, the recent experience of some state courts in enforcing controversial rights under state law demonstrates that the state judiciary


\textsuperscript{167} Even if state and federal judges were selected through a similar process, the fact that state judges are selected locally while federal judges are selected nationally could have an impact. Although in most cases "senatorial courtesy" or its equivalent produces locally responsive federal judges, there will be circumstances when regional attitudes are not reflected in the appointing process. Thus, a nationally selected bench may differ from one selected locally. This may explain in part the experience in the south during the civil rights era, when the willingness of federal judges in the Fifth Circuit to resist local pressures may have been as much attributable to the southern Republicanism of the period as to factors inherent in the federal judiciary. See J. Bass, Unlikely Heroes (1981); cf. V. Navasky, Kennedy Justice 242-76 (1971) (discussing political considerations that influenced the selection of federal judges during the Kennedy administration).

The independence produced by life tenure, however, clearly has an impact on performance. Accord Landes & Posner, supra note 165 (economic analysis suggests that higher pay, better working conditions, higher status, and job security affect performance).

\textsuperscript{168} Majoritarian issues for which the independence of federal judges could be a disadvantage might include education of the handicapped, rights of nursing home patients, and consumer issues.

\textsuperscript{169} Although only three states, Massachusetts, New Hampshire and Rhode Island, provide insulation for judges of the states' highest court that is at least the equivalent of the tenure of federal judges, approximately half the states provide judges on their highest court some insulation from competitive, popular elections. See Developments, supra note 10, at 1351. Nevertheless, the insulation afforded state trial judges is less, and several states that insulate their courts of last resort do not provide similar protection for their general jurisdiction trial courts. See Berkson, Judicial Selection in the United States: A Special Report, 64 Judicature 176 (1980) (comparison among states of method of selection of trial and appellate court judges).

The process by which judges were selected was found not to influence choice of forum decisions in education cases. Student Litigation, supra note 151, at 116-21. Neuborne has suggested, however, that there is a correlation between states that provide the most insulation to their judges and those which have been most willing to protect individual rights. See Neuborne, supra note ?, at 1116 n.45. Even if the method of judicial selection is not a major factor in most cases, it may be important in particular cases.

\textsuperscript{170} See Developments, supra note 10, at 1351.
can be responsive to counter-majoritarian and unpopular claims.\footnote{171}{See supra notes 80-83 and accompanying text.} Thus, at a time when the Supreme Court is becoming less responsive to such claims, many state courts are a better choice for litigants with an option.

ii. The jury

Although jury practice is basically uniform among the federal district courts, substantial variations exist from state to state.\footnote{172}{For statutes governing federal jury practice, see 28 U.S.C. §§ 1861-77 (1982). Local rules adopted by almost all federal district courts have required the use of juries of less than twelve. See Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A.L. Rev. 213, 237 n.112 (1981). Federal juries have had the reputation of being “blue ribbon” juries composed of persons of higher socio-economic status who are less inclined to impose liability but more inclined to render large verdicts when liability is established. See Shepard’s Manual of Federal Practice 32-33 (R. Lavine & G. Horning ed. 1979) [hereinafter cited as Manual of Federal Practice]. Although the Jury Selection and Service Act of 1968, Public Law 90-274, 82 Stat. 53 (codified at 28 U.S.C. § 1861 (1982)), with its requirement of jury selection plans building on voter registration lists is said to have changed this inclination, Chief Judge Weinstein of the Eastern District of New York has pointed out that the use of voting rolls in that district may produce juror panels that are not as representative as state panels. Weinstein, Coordination of State and Federal Judicial Systems, 57 St. John’s L. Rev. 1, 21 (1982); see also Selecting a Trial Panel: Whose Peers Are They?, National Law Journal, Feb. 20, 1984 at 1 (reporting that only three federal districts have gone beyond voter registration lists in selecting juries as contrasted to the state court systems of which approximately one half supplement voter registration lists and where significant activity is underway to make juries more representative).} These differences relate to the composition and selection of the jury, the availability of a jury in particular cases and on particular issues, requirements of jury-unanimity, and the respective roles of the judge and jury. Lawyers are aware of these differences and in most areas of the country an elaborate folklore exists concerning how federal and state juries perform, especially as to their generosity in the amount of damages they award.\footnote{173}{See, e.g., Note, supra note 150, at 194; Summers, supra note 150, at 937; Bumiller, supra note 150, at 755-56, for diversity studies which show that lawyers have different expectations concerning the generosity of state and federal juries.} Moreover, studies suggest that variations in jury size and voting requirements affect results.\footnote{174}{See Roper, Jury Size and Verdict Consistency: “A Line has to be Drawn Somewhere”, 14 Law & Soc’y Rev. 977 (1980) (larger criminal juries hang more often but no propensity to convict or acquit). But see Colgreve v. Battin, 413 U.S. 149, 152 (1973) (no discernible difference between juries of six or twelve persons).}

Federal juries are chosen from a multi-county area that is generally more diverse than the single county or city from which state juries are typically chosen. In urban areas, the state court venire
will generally include more Blacks and Hispanics as well as more poor people. In contrast, the state court venire in suburban and rural areas will reflect communities that lack the racial and ethnic diversity of urban areas.

The role of attorneys in the jury selection process also differs between federal and state courts. In federal courts the judge generally conducts the *voir dire*; thus the ability of lawyers to question prospective jurors directly is limited.172 In most state courts, on the other hand, attorneys can question prospective jurors individually.176 Thus, lawyers in state courts begin the process of communicating with the jurors at an earlier stage in the trial and at the same time obtain more information for use in exercising challenges.177

These differences may influence the choice of forum decisions. Lawyers representing members of racial or ethnic minorities in urban areas may prefer a state court jury which is more likely to include persons with similar backgrounds. Likewise, lawyers representing unpopular parties or parties advancing unpopular claims

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may welcome the state practice of permitting extensive questioning of prospective jurors about their knowledge of the case, the parties, and their views on the issues.178

The availability of a jury can also vary between federal and state courts. The seventh amendment guarantees a trial by jury in federal court cases seeking relief available in 1791 at common law. Juries are also generally available in federal court damage actions to enforce federal constitutional or statutory rights.179 On the other hand, when only equitable relief is sought in federal court, neither party can demand a jury trial, and the court will serve as the fact finder.180

Because the right to jury trial guaranteed by the seventh amendment does not apply to the states,181 the availability of jury trials in state courts is generally treated as an issue of state law. Although most states guarantee jury trials on terms similar to those of the seventh amendment,182 state law concerning the right to a jury trial varies from federal law in several respects. For example, while some states do not provide jury trials in mixed law-equity actions,183 other states guarantee jury trials in equitable actions.184 The range of issues submitted to the jury may also differ; some state courts retain the practice of having judges hear equitable defenses, while federal courts assign the issue to the jury.185

Federal and state court civil jury practice also differs on the requirement of unanimity. Under the seventh amendment, federal juries must decide cases unanimously unless the parties waive this right.186 State courts, however, are free to use non-unanimous verdicts and often do.187 Thus, plaintiffs raising federal claims may

178. Conversely, some state juries may be more sympathetic to local issues and parties and may be reluctant to award large verdicts against local officials or municipalities, especially when they may be taxpayers and have an indirect interest in the outcome. Cf. 1 Newberg, Class Actions 299 (1983).
186. American Publishing Co. v. Fisher, 166 U.S. 464, 467-68 (1897). Professor Wright has noted that there are no recent opinions on whether unanimity is required in civil cases and predicts that the Supreme Court will hold that unanimity is not required. C. Wright, supra note 85, at 628 n.5; cf. Colgreve v. Battin, 413 U.S. 149 (1973) (six-member civil jury does not violate seventh amendment).
187. Although 20 states require unanimous civil jury verdicts, the rest permit non-unanimous verdicts without consent of the parties: 10 permit 10/12 verdicts; 12 permit 9/12
prefer state courts, where they can prevail with less than a unanimous vote, to federal courts, where the presence of a single holdout juror can thwart verdicts.

Other differences in jury practice that influence choice of forum decisions flow from the federal judge’s greater control over the jury. This includes the judge’s role in jury selection, the more extensive federal court use of special verdicts and general verdicts with interrogatories, and the ability of federal judges to comment on the evidence. These practices expand the power of the federal trial judge at the expense of the jury and make the state court potentially more attractive to litigants who prefer to maximize the role of the jury.

b. Tactical Choice of Forum Considerations

In addition to differences in the interpretation of the underlying substantive law and the scope of the available remedies used to enforce it, state and federal courts have different policies governing litigation. Some differences are found in state rules of civil procedure, which often differ from the federal rules; others exist in the statutory and common law rules governing the operation of courts.

Rules concerning the availability and scope of discovery also influence choice of forum decisions. In surveys covering diversity cases, it was found that lawyers in states that permit only limited


188. Thus, the dynamics differ from criminal cases when defendants prefer a unanimity rule in the hope of avoiding a verdict of guilty by attracting a holdout juror.

189. C. Wright, supra note 85, at 651-57.

190. See supra notes 175-76 and accompanying text.

191. See Fed. R. Civ. P. 49 (giving federal judges discretion to use a special verdict, a general verdict or a general verdict with interrogatories). Some states prohibit the use of special verdict, see Ohio R. Civ. P. 49(C), but in Wisconsin special verdicts are the rule and not the exception. Wis. Stat. Ann. § 805.12(1) (West 1983); see Wisconsin Judicial Council Committee’s Note to § 805.12(1) (1974).

The impact of the form of the verdict on choice of forum considerations will depend on the preference of the particular court system and the nature of the case. When cases are complex or lawyers feel jury bias may have an adverse impact on their case, they may prefer the restrictions on the jury imposed by the special verdict. R. Figg, R. McCullough & J. Underwood, Civil Trial Manual 441-43 (1977) [hereinafter cited as Civil Trial Manual].

192. C. Wright, supra note 85, at 629.

193. Approximately one half of the states have adopted rules of procedure patterned after the federal rules. Cox & Newbern, New Civil Procedure: The Court that Came in from the Code, 33 Ark. L. Rev. 1, 2 n.6 (1979).
discovery usually express a preference for federal court because of superior federal discovery procedures.\textsuperscript{194} Although such differences in discovery seem to be narrowing, federal courts may be preferred in federal question cases which turn on factual issues.\textsuperscript{195} Conversely, parties seeking to avoid being subjected to various discovery devices, including physical or medical examinations or extensive interrogatories, might choose state courts which limit those methods of discovery.\textsuperscript{196}

Other tactical reasons for choosing state courts over federal courts to enforce federal claims could involve state rules on class actions that may deviate from the burdensome federal requirement of individualized notices in \((b)(3)\) classes.\textsuperscript{197} Additionally, state policies on fee-shifting,\textsuperscript{198} the availability of interim relief,\textsuperscript{199} and \textit{res judicata}\textsuperscript{200} may make state forums as or more attractive than

\begin{itemize}
\item \textsuperscript{194} See Bumiller, supra note 150, at 755-56; Summers, supra note 150, at 937; Note, supra note 150, at 179, 189; see also Civil Trial Manual, supra note 191, at 76-78.
\item \textsuperscript{195} But see Student Litigation, supra note 151, at 134-36 (finding differences in discovery to be minor and to have little impact on forum choices).
\item \textsuperscript{196} See Civil Trial Manual, supra note 191, at 76-77.
\item \textsuperscript{197} See Citizens for Pretrial Justice v. Goldfarb, 88 Mich. App. 519, 278 N.W.2d 653 (1979) (individualized notice not required under Michigan class action rule); Unif. Class Actions [ACT] [RULE] § 7, 12 U.L.A. 21 (West Supp. 1984) (personal notice need not be provided class members whose whereabouts can be ascertained but whose potential recovery is estimated to be $100 or less); see also Mitchem v. Melton, 277 S.E.2d 895 (W. Va. 1981) (no certification requirement under West Virginia class action rule); Newberg, supra note 178, at 294-303; Brown, Public Interest Litigation in the States—A Foster Home for Federal Orphan?, 12 Suffolk U.L. Rev. 1184, 1188-94 (1978) (arguing that state class action rules can avoid the requirement of individualized notice in class actions under Fed. R. Civ. P. 23(b)(3) and imposed by Eisen v. Carlisle & Jacquetlin, 417 U.S. 156 (1974), and suggesting other advantages to state class actions). But see Braverman, Class Certification in State Court Welfare Litigation: A Request for Procedural Justice, 28 Buffalo L. Rev. 57 (1979) (discussing New York's restrictive policy of not certifying class actions in public actions absent a special showing of necessity).
\item \textsuperscript{199} In addition to differences in standards for granting interim relief, the greater accessibility of state court judges capable of providing interim relief may be an advantage.
\item \textsuperscript{200} Although most states bar plaintiffs from litigation claims that could have been heard in earlier but unsuccessful federal court litigation, when such claims arise from the same transaction, some define the cause of action narrowly and permit such relitigation. See, e.g., Lamartiniere v. Allstate Ins. Co., 415 So. 2d 499 (La. Ct. App. 1982). In addition, plaintiffs who have lost similar issues in earlier federal litigation against different defendants may prefer state courts that adhere to the doctrine of mutuality and do not permit the defensive use of collateral estoppel by non-parties. But see infra note 686.
\end{itemize}
federal forums. On the other hand, state policies providing strict rules of pleading,\textsuperscript{201} short statutes of limitations,\textsuperscript{202} limitation on \textit{in forma pauperis} practices,\textsuperscript{203} the use of bonds as preconditions for interim relief,\textsuperscript{204} and presumptions of the constitutionality of state statutes\textsuperscript{205} could discourage litigants who might otherwise select state forums.

The currency of federal and state dockets may also influence forum choices.\textsuperscript{206} The impact of delay on litigants will depend on the nature of the case, the relief sought and the financial conditions of the parties. Although state and federal courts can provide interim relief, in many cases no effective interim relief is available.

\textsuperscript{201} Although strict state pleading requirements might be expected to discourage litigants from filing § 1983 claims in state courts, see Neuborne, \textit{supra} note 24, at 736, three states that have not adopted notice pleading—California, Illinois and New York—have substantial § 1983 caseloads. See Appendix, Table I. These states are among those with the highest volume of litigation in general, and it is beyond the scope of this article to consider whether the liberalization of pleading rules would increase the volume of § 1983 litigation in those states. Nonetheless, it seems likely that factors other than the strictness of pleading requirements are primarily responsible for the use of state courts to raise § 1983 claims.

\textsuperscript{202} Neuborne, \textit{supra} note 24, at 736.


\textsuperscript{204} \textit{See generally} Dobbs, \textit{Should Security be Required as a Pre-Condition to Provisonal Injunctive Relief?} 52 N.C.L. REV. 1091, 1096-1102 (1974) (reviewing state and federal court policies on injunction bonds).

\textsuperscript{205} \textit{See} Satter & Gehalle, \textit{Litigation under the Connecticut Constitution—Developing a Sound Jurisprudence}, 15 CONN. L. REV. 57, 67-72 (1982) (urging abandonment of Connecticut's requirement that litigants must establish legislative or executive actions to be unconstitutional beyond a reasonable doubt in order to prevail).

\textsuperscript{206} M. AVERY & D. RUDOVSKY, \textit{POLICE MISCONDUCT LITIGATION MANUAL}, § 3.7(c) (1980); \textit{see also} Goldman & Marks, \textit{supra} note 150, at 98. When there are significant differences in delay between state and federal courts, litigants will choose forums accordingly. \textit{Compare} Note, \textit{supra} note 150, at 187 (reasonably current dockets eliminate congestion as a choice of forum factor) \textit{with} Buemiller, \textit{supra} note 150, at 755-56 (delay a major determinant of decisions to avoid state courts in Philadelphia and Los Angeles where federal court calendars are more current). Although the Supreme Court has commented upon the absence of statistics on court delay and the lack of significant differences between delay in state and federal courts, \textit{see} Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 520 n.5 (1981), that observation is only applicable in the aggregate, and significant differences that exist in particular jurisdictions influence choice of forum decisions.
Generally, plaintiffs prefer the forum that will enable them to get to trial the quickest. This is particularly true in damage cases when delay can make plaintiffs' cases more difficult, can result in relief coming too late to be of benefit, and can reduce the present value of final awards. Therefore, plaintiffs who need recompense quickly may be willing to risk trying a matter in a potentially less sympathetic forum.207

Distance between the plaintiff, the lawyer, and the federal courthouse may also influence the forum choice. Lawyers in metropolitan areas, which generally contain federal district courts, are more likely to choose federal court than lawyers in cities without federal courts. Conversely, lawyers who must travel great distances to litigate in federal court may prefer closer state courts to minimize financial and other burdens of litigation. On the other hand, some lawyers may prefer to force their opposing counsel to travel long distances to an inconvenient forum. Finally, familiarity with the respective forums, including its personnel and policies, or the expectation that an opponent will not be familiar with the chosen forum, can influence choice of forum decisions.208

B. The Use of § 1983 to Litigate Federal Claims in Federal Court

The use of § 1983 in federal court litigation demonstrates that features unique to § 1983 usually make it preferable to alternative remedies based on state or federal law. Section 1983 confers no substantive rights, and decisions on the merits of federal claims should be the same regardless of whether § 1983 is used.209 The remedial attributes of the cause of action authorized by § 1983, however, often facilitate reaching the merits of federal claims. Because these same attributes are applicable in state courts, the § 1983 action is becoming the preferred state court remedy for the affirmative litigation of federal claims.

Historically, litigants in federal courts have used two types of actions to redress violations of federal law by state or local officials: an implied right of action under the Constitution and the § 1983 action. Although federal courts have subject matter jurisdiction

207. See Student Litigation, supra note 151, at 125-28 (finding court delay the most important non-judgment-related reason for forum choice).

208. Neuborne, supra note 24, at 734-35; see also Manual of Federal Practice, supra note 172, at 22; Student Litigation, supra note 151, at 15; Summers, supra note 150, at 937; Note, supra note 150, at 194.

209. See supra note 2.
over implied federal causes of action against state or local officials, the existence of these implied actions has often been in doubt.\textsuperscript{210} Moreover, the availability and emergence of \$ 1983 actions against those same defendants raises questions concerning both the availability of and the need for the implied remedies. These doubts seem particularly apt given the Court’s practice of developing the implied action and the \$ 1983 action similarly and borrowing freely between them despite their different origins.\textsuperscript{211}

Because \$ 1983 applies only to violations under color of state law, the Court created its equivalent for federal violations in \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}.\textsuperscript{212} In \textit{Bivens}, the Court implied a private cause of action for those who had been denied their constitutional rights under the color of federal law.

Had \$ 1983 not been enacted or had it been repealed with other Reconstruction-era civil rights statutes that did not survive the 19th century,\textsuperscript{213} the Court presumably could have used an approach in suits against state officials similar to that used in \textit{Bivens} actions. The existence of the modern \$ 1983 action, however, has made uncertain the availability of implied actions against state or local defendants.\textsuperscript{214} Nonetheless, the theoretical availability of \textit{Biv-
ens type actions helps identify some of the differences between the remedies.

The use of Bivens actions against state or local defendants has gone through three distinct stages. Prior to Monroe v. Pape, the Court routinely permitted damage and injunctive actions to enforce constitutional provisions without regard to the availability of § 1983. After Monroe defined “person” to exclude municipalities and after that decision was extended to include injunctive actions, litigants attempted to use Bivens actions to reach municipalities directly under the Constitution. Finally, the 1978 decision in Monell v. Department of Social Services overruled Monroe’s narrow definition of “person,” and subjected municipalities to suits directly under § 1983. At the same time, however, the Monell decision created new limitations on § 1983 actions.

In the course of extending § 1983 to the “official policies” of municipalities, the Monell Court eliminated vicarious theories of liability based on respondeat superior. As a result, litigants still attempt to use Bivens actions against municipalities in cases involving illegal but unauthorized conduct of municipal employees. Similarly, plaintiffs have tried to use Bivens actions to avoid § 1983 limitations concerning the survival of actions and the eleventh amendment.

221. 436 U.S. at 691-92 & n.57.
222. See infra note 225.
223. See infra note 233.
224. Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31 (1st Cir. 1982) (per curiam) (damages unavailable because of the eleventh amendment), cert. denied, 104 S. Ct. 72 (1983); cf. Jagnandan v. Giles, 538 F.2d 1166, 1182-86 (5th Cir. 1976) (rejecting the argument that the fourteenth amendment itself overrides the eleventh amendment), cert. de-
Although these defects in § 1983 demonstrate that § 1983 is not always effective and that Bivens actions should be available, the courts have not responded favorably to such arguments. Moreover, even if Bivens and § 1983 actions are permitted to co-exist, the Court would probably not apply different remedial rules in Bivens actions.\(^{225}\)

When not constrained by specific statutes, the Court has construed § 1983 and Bivens actions to eliminate or neutralize potential differences between them. For example, the § 1983 statutory "color of law" requirement has been construed as broadly as the fourteenth amendment "state action" requirement, the approach taken in Bivens actions.\(^{226}\) Likewise, the application of § 1983 to unauthorized as well as authorized conduct has been followed in Bivens actions.\(^{227}\) Official immunities defenses have also developed similarly.\(^{228}\) In addition, federal courts in Bivens actions against federal defendants have overwhelmingly rejected liability based on respondent superior, largely because the Court rejected this form of vicarious liability under § 1983.\(^{229}\) Finally, Bivens courts have followed § 1983 on such issues as the availability of collateral es-

\(^{225}\) Even before Monell, courts that had been willing to entertain suits against municipalities directly under the Constitution had generally not been willing to impose liability based on respondent superior. See, e.g., Turpin v. Mailet, 579 F.2d 152, 166-67 (2d Cir.) (en banc), vacated and remanded sub nom. City of West Haven v. Turpin, 439 U.S. 974 (1978); Nix v. Sweeney, 573 F.2d 998, 1003 (8th Cir. 1978); Jamison v. McCurrie, 565 F.2d 483, 485-86 (7th Cir. 1977). After Monell, the courts of appeals have uniformly rejected efforts to use Bivens to impose liability on municipalities through respondent superior, including those courts that have assumed or found that § 1983 does not preclude Bivens actions. See, e.g., Tarpley v. Greene, 684 F.2d 1, 9-10 (D.C. Cir. 1982); Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981); Dean v. Gladney, 621 F.2d 1331, 1334-37 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981); Jones v. City of Memphis, 586 F.2d 622, 624-25 (6th Cir. 1978), cert. denied, 440 U.S. 914 (1979); Molina v. Richardson, 578 F.2d 846, 847-54 (9th Cir.), cert. denied, 439 U.S. 1048 (1978).

\(^{226}\) Cf. United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' requirement under the Fourteenth Amendment.").

\(^{227}\) Bivens itself involved a case in which the petitioner alleged that the illegal action violated the fourth amendment, and federal law did not authorize the actions of the law enforcement officials. Bivens, 403 U.S. at 396-97.


\(^{229}\) See supra note 225.
toppel and the choice of statute of limitations. Conversely, when the Court in a Bivens action refused to use a state survival policy because the federal defendants' conduct allegedly caused the death, lower federal courts maintained parity between the actions by refusing to apply similar state survival policies in § 1983 cases.

Despite the similar development of § 1983 and Bivens actions in these areas, there are attributes of the modern § 1983 action that are not found in Bivens actions and that make the § 1983 action a more effective remedy.

First, § 1983 broadly authorizes a private cause of action for equitable or legal relief based on violations of constitutional or federal statutory rights. Thus, for constitutional claims, § 1983 provides a definite and simple affirmative answer to the question whether a private remedy is available. In Bivens actions, on the other hand, whether a private remedy exists depends on a provision by provision analysis of the underlying constitutional rights, the relationship of the constitutional rights to statutory remedies, and other "factors counseling hesitation." When the underlying right is statutory, the Bivens approach is replaced by a statute-by-statute analysis that relies heavily on legislative history to deter-

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232. Carlson v. Green, 466 U.S. 14 (1980) ("We hold that whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." Id. at 24 (quoting Green v. Carlson, 581 F.2d 669, 675 (7th Cir. 1979)).

233. Federal courts that have rejected state policies that cause actions to abate if the complained of conduct caused the death have generally done so under § 1983 by finding that the state abatement policy is inconsistent with the purposes of § 1983. Although such cases are technically not Bivens cases, they have relied on Carlson to construe § 1983 without regard to the limitations of state law. See, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1234-41 (7th Cir. 1984); Heath v. City of Hialeah, 560 F. Supp. 840, 843 (S.D. Fla. 1983). But see Jones v. George, 533 F. Supp. 1293, 1302-06 (S.D. W. Va. 1982).

234. See supra note 2.

235. Bivens, 403 U.S. at 396; see Carlson v. Green, 446 U.S. 14 (1980) (allowing direct action under the eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (allowing direct action under fifth amendment against congressman for sexually discriminatory employment practices). For examples of situations where "special factors" prevented the implication of direct actions, see Bush v. Lucas, 103 S. Ct. 2404, 2416-17 (1983) (denying direct action under the first amendment to remedy retaliatory personnel action because elaborate remedial system already existed); Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983) (denying direct action by naval personnel for racial discrimination because of unique disciplinary structure of military).
mine whether a particular statute may be privately enforced.\textsuperscript{236} Under a \textit{Bivens} approach, however, a court would be less likely to find the existence of a private right of action based on a federal statute than under the § 1983 approach, which operates as a presumption in favor of private enforcement.\textsuperscript{237} Congress may expressly or impliedly preclude private enforcement of federal statutes through § 1983,\textsuperscript{238} and § 1983 may not reach all constitutional rights.\textsuperscript{239} The use of § 1983, therefore, does not entirely avoid a case-by-case analysis of the underlying rights being enforced. Nonetheless, the availability of § 1983 significantly alters the nature of the inquiry in both constitutional and statutory cases in a manner that favors private enforcement.

Second, while § 1983 does not require the exhaustion of administrative remedies,\textsuperscript{240} \textit{Bivens} actions do.\textsuperscript{241} Although lawyers typically utilize administrative remedies they believe adequate, exhaustion requirements pose a serious dilemma for plaintiffs who believe available administrative remedies are inadequate. This dilemma exists because remedies are labeled "inadequate" only when a litigant risks failing to follow them and the courts approve the tactic. As a result, plaintiffs who proceed directly to a judicial forum in cases not based on § 1983 do so at their peril. At a minimum, the need to resolve issues concerning the adequacy of the administrative remedy will delay litigation.\textsuperscript{242} At worst, failure to
use a remedy subsequently found adequate can result in the dismissal of the case. To avoid these risks lawyers often engage in unnecessary exhaustion of remedies, thus forfeiting immediate recourse to a judicial forum. In contrast, the availability of § 1983 avoids the time, expense, and risk of litigating side issues concerning the adequacy of administrative remedies.

A third advantage of § 1983 is that plaintiffs using it may seek to enjoin state judicial proceedings. The anti-injunction statute\(^{243}\) does not prohibit these injunctions in § 1983 actions,\(^{244}\) although considerations of equity, comity and federalism have limited sharply the circumstances under which these injunctions are available. Plaintiffs in Bivens actions, however, cannot obtain federal court orders enjoining pending state court proceedings.\(^{245}\)

Finally, the framing of actions under § 1983 triggers the Civil Rights Attorneys' Fees Awards Act of 1976.\(^{246}\) This provision has revolutionized § 1983 litigation by shifting fees to unsuccessful defendants. Absent specific legislation, federal courts have only a limited inherent power to award fees against parties who have acted in bad faith and have no power to award fees on a private attorney general basis.\(^{247}\) Although Congress in the Equal Access to Justice Act\(^{248}\) expanded the circumstances under which federal courts may award fees against federal defendants, this expansion does not apply to suits against state or local defendants.\(^{249}\) Accordingly, even when all other potential advantages of § 1983 are unavailable, few plaintiffs would knowingly forsake the § 1983 rem-

\(^{244}\) Mitchum v. Foster, 407 U.S. 225 (1972).
\(^{245}\) Section 1983 has been held to be within the "expressly authorized" exception to 28 U.S.C. § 2283 (1982), see Mitchum v. Foster, 407 U.S. 225 (1972), but a Bivens action would not fall within that exception. Although a Bivens action against a state court proceeding could occasionally fall within the two other exceptions in 28 U.S.C. § 2283, it would be rare. See generally Redish, The Anti-Injunction Statute Reconsidered, 44 U. Chi. L. Rev. 717 (1977).

\(^{246}\) See infra notes 503-25 and accompanying text.

\(^{249}\) By its terms, the Equal Access to Justice Act only applies to actions against the federal government. See 28 U.S.C. § 2412 (1982). It is unclear, however, if it applies to Bivens actions against federal defendants. Compare Lauritzen v. Lehman, 736 F.2d 550, 553-59 (9th Cir. 1984) (interpreting § 2412(b) as not authorizing awards of fees against the federal government in Bivens actions) with Premachandra v. Mitts, 727 F.2d 717, 723-30 (8th Cir. 1984) (interpreting § 2412(b) as authorizing awards of fees against the federal government in Bivens actions).
edy because of its link to the award of attorney fees.

Section 1983 is a more effective federal court remedy than Bivens actions, and the deficiencies in § 1983 are unlikely to be cured even if Bivens actions are available. On the other hand, state causes of action to enforce federal law, which can be heard in federal court under pendent jurisdiction, have the potential for curing many of the defects of § 1983. The threshold question regarding state causes of action is whether state law has authorized them. States may create parity between state causes of action and § 1983 by borrowing remedial doctrines from § 1983 such as the no-exhaustion requirement and fee-shifting provisions. States may also go beyond § 1983 by creating state causes of action that impose vicarious liability without regard to respondeat superior defenses or that narrow qualified or absolute immunities. States, however, are limited in their ability to set aside subject matter jurisdictional or other doctrinal limitations on federal courts that entertain state causes of action. States may waive their eleventh amendment immunity from suit in federal court or create new interests, the invasion of which may provide standing. Nevertheless, states cannot confer jurisdiction on federal courts to hear matters outside the “case or controversy” requirement, or beyond the equitable power of federal courts. Nor may states “waive” defenses integral to the § 1983 cause of action. For example, states could not consent to be sued under § 1983 for actions not taken under color of state law; nor could they subject municipalities to § 1983 lia-

250. See infra notes 437 & 439.


254. Cf. AVCO Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557 (1968) (suggesting that federal court may not issue an injunction prohibited by federal law in a case removed from a state court that could issue an injunction).

255. Cf. Brown v. United States National Bank, 265 Or. 234, 509 P.2d 442 (1973) (holding that self-help repossession does not involve state action necessary for due process claim); Brennan v. Minneapolis Soc'y for the Blind, 282 N.W.2d 515 (Minn. 1979) (bylaws of a non-profit corporation with close relation to the state does not constitute state action). But states may dispense with the state action requirement in suits brought under their own constitution. See, e.g., Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 379 N.E.2d 1169 (1978) (use of a more flexible state action requirement under state due process clause to hold that garageman's lien violates state due process).
bility under theories of respondeat superior. On the other hand, because many limitations on § 1983 result from the use of state policies to fill remedial gaps in § 1983 on issues such as the survival of actions, statutes of limitations, tolling, and res judicata, state actions to modify these doctrines in state-created causes of action will result in similar modifications in § 1983 actions.

Although state remedies may go further than § 1983 in making state actors liable for violations of federal law, states have not been required to do so. Thus, state causes of action heard in federal court under pendent jurisdiction will be more useful to plaintiffs than § 1983 actions only if states have voluntarily adopted a broader remedy, or if state restrictions are invalid because they independently violate federal law.

Section 1983 is important because it rejects many potential defenses that might otherwise be available to defendants in federal court. Although federal common law may override defenses that burden or otherwise interfere with the federal rights being enforced in Bivens actions, § 1983 provides a framework in which such defenses may be more readily avoided. Moreover, certain remedial features of § 1983 result from specific factors unique to § 1983 and are unlikely to be developed independently. Likewise, state causes of action will only incorporate the remedial innovations of § 1983, or improve on them, if states choose to do so. Section 1983, therefore, will generally be a more useful remedy than other actions authorized by federal or state law. Accordingly, plaintiffs in federal court have made § 1983 the primary remedy for enforcing federal rights against state and local defendants.

C. The Use of § 1983 to Litigate Federal Claims in State Court: A Synthesis and Review of the Experience of the State Courts

State court litigation to enforce federal rights may avoid many doctrinal limitations on federal courts even if the federal court ac-

256. But see infra note 420.
257. See infra notes 600-687 and accompanying text.
258. This has often resulted in state rules that favor plaintiffs, and some defendants have argued for a uniform and limited construction of § 1983. See, e.g., Chardon v. Soto, 103 S. Ct. 2611 (1983) (federal court borrowing state rule on tolling to permit § 1983 action to survive after completion of related class action); Haring v. Prosise, 103 S. Ct. 2368 (1983) (applying state preclusion policy to permit federal court § 1983 damage action for an illegal search by state court defendant after a guilty plea).
259. See supra note 232.
tions are framed in terms of § 1983. Moreover, the use of § 1983 in state court may also defeat otherwise available state law defenses.

The alternatives to state court § 1983 actions for raising federal claims against state or local defendants are actions independently authorized by state or federal law. The attractiveness of these alternatives, however, depends on the procedural and other rules applied under state law. Furthermore, many of the reasons that make § 1983 the preferred federal court remedy also apply in state court. The threshold advantage of using § 1983 to raise federal claims in state court is its authorization of a private remedy. Absent § 1983, a private remedy will not always be available under either state or federal law. Although states may as a matter of state law authorize civil actions for violations of federal law, it is unsettled whether they are required to do so.260 Section 1983 avoids this problem by broadly authorizing a private cause of action.

State actions not based on § 1983 may be subject to state policies on exhaustion of administrative remedies, immunities, and attorney fees. In state court § 1983 litigation, however, such policies need not be followed.261 On the other hand, a state court action under state law may have its advantages. Some states authorize actions similar to § 1983 but without its limitations. For example, states may impose liability on governmental entities and supervisory officials based on respondeat superior or permit punitive damages against municipalities.262 The question whether a state has authorized such causes of action is initially one of state law. Although state refusals to provide causes of action to enforce federal claims raise federal questions, neither Congress nor the Court has precluded states from creating causes of action to enforce federal rights.263


261. See infra notes 415-78 & 503-51 and accompanying text.

262. See infra notes 437-38.


A. . . . In the scheme of the Constitution [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate
State court § 1983 actions can be more useful to plaintiffs than actions authorized by state law or those implied from federal law. In addition to the incentives provided by fee-shifting statutes, state court § 1983 actions can avoid defenses that prevent state courts hearing state law claims from providing full relief. For example, doctrines of governmental immunity, notice of claims statutes, short statutes of limitations, ceilings on wrongful death recoveries and damages available from municipalities, and exhaustion of administrative remedies requirements could defeat state law claims against state and local defendants.\(^\text{264}\)

State law initially determines whether state policies governing litigation in state courts apply to § 1983 actions.\(^\text{265}\) Nonetheless, even when state law requires the use of state policies in all state court litigation, including § 1983 actions, the validity of using state policies to limit a federal cause of action is itself a federal question.

The state court § 1983 action has potential advantages over its federal court counterpart, and an increasing number of litigants are bringing § 1983 claims in state courts. Given the available statistics on state trial courts, it is not possible to estimate the volume of state court § 1983 litigation.\(^\text{266}\) The lack of statistics also makes

ones. If they were to fail, and if Congress had taken away the Supreme Court’s appellate jurisdiction and been upheld in doing so, then we really would be sunk.
Q. But Congress can regulate the jurisdiction of state courts, too, in federal matters.
A. Congress can’t do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution.

Accord O’Connor, Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge, 22 WM. & MARY L. REV. 801, 815 (1981); see also Note, Congressional Power over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples, 49 N.Y.U. L. REV. 131, 134-37, 141-43 (1974) (arguing that Congress may only “withdraw” state court jurisdiction over matters that fall within article III when it provides a federal forum to hear such issues).

264. Assuming states may use these defenses in litigation to enforce state law, there are substantial constitutional questions concerning whether such policies may defeat state causes of action to enforce federal law. The use of § 1983, however, provides less far-reaching statutory arguments that can avoid the need to reach whether state rules, when applied evenhandedly, may be invalid because they burden underlying federal rights. See infra notes 283-331 and accompanying text.

265. See infra note 337.

266. The available state court statistics do not identify the nature of the civil actions filed in state trial courts of general jurisdiction. See STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART (National Center for State Courts 1978). Although it might be theoretically possible to estimate the volume of state trial court § 1983 actions by developing ratios between civil caseloads and reported appellate opinions and extrapolating from the number of reported state court appellate § 1983 opinions, such an approach has many pitfalls and is beyond the scope of this article. See supra note 37 for a discussion of federal § 1983 statis-
it impossible to reach any definitive conclusions about the types of § 1983 cases being filed in state courts. Nonetheless a review of reported appellate state court § 1983 decisions provides some tentative observations.

First, § 1983 actions have been litigated in almost every state judicial system, and with one possible exception, no state court system currently refuses to hear them.267

Second, in a number of states, notably California, Colorado, Massachusetts, Michigan, New York and Wisconsin, the volume of reported appellate cases, the range of issues raised in them, and the results suggest that state court § 1983 actions have become an important remedy, even though statistically they may not yet be a significant phenomenon.268

Third, the volume of state court § 1983 cases is increasing rapidly. For example, the number of reported appellate state court § 1983 decisions in each of the past 15 years is as follows:

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<tr>
<th>Year</th>
<th>1983 Cases</th>
<th>1978 Cases</th>
<th>1973 Cases</th>
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<tr>
<td>1983</td>
<td>105</td>
<td>26</td>
<td>12</td>
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<tr>
<td>1982</td>
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<td>18</td>
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<td>1980</td>
<td>57</td>
<td>12</td>
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<td>1979</td>
<td>39</td>
<td>6</td>
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Because reported appellate decisions represent only a fraction of the § 1983 state court caseload, the growth in appellate cases undoubtedly reflects a corresponding increase in the volume of § 1983 actions filed in state trial courts, and § 1983 actions appear to be routinely litigated in many states.269


268. A breakdown of the reported state appellate court § 1983 opinions by state and subject matter is contained in the Appendix, Tables I & II.

269. In collecting these statistics, a Lexis search was conducted of all reported appellate state court opinions between 1969 and 1983 which cited 42 U.S.C. § 1983. Cases so identified were reviewed but were only included if a party sought affirmative relief through § 1983 or if an appellate court treated a case as seeking relief through § 1983. Thus, cases in which § 1983 was cited as part of the background or in reference to another case were not included. Similarly, cases in which defendants relied on § 1983 as a defense without seeking affirmative relief were not included regardless of how the court treated the § 1983 issue. See, e.g., Thurman's Auto Parts & Wrecker Serv. v. Cobb County, 248 Ga. 826, 286 S.E.2d 707 (1982); State ex rel Peach v. Goins, 575 S.W.2d 175 (Mo. 1978). But cf. New Jersey Div. of Youth &
Fourth, the range of substantive claims raised in state court § 1983 actions seems as broad as in federal court; the distribution, however, seems different. Certain § 1983 actions, especially those involving non-majoritarian values, appear to be litigated in state court less often than in federal court. For example, fewer state prison and jail cases, and police, judicial, and prosecutorial abuse cases seem to be filed in state court under § 1983. State court § 1983 actions also seem to involve few racial discrimination, welfare, and other poverty law claims. On the other hand, state court § 1983 actions appear to include a high percentage of cases concerning public employment, other than group-based discrimination claims, as well as many nontraditional economic-based § 1983 cases.

Family Serv. v. J.O. 178 N.J. Super. 75, 427 A.2d 1150 (Middlesex County Ct.) (1980) (raising § 1983 as an affirmative defense). Cases in which affirmative relief was sought through § 1983 counterclaims, however, were included. See infra note 272.

Neither the success of the case, the prominence of the § 1983 claim nor the willingness of the court to address the § 1983 claim was considered; as long as a claimant asserted rights and sought relief through § 1983 the case was included. In addition, reported appellate court opinions that did not specifically cite § 1983 were included when the action was obviously pursued under § 1983. Cases in which a dissent urged a matter be treated under § 1983, however, were not included when the majority did not address § 1983. See, e.g., James v. Board of Educ., 37 N.Y.2d 891, 894, 340 N.E.2d 735, 737 (1975) (Fuchsberg, J., dissenting); DeFunis v. Odegaard, 84 Wash.2d 617, 635, 529 P.2d 438, 448 (1974) (Hale, C.J., dissenting).

Because the statistics may reflect changes in state appellate court structures during this period, that explanation was explored. For example, state intermediate appellate courts account for 42.7% of the 482 state § 1983 opinions published between 1969 and 1983. See Appendix, Table I. Therefore, I considered whether the recent increase in the number of states with intermediate appellate courts might explain the increased volume in reported state court § 1983 appellate opinions. Such an explanation must be rejected. Between 1973 and 1981, the period during which the volume of reported state § 1983 appellate opinions began to increase sharply, the number of states with intermediate appellate courts with civil jurisdiction increased from 24 to 31. See M. Osthus, State Intermediate Appellate Courts v. 20-23, 50 (rev. ed. 1980). Yet, the intermediate appellate courts of the seven states that created intermediate appellate courts—Arkansas, Hawaii, Idaho, Iowa, Kansas, Kentucky and Wisconsin—only account for 12 of the 482 cases in the 1969-1983 survey. See Appendix, Table I. Thus, the increase in the number of state intermediate appellate courts did not cause the sharp increase in reported state court § 1983 opinions, and the statistics support the conclusion that there has been a significant increase in the volume of state court § 1983 litigation.

270. These observations are largely impressionistic. Within the federal system, it is not possible to determine from the available statistics the volume of § 1983 cases as contrasted to other civil rights claims, see supra note 38, much less the subject matter breakdown of § 1983 actions. Nevertheless, Professor Eisenberg, supra note 38, at 536-37, has begun the process of breaking down the § 1983 caseload by identifying all § 1983 actions filed in a single federal district in 1975 and 1976. His statistics for that two year period reveal that prisoner cases and police and judicial/prosecutorial abuse cases dominate the federal state court § 1983 caseload. Professor Eisenberg has urged similar studies of state § 1983 dockets, supra note 38, at 524 n.179. This breakdown of reported state appellate court § 1983 cases, see Appendix, Table II, represents such an effort, although the focus on reported appellate court opinions makes meaningful comparisons difficult.
involving regulatory issues such as state taxation, business regulation, land use, and inverse condemnation.\textsuperscript{271}

Fifth, a state court § 1983 counterclaim practice has emerged.\textsuperscript{272} State court defendants have used § 1983 counterclaims to seek declaratory and injunctive relief\textsuperscript{273} as well as for damages.\textsuperscript{274} State court defendants have also used counterclaims to defend the underlying state proceeding and to raise federal issues concerning its collateral aspects.\textsuperscript{275} In addition, § 1983 counterclaimants can go beyond the contours of the original state court proceeding by joining new parties as defendants to the counterclaim\textsuperscript{276} or by filing class action counterclaims.\textsuperscript{277} Finally, the avail-

\textsuperscript{271} Although the subject matter distribution of reported state appellate court § 1983 opinions has not changed significantly over the past 15 years, the sharp increase in the volume of such actions has resulted in state courts becoming more familiar with § 1983 claims. Moreover, § 1983 claims now seem more central to state court litigation than they had been previously.

\textsuperscript{272} The Supremacy Clause requires state courts to entertain federal defenses. See Hart, \textit{supra} note 21, at 507. Section 1983 by its terms is available only to establish liability or in "other proper proceedings for redress." Thus, § 1983 is not properly used merely to raise a defense. See \textit{supra} note 269. Nevertheless, § 1983 counterclaims can seek relief beyond that sought by the plaintiffs. In a damage action, a federal defense would only provide a set-off against the principal claim, but a counterclaim enables a defendant to obtain a net recovery. A defendant can seek declaratory and injunctive relief through a counterclaim involving either the subject matter of the principal suit or a procedural or collateral issue in circumstances in which \textit{Younger} considerations prevent federal courts from hearing such actions. Finally, the counterclaim may have the tactical advantage of raising the stakes by increasing the plaintiff's exposure and signaling that the defendant will be litigating aggressively.


\textsuperscript{274} See, e.g., Breeden v. City of Nome, 628 P.2d 924 (Alaska 1981) (§ 1983 damage counterclaim for termination of employment in response to breach of contract suit); Boland v. City of Rapid City, 271 N.W.2d 60 (S.D. 1978) (§ 1983 counterclaim for damages in condemnation action); Brown v. Hipshire, 553 S.W.2d 570 (Tenn. 1977) (§ 1983 counterclaim alleging assault and battery by police officers who had sued the defendant in tort).


ability of attorney fees to those transforming federal defenses into § 1983 counterclaims has made this tactic particularly attractive.

Sixth, liberal state joinder rules are increasingly being used to combine § 1983 actions with state law claims in plenary as well as in special proceedings. These joiners may expand the available relief, avoid potential res judicata problems, and bring the joined action under the attorney fees statute.

Seventh, state courts have not answered many questions concerning the procedural or collateral rules that apply in state court § 1983 litigation. State courts have invariably exercised concurrent jurisdiction over § 1983 actions and have accepted the entire § 1983 action with all the remedial and other rules applicable in federal court § 1983 litigation without fully discussing or analyzing the issues involved in borrowing federal causes of action. On the other hand, some state courts have almost casually applied state doctrines to limit § 1983 actions. Although state courts have generally recognized that federal doctrinal limitations do not apply in state court, some have used analogous state doctrines in the same limiting way. The absence of any well-developed analytic framework to examine specific restrictions on state court § 1983 actions has left the courts and litigants with little guidance.

Finally, while some state courts have refused to entertain particular § 1983 actions or provide full relief based on doctrines such as forum non conveniens, exhaustion of administrative remedies, and state sovereign immunity, state courts have not rejected the federal § 1983 model. Although a few state courts have reacted

counterclaim and third party complaint challenging "sewer service" in collection action).


278. See infra note 384.

279. There also seems to be less splitting of causes of action. During the early part of the period studied, state court cases based on state law often involved the same subject matter as parallel § 1983 actions filed in federal court. Litigants now seem less likely to bifurcate their claims when they have equal access to both forums, perhaps because of Board of Regents v. Tomanio, 446 U.S. 478 (1980) (no federal tolling rule in § 1983 litigation), and the application of preclusion principles to § 1983 litigation. See infra note 664. The decision in Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984), erecting an eleventh amendment barrier to the litigation of pendent state claims for injunctive relief against state officials in federal court, may lead to an increase in the bifurcation of claims. See Schwartz, The Eleventh Amendment and State Law Claims, 18 CLEARINGHOUSE REV. 151, 154 (1984). This bifurcation will also present novel issues of preclusion. See infra notes 680-87 and accompanying text.

280. See infra notes 907-25 and accompanying text.

281. See supra note 25.
strongly to the imposition of a federal cause of action with federal remedial doctrines, these reactions have been isolated.\textsuperscript{282} Most state courts have accepted the obligation to enforce federal law through § 1983 and have been willing to look to the remedial attributes developed in federal court § 1983 litigation as a source of guidance.

III. Obligatory State Court Jurisdiction and the Use of State Remedial Policies in § 1983 Actions: A Framework

Although § 1983 actions are now routinely heard in the courts of many states, it was not until its 1979 Term that the Supreme Court of the United States held in two separate cases that state courts had concurrent jurisdiction over § 1983 actions.\textsuperscript{283} Because these cases arose in states which did not limit jurisdiction over § 1983 actions under state law, the Court did not need to decide whether state courts were required to hear such actions. The

\textsuperscript{282} The comments of a New York trial judge illustrate the apprehension concerning the burden of state court § 1983 litigation. The judge observed: “In many respects, section 1983 is regarded as a panacea by grieving persons, and litigation thereunder covers the wide spectrum of all real or imagined societal ills such as abortion, attachment, education, housing, licensing, procedures, mental commitment, prisoner conditions, taxes, voting, zoning, etc.” Brody v. Leamy, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977).

He then commented on the impact of permitting § 1983 actions to be heard in state courts:

\begin{quote}
[I]t cannot be seriously disputed that acceptance of jurisdiction of section 1983 claims would inundate our court system, add years of waiting time to our already congested trial calendars, and create an influx of new filings of highly complex matters which might have the side effect of abrogating our traditional state law remedies . . . .
\end{quote}

90 Misc. 2d at 15-16 n.3, 393 N.Y.S.2d at 254 n.3. Finally, he noted:

\begin{quote}
[P]laintiff urges that this court is compelled to accept jurisdiction of this federal claim, assume the burden of trying causes of action of federal origin, incorporate into the state legal system alien concepts of jurisprudence that could wreak havoc upon orderly common law disciplines, and inject into the state judicial system the potential for an onerous burden of a rapidly expanding caseload of civil rights claims that could not possibly be managed without substantial trial delay to equally meritorious state oriented actions in the absence of an increase in judicial manpower, the overall effect of which would necessarily lead to exacerbation of federal-state court relationships. Plaintiff’s position appears untenable when it is recognized that an adequate state remedy exists, liability for tortious wrong.
\end{quote}

90 Misc. 2d at 17, 393 N.Y.S.2d at 255 (footnote omitted). Nevertheless, relying on dicta in Aldinger v. Howard, 427 U.S. 1, 18 (1976), the court held that federal court jurisdiction over § 1983 actions was not exclusive and that the state trial courts could entertain § 1983 claims. 90 Misc. 2d at 20, 393 N.Y.S.2d at 257.

\textsuperscript{283} Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283 n.7 (1980); see also Aldinger v. Howard, 427 U.S. 1, 36 n.17 (1976) (Brennan, J., dissenting).
Court, nevertheless, noted that state courts are generally not free to refuse enforcement of federal claims if the same type of state law claims are enforced in their courts.\textsuperscript{284} The resolution of whether state courts are required to exercise jurisdiction over § 1983 actions may illuminate issues involving the procedural and remedial rules applicable in state court § 1983 litigation. The primary argument against state courts exercising jurisdiction over § 1983 actions has been that jurisdiction over § 1983 actions was exclusively federal.\textsuperscript{285} Most state courts, however, rejected the exclusivity argument and found jurisdiction under tradi-

\textsuperscript{284} In Martinez v. California, 444 U.S. 277 (1980), Justice Stevens, writing for a unanimous Court, stated:

We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where "'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.'" Testa v. Katt, 330 U.S. 386, 391, quoting Claflin v. Houseman, 93 U.S. 130, 137.

See also Aldinger v. Howard, 427 U.S. 1, 36 n.17 (Brennan, J., dissenting); Grubb v. Public Utilities Comm'n, 281 U.S. 470, 476. We have never considered, however, the question whether a State must entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim. Testa v. Katt, 330 U.S. at 394. But see Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969).

444 U.S. at 283 n.7.

In Maine v. Thiboutot, 448 U.S. 1 (1980), which involved inter alia the applicability in state court of § 1983's companion attorney fees statute, 42 U.S.C. § 1988 (1982), Maine argued that jurisdiction over § 1983 actions was exclusively federal. The Court, however, summarily disposed of that argument and reasoned:

Petitioners also argue that jurisdiction to hear § 1983 claims rests exclusively with the federal courts. Any doubt that state courts may also entertain such actions was dispelled by Martinez v. California, 444 U.S. 277, 283, 284, n.7, (1980). There, while reserving the question whether state courts are obligated to entertain § 1983 actions, we held that Congress has not barred them from doing so.

448 U.S. at 3 n.1.

tional principles of state court jurisdiction. Moreover, the Supreme Court's use of the nondiscrimination principle to define the duty of state courts has, in effect, required states to hear § 1983 actions. Consequently, the Court will probably not have to decide whether states may refuse to entertain § 1983 actions. Some states, however, may be reluctant to abandon their normal procedural and remedial policies, and may either partially exclude some § 1983 actions from their courts or use state policies to limit § 1983 actions.

The Court's failure to decide whether state courts are obligated to hear § 1983 actions is unfortunate. The Court could have removed the remaining doubts as to whether, or under what circumstances, state courts could refuse to hear § 1983 actions either by deciding whether states could exclude federal causes of action or by suggesting how the prohibition on state discrimination against federal claims should be applied. Instead, by leaving the issue unresolved, the Court may have encouraged continued litigation. More importantly, the Court's comment about the nondiscrimination bar suggests that as long as states act evenhandedly, they may decline to entertain certain § 1983 actions or impose state law limitations on the § 1983 actions they hear.

Even so, allowing the states to hear § 1983 actions eliminated the principal argument made against the exercise of state court jurisdiction over § 1983 actions. By calling attention to the use of § 1983 in state courts, these decisions undoubtedly contributed to


Although the question whether state courts will entertain nonexclusive federal causes of action is initially one of state law, most state courts have only addressed it under general principles of state court jurisdiction. But see Kristensen v. Strinden, 343 N.W.2d 67, 70-71 (N.D. 1983) (relying on state constitutional provision guaranteeing open courts and the availability of remedies, see N.D. Const. art. I, § 9 to conclude that the North Dakota Constitution "does not permit State courts any discretion in determining whether or not to entertain actions properly brought before them"). For discussion of state constitutional right to access provisions, see infra note 337.

287. See supra note 25.
the increase in state court § 1983 litigation.\textsuperscript{288} Moreover, although the Court dealt with the jurisdictional issue summarily, its approach was consistent with the principles that have governed concurrent jurisdiction.\textsuperscript{289} Congress has neither expressly nor impliedly made federal courts the exclusive forum for hearing § 1983 actions.\textsuperscript{290} Furthermore, a regime of concurrent jurisdiction is consistent with the purposes ascribed to § 1983 in \textit{Monroe v. Pape}\textsuperscript{291} and with the history of § 1983's jurisdictional counterparts.\textsuperscript{292}

\textsuperscript{288} Thiboutot and Martinez also encouraged state court litigation of § 1983 actions by requiring that state courts use federal policies to determine whether attorney fees and immunities are available.

\textsuperscript{289} Under the presumption of concurrency, state courts may exercise jurisdiction over federally created causes of action as long as Congress has not explicitly or implicitly made federal court jurisdiction exclusive. An implied exclusivity can result from an “unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981). In considering whether a federal claim is incompatible with state-court jurisdiction, the Court looked to “the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.” \textit{Id.} at 483-84. These concerns are primarily systemic, because exclusive federal jurisdiction is not necessary to protect parties; plaintiffs make initial choice of forum selections and the removal statutes protect defendants from involuntarily litigating cases in state courts. \textit{Id.} at 483 n.12 (citing 28 U.S.C. § 1441(b) (1982)); see also Hathorn v. Lovron, 457 U.S. 255, 271 (1982) (Rehnquist, J., dissenting) (arguing that considerations of uniformity, federal expertise, and federal hospitality supported a conclusion that state courts do not have jurisdiction over claims to enforce the Voting Rights Act). In \textit{Hathorn}, the majority did not have to reach this issue because the questions under the Voting Rights Act only arose collaterally in a state cause of action. See \textit{generally} Redish & Muench, \textit{supra} note 78.

\textsuperscript{290} Federal courts have subject matter jurisdiction over § 1983 actions through 28 U.S.C. §§ 1331, 1343(a)(3) (1982). Actions involving statutory claims not providing for “equal rights,” however, can only be heard under the former. See \textit{supra} note 33. Neither statute provides exclusive federal court jurisdiction.

\textsuperscript{291} 365 U.S. 167 (1961). In \textit{Monroe}, Justice Douglas identified the purposes of § 1983 as: 1) overriding certain kinds of state laws; 2) providing a remedy when the state remedy was inadequate; and 3) providing a federal remedy when the state remedy, though adequate in theory, was not available in practice. 365 U.S. at 173-74. He then observed: “The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.” 365 U.S. at 183. Each of the purposes Justice Douglas identified is consistent with the use of § 1983 in state court, and although Justice Douglas's opinion in \textit{Monroe} focused on the use of § 1983 in federal court, a party confronted with inadequate state remedies—in theory or practice—might choose state court.

In \textit{Patsy v. Board of Regents of the State of FL}, 457 U.S. 496, 506-07 (1982), in holding that § 1983 litigants are not required to exhaust state administrative remedies prior to initiating federal court § 1983 actions, the Court emphasized that the framers of the Civil Rights Act of 1871 did not preclude state judicial efforts to address the underlying conduct that gave rise to § 1983 actions and did not intend federal law to preempt the field.

\textsuperscript{292} Section 1 of the Civil Rights Act of 1871, in addition to creating a new federal cause of action, provided for “such proceedings to be prosecuted in the several district or circuit courts of the United States.” Civil Rights Act of 1871, ch. 22, 17 Stat. 13. This provision, however, can be contrasted with other civil rights actions over which jurisdiction was expressly made exclusively federal. See the Civil Rights Act of 1866, which gave district
The principle of concurrent jurisdiction permits states to entertain federal causes of action, but the Supreme Court has also required state courts to exercise jurisdiction over federal actions in various circumstances. Despite the existence of a jurisprudence that prohibited the federal government from obligating state courts to hear federal actions,293 the Court, in 1912, imposed a duty

courts jurisdiction over crimes under the Act "exclusively of the courts of the several States . . . ." Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27. One commentator has viewed the initial jurisdictional scheme of the Civil Rights Act of 1871 as creating exclusive federal jurisdiction and has viewed that pattern as having continued until the Judicial Code of 1911. See Shapiro, The Enforceability and Proper Implementation of § 1983 and the Attorneys’ Fees Awards Act in State Courts, 20 Ariz. L. Rev. 743, 746-51 (1978). Others have seen the 1874 codification of the federal statutes as being too equivocal to support a regime of concurrent jurisdiction and have looked instead to the principle of concurrency. See Neuborne, supra note 24, at 749 n.90.

The Judicial Code of 1911 repealed the general provision on concurrent jurisdiction that dated from the Act of Mar. 3, 1875, which created federal question jurisdiction: "[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits [meeting the jurisdictional amount] and arising under [federal law]." Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. See Robb v. Connolly, 111 U.S. 624, 637 (1884); Mondou v. New York, N.H. & H. R.R., 223 U.S. 1, 56 (1912). The Judicial Code of 1911 reorganized the structure to include a separate section enumerating those areas where federal courts had exclusive jurisdiction. Judicial Code of 1911, ch. 231, § 256, 36 Stat. 1087, 1160-61, repealed by Judicial Code and Judiciary Act of 1948, ch. 646, 62 Stat. 869 (current version in scattered sections of 28 U.S.C.). The Judicial Code and Judiciary Act of 1948 abandoned this approach, and returned to a statute by statute statement of exclusivity, with the presumption that jurisdiction was concurrent in other cases. See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prosbs. 216, 224 n.37 (1948) (citing 28 U.S.C. §§ 1333 (admiralty); 1334 (bankruptcy); 1338 (patent and copyright); 1355 (fines, penalties, or forfeitures)).

293. The philosophy that the federal government could not impose mandates on the states, especially the state courts, has been described as the doctrine of dual or coordinate sovereignty, see Monell v. Department of Social Servs., 436 U.S. 658, 669-83 (1978), and it was the constitutional basis for opposition to the First Conference Report on the Civil Rights Act of 1871. See, e.g., Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). These precedents have not survived, see Monell, 436 U.S. at 676, but regardless of whether they were constitutional constraints on the power of Congress to impose obligations on states, they operated as political constraints. Even today Congress is reluctant to speak to the states other than indirectly. See generally Stewart, Pyramids of Sacrifice! Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196 (1977) (discussing Congress's power to impose mandates on the states regarding environmental matters). For a discussion of the role of the doctrine of dual sovereignty in construing § 1983, see infra note 321.

The debate concerning the power of Congress vis-a-vis the state courts in part revolved around whether Congress delegated or vested federal jurisdiction in state courts or merely removed federal obstacles, thus permitting states to exercise their pre-existing jurisdiction. See Barnett, The Delegation of Federal Jurisdiction to State Courts by Congress, 43 Am. L. Rev. 852 (1909). This debate, however, is now largely of historical interest because the twentieth century cases have established that the federal government may require state courts to entertain federally created causes of action. But out of deference to the past, this mandate
on state courts to exercise jurisdiction over federal actions. In *Mondou v. New York, N.H. & H. Railroad*, the courts of Connecticut refused to hear damage actions under the Federal Employers' Liability Act (FELA). After concluding that the Act permitted concurrent state court jurisdiction, the Court addressed the question of the duty of such a [state] court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right to civil recovery arising under the act of Congress..." Disclaiming any congressional intent to enlarge or regulate the jurisdiction of state courts, the Court observed that the Connecticut trial courts were courts of general jurisdiction empowered to hear personal injury actions. Accordingly, their refusal to hear FELA actions because of a disagreement with the underlying federal policies was "inadmissible." Building on cases establishing the principle of concurrent jurisdiction and concluding that federal laws were also the laws of the state, the Court stated that "the existence of the jurisdiction creates an implication of duty to exercise it, and that its exercises may be onerous does not militate against that implication." Finally, the Court said that any inconvenience and confusion caused by requiring Connecticut courts to hear federal causes of action with different attributes did not justify the refusal to hear FELA cases.

*Mondou* established that state courts that can hear analogous state law claims may not refuse to hear similar federal claims. *Mondou*, however, can also be read more broadly to establish an affirmative duty of state courts to hear federal cases within their jurisdiction. When states refuse categorically to entertain a federal cause of action, the principles of nondiscrimination and affirmative duty merge, and states are prohibited from closing their doors completely to federal actions.

The principle of nondiscrimination also applies when states is usually framed in terms of a prohibition on discriminating against federal causes of action. Because a categorical exclusion of a federally created cause of action would discriminate against that cause of action, even if the state-created cause of action is similarly excluded, it is possible to use the nondiscrimination framework to impose a duty on state courts that goes beyond the duty to refrain from treating federal actions differently than state-created actions.

294. 223 U.S. 1 (1912).
295. *Id.* at 56-57.
296. *Id.* at 57.
297. *Id.* at 57-58. The Court relied on *Claffin v. Houseman*, 93 U.S. 130, 136-37 (1876), for this proposition as well as for the principle of concurrency.
selectively exclude actions because of their federal nature. In McKnett v. St. Louis & San Francisco Railway, the state courts of Alabama refused to hear FELA actions between nonresidents on out of state accidents even though they heard similar transitory actions under state law and nontransitory FELA actions. The Court held that this refusal was an unlawful discrimination against federal rights. Writing for a unanimous Court, Justice Brandeis observed that Congress had not attempted to compel states to provide courts for the enforcement of FELA, but the Constitution prohibited states courts of general jurisdiction from refusing to hear claims solely because they are brought under federal law. As a result, the principle of nondiscrimination, which originated as a rule of statutory construction in Mondou, was elevated to a constitutional level.

Finally, in Testa v. Katt, Rhode Island state courts that entertained the "same type" of state law claims, as well as double damage claims under federal law, refused to hear actions under the Federal Emergency Price Control Act because the actions involved claims for treble damages. Rhode Island claimed a "valid excuse" in refusing to enforce "penal" statutes of other jurisdictions, including those of the United States. The Court, however, applied a broad principle of nondiscrimination and prohibited Rhode Island's complete exclusion of damage claims under a federal statute because Rhode Island courts heard similar claims under both state law and other federal statutes.

300. In holding that the Connecticut courts could not exclude FELA actions, the Supreme Court, in Mondou, did not rely on any specific constitutional provision. Nonetheless, the principle of nondiscrimination used to impose a duty on the Connecticut courts to hear FELA actions is clearly broader than the specific language of FELA, which is silent as to the duty of the state courts. The principle represents a rule of statutory construction that obligates state courts to entertain federal causes of action in the face of congressional silence. But cf. Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 207 (arguing that absent an express congressional declaration requiring state courts to exercise jurisdiction over federally created causes of action, the Supreme Court should not impose such an obligation where there is a federal forum). In treating the principle as one of constitutional dimension in McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233-34 (1934), Justice Brandeis did not indicate which constitutional provision the Alabama policy violated.
302. In Federal Energy Regulatory Comm. v. Mississippi, 456 U.S. 742 (1982), the Court rejected Mississippi's tenth amendment challenge to the Public Utilities Regulatory Policies Act of 1978. The Act required states to consider certain approaches to public utility rate-making in order to encourage the adoption of energy saving policies. In reviewing this issue, the Court compared this obligation of state public utility commissions to the obligation of states to open their courts to federal causes of action on an evenhanded basis and
Given the breadth of the nondiscrimination principle, state courts are, in effect, required to hear § 1983 actions. To exclude § 1983 cases, states would have to close their courts to similar actions authorized by state and federal law against state and local governmental bodies and their employees. Although such a wholesale exclusion of legal challenges to governmental actions is a theoretical possibility, it is so implausible that one can conclude that the nondiscrimination principle imposes a de facto obligation on states to hear § 1983 actions.

The duty of states to entertain nonanalogous federal causes of action, however, is still undecided. The Supreme Court has upheld some state refusals in specific cases to exercise jurisdiction, but it has never allowed a state to exclude completely a federal cause of action from state courts that had concurrent jurisdiction. Nevertheless, the Court has been willing to approve partial exclusions if states have a "valid excuse" to support them.

In Douglas v. New York, N.H. & H. Railroad, the state courts of New York excluded FELA actions brought by nonresidents based on out-of-state accidents. The defendant’s only contact with New York was its business there, and the suit was dismissed under a state statute that gave New York courts discretion to dismiss suits brought by residents of other states. The plaintiff had argued that the FELA grant of jurisdiction required state courts to entertain such suits. The Court, however, relying on Mondou, concluded that FELA did not require state courts to hear

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reaffirmed Testa v. Katt, 330 U.S. 386 (1947) and the nondiscrimination principle. The Court also expressly rejected Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), which was a cornerstone of the philosophy of coordinate sovereignty under which states heard federal causes of action as a matter of comity and concluded that Dennison had not survived Testa. See supra note 293.

303. See Neuborne, supra note 24, at 758.

304. Although Neuborne agrees that the nondiscrimination principle imposes a de facto obligation on states to hear § 1983 actions, he argues that the “nondiscrimination” model is inadequate, characterizing it as a “facile formula which imposes a de facto obligatory jurisdiction” but avoids the fundamental issue of when such obligatory jurisdiction should exist. Id. at 759. In its place, he urges the adoption of an “affirmative duty” model under which state courts are required to hear § 1983 actions as part of a constitutionally mandated “presumptively obligatory” state court jurisdiction. Id. at 759-66.

The creation of an affirmative duty to hear § 1983 actions does not avoid the need to determine whether states may exclude subclasses of § 1983 actions or impose their own procedures when hearing § 1983 actions. The establishment of an affirmative duty would not resolve these questions but would make it clear that states are required to do more than refrain from discriminating against federal causes of action.

305. See, e.g., Hart, supra note 21, at 507-08; C. Wright supra note 85, at 271.

306. 279 U.S. 377 (1929).
federal actions if state courts had "an otherwise valid excuse."\textsuperscript{307} Favoring state residents, regardless of their citizenship,\textsuperscript{308} was considered a valid excuse. In upholding the exclusion, the Court did not rely solely on the state's evenhanded application of its policy. Rather, the Court pointed to New York's interest in giving its residents preferential access to its often overcrowded court system. New York did not exclude FELA actions brought by nonresidents for accidents within the state; nor did it exclude FELA actions brought by residents for accidents outside the state. Thus, while \textit{Douglas} allowed states to refuse to hear foreign actions by nonresidents, it cannot be read to support an across-the-board refusal by state courts to hear FELA claims. Moreover, the Court did not rely on the state's evenhanded treatment of both FELA actions and state actions but instead examined the policy behind the exclusion.\textsuperscript{309}

Under the principle of nondiscrimination, states cannot exclude federal actions because of their federal nature. That principle is one of inclusion not exclusion; it requires state courts to hear federal claims when states hear analogous state claims. When states have refused categorically to hear federal actions, the doctrine has required them to entertain those actions. There is no support in Supreme Court decisions, however, for the proposition that states may exclude federal actions as long as they also exclude analogous state causes of action; state exclusions of subclasses of federal actions have not been upheld solely on the ground of their evenhandedness.\textsuperscript{310}

To exclude federal causes of action, states must have a sufficiently strong policy interest outweighing the federal interest in having the congressionally established choice of forum option respected. State exclusions that discriminate against federal actions are not "valid excuses," but the evenhandedness of an exclusion does not, by itself, make an excuse valid. Nevertheless, states

\textsuperscript{307} \textit{Id.} at 388.

\textsuperscript{308} The plaintiffs had contended that the New York policy discriminated against noncitizens of New York State in violation of the Privileges and Immunities Clause, U.S. \textsc{Const.} art. IV § 2. The Court, however, construed the policy of New York to apply to nonresidents, regardless of whether they were citizens, thus avoiding the constitutional issue.

\textsuperscript{309} \textit{Accord Missouri ex rel. Southern Ry. v. Mayfield}, 340 U.S. 1 (1950) (even-handed application of forum non conveniens may exclude FELA actions by nonresidents on out of state accidents).

\textsuperscript{310} Professor Redish has argued, persuasively, that there is no analogous right doctrine permitting states to exclude federal causes of action solely because they do not entertain analogous state actions. \textsc{M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power} 132-38 (1980).
may have a sufficiently strong interest in administering their judicial systems to justify the adoption of policies which, when even-handedly applied, result in the exclusion of a subclass of the federal actions. Consequently, state policies regulating which federal actions will be heard based on the identity of the parties, the relation of the parties or the cause of action to the forum, or compliance with state rules governing the litigation do not ipso facto sanction refusals to entertain particular causes of action.

State courts are effectively prohibited from excluding completely federal causes of action, and partial exclusions are only permitted on a limited basis. The nondiscrimination principle, however, also prevents states from singling out federal causes of action and applying policies that are not followed in analogous state-created causes of action. Thus, state policies are not a "valid excuse" to support state practices not applicable to state and federal actions alike. In addition, states that entertain federal causes of action must hear the full cause of action and may not pick and choose among its attributes.

311. Id. at 137.

312. State enforcement of federal claims has recently been reviewed and it has been suggested that "[t]he entire analysis of door-closing rules when a superior source of law is involved can . . . be reduced to two issues: facial neutrality and preemption. Facially neutral rules are the only type of laws that are acceptable when a superior source of law is involved. Justifications based on local public policy are preempted by the superior source." Brilmayer & Underhill, Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws, 69 Va. L. Rev. 819, 839-40 (1983). Although this is undoubtedly true, the use of preemption principles poses, but does not answer, the question of when a conflict exists between local rules of practice and the federal cause of action. Given Congress's traditional silence on the procedural policies to be followed when federal actions are heard in state courts, it is still necessary to develop the framework for approaching facially neutral policies governing state court litigation.

313. Although cases prohibiting the use of discriminatory state policies have involved total or partial exclusions of federal actions from state courts, see Testa v. Katt, 330 U.S. 386 (1947); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934); Mondou v. New York, N.H. & H. R.R., 223 U.S. 1 (1912), the nondiscrimination principle they establish is equally applicable when state courts that entertain a federal cause of action refuse to provide the claimant the benefits of state law.

314. In Garrett v. Moore-McCormack Co., 317 U.S. 238 (1942), without deciding whether state courts were required to make their courts available for the enforcement of federal rights under § 33 of the Merchant Marine Act, which incorporated by reference FELA principles, the Court prohibited the Pennsylvania courts from following state law that imposed on plaintiffs the burden of proving a release was not executed freely because this altered certain rights under the Act:

If by its practice the state court was permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less...
The Supreme Court has also required state courts hearing federally created causes of action to apply policies consistent with the purposes of the underlying statute. For example, when Congress enacted FELA it did not address many of the procedural attributes of the cause of action, and the Court was unwilling to impose a federal code of procedure in state court FELA cases. Nevertheless, the Court has prohibited states from following policies that were inconsistent with the broad purposes of FELA or that burdened the litigation of FELA claims. Accordingly, the Supreme Court has rejected state requirements concerning pleadings, burdens of persuasion, the sufficiency of the evidence, the province of the jury, and the propriety of certain jury instructions when those requirements impaired the FELA cause of action. The Court rejected these state requirements notwithstanding their evenhanded application to federal and state-created causes of action.

State courts that entertain § 1983 actions must follow the federal definition of the cause of action and cannot construe § 1983 differently because the action is in state and not federal court. Nor may states selectively entertain some § 1983 actions while rejecting others. For example, a state that disagreed with Supreme Court decisions allowing municipalities to be sued under § 1983 could not decline to exercise jurisdiction in § 1983 actions against municipalities. Although the impact of such jurisdictional bars are less significant than decisions on the merits, the exclusion of subclasses of a federally created action because of substantive disagreements with its underlying policy is no different than Connecticut's unsuccessful effort more than seventy years ago to exclude FELA actions

Id. at 245. The fact that Pennsylvania had voluntarily opened its courts to the federal cause of action was enough to require it to give petitioner "the benefit of the full scope of these [federally created] rights," and even though the state classified the rule in question as procedural, this did not give the state authority to reject a policy that "inhered" in the cause of action. Id. at 249; see also Central Vt. Ry. Co. v. White, 238 U.S. 507, 511-12 (1915) (holding that burden of proof on contributory negligence is a federal question).


316. The purpose of FELA was to provide full compensation to injured railroad workers without regard to a number of limiting doctrines of state tort law. See Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).


318. Under Monell v. Department of Social Servs., 436 U.S. 658 (1978), cities are "persons" within § 1983 and states cannot immunize them from liability. See infra notes 431-36 and accompanying text. Unlike decisions on the merits that generally preclude subsequent federal court litigation, jurisdictional dismissals should not preclude subsequent federal court litigation of identical claims.
because of its disagreement with the policies of the federal statute.\textsuperscript{319}

The nature and scope of the § 1983 cause of action and the definition of § 1983, once established, should apply uniformly in all federal and state courts. Despite the fact that the language and legislative history of § 1983 leave many questions unanswered, the Supreme Court has developed rules of construction to interpret § 1983 against the background of the common law, principles of tort liability, and considerations of public policy.\textsuperscript{320} The Court’s approach has produced a uniform definition of the elements of the § 1983 cause of action, including issues the statute does not expressly address, such as the availability of immunities and rules on damages.\textsuperscript{321}

\textsuperscript{319} The Court will have an opportunity to address the circumstances under which states may exclude § 1983 actions in Spencer v. South Carolina Tax Comm’n, 316 S.E.2d 386 (S.C.), cert. granted, 105 S. Ct. 242 (1984). In Spencer, the Supreme Court of South Carolina, in denying an application for attorney fees, held that § 1983 was not available to “circumvent” state remedies. The issue arose because the plaintiffs, who prevailed in a state-created action to enforce a federal constitutional claim involving South Carolina’s tax system, had joined an identical claim under § 1983. In refusing to entertain the § 1983 claim while hearing the state-created action to enforce the same federal constitutional provisions, the South Carolina court may have violated the nondiscrimination principle. See supra notes 293-304 and accompanying text. Unlike Testa v. Katt, 330 U.S. 386 (1947) which involved \textit{inter alia} a state discriminating between similar federal statutory actions, \textit{Spencer} involves a state that will only entertain certain federal constitutional claims in state-created actions. Nonetheless, once a state creates a state cause of action in which it will hear federal claims, it should not be able to refuse to entertain federal causes of action in which plaintiffs can raise identical claims. Moreover, even if the denial of access to state courts because of the existence of state remedies could be evenhanded, it is inconsistent with the supplementary nature of the § 1983 remedy. See supra note 291. Despite the fact that the plaintiffs may have joined claims under § 1983 because of the availability of attorney fees as the South Carolina court speculated, South Carolina’s disagreement with the federal policy on fee-shifting is not a valid excuse for excluding plaintiff’s federal cause of action. See supra notes 305-12 and accompanying text.

\textsuperscript{320} See infra notes 415-24 & 479-501 and accompanying text. Although the construction of § 1983 often implicates important issues of federalism and separation of powers, the Court has treated the task of construing § 1983 as one of statutory construction. Justice Frankfurter suggested that such a characterization “denuded” the issues of much of their significance, Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting), and decisions of the Court have often relied extensively on policy considerations. See, e.g., Briscoe v. LaHue, 103 S. Ct. 1108 (1983); Smith v. Wade, 103 S. Ct. 1625 (1983); Owen v. City of Independence, 445 U.S. 622 (1980); Scheuer v. Rhodes, 416 U.S. 232 (1974). Nonetheless, the task before the Court is the construction of the statute, and Congress is free to alter the statute and override Court decisions construing § 1983.

\textsuperscript{321} The argument can be made that although the doctrine of dual sovereignty has not survived, see supra notes 293 & 302, it provides guidance in construing § 1983, and that the Court should only impose a federal model of § 1983 on state courts where Congress has expressly required the use of federal policies. Cf. Sandalow, supra note 300, at 207. The Court has noted that the Forty-Second Congress’s express reliance on the doctrine in app
These principles are difficult to apply because the policies followed in § 1983 actions do not come from a single source. Many of the policies followed in § 1983 cases in federal court are based upon policies and practices generally applicable in federal court litigation rather than specifically derived from § 1983. Section 1983 is also silent on several issues on which there are no policies generally applicable in federal courts. Such gaps in federal law are common, and federal courts customarily borrow appropriate policies from the law of the forum state. Borrowing also takes place in litigation under § 1983 and other Reconstruction-era causes of action in which a choice of procedure statute, 42 U.S.C. § 1988, instructs federal courts to borrow the federal rule from state law. Accordingly, federal rules borrowed from state law govern statutes of limitations, rules on tolling, and survival policies in § 1983 cases. Finally, a federal floor of minimally acceptable remedial rules exists, and when the use of state policies is inconsistent with the purposes of § 1983—compensation and deterrence—state policies need not be followed.

State courts hearing § 1983 causes of action must hear the full cause of action, and may not pick and choose among its attributes. If a policy or practice comes from § 1983 itself or is integral to the § 1983 remedy, state courts must apply the same policy. Similarly, federal statutes governing § 1983 litigation are applicable in state courts unless the statutes limit their application to federal court.

Proaching aspects of the Civil Rights Act of 1871 is helpful in establishing legislative intent. See Monell v. Department of Social Servs., 436 U.S. 658, 690-95 (1978) (prevailing doctrine of dual sovereignty explains the rejection of the Sherman Amendment’s imposition of liability on counties that failed to prevent violations of the law, and justifies the refusal to impose vicarious liability in § 1983 actions based on respondent superior). The Court has not, however, required an explicit statement by Congress before requiring elements of federal causes of action to be followed in state courts. Thus, a uniform § 1983 immunity doctrine has been applied to state court § 1983 actions without any special showing that Congress had required state courts to use the same immunity doctrines used in § 1983 actions in federal courts. See Martinez v. California, 444 U.S. 277 (1980). Given the indirect way Congress traditionally approaches issues involving the state obligation to hear federal causes of action and the bare legislative record of § 1983, especially with respect to its availability in state courts, any other approach would permit states to justify a wide range of limitations on state court § 1983 actions by pointing to the failure of Congress to address the issue. Such an approach, if followed, could effectively remove the states as forums for hearing § 1983 actions.

322. See supra notes 193-205 and accompanying text.
323. See infra note 601.
324. See infra notes 600-58 and accompanying text.
326. See, e.g., Maine v. Thiboutot, 448 U.S. 1 (1980) (attorney fees provisions are appli-
Moreover, when § 1983 is silent and federal courts use state procedures to fill the gaps, state courts may also fill those gaps by referring to their own policies. But states must also reject state policies at odds with the underlying purposes of § 1983. On the other hand, when policies that govern § 1983 actions in federal court are those generally applicable in federal court, state courts will not be required to follow them. For example, jurisdictional and other doctrinal limitations on federal courts as well as the Federal Rules of Civil Procedure are uniquely applicable in federal courts. State courts, therefore, should be guided initially by their own law in addressing such issues. State courts, however, are not free to use their own procedural and remedial rules without regard to the impact of those state rules on the purposes of § 1983; and if state policies, even of a housekeeping nature, are inconsistent with § 1983's purposes of deterrence and compensation, they must be rejected.

Although state court judgments can be insulated from Supreme Court review under the adequate state ground doctrine when those judgments are based upon state procedural doctrines, the adequacy of the state ground is itself a federal question. An adequate state ground is not present when decisions are based upon state procedures that burden the litigation of federal claims or are inconsistent with the purposes of the federal rights being enforced. As a result, state policies should be examined to determine their impact on both the pre-incident conduct that § 1983 is designed to influence as well as the post-incident ability to litigate such claims. Thus, when § 1983 actions are litigated in state courts, it will be necessary to examine not only exclusions of the

cable in § 1983 actions regardless of court system).


328. See supra notes 309-13 and accompanying text.

329. See L. Tribe, supra note 100, at 119-29.

330. See Davis v. Wechsler, 263 U.S. 22 (1923); Brown v. Western Ry., 338 U.S. 294 (1969). But see Hill, The Inadequate State Ground, 65 COLUM. L. REV. 943 (1965) (arguing that the adequate state ground doctrine does not include a "burdensome procedural rule" that permits the Court to reject state court decisions because of the burdensomeness of state procedures). Nor may states use procedural doctrines that discriminate against federal causes of action to refuse to reach the merits of federal claims, or give their courts unlimited discretion to determine when to overlook procedural defaults and reach federal issues. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (state rule concerning notice for reviewing a transcript on appeal deemed discretionary by the Court and not an adequate state ground to prevent Supreme Court review of federal issues).

331. Neuborne, supra note 24, at 779-80.
cause of action but also state procedural and other rules that may conflict with the § 1983 cause of action or with its purposes.

IV. State Court Limitations on § 1983 Actions

The litigation of § 1983 actions in state courts raises novel and important issues concerning the applicable policies and procedures. State courts entertaining federal causes of action often favor familiar state law. If state courts, however, follow state policies in § 1983 litigation, they may deny litigants a forum that can reach the merits of their federal claims and provide full relief. Thus, even litigants who prefer state forums often find certain state policies disadvantageous and attempt to avoid them. Additionally, in some cases, the state court § 1983 action can be superior to its federal court counterpart, but this raises the issue whether policies applicable in federal courts or their state analogues apply in state court § 1983 actions.

332. Although state court litigation of federally created causes of action is common, see Redish & Muench, supra note 78, the litigation of § 1983 actions in state courts raises unique issues of public policy because of the constitutional and statutory rights enforceable through § 1983.

333. See supra note 25.


335. The anomaly of plaintiffs who have chosen state forums attempting to avoid state law by arguing for the application of federal procedures has been described by one commentator as an "eat-your-cake-and-have-it-too" position. Note, Procedural Protection for Federal Rights in State Courts, 30 U. Cin. L. Rev. 184, 192 (1969). Reed v. Pennsylvania Rd. Co., 171 Ohio St. 433, 171 N.E.2d 718 (1961), a case involving the Federal Safety Appliance Act, illustrates a judicial reaction to the application of federal procedures when plaintiffs have chosen state forums. Precedent required the Ohio courts to follow the federal "split scintilla" rule for reviewing jury verdicts, although Ohio courts had abandoned the rule in state tort litigation. As Judge Taft noted:

This court abandoned the scintilla rule years ago . . . and therefore has considerable difficulty in understanding why it should be required to apply the federal scintilla or split-scintilla rule in Ohio courts in this kind of case. . . . If [the plaintiff] elects to sue in an Ohio court, he probably does so in order to secure certain procedural advantages not available to him in a federal court. For example, he may prevail by securing the concurrence of only nine instead of all twelve jurors. . . . Furthermore, no trial judge can grant more than one new trial against him on the weight of the evidence, and no appellate court can reverse more than one judgment in his favor on the ground that it is against the weight of the evidence. . . . Also, he avoids the risk of any comment by the trial judge upon the evidence or the credibility of witnesses. . . . If the plaintiff can, by suing in an Ohio court, get these and other procedural advantages, why should he not be required to take with them those procedural disadvantages that are a part of the ordinary procedure in the courts of Ohio?

Id. at 436 n.1, 171 N.E.2d at 720 n.1 (citations omitted).

336. In some cases defendants will argue that state courts must apply federal rules. See, e.g., Minneapolis & St. L. R. R. v. Bombolis, 241 U.S. 211 (1916) (federal jury unanimity
Although the Supreme Court has not fully addressed how state courts should approach the use of state policies in § 1983 litigation, there are a number of traditional approaches that state courts should follow. Initially, state courts must review their policies to see if under state law they apply to § 1983 actions. Second, they must define the scope and nature of § 1983 and disregard state policies inconsistent with that federal definition. Third, state policies not applied evenhandedly to state and federally created causes of actions cannot be "valid excuses" for refusing to enter-


337. Justice Hans A. Linde of the Supreme Court of Oregon, one of the architects of the state constitutional law movement, has urged state courts to address subconstitutional state law issues before reaching state or federal constitutional issues. See Linde, supra note 10, at 390-91; see also Carson, supra note 10, at 653-55. State courts have used this advice in finding principles of state court jurisdiction to support the exercise of jurisdiction over § 1983 claims. Thus, state courts have not had to decide whether federal law required them to entertain § 1983 actions. See supra note 286; see also Terry v. Kolaki, 78 Wis. 2d 475, 497-98, 254 N.W.2d 704, 713 (1977) (state law required state small claims courts to entertain § 1983 actions otherwise within their jurisdiction); cf. Luker v. Nelson, 341 F. Supp. 111 (N.D. Ill. 1972) (the Illinois legislature did not intend the notice of claim statute to be applicable to § 1983 actions).

State courts must also review state policies to see if they independently violate state law. For example, many state constitutions guarantee a right of access to state courts. See Note, The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?, 13 RUTGERS L.J. 399 (1982). Other state constitutional provisions may invalidate state policies that impair state or federal actions. See, e.g., White v. Montana, 661 P.2d 1272 (Mont. 1983) (Montana statute barring tort recovery against governmental entity for noneconomic loss and limiting other tort recoveries against governmental defendants to $300,000 violates equal protection clauses of state and federal constitutions); see alsoKristensen v. Strinden, 343 N.W.2d 67, 70-71 (N.D. 1983) (North Dakota Constitution precludes denial of state forum for § 1983 actions).

Limitations on the ability to litigate fully state causes of action may also independently violate federal substantive rights. See, e.g., Mills v. Habluetzel, 456 U.S. 91 (1982) (one year statute of limitations for illegitimate children to identify father and enforce right to child support denies illegitimate children a reasonable opportunity to assert claims and violates equal protection). Finally, the liberty and property interests in a cause of action, the violation of which give rise to a due process claim under § 1983 when state post-deprivation procedures are not adequate, see Parratt v. Taylor, 451 U.S. 527 (1981), are a potential source of indirect federal limitations on the ability of states to restrict access to state courts and the available relief. Cf. Hudson v. Palmer, 104 S. Ct. 3194, 3205 (1984) (waiver of state sovereign immunity in state causes of action against state employees is a factor in determining adequacy of state post-deprivation remedies). The waiver of state sovereign immunity for state but not federal claims, however, implicates the nondiscrimination principle. See infra notes 474-98 and accompanying text. For a more limited view of Parratt, see Smolla, The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co., 1982 U. ILL. L. REV. 831, 871-81.
tain § 1983 actions or for limiting their scope. Finally, state courts must ignore policies that burden litigation or are otherwise inconsistent with the purposes of § 1983. Even when applied evenhandedly, such policies are not an adequate state ground to preclude Supreme Court review of federal issues arising in state court § 1983 actions.338

In examining state court § 1983 litigation, this part will focus on issues that state and federal courts might resolve differently and on how the former should approach such issues.339 It is inevitable that courts will differ in their construction of § 1983, but such conflicts should be resolved without regard to the judicial system in which they arise.340 When state courts entertain federal causes of action like § 1983, however, they will have to address a number of unique issues that do not arise directly in federal courts.

State restrictions on § 1983 actions fall into five areas. First, there are threshold or door-closing restrictions that can result in complete or partial denials of access to particular state forums. Second, there are state policies that may conflict with the language, legislative history, or policies of § 1983.341 Third, federal courts use some state policies to fill gaps in § 1983.342 Although state courts would also generally apply these policies, the choice of a particular policy may violate minimum federal standards. Fourth, there are policies governing state court litigation that deviate from analogous federal court policies and that, despite their

338. See supra notes 311-17 and accompanying text.
339. Although I have suggested how state courts should resolve some conflicts between state policies and § 1983, in most cases it is not possible to do more than identify issues that will arise as the volume of state court § 1983 litigation increases. In focusing on state courts, I have generally not addressed whether the federal courts have correctly construed § 1983, but whether state courts may utilize their own policies in § 1983 actions. Because of the complexity often characterizing § 1983 and the volume of federal court § 1983 litigation, it will often be difficult to determine whether a state court has adopted what it believes to be the soundest of competing interpretations of § 1983, or whether it has found something unique about the state forum to justify an interpretation of § 1983 that differs from the prevailing federal court interpretation.
340. As more courts entertain a federal cause of action, there will be more conflicts and uniformity will become more elusive. See Redish & Muench, supra note 78, at 331-34. For a brief discussion of potential implications of the increase in state court § 1983 litigation for the Supreme Court and its obligation to maintain the uniformity of federal law, see infra notes 797-802 and accompanying text.
341. These include state efforts to redefine the scope of the § 1983 cause of action, to alter the immunities available in § 1983 damage actions, to impose preconditions on the filing of § 1983 actions, or to remove certain subjects from § 1983 litigation.
342. These gap-filling policies include state statutes of limitations and related rules on tolling, the survival of § 1983 claims, and the state doctrine of res judicata.
housekeeping nature, may limit the use of § 1983. Finally, there are state doctrines of justiciability, the use of which in state courts may burden federal rights secured by § 1983.

In addition to identifying and describing state policies that may limit § 1983 actions, this part will review their impact on the duty of state courts to entertain § 1983 actions. This review goes beyond whether particular state policies are invalid because states do not apply them evenhandedly to state-created causes of action. States must do more than refrain from discriminating against federal causes of action, and state policies must be reviewed in light of the purposes of § 1983—compensation and deterrence—their impact on the litigation of § 1983 actions and the underlying rights secured by § 1983.

A. State Door-Closing Doctrines

The willingness of states to entertain § 1983 actions raises the question of which courts in the state judicial system should hear such actions. Unlike the federal judicial system, with its single level of trial courts and liberal transfer statutes to cure incorrect and inconvenient forum choices, state judicial systems are often more complex. Many states supplement their courts of general

343. These include procedures that have their origin in the Federal Rules of Civil Procedure, such as rules concerning pleading, discovery, and class actions as well as jury instructions on damages and policies relating to the availability and operation of jury trials. Minimum federal standards, however, may also apply to these practices and procedures.

344. Although the federal judicial system maintains specialized trial courts with nationwide jurisdiction, such as the United States Claims Court, the Court of International Trade, and the United States Tax Court, see C. Wright, supra note 85, at 14-19, the district courts are the general courts of original jurisdiction throughout the country and the only federal courts with even arguable jurisdiction over § 1983 actions against defendants acting under color of state law. See id. at 8-9.

345. See 28 U.S.C. § 1404 (1982) (transfer where venue proper); id. at § 1406 (transfer where venue improper). The Supreme Court has construed the latter provision liberally to permit transfers of cases lacking both proper venue and personal jurisdiction. See Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962).

346. Judge Haynsworth's comparison of the state and federal judicial systems in Virginia illustrates the complexity of the former. In Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970), he characterized the "melange of basic trial courts" that exists in Virginia as "one of multiple, separate trial courts with sometimes overlapping territorial and subject matter jurisdiction." Id. at 532. Judge Haynsworth, contrasting the federal and state judicial systems, noted that Virginia's court system is duplicative and inefficient:

Virginia's [system] is a highly decentralized, relatively autonomous, system of independent trial courts of sometimes overlapping and duplicating jurisdiction with few administrative or procedural provisions for coordination of their effort or the performance of cooperative or complementary functions. In stark contrast, the federal system is "one great system for the administration of juf-
jurisdiction with courts of limited jurisdiction and maintain special proceedings to hear cases involving small claims, claims against the state, and other matters. These courts often have strict jurisdictional and other procedural limitations and may lack transfer or savings provisions adequate to preserve actions that statutes of limitations would otherwise bar. Thus, the filing of § 1983 actions in the wrong state court or the use of the wrong proceeding can result in the prejudicial dismissal of the action.

The existence of specialized courts and proceedings with partial door-closing policies and special procedures raises the issue of under what circumstances such courts may exclude § 1983 actions. Conversely, the amenability of these courts to hear § 1983 actions poses the question whether states can grant them exclusive jurisdiction over certain § 1983 claims, and thus limit the power of courts of general jurisdiction. Finally, state venue and forum non conveniens policies, which ostensibly only regulate which geographic branch of a court with subject matter jurisdiction can hear particular § 1983 actions, can influence the availability of state forums for § 1983 actions.

Jurisdictional issues other than the threshold question of whether states can entertain § 1983 actions have rarely arisen in state court § 1983 litigation, but will appear more frequently as lawyers become more aware of the advantages of framing federal claims in terms of § 1983 and the volume of state court § 1983 litigation increases. States may, however, meet their obligation

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347. See supra note 382.

348. State transfer provisions operate like 28 U.S.C. § 1406 (1982) and permit transfers within the state to courts with proper venue. Savings statutes give plaintiffs whose timely actions are dismissed a specified period in which to bring a second action. Although most states have one provision or the other, see Burnett v. New York Cent. R.R., 380 U.S. 424, 431-33 (1965) (discussing state methods for preserving causes of action after plaintiff brought action in a court with improper venue), they are often not applicable when the original court lacked subject matter jurisdiction.


350. For a discussion of tactical advantages to framing federal claims and counterclaims
to entertain § 1983 actions without opening all their courts to § 1983 actions, and the Supreme Court should uphold partial door-closing policies that neither foreclose litigation of § 1983 claims in state courts nor unreasonably burden their prosecution.\textsuperscript{351}

1. SMALL CLAIMS COURTS

Section 1983 actions range from disputes involving a few dollars to multi-million dollar claims and major challenges to the administration of state programs and institutions.\textsuperscript{363} When small sums of money are involved, some plaintiffs will utilize state small claims courts\textsuperscript{353} that were created to provide a simple, inexpensive, and expeditious remedy for minor disputes.\textsuperscript{354} Most states maintain small claims courts that can hear civil claims under a specified dollar amount but lack general equitable power.\textsuperscript{355} Claims are usually based on state contract or tort law, but the statutory definition of their jurisdiction is generally framed in terms of the amount of recovery sought.\textsuperscript{356} References to the source of the underlying rights are rare, although the exclusion of special torts such as libel and slander is common.\textsuperscript{357} Thus, most jurisdictional grants for

\textsuperscript{351} in terms of § 1983, see supra notes 272-77 and accompanying text.


\textsuperscript{353} The National Lawyers Guild-sponsored publication by M. Avery & D. Rudovsky, supra note 206, at § 3.7(h) at 3-30 recommends consideration of small claims court for disputes with the police involving small sums.

\textsuperscript{354} See Steele, The Historical Context of Small Claims Courts, 1981 A.B.F. Research J. 293, for a review of the changing perception of the role of small claims courts. To assure expeditious treatment of small claims and to prevent collection agencies from dominating small claims courts, a number of states deny assignees and collection agencies access to their small claims courts and prohibit representation by attorneys or the use of jury trials and appeals. R. Ruhnka & S. Weller, Small Claims Courts: A National Examination 3 (1978).

\textsuperscript{355} A National Center for State Courts study found that as of January, 1977, eight states had no statutory provisions for specialized handling of small claims using informal procedures, and a few states limited small claims courts to urban areas. R. Ruhnka & S. Weller, supra note 354, at 2, 14 & nn.1-2. The study also contains a state by state compendium of statutory descriptions of small claims courts. Id. at 201-13 app.

\textsuperscript{356} Id. at 201-13 app.

\textsuperscript{357} The rationale for excluding these torts from small claim courts is that they are quasi-criminal and too important to entrust to an informal procedure. Id. at 2.
small claims courts do not by their terms exclude § 1983 actions seeking damages below the ceiling, and under state law, these small claims courts must hear § 1983 actions.\textsuperscript{358}

State small claims courts also must hear § 1983 damage actions under the nondiscrimination principle. Whenever small claims courts hear damage actions in tort cases, they should not be able to exclude damage actions brought under § 1983 against the same defendants.\textsuperscript{359} A difficult question arises, however, when states exclude some § 1983 actions from small claims courts for reasons also applicable to state law claims. For example, states generally exclude suits for injunctive relief from small claims courts, but the ability of state courts of general jurisdiction to hear such § 1983 actions minimizes any resulting burden. States can defend restricting small claims courts to less complex, non-injunctive cases because it avoids delay, enables unrepresented parties to resolve disputes involving small sums of money quickly and simply, and avoids the ongoing judicial involvement that flows from use of the injunctive power.\textsuperscript{360} Plaintiffs might argue that such partial ex-
clusions are improper and that considerations of compensation and deterrence require states to make simplified procedures available in §1983 actions in which injunctive relief is sought in minor disputes. States, however, have not excluded such §1983 claims from their state forums, and persons acting under color of state law are not less likely to respect federal law because states limit access to small claims courts.

Similar issues arise when defendants in small claims courts raise §1983 claims as equitable counterclaims.\textsuperscript{361} If states evenhandedly require the combined actions to be transferred to other courts, the burden on §1983 claimants is minimal. A state policy barring equitable counterclaims, however, might require defendants who wanted affirmative relief to file independent actions. Although defendants could raise their federal issues as defenses, having to pursue claims in two forums simultaneously places a greater burden on §1983 claimants. Despite this burden, the availability of state forums that could provide full relief in the §1983 action, even where it was closely related to the principal claim, would justify state refusals to hear equitable §1983 counterclaims in small claims courts.\textsuperscript{362}

When small claims courts are available to hear §1983 damage actions, there is a related question whether state courts of general jurisdiction can refuse to hear §1983 cases within the jurisdiction of small claims courts. Although states generally should be able to organize their judicial systems to deny courts of general jurisdiction power to hear cases within the jurisdiction of courts of limited jurisdiction, it is necessary to consider the impact of such exclu-

\textsuperscript{361} Recent interpretations of the "state action" requirement of the fourteenth amendment have made possible §1983 counterclaims based on the private use of state provisional remedies. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); see supra note 275.

\textsuperscript{362} Policies that require potential §1983 equitable counterclaims to be filed as independent actions might be inconsistent with the purposes of the informal tribunal. These policies also impose burdens on §1983 claimants where collateral estoppel applies to judgments from small claims courts. Defendants forced to litigate legal and factual issues in expedited proceedings with simplified procedures and limited discovery could have their federal rights seriously impaired if they could not raise those issues fully in a §1983 equitable action. But cf. Sanderson v. Neiman, 17 Cal. 2d 563, 573-74, 110 P.2d 1025, 1030-39 (1941) (refusing to give small claims findings collateral estoppel effect on state grounds). Most states do not apply collateral estoppel, however, to findings of small claims courts. See Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 348 (1978). Moreover, states can resolve the problem of joining equitable claims with small monetary disputes by giving a court of general jurisdiction exclusive jurisdiction over the equitable claims and permitting it to hear small monetary disputes not otherwise within its jurisdiction under an incidental or ancillary jurisdiction.
sions. For example, when the rules and procedures of small claims courts limit the use of attorneys, the availability of discovery, the power to award related injunctive relief, and the right to jury trials and appeals, the channeling of § 1983 claims to small claims courts burdens rights secured by § 1983 and the litigation of § 1983 claims. Although plaintiffs can avoid small claims courts by increasing the damages sought, the burden of forcing plaintiffs who wish to use state courts to pursue § 1983 actions in small claims courts should require states to make available an appropriate court of general jurisdiction regardless of the amount of damages sought.

2. COURTS OF CLAIMS

Some states have created courts of claims to entertain damage suits against the state and its agencies. Unlike small claims courts, which provide a simplified forum for certain cases that could be heard in courts of general jurisdiction, courts of claims hear specialized cases not otherwise entertained because of state sovereign immunity. State legislatures created such courts in response to pressure to abrogate sovereign immunity and generally provided jurisdiction over tort and contract claims against the state to place it on a par with private parties. Enforcement of

363. To avoid these problems, jurisdictions that place limitations on the use of small claims courts or procedures often permit plaintiffs to file in courts of general jurisdiction and give defendants either the right to transfer to a court of general jurisdiction or to obtain a de novo hearing. See R. RUHNKA & S. WELLER, supra note 354, at 155-61.


365. Winborne, supra note 120. See most states, however, have fully or partially waived their sovereign immunity without creating specialized courts. Thus, many plaintiffs can bring suits against the state in courts of general jurisdiction even though they may be subject to the special procedures of state tort claims acts. See, e.g., Erickson v. State, 444 A.2d 345 (Me. 1982) (suit against state under Tort Claims Act dismissed for failure to comply with 180-day notice of claim requirement); DeVargas v. New Mexico, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981) (otherwise available suit against state under New Mexico Tort Claims Act not permitted because of statute of limitations), petition for cert. quashed as improvidently issued, 97 N.M. 563, 642 P.2d 166 (1982). But see Chasse v. Banas, 119 N.H. 93, 399 A.2d 608 (1979) (statute establishing mental patients' right to treatment subjects states to suit in state court of general jurisdiction).

366. See, e.g., McCord v. Ohio Div. of Parks and Recreation, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978) (no new right of action created but state placed on same level as private parties); N.Y. Jud. Ct. Cl. Law § 8 (McKinney 1963) (liability “determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations . . . .”); Ohio Rev. Code Ann. § 2743.02(A) (Page 1981) (“liability [to be] determined . . . in accordance with the same rules of law applicable to suits between private parties . . . .”).
federal rights, however, is often not a basis of jurisdiction, and a variety of exceptions further shield states from liability for certain discretionary activities.

When state law permits courts of claims to award monetary relief, states are required under the nondiscrimination principle to entertain § 1983 actions seeking similar relief. The obligation to hear § 1983 actions, however, does not require that states hear them in certain forums. If state courts of general jurisdiction are available to hear § 1983 actions and can provide full relief, there is no requirement that courts of claims also entertain the action. In those cases, the state interest in creating a specialized forum with expertise in a narrow range of tort or contract claims against the state justifies the restriction on access to courts of claims. When the availability of a state forum that can provide full relief is unclear, however, the state should bear the burden of demonstrating the availability of a competent alternative forum; when this burden is not met, states should not be permitted to exclude § 1983 actions from their courts of claims.

On the other hand, when a

367. See, e.g., Maloney v. State, 3 N.Y.2d 356, 361, 144 N.E.2d 364, 367, 165 N.Y.S.2d 465, 468-69 (1957) (state has not waived immunity to suit under federally created rights; no wrongful death suit against state under Jones Act). States may also consent to be sued in specialized courts, such as Pennsylvania’s commonwealth court. These waivers of sovereign immunity, however, do not necessarily extend to the enforcement of federal rights. See Kapil v. Association of Pa. State College & Univ. Faculties, 470 A.2d 482, 484-85 (Pa. 1983) (discussing the judicial and legislative history of Pennsylvania’s limited statutory waiver of sovereign immunity).

368. See, e.g., Genessee County Rd. Comm’n v. Michigan State Highway Comm’n, 86 Mich. App. 294, 272 N.W.2d 632 (1978) (state waiver of immunity by creation of court of claims does not waive immunity for governmental functions). For a discussion of doctrines that limit the abrogation of sovereign immunity to exclude from liability “discretionary” or “governmental” activities, see Wilkins, Tort Claims Against the State: Comparative and Categorical Analyses of the Ohio Court of Claims Act and Interpretations of the Act in Tort Litigation Against the State, 28 CLEVE. ST. L. REV. 149, 191-214 (1979).

369. For example, Illinois’s grant of exclusive jurisdiction to its court of claims includes all claims against the state “founded upon any law of the State” and claims “for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation . . . .” ILL. REV. STAT., ch. 37, § 439.8(a), 439.8(d) (1983). If these provisions were construed to exclude all § 1983 damage claims from the court of claims, Illinois would be in violation of the nondiscrimination principle, unless it permitted courts of general jurisdiction to entertain such § 1983 claims and provide full relief. Moreover, even if it permitted access to the court of claims in § 1983 actions, the state might still be obligated to provide full access to its courts of general jurisdiction for § 1983 claims. See infra notes 474-77 and accompanying text.

370. These problems will be more serious during the period during which § 1983 cases raising unfamiliar issues increasingly begin to appear on state court dockets. The state obligation to hear § 1983 actions should include a requirement that state courts demonstrate the clear availability of other state forums before excluding § 1983 actions. But see Kish v. Wright, 562 P.2d 625 (Utah 1977) (refusing to hear a § 1983 action because of the availabil-
state has transfer or savings provisions that permit courts of general jurisdiction to hear § 1983 actions filed improperly in courts of claims, the impact of excluding such actions from courts of claims will be minimal\textsuperscript{371} and the state can easily show the availability of a competent forum. But when the exclusion of § 1983 actions from courts of claims results in the state denying plaintiffs access to state forums that can provide full relief, courts of claims must hear § 1983 claims seeking monetary relief from the state.

Nonetheless, the willingness of states to hear § 1983 actions in courts of claims should not permit them to exclude § 1983 actions from their courts of general jurisdiction. Courts of claims maintain special procedural rules that often include ceilings on recoveries,\textsuperscript{372} an absence of jury trials,\textsuperscript{373} waivers of rights against officials,\textsuperscript{374} special notice of claim procedures,\textsuperscript{375} limitations on the availability of related declaratory or injunctive relief,\textsuperscript{376} and other restrictions.\textsuperscript{377} Such rules, even if applied without regard to the source of the rights being enforced, burden the litigation of § 1983 actions.

\textsuperscript{371}See Reese v. Ohio State Univ. Hosp. 6 Ohio St. 3d 162, 451 N.E.2d 1196 (1983) (applying the Ohio savings provisions, Ohio Rev. Code Ann. § 2305.19 (Page 1981), which give a plaintiff one year to file a new action after a claim is dismissed for reasons not going to the merits, to actions originally filed in the court of claims).

\textsuperscript{372}See, e.g., Ill. Rev. Stat. ch. 77, § 439.8(d) (1983) ($100,000 limit per claimant for "cases sounding in tort"). States without courts of claims may also have ceilings on the amount of recovery against the state or its subdivisions. See infra note 488.

\textsuperscript{373}Statutes that permit plaintiffs to proceed against the state in courts of claims generally do not allow juries to hear such cases. See, e.g., Mich. Comp. Laws § 600.6443 (1968); N.Y. Jud. Ct. Cl. Law, § 12, (3) (McKinney 1963); Ohio Rev. Code Ann. § 2743.11 (Page 1981).

\textsuperscript{374}As a condition of suing in the Ohio Court of Claims, litigants must waive their right to proceed against the individual state official or employee. Ohio Rev. Code Ann. § 2743.02(A) (Page 1981).

\textsuperscript{375}See, e.g., Mich. Comp. Laws § 600.6431 (1968) (party must file notice of intention to file a claim for property damage or personal injuries within six months of the event giving rise to the cause of action; party must also file a second notice with a detailed statement of the nature of the claim within one year after the claim accrues).

\textsuperscript{376}See, e.g., Crider v. State, 110 Mich. App. 702, 313 N.W.2d 367 (1981) (court of claims lacks power to grant injunctive relief against state agencies); Psaty v. Duryea, 306 N.Y. 413, 118 N.E.2d 584 (1954) (court of claims limited to awarding damages against state and no power to grant strictly equitable relief). But see Plastic Surgery Assocs. v. Ratchford, 7 Ohio App. 3d 118, 454 N.E.2d 567 (1982) (court of claims has jurisdiction to grant injunctions and declaratory judgments against the state).

\textsuperscript{377}The Michigan Court of Claims Act provides that the jurisdiction conferred against the state be exclusive, Mich. Comp. Laws § 600.6419 (1968), and that "[n]o claimant may be permitted to file [a] claim . . . who has an adequate remedy . . . in the federal courts . . . ." Mich. Comp. Laws § 600.6440 (1968); see Crane v. State, No. 56572 (Mich. Ct. App. June 11, 1982) (unpublished order dismissing action against the state in court of general jurisdiction for violation of federal rights), appeal dismissed, 104 S. Ct. 51 (1983).
Unlike small claims procedures that make the litigation of small monetary claims easier and serve the goals of compensation and deterrence, court of claims procedures often make prosecution of § 1983 actions more difficult. Thus, litigants who choose state courts of general jurisdiction should be able to have their § 1983 claim heard regardless of any state policy channeling such actions to courts of claims.\textsuperscript{378}

\section*{3. OTHER SPECIAL PROCEEDINGS}

Many states also have special proceedings or special courts of limited jurisdiction that are the exclusive means of reviewing administrative agency actions, as well as cases involving taxation, probate, zoning, evictions, and family matters such as termination of parental rights, neglect and dependency proceedings and paternity actions.\textsuperscript{379} Unlike the unified "civil action" used in federal\textsuperscript{380} and many state courts,\textsuperscript{381} special proceedings are not plenary proceedings and are often characterized by the use of special procedures that limit their attractiveness.\textsuperscript{382}

Although states may make special proceedings the exclusive means of adjudicating state law issues, there are limits to their ability to exclude § 1983 claims from such proceedings. Moreover, states cannot use the existence of special proceedings to limit access of § 1983 claimants to state courts of general jurisdiction that can provide full relief.

Under the Supremacy Clause plaintiffs in state special proceedings can raise federal issues arising out of the same controversy and the state courts must entertain them.\textsuperscript{383} Section 1983 by

\begin{footnotes}
\item[378] But see Chicago Welfare Rights Org. v. Weaver, 5 Ill. App. 3d 655, 284 N.E.2d 20 (1972), aff'd on other grounds, 56 Ill. 2d 33, 305 N.E.2d 140 (1973), appeal dismissed, 417 U.S. 962 (1974), in which an Illinois intermediate appellate court upheld the dismissal of a § 1983 suit in a court of general jurisdiction because only the court of claims could provide the relief sought.
\item[380] See Fed. R. Civ. P. 2, which provides for one form of action known as a "civil action."
\item[381] See supra note 193.
\item[382] Special proceedings are often characterized by their limited scope of review, limitations on discovery, and short statutes of limitations. See Neuborne, supra note 24 at 738, discussing Article 78 proceedings in New York, N.Y. Civ. Prac. Law §§ 7801-7806 (McKinney 1981). Even states that have adopted rules patterned after the federal rules, see supra note 193, often have special proceedings with similar limitations. See, e.g., Wisconsin Administrative Procedure Act, Wis. Stat. Ann. §§ 227.01-227.26 (West 1982).
\item[383] See Hart, supra note 21, at 507. State courts entertaining state causes of actions may even construe federal statutes over which federal courts have exclusive jurisdiction. See, e.g., Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), cert. denied, 350 U.S.
\end{footnotes}
its terms, however, may be used in actions at law or equity or in “other proper proceedings for redress” and plaintiffs have joined § 1983 claims in special proceedings in a wide range of cases. This enables plaintiffs to obtain the benefits of a plenary proceeding, to broaden the available relief, and to recover attorney fees.

Because federal law does not bar such joinders, the initial question of whether states will permit § 1983 claims to be heard in special proceedings will depend upon state joinder rules and the state definition of the jurisdiction of the court in which the plaintiffs commenced the principal action. States cannot, however, exclude § 1983 claims from special proceedings where the exclusion burdens plaintiffs’ ability to litigate § 1983 claims.

The dispute that led to the Supreme Court’s decision in Maine v. Thiboutot illustrates these issues. The Maine Department of Human Service had denied the plaintiffs Aid to Families with Dependent Children (AFDC) benefits. The plaintiffs appealed the administrative hearing decision to the Maine courts under a state-created proceeding to review administrative agency decisions. Subsequently, they joined a § 1983 claim that brought the action within the federal attorney fees statute and broadened the relief sought to include injunctive and class relief. Although the Maine courts found the joinder proper under state law, a contrary ruling would have raised difficult issues. Had the court prevented the plaintiffs from raising the § 1983 claim in the special proceeding, states cannot, however, exclude § 1983 claims from special proceedings where the exclusion burdens plaintiffs’ ability to litigate § 1983 claims.

The dispute that led to the Supreme Court’s decision in Maine v. Thiboutot illustrates these issues. The Maine Department of Human Service had denied the plaintiffs Aid to Families with Dependent Children (AFDC) benefits. The plaintiffs appealed the administrative hearing decision to the Maine courts under a state-created proceeding to review administrative agency decisions. Subsequently, they joined a § 1983 claim that brought the action within the federal attorney fees statute and broadened the relief sought to include injunctive and class relief. Although the Maine courts found the joinder proper under state law, a contrary ruling would have raised difficult issues. Had the court prevented the plaintiffs from raising the § 1983 claim in the special proceeding,

825 (1955).


385. 448 U.S. 1 (1980).

386. The Supreme Judicial Court of Maine provided prospective injunctive relief to the entire class but limited the retroactive relief to the named plaintiff, because the unnamed members of the class had not used the state administrative proceeding that would have waived state sovereign immunity. See infra text accompanying notes 464-66.
they could have filed a separate § 1983 action. Nonetheless, even if the plaintiffs could litigate both claims simultaneously, the granting of relief in the special proceeding could limit their ability to pursue the § 1983 action. Thus, unless the state courts would permit the named plaintiffs to pursue their injunctive and class claims after the special proceeding restored their welfare benefits, the exclusion of the § 1983 action from the special proceeding would have limited their access to the state courts. On the other hand, if the earlier decision in the special proceeding had no limiting effect on their subsequent ability to pursue the § 1983 claim, the plaintiffs would have faced only the minimal burden of having to split their claims.387

Conversely, some state courts of limited jurisdiction and special proceedings have exclusive jurisdiction over certain subjects, thus raising the issue whether state courts of general jurisdiction can hear § 1983 actions that involve such matters.388 For example, the judicial review procedures of state administrative procedure acts are often the exclusive means of resolving disputes with state agencies and can be the basis for state court refusals to entertain § 1983 actions by plaintiffs who had not utilized state administrative or judicial review procedures.388 Similarly, some states give courts of general jurisdiction concurrent jurisdiction over § 1983 claims but limit the available relief by permitting only special proceedings to award certain relief.389


388. See supra note 349.

389. See, e.g., Chicago Welfare Rights Org. v. Weaver, 56 Ill. 2d 33, 305 N.E.2d 190 (1972) (state administrative remedy, followed by judicial review, is the exclusive remedy), appeal dismissed, 417 U.S. 962 (1974). The Indiana courts have also relied on the exclusive jurisdiction of their judicial review procedures, with its 15-day statute of limitations, to refuse to hear § 1983 challenges to administrative agency actions. May v. Blinzinger, 460 N.E.2d 546 (Ind. Ct. App. 1984) (§ 1983 action not available because state Administrative Adjudication Act is exclusive means of obtaining review of such state agency actions). Plaintiffs in Indiana are unable to avoid the impact of this decision by dispensing with administrative remedies as Indiana has also imposed an exhaustion of administrative remedies requirement in state court § 1983 actions. See infra note 536.

390. Thiboutot v. State, 405 A.2d 230 (Me. 1979) (no retroactive relief to unnamed class members who had not used state administrative procedures), aff'd on other grounds, 448 U.S. 1 (1980).
These state policies condition access of § 1983 claimants to state judicial forums on compliance with the restrictive procedural requirements that characterize special proceedings.\textsuperscript{391} Such limitations must be reviewed carefully even when states apply them equally to state-created causes of action. States may claim an interest in concentrating disputes involving the administration of state programs in special forums, but policies that deny plaintiffs with § 1983 claims access to state courts capable of providing full relief should not be upheld. Where the procedural attributes of special proceedings burden the ability of plaintiffs to pursue their § 1983 claims, states should not be permitted to exclude § 1983 actions from their courts of general jurisdiction.\textsuperscript{392} On the other hand, where the use of special state proceedings is not burdensome, states may require § 1983 claims to be filed in special proceedings.

As with § 1983 claims by plaintiffs, the ability of defendants to raise § 1983 counterclaims in special proceedings will initially depend upon state joinder rules and the state definition of the jurisdiction of the court in which the plaintiff commenced the principal action. Although courts of limited jurisdiction cannot deny defendants the opportunity to raise federal defenses, the question arises whether such courts must entertain § 1983 counterclaims.

State courts of limited jurisdiction that entertain state law counterclaims cannot refuse to hear federal counterclaims seeking similar relief under § 1983. The more difficult question, however, involves evenhanded refusals by state courts of limited jurisdiction to hear specific types of state law counterclaims. For example, when considerations of equity, comity and federalism deny state court defendants access to federal forums, may defendants raise identical issues through § 1983 counterclaims? Alleged state contemnors or defendants in state child neglect or other family law related proceedings may file § 1983 counterclaims seeking enhanced procedural safeguards and challenging the validity of the statutes authorizing the state proceeding.\textsuperscript{393} In addition, state

\begin{itemize}
  \item \textsuperscript{391} See supra note 382.
  \item \textsuperscript{392} This is especially true where state policies on collateral estoppel preclude relitigation of issues concluded in the special proceeding. But cf. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 473, 476-77 (1982) (state court proceedings need only satisfy minimum requirements of the due process clause in order to qualify for full faith and credit guaranteed by federal-law). To deny plaintiffs access to courts with plenary jurisdiction in which they could obtain a full hearing on their § 1983 claims would have the effect of denying § 1983 claimants access to state courts.
\end{itemize}
court defendants may attempt to expand the original dispute by seeking equitable, declaratory or monetary relief.

State court refusals to hear such counterclaims on the ground that they are outside the limited jurisdiction of the special proceeding raise fundamental issues especially when the unavailability of federal court relief is premised on the willingness of the state courts to hear federal claims in the single state proceeding. In Moore v. Sims,394 the Supreme Court rejected a broad attack on the Texas child neglect statutes because the state court defendants could have pursued their federal claims in the pending state court proceeding. The Court suggested that defendants could raise such federal claims by counterclaim.395 Once a state court permits equitable counterclaims, however, it cannot refuse to hear similar counterclaims based on § 1983. Thus, when states shield themselves from federal court § 1983 actions by relying on their willingness to entertain federal claims in the state proceedings, the Court may also require that they entertain § 1983 counterclaims.

Although the nondiscrimination principle may prohibit state courts from refusing to hear § 1983 counterclaims, state refusals to hear analogous state counterclaims do not necessarily justify similar limitations on § 1983. Rather, it is necessary to look to the state interest in the administration of their judicial systems to see if it justifies the exclusion of § 1983 counterclaims in light of the federal interests at stake. Refusing to open special proceedings to § 1983 counterclaims would force defendants to bifurcate their claims, litigating part defensively and the remainder affirmatively. If state courts of general jurisdiction could still hear the § 1983 actions and provide full relief in independent proceedings, the burden of litigating in two forums would be minimal, and states could evenhandedly exclude § 1983 counterclaims from special proceedings. On the other hand, states should not be permitted to use state rules on compulsory counterclaims to require defendants to file § 1983 counterclaims in special proceedings or courts of limited jurisdiction where the procedural attributes of those proceedings burden § 1983 claimants' ability to pursue their federal claims.

4. VENUE AND FORUM NON CONVENIENS

The obligation of states to entertain § 1983 actions does not eliminate state doctrines of venue and forum non conveniens.

395. Id. at 425 n.9.
Rules of venue govern which geographic unit or units of a court system may hear a matter.\textsuperscript{396} Forum non conveniens provides a court with discretion to decline to exercise jurisdiction in favor of a more appropriate court.\textsuperscript{397} When raised successfully these doctrines can result in courts transferring cases to other courts. Where a state has no transfer or savings provision or where another jurisdiction is the appropriate forum, however, these doctrines can result in the dismissal of cases.\textsuperscript{398}

The issue of venue is unlikely to create unusual problems in state court § 1983 litigation. States do not have special venue provisions for § 1983 actions and can apply their otherwise applicable venue statutes to § 1983 litigation.\textsuperscript{399} Although this might require some plaintiffs to file § 1983 actions in distant forums such as in the county where the headquarters of a state agency is located rather than where the plaintiff resides or the claim arose,\textsuperscript{400} such burdens are minimal and the state may have a strong interest in determining the location of litigation affecting state interests.

Forum non conveniens, on the other hand, can present difficult problems because of the discretion involved and the danger that courts may abuse it to avoid § 1983 cases.\textsuperscript{401} That is apparently what happened in \textit{Kish v. Wright},\textsuperscript{402} in which the Supreme Court of Utah unanimously affirmed a trial court decision which applied forum non conveniens to a § 1983 suit against correctional officials by an inmate at the Utah State Prison on the ground that a federal court could hear the action. The trial court had dismissed the action with prejudice holding that state courts did not have jurisdiction over § 1983 actions and, alternatively, that it had discretion to refuse jurisdiction over § 1983 actions. The supreme court, although reversing the concurrent jurisdiction holding, held that Utah courts had discretion under forum non conveniens to

\begin{itemize}
\item \textsuperscript{396} F. James & G. Hazard, \textit{supra} note 379, at 606-07 (1977).
\item \textsuperscript{397} Id. at 657-60.
\item \textsuperscript{398} Transfer provisions permit a court without jurisdiction or venue to transfer a timely filed action to a proper court even when the statute of limitations has run. When a court dismisses a plaintiff's timely filed complaint for procedural or jurisdictional reasons not going to the merits, savings statutes preserve the action by giving the plaintiff a specified time in which to bring a second action. Burnett v. New York Cent. R.R., 380 U.S. 424, 431-32 (1965).
\item \textsuperscript{399} Some states give defendants special venue options. See, \textit{e.g.}, Ind. Code Ann. § 34-1-13-1 (Burns 1973) (counties in Indiana have absolute right to a change of venue).
\item \textsuperscript{400} But see Graham v. Vann, 394 So. 2d 178 (Fla. 1st DCA 1981) (an exception to rule of limiting venue to the county of agency headquarters where individual relief is sought).
\item \textsuperscript{401} But see M. Redish, \textit{supra} note 310, at 134-35.
\item \textsuperscript{402} 562 P.2d 625 (Utah 1977).
\end{itemize}
refuse to exercise jurisdiction. The court then ruled that the dis-
missal should have been without prejudice so as to allow the plain-
tiff to file in federal court.

The decision does not discuss the basis for applying forum non
conveniens. Aside from a general statement that the doctrine au-
thorizes a court to exercise sound discretion to decline jurisdiction
where there is a more convenient forum, there is no indication why
the federal court was more convenient. Moreover, given the fact
that both the state trial court and the federal court for the District
of Utah sit in Salt Lake County, the county in which the prison is
located, none of the traditional forum non conveniens factors were
applicable.

The Supreme Court of Utah distinguished the power from the
duty to hear federal causes of action and relied on the doctrine of
forum non conveniens to support its conclusion that trial courts in
Utah have broad discretion to decline to hear § 1983 actions when
federal courts are available. The court relied on Missouri ex rel.
Southern Railway v. Mayfield,403 for the proposition that the Su-
preme Court of the United States had held that state courts may
decide whether and to what extent they will apply forum non con-
veniens in their courts. Mayfield, however, involved an even-
handed application of the doctrine to foreign actions by nonresi-
dents. The decision does not support an unlimited delegation to
trial courts to determine the extent to which they wish to hear fed-
eral actions.404 Under Kish, trial courts have broad authority to
hear § 1983 actions, but they can also decide not to hear such ac-
tions whenever there is an available federal forum. Federal forums,
however, are generally available to hear § 1983 cases but are not
available to hear state law claims. Thus, the result of this policy is
to permit state courts to dismiss cases based on federal law by us-
ing the doctrine of forum non conveniens in violation of the non-
discrimination principle.405

Although its use of forum non conveniens is more subtle than

404. Moreover, the Court in Mayfield specifically cited the nondiscrimination principle
to test whether the Missouri policy was singling out federal actions for special, less favorable
treatment. Id. at 4.
405. Professor Redish’s suggestion that the potential for abuse in the use of forum non
conveniens is limited is directed to the traditional use of the doctrine which assumes that
other state courts will be a more appropriate forum. See M. Reussh, supra note 310, at 134-
35. When, however, the availability of an equally convenient federal forum is the basis for
the refusal to adjudicate the federal claim, the state court is exercising almost unlimited
discretion.
the actions of other state courts, the effort by the Supreme Court of Utah to channel § 1983 actions to federal court is not unusual. In a commentary, Justice O'Connor pointed out that "state appellate court judges occasionally become so frustrated with the extent of federal court intervention that they simply abdicate in favor of the federal jurisdiction." She then reported, without comment, that the concern of the Supreme Court of Arizona with the extent of federal court intervention led them "to refuse to hear any prisoner complaints because of 'preemption of the field' by the federal courts.

Similarly, for many years the New York state court judges presiding at the Special Term at the Green Haven Correctional Facility in Dutchess County referred all prisoner petitions involving federal civil rights claims to the United States District Court for the Southern District of New York.

A state court's refusal to enforce federal law because federal

406. In Ziegler v. Miliken, 583 P.2d 1175 (Utah 1978), a prisoner case subsequent to Kish, the Supreme Court of Utah affirmed the trial court's decision that state habeas corpus was not available to review prison administrative procedures. The petitioner had not challenged the validity of his incarceration but rather the conditions of his isolated confinement. In refusing to make habeas available, the trial court relied on the availability of administrative remedies and § 1983 actions. Ironically, the Supreme Court of Utah justified its refusal to provide habeas relief on the basis that state court § 1983 actions were available even though Kish raises questions about their actual availability in Utah. Although Kish finds concurrent state court jurisdiction over § 1983 actions, there is only one other § 1983 case reported in Utah. See Stack v. Martinez, 639 P.2d 154 (Utah 1981).


408. Id. Justice O'Connor's reliance on the unpublished Order of the Supreme Court of Arizona in Patricella v. Arizona, No. H 650 (Ariz. April 24, 1973), for these propositions is curious. Patricella was a six-page handwritten "petition for a writ of habeas corpus, protest" by an inmate at the Arizona State Prison complaining about the failure of prison officials to restore good time forfeited as a result of prison disciplinary proceedings. Apparently, a federal court had prescribed procedural rules for the administration of discipline within the prison and had ordered restoration of good time lost in violation of those standards. The petitioner claimed that he was entitled to restoration of good time and petitioned the Supreme Court of Arizona for such relief. The court, not surprisingly, was reluctant to interpret and enforce a federal court order, and stated that:

It is the opinion of this Court that it would not be appropriate for this Court to attempt to interpret the rules and regulations imposed upon the Arizona State Prison by the Federal District Court, that the Federal District Court having entered into this field has in effect preempted the State of Arizona from further supervision in this regard, and that the appropriate forum is the United States District Court for the District of Arizona.


Although the Supreme Court of Arizona used the phrase "preempted" to describe its reluctance to become involved in enforcing a federal court order, it hardly represents a refusal "to hear any prisoner complaints because of 'preemption of the field' by the federal courts." O'Connor, supra note 263, at 801.

courts are available is similar to the abdication of responsibility by other state institutions. State institutions have contributed to the expansion of federal constitutional law by refusing to deal with difficult social or political issues and have encouraged federal courts to fill the resulting void. State courts' use of discretionary doctrines, such as forum non conveniens, to avoid hearing federal claims not only violates their duty to make state forums available to hear § 1983 actions but also encourages parties to avoid state courts.

B. Scope of the § 1983 Cause of Action

Uniform policies concerning the nature and scope of the cause of action have shaped federal court § 1983 litigation. Although in limited areas federal courts look to state law for the federal policy, federal courts have treated the interpretation of § 1983 as a uniquely federal question and have not used divergent state policies to give the § 1983 action a different meaning from state to state.

When plaintiffs file § 1983 actions in state courts, the state courts must accept the federal definition of the cause of action. It is not always clear, however, whether policies followed in federal court § 1983 litigation are part of the § 1983 cause of action or the result of policies independently applicable to litigation in federal courts. Thus, it is necessary to identify the source of limitations on federal court § 1983 actions to determine whether state courts may use such policies or their state counterparts when entertaining § 1983 actions. When the relevant policies come from § 1983 or when Congress has addressed the applicability of federal doctrines to state courts, states have little discretion and must defer to such policies. On the other hand, when federal policies are not derived from § 1983, states may ignore them, but there may be independent limitations on the extent to which states may substitute their own policies.

412. See infra notes 600-87 and accompanying text.
413. See infra notes 508 & 543.
414. See infra notes 552-68, 704-15 & 764-69 and accompanying text.
1. IMMUNITIES

The Supreme Court of the United States has constructed a complex set of policies to determine when monetary relief is available from defendants whose actions violate federal rights secured by § 1983. Legislators, judges, and prosecutors have absolute immunity in suits for damages;415 other public employees, including police officers, prison officials, school board members, and governors have only a qualified immunity from damage suits and can be liable for their discretionary acts.416 Municipalities, on the other hand, are absolutely liable for damages caused by their official policies but are not necessarily liable for all actions of their employees.417 Similarly, supervisory officials are immune from suit for damages based on their mere employment of subordinates but may be liable for injuries caused by the failure of their supervi-


420. See Johnson v. Glick, 481 F.2d 1028, 1033-34 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973). But see Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971) (finding vicarious liability based on state law), cited approvingly in Moor v. County of Alameda, 411 U.S. 693, 704 n.17 (1973); Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. Pa. L. Rev. 499, 506-07 nn.35-36 (1980). Cases using state law on vicarious liability to impose liability on supervisors may not have survived Monell's rejection of respondeat superior as a basis of § 1983 liability. But see Baskin v. Parker, 602 F.2d 1205, 1211 (5th Cir. 1979) (rehearing) (Rubin J., dissenting in part) (reading Monell narrowly to impose respondeat superior liability based on state law). If Hesselgesser is still good law, it may also have implications for entity liability when state law imposes vicarious liability on governmental bodies based on respondeat superior. See Schnapper, Civil Rights Litigation after Monell, 79 Colum. L. Rev. 213, 265-66 (1979). Regardless of how the Court resolves this issue, the same policy should apply in § 1983 cases whether they arise in state or federal courts. If Hesselgesser is not good law, states may nonetheless go beyond § 1983 and create new causes of action that broadly impose vicarious liability based on respondeat superior. See infra notes 437 & 442.
Finally, nonconsenting states are immune from suit in federal court and the state treasury is protected against suits nominally against state officials.

The Court, in developing these immunities, has not relied on the current status of the doctrines of sovereign, governmental, or official immunity as applied under state law. When the language or legislative history of § 1983 does not supply a clear answer to an immunity, the Court has followed a rule of statutory construction in which it looks to the state of the law in 1871 when Congress enacted the predecessor of § 1983. The Court has been unwilling to presume a congressional intent to override immunities that were well established, absent clear evidence or strong policy considerations. Finally, the Supreme Court has not deferred to policies of particular states but has applied § 1983 immunities uniformly throughout the country regardless of whether particular states maintain analogous immunities under their law.

The applicability of federal definitions of immunities in state court § 1983 litigation should depend on their source. When an immunity is part of the definition of the § 1983 cause of action or a defense derived from the statute, it should apply regardless of the forum in which the parties litigate the action. Similarly, when the immunity is part of the standard of culpability derived from the underlying right, it should apply regardless of the forum. On the other hand, immunities based on limitations on the power of federal courts are only applicable in federal court, and states need not follow them in state court litigation.

Immunities that protect certain officials from personal liability in damage suits have their origin in § 1983. Plaintiffs who file § 1983 damage actions against public officials need not plead that

421. See, e.g., McClelland v. Facteau, 610 F.2d 693, 695-96 (10th Cir. 1979); Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978); Hampton v. Hanrahan, 600 F.2d 600, 626-27 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980).


425. See supra notes 314-21 and accompanying text.

426. See Gildin, supra note 87; cf. Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the eighth amendment).
defendants acted outside the scope of their immunity. Defendants must raise their immunity as an affirmative defense and have the burden of persuasion on the issue. However, despite the origin of official immunities in the legislative history and rules of construction used in § 1983, the Court adjusts the definition of § 1983 immunities based on considerations of public policy. In this way, the Court has maintained parity between § 1983 and Bivens actions by defining the respective official immunities similarly. Despite the influence of policy considerations, the Court has treated immunities in § 1983 damage suits, other than those based on the eleventh amendment, as being derived from the statute, and policies applicable in federal court should also apply in state courts.

States could attempt to deviate from the immunities available in federal court § 1983 litigation by using the broader state immunities applicable to some state-created causes of action. Most state courts that have considered § 1983 immunity issues have followed the federal definitions and have imposed liability even where state law immunized the challenged conduct. Some state courts, how-

427. This allocation of the pleading burden is based in part on the Court’s definition of the § 1983 cause of action, but also on the rules of pleading established by Fed. R. Civ. P. 8(c), by “established practice in analogous areas of the [federal] law,” and by policy considerations. Gomez v. Toledo, 446 U.S. 635, 640-41 (1980).

428. In a concurring opinion in Gomez, 446 U.S. at 642, Justice Rehnquist stated that the issue of the burden of persuasion on the qualified immunity defense remained open. Federal courts that have addressed the issue, however, have held that defendants also have the burden of persuasion on the issue of their qualified immunity. See generally Gildin, supra note 87, at 594-98. State courts have also placed the burden on the immunity issues on defendants. See Cook v. City of Topeka, 232 Kan. 334, 654 P.2d 953 (1982); McGrath v. State, 312 N.W.2d 438 (Minn. 1981).

429. Accord P. SCHUCK, SUING GOVERNMENT 203 (1983) (“The immunities are wholly creatures of federal common law”). Such a characterization, however, does not prevent the Court from finding that federal immunity doctrines are part of the § 1983 cause of action and therefore applicable in state courts. Cf. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) (federal common law governing enforcement of collective bargaining agreements applicable in state courts).

430. See supra notes 211 & 228.


Section 1983 immunity decisions have influenced some state courts, and they have used such policies in state-created causes of action. See, e.g., Jones v. Benton, 373 So. 2d 307 (Ala. 1979) (finding absolute immunity to prosecutors for failure to prosecute criminal activity). Other state courts have provided immunity in state-created actions involving conduct
ever, have looked to the origins of municipal or governmental immunity in the doctrine of state sovereign immunity and have refused to exercise jurisdiction in § 1983 damage cases against municipalities. These decisions are wrong. In rejecting a claim of municipal immunity, the Court has traced the doctrine of municipal immunity to the broader doctrine of state sovereign immunity and found the former inapplicable in § 1983 litigation. Moreover, the Court has made clear that state immunity statutes do not control § 1983 actions brought in state courts. In *Martinez v. Califor-


To the extent these decisions are based on a lack of subject matter jurisdiction, they are inconsistent with the broad statutory grant of original jurisdiction to Ohio courts of common pleas, involving "all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts . . . ." *Ohio Rev. Code Ann.* § 2305.01 (Page 1981). These jurisdictional holdings are at odds with Ohio cases asserting jurisdiction over § 1983 actions. See, e.g., Jackson v. Kurtz, 65 Ohio App. 2d 152, 416 N.E.2d 1064 (1979) (state court jurisdiction in § 1983 action involving suspension of employee in classified civil service). Moreover, the special rule prohibited § 1983 suits against municipalities and boards of education is also inconsistent with the nondiscrimination principle in light of the recent decisions of the Supreme Court of Ohio abolishing the immunity of municipalities and local school districts in state tort actions. See, e.g., Carbone v. Overfield, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983) (negligence of school board employee); Enghauser Mfg. Co. v. Ericksson Eng'g Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (municipality not immune from suit for negligent design of bridge and roadway); *see supra* notes 311-14 and accompanying text; *see also* Solimine, *Adjudication of Federal Civil Rights Actions in Ohio Courts*, 9 *U. Dayton L. Rev.* 39, 48-57 (1983).

433. Owen v. City of Independence, 445 U.S. 622, 647-48 (1980) ("By including municipalities within the class of 'persons' subject to liability for violation of the Federal Constitution and laws, Congress . . . abolished whatever vestige of the State's sovereign immunity the municipality possessed.").
nia, the survivors of a young girl murdered by a parolee sued state parole officials under § 1983 in state court. Under California law the defendants had an absolute immunity, and they argued the California immunity statute controlled. Although the Court's decision that the state had not deprived the plaintiffs of any federal right obviated the need to resolve the immunity question, the Court stated that the state immunity statute does not control the claim, and that

[conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . The immunity claim raises a question of federal law.]

The Court found support for this proposition in § 1983 cases arising in federal courts and clearly felt the same result should apply in state courts.

States could also attempt to narrow the immunities and impose liability under § 1983 where federal courts could not. Thus, a state might make municipalities liable for illegal but unauthorized conduct of employees within the scope of their employment, subject municipalities to punitive damages, or provide prosecu-

435. Id. at 284 n.8 (quoting Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973) (Justice (then Judge) Stevens's influential decision refusing to apply Illinois immunity law in a § 1983 action), cert. denied, 415 U.S. 917 (1974).
436. See, e.g., McLaughlin v. Tilendis, 398 F.2d 287, 290 (7th Cir. 1968).
438. See, e.g., Dickerson v. Young, 332 N.W.2d 93, 105 (Iowa 1983) (punitive damages available against Iowa municipalities for state torts but not under § 1983). But see 1982 Iowa Acts ch. 1018 § 5 (exempting municipalities from liability for punitive damages).
tors with only a qualified immunity in damage actions. Although states may expand the liability of public bodies and officials in state-created causes of action, the source of § 1983 immunities in the statute itself prevents such expansions of liability under § 1983. For example, the unavailability of respondeat superior in damage actions against municipalities is in part an interpretation of the “shall subject or cause to be subjected” language in § 1983, and the mere employment of a wrongdoer does not subject a municipality to § 1983 liability in state or federal court. Likewise, the policy of immunizing municipalities from awards of punitive damages and prosecutors from damage actions is the result of considerations of public policy and the conclusion that Congress would have been explicit had it intended § 1983 to override those immunities and create liability. Thus, even where the actions of defendants are within the scope of the cause of action, their immunity is derived from the statute and should be available in § 1983 actions regardless of the forum.


442. Although the immunities afforded defendants under § 1983 must be considered part of the statute, states may go beyond § 1983 to create state causes of action that incorporate by reference principles of § 1983. For example, the Oregon Tort Claims Act, Or. Rev. Stat. § 30.265 (1982), explicitly creates a state cause of action for damages against a municipality when an employee’s actions within the scope of employment violate § 1983. See Rosacker v. Multnomah County, 43 Or. App. 583, 603 P.2d 1216 (1979). Thus, Oregon courts can award damages against municipalities when liability cannot be based directly on § 1983 because of respondeat superior. Given the ability of states to go beyond § 1983 and create broader state remedies by incorporating federal causes of action, the question of whether this can be done without express legislative authority is a matter of state law. The state judiciary, however, should be as free to develop state causes of action that incorporate elements of § 1983 as they have been in exercising their common law power to innovate state tort law and abolish state doctrines of governmental and sovereign immunity. See Barr, Judicial Activism in State Courts: The Inherent-Powers Doctrine; Baum & Canon, State Supreme Courts as Activists: New Doctrines in the Law of Torts, in State Supreme Courts: Policy-Makers in the Federal System (M. Porter & G. Tarr eds. 1982). See generally G. Calabresi, A Common Law for The Age of Statutes (1982) (discussing the fundamental change in the American legal system from one originally dominated by the common law to one increasingly dominated by statutes and the role of the judiciary).

State created causes of action that incorporate § 1983 may raise federal questions that ultimately can be reviewed in the Supreme Court of the United States, see Note, Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference, 66 Harv. L. Rev. 1498 (1953), but probably do not meet the "arising under" test for federal question
On the other hand, immunities derived from limitations on the power of federal courts independent of § 1983 do not apply in state court actions. The immunity of states qua states from suit in federal court and the protection of the state treasury from indirect suits are based on the eleventh amendment not on limitations inherent in the § 1983 cause of action and do not apply in state court. However, even when the immunities applicable to federal court § 1983 actions are not derived from § 1983, states may attempt to utilize state counterparts to the federal court limitations, and the availability of such defenses in state courts will raise unique federal issues.

2. STATE SOVEREIGN IMMUNITY

Many states retain a doctrine of state sovereign immunity to limit the relief available in suits against the state and its agencies. Although most states have enacted at least a limited waiver of sovereign immunity that subjects them to damage suits in enumerated tort and contract cases, few have extended that waiver to suits based on violations of federal law.

The Supreme Court has not directly addressed the applicability of state sovereign immunity to § 1983 actions, although the Court has reviewed the doctrine in holding that a municipality has no good faith immunity from liability under § 1983. Issues of state sovereign immunity rarely arise in federal court litigation because of the congressional approach to the issue and the threshold jurisdictional questions posed by the eleventh amendment.
islative enactments that override the eleventh amendment, subjecting states to suit in federal court, usually override any substantive immunity of the states.\textsuperscript{480} Similarly, where states waive their eleventh amendment immunity and consent to be sued in federal court, the waiver will generally also apply to state sovereign immunity.\textsuperscript{481} On the other hand, when states retain their eleventh amendment immunity, federal courts lack subject matter jurisdiction, and there is no need to reach the question whether state sovereign immunity is an available defense.\textsuperscript{482}

Federal court plaintiffs confronted with eleventh amendment defenses have argued that § 1983 abrogates the immunity of the states. The Supreme Court, however, rejected that argument\textsuperscript{483} and
adhered to that position after the decision in *Monell v. Department of Social Services*444 opened the door for a reexamination of the legislative history of § 1983. In *Quern v. Jordan*,455 the plaintiffs argued that states, like municipalities, were “persons” within the meaning of § 1983 and were subject to suit in federal court. The Court avoided this issue, however, choosing to first address the jurisdictional question of the eleventh amendment. The Court, relying on the absence of express legislative history showing an intent to abrogate state immunity from suit in federal court, rejected the plaintiffs’ argument without deciding whether states are “persons” within § 1983.456

Whether states are “persons” within § 1983 is distinct from the issue of state sovereign immunity. Federal courts will address the former issue only when states have lost their eleventh amendment immunity, but state courts can reach the issue more readily because the jurisdictional bar of the eleventh amendment is inapplicable to them.457 The resolution of this definitional issue, how-


In *Martinez v. California*, 444 U.S. 277 (1980), a § 1983 action in the California courts against the State of California was dismissed for reasons going to the merits. Because the parties did not raise the issue of whether states are “persons” within § 1983 and it did not involve a question of subject matter jurisdiction, it is not possible to read this decision as implicitly holding that states are persons within § 1983. Cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (issue of amenability of states to suit under § 1983 not before the Court).

457. In federal court, the issue will arise when states have waived their eleventh amend-
ever, will not avoid the need to consider whether states may rely on state sovereign immunity to defend § 1983 actions.

If states are "persons" within § 1983, they can still argue that state sovereign immunity protects nonconsenting states or provides a qualified immunity akin to that sought, unsuccessfully, by municipalities.468

Alternatively, a narrow definition of "person" that excludes states from § 1983 does not prevent courts hearing § 1983 actions from awarding relief that can only come from the state treasury. When states lose their eleventh amendment immunity and waive state sovereign immunity, federal courts may be able to provide full relief in suits against state officials, including relief that will ultimately come from the state. Thus, a narrow construction of "person" may not bar relief.469

These issues rarely arise in federal courts because of the eleventh amendment, but litigants with claims against states have filed § 1983 actions in state courts.466 The suits often attempt to avoid the issue whether states are "persons" within the meaning of § 1983 by naming only state officials.461 Because the relief will come from the state treasury, this stratagem, which does not avoid eleventh amendment defenses in federal court,462 raises the issue of the availability of the state sovereign immunity defense in state courts.463

In some state courts, litigants can obtain full relief in § 1983 actions, but in others, states have successfully defended § 1983 actions on the basis of state sovereign immunity. For example, in

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459. Presumably, this is what would have happened had the Court, in Edelman v. Jordan, 415 U.S. 651 (1974), found Illinois to have waived its immunity to suit in federal court.
463. See Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983), finding the state of North Dakota to be the real party in interest in a suit against a state official in his official capacity and analyzing the case in terms of state sovereign immunity and not whether the state is a "person."
Thiboutot v. State," the Supreme Judicial Court of Maine refused to order payment of retroactive AFDC benefits to unnamed members of the plaintiff class, because Maine had not waived its sovereign immunity. The state trial court had provided prospective injunctive relief to prevent the use of an AFDC budgeting procedure that violated federal law and ordered retroactive benefits for the named plaintiffs but not the unnamed class members.468

In affirming the trial court judgment, the Supreme Judicial Court of Maine held that state sovereign immunity precluded a retroactive award of AFDC benefits against an unconsenting state. Distinguishing the named plaintiffs, who had requested an administrative hearing, from unnamed class members, who had not, the court held that state authorization of retroactive benefits to litigants who successfully pursued state-created remedies did not waive sovereign immunity for other class members.466 After addressing but not resolving whether states are “persons” under § 1983, the court held that absent underpayments made in bad faith for racially discriminatory or other constitutionally impermissible purposes, states may interpose state sovereign immunity as a defense in state court § 1983 actions.467

Both the approach and conclusion of the Supreme Judicial Court of Maine that state sovereign immunity is a proper defense to a state court § 1983 action raise fundamental issues that will only rarely arise in federal court.

First, by not attempting to resolve whether states are “persons” within § 1983, despite acknowledging that the issue was open, the Supreme Judicial Court of Maine appears to suggest that resolution of this issue is irrelevant. Although the determination that states are “persons” within § 1983 may not dispose of the issue whether state sovereign immunity limits the relief available in § 1983 suits against states, it has a direct bearing on the question.468 Thus, if states are “persons,” they can still argue for an
absolute or qualified immunity, but the case for allowing it is weaker.

Second, the decision fails to follow the approach taken by the Supreme Court in considering issues of immunity in § 1983 actions. Because the exclusion of states from the definition of “persons” within § 1983 would not preclude relief that must come from the state treasury where the state has waived its eleventh amendment immunity,469 the issues in § 1983 actions must be whether the state has retained state sovereign immunity and, if so, whether the state may validly use it as a defense. The former is a state law question, but to address the latter, courts must review the language and legislative history of § 1983, the state of the common law in 1871, and public policy.470 States may not immunize conduct that is unlawful under § 1983,471 and the availability of state sovereign immunity in § 1983 cases is a uniquely federal issue, albeit one that will rarely arise in federal court. Although the Supreme Court of the United States has extensively reviewed the legislative history of § 1983 in the context of the states’ eleventh amendment immunity from suits in federal court,472 the Court has used a different approach when considering the availability of other immunities. For example, the Court did not require explicit evidence of legislative intent to reject arguments that the umbrella of state sovereign immunity gave municipalities a qualified immunity and governors an absolute immunity in § 1983 damage actions.473 Thus, the availability of any immunity under § 1983 should be based on a review of the legislative history of § 1983, including the state of the law in 1871, and policy considerations, yet the Supreme Judicial Court of Maine did not undertake the former and only barely the latter.

Finally, the decision of the Supreme Judicial Court of Maine violates the nondiscrimination principle. By retaining state sovereign immunity for most suits based on violations of federal law but by not similarly limiting suits under state law,474 the court subjects federal rights to a more rigorous immunity than applies to state-

469. See supra note 459.
470. See supra note 424 and accompanying text.
474. For a discussion of state sovereign immunity in Maine, see Martin, Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name, 35 Me. L. Rev. 265 (1983).
created rights.\textsuperscript{475} Further, the court found a limited waiver of state sovereign immunity in suits for retroactive welfare benefits where those benefits were sought in actions authorized by state law, which require use of the state administrative process and a state judicial review proceeding.\textsuperscript{476} By authorizing full relief where a state-authorized cause of action is used to enforce federal rights but denying such relief in a federally authorized cause of action, however, Maine discriminated against the federal cause of action because of its federal nature.\textsuperscript{477}

Thus the Supreme Judicial Court of Maine’s reliance on state sovereign immunity to refuse to provide full relief in a state court § 1983 action is inconsistent with the approaches the Supreme Court has applied and with the obligation of state courts to not discriminate against federally created actions.\textsuperscript{478}

\textsuperscript{475} Maine has waived state sovereign immunity for certain bad faith, unconstitutional violations of federal law but has retained immunity for other illegal actions that violate federal law. Such selective waivers, when no analogous limitations apply to the state law claims for which sovereign immunity was waived, may violate the nondiscrimination principle. See \textit{Testa v. Katt}, 330 U.S. 386 (1947) where Rhode Island’s willingness to hear double damage claims under the federal Fair Labor Standards Act but not treble damage claims under the Emergency Price Control Act was relied on to support the conclusion that Rhode Island was discriminating against federal rights. \textit{Cf.} \textit{McKnett v. St. Louis & S.F. Ry.}, 292 U.S. 230 (1934) (state may not selectively entertain federal causes of action while hearing state actions without such exclusions).

\textsuperscript{476} Maine, in effect, required unnamed class members to exhaust administrative remedies despite the absence of such a requirement in § 1983, see \textit{infra} notes 526-51 and accompanying text, and its futility given the predominance of legal issues and the outcome of the administrative hearing in \textit{Thibouot}. Moreover, Maine used its special judicial proceeding to limit the relief available in a plenary proceeding in its courts of general jurisdiction, thus denying § 1983 claimant full access to the state courts. See \textit{supra} notes 388-92 and accompanying text.

\textsuperscript{477} If Maine applied sovereign immunity in a nondiscriminatory way, it might argue it had a “valid excuse” in using its state counterpart to the eleventh amendment defense available in federal court. Such an argument, however, does not overcome Justice Steven’s observation in \textit{Martinez v. California}, 444 U.S. 277, 284 n.8 (1980), that states cannot immunize conduct made actionable by § 1983, and it would still be necessary to look at Maine’s excuse and determine if it is consistent with § 1983.

\textsuperscript{478} The plaintiffs-appellants relied on the decision in \textit{General Oil Co. v. Crain}, 209 U.S. 211, 226 (1908) (“If a suit against state officers is precluded in the national courts by the Eleventh Amendment . . . and may be forbidden by a State to its courts, . . . an easy way is open to prevent the enforcement of many provisions of the Constitution.”). See \textit{Brief for Appellants at 10-11, 405 A.2d 230 (Me. 1979), aff’d on other grounds, 448 U.S. 1 (1980).} The Supreme Judicial Court of Maine ignored \textit{Crain} and its implications. Although \textit{Crain} was based directly on the federal constitution, it has relevance to statutory causes of action to enforce federal constitutional and statutory rights. See generally \textit{Wolcher, supra note 260}.  

\textsuperscript{260}
3. DAMAGES

Although the language and legislative history of § 1983 do not address expressly the issue of damages recoverable in § 1983 actions, the Court has relied on general principles of compensation and the state of the law in 1871 to determine what damages are available in federal court § 1983 litigation.\footnote{See Carey v. Piphus, 435 U.S. 247, 255 (1978). See generally Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 CAL. L. REV. 1242 (1979) (detailed analysis of the use of damage awards for violations of constitutional rights that protect intangible dignitary interests in § 1983 and Bivens litigation).} Under these rules, a court must consider the nature of the legal violation and in procedural due process cases, a court may not presume damages absent actual proof. Nevertheless, plaintiffs may recover nominal damages where they cannot show actual damages,\footnote{See Carey v. Piphus, 435 U.S. 247, 264 (1978).} and punitive damages are available against individuals\footnote{Smith v. Wade, 103 S. Ct. 1625 (1983).} but not municipalities.\footnote{City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).} Federal courts uniformly apply these policies on damages in § 1983 cases, and these policies are not dependent on the law of the state in which the court sits.

The Court is gradually becoming aware that its construction of § 1983 will apply in both state and federal courts. In Smith v. Wade,\footnote{103 S. Ct. at 1625.} where the Court held that punitive damages were available in a § 1983 action against a prison guard on a showing of recklessness, Justice Rehnquist, in dissent, argued that considerations of federalism cautioned federal courts against overriding state policies on punitive damages.\footnote{Id. at 1640 n.23.} Justice Brennan, writing for the Court, responded that § 1983 actions could also be filed in state court, and therefore, federal law overrode state policy regardless of the forum in which the suit was filed.\footnote{Id. at 1658.} Although this approach may not have satisfied Justice Rehnquist’s concerns, Justice Brennan’s assumption that federal damage rules must be applied in state court § 1983 actions is consistent with the way most state courts have been approaching § 1983 damage issues. Wade also suggests the use of a more fluid approach to legislative intent on § 1983 damage issues. In refusing to limit his inquiry to the state of the law on punitive damages as of 1871, Justice Brennan questioned whether the 42nd Congress intended to freeze into § 1983
legal principles that were current in 1871. In suggesting they did not, Wade sets the stage for a broader inquiry into the law of damages.

Wade also supports the use of § 1983 damage policies that are uniform nationally. State courts that have addressed issues of damages in § 1983 actions generally have applied the same policies used in federal courts despite state policies limiting the availability of damages. Some states, for example, impose ceilings on the amount of damages that can be awarded against public bodies or in wrongful death actions, while others place limitations on the availability of punitive damages. Nonetheless, the principles of compensation that have guided the Court should override state policies that limit the available damages in § 1983 actions in federal or state courts. Moreover, considerations of deterrence militate against state policies that limit damages to less than those necessary to provide full compensation.

State ceilings on the damages that can be awarded against municipalities should not be applicable in § 1983 cases, regardless of the forum in which they are filed. Although states may impose ceilings in actions based on state law, they cannot do so in § 1983 actions, and federal principles of full compensation should bind.
state courts. Likewise, state damage policies that limit the damages available in survival or wrongful death actions should not control the elements or amount of damages available in analogous § 1983 actions. Although the uncertainty concerning the availability of § 1983 as a wrongful death remedy confuses the issue, the initial approach of many courts in both survival and wrongful death claims is to look to state law. Federal courts, however, have not felt bound to follow state damage limitations even when they were part of the state law that authorized the § 1983 action. Similarly, state courts should follow federal standards, notwithstanding limiting state policies.

Under Louisiana law, for example, punitive damages are unavailable, and the Supreme Court of Louisiana has refused to allow them in § 1983 cases. But once a state agrees to entertain § 1983 actions, it must apply the full range of remedies available under the statute. Wade made clear that the proper construction of § 1983, influenced by principles of compensation and deterrence, requires that punitive damages be available.

Although the Court has developed uniform policies concerning the availability of damages in § 1983 based on its consideration of § 1983's purposes of compensation and deterrence, there may be situations in which federal courts may use state damage policies in § 1983 actions. In Sullivan v. Little Hunting Park, the Court

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494. Ricard v. State, 390 So. 2d 882 (La. 1980). Although this decision pre-dates Wade, the Supreme Court of Louisiana would adhere to its position even if punitive damages were available in § 1983 cases in federal court. Id. at 885; see also Williams v. McNeil, 432 So. 2d 950 (La. Ct. App. 1983), following Ricard to bar awards of punitive damages in § 1983 cases in Louisiana despite Wade. Other state courts, however, permit punitive damages in § 1983 cases. See, e.g., Falkenstein v. Bismark, 268 N.W.2d 787 (N.D. 1978); Yeager v. Hurt, 433 So. 2d 1176 (Ala. 1983); Dickerson v. Young, 332 N.W.2d 93 (Iowa 1983).

495. In Smith v. Wade, 103 S. Ct. 1625 (1983), the Court held punitive damages to be available against an individual defendant upon a showing of recklessness, without regard to divergent state policies. Although the Court relied upon state policies to develop the uniform federal rule, there is no suggestion that the availability of punitive damages in § 1983 cases would vary from state to state.

reviewed a state court decision under 42 U.S.C. § 1982. Section 1982 protects property rights of non-white citizens but contains no explicit remedies. The Court had earlier held that federal courts could fashion equitable remedies and award damages in cases under § 1982 based on general principles applicable in federal courts. In Sullivan, the Court looked to 42 U.S.C. § 1988, the civil rights choice of procedure provision, and observed that federal damage rules could be borrowed from state law:

[B]oth federal and state rules on damages may be utilized, whichever better serves the policies expressed in federal statutes. . . . The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

Although subsequent Supreme Court decisions have largely undercut Sullivan by imposing a more rigid analysis to § 1988 than Sullivan's search for the better rule and by approaching damage issues without regard to § 1988 and the vagaries of state law, there still may be a limited role for state damage rules in § 1983 cases. For example, where federal law is unclear or non-existent, a federal court under the Rules of Decision Act may look to the damage rules in state law that may vary from state to state. Likewise, tolerance for state deviations may be appropriate when § 1983 cases are filed in state court. Thus, although state courts may not avoid uniform federal rules on § 1983 damages by denying the availability of punitive damages or imposing ceilings on recoveries, other rules going to the measurement of damages may be borrowed from state law.

498. 396 U.S. at 240.
500. In § 1983 damage cases, the Court has developed uniform federal rules without reliance on the policies of the state in which the federal court is sitting, and Sullivan and § 1988 have generally either been ignored or only cited in passing. See, e.g., Smith v. Wade, 103 S. Ct. 1625 (1983); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Carey v. Piphus, 435 U.S. 247 (1978).
502. See, e.g., Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983) (following the federal common law of damages in § 1983 cases to uphold damages for mental anguish absent physical injury in the face of a state law argument requiring such physical injury); see also infra notes 725-40 and accompanying text; cf. Basista v. Weir, 340 F.2d 71 (3d Cir. 1965) (punish...
4. ATTORNEY FEES

Enactment of the Civil Rights Attorney's Fees Awards Act of 1976 has had a profound effect on § 1983 litigation. The Fees Act provides courts with discretion to allow prevailing parties reasonable attorney fees as part of costs in actions under a number of federal statutes, including § 1983. The Act's standard, which favors prevailing plaintiffs, has added a new dimension—often a second lawsuit—to § 1983 litigation. Moreover, the possibility of attorney fees awards by state courts in § 1983 cases has encouraged an increased use of § 1983 in state forums by providing a powerful incentive to frame claims in terms of § 1983, to join § 1983 claims with state law claims, and to raise federal defenses through counterclaims based on § 1983.

The Fees Act overrules a Supreme Court decision rejecting an inherent power of federal courts to award attorney fees on a private attorney general theory but does not address federal courts...

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In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.


505. Prevailing plaintiffs who have obtained substantial relief may also recover fees for the time expended pursuing related but unsuccessful claims. Hensley v. Eckerhart, 103 S. Ct. 1933 (1983). Litigants represented on a non-fee basis by public interest organizations are entitled to fees on the same basis as private attorneys. Blum v. Stenson, 104 S. Ct. 1541 (1984).

506. See supra notes 272-77 and accompanying text.

exclusively.\textsuperscript{508} The Act refers to “court” generically,\textsuperscript{509} and in \textit{Maine v. Thiboutot},\textsuperscript{510} the Court concluded with little difficulty that state courts may award fees in § 1983 actions.\textsuperscript{511} In reaching this conclusion, the Court relied on the Act and its legislative history, including the characterization of the fee provision as an “integral” part of the § 1983 remedy.\textsuperscript{512} In addition, the Court considered that the interest of federalism would not be furthered if fees are available only in § 1983 actions brought in federal courts.\textsuperscript{513}


\textsuperscript{509} Ironically, 42 U.S.C. § 1988 (1982), the choice of procedure provision amended by the Act, seems, by its terms, to address only federal courts. Nonetheless, the Court had previously stated that § 1988 was applicable to state court proceedings. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969). Moreover, the language of the 1976 Fees Act does not refer to the earlier language in § 1988 but stands on its own.

\textsuperscript{510} 448 U.S. 1 (1980).

\textsuperscript{511} The major issue in \textit{Thiboutot} was whether the phrase “and laws” extended to statutory actions not providing for “equal rights,” the issue left open in Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). See supra note 33. The State of Maine, however, argued that even if § 1983 extended to statutory actions, attorney fees were not available in such actions. The Court rejected that limiting construction, finding the Act applicable to all § 1983 claims and further holding it applicable to all § 1983 actions whether brought in state or federal court.

In reaching these conclusions, the Court relied on explanatory statements by Representative Drinan, the House sponsor of the Fees Act, who had made clear his views by describing the purpose of the Act as “authoriz\[ing\] the award of a reasonable attorney’s fee in actions brought in State or Federal courts.” 122 CONG. REC. 35,122 (1976) (quoted in \textit{Thiboutot}, 448 U.S. at 11).

\textsuperscript{512} S. REP. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913.

\textsuperscript{513} Justice Brennan, writing for the Court, observed that if fees were not available in state courts, plaintiffs would have no choice but to bring actions in federal courts. Moreover, those plaintiffs who did not have access to federal courts because of the since repealed $10,000 jurisdictional amount requirement in 28 U.S.C. § 1331(a) (1982) would be unable to obtain fees where they prevailed in § 1983 actions. \textit{Thiboutot}, 448 U.S. at 11 n.12.

\textit{Thiboutot} is an example of a case in which the plaintiffs joined a § 1983 claim, for which attorney fees were available, with a state-authorized cause of action for reasons which may have included the availability of attorney fees. Justice Powell stated in his dissent in \textit{Thiboutot} that the amendment of the complaint to include a § 1983 claim took place “some years after the action was initiated, apparently in response to the enactment of the . . . Fees Awards Act.” \textit{Id.} at 24. However, the amended complaint, which was filed on January 7, 1977, less than 10 months after the March 18, 1976 final decision of the Commissioner of the Maine Department of Human Services from which the plaintiffs sought judicial review under the Maine statutes, also expanded the scope of relief sought. \textit{Thiboutot} v. State, 405 A.2d 230, 232 (Me. 1979). To the extent that the availability of fees encouraged this broadening of relief, a major purpose of Congress in encouraging the private enforcement of federal rights may have been accomplished. Thus, one could accept Justice Powell’s speculation about the plaintiffs’ motivation but find it a salutary effect of the Act, especially since pro-
The adoption of a fee-shifting statute for § 1983 actions reflects the trend of expanding the power of courts to award attorney fees.514 This trend, however, is less evident on the state level, and state courts have less experience in applying fee-shifting statutes.515 Although most state courts seem willing to follow federal standards,516 a number seem uncomfortable with awarding attorney fees where state law contains no provisions for fees under analogous claims and litigants prevail on non-fee claims.517

Recognizing that such issues can also arise when federal courts exercise pendent jurisdiction over state claims, Congress authorized fee awards to parties who prevail on non-fee claims without forcing the courts to reach unnecessary constitutional issues.518 By

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514. See generally Wolf, supra note 504 (discussing attorney fee awards under the Fees Act in multi-claim litigation).
515. But see supra note 198.
518. Congress wanted to adhere to the traditional principle of constitutional adjudication under which courts avoid constitutional issues by attempting to resolve claims on non-constitutional grounds. This principle, however, does not apply where the fee claim does not involve constitutional questions, and the legislative history of the Act provides that in such cases the prevailing party "is entitled to a determination on the other claim for the purpose of awarding counsel fees." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976). Thus, in Smith v. Robinson, 104 S. Ct. 3457 (1984), the Court, in addressing the fee
using a test derived from the doctrine of pendent jurisdiction, Congress provided that where fee claims involve a constitutional question that meets the "substantiality" test and both the fee and non-fee claims arise out of a "common nucleus of operative fact," fees may be awarded to parties who prevail on non-fee claims.\footnote{519}

The joinder of fee and non-fee claims in state courts raises issues that rarely arise in federal court. Typically, federal courts asked to award fees to parties who prevail on non-fee claims already will have exercised pendent jurisdiction over state law claims and will have no difficulty applying the same test to determine if they may award fees on non-fee claims. Where state courts hear § 1983 actions, however, the nexus between federal and state claims

petition of plaintiffs who prevailed on a non-fee claim, considered whether § 1983 was available to enforce the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1420 (1982) (EHA), given the comprehensiveness of the remedial statute, see supra note 39, and whether the EHA had impliedly repealed the availability of § 1983 to reach equal protection violations involving the education of handicapped children. Neither of these issues was a constitutional issue, and the Court ruled on statutory grounds that § 1983 was not an available remedy and denied fees.

519. Where the fee claim involved a constitutional issue, the test for whether a party who prevailed on a non-fee claim could obtain attorney fees was stated as follows:

In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, supra at 725.


Under the substantiality test, federal courts do not have jurisdiction over claims that are wholly insubstantial or are obviously frivolous. See Hagans v. Lavine, 415 U.S. 528, 536-38 (1974)

When a party who prevails on a non-fee claim seeks additional relief on a constitutionally-based fee claim, the court must reach the constitutional issue to fully adjudicate the case. If the party loses the constitutionally-based fee claim, the statutory threshold for an award of fees is not met and fees are not available. On the other hand, when a party also prevails on a constitutionally-based fee claim, the entitlement to fees for work on non-fee claims, whether successful or not, depends on meeting the relationship test established in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983). See also Smith v. Robinson, 104 S. Ct. 3457 (1984). Smith, however, leaves open whether fees are to be awarded when an unadjudicated constitutionally-based fee claim is an alternative ground for identical relief. In Smith, the plaintiffs, who ultimately prevailed on a substantive non-fee claim, also prevailed on a procedural due process claim but were denied fees because the fee-claim was "not sufficiently related to their ultimate success to support an award for the entire proceeding." 104 S. Ct. at 3467-68. In addition, the plaintiffs raised other constitutionally-based fee claims on which they did not prevail. In denying fees based on these claims, the Court also stressed the relationship between the fee and non-fee claims and the fact that different relief was sought. 104 S. Ct. at 3471. Thus, Smith did not involve any unadjudicated constitutionally-based fee claims, and it was not necessary to reach the issue of the availability of fees for a prevailing party whose constitutionally-based fee claims are not reached.
that supports pendent jurisdiction need not be present, and the plaintiffs may have used liberal joinder rules to join all claims against opposing parties without regard to whether they arose from a "common nucleus of operative fact." Thus, state courts often will have jurisdiction over fee and non-fee claims that will have little in common but an identity of parties, and the issue will arise as to the applicability of a test derived from the doctrine of pendent jurisdiction in state courts, where it is a foreign concept.

Despite the anomaly of using a test developed to govern the exercise of pendent jurisdiction in federal courts to determine the availability of fees in state courts for parties who prevail on non-fee claims, there is a need for some test beyond the liberal rules governing joinder of claims. Although authorizing courts to reach the merits of non-constitutional fee claims in determining the availability of fees to parties who prevail on non-fee claims, Congress has established a different test when constitutional issues are present, and there is no indication in the Act or its legislative history that Congress did not expect the same test to apply in state courts.

The legislative history of the Civil Rights Attorney’s Fees

520. Similar issues can arise in federal court where a party joins a non-fee federal statutory claim over which there is independent federal court jurisdiction with a federal statutory or constitutional claim enforceable through § 1983. See Smith v. Robinson, 104 S. Ct. 3457 (1984). See generally Bodensteiner, Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps, 5 W. New. Eng. L. Rev. 391 (1983). In such cases, however, there is independent subject matter jurisdiction over the non-fee claim, without regard to the substantiality of the fee claim or its relationship to the non-fee claim.

521. Because of the liberal joinder provisions of state procedural codes and the status of state courts as courts of general jurisdiction, there will usually be no need to make threshold jurisdictional determinations whether states can hear the joined claims. Where § 1983 claims are filed in special state proceedings, however, questions will arise concerning such joinders and the availability of attorney fees for parties who prevail on non-fee claims. See supra notes 384-95 and accompanying text.

522. Although there may be a need for some test to prevent fee awards to prevailing parties based on frivolous fee claims, critics of the expanded availability of fees have overstated the nature of the problem. Justice Powell has expressed concern that "ingenious pleaders may find ways to recover attorney’s fees in almost any suit against a state defendant," Maine v. Thiboutot, 448 U.S. 1, 24 (1980) (footnote omitted) (Powell, J., dissenting), and Justice Blackmun has observed that fees could become available in almost any case "simply by an incantation of § 1983." Smith v. Robinson, 104 S. Ct. 3457, 3465 (1984).

Where fee claims are based on non-constitutional grounds or where additional relief is sought on constitutional grounds, the merits of such claims must be reached. See supra notes 518 & 519. Thus, fees may only be awarded because of the presence of unadjudicated fee claims where the prevailing party has sought identical relief on non-fee and constitutionally-based fee claims. In such cases, Congress has apparently concluded that constitutional issues should not be reached solely to adjudicate fee petitions and has developed a test borrowed from the doctrine of pendent jurisdiction.
Awards Act of 1976 supports the conclusion that courts should avoid the merits of federal constitutional claims and use a variant of the pendent jurisdiction test in considering whether to award fees to parties who prevail on non-fee claims, but state courts should only be required to apply the threshold or jurisdictional leg of the test. Unlike federal courts—which only reach the merits of pendent state claims after they have exercised discretion to hear such non-fee claims and thus are not required to address independently the discretionary leg of the pendent jurisdiction test when considering a fee petition—state courts will have asserted jurisdiction over the joined claims regardless of "judicial economy, convenience and fairness to litigants." Nonetheless, there is no support in the legislative history of the Act for asking state courts to consider the discretionary issues concerning pendent jurisdiction, and state courts should determine whether the constitutionally-based fee claims are substantial in a constitutional sense and whether both claims arise from a "common nucleus of operative fact." These requirements should adequately assure a close relationship between claims that involve alternative grounds for the same relief, and if the claimants meet these minimal requirements, state courts should award fees to parties who prevail on non-fee claims.

523. See United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966), which included a discretionary leg in the pendent jurisdiction test under which federal courts consider "judicial economy, convenience and fairness to litigants" in determining whether to entertain pendent claims.

524. Although members of the Court have made references to the "pendent jurisdiction" test as being the basis for awarding fees on non-fee claims, Maine v. Thiboutot, 448 U.S. 1, 24 (Powell, J., dissenting), the House Report only refers to the "substantiality test," and its page reference to Gibbs, 383 U.S. at 725, does not include a discussion of the discretionary factors. See supra note 519; see also Wolf, supra note 504, at 241-43 (discussing the joinder of nonconstitutional state claims in state courts).

525. Ironically, the most unequivocal rejection of the "pendent jurisdiction" test for awarding fees to parties who have prevailed on non-fee claims has come from the Supreme Judicial Court of Maine, the court that had ordered attorney fees in Thiboutot four years earlier. In Jackson v. Inhabitants of Town of Searsport, 456 A.2d 852 (Me.), cert. denied, 104 S. Ct. 95 (1983), the state trial court had ordered relief on state grounds but denied the fee request. The Supreme Judicial Court of Maine, in affirming the refusal to award fees, addressed the applicable standards and rejected the argument that Congress intended to award fees on the basis of federal claims that lacked merit. It then reviewed plaintiff's constitutional claim, concluded that it lacked merit, and denied an award of fees. In the course of its opinion, the court addressed constitutional issues concerning the meaning of Parratt v. Taylor, 451 U.S. 527 (1981). See also Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982) (refusing to award fees to a prevailing party on a state claim where the federal equal protection claim lacked merit), cert. denied, 459 U.S. 1103 (1983).

In reaching the merits of the federal claims, the Jackson and Gumbhir courts had to decide difficult federal constitutional issues that could have been avoided.
5. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Access to federal court is generally subject to the requirement that plaintiffs exhaust available administrative remedies. This precondition to litigation can result from an interpretation of the cause of action in question, from other provisions of federal law, or from equitable principles applicable in federal court.

For many years it was unclear whether states could require exhaustion of administrative remedies in § 1983 litigation was uncertain, but in \textit{Patsy v. Board of Regents of the State of Florida}, the Supreme Court of the United States held that administrative exhaustion is not a precondition to filing § 1983 actions in federal court. After reviewing the legislative history of § 1983, the Court concluded that Congress intended to provide immediate access to judicial forums and held that § 1983 plaintiffs were not re-

On the other hand, the denial of attorney fees in \textit{Spencer v. South Carolina Tax Comm'n}, 316 S.E.2d 386 (S.C.), \textit{cert. granted}, 105 S. Ct. 242 (1984), was based on the state court's refusal to permit plaintiffs to use § 1983 to "circumvent" state remedies for raising federal claims involving state tax policies. The issue of the availability of § 1983, however, is a nonconstitutional issue that courts must address in determining whether to award fees to parties who have prevailed on non-fee claims. \textit{See supra} note 518.

Some state courts have chosen to avoid unnecessary federal constitutional claims by applying the substantiability and common nucleus tests to award fees to parties who prevailed on non-fee claims, regardless of the possibility that the "substantial" fee claims might lack merit. \textit{See, e.g., Davis v. Everett}, 443 So. 2d 1232 ( Ala. 1983); \textit{Stratos v. Department of Pub. Welfare}, 387 Mass. 312, 439 N.E.2d 778 (1982); \textit{see also} \textit{Johnson v. Blum}, 58 N.Y.2d 454, 448 N.E.2d 449, 461 N.Y.S.2d 782 (1983) (dictum).

The complexity that results from the use of the substantiability and common nucleus tests is avoided in California, where the Supreme Court of California has construed the state attorney fees rule, \textit{CAL. CIV. PROC. CODE} § 1021.5 (1980), the same as § 1983, thus making additional proceedings to construe federal law unnecessary when a party prevails on a state law claim. \textit{See Serrano v. Unruh}, 32 Cal. 3d 621, 638-39 n.27, 652 P.2d 985, 996 n.27, 186 Cal. Rptr. 754, 765 n.27 (1982) (en banc).

Despite repeated references in Supreme Court decisions to the absence of an exhaustion of administrative remedies requirements in § 1983 cases, a number of courts and commentators had concluded the issue was open. \textit{See Patsy v. Board of Regents of the State of Fl.}, 634 F.2d 900 (5th Cir. 1981) (en banc), \textit{rev'd}, 457 U.S. 496 (1982); \textit{see also} \textit{Developments, supra} note 3, at 1274. The Court's fitful efforts to resolve the issue undoubtedly fed this confusion. \textit{See Jenkins v. Brewer}, 624 F.2d 1106 (7th Cir. 1980), \textit{petition for cert. dismissed as improvidently granted}, 450 U.S. 1338 (1981); \textit{Burrell v. McCray}, 516 F.2d 357 (4th Cir. 1975) (en banc), \textit{petition for cert. dismissed as improvidently granted}. 426 U.S. 471 (1976).

Following the lead of the Second Circuit in \textit{Eisen v. Eastman}, 421 F.2d 560 (2d Cir. 1969), \textit{cert. denied}, 400 U.S. 841 (1970), other circuits adopted limited exhaustion requirements. \textit{See, e.g., Secret v. Brierton}, 584 F.2d 823 (7th Cir. 1978); \textit{see also} \textit{H. Friendly, Federal Jurisdiction: A General View} 100-07 (1973) (advocating legislation to amend § 1983 to permit stays of federal proceedings where adequate state administrative remedies exist but have not been exhausted).

quered to exhaust even adequate state administrative remedies.

Despite the decision in *Patsy*, some special exhaustion requirements still exist. Congress has expressly authorized exhaustion requirements for state prisoners, who must use “plain, speedy and effective” prison grievance procedures, and federal courts may stay prisoners’ § 1983 actions for up to ninety days.\(^{528}\) Similarly, participants in pending administrative proceedings within the jurisdiction of state courts have diminished federal court access.\(^{529}\)

Finally, Justice Brennan has suggested that a limited exhaustion of administrative remedies requirement may be implied from congressional policy where the requirement only defers but does not displace federal court § 1983 actions.\(^{530}\) Although *Patsy* has not resolved all questions concerning exhaustion of administrative remedies in § 1983 cases, it made clear that neither the definition of § 1983 nor equitable considerations applicable in federal court support the imposition of a general exhaustion of administrative remedies requirement in § 1983 cases.

During the period of uncertainty, most state courts followed the no-exhaustion rule,\(^{531}\) but some read exhaustion requirements into § 1983. Often, this was based on federal court cases adopting a limited exhaustion requirement.\(^{532}\) There are, however, examples of state courts acknowledging the existence of a no-exhaustion rule in

\(^{528}\) The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 352 (1980), (current version at 42 U.S.C. § 1997e) (1982), imposed a limited exhaustion of administrative remedies requirement in § 1983 actions by permitting courts to continue § 1983 cases for up to ninety days to permit certain state prisoners to exhaust “plain, speedy and effective administrative remedies” that meet the standards promulgated by the Attorney General. The Court relied on this statute in *Patsy* as evidencing congressional understanding and support for the general no-exhaustion policy, although no inmate grievance procedures had yet been certified as meeting federal standards, *Patsy*, 457 U.S. at 535 n.21 (Powell, J., dissenting).


\(^{532}\) *See*, e.g., Castelaz v. City of Milwaukee, 94 Wis. 2d 513, 289 N.W.2d 259 (1980) (interpreting prevailing Supreme Court decisions as permitting the use of an exhaustion of administrative remedies requirement in § 1983 cases). *But see* McGrath v. State, 312 N.W.2d 438 (Minn. 1981) (requiring exhaustion prior to bringing § 1983 where arbitration available under collective bargaining agreement).
federal court but finding it inapplicable to § 1983 state court actions.

In Chicago Welfare Rights Organization v. Weaver, the Supreme Court of Illinois refused to entertain a § 1983 action for reasons that included the rejection of the federal no-exhaustion rule. The plaintiffs had challenged the legality of the shelter allowance maximum in the Illinois AFDC program on federal and state ground and sought prospective injunctive relief and payment of benefits wrongfully withheld. Under Illinois law, the exclusive remedy was an administrative hearing which was subject to judicial review under the state Administrative Procedure Act. Having chosen to join § 1983 and state law actions in the state court of general jurisdiction, the plaintiffs did not use the administrative process.

The court dismissed the case because of plaintiffs' failure to invoke the available administrative remedies. The court was aware that under the prevailing § 1983 no-exhaustion rule, a federal court would not have required plaintiffs to exhaust their administrative remedies as a precondition to a § 1983 action. With little analysis or discussion, the Illinois court concluded that the state-created remedies, which precluded consideration of the state law claim, also precluded direct access to state judicial forums in § 1983 cases.

533. 56 Ill. App. 2d 33, 305 N.E.2d 140 (1972), appeal dismissed, 417 U.S. 962 (1974); see also Thompson v. Medical Licensing Bd., 180 Ind. App. 333, 389 N.E.2d 43, reh'g denied, 180 Ind. App. 333, 388 N.E.2d 679 (1979), cert. denied, 449 U.S. 937 (1980), where an intermediate appellate court in Indiana reasoned that a state court does not change into a federal court merely because an action is under § 1983 and squarely held that Supreme Court decisions applying a "no-exhaustion" § 1983 policy in federal court are not applicable in state court § 1983 actions. "If [the plaintiff] desired the benefit of federal procedures, he should have brought his suit in federal court." Id. at 680.

534. The Supreme Court of Illinois also referred to Rosado v. Wyman, 397 U.S. 397, 422 (1970), in which the Supreme Court of the United States had expressed concern about the increased involvement of federal courts in welfare cases but observed that Congress had not "deprive[d] federal courts of their traditional jurisdiction." Chicago Welfare Rights Org. v. Weaver, 56 Ill. 2d 33, 40 305 N.E.2d 140, 144 (1972), appeal dismissed, 417 U.S. 962 (1974). The Supreme Court of Illinois took this statement, which really addresses Congress's failure to give the federal agency primary jurisdiction over state compliance in federal-state categorical assistance programs, to permit Illinois to create an exclusive judicial remedy to be used after state administrative remedies had been exhausted. The fact that Congress has plenary authority over judicial review of federal statutory programs, however, does not mean that states may impose conditions on federal causes of action. Moreover, the failure of Congress to act helped persuade the Rosado Court that immediate judicial access was available. Nevertheless, Illinois took the same silence as an invitation to impose limitations on the § 1983 cause of action.

535. Although the decision rejects the no-exhaustion § 1983 rule, its real basis seems to
Although the Illinois court might modify its policy after Patsy’s holding that § 1983 did not include an exhaustion requirement, Illinois and other states might argue that their obligation to hear § 1983 actions does not require them to abandon state policies.\textsuperscript{536} They may also argue that their interest in the efficient administration of their judicial system justifies use of an exhaustion requirement and that, absent an explicit congressional directive to the contrary, states should be permitted to follow their own policies.\textsuperscript{537}

The response to these arguments is based on the nature of the state obligation to hear § 1983 actions and the source of the no-exhaustion policy in § 1983 litigation. Once states agree to hear § 1983 actions, they must apply the attributes of the federal cause of action.\textsuperscript{538} Because the no-exhaustion rule is part of the § 1983 cause of action, state courts that entertain § 1983 actions must permit plaintiffs immediate access to a judicial forum without regard to exhaustion requirements generally applicable in state-created actions. The review in Patsy of the legislative history of §


\textsuperscript{537} See M. Redish, supra note 310, at 129-31.

\textsuperscript{538} See supra notes 314-19 and accompanying text.
1983 demonstrates that the no-exhaustion policy is an integral part of § 1983 and that it is intended to assure immediate access to judicial forums.\textsuperscript{539} Moreover, the policy of § 1983 is sufficiently strong to overcome the strong equitable considerations that support an exhaustion requirement in the federal courts in other contexts.\textsuperscript{540}

Any requirement that Congress be explicit in addressing the procedural attributes of federal causes of action heard in state courts could result in differing interpretations of the same cause of action. Congress, however, seldom directly addresses issues concerning the obligation of state courts to hear federal causes of action or the details of those actions,\textsuperscript{541} and any rule of construction that requires explicit statements by Congress effectively resolves the issue against a uniform interpretation of § 1983. It could also result in many plaintiffs avoiding state courts because of the risk they would be required to exhaust administrative remedies or pay the price for failing to do so.\textsuperscript{542}

Although \textit{Patsy}'s construction of § 1983 as providing direct access to federal courts should preclude states from adopting general exhaustion of administrative remedies requirements for § 1983 actions heard in state courts, other special exhaustion requirements apply in state courts. For example, state courts may require inmates in state prisons with grievance procedures to use those remedies as a condition of pursuing § 1983 suits.\textsuperscript{543} Congress specifically created this limited exception to the § 1983 no-exhaustion

\textsuperscript{539} See \textit{supra} text accompanying note 527.

\textsuperscript{540} The judicially-developed rule in the federal courts is that exhaustion of administrative remedies is required in civil actions. See \textit{McKart v. United States}, 395 U.S. 185 (1969); \textit{Myers v. Bethlehem Shipbuilding Corp.}, 303 U.S. 41 (1938); \textit{see also Patsy v. Board of Regents of the State of Florida}, 457 U.S. 496, 518 (1982) (White, J., concurring) (discussing the long-standing federal court exhaustion of administrative remedies requirement and its equitable basis but observing that § 1983 is not available in federal court to enjoin civil or administrative enforcement proceedings).

\textsuperscript{541} See \textit{supra} notes 314-21 and accompanying text.


\textsuperscript{543} The limited exhaustion requirement in 42 U.S.C. § 1997e for some prisoner § 1983 cases, see \textit{supra} note 528, used the generic phrase “court” in authorizing stays in § 1983 cases. Original versions of this limited exhaustion requirement used the phrase “district court” to refer to only the federal courts. See \textit{Civil Rights For Institutionalized Persons, 1977: Hearings on H.R. 2439 and H.R. 5791 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 286 (1977)} (text of H.R. 5791). \textit{See also, H.R. 12008, 94th Cong., 2d Sess., § 4, 122 CONG. REC. 3,945 (1976). The unqualified reference to “courts” was relied upon in making attorney fees available in state court § 1983 litigation. See \textit{supra} notes 507-13 and accompanying text.
requirement, thus giving further support to the use of a general no-
exhaustion policy in § 1983 actions in state as well as in federal
courts.\textsuperscript{544}

On the other hand, the location of other special exhaustion re-
requirements in principles of equity, comity, and federalism applica-
ble in federal courts leaves the § 1983 action intact and poses the
question whether states may use such federal doctrines or their
state counterparts to limit the power of state courts to provide a
direct § 1983 remedy regardless of the availability of administra-
tive remedies. For example, the holding that federal courts may
not use § 1983 to enjoin pending lawyer disciplinary proceedings
under state court supervision does not narrow § 1983 or preclude
state courts from granting relief.\textsuperscript{545} Nevertheless, it does raise a
unique question of the extent to which state courts may rely on
state counterparts of federal equitable doctrines to limit the § 1983
relief available in state courts.\textsuperscript{546}

On a less theoretical level, defendants have argued that state
notice of claim provisions should be applicable in § 1983 litiga-
tion.\textsuperscript{547} Although these procedures, which are ordinarily part of
state tort claims statutes and are closely related to state waivers of
government immunity,\textsuperscript{548} do not provide an opportunity for a hear-
ing, they do constitute preconditions to commencing litigation and
deny direct access to judicial forums. Federal courts, however, have
generally disallowed the use of state notice of claim provisions as

545. Although the applicability of considerations of equity, comity, and federalism to
pending administrative proceedings under state court supervision is unclear, the Court has applied the limitations to lawyer
disciplinary proceedings under court supervision. Middlesex County Ethics Comm. v.
546. See infra notes 563-68 and accompanying text.
547. Some support from this position is provided by Justice Brennan's cryptic state-
ment in Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 137 (1981): "Where
administrative remedies are a precondition to suit for monetary relief in state court, absent
some substantial consideration compelling a contrary result in a particular case, those reme-
dies should be deemed a precondition to suit in federal court as well." This statement, how-
ever, appeared in a concurring opinion that rejected comity as a bar to federal court juris-
diction over § 1983 damage actions involving state taxation. Although Justice Brennan
found an implied exhaustion requirement in the policy of the Tax Injunction Act to defer to
state institutions on questions of state tax administration, he preferred the delay from an
administrative exhaustion requirement to the more drastic "judicial abnegation of federal
court jurisdiction" despite the § 1983 basis of the suit. Fair Assessment, 454 U.S. at 100. He
also reaffirmed his support for the no-exhaustion principle in § 1983 cases. Thus, little sup-
port for a broad exhaustion requirement can be found in Justice Brennan's Fair Assessment
opinion, especially given the Court's subsequent decision in Patsy v. Board of Regents of the
548. See Williams v. Horvath, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976).}
preconditions to § 1983 litigation, and the Supreme Court has refused to apply local preconditions that limit access to state forums in federal actions. Despite the states’ legitimate interest in the use of notice of claim provisions in state-created actions, their application to § 1983 would impose new requirements that would make state forums less attractive to § 1983 claimants, and state courts that have addressed the issue have consistently rejected their application to § 1983 litigation.

6. EQUITY, COMITY, AND FEDERALISM

The use of state court § 1983 actions to enjoin state judicial proceedings will inevitably increase as the volume of state court § 1983 litigation increases. Some litigants will bring these actions in circumstances in which federal courts could also provide the requested relief. Others may seek relief unavailable in federal court because the considerations of equity, comity, and federalism, brought together in Younger v. Harris, limit federal court intervention in state judicial proceedings.

The availability of state court § 1983 actions to enjoin judicial proceedings will depend on how the court defines the § 1983 cause of action, the source of the limitations applicable in analogous fed-

549. See, e.g., Donnovan v. Reinbold, 433 F.2d 738, 741-42 (9th Cir. 1970); Perrote v. Percy, 452 F. Supp. 604, 605 (E.D. Wis. 1978) (requiring dismissal because of failure to comply with notice of claim statute “would unacceptably elevate subtleties of state procedural law above the avenue of relief created by Congress for the protection of federal constitutional rights . . .”).


[T]he purposes underlying section 1983—i.e., to serve as an antidote to discriminatory laws, to protect federal rights where state law is inadequate, and to protect federal rights where state processes are available in theory but not in practice . . . may not be frustrated by state substantive limitations couched in procedural language.

Id. at 841, 548 P.2d at 1129-30, 129 Cal. Rptr. at 457-58; see also Logan v. Southern Cal. Rapid Transit Dist., 136 Cal. App. 3d 116, 125, 186 Cal. Rptr. 878, 883 (1983) (holding that states may not impair federally created rights or impose conditions on them and following the Patsy no-exhaustion rule).


eral court cases, and whether, or to what extent, states may use their own equitable and related doctrines to govern state court § 1983 litigation.

When state criminal prosecutions are brought in bad faith or under "patently invalid" statutes, defendants can use § 1983 to obtain federal injunctive relief against pending prosecutions. In these cases, the opportunity to be heard in state court is an inadequate justification for subjecting a person to a criminal prosecution, and the irreparable harm to the defendant is "great and immediate." Thus, equitable intervention is justified, notwithstanding countervailing considerations of federalism and comity. On the other hand, where federal court plaintiffs only experience the ordinary harm that flows from defending criminal charges—even those based on overly broad statutes implicating first amendment rights—federal courts cannot enjoin prosecution. Similarly, federal equitable intervention under § 1983 against most state court civil proceedings is unavailable where the state proceeding provides the defendant the opportunity to raise federal issues.

State definitions of equity have not constrained federal courts from using a federal definition of equity. The source of that federal definition, however, is less clear. In some instances, substantive federal law provides the governing equitable rule, as with the availability of injunctions against strikes. In others, the traditional principles of equity applicable in federal courts govern. Although early § 1983 cases provided injunctive relief where equitable remedies would not otherwise have been available under federal equity rules, the courts have rejected that view and have

554. Id. at 53-54.
555. Id. at 50.
556. See Judice v. Vail, 430 U.S. 327, 337 (1977). Although the issue of whether Younger considerations apply to all civil proceedings involving the state is said to be open, see Moore v. Sims, 442 U.S. 415, 423 n.8 (1979), the Court has yet to identify a state civil proceeding in which they do not apply.
557. See C. Wright, supra note 85, at 400; see also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 398, 404 (1971) (Harlan, J., concurring) ("Congress provided specifically for the exercise of equitable remedial powers by federal courts . . . in part because of the limited availability of equitable remedies in state courts in the early days of the Republic.").
not construed § 1983 as enlarging the equitable power of federal courts. Federal courts asked to enjoin state judicial proceedings have followed traditional equitable standards, under which such relief is not available where state court defendants have an adequate remedy at law and will suffer no irreparable injury if the injunction is not granted. Moreover, considerations of comity and federalism reinforce principles of equity. Thus, where state court defendants have the opportunity to present their federal claims in a single state court proceeding, federal injunctive relief is unavailable.

In considering the availability of state court § 1983 actions to enjoin state judicial proceedings, it is significant that the limitations on federal equitable intervention are not inherent in a § 1983 cause of action. The § 1983 cause of action is extremely broad and can reach state judicial proceedings. Limitations on its use in federal court are derived from the doctrine of equity applicable in federal courts and from considerations of comity and federalism that apply with special force where the target of federal equitable power is a state judicial institutional actor. Thus, state courts may use § 1983 to provide injunctive relief where federal courts cannot. However, because state courts can use § 1983 in this way does not mean they must, and it is necessary to consider different settings in which state courts may be asked to enjoin state judicial proceedings.

State courts should not use equitable limitations derived from state law to refuse relief where the analogous federal equitable doctrine would not prevent a federal court from enjoining a prosecution. Thus, state courts should not refuse to enjoin bad faith state criminal prosecutions. On the other hand, state courts may use § 1983 to grant relief not available in federal courts under federal definitions of equity. Thus, state courts may use § 1983 to en-

559. See Comment, supra note 31, at 364 and cases cited.
560. See Younger v. Harris, 401 U.S. 37 (1971); see also Comment, supra note 13, at 72-80 (discussing the Court's use of comity and Federalism to shift responsibility to states for protecting individual rights).
562. See Shreve, Federal Injunctions and the Public Interest, 51 Geo. Wash. L. Rev. 382 (1983) (attempting to break Younger into its component parts and arguing that Younger's use of comity and federalism have effectively eliminated the traditional exercise of equitable discretion concerning injunctive relief). When § 1983 actions are filed in state courts the federalism and comity issues will involve whether federal law as contrasted to federal courts should be limited in their ability to affect state institutions. Cf. Smith v. Wade, 103 S. Ct. 1625, 1640 n.23 (1983) (federal law imposes punitive damages in § 1983 actions against state officials regardless of the judicial forum).
join prosecutions under overbroad criminal statutes or to enjoin state contempt proceedings that do not meet federal procedural standards.\textsuperscript{563}

Under this approach, states could follow their own equitable policies on when to enjoin state court proceedings, but Younger considerations would represent a floor and state courts could not refuse to enjoin proceedings federal courts could enjoin. Conversely, state courts could narrow or even abandon their equitable limitations and permit their courts to use § 1983 to enjoin other state court proceedings that violate federal rights, but they would not be required to do so.

The most difficult issues, however, involve the definition of the federal floor. Although it can be no lower than required by Younger, there will be circumstances where the limitations on federal equitable power are based on factors peculiar to the federal nature of the forum because of considerations of comity and federalism. State courts, applying the same standards, should weigh the factors differently. For example, may state courts refuse to enjoin a criminal prosecution under an overbroad statute that regulates first amendment activities? The § 1983 cause of action is sufficiently broad to support an injunction, but Younger considerations prevent federal courts from providing equitable relief. Without the constraints of comity and federalism, should state courts be able to use a broad state definition of equity to also deny relief?

A review of possible sources of exhaustion of administrative remedies requirements aids the search for the basis of limitations of § 1983 actions. Federal equitable limitations on the use of civil actions generally support exhaustion requirements,\textsuperscript{564} but the Court, in Patsy v. Board of Regents of the State of Florida,\textsuperscript{565} found that Congress intended to provide immediate access to judicial proceedings. Thus, Patsy stands for the scope of the § 1983 action as well as for its ability to override certain equitable defenses.\textsuperscript{566}

\begin{footnotesize}
564. See supra note 540.
566. Although the Patsy Court did not expressly address whether its decision altered the application of Younger considerations to broaden the availability of § 1983 injunctive actions involving state judicial proceedings, see Patsy v. Board of Regents, 457 U.S. 496 (1982) (White, J., concurring), it seems unlikely the Court would retreat from Younger. But see Ziegler, supra note 130, reviewing the legislative history of the Civil Rights Act of 1871 and arguing that the 42nd Congress intended § 1983 to be available to address systemic deficiencies in state courts.
\end{footnotesize}
Where § 1983 actions are filed in state court, state equitable defenses, analogous to those overridden by the § 1983 cause of action, should also be overridden. Thus, when federal court § 1983 actions are brought to enjoin bad faith criminal prosecutions, the scope of § 1983 is sufficient to override any federal court limitations on such injunctions, whether the limitations are based on equity, comity, or federalism. State courts must also entertain these suits.

Younger, however, establishes that § 1983 cannot override equitable defenses in a federal suit to enjoin criminal prosecutions under overbroad statutes. Where the identical action is brought under § 1983 in state court, the question is whether states may use state defenses analogous to those used by federal courts. Justice Rehnquist has suggested an answer in the tax context where he has pointed out that federal notions of comity do not constrain state § 1983 actions.\textsuperscript{567} Similarly, the absence of considerations of comity and federalism weaken the defense to a state court § 1983 suit to enjoin a prosecution under an overbroad statute. The § 1983 cause of action reaches the conduct, but the duty to not go beneath the floor created by the federal doctrine of equity raises the question whether the federal doctrine of equity, standing alone, precludes all injunctions to overbroad statues.\textsuperscript{568} On the other hand, even absent considerations of comity or federalism, the equitable limitations that prevent injunctions of criminal procedures or sentences may be sufficiently strong to permit states to interpose analogous limitations on § 1983 actions in state courts.

The following trichotomy should govern the availability of § 1983 in state court suits that affect pending judicial proceedings: first, Younger considerations should constitute a floor, and state courts should not be able to refuse to enjoin proceedings that could be enjoined in federal court; second, the Younger considerations used as the federal floor should be modified in state courts where considerations of comity and federalism either disappear or are altered, and state courts must provide relief not proscribed by the modified defense; third, even where states may refuse to provide relief, they should not be required to do so and may further narrow the equitable limitations applicable in their courts and use § 1983 to provide relief.

\textsuperscript{567} Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100 (1981).
Thus, state courts could use § 1983 to provide relief in cases where federal courts could not, including suits to enjoin the admissibility of evidence or to vacate state judgments. State courts, however, would not be required to provide relief in these cases but must provide relief where prosecutions are brought in bad faith or under patently invalid statutes. Finally, although the precise definition of this gray area will depend, in part, on the definition of the federal standards and the availability of other state remedies, state courts should be required to provide relief in some cases where prosecutions are brought under overbroad statutes as well as in other circumstances in which federal courts cannot.

7. SECTION 1983 AND STATE TAXATION—THE TAX INJUNCTION ACT

The Tax Injunction Act of 1937, which provides that district courts “shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state,” has limited attempts to use § 1983 in federal court to challenge the constitutionality of policies and practices involving state taxation. The Supreme Court has interpreted this Act as prohibiting declaratory judgments. In addition, the policy of comity has survived independently of the Act and prohibits damage actions involving the collection of state taxes.

Because of the lack of access to federal court, challenges to policies used to collect state taxes, particularly assessment policies, have been filed in state courts under § 1983. Although some state courts have entertained these cases and reached the merits, other courts have declined to do so on the ground that § 1983 actions should not be heard in state courts where federal courts could not entertain them. For example, in State Tax Commission


v. Fondren, the Supreme Court of Mississippi relied on the Tax Injunction Act to limit the power of state courts to use § 1983 to enjoin state tax collections. The plaintiffs had challenged the unequal property tax assessment in Mississippi on federal and state grounds and sought to enjoin the Tax Commission from approving county assessment rolls until equalization was provided. The chancery court ordered values to be equalized and awarded the plaintiffs attorney fees. The Supreme Court of Mississippi affirmed the ruling requiring equalization but reversed the award of fees on the ground that concurrent state court jurisdiction over § 1983 actions did not exist where a federal court would not have jurisdiction by operation of the Tax Injunction Act. In reaching this conclusion, the court relied on federal cases that treated the Tax Injunction Act as imposing an exhaustion of judicial remedies requirement in § 1983 cases to enjoin the collection of taxes and reasoned that if the presence of a “plain, speedy, and efficient” state remedy prevented the case from being brought in federal court, the state court § 1983 action must also fail.

Likewise, in Backus v. Chilivis, the Supreme Court of Georgia affirmed the refusal of a trial court to hear a § 1983 challenge of unequal tax appraisals by plaintiffs who had not first presented their claim to the county board of tax equalization. Plaintiffs had sought damages on an equal protection theory from a private contractor who was performing the technical work involved in the appraisal. Without reaching the defendant’s argument that all § 1983 actions are within the exclusive jurisdiction of the federal courts, the court reasoned that federal courts would defer to state administrative and judicial remedies in matters of state taxation, and it would be anomalous to permit plaintiffs to circumvent established state procedures by filing a state court § 1983 action.

Although similar to Fondren in its declaration that state courts will not tread where federal courts cannot, the Backus deci-

574. The chancery court had required equalization at true value, but the Supreme Court of Mississippi reversed that part of the ruling but still awarded plaintiffs substantial relief on their claim that equalization was required.
575. In reversing the award of attorney fees, the Supreme Court of Mississippi did not rely on the fact that the relief ultimately awarded was based exclusively on a non-fee claim. Fees may be available where a party prevails on a non-fee claim. See supra notes 518-25 and accompanying text.
section relies on a special exhaustion of state remedies requirement in state tax cases. The Georgia court, however, does not address whether the Georgian taxpayers could join their § 1983 claim with their state judicial remedy after exhausting their administrative remedy. 578

These holdings ignore the basis for federal court refusals to hear tax matters. Although some § 1983 actions that cannot be heard in federal court may also be excluded from the state courts, the basis for the federal court exclusion must be identified. Exclusions based on the nature and scope of the § 1983 may be applicable in both federal and state forums, but jurisdictional and other federal court limitations independent of § 1983 should not apply in state courts.

The Tax Injunction Act may represent a limitation on the jurisdiction or the equitable power of federal courts but not on the scope of § 1983. In Fair Assessment in Real Estate Association v. McNary, 578 the Court held that § 1983 damage actions challenging inequitable and retaliatory local property tax assessments could not be heard in federal court. Without deciding whether the Act barred such actions, Justice Rehnquist, writing for the Court, found that the doctrine of comity, which was particularly strong in state tax cases, had pre-dated and survived passage of the Act and therefore barred § 1983 actions in federal court.

Justice Rehnquist relied on the doctrine of comity to exclude cases that would disrupt state tax systems. In so doing, he distinguished those cases that allow immediate federal court access under § 1983 to persons whose federal rights were violated. He acknowledged, however, that absent adequate state judicial remedies, the federal courts could have heard the § 1983 actions and observed the

578. Id. at 503-06, 224 S.E.2d at 373-75. In Spencer v. South Carolina Tax Comm'n, 316 S.E.2d 386 (S.C.), cert. granted, 105 S. Ct. 242 (1984), the Supreme Court of South Carolina relying on Backus refused to entertain a § 1983 action challenging on federal constitutional grounds the policy of limiting the non-business deductions of nonresident taxpayers, while entertaining the federal claims in a state-created action. The plaintiffs had exhausted their state administrative remedy and joined their claims, but the court stated that it would not permit plaintiffs to "circumvent" state remedies. The conclusion that § 1983 was unavailable, however, has the effect of precluding § 1983 actions in state tax cases whenever federal courts are similarly barred because of the adequacy of state remedies.


580. The Court concluded that: "[D]espite the ready access to federal courts provided by Monroe and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." Id. at 116. The Court did not decide whether comity precluded federal courts from hearing all § 1983 challenges to state tax assessment practices and expressly left open whether federal
served that the plaintiffs could have asserted their claim in state court under § 1983.\textsuperscript{581} \textit{Fair Assessment} thus establishes that the § 1983 cause of action reaches state tax matters but that limitations on the power of federal courts generally bar suit.

Even if tax matters are within § 1983, there is a suggestion in Justice Brennan's concurring opinion in \textit{Fair Assessment} that in tax matters there may be a special exhaustion of administrative remedies requirement justifying deferral of consideration of state tax disputes while taxpayers seek administrative resolution of their grievances. Justice Brennan, joined by three other Justices, argued that plaintiffs' failure to exhaust their state administrative remedies for each disputed tax assessment justified the dismissal of the damage claims.\textsuperscript{582} Although acknowledging that a no-exhaustion rule was the general policy in § 1983 actions, he suggested that in some areas exhaustion could be required despite the absence of clear statements of congressional intent or "persuasive considerations of policy." These lesser considerations, which sufficed where the issue was deferral not displacement of federal court consideration, were found in the policies behind the Tax Injunction Act, in which Congress expressed its desire to limit federal court involvement in state tax matters.

The Court's limitations on the use of § 1983 to challenge state tax policies were derived from the principles of comity, which prohibit federal courts from interfering with important state functions and should have no applicability to state court § 1983 actions. The majority opinion is concerned exclusively with the disruptive impact of federal courts entertaining actions that can directly or indirectly affect state tax systems, but no such interference results when state courts entertain actions under state or federal law. Similarly, the limited exhaustion of administrative remedies requirement suggested by Justice Brennan, if adopted by the Court, should only constitute a limitation on federal court § 1983 actions courts could hear "a facial attack on tax laws colorably claimed to be discriminatory as to race." \textit{Id.} at 107 n.4.

\textsuperscript{581} In discussing the adequacy of the Missouri remedies, Justice Rehnquist pointed out that "[t]he Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court." \textit{Fair Assessment}, 454 U.S. at 116-17; \textit{see, e.g.}, Stafford v. Muster, 582 S.W.2d 670, 681 (Mo. 1979); Shapiro v. Columbia Union National Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc), \textit{cert. denied}, 444 U.S. 831 (1979); \textit{see also} Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900, 920 (1984) ("Challenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . must be brought in state court.").

\textsuperscript{582} \textit{Id.} at 136-37. Justice Brennan took the position that neither comity nor the Tax Injunction Act barred damage actions from federal court.
because the source of the limitation comes from policies specifically applicable to federal courts. Thus, Backus may have been incorrectly decided if the decision was based on the failure of the plaintiffs to use their state administrative remedies. Fondren may also have been incorrect as there is no basis for a broad state court policy of refusing to hear § 1983 actions involving state taxation only because federal courts could not hear them.

Many state courts have entertained § 1983 actions involving state tax matters without any suggestion that § 1983 should not be used in state court because it cannot be used in federal court to challenge state tax policies. An argument to prohibit use of § 1983 in state courts when it is unavailable in federal court takes limitations of comity and federalism, whether legislatively or judicially developed, and turns them around to prevent state courts from protecting federal rights. Although arguments could be made that policies which justify limiting judicial involvement in state tax matters also support restrictions on the uses of § 1983 actions in state courts, the decision in Fair Assessment establishes that § 1983 reaches state tax matters, and state refusals to hear such claims are inconsistent with the duty to hear § 1983 cases.

8. SECTION 1983 AND THE FACT OR DURATION OF CONFINEMENT—THE PREISER ISSUE

State prisoners challenging conditions of their confinement have used § 1983 extensively in federal courts, but § 1983 is unavailable in suits challenging the fact or duration of confinement. Although § 1983 literally reaches all unconstitutional deprivations of liberty, the Court in Preiser v. Rodriguez held that the federal habeas corpus statute was the exclusive remedy for federal court challenges to the fact or duration of confinement. The impor-

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583. Although the imposition of an exhaustion of administrative remedies requirement in § 1983 cases in state courts is inconsistent with the general no-exhaustion policy, premature challenges to state tax assessments may often be nonjusticiable because of ripeness considerations. Where a party challenges an initial assessment as being invalid on its face or retaliatory, however, the claim arises regardless of what might take place at a subsequent administrative hearing, and state imposed exhaustion requirements should not limit the § 1983 guarantee of direct access to a judicial forum.

584. See supra note 572.

585. The statutory habeas remedy, 28 U.S.C. § 2254 (1982), if read literally, also reaches all confinements, but the Court has limited its availability. See Stone v. Powell, 428 U.S. 465 (1976) (no habeas corpus relief for state prisoners who had the opportunity to raise fourth amendment claims in state courts).

tance the Court attached to the exhaustion of state judicial remedies requirement, applicable in habeas but not § 1983 cases, influenced the Preiser result.587

Litigants for whom a federal forum is unavailable because they seek relief only available through habeas have filed § 1983 actions in the state courts. State courts, however, have not been receptive to § 1983 actions seeking relief that may affect the fact or duration of confinement and have reasoned that because federal courts could not provide such relief under § 1983, state courts similarly should be unable to do so. In Williams v. Davis,588 state prisoners in Alabama challenged the loss of good time as a result of procedurally defective disciplinary hearings in a petition for a writ of habeas corpus joined with a § 1983 action for declaratory and injunctive relief. The trial court dismissed both counts, but the Supreme Court of Alabama found habeas to be a proper remedy and held that the disciplinary hearings violated due process. Nevertheless, the court relied on Preiser to hold § 1983 unavailable because the relief, which would have affected the duration of confinement, was within the “core” of habeas corpus.589

State courts may not refuse to entertain § 1983 actions simply because federal courts would not, and it is necessary to identify the basis for the exclusion of these § 1983 actions from federal court. Preiser involved a federal court action by state prisoners who had been denied good time credits as a result of improper disciplinary proceedings. The restoration of this good time could have resulted in their immediate release, but they had not sought relief in the state courts, a statutory precondition for filing federal habeas corpus petitions. Their federal suit was brought under § 1983, and the issue was the availability of § 1983 where the more specific habeas statute could have provided a remedy, albeit one that was only available after unsuccessful resort to state judicial remedies.590

In concluding that cases within the core of the federal habeas remedy—those challenging the fact or duration of confinement—could not be pursued under § 1983, the Court attempted to reconcile the specific habeas remedy with the more general § 1983

587. Id. at 489-93.
588. 386 So. 2d 415 (Ala. 1980).
590. Preiser, 411 U.S. at 489-90.
action. Although conceding that the terms of § 1983 made it literally applicable, the Court found that the same policy considerations that made § 1983 inapplicable in challenges to underlying state convictions made it inapplicable to other actions within the "core" of habeas corpus. Finally, the Court rejected the argument that § 1983 should be available when the contested action is administrative, not judicial. Relying on broad considerations of "federal-state comity," the Court concluded that § 1983 is not an alternative to the traditional remedy of habeas corpus, the "sole federal remedy."

Although language in the decision can be read to limit the definition of the § 1983 cause of action, Preiser was concerned solely with the relationship between the federal court § 1983 action and the federal habeas remedy, and the Court did not contemplate the possibility of § 1983 actions being filed in state courts. Nor did the Court directly address whether the unavailability was the result of implied limitations on the scope of § 1983 or on the power of federal courts. Nonetheless, the reliance on considerations of federalism underlying the habeas exhaustion requirement, the citation of Younger, and the use of "federal-state comity" to justify respect for certain state administrative functions, support the conclusion that Preiser does not narrow the § 1983 cause of action. Rather, Preiser is most appropriately viewed as an equitable limitation on the power of federal courts.

This construction of § 1983 to reach challenges to administra-

591. Id. at 489.
592. Id. at 490.
593. Id. at 489.
594. Id. at 491.
595. The continued availability of § 1983 to enjoin bad faith prosecutions, see Younger v. Harris, 401 U.S. 37 (1971), could involve relief that might affect the fact or duration of confinement. This exception, though rarely used, provides further support for the conclusion that Preiser did not limit the definition of the § 1983 cause of action. Nonetheless, Preiser did limit the use of § 1983 in federal court by implicitly holding that it was not sufficiently powerful to override equitable defenses.
596. The expansion of Preiser to damage actions challenging aspects of state court criminal proceedings further supports the interpretation that Preiser is an equitable limitation on the power of federal courts. In cases expanding Preiser, it is not the availability of the federal habeas corpus remedy that precludes the § 1983 action because the habeas proceeding cannot provide damages. Rather, there is a broad Younger-type doctrine of deference that limits the power of federal courts. The federal courts, however, are split on whether § 1983 can be used to attack criminal convictions where the subject of the suit will not affect confinement. Compare Cavett v. Ellis, 578 F.2d 567 (5th Cir. 1978); Hanson v. Circuit Court of the First Judicial Circuit, 591 F.2d 404 (7th Cir. 1979), cert. denied, 444 U.S. 907 (1979) with Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978) (per curiam); Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978).
tive confinements does not by itself require state courts to entertain § 1983 actions any more than they must hear § 1983 actions challenging the validity of state court convictions.\textsuperscript{597} Rather, state courts should be able to refuse to entertain these § 1983 actions where they make available suitable alternative remedies. Thus, the availability of a state habeas corpus procedure to challenge criminal convictions or sentences would justify a bar on the use of § 1983 for the same challenge.\textsuperscript{598} On the other hand, the availability of state corrective processes should not preclude state court § 1983 challenges to administrative confinements which involve a weaker state interest, even when the relief may affect the fact or duration of confinement. State courts exercising equitable power traditionally issue orders against administrative bodies, and absent the comity and federalism concerns identified by Preiser, state courts should provide relief in § 1983 actions rather than require plaintiffs to use more burdensome state-authorized proceedings. Unlike proceedings to vacate state convictions, where the state may have a strong interest in determining the court that hears the matter and in regulating attributes of the action, challenges to administrative confinements should be subject to plenary proceedings. Finally, any other interpretation of Preiser could produce the untenable result that prisoners in states that did not make habeas or other

\textsuperscript{597} In Preiser, all parties conceded that § 1983 would not be available for such purposes. It is not, however, clear whether this concession went to the scope of § 1983 or to the equitable limitations on its use.

\textsuperscript{598} Even where states do not make any corrective processes available to challenge criminal convictions, the Court has avoided the ultimate question of the duty of states to create such remedies, see Hart, supra note 21, at 507-08 n.59, and has suggested that direct access to federal courts through habeas corpus would be available without regard to exhaustion. See Young v. Ragen, 337 U.S. 235 (1949). Although one can argue that § 1983 should also be available in federal court for such purposes, the availability of the federal habeas remedy and considerations of comity that preclude direct federal district court review of state judicial decisions justify the refusal to permit such uses of § 1983. On the other hand, where states do not make available a judicial proceeding to correct administrative decisions, Younger considerations are inapplicable and access to federal court in § 1983 actions should not be precluded. In such cases, a party deprived of liberty will also have access to federal court through habeas corpus, but no state judicial remedy will be available unless § 1983 is permitted to reach administrative confinements. This use of § 1983 in state courts also avoids one of Professor Hart's ultimate questions by substituting a statutory solution for a constitutional one. Nonetheless, this use of § 1983 is only available when the underlying claim is based on a violation of federal law. Where the claim is based on a violation of state law but the state makes no corrective process available, it may not be possible to avoid the ultimate constitutional question. See Hill v. Superintendent, 392 Mass. 198, 446 N.E.2d 818 (1984) (due process clause of fourteenth amendment requires states to provide judicial review of prison disciplinary board's finding that lead to deprivation of good-time credits), \textit{cert. granted}, 105 S. Ct. 428 (1984).
remedies available to challenge administrative actions would be completely denied access to state courts to challenge unconstitutional deprivations of liberty.699

C. Section 1983 and the Use of State Policies—Filling the Gaps

Where the Supreme Court has construed § 1983 to develop a uniform definition of the § 1983 cause of action, state courts hearing § 1983 actions should use the same definition. On certain issues for which there is no federal policy or practice and on which § 1983 and its legislative history are silent, federal courts look to state law to fill the gaps. The analogous policy of the state in which the federal court is sitting governs the applicable statute of limitations, tolling, and related policies, as well as the survival of § 1983 actions.600 This borrowing is a common feature of federal law;601 indeed, there is a specific statute, 42 U.S.C. § 1988,602 that requires the use of state policies, where federal law is deficient, in the enforcement of the surviving Reconstruction-era civil rights statutes, including § 1983. In addition, a federal statute controls the preclusive effect of prior state court judgments by requiring federal courts to give them the same full faith and credit state courts afford them.603

The policies federal courts borrow from state law become federal policies, and selection of the appropriate policy is itself a federal question.604 The result of this borrowing is a lack of uniformity from state to state in certain attributes of § 1983 litigation, but the Court has construed § 1988 to impose minimum federal standards on the state policies federal courts may borrow.605

Statutes that direct federal courts to look to state law to fill gaps in federal causes of action often are directed expressly to fed-

599. See, e.g., Riner v. Raines, 409 N.E.2d 575 (Ind. 1980) (state habeas corpus not available in Indiana to review prison disciplinary proceeding).
600. See infra notes 610-58 and accompanying text.
602. See generally Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. PA. L. REV. 499 (1980) (reviewing the background of § 1988 and arguing that it has been improperly applied outside the area of cases that have been removed to federal court).
605. See infra notes 611-12 and accompanying text.
eral rather than state courts, but the civil rights choice of procedure provision, 42 U.S.C. § 1988, has been found to apply to state courts. The uncertainty surrounding this statute, however, complicates any discussion of its applicability to state courts. If § 1988 did not exist, federal courts filling gaps in § 1983 would probably still borrow many of the same state policies used by federal courts to fill gaps in other federally created causes of action. On the other hand, in many areas, the national character of the federal law has led federal courts to reject state variations in favor of a uniform national policy. In areas affecting the states, however, the Court has accepted a lack of uniformity, and the principal impact of § 1988 is this approval it gives state-by-state variations in § 1983 cases.

When § 1983 cases are filed in state courts, state courts are required to apply the federal policies governing the cause of action, even where federal courts have borrowed those policies from state law. The question of what state policy to apply is a federal issue on which the Supreme Court does not defer to the states, despite the primacy of state courts in construing state law. Moreover, this treatment of the borrowing process as a federal issue is important because state courts may be reluctant to scrutinize carefully their own law and reject its application to § 1983 actions, even where state law is inconsistent with the policy considerations underlying § 1983.

1. STATUTES OF LIMITATIONS

Federal law contains no statute of limitations for § 1983 actions. Federal courts look to the law of the forum state for the limitations period and for related rules on the tolling, revival, and application of statutes of limitations. This process of borrowing

607. See supra note 509.
608. See, e.g., Del Costello v. International Brotherhood of Teamsters, 103 S. Ct. 2281 (1983) (use of a uniform statute of limitations governs suits by employees alleging that employers breached a collective bargaining agreement and that unions breached the duty of fair representation); Carlson v. Green, 446 U.S. 14 (1980) (uniform national survival policy in Bivens actions where death results from challenged conduct).
state statutes of limitations, however, is not open-ended. Congress has instructed federal courts to use the most appropriate state law as long as it is "not inconsistent with the Constitution and laws of the United States," and the Court has interpreted this to require federal courts to reject state policies that are inconsistent with § 1983's underlying purposes of compensation and deterrence.

Federal courts have followed a variety of approaches in selecting limitations periods for § 1983 litigation. Some federal courts look to the limitations period for the closest state cause of action, but others have applied a uniform period to all § 1983 actions in a particular state. In looking to state law, most federal courts have not simply determined which limitations period the state legislature intended to apply to § 1983 actions. Rather, federal courts have generally followed federal standards in choosing the appropriate period because states do not develop statutes of limitations with national interests in mind, and state policies cannot be used to frustrate or interfere with national interests.

Although the matter is not free from doubt, the Supreme Court has not sanctioned an approach that simply defers to the intent of the state legislature in determining which limitations period is most analogous to the § 1983 cause of action. The Court has suggested that limitations periods that discriminate against federal

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613. Compare Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974) (period for specific underlying tort) with Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (limitations period from liability based on statute); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977) (general statute of limitations). For a case reviewing the position of each federal circuit on statute of limitations in § 1983 cases and concluding that a general characterization of claims should be used for a uniform limitations period in each state regardless of the discrete facts and analogous state cause of action, see Garcia v. Wilson, 731 F.2d 640 (10th Cir.) (en banc), cert. granted, 105 S. Ct. 79 (1984). See generally Brophy, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. St. L.J. 97 (discussing the advantages and disadvantages of the various approaches).
615. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("State legislators do not devise their limitations periods with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.").
rights are invalid,\(^6\) as are those that are inconsistent with the purposes of compensation and deterrence of \$ 1983. Moreover, the Court has identified an independent threshold question that must be answered before courts address whether to reject a limitations period. In *Burnett v. Grattan*,\(^6\)\(^1\) the Court looked to the functional differences between federal and state causes of action in determining whether a state limitations period was the appropriate analogue. Maryland had argued that the limitations period borrowed from its state employment discrimination administrative remedies should apply, but the Court saw it as affecting narrower state goals than the relevant federal civil rights statutes. Although the Court considered compensation and deterrence in addressing the threshold issue of selecting the appropriate limitations period, that determination was expressly distinguished from the determination of whether the applicable period was "inconsistent with the Constitution and laws of the United States" within \$ 1988.\(^1\)\(^8\) There is no suggestion in *Burnett* that the period selected would have been different had Maryland explicitly made the administrative law limitations period applicable in \$ 1983 and related civil rights actions. Thus, the decision supports the conclusion that federal not state standards apply in determining initially which limitations period to use.

State and federal courts hearing \$ 1983 actions should apply the same principles in selecting limitations periods and related rules. Even absent a congressional directive to use state law, however, state courts will look to their own law. Nonetheless, the federalization of the issue of the choice of limitations periods should prevent state courts from using a particular statute of limitations simply because the legislature has designated it as applying to \$ 1983 cases.

Likewise, where states create special procedures for hearing state causes of action which include limitations periods, federal standards may mandate different policies in \$ 1983 actions. For example, state and federal courts have consistently rejected state


618. *Id.* at 2931 n.15.
tort claims act requirements that plaintiffs file notices of their claims as a precondition to filing § 1983 actions.\textsuperscript{619} The argument has been made, however, that these notice periods provide the appropriate limitations periods for § 1983 actions. Similarly, it has been argued that state procedures for judicial review of administrative agency actions, which often provide as few as thirty days to begin an action, are analogous for purposes of the § 1983 limitations period.\textsuperscript{620} In such cases, state courts may be inclined to look to the intent of the state legislature and to familiar state practices, rather than to the federal interests that require the rejection of such special limitations periods.

State courts entertaining § 1983 actions have generally followed federal approaches and have looked to federal courts for guidance in determining the analogous state cause of action for purposes of borrowing limitations periods.\textsuperscript{621} State courts have rarely examined in depth whether the choice of a particular limitations period is consistent with the purposes of § 1983. An exception is the Supreme Court of California decision in Williams \textit{v. Horvath},\textsuperscript{622} which involved the relationship between the state tort claims act and § 1983. Writing for a unanimous court, Justice Mosk reviewed the origins and functions of the notice of claims requirement, and found the state policies inapplicable to § 1983 actions. Significantly, the court also refused to use the 100 day limitations period in the Tort Claims Act for filing notices of claims as the applicable statute of limitations for § 1983 actions, noting that the function of the notice requirement was closely linked to the state’s limited waiver of sovereign immunity and need to confine potential governmental liability.\textsuperscript{623} Such a result is consistent with

\textsuperscript{619} See supra notes 549 & 551.
\textsuperscript{622} 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976).
\textsuperscript{623} The defendants in Williams contended that the complaint should have been dismissed for failure to allege compliance with the 100-day requirement and argued that the period was the appropriate statute of limitations, but the court rejected this characterization and the applicability of the claims requirement to § 1983 actions. \textit{Id.} at 837-42, 548 P.2d at 1127-30, 129 Cal. Rptr. at 455-58; \textit{see also} Donovan \textit{v. Reinbold}, 433 F.2d 738, 741-42 (9th Cir. 1970). \textit{But see} Stewart \textit{v. City of Northport}, 425 So. 2d 1119 (Ala. 1983) (using six-month statute of limitations borrowed from tort claims act); DeVargas \textit{v. State ex rel.}
the approach of the Supreme Court in *Burnett*. Likewise, when faced with arguments that the limitations periods for seeking judicial review under state administrative procedure acts should be used in § 1983 actions, state courts should reject such periods in light of the limited purpose of the state acts of providing a narrow review of administrative agency actions as contrasted to the plenary review offered in § 1983 actions.\(^\text{624}\)

In addition, limitations periods borrowed from special state proceedings such as tort claims acts and administrative agency judicial review procedures will often be inappropriate in § 1983 actions because they are too short. Although the Court has not rejected any state statute of limitations applicable to § 1983 because it was unreasonably short, the framework the Court has developed suggests such statutes are invalid. In *Board of Regents v. Tomanio*,\(^\text{625}\) the Court approved the use of a state tolling rule that permitted the statute of limitations to run while a state action was pursued in state court. In holding that the § 1983 action abated, the Court found that neither deterrence nor compensation was “significantly affected” because plaintiffs could have readily enforced their claims “simply by commencing their actions within three years.”\(^\text{626}\) A short limitations period, however, would not give plaintiffs the “reasonable time to sue”\(^\text{627}\) to which they are entitled.\(^\text{628}\) Thus, both state and federal courts should carefully review short state limitations periods to determine if they significantly af-

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\(^{624}\) No federal circuit uses a statute of limitations in § 1983 cases taken from the judicial review provisions of state administrative procedure acts.

\(^{625}\) 446 U.S. 478 (1980).

\(^{626}\) *Id.* at 488. The Court also considered whether an interest in national uniformity and federalism supported a federal tolling policy while state claims were being presented to state courts. It concluded that the interest in uniformity did not mandate a national policy. *Id.* at 488-92.


\(^{628}\) In *Board of Regents v. Tomanio*, 446 U.S. 478, 484 n.4 (1980), the Court left unanswered the question whether the New York four-month period would be the proper limitations period. *But see Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3d Cir. 1983), *cert. granted*, 104 S. Ct. 3571 (1984). In *Knoll*, Judge Aldisert noted it would be inconsistent with the purposes of § 1983 to use a six-month limitation in employment discrimination claims against public officials, while a six-year limitation applied to claims of private employment discrimination.
fect principles of compensation and deterrence by limiting the ability of plaintiffs to commence § 1983 actions.\footnote{629. See Franklin v. City of Marks, 439 F.2d 665 (5th Cir. 1971) (rejecting the use of a ten-day limit to challenge municipality de-annexation ordinances as the statute of limitation in § 1983 actions because of its inconsistency with the purposes of § 1983); cf. Ganther v. Board of Regents, 127 Ariz. 57, 617 P.2d 1173 (1980) (dicta suggesting that 30- or 60-day limitations period might be invalid).}

2. \textsc{survival of § 1983 actions}

There is no federal rule governing the survival of § 1983 actions, and federal courts have generally looked to state policies for the applicable rules on survival and wrongful death actions.\footnote{630. Robertson v. Wegmann, 436 U.S. 584 (1978); Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961).} At common law, personal actions abated with the death of either the victim or the wrongdoer. Death of a party did not create a cause of action on behalf of living persons injured by the death.\footnote{631. See Johnson, \textit{Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions}, 37 LA. L. REV. 1, 4 (1976).} The adoption of statutes providing for the survival of actions and creating wrongful death causes of action softened these doctrines. Survival policies permit the remedy that had been available to the victim to survive the death of the victim and the wrongdoer; they permit litigation to be commenced or to continue after the death of the plaintiff or defendant. The surviving action is identical to the original action decedents could have brought and their legal representatives or estates could have pursued on their behalf. On the other hand, wrongful death actions recognize the interest of the living in the life of the decedent and permit designated beneficiaries to be compensated for their loss resulting from the death of another.\footnote{632. See generally W. PROSSER \& W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 940-61 (W. Keeton 5th ed. 1984).}

Federal courts borrow state policies on survival only to the extent these policies are consistent with § 1983's underlying purposes. In \textit{Robertson v. Wegmann},\footnote{633. 436 U.S. 584 (1978).} the Supreme Court of the United States upheld the use of a Louisiana policy that only permitted survival actions brought on behalf of specified relatives. The named plaintiff, who had died during the litigation for reasons unrelated to the cause of action, was not survived by any relatives within the survival statute. In rejecting the argument that use of the state survival policy was inconsistent with compensation and
deterrence, the Court pointed out that § 1983 did not mandate rejection of state policies whenever the use of federal policies would produce a different result and that Congress had accepted a lack of uniformity in § 1983. Because the state policy in Robertson did not absolutely prevent the survival of actions, the Court held that their use would not significantly affect policies of compensation and deterrence. Compensation was not affected because the plaintiff had died, and the Court reasoned that § 1983's special concern for deterrence would not be adversely affected because defendants would not act differently based on their expectation as to which relatives would survive a decedent.

Robertson left unanswered the question whether state policies denying the survival of § 1983 actions would apply where the complained-of conduct caused the death. In Carlson v. Green, a Bivens action against federal officials, the Court rejected use of a state survival policy that would cause the action to abate where the complained-of conduct caused the death. Although the Court has not addressed whether the same result would apply in a § 1983 action where death also resulted from the complained-of conduct, most federal courts have held that minimum federal standards prevent the use of a state policy that causes such actions to abate.

These issues should be resolved similarly in § 1983 actions filed in state or federal court. Regardless of the forum, courts should first look to the state survival policy; both state and federal courts, however, must ask whether the purposes of § 1983 require rejection of state policies that cause § 1983 actions to abate.

A number of courts also have addressed whether § 1983 may be used in conjunction with state wrongful death statutes, or independently, to create a cause of action to compensate relatives for losses suffered from a wrongful death. Such actions are distin-

634. Id. at 593.
635. Id. at 592.
636. Id. at 594. Robertson also left undecided the validity of a state policy of refusing to permit the survival of any tort actions. Id. This issue, however, will not arise because all states permit some actions to survive. See S. Speiser, RECOVERY FOR WRONGFUL DEATH 648-787 (2d ed. 1975). The more difficult and common issues, however, involve limitations on the damages available in survival actions.
638. See supra note 233.
639. The leading federal court case approaching the § 1983 wrongful death issue by borrowing state law is Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), cert. denied, 368 U.S. 921 (1961). Difficult issues, however, arise where plaintiffs attempt to engraft state wrongful death provisions into § 1983 but then resist application of state damage and other limitations as being inconsistent with federal law.
guishable from § 1983 actions that have survived, because the latter seek only the relief to which the decedent would have been entitled but for his or her death.

Section 1983 actions for wrongful death have constitutional and statutory dimensions. On the constitutional level, plaintiffs claim associational or familiar rights in their continued relationship with the decedent and argue that the killing violates rights of both the decedent and the surviving relative. On a statutory level, the argument has been made that § 1983 in conjunction with state law provides standing for persons injured by the killing of a close relative. Thus, a parent suing because of the wrongful death of a child at the hands of the police would claim that the killing violated the child’s rights and entitled the parents to recover the resulting pecuniary and non-pecuniary damages.

Initially, there does not seem to be any reason for state or federal courts to address these complex issues differently. Some state courts, however, have found § 1983 and wrongful death actions to “merge” and have applied the limitations of the latter, including limitations on damages in § 1983 or have dismissed § 1983 claims that were joined with state wrongful death actions.

Under merger, a party with alternative remedies for the same right of action will lose the lesser remedy, which is said to have merged with the greater one. The Supreme Court of Colorado in Jones v. Hildebrant, held that when a state wrongful death action was joined with a § 1983 claim, the two were merged and the § 1983 claim was dismissed. The court viewed its decision as not de-

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640. See, e.g., Mattis v. Schnarr, 502 F.2d 588, 593-95 (8th Cir. 1974); Bell v. City of Milwaukee, 746 F.2d 1205, 1242-48 (7th Cir. 1984).
642. Although in another context the Court rejected the argument for a statutory doctrine of third party standing within § 1983, see Warth v. Seldin, 422 U.S. 490 (1975), parties continue to make that argument in wrongful death § 1983 actions, and it may be more compelling where victims can no longer assert their own rights. But see Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 296 n.109 (1984).
643. In Robertson, 436 U.S. at 592 n.9, Justice Marshall noted that the abstention of the action “does not . . . preclude recovery by survivors who are suing under § 1983 for injury to their own interests.”
645. See BLACK’S LAW DICTIONARY 1140 (Rev. 4th ed. 1968).
priving the plaintiff of any rights. Because the court did not recognize the associational rights of the survivor and limited damages in the § 1983 action to the $45,000 ceiling in the state wrongful death action,647 the plaintiff still had a state wrongful death action. Moreover, the court assumed that federal courts could still hear the plaintiff's § 1983 action had she chosen to file there.648 Consequently, the merger policy resulted in the state courts not being able to hear § 1983 actions joined with actions for wrongful death in which survivors sought identical relief.

Subsequently, the Supreme Court of Colorado held that associational rights could be asserted in § 1983 actions without the dollar limits of the state wrongful death statute.649 The court, however, did not reject entirely their decision in Jones, but explained that subsequent events such as the imposition of municipal liability through Monell, the availability of attorney fees, and the holding on associational rights, undercut the rationale of Jones by making it clear that the § 1983 claim sought relief not available in the state wrongful death action.650 The implication, however, is that if only the same relief was being sought, the § 1983 claim would not be heard.

The Jones decision and the Colorado court's begrudging reluctance to repudiate it could, if followed, have the unfortunate effect of denying litigants the right to pursue § 1983 actions in state courts.651 There is no basis for dismissing the § 1983 action even where § 1983 actions only provide the same relief available in state wrongful death actions. The doctrine of merger, if valid, should be no more applicable in state court where § 1983 actions are joined with wrongful death actions than in federal court.652 The availability of adequate state remedies, however, does not preclude § 1983 actions. Monroe v. Pape653 holds that § 1983 is a supplementary remedy that may co-exist with traditional state remedies. Thus, there is no basis for the suggestion that a doctrine of merger re-

647. Id. at 7-8, 550 P.2d at 344-45.
648. Id. at 7-8, 550 P.2d at 344.
650. Id. at 461-62.
651. See also Alvarez v. Wiley, 71 Cal. App. 3d 599, 139 Cal. Rptr. 550 (1973) (dismissal of § 1983 action seeking injunctive relief because it had "merged" with the state wrongful death claim under which injunctive relief was unavailable).
652. Under pendent jurisdiction, a federal court could hear a § 1983 claim joined with a state wrongful death action.
quires the dismissal of § 1983 actions where wrongful death or other state tort actions are also being pursued. Moreover, Justice Harlan's review of the legislative history supports the conclusion that the federal and state remedies can co-exist by attributing to the 42nd Congress: “[T]he view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.”

Courts should also reject the argument that the dollar limitations contained in state wrongful death actions should apply in § 1983 actions. In ultimately holding that the wrongful death ceilings should not be applied in § 1983 actions, the Supreme Court of Colorado relied on the broader purposes of § 1983. The court particularly noted that a refusal to provide compensation for all damages—including those based on associational rights—would violate the principle of full compensation.

State statutes that authorize survival or wrongful death actions but limit the available damages raise more difficult questions. Federal courts hearing § 1983 actions often reject state policies that do not permit claims for punitive damages to survive the victim's death or that place ceilings on the damages available to survivors or deny them non-pecuniary recoveries.

In addressing these issues, federal courts ask whether principles of compensation and deterrence support the use of such state limitations on the available damages. These principles set minimum federal standards, and state courts should apply them in entertaining § 1983 actions. Although some state courts may tend to favor state law, they should reject state policies that limit the damages available in § 1983 actions where such policies deviate from federal standards or are inconsistent with the purposes of § 1983.

3. RES JUDICATA

Congress has directed federal courts to afford state court judg-

654. Id. at 196 (Harlan, J., concurring).
656. See supra note 493.
657. See Robertson v. Wegmann, 436 U.S. 584 (1978) (requiring that this inquiry be made).
658. See supra notes 315-31 and accompanying text.
ments the same full faith and credit that state courts would pro-
vide them. This policy requires federal courts in § 1983 cases to
follow state policies on res judicata and collateral estoppel. The
Court has relied on considerations of federalism to create a major
exception to this rule and has required federal courts to deter-
mine whether litigants have had a “full and fair opportunity” to be
heard before applying preclusion. Where issues have actually
been litigated in state courts, state preclusion policies limit the
ability of federal courts to decide those issues independently. Some federal courts, however, had been reluctant to deny parties
the right to be heard on unlitigated § 1983 claims and had con-
structed a federal exception to state preclusion policies. The Su-
preme Court has rejected this exception, and the use of state poli-
cies generally prevents federal courts from addressing federal
claims, where parties had the opportunity to join them with state
claims in prior state court proceedings.

659. See 28 U.S.C. § 1738 (1982), which provides that “judicial proceedings [of any
state court] shall have the same full faith and credit in every court within the United States
... as they have ... in the courts of such State ... from which they are taken.”
660. See Allen v. McCurry, 449 U.S. 90 (1980); Haring v. Prosise, 103 S. Ct. 2368
661. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964)
(doctrine of abstention permits litigants to preserve access to federal court and avoid preclu-
sion by only presenting state law claim to state court); cf. Harris County Comm’rs v. Moore,
420 U.S. 77, 88 n.14 (1975) (federal court case dismissed without prejudice to permit state
courts to address state law questions).
662. This qualification on when state court judgments have a preclusive effect comes
from Allen v. McCurry, 449 U.S. at 95, but its source was not identified. See also Haring v.
Prosise, 103 S. Ct. 2368, 2373 (1983) (suggesting that “additional exceptions to collateral
estoppel may be warranted in § 1983 actions in light of the ‘understanding of § 1983’ that
the federal courts could step in where the state courts were unable or unwilling to protect
federal rights”) (quoting Board of Regents v. Tomanio, 446 U.S. 478, 485-86 (1980)). But see
process).
lateral estoppel policies in a subsequent federal court Title VII case).
n.2, the Court reserved ruling on whether to bar § 1983 plaintiffs from litigating claims that
they could but did not raise in prior state proceedings. Although traditional notions of col-
lateral estoppel do not preclude litigation of issues not actually raised, the question left
unanswered was whether a federal policy of claim preclusion permitted federal courts to
entertain § 1983 actions after plaintiffs unsuccessfully litigated related state law claims in
adopt a federal tolling policy to prevent running of statute of limitations while plaintiffs
present state claims to state courts). Despite the absence of authority under state law, a
number of circuits permitted parties to litigate such § 1983 claims. See, e.g., Gargiul v.
Tompkins, 704 F.2d 661 (2d Cir. 1983); New Jersey Educ. Ass’n v. Burke, 579 F.2d 764, 772-
74 (3d Cir. 1978); Lombard v. Board of Educ., 502 F.2d 631, 635-37 (2d Cir. 1974). The
Where § 1983 actions are heard in state courts subsequent to earlier state court judgments, state courts apply their normal rules of preclusion; thus, there should be no difference between the approach of state or federal courts in considering the preclusive effect of prior state court judgments. On the other hand, federal courts do not follow state policies where other federal courts have rendered prior judgments. Rather, the Court has developed its own preclusion policies. It has abandoned the requirement of mutuality, and non-parties to earlier litigation may use collateral estoppel offensively and defensively against litigants against whom legal or factual issues were resolved in the earlier litigation. Nevertheless, the Court has viewed the decision to permit the nonmutual offensive use of collateral estoppel as involving the exercise of discretion and has refused to authorize its use against the federal government on purely legal issues.

The Court’s limitation on the nonmutual use of collateral estoppel against the federal government makes the availability of the nonmutual use of collateral estoppel in federal court § 1983 cases against state and local defendants uncertain. Nonetheless, prior federal court judgments have been used in subsequent § 1983 litigation to estop parties from relitigating issues previously decided against them, and the nonmutual offensive use of collateral estoppel may become important in § 1983 litigation. For example, non-parties may rely upon a federal court judgment construing the action of a local government official to be the “official policy” of

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Many preclusion issues that arise in state court § 1983 actions also arise when state-created actions are filed in state courts after the conclusion of federal court § 1983 actions on related matters.


See, e.g., Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982) (permitting state prisoners to take advantage of an earlier judgment finding prison living conditions to constitute cruel and unusual punishment but requiring the culpability of individual defendants to be proven), cert. denied, 104 S. Ct. 335 (1983); Crowder v. Lash, 687 F.2d 996, 1009-11 (7th Cir. 1982) (offensive nonmutual use of collateral estoppel may preclude state prison officials from relitigating findings of unconstitutionality of prison conditions).
the municipality\textsuperscript{670} or invalidating a state policy or practice\textsuperscript{671} in subsequent federal court cases to estop defendants from relitigating legal or factual issues that had been decided against them.

These developments have influenced state courts but have not led state courts to embrace them uniformly.\textsuperscript{672} Thus, in states that have not abandoned mutuality, defendants may be able to relitigate issues already resolved in earlier proceedings. Such cases will raise the issue whether state courts must give earlier federal court judgments the same preclusive effect a second federal court would give such judgments. This issue, which is not unique to § 1983 litigation, raises questions as to the obligation of state courts to respect federal court judgments.

Although neither the Full Faith and Credit Clause nor the implementing federal statute applies by its terms to the obligation of state courts to respect federal court judgments, federal law governs the obligation of state courts to give federal judgments full faith and credit.\textsuperscript{673} The use of federal judgments in state court raises federal issues, and federal law determines the scope of federal court judgments, including what issues are concluded and which persons are bound.\textsuperscript{674} The principle that the court rendering the judgment determines issues involving the scope of its judgment has guided federal courts in developing a federal law of res judicata. This principle, which has been applied in both federal question and diversity cases, has resulted in the application of the relaxed notions of mutuality in state courts.\textsuperscript{675} State courts, however, have

\textsuperscript{671} See supra note 669.
\textsuperscript{673} See Degnan, \textit{Federalized Res Judicata}, 85 \textit{Yale L.J.} 741, 744-50 (1976). Moreover, the use of federal court judgments in state courts itself raises a federal question, and in some cases, a federal court may enjoin state court proceedings to "effectuate its judgment." See 28 U.S.C. § 2283 (1982) (amended in 1948 to overrule Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), and codify exceptions to the anti-injunction policy); cf. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (federal court may enjoin relitigation of federal court decree by non-diverse parties over whom federal court only had ancillary jurisdiction). The question whether a federal court may enjoin a state proceeding, however, is different from the question whether it will do so. See generally Redish, supra note 245, at 722-26.
\textsuperscript{675} Id. at 760-70.
been reluctant to abandon their own policies and have often fol-
lowed state law.\textsuperscript{679} Despite this reluctance, the scope of federal
court judgments is a federal question, and established federal law
requires states to give them full faith and credit.

These principles may require state and federal courts to give
federal court judgments the same preclusive effect, and non-parties
to earlier federal litigation may attempt to use collateral estoppel
offensively in subsequent state litigation. The conclusion that the
federal doctrine is applicable in state court proceedings, however,
does not determine when its application requires state courts to
defer to federal court judgments. Such issues should be decided on
a case by case basis using federal, not state, standards.\textsuperscript{677}

Application of state doctrines of res judicata may also arise
where state courts use state policies against splitting causes of ac-
tion to preclude state court litigation of claims closely related to
those adjudicated in completed federal court litigation. State bars
on splitting causes of action, however, should not operate to deny
access to a state forum without regard to the reasons why a federal
court did not exercise jurisdiction or reach the merits of all the
potential claims. Although in certain cases the federal judgment or
policy may support the conclusion that the unadjudicated claims
may not be pursued in state courts, there will be other cases in
which the federal judgment will support hearing them.

Generally, state courts have precluded plaintiffs from relitigat-
ing state law claims they could have joined with § 1983 claims in
earlier federal court litigation under pendent jurisdiction,\textsuperscript{678} and
this policy is consistent not only with the Restatement (Second) of
Judgments\textsuperscript{679} but also with the principle that the meaning of fed-
eral court judgments is itself a matter of federal law. This policy,

\textsuperscript{676} Id. at 770.

\textsuperscript{677} The nonmutual use of collateral estoppel may impose a limited obligation on state
courts to follow federal court interpretations of federal law, something not required by \textit{stare
decisis}. See \textit{supra} note 85. \textit{Compare} Comment, \textit{Federal Declaratory Relief From Unconsti-
520, 556-59 (1974) (urging use of \textit{res judicata} because it does not create as much federal
interference with state court proceedings as federal injunctions) \textit{with} Shapiro, \textit{State Courts
and Federal Declaratory Judgments}, 74 \textit{Nw. U. L. Rev.} 759, 770-74 (1979) (expressing cau-
tion about the expanded use of collateral estoppel by non-parties and characterizing it as "a
small tail . . . wagging a very large dog," \textit{id.} at 774).

\textsuperscript{678} \textit{See}, e.g., \textit{Hill v. Wooten}, 247 Ga. 737, 279 S.E.2d 227 (1981); \textit{Silver v. Queen's
Hosp.}, 63 \textit{Hawaii} 430, 629 P.2d 1116 (1981); \textit{Campbell v. Glenwood Hills Hosp., Inc.}, 273

\textsuperscript{679} \textit{Restatement (Second) of Judgments}, § 25 \textit{Comment e}, illus. 10 (1982).
however, should not apply unless the two claims were sufficiently closely related to otherwise justify the application of res judicata. The mere fact that the less onerous standards of pendent jurisdiction might have been met does not justify giving an earlier federal judgment greater preclusive effect than it deserves.

More difficult questions arise when a party chooses a federal forum of limited jurisdiction to litigate part of a claim a state court could have heard in its entirety.\textsuperscript{680} For example, after a federal court judgment that does not completely adjudicate the controversy, parties may file state court actions. Although some litigants seeking prospective and retroactive relief will file their entire federal claim in state court, the eleventh amendment may lead beneficiaries of prospective federal court judgments to seek retroactive relief on their federal claims in the state courts.\textsuperscript{681} Similarly, when federal courts do not exercise pendent jurisdiction over state law claims for jurisdictional\textsuperscript{682} or discretionary reasons,\textsuperscript{683} some plaintiffs may pursue parallel actions with the § 1983 claim in federal

\textsuperscript{680} The extent to which prohibitions against splitting causes of action operate before judgment to require state courts to dismiss or stay state court actions under § 1983 or state law because of the pendency of federal court proceedings is beyond the scope of this article. The traditional policy of federal courts is that in personam actions seeking only monetary judgements should be permitted to proceed to judgment with the principles of preclusion preventing relitigation. \textsl{See} Kline v. Burke Constr. Co., 260 U.S. 226 (1922). \textsl{But see} ALA. CODE § 6-5-440 (1975). The Supreme Court of Alabama construed this statute to prohibit plaintiffs from simultaneously prosecuting actions in state and federal courts. \textsl{See} L.A. Draper & Sons, Inc. v. Wheelabrator-Frye, Inc., 454 So.2d 505, 506 (Ala. 1984). \textsl{But see} Terrell v. City of Bessemer, 406 So. 2d 337 (Ala. 1981) (If a federal court refuses to accept pendent jurisdiction over a cause arising from the same facts but filed in state court, then the claimant may prosecute both actions simultaneously.).

\textsuperscript{681} \textit{See supra} note 117.

\textsuperscript{682} Federal courts may decline to exercise pendent jurisdiction over state claims for jurisdictional reasons because the federal claim is insubstantial or the federal and state claims do not arise from a “common nucleus of operative facts.” \textsl{United Mine Workers of America v. Gibbs}, 383 U.S. 715, 725 (1966). In such cases there should rarely be a splitting cause of action issue. In the former, the federal court does not even exercise jurisdiction over the federal claim; in the latter the “common nucleus” test is less demanding than the trans-action or other tests used in claim preclusion, and parallel actions should be permitted regardless of forum. A different issue arises, however, where federal courts entertaining federal claims decline to hear pendent state claims against state officials because of the eleventh amendment. \textsl{See} Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984). In such cases the state forum would have been available to hear all the related claims while the federal forum could only hear some of the claims. For a discussion of \textsl{Pennhurst}, \textsl{see supra} note 119.

\textsuperscript{683} Where federal courts refuse to exercise pendent jurisdiction for discretionary reasons, \textsl{see supra} note 523, the state court must still determine whether the more rigorous claim preclusion test is met. The fact that the “common nucleus” jurisdictional test may be met, despite dismissal of the pendent claim, only means that the claims were sufficiently closely related in a constitutional sense to constitute a single case.
court and the state law claim filed in state court, despite the availability of a state forum in which they could have filed their joined claims.

Some state courts in such circumstances have refused to permit plaintiffs to file only part of their claim in state courts, thus effectively requiring parties who wish to preserve all their potential claims to forego the federal forum and litigate their entire claim in state courts. Such a result, however, is wrong. Although there is support in the Restatement (Second) of Judgments for application of the prohibition against splitting causes of action to parties that choose a forum of limited jurisdiction, that provision only applies where there is a court able to hear the full matter in the same judicial system. Moreover, state policies that refuse to permit such claims to be split are inconsistent with the principle that the scope of the federal judgment is a matter of federal law. Thus,

684. See, e.g., City of Los Angeles v. Superior Court, 85 Cal. App. 3d 143, 151, 149 Cal. Rptr. 320, 324 (1978) ("[A] litigant cannot avoid the impact of the rule against splitting causes of action by choosing for his first foray a tribunal of limited jurisdiction"); Mattson v. City of Costa Mesa, 106 Cal. App. 3d 441, 455, 164 Cal. Rptr. 913, 921 (1980) (After a federal court "has declined to exercise pendent jurisdiction over the non-federal claim, the plaintiff . . . may proceed to trial on the federal claim, or, usually, he may elect to dismiss the federal claim without prejudice . . . and litigate both claims in the state court."); see also Heninger, 42 U.S.C. § 1983 and Common Law-Torts: An Analysis of Procedural Pitfalls, 12 CUM. L. REV. 99, 108 n.45 (1981).


686. See Degnan, supra note 673, at 756. Decisions that address issues raised by the splitting of causes of action by looking to the meaning of the federal court judgment are consistent with the principle that the scope of a federal court judgment is itself a federal issue. See Stanton v. Godfrey, 415 N.E.2d 103 (Ind. Ct. App. 1981) (relying on federal law to hear federal claims that the eleventh amendment barred from federal court); cf. Gagne v. Norton, 189 Conn. 29, 453 A.2d 1162 (1983) (relying on the meaning of a federal court consent judgment to bar state claim for relief unavailable in federal court). Ironically, some state courts may violate these principles by being too ready to entertain actions that arise from the same transactions as earlier federal actions. See, e.g., Lamartiniere v. Allstate Ins.
the issue whether states may preclude parties from pursuing unadjudicated claims in the state courts is a matter ultimately to be decided under federal law regardless of state policies against splitting causes of action. Finally, the use of state preclusion doctrines to require parties who desire a federal forum to waive all state claims, including those that cannot be heard in federal court, has the effect of burdening access to federal courts.\footnote{887}

D. State Housekeeping Rules—Rules of Practice

Despite similarities in the policies governing litigation in state and federal courts brought about by the adoption of uniform federal rules of procedure and evidence, there are still many variations. State and federal rules concerning pleading requirements, the availability and role of juries, jury instructions, and joinder and discovery often differ.

Although state courts are generally free to follow their normal litigation practices when entertaining federal actions, state housekeeping rules that appear merely to regulate details of litigation sometimes have a significant impact on the litigation of § 1983 claims. Despite the general rule that state court rules will be followed in state court litigation, such “local practices”\footnote{888} must be carefully reviewed. Where these rules burden § 1983 litigation or are inconsistent with the purposes of § 1983, they must be rejected.\footnote{888}

\footnote{687. See generally Mahoney, A Sword As Well As A Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation, 69 IOWA L. REV. 469, 486-89 (1984) (suggesting that recent developments may encourage plaintiffs to split their claims, suing for injunctive or declaratory relief in federal court, while suing for damages in state court).}

\footnote{688. See Justice Holmes’s statement in Davis v. Wechsler, 283 U.S. 22, 24 (1923) (“Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”).}

\footnote{689. In this section, I will review state rules involving pleadings, jury availability, and jury instructions on damages. Almost any state rule, however, can give rise to a claim that the state has impermissibly burdened the § 1983 cause of action. See, e.g., Tucker v. Maher, 192 Conn. 460, 472 A.2d 1261 (1984) (non-compliance with requirement of Connecticut Practice Book § 390(h) that non-parties with an interest in the subject matter of the complaint be given reasonable notice of the litigation required dismissal of the § 1983 claim). Neuborne has argued that state discovery and evidentiary rules may not be used when they burden state court § 1983 litigation or have an adverse impact on the goals of § 1983, see Neuborne, supra note 24, at 786, and that federal class action rules should be uniformly used in state court § 1983 litigation. See id. at 783-84. The latter suggestion is not convinc-}
In establishing the pleading requirements for § 1983 cases, the Supreme Court of the United States has focused on the definition of the cause of action. Plaintiffs in § 1983 cases need only allege that some person, acting under color of state law, deprived them of federal rights. Plaintiffs seeking damages need not allege that defendants acted outside their official immunities, but defendants must raise such "confession and avoidance" defenses affirmatively.

The Federal Rules of Civil Procedure focus on the notice function of pleading. It is not necessary in federal court to plead with specificity or allege the facts on which the cause of action is based. Most states have adopted pleading rules patterned after the federal rules and do not subject § 1983 actions to strict pleading standards. Some states, however, retain strict pleading requirements, and it is necessary to review such rules with care to determine whether they merely regulate the housekeeping aspects of filing class actions or that imposed disabilities on named plaintiffs in class actions would improperly limit access of § 1983 claimants to state courts.

Cf. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (special state class action rules governing costs in shareholder derivative suit applicable in diversity litigation). Moreover, requiring states to use federal class action rules in state court § 1983 litigation would prevent plaintiffs from taking advantage of state class action rules that are more favorable than the federal rules. Cf. supra note 197. Nonetheless, there may be situations in which a particular rule is inconsistent with the purposes of § 1983 and must be rejected. Thus, a procedural rule that required large bonds as a condition of filing class actions or that imposed disabilities on named plaintiffs in class actions would improperly limit access of § 1983 claimants to state courts. Cf. Kaiser v. Cahn, 510 F.2d 282, 285-86 n.4 (2d Cir. 1974) (state law suspending civil rights of state prisoners and prohibiting them from bringing suit does not affect capacity to sue under § 1983).

690. Gomez v. Toledo, 446 U.S. 635 (1980). The Court has also adopted a standard for testing the legal sufficiency of pleadings, under which complaints are not dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Finally, in pro se cases the Court has set forth an even more relaxed pleading standard. See, e.g., Hughes v. Rowe, 449 U.S. 5, 10 (1980); Haines v. Kerner, 404 U.S. 519, 520 (1972).


692. Fed. R. Civ. P. 8(a)(2) only requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." 693. Plaintiffs following the rules too literally proceed at their peril, especially in § 1983 cases, where many lower federal courts have treated civil rights actions as exceptions to the liberal pleading philosophy and have imposed stricter pleading requirements on parties represented by counsel. See Jennings, The Relationship of Procedure to Substance in Civil Rights Actions Under Section 1983: No Cause for Complaint?, 12 SETON HALL 1, 12-23 (1981).

of pleading or if they alter the required elements of the § 1983 cause of action.\textsuperscript{696}

A pleading issue that has often come up in state court § 1983 litigation involves the need to allege that the action is brought under § 1983.\textsuperscript{696} State court litigants are only recently beginning to understand the advantages of framing suits to enforce federal law under § 1983, and parties often have raised federal claims without any reference to the statute.

State courts that follow pleading rules patterned after the federal rules generally have not required plaintiffs to refer specifically to § 1983 and have looked to the allegations of the complaint to determine whether plaintiffs have pleaded the elements of a § 1983 action.\textsuperscript{697} Some state courts, however, have construed even "liberal" pleading requirements in a technical way and have refused to treat complaints that failed to mention § 1983 as being brought under § 1983.\textsuperscript{698} Other state courts have resisted efforts to characterize state-created actions as actions under § 1983\textsuperscript{699} or to amend

\textsuperscript{695} See Neuborne, supra note 24, at 782.

\textsuperscript{696} These pleading issues often arise in actions brought by state prisoners. Despite the complexity concerning the appropriateness of habeas corpus, § 1983, and other remedies, some states strictly scrutinize prisoner petitions, and dismiss petitions that do not select the correct remedy. See, e.g., Pruitt v. Joiner, 395 N.E.2d 276 (Ind. Ct. App. 1979); Polsgrove v. Kentucky Bureau of Corrections, 549 S.W.2d 834 (Ky. Ct. App. 1977); Riner v. Raines, 409 N.E.2d 575 (Ind. 1980); Ziegler v. Miliken, 583 P.2d 1175 (Utah 1978). On the other hand, some state courts construe prisoner petitions liberally to select the remedy most appropriate to the grievance alleged. See, e.g., Amek Bin-Rilla v. Israel, 113 Wis. 2d 514, 335 N.W.2d 384 (1983) (Wisconsin courts have discretion to treat prisoner petitions as § 1983 actions).

\textsuperscript{697} State court decisions holding that it is not necessary to plead specifically that the action was brought under § 1983 include: Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982), cert. denied, 459 U.S. 1103 (1983); Rzeznik v. Chief of Police of Southampton, 374 Mass. 484, 373 N.E.2d 1128, 1134 n.8 (1978); Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562, 576 (1981); Boldt v. State, 101 Wis. 2d 566, 305 N.W.2d 133, cert. denied, 454 U.S. 973 (1981). In Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979), a parenthetical reference to "§ 1983" in the title of the complaint was sufficient to meet pleading requirements. See also Amek Bin-Rilla v. Israel, 113 Wis. 2d 514, 335 N.W.2d 384, 389 (1983) (Pro se habeas petition can be construed as a petition for writ of mandamus or § 1983 action, and court should look "beyond the legal label the petitioner placed on his papers."). Nonetheless, even state courts that liberally construe a complaint as being under § 1983 despite the absence of an express reference to the statute view the "better practice . . . to specifically plead a violation of § 1983." Gumbhir, 231 Kan. at 514, 646 P.2d at 1085.

\textsuperscript{698} Ingram v. Moody, 382 So. 2d 522, 524 (Ala. 1980) ("We are aware of the liberal construction to be placed on pleadings . . . . Nevertheless, we are of the opinion that the record before us will not support the conclusion that the case was tried on § 1983 considerations.").

pleadings to include specific references to § 1983.\textsuperscript{700}

Technical pleading requirements raise issues similar to those posed in states that reject the federal model and require pleadings to be made with specificity. For example, in \textit{International Society for Krishna Consciousness v. City of Evanston},\textsuperscript{701} an Illinois appellate court discussed in depth the differences between the pleading requirements under the Federal Rules of Civil Procedure\textsuperscript{702} and the Illinois Civil Practice Act.\textsuperscript{703} Although the pleading discussion had no effect on the disposition of the case, the court addressed its comments to the practicing bar and trial judges and encouraged judges to dismiss complaints that did not meet strict state pleading requirements.

States like Illinois should be permitted to maintain their stricter pleading policies, even in § 1983 cases, as long as these policies do not introduce into the § 1983 cause of action new elements that federal law does not authorize. The sufficiency of the evidence required to prevail on a federal claim, however, is a federal issue, and state courts cannot impose more burdensome requirements in the guise of pleading rules.\textsuperscript{704}

In \textit{Brown v. Western Railway of Alabama},\textsuperscript{705} the state court dismissed a FELA complaint as a result of strict Georgia pleading rules that construed allegations of the complaint "most strongly against the pleader."\textsuperscript{706} The plaintiff had alleged he was injured while performing his duties when he stepped on a large clinker lying alongside the track in the railroad yard. The complaint alleged the presence of the clinker was the act of negligence. The Georgia courts dismissed the action because the allegations of the complaint were not precise enough to meet state pleading requirements.

In reversing the state court, the Supreme Court of the United

\textsuperscript{701} 89 Ill. App. 3d 701, 411 N.E.2d 1030 (1980).
\textsuperscript{702} FED. R. CIV. P. 8(a).
\textsuperscript{703} The Illinois Civil Practice Act requires a plain and concise statement of the pleader's cause of action, with each stated in a separate count, individually pleaded, designated and numbered. ILL. REV. STAT. ch. 110 § 33(1)(2) (1979), repealed by § 19B-101, 1982 Ill. Laws 280, re-enacted in ILL. REV. STAT. ch. 110 § 2-603 (1983).
\textsuperscript{704} See Williams v. Horvath, 16 Cal. 3d 834, 841, 548 P.2d 1125, 1129-30, 129 Cal. Rptr. 453, 457-58 (1976) ("[t]he purposes underlying section 1983 . . . may not be frustrated by state substantive limitations couched in procedural language.").
\textsuperscript{705} 338 U.S. 294 (1949).
\textsuperscript{706} Id. at 295.
States looked to the sufficiency of the allegations and stated that "the forms of local practices" cannot defeat the federal right and that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." 707 Finally, the Court stated that it would not "fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings." 708

Although these statements can be read as requiring the use of federal pleading standards by state courts entertaining federal causes of action, such a reading would supplant state pleading rules and would interfere with the ability of states to establish their own housekeeping rules. Moreover, a broad reading of Brown would ignore the substantive role the Court has played in reviewing the sufficiency of the evidence in FELA cases. 709 Brown is most appropriately viewed as a case in which the Court's primary concern was that the plaintiff was expected not only to plead with greater specificity but also to meet a higher threshold of proof. This requirement was unacceptable to the Court, which held that under federal law the facts alleged in the complaint supported the inference of negligence and that the issue should go to the jury. 710

Nonetheless, it would be a mistake to reject completely the statements in Brown concerning pleading requirements. Nothing in Brown requires state courts to abandon their pleading rules when hearing federal causes of action, and the Court has accepted the primacy of state rules of practice and procedure to govern state court litigation. Where state rules "dig into 'substantive rights'" or are used "to impose unnecessary burdens upon rights of recovery authorized by federal laws," 711 however, they will be overridden. Thus, where the Court reviews state court complaints based on federal causes of action, whether under FELA or § 1983, it will independently consider their sufficiency under federal standards. Although state pleading requirements generally govern, they need not be followed where such requirements burden federal rights. 712

707. Id. at 298.
708. Id. at 299.
710. See Hill, supra note 317.
One could argue that this backup role for federal law makes the claimed deference to state pleading rules illusory, but few cases turn on issues of pleading. Given the delay, cost and uncertainty of appellate review, and the opportunity to amend pleadings, few litigants intentionally reject state pleading requirements. Nonetheless, where state pleading rules burden federal rights, the Court can review the federal claim and provide appropriate relief. Likewise, the Court can review state pleading rules that impose more exacting proof standards to keep cases from reaching juries, and it can consider the sufficiency of the evidence that plaintiffs had to plead and prove.

Decisions dismissing § 1983 complaints because of the failure to comply with pleading specificity requirements should be carefully reviewed. If the allegations of the complaint are sufficient to support a judgment, state pleading rules should not result in dismissal of the action.

713. The question whether an action has been brought under § 1983 often arises late in litigation where plaintiffs seek to characterize actions as having been brought under § 1983 to obtain attorney fees or take advantage of other remedial aspects of § 1983. See, e.g., Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982), cert. denied, 459 U.S. 1103 (1983); Riedy v. Sperry, 83 Wis. 2d 158, 265 N.W.2d 475 (1978). This is distinct from the threshold pleading issue of whether a motion to dismiss for failure to state a claim, or its equivalent, should be granted. The latter question is largely one of construing the pleadings, and defective pleadings can usually be amended. But see DeVargas v. State ex rel. N.M. Dept. of Corrections, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), petition for writ of cert. quashed as improvidently granted, 97 N.M. 563, 642 P.2d 166 (1982). Thus, strict pleading rules usually result in the delay but not the denial of claims. On the other hand, the question of whether actions may be treated as under § 1983 where parties have not explicitly relied on the statute is largely a transitional problem; and as more litigants understand the value of using § 1983, they can be expected to make their reliance clear. Even state prisoners are now being encouraged to consider filing § 1983 claims in state courts. D. Manville, PRISONER'S SELF-HELP LITIGATION MANUAL 57-59 (1983).

714. States should not be able to impose additional procedural requirements on § 1983 actions in the guise of pleading rules. For example, a court that dismissed a § 1983 action because of the failure of the plaintiff to plead compliance with an exhaustion of remedies requirement was really attempting to impose an exhaustion requirement in § 1983 actions. Scott v. Palmetto Area School Dist., 63 Pa. Commw. 528, 439 A.2d 859 (1981).

715. Any attempt by state courts to deviate from the federal policies concerning the pleading of affirmative defenses would also be improper. In federal court § 1983 damage actions, defendants must plead their official immunity affirmatively and have the burden of persuasion on this issue. See supra note 428. Although consistent with the Federal Rules of
2. JURY ISSUES

The substantial variations in jury practice between state and federal courts\footnote{16} take on special significance when plaintiffs file § 1983 actions in state courts.

The Supreme Court of the United States has never addressed whether there is a right to a jury trial in federal court § 1983 damage actions, and some courts and commentators have expressed concern that trial by jury may be inconsistent with § 1983's remedial purposes.\footnote{17} Nevertheless, most lower federal courts have concluded that the seventh amendment guarantees a jury trial in suits for money damages,\footnote{18} and jury trials are common in § 1983 litigation.

The seventh amendment is not applicable in state courts,\footnote{19} and as a general rule state law governs the right to jury trial in state court actions. In most cases, state law produces a result similar to federal law, but because the scope of state jury guarantees is sometimes narrower than the federal guarantee, some states deny jury trials to litigants who could obtain them in federal courts.\footnote{20} If, however, § 1983 itself is the source of the right to a jury trial in § 1983 actions, this right would apply in state as well as in federal courts.

There is evidence that Congress contemplated the availability of jury trials in § 1983 cases. Although neither § 1983 nor § 1 of the Civil Rights Act of 1871 from which it is derived expressly require jury trials, Congress recognized that in some cases the newly created civil causes of action that included what has become § 1983 would be tried before juries.

The Forty-Second Congress, which adopted the Civil Rights

\footnote{16} See supra notes 172-92 and accompanying text.
\footnote{18} See, e.g., Burt v. Board of Trustees of Edgefield County School Dist., 521 F.2d 1201 (4th Cir. 1975); Hildebrand v. Board of Trustees of Mich. State Univ., 607 F.2d 705, 708 (6th Cir. 1979) (right to jury trial in federal court cases, including § 1983 actions, if the relief sought includes compensatory or punitive damages).
\footnote{19} See Walker v. Sauvinet, 92 U.S. 90, 92-93 (1875).
\footnote{20} See supra note 183-85 and accompanying text.
Act of 1871, was concerned with the breakdown of civil institutions in the South, including the jury system. It responded by imposing new controls on the process of selecting jurors in the hope that federal court juries hearing the new causes of action would not be contaminated by involvement in the conspiracies proscribed by the Act. Accordingly, section 5 of the Act required an oath of jurors, stating they had not aided or taken part in any combination or conspiracy, as defined in section 2 of the Act, to obstruct enforcement of federal law or interfere with the judicial process. Section 2 provided civil as well as criminal liability, and plaintiffs who wished to avoid a jury trial have argued that the jury-related references in section 5 were directed merely to juries in criminal prosecutions as required by the sixth amendment. Yet, the language in section 5 was considerably broader than criminal proceed-


722. Section 5 of the Civil Rights Act of 1871 provides:
That no person shall be a grand or petit juror in any court of the United States upon an inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the plans and penalties declared against that crime . . . .


724. Section 5 of the Civil Rights Act of 1871 repealed the Act of June 17, 1862, ch. 103, §§ 1-2, 12 Stat. 430, which had disqualified from service as grand and petit jurors those who had joined the rebellion. In place of the repealed requirements, § 5 imposed special qualifications in proceedings under the Civil Rights Act of 1871. Curiously, the repealed provisions appeared in the Revised Statutes that the Forty-Third Congress adopted in 1874. See Rev. Stat. §§ 820-21 (1875); see also Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 83 n.214 (1962). In addition, the special juror qualifications of § 5 of the Act were codified as Revised Statute § 822 but were broadened to apply to proceedings in courts of the United States “under the provisions of Title ‘CIVIL RIGHTS’ and of Title ‘CRIMES,’ for enforcing the provisions of the fourteenth amendment to the Constitution.” Rev. Stat. § 822, 152 (1875). Thus, the special requirements that excluded from jury service persons who had aided certain combinations or conspiracies in violation of those titles were applied to a wider range of proceedings than those originally contained in the Civil Rights Act of 1871. See Van Ermen v. Schmidt, 374 F. Supp. 1070, 1072 (W.D. Wis. 1974).
nings and related to "any suit, proceeding, or prosecution . . . under the provisions of this act." Thus, the language of the Civil Rights Act of 1871 specifically contemplated the availability of jury trials. Moreover, there is no indication in the legislative history that the perversion of juries in state courts so repulsed Congress that it limited their use in federal courts. This conclusion is consistent with the approach taken in other statutory schemes where the Supreme Court has relied on similarly isolated bits of evidence to conclude that Congress contemplated the availability of jury trials in statutory actions and then extended that right to such actions filed in state courts.

Assuming there is a statutory right to a jury trial in state court § 1983 litigation, the precise contours of that right must be examined. For example, issues will arise concerning the unanimity requirement and the range of issues juries must hear.

The seventh amendment right to trial by jury includes the re-


727. Section 1 of the Act is additional authority for the proposition that Congress assumed that certain proceedings therein would be tried by a jury. Section 1 provided that the offending person shall "be liable to the party injured in any action at law." Id. § 1 (emphasis added).

728. Because the language of § 5 of the Civil Rights Act of 1871 is addressed to "any court of the United States," only persons serving on juries in federal courts had to take the required oaths. Ch. 22 § 5, 17 Stat. 13, 15 (1871). Nonetheless, the enactment of the statute suggested that Congress contemplated the availability of jury trials in actions involving § 1983; therefore, any analysis of the availability of jury trials in federal court § 1983 actions will normally begin with the statutory question rather than the seventh amendment question. But cf. Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) (holding that jury trials are required under the seventh amendment in Title VIII housing discrimination cases in federal court without reaching the statutory issue, in part, to limit the decision's implications for state court litigation).

The repeal of the special juror requirements in the Judicial Code of 1911, ch. 231, § 297, 36 Stat. 1168 (1911), permitted jurors to serve without having to deny participation in prohibited combinations and conspiracies. The removal of these special qualifications, however, does not necessarily indicate that Congress contemplated that juries would not hear § 1983 actions.

729. In FELA cases, the Court found the right to a jury trial to be "part and parcel of the remedy afforded railroad workers." Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943), and thereby applicable in state courts; see Dice v. Akron, C & Y R.R., 342 U.S. 359, 363 (1952). The seventh amendment did not compel this result, and the Court did not rely upon the available statutory support, which was merely an isolated reference in the Act. See Hill, supra note 317, at 393-98.

730. The availability of jury trials in § 1983 suits in state courts against the state also remains undecided. Assuming the amenability of states to damage suits under § 1983, the Court may require a more explicit statement by Congress to impose a statutory right to jury trials in state court § 1983 actions. Cf. Lehman v. Nakhian, 453 U.S. 156, 168 (1981) (refusing to find a statutory right to a jury trial in Age Discrimination in Employment Act cases against the federal government absent affirmative and unambiguous statements).
quirement that juries render unanimous decisions, but state courts are not subject to this requirement. Consequently, plaintiffs who desire jury trials in state courts will generally view the opportunity to prevail without jury unanimity as a tactical advantage. On the other hand, state court § 1983 defendants will argue that states must follow the federal unanimity rule. In a 1916 FELA case, however, Minneapolis & St. Louis Railroad v. Bombolis, the Supreme Court permitted Minnesota to use a non-unanimous jury in a state court civil case and rejected the argument that the seventh amendment obligated Congress to attach federal unanimity requirements to the statutory rights it created.

Had Bombolis remained the last word on the applicability of federal jury guarantees in state courts, those arguing for jury unanimity requirements would have little support. But, in Dice v. Akron, Canton & Youngstown Railroad, the Court construed FELA and found the right to a trial by jury to be “part and parcel” of the federal remedy. Dice addressed the question whether the judge or jury was to decide the factual issue of fraud in the execution of a release. As a matter of local practice in personal injury cases, the Supreme Court of Ohio had refused to extend the right to a jury trial, because the equitable nature of this defense made the action predominantly one in equity. Despite the inapplicability of the seventh amendment to the states and the Bombolis decision, the Court prohibited the Ohio practice of singling out one phase of the trial for determination by the judge. More importantly, the Supreme Court supported its holding by characterizing the right to jury trial as “too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of procedure.’”

Although commentators have criticized Bombolis and suggested that it has not survived Dice, the Court has rejected opportunities to reverse it. Yet the cases are reconcilable, for they indicate that FELA guarantees the right to a jury trial but does not specify its relevant details. Similarly, the legislative history of § 1983, although not expressly requiring a jury to hear the new


733. 342 U.S. 359 (1952).

734. Id. at 363.

735. See C. Wright, supra note 85, at 271-72.
cause of action; supports the conclusion that § 1983 guarantees the right to jury trial in state court but does not preserve its details.\textsuperscript{736} Further, there are no policy reasons that suggest that the use of non-unanimous juries in state court § 1983 litigation is inconsistent with the goals of § 1983 of deterrence and compensation. If state courts gave § 1983 defendants special treatment and required unanimous verdicts, § 1983 cases would be more difficult for plaintiffs to litigate. The resulting burden may reduce the deterrent effect of § 1983 by lessening the financial incentive for potential § 1983 defendants to comply with federal law. Moreover, requiring states to use unanimous juries in state court § 1983 litigation, while permitting non-unanimous jury verdicts in analogous state damage actions, would single out § 1983 litigation and discourage plaintiffs from choosing state courts to enforce their federal rights through § 1983 actions.\textsuperscript{737}

3. DAMAGES—JURY INSTRUCTIONS

The measurement of damages in § 1983 cases, particularly with respect to the implications of the tax system and inflation, may prove troublesome for state courts. Assuming uniform federal rules on the availability of damages are binding on state and federal courts hearing § 1983 actions,\textsuperscript{738} there still may be room for state policies concerning the measurement of damages and the instruction provided juries.

Under the Internal Revenue Code, awards of compensatory damages are exempt from taxation,\textsuperscript{739} and defendants customarily seek cautionary instructions advising juries of the tax exempt status of damage awards to discourage juries from inflating awards to compensate for taxes.\textsuperscript{740} Defendants also seek instructions that will decrease compensation for lost wages by accounting for taxes and

\textsuperscript{736} The establishment of a statutory right to jury trial in state court § 1983 actions will also have an impact on the issues to which the right to jury trial attaches. In Dice, the Court construed the FELA right to jury trial to apply to all factual issues, including traditional equitable defenses concerning whether releases were fraudulently obtained. Accordingly, the Court should similarly construe any statutory guarantee of jury trials in state court § 1983 actions.

\textsuperscript{737} Cf. Maine v. Thiboutot, 448 U.S. 1, 11 n.12 (1980) (considerations of federalism support making attributes of § 1983 actions in state as well as federal courts).

\textsuperscript{738} See supra notes 479-502 and accompanying text.


other applicable deductions and work-related expenses.\textsuperscript{741} In addition, defendants commonly argue that lump-sum awards that represent replacement of future income or future pain and suffering should be discounted, because the present value of a lump sum is less than would be paid over time.\textsuperscript{742} On the other hand, plaintiffs seeking compensation for lost earning capacity point to the unlikelihood they would continue to be compensated at the same level and seek enhanced awards to reflect increases in earning capacity and inflation.\textsuperscript{743} Both parties seek to admit evidence consistent with their theories of the proper measurement of damages.

Recent Supreme Court decisions reviewing special federal tort statutes have examined these issues. In most cases the Court has treated congressional silence as requiring the use of a federal common law rule under which courts must admit evidence on the effect of taxation and give instructions concerning taxation. Moreover, the Court has extended these requirements to federal cases filed in state court such as those under FELA, regardless of the normal state policies.\textsuperscript{744} This treatment, however, has not been uniform. In reviewing a state court action under the Outer Continental Shelf Lands Act (OCSLA),\textsuperscript{745} the Supreme Court relied on specific language in the Act that rejected national uniformity as an OCSLA goal but left unanswered whether state courts may refuse to admit evidence or give instructions concerning the effect of taxation in such cases.\textsuperscript{746}

Most recently, in an action under the Longshoremen’s and Harbor Workers’ Compensation Act,\textsuperscript{747} the Court addressed the issue of adjusting damage awards to reflect inflation and the present value of future income streams.\textsuperscript{748} Although the Court declined to

\textsuperscript{741} See generally id.
\textsuperscript{742} See Jones & Laughlin Steel Corp. v. Pfeifer, 103 S. Ct. 2541, 2550-51 (1983).
\textsuperscript{743} Id. at 2548-50.
\textsuperscript{744} See Norfolk & W. R.R. v. Liepelt, 444 U.S. 490 (1980). The Court noted that “one of the purposes of the Federal Employers’ Liability Act was to ‘create uniformity throughout the Union’ with respect to railroads’ financial responsibility for injuries to their employees” and that “[i]t has long been settled that the questions concerning the measure of damages in an FELA action are federal in character.” Id. at 493 & n.5.
\textsuperscript{746} Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478-84 (1981). But see Gulf Offshore Co. v. Mobil Oil Corp., 628 S.W.2d 171 (Tex. Civ. App.) (holding on remand that controlling Louisiana law makes giving of cautionary instructions discretionary, and therefore upholding refusal to give such instructions), cert. denied, 103 S. Ct. 259 (1982).
\textsuperscript{748} The federal trial court in Jones & Laughlin felt bound to follow the complete offset rule used by the Pennsylvania courts. Under the Pennsylvania rule, future inflation
announce a rule for federal courts where Congress provided no guidance as to the calculation of the damages in federal causes of action, it also refused to embrace a rule requiring federal courts to follow state rules.\footnote{Jones \& Laughlin, 103 S. Ct. at 2545.}

When addressing issues of damages and their tax consequences, the Court has been sensitive to the particular statutes involved, all of which emphasized the goal of providing compensation. Although attempting to develop damage rules responsive to that purpose, the Court has been most willing to defer to state policies, where there has been a specific statute requiring the use of state law.\footnote{State law need only be used to the extent it is "not inconsistent" with the Act and other federal law. Thus, it is still unclear how much state variation of damage remedies the Court will permit.}

When these issues arise in § 1983 cases in federal court, federal courts can be expected to look to the rules developed under other statutes in which Congress has been silent as to the measure of damages. Further, federal courts will look to independent policies governing the federal courts, including federal common law.\footnote{Cf. Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 486-87 (1981) (treating Liepelt as articulating a federal common law rule that would apply in OCSLA cases had Congress not given more specific guidance).}

Moreover, the Federal Rules of Evidence provide support for the consideration of the tax consequences of compensatory awards and the impact of taxes on past and future income. Federal courts, therefore, are likely to admit evidence and give instructions accordingly.\footnote{See FED. R. EVID. 401-403. But cf. In re Air Crash Disaster, 526 F. Supp. 226, 231-32 (N.D. Ill. 1981) (Erie doctrine requires following state policies on admissibility of evidence and instructions on non-taxability of compensatory award).}

Where, however, there is no guidance from § 1983 or general principles of compensation or other policies governing litigation in federal courts, federal courts may borrow applicable policies from the state courts.\footnote{See Rules of Decisions Act, 28 U.S.C. § 1652 (1982); cf. Jones \& Laughlin Steel Corp. v. Pfeifer, 103 S. Ct. 2541, 2557 (1983) (permitting but not requiring trial courts to use state rules governing calculation of damage awards for lost earnings in an inflationary economy in an action under federal statute that provided no specific guidance regarding calculation of damage awards).}

Similar damage issues arise in state courts that do not follow...
the federal practice, and the choice of the proper policy in state court § 1983 litigation should depend on the source of the policies followed by federal courts. Where neither § 1983, general principles of compensation, nor the federal common law require uniform federal damage policies in federal court § 1983 actions, state courts should be able to use their own policies in § 1983 actions. Although the Court has treated § 1983 damage issues uniformly, the basic entitlement to damages can be distinguished from the more detailed rules concerning the admission of evidence and instructions used to implement damage policies. Thus, it may be consistent with § 1983 for state courts to use state policies denying jury instructions on the non-taxability of compensatory awards, the taxability of lost earnings, and the impact of inflation.

E. State Case or Controversy Requirements

Because the "case or controversy" limitation on the business of the federal courts is inapplicable in state courts, plaintiffs, who cannot meet federal justiciability requirements, may file § 1983 actions in state courts. Further, because federal courts, including the Supreme Court, may only hear matters that meet the "case or controversy" requirement, the filing of federal actions in state court may result in state court judgments that are insulated from Supreme Court review. This has prompted a suggestion that would "make standing to raise a constitutional question . . . itself a federal question." This approach would permit the Supreme Court to hear all cases granting relief on federal grounds,

755. See supra notes 100-06 and accompanying text.
757. SUPREME COURT AND SUPREME LAW 35 (E. Cahn ed. 1954) (often-cited suggestion by Professor Paul Freund made at a symposium discussion on the role of the Court); see also Flast v. Cohen, 392 U.S. 83, 116, 132 n.22 (1968) (Harlan, J., dissenting) (citing Freund suggestion).
The Court has not accepted these suggestions; therefore, state courts may reach federal issues where federal courts cannot. The ability of state courts to hear cases that do not meet federal standards does not necessarily require them to do so. Issues arise in state court § 1983 litigation as to whether or when state courts may rely on state justiciability doctrines to refuse to hear cases federal courts also could not hear. Additionally, some states impose stringent justiciability limitations on state court litigation, thus refusing to make state forums available where federal courts are open.

The use by state courts of narrow justiciability standards to refuse to hear § 1983 actions that could be heard in federal court raises federal questions reviewable by the Supreme Court. Although the Supreme Court has not treated state court decisions using liberal state justiciability doctrines as raising federal questions, it does view state court interpretations of the federal case or controversy requirement as giving rise to federal questions. Where state courts have interpreted the case or controversy requirement, the Court has been willing to review such findings. Likewise, where state courts base their justiciability holdings on state law and refuse to reach the merits of federal claims, the Court has also treated such judgments as raising federal questions which it can review. For example, in Liner v. Jafco, Inc., the Tennessee Chancery Court enjoined peaceful picketing arising out of a labor dispute. By the time the matter reached the Tennessee intermediate appellate court, the construction had been completed, and the state court, although it expressed agreement with the issuance of the injunction, found the federal question raised in the appeal to be moot. The respondent construction company argued that the state court's finding that the issue was moot bound the Supreme Court. The Supreme Court disagreed, holding the question of mootness to be a federal question upon which the Supreme Court,

759. See L. Tribe, supra note 100, at 81 n.8.
761. 375 U.S. 301 (1964).
762. Id. at 304.
as the final arbiter, could make an independent judgment.\textsuperscript{763}

\textit{Liner} can be viewed as a case in which the state court applied too narrow a definition of the federal mootness doctrine to cut off federal review. In reviewing the case, however, the Supreme Court did not examine whether the state court was interpreting the federal mootness doctrine or a state analogue. To the extent the state court was construing the federal requirement, such a decision cannot be final. On the other hand, if the state court was using its own mootness doctrine, under which it refused to hear certain controversies that fell within the exceptions to the federal mootness doctrine, the state would be placing a limitation on the duty of its courts to entertain federal actions.

Although \textit{Liner} is an example of the Court's unwillingness to permit state courts to have the final word on the meaning of federal law, including federal standards of justiciability, the decision suggests a broader role for Supreme Court review. State court decisions to hear federal claims are not invariably interpretations of federal justiciability standards. Article III requirements do not apply to state courts. Except where state courts borrow federal concepts of justiciability, there is no reason for state courts to interpret federal justiciability standards.\textsuperscript{764}

The issue is whether state court reliance on state justiciability standards is an adequate and independent state ground to preclude Supreme Court review, or, put slightly differently, whether state court reliance on a state justiciability doctrine is a valid ex-

\textsuperscript{763} \textit{Id.}

\textsuperscript{764} Under Michigan v. Long, 103 S. Ct. 3469 (1983), the Court's recent major statement on the adequate state ground doctrine, the Court presumes that an ambiguous mootness decision like \textit{Liner} interpreted the federal case or controversy requirement. Thus, the Court would not consider the adequacy of the state ground and the mootness holding would be subject to Supreme Court review under federal standards. At the time the court decided \textit{Liner}, however, it did not approach ambiguous state decisions with such a presumption, see Michigan v. Long, 103 S. Ct. at 3474-75, and the reliance of the \textit{Liner} Court on the adequate state ground cases demonstrates that state courts are limited in their use of a state mootness doctrine to refuse to reach federal issues. State courts that wish to insulate judgments resting on less rigorous justiciability standards from Supreme Court review must now demonstrate that they relied on independent state law grounds. On the other hand, state court refusals to hear federal issues, whether based on state or federal law, will always raise federal questions, but the basis of the state court refusal will affect the type of analysis by the Court. Federal justiciability standards, however, should operate as a floor and state courts should not be able to refuse to entertain federal actions because their state justiciability doctrine precludes reaching issues that a federal court could. \textit{Cf.} Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962) (state courts required to follow the federal definition of the "political question" doctrine in determining whether to hear reapportionment cases raising federal constitutional issues).
cuse to justify a refusal to entertain federal causes of action. Where state and federal justiciability standards are so interdependent that state decisions do not stand on their own, the Supreme Court can treat the refusal to reach federal issues as itself a federal issue. On the other hand, where the state decision rests independently on state justiciability grounds, the issue is whether such ground may preclude Supreme Court review. Liner's reliance on the adequate state ground line of cases suggests that, in some cases, state procedural limitations may not be a basis for state courts refusing to hear federal causes of action.

Where state justiciability standards are more restrictive than federal standards, states should not be allowed to rely on policy reasons to support the exclusion of cases that meet federal but not state standards. Exclusion of a class of federal actions on that basis is inconsistent with the courts' duty to hear §1983 cases. Thus, the requirements of the federal case or controversy doctrine, including its prudential elements, should be viewed as a floor. States should not be permitted to interpose their own limiting doctrines to bar review of claims that could be heard in federal courts.

The use of state justiciability limitations analogous to federal court limitations gives rise to other issues. For example, some states prohibit taxpayer suits despite the absence of federal requirements that access to state courts be so limited. Federal law, by analogy, supports such restrictions. The source of most federal court limitations, however, is not the Constitution but concern over the judicial role in a system characterized by separation of powers. Although such uniquely federal considerations often have state counterparts, many states have significantly broadened access to state courts, and others have so little concern for separation of powers considerations that they permit the rendering of advisory opinions. State separation of powers considerations, where applied evenhandedly to state and federal causes of action, how-

765. See L. Tribe, supra note 100, at 123-25.
766. In supporting his conclusion that the question of mootness was itself a federal question, Justice Douglas relied on Justice Holmes's opinion in Love v. Griffith, 266 U.S. 32 (1924), a case that approved a mootness dismissal of a state court challenge to a racially discriminatory voting policy. In deferring to the state holding, Justice Holmes had relied on Davis v. Wechsler, 263 U.S. 22 (1923) and Ward v. Love County, 253 U.S. 17 (1920), two cases that prohibited states from using state defenses to prevent the reaching of federal issues. See also Henry v. Mississippi, 379 U.S. 443, 447 (1965) (treating Liner as an adequate state ground case).
767. See supra note 103.
768. See supra note 94.
769. See supra note 102.
ever, reflect a state interest in the administration of their judicial system that can be a valid basis for limiting access to state courts.

Consideration of cases the Supreme Court has dismissed for failure to meet aspects of the standing doctrine illustrates some of these problems. For example, in *City of Los Angeles v. Lyons*, the inability of the plaintiff to show a reasonable likelihood that he would again be subjected to police abuses resulted in the denial of standing to seek injunctive relief. States could permit their courts to entertain such suits under § 1983 because federal standing doctrines are inapplicable to state § 1983 actions. The more difficult issue arises in states that adhere to limitations similar to those relied upon in *Lyons*. Although the argument could be made that such limitations are inconsistent with § 1983's principles of compensation and deterrence, such arguments are not compelling where they involve state counterparts to federal limitations. Thus, federal justiciability limitations on the business of federal courts should also be used as a floor to require state courts to hear § 1983 cases that federal courts can hear. Such federal standards, however, neither require nor preclude state courts from interpreting the state justiciability standards to hear federal cases that federal courts cannot hear.

V. The Implications of the State Court § 1983 Action

This review of state court § 1983 litigation demonstrates that state courts have become an important forum for the private enforcement of federal rights against state and local defendants. Regardless of whether they must entertain such actions, state courts have opened their doors to § 1983 and have begun to address many of the difficult procedural and remedial issues that arise in such litigation.

The increase in state court § 1983 litigation, although overshadowed by the recent expansion in state constitutional litigation, has a number of significant implications. First, the availability of state courts to hear § 1983 actions sharply expands the judicial resources available to protect federal rights. It also affects the quality of such state remedies by enabling state courts to take advantage of many of the remedial attributes that made § 1983 the principal federal remedy for the private enforcement of federal law against state and local defendants. Second, the increased filing

771. Although many of the issues that arise in state court § 1983 litigation are analo-
of § 1983 actions in state courts will increase the opportunity for the removal of those actions to federal court and raise both interpretative and tactical questions concerning removal, as well as broader questions concerning judicial federalism. Third, the increase in state court § 1983 litigation will result in an increase in the volume of federal issues decided by state courts, which will inevitably affect the uniformity of federal law and the role of the Supreme Court in seeking such uniformity. Finally, the emergence of a viable state court remedy for the private enforcement of federal law may have an impact on the role that federal courts play in § 1983 litigation.  

A. The Expansion of Judicial Resources

The significance of the availability of § 1983 actions in state courts lies in the remedial advantages § 1983 has over many state-created remedies. Through § 1983, state court judges have access to a large body of well-developed remedial law that often differs from state law. This wholesale incorporation of federal law permits state courts to reach the merits of actions that traditional state law defenses might have barred. Moreover, state courts may still be required to utilize selectively state remedial doctrines that benefit plaintiffs. The use of § 1983 in state court litigation as a floor offers the possibility that state court remedies will be as good as, and in many cases, superior to their federal court counterparts.

The availability of a new body of legal doctrine in state courts will not itself result in the more vigorous enforcement of federal rights. The expansion of federal court litigation through § 1983 is not simply the result of the remedial advantages of § 1983 over state remedies but is also a function of the perception, undoubtedly correct, that the federal courts were a more sympathetic forum for entertaining § 1983 actions is the possibility that the Supreme Court may use it to justify cutting back the role of federal courts in protecting federal rights. This has already happened to some extent, as the Court has cited the availability of § 1983 actions in state courts in decisions limiting access to federal courts. See, e.g., Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100, 116-17 (1981); cf. City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1671 (1983) (state courts free to interpret standing more broadly to provide ongoing supervision of police). Nonetheless, the Court has often relied on the availability of state courts to entertain federal claims when limiting the jurisdiction or role of federal courts, see supra note 58, and it is difficult to believe the above cases would have been resolved differently had state courts not been empowered to entertain § 1983 actions.

772. An unanticipated consequence of the emergence of state courts as significant forums for entertaining § 1983 actions is the possibility that the Supreme Court may use it to justify cutting back the role of federal courts in protecting federal rights. This has already happened to some extent, as the Court has cited the availability of § 1983 actions in state courts in decisions limiting access to federal courts. See, e.g., Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100, 116-17 (1981); cf. City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1671 (1983) (state courts free to interpret standing more broadly to provide ongoing supervision of police). Nonetheless, the Court has often relied on the availability of state courts to entertain federal claims when limiting the jurisdiction or role of federal courts, see supra note 58, and it is difficult to believe the above cases would have been resolved differently had state courts not been empowered to entertain § 1983 actions.

773. See supra notes 258-59 and accompanying text.
rum for the enforcement of the underlying rights.\textsuperscript{774} Had the plaintiffs in \textit{Monroe v. Pape}\textsuperscript{775} been able to litigate a state tort action in federal court, they might have been content to do so.\textsuperscript{776} The importance of § 1983 is that it supplemented state remedies by creating a federal cause of action over which federal courts had jurisdiction. Thus, in addition to its remedial advantages, § 1983 offered plaintiffs the opportunity to select the forum they believed to be more sympathetic.

Likewise, litigants presently inclined to use state courts to pursue issues affecting federal rights can usually use state law. State law, however, often contains remedial limitations that prevent full enforcement of federal rights. Section 1983, on the other hand, includes a new body of remedial law that state courts can incorporate.\textsuperscript{777}

The expansion of state court § 1983 litigation may also open a new and important dialogue between state and federal courts. Many of the remedial and substantive issues that arise in state court § 1983 litigation are issues on which there are no authoritative Supreme Court decisions. State courts will likely rely heavily on decisions of lower federal courts. Although such reliance is not unique, the unfamiliarity of state courts with § 1983 may make it more likely for them to look to federal courts for guidance concerning both the remedial attributes of § 1983 and the underlying federal substantive law.

Unlike the dialogue concerning federal constitutional law that takes place in federal habeas corpus cases, where state and federal courts address identical issues in the same case,\textsuperscript{778} the application of preclusion in § 1983 usually prevents state and federal courts

\textsuperscript{774} See Neuborne, \textit{supra} note 7.

\textsuperscript{775} 365 U.S. 167 (1961).

\textsuperscript{776} The federal substantive issues concerning the validity of the police action in \textit{Monroe} would come up in a state tort action, but federal court jurisdiction would be unavailable. \textit{See generally} C. Wright, \textit{supra} note 85, at 98-102.

\textsuperscript{777} Although state courts often are theoretically free to ignore state doctrinal limitations, even those with deep roots in state law, \textit{see} Baum & Canon, \textit{State Supreme Courts as Activists: New Doctrines in the Law of Torts}, in \textit{State Supreme Courts: The Policymakers in the Federal System} (M. Porter & G. Tarr eds. 1982), state courts may be reluctant to do so, especially where state remedial limitations are part of state positive law.

\textsuperscript{778} \textit{See} Cover & Aleinikoff, \textit{Dialectical Federalism: Habeas Corpus and the Court}, 86 \textit{Yale L.J.} 1035 (1977) (federal writ of corpus habeas selected by the Warren Court as the remedial vehicle to implement constitutionalization of state criminal procedure). Recent cutbacks on the scope of habeas corpus, however, have limited the role of lower federal courts, \textit{see supra} notes 58-59, and altered the "dialogue" between state and federal courts. The cutbacks have also placed more pressure for maintaining uniformity of federal law on direct Supreme Court review of state court decisions.
from hearing the same case.\textsuperscript{779} Nonetheless, state and federal courts will address many of the same remedial and substantive issues, and the amount of borrowing that customarily takes place between state and federal courts will be increased. Moreover, given the comparatively low number of reported \$ 1983 state court decisions, the limited range of issues state courts have addressed, and the difficulty in obtaining access to them, state courts may be more dependent on decisions of lower federal courts in these areas than they are in others.\textsuperscript{780}

Finally, an ironic feature of this dialogue may be that the body of federal decisional law to which state courts will look may favor the merits of the claims raised by parties seeking affirmative federal court relief. The availability of door-closing doctrines often enables federal courts to dispose of such cases without reaching the merits, and federal trial courts often prefer such dispositions. Thus, where federal courts are hostile to the merits of federal claims, they often produce decisions that are not on the merits.\textsuperscript{781} On the other hand, sympathetic courts are more likely to resolve both procedural and substantive issues favorably.\textsuperscript{782}

B. The Role of Removal

Under the general federal removal statutes,\textsuperscript{783} defendants can remove federal question cases to federal court when such cases could have been commenced in federal court. Jurisdiction of fed-

\textsuperscript{779} See supra notes 664 & 678.
\textsuperscript{780} This may already be changing and state courts appear to be looking more often to \$ 1983 decisions of other state courts.
\textsuperscript{781} Cf. Tushnet, supra note 92 (Supreme Court uses standing as a surrogate for its views on the merits).
\textsuperscript{782} The increase in state court \$ 1983 litigation parallels the expansion of state constitutional law, but litigants often approach the latter as if state and federal law operated in separate spheres with little overlapping of jurisdiction. State constitutional law is often relied upon when Supreme Court decisions foreclose federal court relief based on federal law. See Williams, supra note 13, at 359-62 (discussing a new model of constitutional law characterized by reliance on the state constitution after the rejection of federal claims). Litigants often do not present state courts with the full range of state and federal issues. The increasing use of \$ 1983 actions in state courts to raise issues the Supreme Court has not resolved will result in state courts being forced to consider more carefully the relation between state and federal law.
\textsuperscript{783} 28 U.S.C. \$ 1441(a) (1982) provides:
(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
eral courts under removal is also derivative; federal courts only exercise jurisdiction in removed cases when state courts also had jurisdiction. When cases are removed "improvidently and without jurisdiction," they are remanded to state courts.

The applicability of removal to state court § 1983 actions raises technical questions as to the scope, meaning, and operation of the removal statutes. Although there may be political constraints on state or local defendants removing cases to federal courts, the increase in the volume of state court § 1983 litigation will inevitably result in an increase in the number of state court § 1983 cases removed.

When § 1983 actions are filed in state court to avoid the limitations of the federal "case or controversy" requirement, removal is unavailable since federal courts would not have had original jurisdiction. Thus, the existence of constitutionally-based subject-matter jurisdictional limitations on particular cases or controversies should result in federal courts remanding such removed cases to the state courts. In comparison, justiciability limitations having

784. 1 A. J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.157[3] (2d ed. 1983); see also Lambert Run Coal Co. v. Baltimore & O. R.R., 258 U.S. 377 (1922). In Lambert Run Coal, Justice Brandeis wrote for the Court:

The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

Id. at 382.

785. 28 U.S.C. § 1447(c) (1982) provides:

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . . The state court may thereupon proceed with such case.

786. Professor Sager has argued that state courts be permitted to provide more expansive interpretations of underenforced federal norms and has pointed out that the ability of state court defendants to remove such cases to federal court may undercut an expanded role for state courts in interpreting federal law. Thus, he has urged that the removal statutes be amended to preserve the choice of forum. Sager, supra note 76, at 1254-55. Even if state courts are not given a mandate to more broadly construe certain federal constitutional provisions, the irony of state or local defendants being able to remove actions to enforce federal law from state to federal courts will continue under the current removal statutes.

787. See 28 U.S.C. § 1447(c) (1982). In Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976), the Supreme Court suggested that remands were restricted to statutory grounds, but courts have remanded § 1983 cases on policy grounds, see Young v. Board of Educ. Fremont County School Dist., 416 F. Supp. 1139 (D. Colo. 1976), and the circuits are split as to whether Thermtron eliminated all discretionary, non-statutory grounds for remands. Compare Naylor v. Chase & McGrath, Inc., 585 F.2d 557, 563-65 (2d Cir. 1978) (abstention is a basis for discretionary remand when an unconstrued state law is at issue); IMFC Professional Servs. v. Latin Am. Home Health, 676 F.2d 152, 159-60 (5th Cir. 1982) (remand proper if based on clearly articulated authority); In re Romulus Community Schools, 729 F.2d 431, 435-40 (6th Cir. 1984) (discretionary remand of pendent state law

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their origin in judicially developed or prudential considerations give rise to more difficult questions. If the Constitution limits taxpayer standing, federal courts will remand removed state court taxpayer suits. On the other hand, if such limitations are only prudential, the argument could be made that they are not jurisdictional limitations on federal courts within the meaning of the removal statutes, and the removed action should be dismissed. Such a result, however, would be unsatisfactory. To permit state court § 1983 actions to be removed and then dismissed would deny plaintiffs access to a judicial forum. Although it would be possible to carve a removed-case exception out of the prudential doctrine, the better resolution would be to interpret the jurisdictional limitation on removal broadly and remand such cases as having been removed improvidently without jurisdiction.

On the other hand, neither non-jurisdictional limitations on the scope of relief available in federal courts nor the rules governing litigation preclude removal. Defendants may be able to avoid less stringent state equitable standards, state class action notice requirements, and state non-unanimity jury rules by removing state court § 1983 cases to federal court. Quasi-jurisdictional defenses like the eleventh amendment, however, go the power of federal courts, and their presence should be the basis for a remand.

The availability of removal will increase the tactical significance of the decision to bring § 1983 cases in state court or to join § 1983 claims in affirmative state court litigation under state law.

claims removed with § 1983 claim proper after dismissal of the federal claim) with Ryan v. State Bd. of Elections, 661 F.2d 1130, 1133-34 (7th Cir. 1981) (remand based on abstention improper where federal jurisdiction requirements are met); Levy v. Weissman, 671 F.2d 766, 768-69 (3d Cir. 1982) (remand for failure to comply with local rule improper).


789. See Comment, supra note 13, at 90-93.

790. Id. at 93. But cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., 103 S. Ct. 2841 (1983) (same federal question standards apply in declaratory judgment actions removed from state to federal court as in cases originally commenced in federal court).

791. See AVCO Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) (removal permitted in labor dispute despite questions about the power of federal courts to issue requested injunction).

792. Commentators have suggested that the sovereign immunity defense is non-jurisdictional and thus, requires the dismissal of removed actions. See 1A J. Moore, Moore’s FEDERAL PRACTICE ¶ 0.169[11] n.16 (2d ed. 1983) (criticizing City of Sacramento v. Secretary of HUD, 363 F. Supp. 736 (E.D. Cal. 1972)). The eleventh amendment, however, is a subject matter jurisdictional limitation and a more appropriate basis for remand. See Edelman v. Jordan, 415 U.S. 651, 677-78 (1974).
If the result of joining a § 1983 claim to a state law claim, perhaps because of the availability of attorney fees, is the removal of the entire action to federal court and the resulting application of less favorable federal policies, litigants with strong state law claims may be reluctant to join federal claims.

Similarly, defendants may view removal as a way to take advantage of doctrinal limitations on cases heard or relief provided in federal court. They may also remove so as to break the linkage between fee and non-fee claims. Parties may join state law claims for which attorney fees are not available with only marginally related federal claims. In such cases, the entire action is removed to federal court, but the federal court makes an independent decision as to whether it should retain jurisdiction over the state claim. By removing such actions to federal court and arguing for the remand of state claims, defendants may be able to avoid having to pay fees if they lose on non-fee claims.

Finally, in presiding over removed state court § 1983 cases, federal courts may have to determine whether state jurisdictional and other requirements have been met. For example, where questions are raised whether plaintiffs had standing to sue under state law had the case not been removed, federal courts will not only consider whether federal standing requirements are met but will

793. For a discussion of the applicable rules on the availability of attorney fees for parties who prevail on non-fee claims joined with § 1983 claims, see supra notes 518-25 and accompanying text.

794. See 28 U.S.C. § 1441(c) (1982). Under 28 U.S.C. § 1441(c), a federal court has discretion to hear or remand non-removable claims that are separate and independent from removable ones. Where a state law claim is closely related to a federal claim and meets the test for pendent jurisdiction, however, the state claim may be removable under 28 U.S.C. § 1441(a). But where a federal court would apply the discretionary leg of the pendent jurisdiction test to decline to hear a state claim, it could still hear a “separate and independent” state law claim under 28 U.S.C. § 1441(c).

795. Where state constitutional and other state law claims against state officials are joined in state court with § 1983 claims, removal of the entire action will present novel issues resulting from the recent interpretation of the eleventh amendment to prohibit original federal court jurisdiction over pendent state claims for injunctive relief against state officials. See Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984). Under § 1441(c) state claims that are part of otherwise removable actions may generally be heard in federal court, see supra note 794, but it is unclear how such claims will be treated where the state claim could not have originally been brought in federal court. It is unlikely that federal courts will view the removal by state officials as a waiver of the state’s eleventh amendment immunity, and such state claims should be remanded to state court. Although this will result in parallel litigation in the state and federal courts, defendants should not be able to rely on prohibitions against splitting claims to deny plaintiffs a forum for their federal claims.
also address the standing issue under state law. Federal courts will thereby play a role in overseeing the development of the state law through which states open their courts to § 1983 cases.

C. Uniformity of Federal Law and the Role of the Supreme Court

The expanded use of state courts to enforce federal rights through § 1983 actions will also increase the lack of uniformity in federal law. State court decisions granting relief on federal grounds are becoming a larger part of the Supreme Court's docket, and grounding state court decisions in federal law may invite review by the Supreme Court. The volume of state court § 1983 litigation is increasing significantly, and as more § 1983 state court decisions address the remedial attributes of the § 1983 cause of action and the underlying substantive law, there will be an increase in conflicting interpretations of federal law.

In the federal courts, the filtering role played by the United States Courts of Appeals minimizes conflicts over the meaning of federal law, but some have questioned whether the Supreme Court has the resources to resolve important conflicts in federal law. As a result, numerous proposals have been made for the creation of a

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797. Professor Sager has pointed out that “the certiorari policy of the Burger Court distinctly appears to favor the review of state court decisions which invalidate state conduct on federal constitutional grounds.” He has also identified the sharp increase in both the number of petitions seeking review of state decisions invalidating state conduct on federal grounds, and the increasing likelihood that such cases will be taken by the Court and reversed. Sager, supra note 76, at 1248-49 n.119; see also Michigan v. Long, 103 S. Ct. 3469, 3491 & nn. 2 & 3 (1983) (Stevens, J., dissenting) (updating and further documenting the fact that a larger portion of the Court’s docket involves state court judgments upholding federal claims); Welsh, Whose Federalism?—The Burger Court’s Treatment of State Civil Liberties Judgments, 10 HASTING CONST. L.Q. 819, 824-25 (1983) (between the 1977 and 1982 Terms, the Court either reversed, vacated, or granted full relief to 38% of the state-initiated petitions for review yet only reviewed less than 4% of the paid petitions from state courts by civil liberties claimants).

798. There has been disagreement as to the extent and seriousness of the unresolved conflicts among federal courts of appeals, and a number of commentators recently have questioned whether the existence of such unresolved conflicts poses a sufficiently serious problem to warrant structural changes in the federal judicial system. See, e.g., Hellman, How Not to Help the Supreme Court, 69 A.B.A. J. 750, 753-54 (1983); Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 CAL. L. REV. 913, 928-29 (1983). But see Shaefer, Reducing Circuit Conflicts, 69 A.B.A. J. 452 (1983).
new federal appellate court between the federal court of appeals and the Supreme Court.\textsuperscript{799} Ironically, although the lack of uniformity that may result from the increased state court litigation of federal claims can be substantial,\textsuperscript{800} most of the debate concerning proposals to increase the appellate capacity of the federal courts has focused on the conflicts that exist among the federal circuits. Any addition to the number of courts whose conflicting decisions the Supreme Court must reconcile, inevitably increases the overall lack of uniformity. Thus, the sharp increase in state court § 1983 litigation has the potential of producing a significant increase in this lack of uniformity.\textsuperscript{801}

Under the new regime that is evolving, conflicts in the interpretation of federal law will be less significant. A federal court of appeals with responsibility for a multi-state area can create conflicts that will impose greater institutional pressures on the Supreme Court. The existence of different interpretations of federal law in a single state is less significant.\textsuperscript{802}

\textsuperscript{799} See generally Note, Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court, 97 HARV. L. REV. 307 (1983) (reviewing recent proposals to relieve the volume of cases before the Court and expand the appellate capacity to insure uniformity of federal law).

\textsuperscript{800} See generally, Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity, 64 CAL. L. REV. 943 (1976) (suggesting that the proposed National Court of Appeals be given obligatory jurisdiction to review state court judgments in federal question cases).

\textsuperscript{801} The Supreme Court has specifically identified considerations governing the availability of review on certiorari and has identified conflicts between federal courts of appeals and state courts of last resort, Rule 17(a), as well as conflicts between decisions of state courts of last resort, Rule 17(b), to “indicate the character of reasons that will be considered.” Given the breadth of these standards that go beyond conflicts between decisions of state courts of last resort and the federal court of appeals in which it is located, it is clear that a significant number of certiorari-worthy conflicts already exist concerning the remedial aspects of state court § 1983 actions. Such issues include whether states are “persons” within the meaning of § 1983; the role of state sovereign immunity in limiting relief in § 1983 actions; the propriety of exhaustion of administrative remedies requirements; the proper approach to attorney fees for parties who prevail on non-fee claims; and the availability of § 1983 actions in matters involving state taxation. The Court will have an opportunity to address the last two of these issues in Spencer v. South Carolina Tax Comm’n, 316 S.E.2d 386 (S.C.), cert. granted, 105 S.Ct. 242 (1984). See supra notes 319, 525 & 578.

\textsuperscript{802} Nonetheless, conflicts between state and federal courts will persist and will be difficult to resolve given the ability of parties adversely affected by state court interpretations of federal law to avoid state forums. Unlike habeas cases in which relitigation in federal court in specific cases is available, § 1983 cases are not subject to relitigation. Moreover, state court interpretations of federal law may often involve unique issues because of the identity of the forum. For example, a state-imposed exhaustion of administrative remedies requirement in § 1983 cases may be defended with arguments unique to the state courts. Thus, aberrant state court interpretations of the remedial aspects of § 1983 are not likely to be resolved in cases coming from the federal courts, and resolution may be delayed until the
Moreover, the interests of litigants are generally protected since all parties can avoid the adverse impact of objectionable state court interpretations of federal law through plaintiffs' initial choice of forum as well as through defendants' decision whether to remove to federal court.

Nonetheless, the litigation of § 1983 actions in state courts increases the likelihood of conflicting interpretations of federal law that the Supreme Court is unlikely to review. The emergence of state court § 1983 litigation may therefore contribute significantly to a lack of uniformity in federal law.

VI. CONCLUSION

This review of the increase in state court § 1983 litigation has identified a phenomenon that can have significant implications for the private enforcement of federal rights. State court § 1983 litigation is increasing, because in many instances, it offers plaintiffs a remedy that is as good as, or even better than, the available federal court remedy.

This increase in state court § 1983 litigation will raise many unique issues for the state courts and, ultimately, the Supreme Court. Although these issues may raise difficult questions and pose dangers of an increased lack of uniformity in federal law, the expansion of judicial resources is a healthy development, and the Supreme Court should encourage it by being willing to review aberrant state court decisions limiting the scope of § 1983 or placing unnecessary obstacles in the path of § 1983 litigation.

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Court has the opportunity to address a similar issue in a case from another state.
**APPENDIX**

**EXPLANATION OF TABLES**

I collected the statistics in Tables I and II on reported state appellate court § 1983 opinions through a Lexis search for all opinions between 1969 and 1983 which cited 42 U.S.C. § 1983. I only included those cases where a party sought affirmative relief through § 1983. As long as a claimant sought relief through § 1983, I included the case. I did not consider the success of the case, the prominence of the § 1983 claim, nor the willingness of the court to address the § 1983 claim. In addition, I included opinions that I located independently of the Lexis search if the action was obviously pursued under § 1983, regardless of whether the court cited § 1983. For a further discussion of these statistics, see supra note 269.

Table I contains a state by state breakdown of the reported appellate court § 1983 opinions between 1969 and 1983. I divided these totals into decisions of state courts of last resort and state intermediate appellate courts. Cases in which there are opinions in both intermediate appellate courts and state courts of last resort are only included in the totals for the higher court.

Table II contains a subject matter breakdown of the reported state appellate court § 1983 opinions for three separate periods since 1969. I summarized the categories used in table II in the breakdown that follows it.

**TABLE 1**

**STATE BY STATE BREAKDOWN REPORTED APPELLATE COURT § 1983 OPINIONS (1969-1983)**

<table>
<thead>
<tr>
<th>State</th>
<th>Total</th>
<th>Courts of Last Resort</th>
<th>Intermediate Appellate Courts</th>
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<td>15</td>
<td>2</td>
</tr>
<tr>
<td>Alaska</td>
<td>8</td>
<td>8</td>
<td>**</td>
</tr>
<tr>
<td>Arizona</td>
<td>14</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>Arkansas</td>
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</tr>
<tr>
<td>California</td>
<td>45</td>
<td>3</td>
<td>42</td>
</tr>
<tr>
<td>Colorado</td>
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<td>15</td>
<td>8</td>
</tr>
<tr>
<td>Connecticut</td>
<td>2</td>
<td>2</td>
<td>**</td>
</tr>
<tr>
<td>Delaware</td>
<td>0</td>
<td>0</td>
<td>**</td>
</tr>
<tr>
<td>Florida</td>
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<td>1</td>
<td>9</td>
</tr>
<tr>
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<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Hawaii</td>
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<td>0</td>
<td>0*</td>
</tr>
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<td>3</td>
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<tr>
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<td>28</td>
</tr>
<tr>
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</tr>
<tr>
<td>Maine</td>
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<td>12</td>
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</tr>
<tr>
<td>Maryland</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>State</td>
<td>Total</td>
<td>Courts of Last Resort</td>
<td>Intermediate Appellate Courts</td>
</tr>
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<td>-------</td>
<td>-----------------------</td>
<td>------------------------------</td>
</tr>
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<td>2</td>
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</tr>
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<td>3</td>
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<tr>
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<td>6</td>
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<tr>
<td>Rhode Island</td>
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<td>6</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td>482</td>
<td>206</td>
<td>276</td>
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*State intermediate appellate court with civil jurisdiction created between 1973 and 1981.

**No state intermediate appellate court with civil jurisdiction.
### TABLE II

#### SUBJECT MATTER BREAKDOWN

**REPORTED APPELLATE COURT**

**§ 1983 OPINIONS**

(1969-1983)

<table>
<thead>
<tr>
<th>Description</th>
<th>1969-78</th>
<th>% * 1979-81</th>
<th>% * 1982-83</th>
<th>% * Total</th>
<th>% *</th>
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<td>5.8</td>
<td>6</td>
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<td>32</td>
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<td>20</td>
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<td>6</td>
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<td>Description</td>
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<td>%</td>
<td>*</td>
<td>1979-81</td>
<td>%</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>---------</td>
<td>----</td>
<td>----</td>
<td>---------</td>
<td>----</td>
</tr>
<tr>
<td>Business</td>
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<td></td>
</tr>
<tr>
<td>Regulation/Licensing</td>
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<td>4.2</td>
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<td></td>
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<td>4.7</td>
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<td></td>
<td>0</td>
<td></td>
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<td></td>
<td>5</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td>103</td>
<td>100%</td>
<td></td>
<td>187</td>
<td>100%</td>
</tr>
</tbody>
</table>

*Percentages have been rounded off to nearest tenth.
SECTION 1983 CASE—BREAKDOWN

Explanations

Education — students' rights; due process; first amendment; discipline; and athletics

Public Employment — teachers and other public employees; job retention and hiring; due process; union activities; employees' first amendment rights; wages and benefits; not race or sex discrimination; collective bargaining; and claims against private employers alleged to be acting under color of state law

Race Discrimination — employment and other race discrimination; racial epithets

Sex Discrimination — employment and other sex discrimination; pension benefits; scholarships

Reverse Discrimination — race-based challenges to contracting set-asides; hiring and admission preferences

Housing Discrimination — exclusionary zoning; Warth-type cases including those based on race and poverty

Police Brutality — assault and battery and other cases alleging excessive force by the police and other law enforcement officials; does not include “victims” rights or false arrest/malicious prosecution cases

Prosecutorial/Police/Judicial Abuse — police abuse without brutality; false arrest; prosecutorial misconduct; malicious prosecution; judicial abuse; witnesses; clerks; bail revocation; search abuses; probation revocation; automobile issues; DWI

Victims' Rights — suits based on government non-enforcement, or negligent injuries; failure to protect

Prisoners' Rights — jail and prison conditions, including cruel and unusual punishment; discipline; conditions and confinement; guard brutality; visitation rights; parole rights

Pornography — literature; nude dancing; adult entertainment

First Amendment — non-pornography first amendment issues other than religious claims and those involving the rights of public employees, prisoners or students
Land Use — economic-based zoning; just compensation; inverse condemnation; building permits; special assessments/public improvements

Rights of the Handicapped — physically handicapped; mentally retarded; right to treatment; rights of the institutionalized; rights of the blind; EHA; commitments; guardianships; alcoholism/commitment

Environmental — non-economic land use; airport noise; non-smokers' rights

Juvenile/Family Rights — rights of juveniles other than students and handicapped; includes foster care and parent-child relationships; education in detention

Establishment/Free Exercise — religious rights; establishment and first amendment claims

Consumer/Commercial Issues — repossession; other provisional remedies; security interests

Welfare — AFDC; general relief; food stamps; health care; need-based benefits

Governmental Services/Benefits — non-welfare government benefits such as utility services; unemployment compensation; garbage services

Reproductive Freedom — abortion clinics; abortion rights

Business Regulation/Licensing — contracts with government; business regulation; professional licensing; private school licensing; warrantless inspections of business premises

Taxation — property tax; collection

Elections — reapportionment; contests; right to vote

Housing — evictions; distraint; public housing

Miscellaneous — other; unclear