

1989

# Beyond Parity: Section 1983 and the State Courts

Susan Herman

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), and the [Other Law Commons](#)

---

## Recommended Citation

54 Brook. L. Rev. 1057 (1989)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

# BROOKLYN LAW REVIEW

---

Volume 54

1989

Number 4

---

## ARTICLES

### BEYOND PARITY: SECTION 1983 AND THE STATE COURTS

*Susan N. Herman\**

State court is the new frontier of civil rights litigation. As the Supreme Court has been cutting back on the substance of federal constitutional rights<sup>1</sup> and the availability of federal court relief,<sup>2</sup> prospective plaintiffs have been turning to the state

---

\* Professor of Law, Brooklyn Law School. Barnard College, A.B., 1968; New York University School of Law, J.D., 1974. I am grateful to Margaret Berger, Maryellen Fullerton, Marsha Garrison, and Joel Gora, Professors of Law, Brooklyn Law School and Burt Neuborne, Professor of Law, New York University School of Law, for their helpful comments on earlier drafts, to Joan Bratkowsky, Kerry Brennan and David Woll for their research assistance, and to Brooklyn Law School for the generous support of its research stipend program.

<sup>1</sup> See, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986) (negligent excessive use of force on prisoner does not state claim under eighth amendment); *Illinois v. Gates*, 462 U.S. 213 (1983) (relaxing standards for determining whether search warrant based on informant's tip satisfies fourth amendment probable cause requirement); *Parratt v. Taylor*, 451 U.S. 527 (1981) (no fourteenth amendment procedural due process claim exists if the state courts afford an adequate remedy for negligent deprivation of property); *Hudson v. Palmer*, 468 U.S. 517 (1984) (extending *Parratt*, 451 U.S. 527 (1981), to intentional deprivations of property); *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no first amendment right to disseminate leaflets in private shopping center).

<sup>2</sup> See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (federal injunctive relief unavailable in section 1983 action if based on pendent state law claim); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (federal injunctive relief unavail-

courts for vindication of their rights. These federal court refugees rely on state constitutional claims if they need a haven from restrictive federal constitutional doctrine,<sup>3</sup> but, more and more frequently, they simply bring their federal claims to state court under the aegis of 42 U.S.C. section 1983.<sup>4</sup>

---

able against future police practices for plaintiffs who could not show a likelihood they themselves would suffer from those practices); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (plaintiffs challenging a state taxation system on constitutional grounds must take their claims to state court if adequate state court remedies exist); *Younger v. Harris*, 401 U.S. 37 (1971) (federal injunctive relief generally unavailable to enjoin state criminal proceedings).

These proliferating restrictions arise largely because of the Court's discomfort with the bulk and nature of section 1983 litigation. See Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will The Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2-3, 20-29 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 8, 62-65 (1984); Morrison, *Rights Without Remedies: The Burger Court Takes The Federal Courts Out Of The Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 850-58 (1977); Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 S. CAL. L. REV. 449, 452-54 (1986); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 76-79 (1984); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 503 & n.15 (1985).

<sup>3</sup> The fact that the states may be more generous in interpreting their own constitutional provisions than the Supreme Court has been in interpreting parallel federal constitutional provisions, even if the language of the provisions is the same, has spawned a nationwide cottage industry in state constitutional case law and scholarship. For good discussions of the issues presented in such litigation, see Symposium: *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); see also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 and sources cited at 1328-29 nn.15-22 & 1334 n.20 (1982).

Backlash has developed in some states. For example, a recent amendment to the Florida Constitution provides: "This right [against unlawful searches and seizures] shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12 (1968, amended 1982). See also Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984).

<sup>4</sup> Section 1983 of title 42 of the United States Code provides:

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

The rapid proliferation of section 1983 actions brought in state rather than federal court is easy to understand. Although state courts might not be required to entertain section 1983 actions,<sup>5</sup> they do have concurrent jurisdiction to do so,<sup>6</sup> and most states have agreed to exercise this concurrent jurisdiction.<sup>7</sup>

---

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.

42 U.S.C. § 1983 (1982).

See Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981) (recognizing the significance of the phenomenon of state court section 1983 actions) and Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381 (1984) (same). Professor Steinglass estimates that in two decades, reported state appellate section 1983 decisions have increased from a handful to almost 200 per year. *Id.* at 435. The same author's SECTION 1983 LITIGATION IN THE STATE COURTS (1988) [hereinafter S. STEINGLASS] is a useful treatise for state court practitioners and judges contending with section 1983 actions.

Most of the discussion in this Article would apply equally to section 1983's less frequently litigated companion statutes, especially sections 1981 and 1982 of title 42 of the United States Code.

<sup>5</sup> The question was expressly left open by the Supreme Court in *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980); see also *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980). For arguments that state courts should be required to hear section 1983 actions, see Gordon & Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1156-70 (1984); Neuborne, *supra* note 4, at 753-59; Note, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 YALE L.J. 414, 420-28 (1985) [hereinafter Note, *State Taxation*]; Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1551-56 (1960) [hereinafter Note, *State Enforcement*].

<sup>6</sup> See *Felder v. Casey*, 108 S. Ct. 2302 (1988); *Patsy v. Board of Regents*, 457 U.S. 496, 506-07 (1982); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez*, 444 U.S. at 283 n.7.

<sup>7</sup> See Steinglass, *supra* note 4, at 559-60 (appendix E for a list of relevant state court cases).

Issues do still arise as to whether states may carve out exceptions to their acceptance of section 1983 litigation. The Supreme Court granted certiorari to decide one such issue during the 1984 Term, in the case of *Spencer v. South Carolina*, 281 S.C. 496, 316 S.E.2d 386 (1984), *aff'd*, 471 U.S. 82 (1985). The South Carolina courts held that it is permissible for a state court to refuse to hear a claim under section 1983 when an adequate state law remedy existed and when the sole purpose of invoking section 1983 was to justify the allowance of counsel fees. 281 S.C. at 496, 316 S.E.2d at 389. This opinion was affirmed by an equally divided Court. 471 U.S. at 82.

Similar issues continue to arise in various contexts. See, e.g., *Cepeda v. Coughlin*, 128 A.D.2d 995, 513 N.Y.S.2d 528 (3d Dep't), *leave to appeal denied*, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987) (refusing to hear damages claim in state court section 1983 action against state corrections officer because state law committed such claims to a remedy in the Court of Claims). See Steinglass, note 4, at 382-89.

Plaintiffs' attorneys now frequently add a section 1983 claim to what would otherwise be a state tort action<sup>8</sup> — adding a fourth amendment based police misconduct claim to a battery action when police brutality is alleged, or a due process claim to a wrongful discharge action when a government employee has been fired — because in this way they can consolidate related state and federal claims in one action,<sup>9</sup> because state court may be more familiar or convenient to the attorney than federal court,<sup>10</sup> and because a victory on a section 1983 claim brings with it the coveted right to collect attorney's fees.<sup>11</sup>

A federal statute in state court is an awkward guest. Two different sets of governing rules compete, each with a strong argument for its own applicability. Should a state court hearing a federal section 1983 claim seek to mimic the procedures a federal court would have followed in hearing the same claim, or should it follow the procedures it would have followed (or possibly will be following) in hearing the state law analogue of the claim? It is clear that the state courts must follow the "sub-

---

<sup>8</sup> The substantial overlap between section 1983 and state tort actions has been well noted. See Whitman, *supra* note 2. In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court recognized this correspondence, declaring that section 1983 should be characterized as a personal injury action for the purpose of choosing the applicable state statute of limitations. See text accompanying notes 100-01, 105-06 *infra*.

<sup>9</sup> It may not always be possible to consolidate related state and federal claims in one proceeding in federal court because of restrictions, see note 2 *supra*, disabling the federal court from providing requested injunctive relief or even damages. In state court, the restrictions of the eleventh amendment, article III, and federal court prudential doctrines are inapplicable. See text accompanying notes 237-44 *infra*.

<sup>10</sup> Familiarity and convenience can be powerful motivating factors. In one survey, attorneys in ten jurisdictions were asked whether, jurisdiction being equally available, they would prefer to litigate civil actions in state or federal court. Of 252 respondents, 193 expressed a preference for state court and 34 for federal court. (The remaining respondents expressed no preference.) The principal reasons given for preferring state court were quicker disposition of cases, familiarity, and convenience. This preference was despite the fact that most respondents thought federal judges more competent and federal procedure superior. See 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, 816-19 (1981) (appendix A).

<sup>11</sup> See 42 U.S.C. § 1988 (1982) (giving the court discretionary power to award reasonable attorney's fees to the prevailing party, other than the United States, as part of trial costs); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (In enacting section 1988, Congress intended to make attorney's fees available in state court section 1983 actions.).

For a fuller discussion of factors influencing choice of forum in section 1983 actions, see Steinglass, *supra* note 4, at 413-24; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing for the superiority of federal court as a forum for civil rights litigation).

stance" of section 1983<sup>12</sup> and, at least in some circumstances, may follow their own "procedure,"<sup>13</sup> but long experience in diversity cases and in other areas of concurrent jurisdiction<sup>14</sup> teaches that this distinction is more a restatement of the problem than a resolution of it. Are strict pleading rules procedural? Are allocations of burdens of proof or the relative responsibilities of judge and jury procedural?

Other issues, less familiar from the past, also arise. May a state court apply a state notice of claim statute which would not have been applied in a parallel federal court section 1983 action in that jurisdiction?<sup>15</sup> May a state court, following its usual court rules, refuse a section 1983 plaintiff a jury trial in a category of case in which a jury trial would have been available in a parallel federal court proceeding?<sup>16</sup> On the other hand, may a state court apply an unusually generous standing doctrine and hear the section 1983 claim of a plaintiff the federal courts would have turned away?<sup>17</sup> Does it matter whether the federal court would have denied the plaintiff standing on the basis of

---

<sup>12</sup> Once the Supreme Court has decided, for example, that a municipality is a "person" within the meaning of section 1983 and therefore may be sued as a defendant, see *Monell v. City of N.Y.*, 436 U.S. 658 (1978), the state courts may not declare that, as far as they are concerned, municipalities are not "persons." The Supreme Court has held that state law may neither contract nor expand the substance of section 1983. See *Moor v. County of Alameda*, 411 U.S. 693 (1973) (application of California state law providing for vicarious liability of county in federal court section 1983 action would be unwarranted expansion of section 1983 without congressional authorization). For a suggestion that the states might be permitted to expand but not contract the substance of section 1983, see text accompanying notes 252-54 *infra*.

The Supreme Court's definition of the substance of section 1983 has been generous. See text accompanying notes 90-106 *infra*.

<sup>13</sup> *Felder v. Casey*, 108 S. Ct. 2302, 2306 (1988). ("No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts.") See text accompanying notes 289-302 *infra* for some examples of such "procedures" (Section III. B of text).

<sup>14</sup> See text accompanying notes 184-231 *infra*.

<sup>15</sup> The Supreme Court has answered this question in the negative. See text accompanying notes 37-48 *infra*.

<sup>16</sup> See note 302 *infra*.

<sup>17</sup> See, e.g., *Langford v. Superior Court*, 43 Cal. 3d 21, 37 n.6, 729 P.2d 822, 833 n.6, 233 Cal. Rptr. 387, 398 n.6 (1987) (Bird, C.J., concurring and dissenting) (California standing requirements "less stringent" than those imposed by federal law); *South Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 337, 456 A.2d 390, 483 (1983) (state standing doctrine "'much more liberal'" than that applied in federal court) (quoting *Crescent Park Tenants Ass'n v. Realities Equities Corp.*, 58 N.J. 98, 275 A.2d 433 (1971)).

prudential concerns,<sup>18</sup> or because of the restrictions of article III,<sup>19</sup> in which case the state court's decision on a matter of federal law would be unreviewable by the Supreme Court?<sup>20</sup>

These questions and many others like them are inevitable. They are also inevitably difficult for two reasons. First, the answers to these questions depend on the intent of Congress<sup>21</sup> in an area in which Congress has been particularly inscrutable.<sup>22</sup> Second, even if Congress wished to create a new statute to address these questions, it is not easy to resolve the conflicting policies at stake or to draw clear lines in this area. The Supreme Court, working in the absence of articulated congressional intent, has provided answers to several questions about what collateral law<sup>23</sup> state courts may or must use in section 1983 actions, but has not provided a cogent theoretical basis for answering the questions remaining. Thus, the brunt of the problem of deciding what procedures and principles to apply to state court section 1983 actions is being borne by state court judges and litigators, who have been discovering the truth of Hart's observation, in a similar context, that "[p]eople repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did."<sup>24</sup>

This Article will explore means of resolving these inconsistencies. The first section will discuss the current state of the law — relevant Supreme Court case law, and what we know of con-

---

<sup>18</sup> See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975) (restrictions on plaintiffs' standing in exclusionary zoning challenge not attributed to Article III).

<sup>19</sup> See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-10 (1983) (standing restriction attributed to Article III case or controversy requirement).

<sup>20</sup> See text accompanying notes 255-63 *infra* for a discussion of this problem.

<sup>21</sup> As in the context of federal diversity litigation, what is sometimes characterized as a "choice" between federal and state law is, because of the supremacy clause, U.S. CONST. art. VI, not truly a matter of choice at all. See Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 316 (1980). The state courts must apply federal law to the extent that Congress intends for them to do so. Although the limits of Congress's power to impose federal law on the state courts have never been tested, the FELA cases, see text accompanying notes 184-214 *infra*, assume that this power is an expansive one.

<sup>22</sup> The relevant statutes are, for the most part, either silent or thoroughly ambiguous on the key questions concerning concurrent jurisdiction and the role of the state courts. See text accompanying notes 62-142 *infra*.

<sup>23</sup> By collateral law, I mean state or federal rules, statutes, or practices extrinsic to section 1983 itself, and therefore possibly not "substantive" federal law.

<sup>24</sup> Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

gressional intent and the Supreme Court's possibly distorted view of congressional intent. Section II will suggest what the law should be, analyzing the factors both Congress and the Supreme Court should consider in deriving standards to govern these choices of law. Part III then discusses application of these principles in four instances in which state and federal collateral law might differ: (1) when a state's justiciability principles are less restrictive than federal justiciability principles (more plaintiff-oriented, as when a state's standing doctrine is more generous than that prevailing in federal court); (2) when a state's justiciability principles are more restrictive than federal, as when a state would employ an exhaustion of administrative remedies requirement in certain types of cases; (3) when a state's procedure is more favorable to plaintiffs than federal (when a state provides attractive attachment procedures or does not require the posting of a bond as a prerequisite to injunctive relief, for example); and (4) when a state's procedure is less favorable (when state law would not provide for a jury trial, for example).

I have no easy answers, for these are not easy issues. In fact, many of my conclusions render these choice of law decisions more difficult than they might otherwise be. If congressional intent were clear, if precedent addressed analogous issues, if some overriding principle — like a need for uniformity of decision — applied, decisions about choice of federal or state collateral law would be simplified. But I conclude that congressional intent provides little guidance on these issues (including some the Court has already decided), that precedents in other presumably analogous areas are not sufficiently analogous to lend their answers, that the need for uniformity is not a categorical imperative in this area, given the balkanized nature of section 1983 litigation, and that there is no substitute for making decisions on individual issues by balancing the relative federal and state interests involved.

These conclusions would lead to disparity — among state courts, and even between federal and state courts in the same jurisdiction — but I will argue that allowing state and federal procedures for handling section 1983 cases to evolve differently will serve the goals of section 1983 if plaintiffs are afforded a true choice between the federal and state forum.



## I. THE STATE OF THE LAW

### A. *The Supreme Court and State Court Section 1983 Actions*

The Supreme Court has decided three significant cases on collateral law in state court section 1983 actions.<sup>25</sup> In each of these three cases, the Court used the supremacy clause to prohibit the states from following relevant state collateral law, basing its holding on an interpretation of congressional intent. Although I have no disagreement with the results of these particular cases, I think these opinions and others on related topics<sup>26</sup> overread and perhaps misread congressional intent, mostly on the issue of the need for uniform results in section 1983 litigation.

In the first case, *Martinez v. California*,<sup>27</sup> the state court applied a state statute that immunized a parole officer from liability, thereby defeating the plaintiff's section 1983 claim.<sup>28</sup> The Supreme Court simply announced that the state statute should not have been followed because the existence of an immunity defense in a section 1983 action is a federal question.<sup>29</sup> The common law of immunities the Supreme Court has been applying in section 1983 cases<sup>30</sup> was deemed intrinsic to the statute itself, and, therefore, accompanied the statute to state court.

*Martinez* prohibited use of a state statute unfavorable to plaintiffs, while the next case compelled a state court entertaining a section 1983 action to employ a federal statute favorable to plaintiffs — in this case the provision of 42 U.S.C. section 1988

---

<sup>25</sup> *Felder v. Casey*, 108 S. Ct. 2302 (1988); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Martinez v. California*, 444 U.S. 227 (1980). In *Smith v. State*, 428 Mich. 540, 410 N.W.2d 749 (1987), *cert. granted sub nom.*, *Will v. Michigan Dep't of State Police*, 108 S. Ct. 1466 (1988), the Court will be called upon to decide whether the state is a "person" within the meaning of section 1983, a question that does not arise in federal court section 1983 actions because of the restrictions of the eleventh amendment.

<sup>26</sup> See text accompanying notes 90-109 *infra*.

<sup>27</sup> 444 U.S. 277 (1980).

<sup>28</sup> Plaintiffs, survivors of a girl killed by a parolee, claimed that state parole officials had denied them due process of law by participating in an allegedly reckless parole release decision which led to the girl's death. *Id.* at 279.

<sup>29</sup> *Id.* at 284. The Court went on to find no constitutional violation on the theory that state actors had not caused deprivation of the girl's life, and, therefore, decided that the issue of whether parole officers should be considered entitled to immunity from suit under federal law need not be reached. *Id.* at 284-85.

<sup>30</sup> *Id.* See text accompanying notes 93-96 *infra* for discussion of the Court's treatment of the issue of common-law immunities under section 1983.

allowing attorney's fees to a prevailing party.<sup>31</sup> In *Maine v. Thiboutot*,<sup>32</sup> the Supreme Court found that Congress intended the attorney's fees provision to apply to state as well as federal court section 1983 actions.<sup>33</sup> It took no more than three sentences for the Court to reach this conclusion. Citing one representative's reference to state court actions during the floor debate,<sup>34</sup> and a senate report's description of attorney's fees as "an integral part of the remedies necessary to obtain" compliance with section 1983,<sup>35</sup> the Court then concluded: "[i]t follows from this history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in state or federal court."<sup>36</sup>

If these cases provided scant explanation for the Court's results, the next case, *Felder v. Casey*,<sup>37</sup> compensated by providing too much. Plaintiff Felder's state court section 1983 action alleged that he had been subjected to a racially motivated arrest and beating by Milwaukee police officers. The action was dismissed on the ground that the plaintiff had not complied with a state notice of claim statute.<sup>38</sup> The statute at issue provided that no suit may be brought in Wisconsin state court against a state or local governmental entity or officer unless the plaintiff in the action has (1) within 120 days of the alleged injury notified defendant of the circumstances, the amount of the claim, and the plaintiff's intention to hold defendant liable,<sup>39</sup> (2) waited 120

---

<sup>31</sup> 42 U.S.C. § 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . 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."

<sup>32</sup> 448 U.S. 1 (1980).

<sup>33</sup> *Id.* at 11.

<sup>34</sup> Representative Drinan described the purpose of section 1988 as being to "authorize the award of a reasonable attorney's fee in actions brought in State or Federal Courts." 122 CONG. REC. 35,122 (1976). See 448 U.S. at 11.

<sup>35</sup> S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5913. See 448 U.S. at 11.

<sup>36</sup> 448 U.S. 1 (1980). The Court also provided some hasty policy rationales in a footnote: first, if attorney's fees were available only in federal court, federalism interests would not be served because plaintiffs would be dissuaded from bringing their actions in state court; and second, the unavailability of attorney's fees in state court would be a financial disincentive for plaintiffs unable to bring section 1983 actions in federal court. *Id.* at 11 n.12.

<sup>37</sup> 108 S. Ct. 2302 (1988).

<sup>38</sup> *Id.* at 2314.

<sup>39</sup> Alternatively, the plaintiff could satisfy the statute by demonstrating that the

days after such notification to allow defendant an opportunity to decide whether to settle the claim, and (3) brought suit within six months of receiving notice that the defendant disallowed the claim.<sup>40</sup> The Wisconsin Supreme Court had upheld the application of the statute, reasoning that although Congress may set the framework for section 1983 actions, the states should remain free to prescribe the procedures under which such claims may be litigated.<sup>41</sup>

The Supreme Court disagreed, holding that the notice of claim statute was preempted. The rationales the Court provided, some implicit and some explicit, are set forth roughly in order of their appearance in the opinion: (1) the statute conflicts in purpose and effect with the remedial objectives of section 1983;<sup>42</sup> (2) application of the notice of claim statute in state court will "frequently and predictably produce different outcomes in section 1983 litigation based solely on whether the claim is asserted in state or federal court,"<sup>43</sup> whereas Congress desires uniform adjudication of section 1983 actions within each jurisdiction;<sup>44</sup> (3) the notice of claim provision discriminates against federal

---

defendant had received actual notice. WIS. STAT. § 893.80(1)(a) (1983 & Supp. 1987). Plaintiff Felder claimed that the actual notice provision was satisfied in his case because his neighbors had lodged complaints with the police, and a local alderman had written a letter to the chief of police complaining about this incident. 108 S. Ct. at 2306. The Wisconsin court held that these communications did not satisfy the actual notice provision because the facts giving rise to plaintiff's alleged injuries were not provided, and the plaintiff's intent to hold defendant liable was not expressed. *Id.* The Supreme Court several times commented grimly that the facts in this case showed that the actual notice provision was hard to satisfy. *Id.* at 2314.

<sup>40</sup> WIS. STAT. § 893.80(1).

<sup>41</sup> *Felder v. Casey*, 139 Wis. 2d 614, 628, 408 N.W.2d 19, 26 (1987), *rev'd*, 108 S. Ct. 2302 (1988). Among the legitimate state interests the court believed this statute to serve were protecting against stale or fraudulent claims, facilitating prompt settlement of valid claims, and identifying and correcting inappropriate conduct by governmental employees and officials. 139 Wis. 2d at 624, 626, 408 N.W.2d at 24, 26.

<sup>42</sup> 108 S. Ct. at 2307. The Court analogized this statute to the immunity statute in *Martinez*.

<sup>43</sup> *Id.* This is because under section 1988 of title 42 of the United States Code, the federal court will borrow state law in section 1983 actions only if federal law is "deficient," see text accompanying notes 85-90 *infra*. The federal courts generally do not see the lack of a federal notice of claim provision as a deficiency, and so do not apply state provisions. See 108 S. Ct. at 2307-08; *Brown v. United States*, 742 F.2d 1498, 1509 n.6 (D.C. Cir. 1984) and cases cited therein; but see *Cardo v. Lakeland Cent. School Dist.*, 592 F. Supp. 765, 772-73 (S.D.N.Y. 1984) (plaintiff's untimely notice of claim unduly burdened state agency).

<sup>44</sup> 108 S. Ct. at 2307.

claims;<sup>45</sup> (4) the provision is "outcome-determinative" and states may not apply outcome-determinative law when entertaining substantive federal rights in their courts;<sup>46</sup> (5) the provision conditions a federal right of recovery; (6) the provision is not otherwise a neutral and uniformly applicable rule; (7) the provision operates as an exhaustion requirement, which Congress intended to prohibit in state as in federal court section 1983 cases;<sup>47</sup> (8) the states may not impose "unnecessary burdens upon rights of recovery," citing and presumably analogizing to the principal example of concurrent jurisdiction cases the Supreme Court has considered in the past — the federal Employers' Liability Acts<sup>48</sup> (FELA) cases;<sup>49</sup> and (9) the state courts should afford the same deference to federal law in litigating federal claims under section 1983 as a federal court would to state law in a diversity case (a reverse *Erie* concept).<sup>50</sup>

---

<sup>45</sup> Although the notice of claim provision applied to all suits against state and local officials and did not single out federal claims, it was likely to have a particularly strong impact on section 1983 actions. The view that the states might not be permitted to adopt procedures that affect state as well as federal claims, but that have a particularly heavy impact on federal claims, can be viewed as an expansive reading of the antidiscrimination doctrine. Under this doctrine states are not permitted to refuse to hear federal claims if they would hear comparable state claims, see text accompanying notes 247-48 *infra* for a fuller discussion of the antidiscrimination doctrine.

<sup>46</sup> 108 S. Ct. at 2313.

<sup>47</sup> *Id.* at 2314. In so holding, over a vigorous dissent, the Supreme Court resolved a controversy begun in *Patsy v. Board of Regents*, 457 U.S. 496 (1982). In *Patsy*, the Court held that no exhaustion of administrative remedies requirement may be imposed in federal court section 1983 actions. Some state courts believed that this holding should not extend to state court section 1983 actions, see, e.g., *Felder v. Casey*, 139 Wis. 2d 614, 408 N.W.2d 19 (1987), *rev'd*, 108 S. Ct. 2302 (1988); *Kramer v. Horton*, 128 Wis. 2d 404, 383 N.W.2d 54, *cert. denied*, 479 U.S. 918 (1986); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985), while others thought *Patsy* should apply to state court also, see, e.g., *Handschuh v. Superior Ct.*, 212 Cal. Rptr. 296, 166 Cal. App. 3d 41 (Ct. App. 1985); *Laurel Park, Inc. v. Pac*, 194 Conn. 677, 485 A.2d 1272 (1984); *Maryland Nat'l Capital Park & Planning Comm'n v. Crawford*, 59 Md. App. 276, 475 A.2d 494, 501 (1984), *aff'd*, 307 Md. 1, 511 A.2d 1079 (1986); *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 661, 453 N.E.2d 96, 99 (1983); *Beitel v. Board of School Comm'rs*, 419 So. 2d 242, 245 (Ala. Civ. App. 1982); *Stratos v. Dep't of Public Welfare*, 387 Mass. 312, 439 N.E.2d 778 (1982); *Maddox v. Clackamas Cty. School Dist.*, 293 Ore. 27, 31, 643 P.2d 1253, 1257 (1982); *Lloyd v. Borough of Stone Harbor*, 179 N.J. Super. 496, 432 A.2d 572 (1981). The arguments seemed so balanced that the author of Note, *Exhaustion of Administrative Remedies in Section 1983 Actions Brought in State Court*, 69 IOWA L. REV. 1037 (1984) took no position on what the outcome should be.

<sup>48</sup> 45 U.S.C. § 51 (1982).

<sup>49</sup> See text accompanying notes 184-214 *infra*.

<sup>50</sup> This reverse *Erie* notion will be discussed at text accompanying notes 215-31

The Court did not discuss the state interests underlying the notice of claim provision, simply stating, "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . .'"<sup>51</sup> Also rejected by the Court was the state's proffered concept, derived from a classic article by Henry Hart,<sup>52</sup> that federal law should "take the state courts as it finds them."<sup>53</sup> This "equitable federalism" argument, said the Court, has no place in supremacy clause analysis.<sup>54</sup>

This fistful of rationales replaces the Court's breezy assertions in *Martinez* and *Thiboutot* that it was simply following the will of Congress. Congressional intent on the issue in *Felder* is, as the dissent points out, not at all clear.<sup>55</sup> Certainly the notice of claim provision conflicts with the remedial scheme Congress wished to make available by enacting section 1983. But does that mean that Congress would have intended for the *state* courts to be barred from applying such a provision? This is a different question, and Hart's answer to this question is that Congress should not dictate procedure for the states to use in adjudicating federal rights as long as it has ensured that a fair federal forum is available.<sup>56</sup> Under Hart's theory, the state court's concurrent jurisdiction is supplementary, and if the state court procedures are not as favorable to plaintiffs as federal procedures, the solution is for plaintiffs to exercise the choice of forum concurrent jurisdiction allows them by bringing their claims to federal court.

The alternative view has been best stated by Burt Neuborne, who argues for procedural parity between state and federal courts in section 1983 actions.<sup>57</sup> Neuborne takes the position that federal collateral law on issues including pleading rules and class actions should follow section 1983 into state court whenever the purposes of section 1983 would be served.<sup>58</sup> The

---

*infra.*

<sup>51</sup> 108 S. Ct. at 2306 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

<sup>52</sup> Hart, *supra* note 24.

<sup>53</sup> *Id.* at 508.

<sup>54</sup> 108 S. Ct. at 2313.

<sup>55</sup> *Id.* at 2318-19 (O'Connor, J., dissenting).

<sup>56</sup> Hart, *supra* note 24, at 509 & 514. Hart would make an exception for state rules so rigorous as to nullify the federal rights asserted. *Id.* at 508.

<sup>57</sup> Neuborne, *supra* note 4, at 786.

<sup>58</sup> See *id.* Professor Neuborne describes the question posed more generally as

purposes ascribed to Congress are defined as, first, the ultimate purpose of deterring state officials from violating civil rights, and second, the instrumental purpose of enhancing the ability of civil rights plaintiffs to litigate and prevail on their claims.<sup>59</sup> The latter purpose will consistently be served by any procedure attractive to plaintiffs; the former purpose requires closer analysis. Neuborne's thesis rests in part on an analogy to the Supreme Court's FELA cases and in part on the reverse *Erie* concept endorsed by the Court in *Felder*, both of which he combines to construct a set of rules to apply in all cross-forum choice of law situations.<sup>60</sup>

Neither position is very attractive if taken to an extreme. The Court has already rejected a broad view of Hart's thesis by holding that the state courts may, in some circumstances, be compelled to forego their usual modes of procedure. It is equally unlikely that the Court will require the state courts to adopt every federal procedure — including federal discovery practices, class action rules, and federal rules of evidence — that might benefit a civil rights plaintiff. *Felder* rejects an extreme version of Hart's theory, but does not necessarily endorse an extreme or even moderate version of Neuborne's. In steering a course between the two extremes in future cases, the Court will be evaluating and balancing a number of factors. Assigning a greater value to the state's interest in following its own procedure will lead to a model closer to Hart's, while assigning a greater value to intrastate uniformity will favor Neuborne's views. A desire to promote the goals of section 1983 might lead in either direction. In Part II, I will discuss these factors, how they are served or disserved by the different paradigms, and the validity of the FELA and *Erie* analogies. But first, because congressional intent is the key to supremacy clause questions, I will begin where the Court in *Felder* began, and discuss what we know of Congress's views on these issues. The Supreme Court in *Felder* is continuing a trend toward minimizing the role of state law, maximizing the creation of federal common law, and exalting the desirability of uniformity between state and federal courts in adjudication of

---

whether a collateral rule is likely to alter the general allocation of risks reflected in section 1983 itself. *Id.* at 773 & 775.

<sup>59</sup> See *id.* at 769, 771 & 780.

<sup>60</sup> See *id.* at 766-76.

federal rights. The relevant legislation and history show this position to be more a construct than an interpretation of Congress's views.

### B. *Congress, Concurrent Jurisdiction, and Section 1983*

Congress has not explicitly addressed the issue of the role of the state courts in section 1983 litigation. However, several sources provide some basis for judging Congress's views on the interests section 1983 was intended to further, the role of state law, and the significance of uniformity: the history of section 1983 itself and its presumptive grant of concurrent jurisdiction to the state courts; 42 U.S.C. section 1988, which provides for choice of law in federal court section 1983 actions; and 28 U.S.C. section 1441, which permits civil rights defendants to remove section 1983 actions to federal court. The legislative history of section 1983 supports an inference that the 42nd Congress not only wished to promote civil rights, but also would have wished to encourage the state courts to litigate their own civil rights disputes.<sup>61</sup> Section 1988, at least as interpreted by the Supreme Court, shows a Congress not unwilling to allow diversity in section 1983 litigation and expressly advocating the use of some state law in adjudication of this federal right. The removal statute, surprisingly and probably accidentally, enhances the role of the federal forum by allowing civil rights defendants to undercut plaintiffs' choice of forum when a plaintiff has made the choice Congress did not expect, and remitting to the federal courts cases that both the plaintiff and the state court wish the state court to hear.

#### 1. The Purposes of Section 1983 and Concurrent Jurisdiction

It is accepted gospel that Congress's main aims in enacting the Civil Rights Act of 1871,<sup>62</sup> the predecessor of section 1983 and its companions, were three:<sup>63</sup> (1) to override certain kinds of

---

<sup>61</sup> This was the Supreme Court's assumption in *Maine v. Thiboutot*, 448 U.S. 1, 11 n.12 (1980) and in *Felder v. Casey*, 108 S. Ct. 2302, 2314 (1988).

<sup>62</sup> See Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). For convenience, I will simply refer to Congress's progression of statutes in this area as "section 1983."

<sup>63</sup> See *Monroe v. Pape*, 365 U.S. 167, 173 (1961).

state laws when those laws prevented the vindication of civil rights;<sup>64</sup> (2) to provide a remedy where state law was inadequate, as where blacks were incompetent to testify against white men who committed crimes against them;<sup>65</sup> and (3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice.<sup>66</sup> The third aim has been characterized by the Supreme Court as the broadest and the most important of Congress's goals.<sup>67</sup>

The question of whether Congress intended federal justiciability principles and procedures to apply to state court section 1983 litigation is complicated by the fact that most members of Congress apparently did not "intend" the state courts to entertain section 1983 actions at all, at least not in the usual sense of the word. When the 42nd Congress created section 1983 and its companion civil rights statutes, state court was part of the problem rather than the solution. As the fourteenth amendment already provided sufficient ammunition for dealing with restrictive state laws,<sup>68</sup> it does seem fair to say that the chief impetus for section 1983 was to provide a federal court forum and federal remedies for those unable to vindicate their federal civil rights in state court.<sup>69</sup> Among the obstacles to state court relief cited in the legislative debates were the biases of state prosecutors, juries, and even judges.<sup>70</sup> Federal court, where

---

<sup>64</sup> *Id.* The view was expressed during the debates that this aim was irrelevant because no such state laws existed. See CONG. GLOBE, 42d Cong., 1st Sess. App. 268-69 (1871) (statement of Mr. Sloss).

<sup>65</sup> See *id.* at 345; *Monroe*, 365 U.S. at 173-74.

<sup>66</sup> *Id.* at 174.

<sup>67</sup> The Court stated: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (citation omitted).

<sup>68</sup> See *Monroe*, 365 U.S. 167, 194-98 (Harlan, J., concurring).

<sup>69</sup> See *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982) (Congress assigned the paramount role in section 1983 litigation to the federal courts). In fact, some of the bitterest criticism of the proposed civil rights statutes sprang from the concern of various members of Congress that state courts were being stripped of the ability to hear claims concerning the conduct of state officials. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 86 (1871) (Rep. Storm complaining that fourteenth amendment litigation was being given to federal courts and taken away from the state courts).

<sup>70</sup> See *id.* at App. 78 (statement of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."); *id.* at 334 (statement of Rep.



judges enjoyed life tenure and, hence, better insulation from political pressure, and where discriminatory state statutes and procedures could be sidestepped, provided an opportunity to overcome these obstacles.

Because the Supreme Court operates on a presumption of concurrent jurisdiction,<sup>71</sup> state court jurisdiction over section 1983 actions derives from what Congress did not say.<sup>72</sup> The legislative history of section 1983 bears only several passing references to the awareness of particular congressmen that the state courts might be able to entertain section 1983 actions,<sup>73</sup> and no

---

Hoar) (deploring the unavailability of state court for actual enforcement of the laws); *id.* at 505 (statement of Sen. Pratt) (criticizing state enforcement of criminal laws against blacks and union sympathizers); *id.* at App. 277 (statement of Rep. Porter) ("loyal men cannot obtain justice in the courts").

<sup>71</sup> "[W]here '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.'" *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) (quoting *Testa v. Katt*, 330 U.S. 386, 391 (1947); *Clafin v. Houseman*, 93 U.S. 130, 137 (1876)). For a criticism of the general presumption of concurrent jurisdiction and a proposed set of criteria for deciding when there should be concurrent jurisdiction over federal causes of action, see Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976); see also Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 207 (concurrent jurisdiction should be imposed only when Congress has been explicit); Neuborne, *supra* note 4, at 758 (questioning presumption of concurrent jurisdiction if jurisdiction is then considered to be obligatory).

<sup>72</sup> The predecessor statute to section 1983, Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S. § 1983), provided for exclusive jurisdiction in the federal courts (proceedings to be prosecuted in "the several district or circuit courts of the United States"). The fact that this language was dropped when section 1983 was enacted has been taken by some to mean that Congress must have intended the state courts to exercise concurrent jurisdiction, see Note, *The Enforceability and Proper Implementation of § 1983 and the Attorney's Fees Awards Act in State Courts*, 20 ARIZ. L. REV. 743, 747-51 (1978). However, the changes of language accompanying this recodification were apparently so haphazard that it is unwise to draw such inferences. See Neuborne, *supra* note 4, at 749 n.90.

<sup>73</sup> Only a few members of Congress referred to the possibility of state court litigation at all, and usually with some other point in mind. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 578, 694-95 (1871) (statement of Sen. Edmunds) (arguing that federal jurisdiction was proper regardless of whether the state courts could hear civil rights cases); *id.* at 514 (statement of Rep. Poland) (alluding to the problem of dual sovereignty); see also *id.* at 216 (statement of Sen. Thurman); *id.* at 334 (statement of Rep. Hoar); *id.* at 514 (statement of Rep. Farnworth). Representative Bingham was one of the very few who even seemed to consider that a state court action could be based on the federal Constitution, no less a federal statute, *id.* at App. 85 (statement of Rep. Bingham).

Even a century later, when Congress was debating whether or not to enact the attorney's fees provision of section 1988 of title 42 of the United States Code, there was very

discussion of why or how section 1983 actions were to be treated in state court.

There are many compelling reasons for assuming that Congress, had it considered the issue, would have decided to allow, indeed to encourage, state court litigation of section 1983 actions. One common justification for conferring exclusive federal jurisdiction is a desire for nationwide uniformity of result,<sup>74</sup> a goal inapposite in section 1983 litigation where the issues involved concern the intrastate conduct of state and local officials.<sup>75</sup> Permitting concurrent jurisdiction provides for greater availability of relief in civil rights actions and, thus, generally promotes the purposes underlying section 1983. Section 1983 was created to provide a forum for those who could not obtain relief from their state courts. If the state courts are in fact available, and even preferable to a civil rights plaintiff, there is no reason why that plaintiff should be denied the opportunity to bring such an action in state court, or the state court denied the opportunity to hear it.

This result also promotes interests of comity and federalism. Because section 1983 provides a cause of action against state officials alleged to have deprived individuals of their federal civil rights, federal court adjudication of section 1983 claims is frequently seen as potentially or actually intrusive upon the states' power. Federal judges and their critics alike have often felt uncomfortable about the prospect of federal courts sitting in judgment on state officials or implementing decrees compelling state officials to take or refrain from certain actions.<sup>76</sup> It was the

---

little discussion of the impact of such a provision on the states, or even acknowledgment that the states would be affected. Representative Drinan, who merely commented that the provision would apply in state court, *see* note 34 *supra*, was a rare exception.

<sup>74</sup> Examples of exclusive jurisdiction include 28 U.S.C. § 1334 (1982 & Supp. IV 1986) (bankruptcy proceedings); 28 U.S.C. § 1338(a) (1982 & Supp. IV 1986) (patent and copyright cases); 28 U.S.C. §§ 1335-36 (1948) (fines, penalties, forfeitures or seizures under laws of the United States); 18 U.S.C. § 3231 (1982) (crimes against the United States). *See generally* Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 511 (1957). In all of these instances, there is some need for nationwide uniformity.

<sup>75</sup> *See* text accompanying notes 154-81 *infra* for a discussion of the significance of uniformity in federal civil rights actions.

<sup>76</sup> One district judge hearing a case challenging conditions at the Indiana State Prison plaintively remarked, "This Judge has indicated from the beginning of this case to the present time, a complete and utter distaste for having to cross that Rubicon which separates the federal government from the state government and enter into the morass

experience of federal judges intimately involved in the day-to-day operations of state institutions, such as prisons and hospitals, that led the current Supreme Court to fashion doctrines curtailing federal court intervention.<sup>77</sup> Rightly or wrongly, the Supreme Court has been very sensitive to the urgings of comity and federalism in decisions cutting back the scope of federal court involvement with state officials' civil rights violations,<sup>78</sup> and Congress has acceded.<sup>79</sup>

These same concerns favor encouraging the state courts to police their own state's errant officials if they will do so.<sup>80</sup> There is no comity or federalism problem if a state court finds a state official guilty of a civil rights violation, or if it enforces a detailed decree concerning the operation of a state prison or hospital. The federal courts would be liberated from part of what many view as a burdensome caseload, while the state courts would accept responsibility as guardians of the federal Constitution.<sup>81</sup>

---

of the day to day operation of the prison." *Hendrix v. Faulkner*, 525 F. Supp. 435, 442 (N.D. Ind. 1981), *aff'd in part and vacated in part sub nom.*, *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

For general discussion of the problem of federal court intervention into the operation of state institutions, see ADVISORY COMM'N ON INTERGOV'TAL RELATIONS, A FRAMEWORK FOR STUDYING THE CONTROVERSY CONCERNING THE FEDERAL COURTS AND FEDERALISM 13-22, 46-49 (1986) (a summary of the problems involved and proposals for a study to assess the extent and impact of federal court intervention); Kaufman, *The Anatomy of Decisionmaking*, 53 *FORDHAM L. REV.* 1 (1984) (another federal judge's view of the tensions and responsibilities in federal court litigation concerning state institutions); Mishkin, *Federal Courts as State Reformers*, 35 *WASH. & LEE L. REV.* 949, 967-71 (1978) (discussion of reasons underlying federal courts' relative lack of inhibition regarding injunctive relief in the context of state institutional litigation).

<sup>77</sup> Dramatic limitations on relief arising out of institutional litigation include *Penhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (limitation on federal injunctive relief in case involving state mental hospital); and *Parratt v. Taylor*, 451 U.S. 527 (1981) (restrictive definition of fourteenth amendment due process claim in case involving state prison).

<sup>78</sup> See Rudenstine, *supra* note 2, at 474-79.

<sup>79</sup> Congress has not overruled these restrictive Supreme Court interpretations of the civil rights statutes.

<sup>80</sup> By suggesting that the state courts should be encouraged to exercise their concurrent jurisdiction over section 1983 actions, I do not intend to endorse the restrictions the Supreme Court has imposed on federal court litigation. I am not suggesting, as the Court sometimes seems to, that the state courts should be the only forum available for this litigation, but simply that they should be an available, and perhaps even a preferred, forum.

<sup>81</sup> See Bator, *The State Courts and Federal Constitutional Litigation*, 22 *WM. & MARY L. REV.* 605, 624, 627-29 (1981) (state courts must be afforded an appreciation of their role in adjudicating constitutional claims); Hart, *The Power of Congress to Limit*

Encouraging state court civil rights litigation also serves the important function of allowing more efficient litigation of civil rights cases. The substantial overlap of section 1983 actions and state tort actions has already been noted,<sup>82</sup> as has the fact that a plaintiff who wishes to consolidate state and federal claims arising out of a single incident may only be able to do so in state court.<sup>83</sup> In light of the ever increasing number of restrictions on the availability of federal relief, encouraging plaintiffs to litigate in state court may be the only way to avoid duplicative litigation.<sup>84</sup>

Given all of these rationales for concurrent jurisdiction — comity, efficiency of adjudication, plaintiff's choice of forum, and expansion of remedies for civil rights violation — and the

---

*the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (state courts as the ultimate guarantors of federal constitutional rights).

At least one member of Congress believed that after the Civil Rights Act of 1871 was enacted, "the tumbling and tottering states [would] spring up and resume the long-neglected administration of law in their own courts, giving, as they ought, themselves, equal protection to all." CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871) (statement of Rep. Coburn).

<sup>82</sup> See note 8 *supra*.

<sup>83</sup> See note 9 *supra*.

<sup>84</sup> As one example, take a prisoner's claim for good time credit. Because a request for injunctive relief is considered a challenge to the fact or duration of confinement, see *Preiser v. Rodriguez*, 411 U.S. 475 (1973), such a claim may not be brought under section 1983, but must be brought under the habeas corpus statutes, 28 U.S.C. §§ 2241 & 2254 (1982), and is therefore subject to the requirement that state court remedies be exhausted. *Preiser*, 411 U.S. at 491-98. If a prisoner wishes to allege that he was subject to an unconstitutionally conducted prison disciplinary proceeding at which his punishment was deprivation of good time credit, he may wish damages for the violation of his constitutional rights, as well as injunctive relief. While the claim for injunctive relief may not be raised in federal court until it has been submitted to the state courts under *Preiser*, the claim for damages is a proper section 1983 claim and may be raised in state or federal court. Raising both claims in state court might result in the damages claim being collaterally estopped in a later federal court proceeding, see *Allen v. McCurry*, 449 U.S. 90 (1980). Therefore, the Supreme Court invites dual litigation in state and federal court for plaintiffs who do not wish to relinquish the opportunity to have the federal court rule on both claims, see *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974). This simultaneous litigation then poses a new complex of problems connected with the order of proceeding and the collateral estoppel consequences of different circumstances. See, e.g., *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986) (damages claim raised in federal court after case was litigated in state court was not res judicata where damages were unavailable in the state court action).

One way to avoid these problems is to trust the state courts with the entire package of claims. Another solution is for Congress to address some of the holes and anomalies the Court has created in federal court civil rights litigation and make the federal courts a more fully available forum.

fact that Congress only created a federal remedy to address what it saw as the states' abdication of the responsibility to entertain civil rights litigation, it seems clear that the state courts should be encouraged to exercise their concurrent jurisdiction as much as possible.

## 2. 42 U.S.C. Section 1988 and Choice of Law

Although not mentioning the state courts, Congress provided a set of instructions to govern the borrowing of state law for civil rights actions brought in federal court.<sup>85</sup> Because the provisions of section 1988 are significant, little-known, and profoundly mysterious, they deserve to be set out in text:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication,

---

<sup>85</sup> Section 1988 probably was intended to apply only in federal court. Section 1988 begins with the words: "The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this Title . . . shall be exercised and enforced in conformity with the laws of the United States . . ." 42 U.S.C. § 1988 (emphasis added). Of course, since Congress had not explicitly conferred concurrent jurisdiction on the state courts, one might reason that the lack of reference to state courts should not be regarded as conclusive, and that any instructions issued to the federal courts in conjunction with section 1988 cases should also be presumed concurrent.

In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the Court applied section 1988 to a state court civil rights action, although without discussing its reasons for doing so. Subsequent cases take a more literal and conservative approach to section 1988, as recommended by Justice Harlan in his dissent in that case, *see id.* at 256. *See* note 88 *infra*.

Professor Steinglass assumes that *Sullivan* is still good law and that section 1988 therefore does apply in state court. *See* S. STEINGLASS, *supra* note 4, at 489. *See also* Walker v. Maruffi, 105 N.M. 763, 737 P.2d 544 (N.M. Ct. App.), *cert. denied*, 105 N.M. 707, 736 P.2d 985 (1987). The wording of section 1988, requiring the court to apply federal law except where it is "deficient" or "not adapted" makes little sense in the context of state court. Professor Steinglass recognizes this in explaining that the state court's inquiry into deficiency should be "necessarily narrower" than a federal court's because much suitable federal law will exist but not apply in state court. Steinglass, *supra* note 4, at 489. The only provision of section 1988 that makes sense in the state court context is the inconsistency clause, which is superfluous, since the supremacy clause would prohibit the state courts from applying any law, whether federal or state, inconsistent with section 1988.

For these reasons, I conclude that *Sullivan*, which has been effectively overruled in other respects, and which never seemed to recognize that applying section 1988 to the state courts represented a decision, is not a reliable basis for finding section 1988 applicable to the state courts. Accord Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1181 (1986).

shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution or laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty . . . .<sup>86</sup>

The few commentaries on this provision demonstrate conclusively that no one knows what it means. The language is baroque, and the legislative history of little help.<sup>87</sup>

The Supreme Court first interpreted section 1988 as authorizing a court to choose between state and federal law, depending on which best served the goals of section 1983.<sup>88</sup> More recently, however, the Court has interpreted section 1988 as establishing a three-step inquiry:

First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum

---

<sup>86</sup> 42 U.S.C. § 1988.

<sup>87</sup> One commentator, Theodore Eisenberg, argued that the statute is so bizarre that it cannot possibly mean what it says and therefore must mean something altogether different. He proposed that section 1988 be deemed irrelevant to section 1983 actions and applicable only in cases brought under state law and removed to federal court. See Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980) (a thorough analysis and *reductio ad absurdum* of the statute); see also Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 604-11 (1985) (on the ambiguity of the legislative history).

<sup>88</sup> *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1962), involving claims under sections 1981 and 1982, interpreted section 1988 to permit a state court to choose between state damages law and federal common law on damages, and to adopt whichever would better serve the goals of the civil rights statutes. *Id.* at 240. Justice Harlan, in dissent, took issue with the view that a choice is involved, interpreting section 1988 as establishing a preference for federal law where it exists, and dictating the use of state law where it does not. *Id.* at 256-57 (Harlan, J., dissenting). Current law reflects Harlan's view. See, for example, *Robertson v. Wegmann*, 436 U.S. 584 (1978), which required a federal court to borrow state survivorship law less favorable to plaintiff than existing federal common law. The *Robertson* dissent, Justice Blackmun, joined by Justices Brennan and White, argued for a return to the *Sullivan* rule and a freer choice between federal and state law. *Id.* at 596-600 (Blackmun, J., dissenting).

state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and the laws of the United States."<sup>89</sup>

Under this approach, state law could play a very significant role in section 1983 litigation for it would govern whenever federal law is "deficient" (so long as the state law were not itself inconsistent with federal law or policy). One might then infer that Congress was not particularly concerned with nationwide uniformity of collateral law in section 1983 adjudication, even in federal court, and that Congress was willing for the states to play a significant role in creating collateral law for section 1983.<sup>90</sup>

The Supreme Court, however, has interpreted section 1988 in ways that minimize the impact of state law, possibly more than Congress would have intended, in order to serve the goal of uniformity. These interpretations include a relatively narrow definition of what constitutes a "deficiency" in federal law. According to the Supreme Court, the common law existing at the time of enactment of the Civil Rights Act should be deemed part of section 1983, on the theory that Congress was aware of such common law and did not disown it.<sup>91</sup> Thus, federal law is not "deficient" if common law predating the enactment of section 1983 existed.<sup>92</sup> For example, in *Martinez*, the Court might have

---

<sup>89</sup> *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984).

<sup>90</sup> This is the view of one commentator who sees the statute as Congress's compromise between the interests of federalism and promotion of civil rights, and urges greater use of state law in section 1983 litigation. Coleman, 42 *U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 *IND. L. REV.* 665, 668, 692-712, 733 (1986).

Professor Kreimer, on the other hand, reads section 1988 differently. Finding it surprising that a Congress suspicious of state law would have commanded extensive use of state law in section 1983 actions, he proposes that the reference in section 1988 to "the common law" be construed as referring not to the common law of the states, but to federal common law, thereby authorizing the federal courts to create federal common law in civil rights cases. Kreimer, *supra* note 87, at 615-16, 618-28. See note 102 *infra*.

<sup>91</sup> See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (If Congress had intended to displace the common law of immunities prevalent in 1871, Congress would have done so explicitly.).

<sup>92</sup> Here again, the early *Sullivan* case had taken a different view. The majority seemed to assume that federal law was "deficient" on the issue raised — the measure of compensatory damages in civil rights actions — because Congress had not provided any specific law on damages, and that it was, therefore, necessary to look to state law. *Sullivan*, 396 U.S. at 240. The law of damages is now considered intrinsic to section 1983. See text accompanying notes 97-98 *infra*.

taken the position that federal law is deficient on the issue of immunity defenses because section 1983 itself does not speak to the issue of immunities,<sup>93</sup> and then, under section 1988, looked to applicable state law (so long as that law was not inconsistent with the purposes of section 1983).<sup>94</sup> But because common-law immunities are deemed to have survived the passage of section 1983, the Court does not refer to state law to determine when a defendant may claim immunity.<sup>95</sup> Instead, the Court has created an entire federal common law of immunities, including a great deal of case law on novel issues, which is deemed to be part of the substance of section 1983.<sup>96</sup> The Court has also created a common law of damages<sup>97</sup> that it construes as integral to section 1983, rather than looking to state damages laws.<sup>98</sup>

---

<sup>93</sup> See Coleman, *supra* note 90, at 723-26.

<sup>94</sup> In *Martinez*, the Court presumably would have found the state immunity statute to be inconsistent with the purposes of section 1983, as it precluded suit against the state officials involved. The Court then, under section 1988, would have arrived by a different route at the necessity of inventing federal common law to replace the burdensome state law. See Eisenberg, *supra* note 87, at 520 n.82 (questioning what law does apply if state law is considered and then rejected under section 1988). Under this approach, it would be clear that the Court's substitute for state law could be derived from modern policies, and not tied to the law of 1871. However, although the Court uses the common law in existence in 1871 as an excuse to ignore the section 1988 reference to state law, the Court has not been shy about modernizing the federal common law to be applied. See Kreimer, *supra* note 87, at 607-11, for a discussion of the appropriate role of the common law of 1871 in section 1983 litigation.

<sup>95</sup> In *Briscoe v. LaHue*, 460 U.S. 325, 326, 334 (1983), Justice Stevens described the question of witnesses' immunity as one of "statutory construction" of section 1983.

<sup>96</sup> See, e.g., *Pulliam v. Allen*, 466 U.S. 522 (1984) (judicial immunity); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Dennis v. Sparks*, 449 U.S. 24 (1980) (conspirators' immunity); *Supreme Court v. Consumers Union*, 446 U.S. 719 (1980) (legislative immunity); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (municipal immunity); *Butz v. Economou*, 438 U.S. 478, 512-14 (1978) (judicial immunity); *Stump v. Sparkman*, 435 U.S. 349 (1978) (same); *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials' immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (hospital administrators' immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (school officials' immunity); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (various state officials' immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (judicial and police officials' immunity); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity).

<sup>97</sup> See, e.g., *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive damages unavailable against municipality); *Carey v. Piphus*, 435 U.S. 247 (1978) (nominal damages).

<sup>98</sup> As *Sullivan* had suggested, see note 88 *supra*, not imposing a blanket federal rule would give the states the opportunity to be more generous than federal law requires. See *Monessen S.W. Ry. Co. v. Morgan*, 108 S. Ct. 1837 (1988), in which a state was prohibited from giving an FELA plaintiff the advantage of a more profitable state law on dam-



While federal law clearly is deficient in not providing a statute of limitations for section 1983 cases,<sup>99</sup> the Court, in *Wilson v. Garcia*,<sup>100</sup> found that the characterization of section 1983 for purposes of choosing a statute of limitations is also a matter of federal law.<sup>101</sup> The Court chose to characterize section 1983 as most closely resembling a personal injury claim, so although the state legislatures do choose the length of the limitations period, state common law plays no role in selecting a statute of limitations.

Expanding the scope of the substance of section 1983 avoids the use of much state law in federal court section 1983 actions despite Congress's evident willingness in section 1988 to contemplate use of state law.<sup>102</sup> Why does the Court find this result de-

---

ages because the law of damages governing FELA claims was deemed to be exclusively federal. See text accompanying notes 102-06 *infra*.

<sup>99</sup> By way of contrast, Congress has provided statutes of limitations for such federal actions as antitrust actions under 15 U.S.C. § 15(b) (1982), and FELA actions, 45 U.S.C. § 56.

<sup>100</sup> 471 U.S. 261 (1985).

<sup>101</sup> As was the case in *Martinez and Thiboutot*, see text accompanying notes 27-36 *supra*, the Court portrayed its decision as a simple matter of statutory interpretation. *Id.* at 278-79.

<sup>102</sup> Professor Kreimer, interpreting section 1988 as invoking federal rather than state common law, suggests that the Court should create federal common law to govern civil rights litigation except as to issues governed by state statutes (and constitutions, presumably). See Kreimer, *supra* note 87, at 630-32. This approach, he argues, is at least as consistent with the history of section 1988 as any other, and provides the virtue of allowing the courts to create new law to meet new situations and to provide uniformity of approach. His compromise does give the federal courts some basis for deciding when to use state law, and when not, and harmonizes the Court's federalizing approach to issues like immunities and damages with its attempt to follow state law on issues like statutes of limitations. However, like all compromises, this one has an element of arbitrariness. What reason could there be for Congress to have concluded that state statutes but not state common law should apply in federal civil rights actions? Cf. Hart, *supra* note 24, at 512 (describing the significance of the *Erie* case as inhering in the federal courts' attempt to respect the state's division of authority between its courts and its legislature).

The idea that statutory law may in some instances be less likely to disadvantage civil rights plaintiffs than state common law seems to be reflected in the Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), to tie section 1983 to the statutes of limitations for personal injury. A state legislature is unlikely to reduce its personal injury statute of limitations unreasonably, because much more than section 1983 litigation would be affected. A court making a choice in a particular case, unlike the legislature, has no political check to restrain such a decision and might be more likely to discriminate against civil rights plaintiffs. But again, the Court can use the inconsistency provision of section 1988 to overcome such discrimination, whether by case or by statute.

I think the Court's different approach to issues like immunities and damages, on the

sirable? If the Court were to use section 1988 more generously and apply state law more often instead of finding or inventing federal common law then deemed to be part of section 1983, the state courts and legislatures would have the power to control federal civil rights litigation by controlling their own law. This might create a problem if the states had or created procedures eviscerating civil rights actions. But section 1988 already deals with that potential problem by providing that state law may be rejected if it is inconsistent with the policies of section 1983. The Court's approach, therefore, provides no more protection against hostile state law.

At the same time, it precludes the possibility of a state applying more generous law. If a state has a damages rule that would be more generous to civil rights plaintiffs, not only would the federal court be foreclosed from selecting that rule, but the state court would not be permitted to use the rule in a section 1983 action either, because federal damages law is deemed to be part of section 1983 itself.<sup>103</sup> The Court has already held in an FELA case that the state may not afford a federal claim plaintiff the benefit of a more generous state law on damages.<sup>104</sup> Similarly, while the Court's decision in *Wilson* protects against unsuitably short statutes of limitations intended to protect state

---

one hand, and to the state laws which it employs under section 1988, on the other, is based on an attempt to distinguish between substance and procedure rather than upon a distinction between statutes and common law. Professor Kreimer perceives *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), whose approach of applying a generous dose of federal common law in diversity litigation was in effect when the civil rights acts were framed, as informing Congress's view of the status of federal common law. See Kreimer, *supra* note 87. I think the current cases reflect the attitude of later diversity cases, see text accompanying notes 229-31 *infra*, by trying to employ federal common law on issues closely connected with Congress's purposes in enacting the predecessor of section 1983 — like the question of which state and local officials could avoid liability through friendly state law, or the breadth of availability of damages — and referring to state law for "procedural" matters. Under Professor Kreimer's approach, any state statute favorable to civil rights plaintiffs could apply, although unfavorable statutes would be "inconsistent" with federal policies; under the Supreme Court's approach, state statutes do not apply if they concern the generously defined "substance" of section 1983, regardless of whether they favor plaintiffs. To that extent, I prefer Professor Kreimer's thesis, although I do find it arbitrary to permit the state legislatures and not the state courts to be generous to civil rights litigants.

<sup>103</sup> See *Moor v. County of Alameda*, 411 U.S. 693 (1973), and note 12 *supra*.

<sup>104</sup> This was the situation in *Monessen S.W. Ry. Co. v. Morgan*, 108 S. Ct. 1837 (1988). See text accompanying notes 252-54 *infra* for a discussion of whether the approach of *Monessen* and *Moor* is correct.

officials or to discriminate against civil rights plaintiffs,<sup>105</sup> it might also be interpreted as preventing the state or federal court from adopting a more generous statute of limitations.<sup>106</sup>

The Court's principal rationale for the decision to maximize federal common law and minimize borrowing of state law seems to be uniformity.<sup>107</sup> In deciding under section 1988 whether to borrow state law or to create federal law, the Court has created a checklist of values which, properly, begins with the goals underlying section 1983, mentions federalism, and goes on to include a desire for uniformity.<sup>108</sup> Uniformity is praised as fostering consistency in litigation and also as serving the goal of eliminating needless litigation over which law to use.<sup>109</sup> The federal common-law approach enforces uniformity in the federal courts and state courts alike, but sometimes at the expense of procedures that might benefit civil rights plaintiffs.

Even though the Court has limited the applicability of section 1988, there are still areas where state law is borrowed by the federal courts in section 1983 actions: statutes of limitations,<sup>110</sup> tolling provisions,<sup>111</sup> survivorship statutes,<sup>112</sup> and collateral es-

---

<sup>105</sup> See, e.g., *Burnett v. Grattan*, 468 U.S. 42 (1984), where the Court struck down a six-month state statute of limitations as being too short.

The concern that a statute of limitations might discriminate against civil rights plaintiffs by being overly protective of state or local officials was expressed by the Court in *Felder v. Casey*, 108 S. Ct. 2302 (1988).

<sup>106</sup> See, e.g., *Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wis. 1985) (a pre-*Wilson* case applying a six-year statute of limitations for injury to character or rights instead of the three-year statute governing personal injury that would have to be applied under *Wilson*).

It has been generally assumed that *Wilson* would apply in state court litigation also and bind state courts. See cases cited in *Felder*, 108 S. Ct. at 2315. Because *Wilson* is based not on an interpretation of the substance of section 1983, but on the deficiency of federal law under section 1988, I see no reason why the state courts should not be able to offer section 1983 plaintiffs a more generous limitations period.

<sup>107</sup> See *Wilson v. Garcia*, 471 U.S. 261, 271-75 (1985). Cf. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 953 (1986) (need for uniformity is an important concern in the decision whether to create federal common law).

<sup>108</sup> See *Wilson*, 471 U.S. at 271-75; *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983).

<sup>109</sup> *Wilson*, 471 U.S. at 275. This interest will be explored more fully in Section II *infra*.

<sup>110</sup> See *Wilson v. Garcia*, 471 U.S. 261 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984).

<sup>111</sup> *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

<sup>112</sup> *Robertson v. Wegmann*, 436 U.S. 584 (1978). In *Robertson*, the dissenting jus-

toppel law.<sup>113</sup> At least in these areas, if the Court has properly interpreted section 1988, Congress may be deemed to have intended the law of the individual states to apply in federal court. This is significant because Congress must therefore have concluded first, that the states may be permitted some measure of control over section 1983 litigation, and second, that nationwide uniformity of procedure in section 1983 is not an overriding value.<sup>114</sup> From state to state, the period provided by the applicable statute of limitations may vary, allowing a plaintiff in New York three years to commence a section 1983 action<sup>115</sup> and a plaintiff in Georgia only two.<sup>116</sup> Congress presumably embraces

---

tices complained that the Court, unusually, was too anxious to borrow a restrictive state survivorship law when, under the theory of the immunities and damages cases, federal law does exist on survivorship because there is federal common law. *Id.* at 596-97 (Blackmun, J., dissenting). Compare *Carlson v. Green*, 446 U.S. 14 (1980), a *Bivens* action against a federal official in which, given the inapplicability of section 1988, the Court did use a federal common-law right of survivorship.

Professor Neuborne finds *Robertson* distinguishable from the cases imposing federal common-law rules because the defendants were not responsible for the decedent's death. Therefore, their conduct would not be likely to have been affected by adoption of a more generous rule of survivorship. Neuborne, *supra* note 4, at 779. Professor Meltzer rejoins that a survivorship rule is particularly likely to affect civil rights violators, for a potential defendant beating a potential plaintiff will have an incentive to escalate the use of deadly force if the death of the potential plaintiff will prevent liability. Meltzer, *supra* note 85, at 1172-73. For further discussion of whether survivorship rules are integral to the purposes of section 1983, compare *Robertson*, 436 U.S. at 592 (majority opinion) with *id.* at 600 (dissenting opinion).

On the subject of wrongful death actions in the state courts, see generally Steinglass, *Availability of Section 1983 as Remedy Creates Confusion in State Courts*, Nat'l L.J., June 2, 1986, at 20, col. 1.

<sup>113</sup> *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984).

<sup>114</sup> If one accepts Professor Kreimer's reading of section 1988 as a statute designed to foster creation of federal common law, see note 87 *supra*, rather than Professor Coleman's interpretation of the statute as primarily an instruction to refer to state law, see note 90 *supra*, then the statute does not, as Professor Kreimer says, foreclose all interest in nationwide uniformity, Kreimer, *supra* note 87, at 620, 630. Professor Eisenberg's desire to reconstruct section 1988 is based in part on his conclusion, similar to Professor Kreimer's, that section 1988 should not be read as a wholesale defederalization of civil rights litigation. Eisenberg, *supra* note 87, at 509-15.

I do not believe that nationwide uniformity is an important goal in civil rights litigation. See text accompanying notes 154-73 *infra*. Accord Meltzer, *supra* note 85, at 1181 n.267; Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250-54 (1978). But see Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 35-36 (1975).

<sup>115</sup> N.Y. CIV. PRAC. L. & R. § 214(5) (McKinney Supp. 1987); see 423 South Salina Street, Inc. v. Syracuse, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), cert. denied and appeal dismissed, 107 S. Ct. 1880 (1987).

<sup>116</sup> GA. CODE ANN. § 3-1004 (1974).

this diversity of procedure. If anything, given the Supreme Court's generous attitude toward its power to create federal common law to govern section 1983, Congress may have intended an even greater utilization of state law and, hence, an even greater range of variation in the adjudication of section 1983 actions in the various federal courts.

On the other hand, section 1988 does promote intrastate uniformity. The federal courts will differ from each other but resemble the state courts in their own jurisdictions. On this basis, the Court seems to have assumed that Congress prizes consistency in adjudication within a given state to an extent that would justify compelling the state courts to use federal procedures regardless of whether they favor or disfavor civil rights plaintiffs.<sup>117</sup> But Congress's opinion on this issue is no clearer than anything else about section 1988. It may be that Congress was concerned more with predictability than uniformity.<sup>118</sup> If Congress had authorized the federal courts to choose the procedure most favorable to civil rights plaintiffs, a great deal of litigation would have been engendered about what procedures to use. The Court's approach avoids this litigation, although it does not avoid litigation to determine when federal law is deficient or state law inconsistent with section 1983. It is noteworthy that section 1988, at least as interpreted by the Court, seems to place a higher value on some interest other than the impact of a procedure on a plaintiff's chances of prevailing in a civil rights action, but the precise nature of that countervailing interest is unclear.

Section 1988 seems to be the Supreme Court's chief piece of evidence that Congress values intrastate uniformity and, therefore, would be concerned if state court section 1983 adjudication differed from federal court adjudication. The provision does not bear that much weight.

### 3. Removal

As noted above, one clear purpose underlying section 1983 was Congress's desire to give civil rights plaintiffs the opportu-

---

<sup>117</sup> See *Felder v. Casey*, 108 S. Ct. 2302 (1988); *Wilson v. Garcia*, 471 U.S. 261 (1985).

<sup>118</sup> Or, it bears repeating, Congress may not have intended section 1988 to apply in the way the Court has been applying it at all. See note 87 *supra*.

nity to choose a federal forum.<sup>119</sup> In section 1983 actions, a plaintiff's choice of forum is absolute if the choice is federal court, but not if the choice is state court. Defendants have the power to remove a section 1983 action to federal court.<sup>120</sup> Why should this be? In the past, Congress has given certain plaintiffs with a federal cause of action an absolute and final choice of forum. For example, if a plaintiff commences an FELA action in state court, the defendant is not permitted to remove the action to federal court.<sup>121</sup> Why would Congress have decided that civil rights plaintiffs were not to have the same unilateral choice FELA plaintiffs have?

Here again, congressional silence forces us to guess, and my guess is that Congress simply did not consider this issue. Only a few members of the 42nd Congress seemed to recognize that a plaintiff might choose to raise a section 1983 action in state court.<sup>122</sup> No one seems to have considered the even more astonishing possibility that a defendant might then choose to retreat to federal court. Questions of removal, or of who should have the final choice of forum, simply did not arise.

If Congress had considered this possibility, are there reasons why Congress might have concluded that the plaintiff's choice of a state court forum should be subject to veto by the defendant? Given the nature of section 1983 litigation, the purpose of concurrent jurisdiction, the assumed desirability of encouraging state court litigation of civil rights claims (particularly where plaintiff prefers state court), and the fact that the intrastate behavior of state officials is at stake, I see no convincing reasons.

The usual reasons for permitting defendants to remove fed-

---

<sup>119</sup> See note 69 *supra*.

<sup>120</sup> The general federal removal statute, 28 U.S.C. § 1441(a) (1982), provides for removal of any civil action of which the federal courts have original jurisdiction "except as otherwise expressly provided by Act of Congress."

<sup>121</sup> See *id.* § 1445(a) ("A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45 [FELA], may not be removed to any district court of the United States.").

The same is true in antitrust cases, see 15 U.S.C. § 77(v) ("No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."); in Jones Act cases, see 46 U.S.C. § 688 (1982); in common carrier suits under the Interstate Commerce Act involving an amount in controversy under \$10,000, see 28 U.S.C. § 1445(b); and in worker's compensation cases, see *id.* § 1445(c).

<sup>122</sup> See note 73 *supra*.

eral claims to federal court are first, to mollify defendants who fear that their federal claims or defenses might not be honored by the state court.<sup>123</sup> But the defendants here are state and local officials.<sup>124</sup> If state courts have any bias, it is generally assumed that they will be more hostile to civil rights plaintiffs than to official defendants.<sup>125</sup> The second reason is the presumed expertise of the federal courts in analyzing federal questions. State courts have been gaining experience with interpreting the federal Constitution.<sup>126</sup> But to the extent that federal constitutional law is unfamiliar to the state courts, it is probably plaintiffs who will suffer.<sup>127</sup> The American Law Institute has hypothesized that a state court unfamiliar with federal law might be overly expansive in reading federal law "through misunderstanding as well as through lack of sympathy."<sup>128</sup> This speculation does not provide

---

<sup>123</sup> In diversity cases, for example, a diverse defendant who is a resident of the forum state may not remove an action to federal court, while a diverse defendant who is not a resident of that state may remove. See 28 U.S.C. § 1441(b). The reason underlying this distinction is presumed to be that nonresidents will need "protection from the local prejudices of state courts," while residents will not. See C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3721, at 187 (2d ed. 1985).

<sup>124</sup> The defendants, therefore, would be in the same position as the resident diverse defendants and presumably would not need the assistance of a removal statute to assure a fair hearing.

<sup>125</sup> The state courts are not indifferent in civil rights cases, as they might be in some other type of federal litigation. State court judges might feel a sense of identification with the state official defendants or anticipate a more personal reason to restrict official liability under section 1983. State court judges are themselves subject to section 1983 actions and, although they are immune from suits for damages, are not immune from injunctive relief or court awards of attorney's fees. See *Pulliam v. Allen*, 466 U.S. 522 (1984). The possible empathy of state court judges with defendants might be exacerbated in a case in which plaintiff was a noncitizen of that state.

<sup>126</sup> See Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821, 824-30 (1981) (commenting on the extent of state court experience with federal constitutional issues, even as compared with federal court experience in some areas).

<sup>127</sup> See *Neuborne*, *supra* note 11, at 1105-06.

<sup>128</sup> See A.L.I. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 192 (1969) [hereinafter A.L.I. STUDY].

On this theory, the ALI rejected the positions reflected in *Fraser*, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73, 83-84 (1950) and in *Wechsler*, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 233-34 (1948), that defendants should be permitted to remove only if they are raising federal defenses, and not on the basis of a federal claim the plaintiff decided not to bring in federal court. See A.L.I. STUDY, *supra*, at 191-92, 194. The ALI rejected this position despite its recognition that fear of overly expansive state court readings of federal rights would account for only a very small number of removal cases (with tactical reasons accounting for many more). *Id.* at 192. In reaching this conclusion, the ALI seemed overly

enough of a reason for allowing civil rights defendants to overrule plaintiff's choice of forum. State courts are trusted with federal law in FELA and antitrust cases, and their decisions in section 1983 cases are generally subject to the review of the state appellate courts, the Supreme Court, and Congress.

A third reason to allow removal in cases either the plaintiff or defendant might have brought in federal court is to minimize the consequences of a race to the courthouse. In some cases, the state court plaintiff may simply have outrun the defendant, who would have brought a federal question to be decided in federal court.<sup>129</sup> Removal gives the losing contestant a second chance to invoke federal jurisdiction. But there is no race to the courthouse in section 1983 actions. It is unlikely that section 1983 defendants would be either able or anxious to enter federal court as plaintiffs to litigate the constitutionality of their behavior.<sup>130</sup> The choice of forum is the plaintiff's because only the plaintiff is likely to have an actionable federal claim.

Finally, federal court litigation of various federal questions is sometimes encouraged to promote uniformity in the interpretation of federal law.<sup>131</sup> This goal is sensible when nationwide consistency is significant, as in a case in which an interest of the

---

impressed with the fact that these removal cases would not add considerably to the federal courts' caseload, *see id.* at 194, and insufficiently attentive to the plaintiff's right to choose a forum. Even if the ALI had accepted the Fraser/Wechsler position, defendants in section 1983 actions could still remove on the basis of their federal defenses.

<sup>129</sup> For a colorful example of a pitched battle between plaintiff and defendant over whether litigation would take place in federal or state court, *see* *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), in which plaintiff sued defendant in state court, claiming that plaintiff had no right to arbitration, an issue controlled by federal law, and defendant then filed a diversity action in federal court seeking an order to compel arbitration. The issue became whether the federal court should stay its action pending resolution of the state court proceeding. Despite having lost the initial race to the courthouse, the defendant could have achieved a federal court resolution of the issues without these complications if the case had been removable.

<sup>130</sup> State officials wishing to know whether they could constitutionally require school prayer or establish drunk driving roadblocks, or whether they were immune from suit for a false arrest they believed legal, would probably be viewed as seeking an advisory opinion. It is only the injury to plaintiffs that gives rise to a case or controversy actionable in federal court. It is difficult to imagine a case where state or local officials could successfully frame an affirmative federal court action to litigate the conduct they would otherwise litigate as defendants. They would, thus, have no ability, and perhaps no desire, to race to federal court.

<sup>131</sup> *See* Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 759 (1986) (the need for uniformity of decisions on federal law as a basis for removal of federal questions, whether raised as claims or defenses).



federal government itself is at stake.<sup>132</sup> But nationwide consistency is not particularly relevant with respect to collateral law in section 1983 actions.

In situations in which there is an argument that federal jurisdiction should be exclusive, providing concurrent jurisdiction and allowing defendants to remove is a reasonable compromise. Concurrent jurisdiction allows the states an opportunity to hear cases, but also allows either party to invoke federal jurisdiction if the fears that might have prompted exclusive federal jurisdiction seem justified in a particular case. In the context of section 1983, there is no good argument for exclusive federal jurisdiction,<sup>133</sup> and no reason to believe that section 1983 defendants will need a federal court retreat to achieve a fair hearing on the federal issues involved.

Why do defendants actually remove section 1983 cases to federal court? There are many strategic reasons underlying section 1983 defendants' removal petitions, none of which merits congressional deference. Federal court may offer procedures favorable to the defense,<sup>134</sup> or a particular judge defendants believe will be sympathetic to them.<sup>135</sup> Federal court may be more convenient for defendants or their attorneys, or federal procedure more familiar. Put negatively, federal court may be incon-

---

<sup>132</sup> Federal officers are among the principal beneficiaries of the federal removal statutes. The officers may remove actions concerning any act under color of office or in the performance of their duties, *see* 28 U.S.C. §§ 1442 & 2679(d).

Even those who criticize removal law in other areas would make an exception for federal officers, *see* Wechsler, *supra* note 128, at 234.

<sup>133</sup> *See* text accompanying notes 74-84 *supra* for an argument that concurrent jurisdiction is highly desirable in this context.

<sup>134</sup> These procedures might not be so unfavorable to plaintiff as to be inconsistent with federal law, but still might be preferable to defendants.

<sup>135</sup> A removal petition will be filed after the commencement of the state court suit, so the defendant, unlike the plaintiff on filing the suit, is likely to know to which state court judge the case has been assigned before deciding whether to remove.

In some cases, defendants may be able to make a decision about which forum they prefer based on additional experience with the judge or proceedings in the case. In the lower court proceedings in *Anderson v. Creighton*, 483 U.S. 635 (1987), for example, plaintiffs had commenced their *Bivens* action against federal officials in state court. Defendants removed to federal court, where they met with some success. *See* *Creighton v. City of St. Paul*, 766 F.2d 1269, 1271 (8th Cir. 1985), *vacated sub nom.* *Anderson v. Creighton*, 483 U.S. 635 (1987). A defense summary judgment motion was granted by the district court on the ground of qualified immunity, at which point the remaining non-immune defendants moved to remand back to state court and were permitted to do so. 766 F.2d at 1272 n.2.

venient for plaintiffs or unfamiliar to plaintiffs' attorneys — plaintiffs chose state court for some reason. Defendants may file for removal merely to stall or to complicate the litigation in the hope that the plaintiff will run out of stamina or money. The removal statute gives defendants enormous power to generate simultaneous litigation in state and federal court, or at least prolonged litigation over which court will hear which claims,<sup>136</sup> until the only way the plaintiff can regain control of the litigation and end up with just one state court lawsuit is to drop the section 1983 claim.<sup>137</sup> This situation hardly furthers the goals of the civil

---

<sup>136</sup> Proceedings on the removal petition itself add a stage to the litigation. Once a defendant has filed a removal petition, the plaintiff, who presumably prefers state court, can file a petition to remand to state court, complicating matters further in order to try to accomplish the initial goal of having the state court hear the case. A motion to remand is not likely to succeed if federal issues predominate. See *Pueblo Int'l, Inc. v. De Cardona*, 725 F.2d 823 (1st Cir. 1984); *Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26*, 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd on other grounds*, 638 F.2d 404, *reh'g denied*, 646 F.2d 714 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

Complications do not end once the case is removed and any remand petition denied. If the complaint includes a state cause of action in addition to the section 1983 claim, the federal court may accept pendent jurisdiction over the state law claim(s). See *Pueblo*, 725 F.2d 823. Nevertheless, the federal court may abstain and invite a state court ruling on state law aspects of the case. See *id.*; see also Werhan, *Pullman Abstention after Pennhurst: A Comment on Judicial Federalism*, 27 WM. & MARY L. REV. 449 (1986), for a thoughtful discussion of the problems caused by the combination of the abstention doctrine and limitations on the federal court's injunctive powers. If the federal claim is dismissed later, the pendent state claims will probably also be dismissed, and will have to be refiled in state court. See *Cook v. Weber*, 698 F.2d 907 (7th Cir. 1983).

Alternatively, the district court might exercise its discretion to remand only the state law claims to state court, causing the plaintiff to have to litigate on two fronts simultaneously. See *Executive Serv. of Miami, Inc. v. Southern Bell Tel. & Tel. Co.*, 514 F. Supp. 430 (S.D. Fla. 1981); *DiAntonio v. Pennsylvania State Univ.*, 455 F. Supp. 510 (M.D. Pa. 1978). In fact, the federal court *should* remand the state claim whenever the relief requested on that claim is an injunction barred in federal court by *Pennhurst*. Avoiding *Pennhurst* may be the reason the plaintiff chose state court in the first place. Simultaneous litigation, in addition to exhausting the time and finances of a not particularly affluent group of plaintiffs, also engenders an endless series of procedural imbrolios. Which court will enter which phase of the litigation first? Should the federal court stay its proceedings pending outcome of the state case? What are the collateral estoppel consequences of various federal or state court decisions? As defendant removal in section 1983 actions increases, these battles are multiplying.

<sup>137</sup> See, e.g., *Austwick v. Board of Educ.*, 555 F. Supp. 840 (N.D. Ill. 1983) (federal claim dismissed voluntarily after denial of petition for remand); *McGann v. Mungo*, 578 F. Supp. 1413 (D.S.C. 1982). The court in *Austwick*, annoyed at the plaintiff for the "forum hopping" caused by defendant's removal and the subsequent remand petition, announced that plaintiff had to choose between the state forum and the federal claim and viewed dismissal of the section 1983 claim with prejudice as appropriate punishment

rights statutes.

The purpose of section 1983 is to make it easier for plaintiffs to vindicate their civil rights. Defendants should not be permitted to undercut plaintiff's choice of a convenient forum. During the debates on the FELA, some members of Congress, anticipating that plaintiffs might wish to go to state court for their federal remedy, expressed concern that a plaintiff who wished to sue in state court should not be inconvenienced by being compelled to go to a federal court, which might sit a great distance away.<sup>138</sup> This concern led to the decision to permit concurrent jurisdiction and to prohibit defendant removal. Had Congress considered concurrent jurisdiction over civil rights actions, a similar conclusion about removal might well have been reached.

Furthermore, if Congress presumably wishes to encourage state courts to attract civil rights litigation, why, if a state court has done so by offering an atmosphere attractive to prospective plaintiffs, should the section 1983 defendant be permitted to burden the federal courts<sup>139</sup> with a case both the plaintiff and the state court want the state court to hear?<sup>140</sup>

If Congress purposefully allowed defendants removal power, then that decision might reflect a congressional unwillingness to allow plaintiffs too much control, and an unwillingness to enforce the plaintiff's claim to a favorable state court forum. But

---

for plaintiff's attempt at "tactical manipulation." 555 F. Supp. at 842-43.

<sup>138</sup> See 56 CONG. REC. 4,034 (1910) (statement of Sen. Borah); S. REP. NO. 432, 61st Cong., 2d Sess. 4040-43 (1910).

The anti-removal statutes are thought to protect plaintiffs' right to choose a state court forum, see *Burnett v. N.Y. Cent. Ry. Co.*, 380 U.S. 424, 434 (1965), to the extent that they even permit an exception to diversity jurisdiction, see *Kansas City S. R. Co. v. Leslie*, 238 U.S. 599, 602 (1915).

<sup>139</sup> Another reason for prohibiting removal in some instances is to spare the federal courts the burden of cases that involve essentially local disputes. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 123, § 3729, at 490.

<sup>140</sup> Accord Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1255 n.134 (1978) (arguing that state courts should be enforcing constitutional norms the federal courts, for institutional reasons not applicable in the state courts, do not enforce fully, and that allowing defendants removal power would improperly restrict the ability of the state courts to fill this function). My argument does not go as far as Professor Sager's because I do not assume that the state courts will be interpreting the substantive federal constitutional guarantees at issue in section 1983 litigation more expansively than the federal courts do, but merely that the state courts may be preferable to plaintiffs for reasons of procedural hospitality, familiarity, or simple geographical convenience.

given that the congressional intent expressed by the removal statutes does not seem truly intentional, I am reluctant to draw conclusions from the existence of defendant's removal power, except for the conclusion that this situation should be rectified.<sup>141</sup>

As consideration of all of these relevant statutes shows, Congress has been so silent on most of the key questions concerning the state courts' role in section 1983 litigation that the Supreme Court's divining of congressional intent in this area verges on the psychic. It is difficult to believe that Congress would not wish to encourage state court litigation of section 1983 actions, a goal the Supreme Court's decisions thus far do promote. It is also difficult to believe that Congress would not wish to give civil rights plaintiffs a meaningful choice of forum, but until Congress speaks more explicitly on that issue, there is little the Court can do to correct this congressional oversight.<sup>142</sup> The Court's decisions thus far have benefited civil rights plaintiffs by compelling the state courts to avoid an overly generous immunity defense, award attorney's fees and forego a restrictive notice of claim statute. These results might well accord with Congress's desire to promote a generous remedy for civil rights violations. But there is little reason to believe that Congress would prize uniformity to the extent of disadvantaging a plaintiff if state procedure were more favorable, or that despite section 1988, Congress would approve of the extent to which the Court has created federal common law to use in civil rights litigation in both federal and state court. Congress might not even approve of its own "decision" about the removal power. And it is certainly unclear where Congress would fall on the continuum be-

---

<sup>141</sup> To what extent the courts can rectify this situation by using their discretion to remand section 1983 cases to state court is a matter of some dispute. The district court in *Young v. Board of Educ.*, 416 F. Supp. 1139 (D. Colo. 1976), ruled that absent a compelling reason for defendant to remove a section 1983 action to federal court, plaintiff's choice of forum should prevail. Although the federal courts are said to take a restrictive view of removal out of respect for the state courts, see C. WRIGHT, A. MILLER & E. COOPER, *supra* note 123, § 3721, at 214-15, most federal courts have found section 1983 actions to be removable at the defendants' discretion. See, e.g., *First Granite City Nat'l Bank v. City of Troy*, No. 87-3692 (S.D. Ill. April 13, 1988); *Aben v. Dallwig*, 665 F. Supp. 523, 525 (E.D. Mich. 1987); *Spencer v. South Fla. Water Mgmt. Dist.*, 657 F. Supp. 66, 67 (S.D. Fla. 1986) (expressly rejecting the argument that defendants must present a compelling reason to justify removal). See generally *Swing, Federal Common Law Power to Remand a Properly Removed Case*, 136 U. PA. L. REV. 583 (1987).

<sup>142</sup> The removal statute permits removal "except as otherwise expressly provided by Act of Congress." 28 U.S.C. § 1441(a) (emphasis added).

tween Hart's position that a state court is a state court is a state court<sup>143</sup> and Neuborne's argument that federal procedure should follow a federal claim into state court wherever it would promote the federal interest at stake.

## II. THE THEORETICAL STRUCTURE

The subject of this section is how the choice of collateral law issues in state court section 1983 actions should be handled. The previous section demonstrated that expressed congressional intent does not resolve this question. If Congress wished to become more explicit about its views, it could enact a new statute, select a standard (favoring Hart or Neuborne, for example) or address some particular issues, like those previously discussed in Section I.<sup>144</sup> Whether Congress elucidates its intent or not, these

---

<sup>143</sup> "[A] state court does not undergo a metamorphosis into a federal court merely because it must decide a § 1983 suit. No matter what the nature of the action before an Indiana state court, it remains a state court. As Gertrude Stein observed, a 'rose is a rose is a rose.'" *Thompson v. Medical Licensing Bd.*, 180 Ind. App. 333, 398 N.E.2d 679, 680 (1979), *cert. denied*, 449 U.S. 937 (1980).

<sup>144</sup> I am assuming, for the purposes of this Article, that Congress could go as far as it wished in imposing federal procedure on the state courts. The FELA cases, discussed in text accompanying notes 184-202 *infra*, interpreted congressional intent as imposing a fairly heavy dose of federal law on the states. The cases never suggested that a constitutional boundary was being approached. At some point, however, if Congress were to go to the extreme, the shadowy constitutional principles that informed the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938) — possibly related to the tenth amendment ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively," U.S. CONST. amend. X) — would arise. On the significance of the constitutional basis of *Erie*, concerning the propriety of imposing federal common law in the adjudication of state substantive claims, see Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702-03 (1974) (tenth amendment does not create state enclave, but simply restates negatively the necessity for the federal government to have a constitutional basis for its actions); Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384-85 (1964) (constitutional basis of *Erie* is not dictum, but necessary part of Court's argument).

Congress's power under the enforcement clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 5, pursuant to which section 1983 was enacted, is regarded as extensive, see, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976) (legislation enacted under section five of the fourteenth amendment overrides the eleventh amendment); *Ex parte Virginia*, 100 U.S. 339, 345-48 (1880) (section five of the fourteenth amendment was intended to expand the powers of Congress and limit the powers of the states), but presumably not limitless.

For more recent case law taking a relatively expansive view of Congress's power to impose federal requirements on the states, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling holding of *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the tenth amendment limits federal authority to interfere with

issues will have to be addressed by the courts on a case-by-case basis.<sup>145</sup>

In *Felder v. Casey*, the Supreme Court began the process of formulating its own approach to these questions. Despite the Court's misleading portrayal of its decision as a simple matter of implementing congressional intent, what the Court actually did in *Felder*, as it must do in any similar case, was to balance the relative state and federal interests involved. Because the *Felder* Court did not acknowledge this, it did not discuss the state and federal interests actually at stake, and in fact appeared to adopt a cavalier attitude toward the state's interest, finding that the state's interest is "not material" in a supremacy clause inquiry. Both the federal and state interests involved are more complex than the Court's opinion suggests and deserve a much more open and honest appraisal. In addition, the Court has posited that uniformity is an important interest that weighs heavily in the balance. If this preoccupation with uniformity abates, as I argue it should, the real question is whether the relative state

---

state sovereignty over labor standards); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (permitting imposition of federal procedural requirements on state utility regulatory authorities). See also Meltzer, *supra* note 85, at 1169 & n.198. An interesting perspective on this issue is brought by Professor Althouse's observation that the states' sphere, rather than being a perceptible and unyielding entity, is what is left after appropriate federal power is exercised. See Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

<sup>145</sup> Whether the Court should be considered less free than Congress to wield the power of the supremacy clause is an important question. I tend to agree with the commentators who argue that the Court should take a more modest role, and, therefore, should be hesitant to supersede state law in the absence of congressional action. See Hart, *supra* note 24, at 497; Meltzer, *supra* note 85, at 1168-69 ("state law is presumptively operative, and if it is to be displaced, ordinarily it must be Congress that does so"); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969) (principles of federalism suggest that presumption of applicability of state law may be displaced only in exceptional circumstances in which congressional purposes require subordination of state law).

Professor Field, who has championed a broad view of the power of the courts to create federal common law, might disagree that the courts should be more hesitant than Congress, given that a statutory source of authority exists in section 1983. See Field, *supra* note 107, at 923-27 (discussing support for the proposition that the federal courts' power to create common law is coextensive with Congress's power to legislate); see also Friendly, *supra* note 144, at 407 ("[S]tate courts must conform to federal decisions in areas where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end."). For a related argument that congressional silence should lead to judicial reluctance to impose concurrent jurisdiction on the state courts, see Sandalow, *supra* note 71, at 207.

and federal interests warrant an approach closer to Hart's, allowing the states to use their own procedures unless they are distinctly in contravention of federal purposes, or an approach closer to Neuborne's, requiring the states to use federal procedures whenever plaintiffs' prospects in civil rights litigation would thereby be enhanced.

My conclusion, somewhere in the middle, but probably closer to the position I have characterized as Hart's, is that the states should be permitted to use their own neutral procedures so long as those procedures are not so inconsistent with the purposes of section 1983 as to warrant judicial exercise of the supremacy clause, regardless of whether those procedures are more or less generous to plaintiffs than federal procedure would have been.

In this section, I will discuss the federal and state interests in the balance, and how they are served or disserved by each of these paradigms. I will then address to what extent other considerations, such as the need for uniformity or concern with efficiency of adjudication, should enter the balance. In the following section, I will discuss the validity of answering the questions posed here by referring to precedent in two purportedly analogous areas of the law — the FELA concurrent jurisdiction cases, and the "mirror image" *Erie* cases.

### A. *The Balance of Interests*

#### 1. Defining the Federal Interest and Choosing a Standard

The initial question is how the federal interest at stake should be defined: in terms of the ultimate goal of deterring civil rights violations, or in terms of the broader instrumental goal of enabling more plaintiffs to win civil rights cases? Is the federal interest at stake here an interest in preventing the states from applying state laws that defeat federal rights, or in compelling the states to apply federal laws that enhance federal rights?

In *Felder*, the difference between these two inquiries was not significant because the notice of claim provision falls into the former category — a state law that tended to annihilate the federal right by disabling plaintiffs from bringing suit at all. Examples of procedures falling into the other category include Pro-

fessor Neuborne's example of class action rules,<sup>146</sup> or discovery rules and rules of evidence. If a state has restrictive class action rules, civil rights plaintiffs would certainly benefit if the state court were to adopt more generous federal class action law. But is it fair to say that less generous state class action rules defeat the rights protected by section 1983? It may be that fewer plaintiffs will prevail in section 1983 claims due to a state court's refusal to certify a class, but it is unlikely that state or local officials will thereby be encouraged to more freely violate civil rights, especially given the fact that those plaintiffs could have circumvented the state rules by going to federal court.

Given Congress's silence, I think the Court should opt for the more modest definition of the federal interest at stake, which yields more room for accommodating the state courts' interests and general concerns of federalism. If a state law can be fairly characterized as inconsistent with section 1983, as was the case in *Felder* and in *Martinez*, then it is proper for the Supreme Court to use the supremacy clause to prohibit the state from applying that law. Further, if Congress has specified a particular procedure it wishes to compel the state courts to use — as the Court believed Congress had done in singling out the attorney's fees provision of section 1988<sup>147</sup> — then it is proper for the Court to compel the state court to use that procedure. But if Congress has not specified that a particular collateral rule is to be considered part of section 1983, and if it cannot be fairly said that a state collateral rule is inconsistent with the deterrent goal of section 1983, then I do not think the Supreme Court should exercise the power of supremacy clause to compel the states to follow federal collateral law simply because that law would benefit civil rights plaintiffs. To that extent, I find Hart's theory that concurrent jurisdiction assumes a choice between two different procedural systems persuasive. As long as a fair federal forum is available, there is little risk that illegal conduct by the class of potential defendants will be encouraged by procedural disadvantages plaintiffs might encounter in state court.<sup>148</sup>

---

<sup>146</sup> See Neuborne, *supra* note 4, at 740-42, 783-84 (detailing the difficulties of bringing a class action under New York's old, and even new, class action laws, and urging application of the more generous federal class action rules in all state court section 1983 actions).

<sup>147</sup> See text accompanying notes 31-36 *supra*.

<sup>148</sup> The Court's references to "outcome-determinative" state laws in *Felder v. Casey*,



## 2. The State's Interests

The Court's remark in *Felder* that the state's interests were "not material" must be read in the context of that case. The state's principal interest in the notice of claim statute was in protecting its subdivisions and officials from the very liability section 1983 imposes.<sup>149</sup> If Congress wishes to impose liability, and the state's interest is to avoid liability, then the state's interest may be disregarded as illegitimate. This is apparently what the Court meant by declaring the state's interest to be immaterial to the supremacy clause inquiry.<sup>150</sup>

If the state's interest is not legitimate, or if the state's use of

---

108 S. Ct. 2302 (1988), may suggest agreement with this principle. An outcome-determinative state law — like a notice of claim provision, immunity defense, or other law that would tend to defeat plaintiffs who would not have been defeated in federal court — is likely to be inconsistent with the purposes of section 1983. Such a law would thwart a category of plaintiffs' very attempt to litigate. The Court's concern with outcome-determinative state law presumably only applies to laws that would determine the outcome in a way adverse to plaintiffs. There should not be any problem if a state court wishes to award a plaintiff a victory unattainable in federal court, as long as the state has not exceeded the "substance" of section 1983. See text accompanying notes 252-54 *infra*.

It is difficult to reconcile the court's theory in *Felder* with the case of *Robertson v. Wegmann*, see note 112 *supra*, in which the Court allowed a federal court adjudicating a section 1983 action to apply a state survivorship rule precluding the plaintiff's action. That rule could be characterized as outcome-determinative.

<sup>149</sup> Other interests are also served by the notice of claim statute — for example, avoiding stale litigation — but the Court seemed to regard these as secondary, or perhaps as already adequately covered by the relevant statute of limitations, possibly chosen as a matter of federal law under the principles of *Wilson v. Garcia*, 471 U.S. 261 (1985). See text accompanying notes 99-116 *supra*.

<sup>150</sup> Had the state's interest been a legitimate one, the state court's dismissal of *Felder*'s action for failure to comply with the notice of claim provision could have been viewed as an adequate procedural state ground, barring Supreme Court review. See Meltzer, *supra* note 85, at 1144; *Henry v. Mississippi*, 379 U.S. 443 (1965) (state default rule serving legitimate state interest is an adequate state ground precluding Supreme Court review). The Court could have found the state ground not to be adequate, in that it overly burdened federal rights. See Meltzer, *supra* note 85, at 1142-45. But the Court avoided treating the issue as one of whether an adequate state ground was presented by viewing the notice of claim statute as preempted by the law of section 1983. There should be considerable overlap between the inquiry under the adequate state ground doctrine (where, if the state's interest is not legitimate, or if the state's rule unreasonably burdens a federal right, the state is not permitted to rely on its usual procedure) and the question of whether to view a federal statute as authorizing creation of federal common law that then supplants relevant state procedural law. In the latter context, the Court has been focusing on the federal interest at stake and misty "congressional intent" and, therefore, has not looked carefully at the nature of the state's interest. The court should be asking the same questions about legitimacy of the state interest and burden on federal rights asked in connection with the adequate state ground doctrine.

an apparently neutral procedural rule does in fact discriminate against federal claim plaintiffs,<sup>151</sup> the balance is clear and the federal interest must prevail. But what of a case in which the state has legitimate interests that do not join issue with congressional intent? If, for example, a state wishes to use its usual restrictive class action rules, discovery rules, or rules of evidence only because they are efficient and familiar (and perhaps because these rules are being followed with respect to another claim in the same case), should that state interest be deemed "not material"? The Court in *Felder* several times distinguishes the notice of claim provision from a "neutral and uniform applicable rule of procedure."<sup>152</sup> Presumably, the state's interest in following its own procedural rules is cognizable and should enter the balance when the Court is considering whether to override a state procedure. These interests include the state court's interest in following its own rules because those rules are familiar, because they are the rules possibly being applied to other claims in the same case and, therefore, will promote efficient litigation, because the rules may be well adapted to that particular state or court, and because of the dignitary interest the states have in making their own procedural decisions.

It is difficult to predict how heavily the Supreme Court would weigh these state housekeeping interests and correlative federalism concerns as against the federal interests involved. The Court's attitude toward the significance of such procedural interests has been wildly inconsistent, varying from context to context.<sup>153</sup> Federalism concerns do argue for allowing the state

---

<sup>151</sup> This was one of the theories the Court invoked in *Felder*, taking the broad view that a state law applied most frequently against a federal claimant discriminates against federal claimants, even if the law seems to be applied even handedly. See 108 S. Ct. 2302 (1988); *supra* note 45.

For an inquiry into the constitutional basis for the antidiscrimination doctrine, see Meltzer, *supra* note 85, at 1162.

<sup>152</sup> 108 S. Ct. at 2308.

<sup>153</sup> The FELA cases, for example, do not assign a very high value to the state's housekeeping interests. See text accompanying notes 184-204 *infra* for a discussion of these cases, which impose a substantial amount of federal procedure to accompany the federal claim into state court. In other areas, however, the Court has been much more deferential to the state courts' procedural concern with efficiency of adjudication. In applying the adequate and independent state ground doctrine, for example, the Court will, at least in some circumstances, accept a state's procedural default rule as an adequate state ground precluding Supreme Court review of a federal constitutional claim. See note 150 *supra*. For critiques of this doctrine, see Meltzer, *supra* note 85 (proposing the for-

courts some leeway to use their own procedures, and efficiency argues for allowing the states to use their accustomed rules in multicclaim litigation. But these concerns must yield when a state procedure actually is inconsistent with the purposes of section 1983.

### 3. Uniformity

Prominent in the Court's opinion in *Felder*, as in the section 1988 cases discussed previously, is the notion that collateral law followed in federal and state court section 1983 actions should be identical for the sake of intrastate uniformity. The Court deplores the possibility that the same case might turn out differently in state or federal court because of a difference in the two jurisdictions' collateral law.<sup>154</sup> This concern too should be confined to its context. If the reason the cases would turn out differently is that the state has an outcome-determinative law that prevents plaintiff from bringing a claim, then it has already been established that the state should not be permitted to apply that inconsistent law. But if the case turns out differently because a seemingly neutral procedure has in fact disadvantaged the plaintiff — or, for that matter, disadvantaged the defendant — is that a problem? Is there really some independent value to

---

mulation of federal common-law rule to govern forfeitures of federal rights in both state and federal court); Sandalow, *supra* note 71 (proposing more modest revisions of the adequate state procedural ground doctrine); Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977).

An even broader doctrine permitting a state to preclude consideration of federal claims in order to serve interests of federalism exists in the context of federal habeas corpus jurisdiction. See *Wainwright v. Sykes*, 433 U.S. 72 (1977) (failure to raise federal claim in state proceeding bars federal habeas corpus review unless petitioner can show cause and prejudice). See Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741 (1982). The Court has at times viewed the interests in permitting procedural default in habeas corpus petitions and on direct appeal differently, and has applied different rules in the two contexts, although federal habeas corpus is meant to be an understudy for Supreme Court review.

In contrast to the FELA cases, the diversity cases place a high value on the housekeeping interests of federal court as balanced against the state's interest in its substantive law, see *Hanna v. Plumer*, 380 U.S. 460 (1965) (relying on Congress's involvement with the Federal Rules of Civil Procedure to justify allowing the federal courts to follow their own rules in diversity litigation). See D. CURRIE, *FEDERAL COURTS CASES AND MATERIALS* 527 (3d ed. 1982), for a criticism of the Court's differential treatment of housekeeping interests depending on whether they surface in state or in federal court.

<sup>154</sup> See 108 S. Ct. 2302 (1988).

parity of procedure between state and federal court in section 1983 actions? I doubt it.

Uniformity is both served and disserved whichever choice of procedure is made. If state court section 1983 actions look like federal court section 1983 actions, they achieve that uniformity at the price of uniformity with other state court actions (often including a tort claim joined in the same case). If state court actions follow state procedure, the price is sacrificing some procedural uniformity with actions in the federal court sitting within that same state.<sup>155</sup> The value of applying uniform procedures in a state court case containing section 1983 and other state law claims is obvious. Litigation is simplified and the possibility of contradictory commands is avoided. Borrowing federal procedure on one out of two or three claims in a case might lead to a situation in which the federal claim is entitled to class action treatment, or a jury trial, and the state claims are not. Must there be two trials, or might the plaintiff get a jury trial on a state law issue simply because section 1983 was invoked in the complaint?<sup>156</sup> These issues are troubling to the state courts, as well as to attorneys confronting these procedural imbroglios.

The virtues of federal/state uniformity are somewhat more elusive. Disparity in procedure has several possible negative effects. First, defendants might feel encouraged to violate the civil rights of potential plaintiffs if state procedure makes it too difficult for a plaintiff to succeed in a civil rights action. As noted previously,<sup>157</sup> it would be foolish for defendants to change their behavior if plaintiff could avoid procedural difficulties by simply choosing federal court.

Disparity of procedure might itself be considered problematic. If a plaintiff in a state court section 1983 action could not bring a class action when a plaintiff in a federal court section 1983 action with the same claim could,<sup>158</sup> is this asymmetry

---

<sup>155</sup> The Supreme Court's narrow interpretation of the scope of state law applicable in federal court under section 1988 increases the likelihood of this disparity. See text accompanying notes 88-118 *supra*.

<sup>156</sup> The Supreme Court once held that something like this should happen. In *McAlister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), the plaintiff brought a federal and a state law claim in state court. The Court held that the statute of limitations applying to the federal claim should also apply to the state law claim, on the theory that this would give plaintiff full benefit of the federal right. *Id.* at 226.

<sup>157</sup> See text accompanying notes 146-48 *supra*.

<sup>158</sup> In the diversity cases, this concern was cast as the unfairness of allowing plain-

more than an aesthetic concern? The Supreme Court suggests that such disparity may threaten interests of federalism.<sup>159</sup> If state procedures are less favorable than federal procedures, plaintiffs will bring their section 1983 actions in federal rather than state court, despite the earlier conclusion that state court adjudication of section 1983 actions should be encouraged.<sup>160</sup> But uniformity trims the good as well as the bad. Plaintiffs may be tempted by state court procedures as well as repelled. The central aim of federalism is to give the states enough room to follow their own paths. If a state is offended by the fact that too many plaintiffs are turning to federal court to litigate their section 1983 actions, the solution is simple. The state courts or legislatures may offer procedures as attractive as they wish — unless they are constricted by federally imposed uniformity.

Another reason to be concerned about federal/state uniformity is fear of forum shopping. Deploring forum shopping is a principal activity of some diversity cases,<sup>161</sup> on the apparent assumption that forum shopping is an unmitigated evil. But what is wrong with forum shopping? Section 1983 was enacted to provide plaintiffs with an opportunity to shop for a forum in a situation in which the states had an unwholesome monopoly. Even in diversity cases, the evil reputation of forum shopping has been questioned.<sup>162</sup> The opportunity to select a forum is an integral feature of any concurrent jurisdiction statute. Concurrent jurisdiction in this context is, as Professor Neuborne says, a "self-correcting constitutional compass,"<sup>163</sup> because plaintiffs will choose the forum they consider more promising. The abhorrence of forum shopping in the diversity cases derives from comity concerns not present in this context.<sup>164</sup> It may be undesirable to divert litigation of state law disputes to federal court by

---

tiff's choice of forum to change the character as well as the result of the litigation, *see, e.g.,* *Hanna v. Plumer*, 380 U.S. 460, 467 (1965), and was considered to verge on an equal protection problem. *See id.* at 469.

<sup>159</sup> *See* *Felder v. Casey*, 108 S. Ct. 2302 (1988); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

<sup>160</sup> *See* text accompanying notes 80-84 *supra*.

<sup>161</sup> *See* *Hanna*, 380 U.S. at 468; *Erie R. R. v. Tompkins*, 304 U.S. 64, 75 (1937).

<sup>162</sup> *See* *Ely*, *supra* note 145, at 710 (forum shopping is evil only if it leads to evil); *Hart*, *supra* note 24, at 512 (avoiding forum shopping was a trivial concern in *Erie*; the purpose of diversity jurisdiction is to permit forum shopping).

<sup>163</sup> *Neuborne*, *supra* note 4, at 731.

<sup>164</sup> *See* *Hart*, *supra* note 24, at 513.

promising procedures advantageous to plaintiffs, but there is no comity problem if advantageous procedures attract civil rights plaintiffs with federal claims to state court.<sup>165</sup>

Furthermore, the prospect of eliminating forum shopping is illusory. Total uniformity between federal and state court in section 1983 litigation is unachievable. Even if Congress were to make clear its desire to apply federal collateral rules broadly,<sup>166</sup> there would still be significant differences between the state and federal forum that Congress would be unable or unlikely to do anything about. Among the features of federal court that might continue to attract plaintiffs are the life tenure of federal judges, and some of the other institutional characteristics Professor Neuborne has enumerated.<sup>167</sup> Among the unique features of state court section 1983 litigation are the inapplicability of the eleventh amendment,<sup>168</sup> which might enable a state court plaintiff to sue the state<sup>169</sup> or to collect money unavailable in a federal court proceeding;<sup>170</sup> the inapplicability of restrictions like the tax anti-injunction statute,<sup>171</sup> which leaves the state court as the only possible forum in some cases challenging state tax systems or decision; the inapplicability of the equitable restraint

---

<sup>165</sup> If the state procedures are more favorable to plaintiffs (a situation most comparable to the converse situation *Hanna* feared), civil rights litigants will stay in state court, presumably, and there will be no comity problems. If the state may and does choose to offer procedures less favorable to plaintiffs, and plaintiffs go to federal court, any comity problem is mitigated by the fact that the decision was the state's. The federal courts do nothing but that which Congress enacted section 1983 to accomplish — offer their usual procedures to those civil rights plaintiffs who feel the need of them.

<sup>166</sup> Congress might decide, for example, to apply to state court section 1983 actions all the federal procedures imposed in the FELA cases, *see* text accompanying notes 184-214 *infra*, or even more.

<sup>167</sup> *See* Neuborne, *supra* note 11, at 1121-28.

<sup>168</sup> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

<sup>169</sup> Even with the bar of the eleventh amendment removed, the plaintiff might nevertheless be unable to sue the state because of the constraints of the sovereign immunity doctrine, or perhaps because the state is not a "person" within the meaning of section 1983. *See* *Smith v. State*, Dep't of Public Health, 428 Mich. 540, 410 N.W.2d 749 (1987), *cert. granted sub nom.*, *Will v. Michigan Dep't of State Police*, 108 S. Ct. 1466 (1988).

<sup>170</sup> *See* *Edelman v. Jordan*, 415 U.S. 651 (1974) (federal court may not award retroactive welfare benefits to be paid by state officials due to restrictions of the eleventh amendment).

<sup>171</sup> 28 U.S.C. § 1341.

doctrine of *Younger v. Harris*<sup>172</sup> and succeeding cases; and the probable inapplicability of other federal doctrines limiting injunctive relief.<sup>173</sup> There will and should be forum shopping, so the desire for federal/state uniformity as an antidote does not provide a strong reason to modify state procedures or collateral rules.

Professor Neuborne, the chief proponent of procedural parity between state and federal courts, rests his argument not on the inherent desirability of parity, and certainly not on any dislike of forum shopping, but rather on the assumption that federal collateral law generally is superior to state collateral law in ways that will promote civil rights litigation.<sup>174</sup> Professor Neuborne draws this conclusion because of his focus on examples, like the federal class action rules, in which federal collateral law would be more attractive to plaintiffs.<sup>175</sup> It is certainly true that in particular instances federal law will favor civil rights plaintiffs, but I do not think that the superiority of federal collateral law provides a strong basis for arguing for procedural parity with federal court generally. Whatever may have been the case in earlier decades, federal collateral law is now less notable for its favorable attitude toward civil rights litigation. Professor Neuborne's self-avowed preference for federal court as an institutional matter<sup>176</sup> is more and more under siege as the Supreme Court riddles federal court civil rights litigation with doctrines

---

<sup>172</sup> 401 U.S. 37 (1971). See note 244 *infra*.

<sup>173</sup> See text accompanying notes 240-44 *infra*.

<sup>174</sup> The test Professor Neuborne actually proposes for choosing between state and collateral law does not rest on notions of parity, but rather on what will serve the policies of section 1983. See Neuborne, *supra* note 4, at 779-80.

<sup>175</sup> See *id.* at 735-48. Professor Neuborne also suggests that federal court rules are more familiar to civil rights litigators, and that state court adoption of familiar and uniform federal collateral law will therefore promote civil rights litigation. *Id.* at 734-35. Although federal law may be familiar to Professor Neuborne and the handful of lawyers who make a career of civil rights litigation, I have already expressed my suspicion that it is far less familiar to the majority of lawyers litigating section 1983 claims. The overlap of section 1983 and state tort law should be recalled. I suspect that many lawyers find their first section 1983 claim lurking in what they had thought was a straightforward false arrest or state administrative law case. In a time when support for institutional civil rights litigation has dwindled along with the federal courts' tolerance for the cases that typified civil rights litigation in the 1960s and early 1970s, I think that encouraging lawyers who customarily practice in the state courts to litigate section 1983 claims when appropriate will do more for the vitality of civil liberties than will making the beleaguered civil liberties bar feel more at home in the state courts.

<sup>176</sup> See Neuborne, *supra* note 11, at 1105-06; Neuborne, *supra* note 4, at 726.

limiting federal relief. Standing,<sup>177</sup> the *Pennhurst* doctrine,<sup>178</sup> the expanding *Younger v. Harris*<sup>179</sup> doctrine, and many more developments in a list that could consume pages, plague federal court section 1983 plaintiffs. If the true goal is not parity but promotion of civil rights by advantaging civil rights plaintiffs, wholesale imposition of federal collateral law is becoming a less productive means of serving that goal.<sup>180</sup>

Given that state court section 1983 plaintiffs have a choice of forum and that imposing procedural consistency with federal court will mean sacrificing consistency within the state courts as well as the prospect of state courts developing procedures beneficial to plaintiffs, the desirability of federal/state uniformity should not shift the balance of the relative state and federal interests at stake. Even if the Court's section 1988 decisions do not misconstrue congressional intent in their urge for uniformity in federal court section 1983 litigation, the concern for the type of uniformity reflected in those cases is not a valid goal in the state court context. A more worthwhile goal, cited by the Supreme Court as a desirable consequence of uniformity, is eliminating the prospect of unnecessary litigation over which procedure to use.<sup>181</sup> Serving this goal requires not uniformity but predictability. Any approach providing predictability will serve this goal, regardless of whether it dictates results uniform among state courts, among federal and state courts, or some combination of the two.

If uniformity is read out as an important goal, if the federal interest at stake is defined as deterring civil rights violations, and if the state interest in using its own procedure is factored

---

<sup>177</sup> See notes 241-42 *infra*.

<sup>178</sup> See note 240 *infra*.

<sup>179</sup> See note 244 *infra*.

<sup>180</sup> Half of the disadvantageous state court procedures Professor Neuborne found most troubling, see Neuborne, *supra* note 4, at 736, have been addressed by the Supreme Court's recent section 1988 cases (including some cases which Professor Neuborne notes, as they were decided before his article was written). States may not use short statutes of limitations periods, or perhaps even decide which limitations periods to use, see text accompanying notes 99-106 *supra*; the law of immunities under section 1983 has been nationalized, see text accompanying notes 93-96 *supra*; and the state courts are required to provide attorney's fees, see text accompanying notes 31-36 *supra*. This leaves discovery procedures, class action rules, and strict evidentiary and pleading rules as areas in which Professor Neuborne suggests that the states might provide plaintiffs an additional advantage by following federal law.

<sup>181</sup> See *Wilson v. Garcia*, 471 U.S. 261 (1985).



into the balance, the Court should tend to allow the states to use their own collateral law in areas like class action rules and rules of evidence. The Court so far has not seemed to indulge in any presumption in favor of allowing the states to use their own procedure, in part because of its generous view of the propriety of creating federal common law under section 1983, and in part because of its reliance on cases in areas of the law in which the need for uniformity and the relative state and federal interests at stake are different.

## B. *Cross-Forum Conflict Law*

The Court in *Felder* seemed to accept the premise, set forth in several law review articles<sup>182</sup> that the FELA cases and diversity cases are analogous precedents to be consulted when choice of law issues arise in state court section 1983 actions.<sup>183</sup> Professor Neuborne, in fact, stitched these precedents into a cross-forum law of conflicts, from which both rules and results could be derived.

I do not think that the particular results of the FELA or diversity cases may simply be borrowed to resolve debates about choice of law in civil rights cases. The policies underlying the FELA and diversity cases, and the interpretations of the different statutory schemes are distinct and represent a balance of different interests.

### 1. The FELA Cases

The Federal Employers' Liability Acts (FELA),<sup>184</sup> enacted in 1908, effected various changes in the common-law rules governing liability of the railroads for negligent injuries to employees.<sup>185</sup> The Acts were intended to "promote the safety of the employees and to advance the commerce in which they are engaged."<sup>186</sup> Viewing the railroad as a "unitary enterprise,"<sup>187</sup> Congress believed that a "national law, operating uniformly in

---

<sup>182</sup> See note 215 *infra*.

<sup>183</sup> See 108 S. Ct. 2302 (1988).

<sup>184</sup> 45 U.S.C. §§ 51-60 (1982).

<sup>185</sup> These changes included abrogation of the fellow servant rule and other reforms of substantive tort law.

<sup>186</sup> *In re Second Employers' Liab. Cases*, 223 U.S. 1, 51 (1912).

<sup>187</sup> See *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 330 (1958).

all the States, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce."<sup>188</sup> Like section 1983, the FELA was presumed to confer concurrent jurisdiction.<sup>189</sup> In upholding the constitutionality of the statute, the Supreme Court was careful to note that Congress had not attempted to control the "modes of procedure" in the state courts.<sup>190</sup>

Early cases defined the state courts' procedural realm broadly.<sup>191</sup> Later cases, however, regularly required the state courts to adopt federal procedure whenever that procedure advantaged plaintiffs. *Brown v. Western Ry. of Alabama*,<sup>192</sup> for example, prohibited the state of Georgia from applying its strict pleading rules in an FELA case, holding that the state may not use its own mode of procedure when that procedure imposes "unnecessary burdens upon rights of recovery authorized by federal laws."<sup>193</sup> If a state were permitted to set such "springes,"<sup>194</sup> reasoned the Court, "desirable uniformity in adjudication of federally created rights could not be achieved."<sup>195</sup> Following in this

---

<sup>188</sup> 223 U.S. at 51 (citations omitted).

<sup>189</sup> *Id.* at 55-59. Amendments to the FELA in 1910 made this assumption explicit, see 45 U.S.C. § 56 ("The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.") (emphasis added). See 56 CONG. REC. 4043, 61st Cong., 2d Sess. (1910) ("[T]he state courts are perfectly competent to decide federal questions arising before them, and it is their duty to do so.").

<sup>190</sup> 223 U.S. at 56. Congress's initial attempt to regulate in this area had been held unconstitutional by the Court. See *The Employers' Liab. Cases*, 207 U.S. 463, 504 (1908).

<sup>191</sup> In *Minneapolis & St. Louis Ry. Co. v. Bombolis*, 241 U.S. 211 (1916), the Court found that a state law authorizing a nonunanimous jury could be applied in a state court FELA action. The Court's opinion focused on the dictates of federalism, the need for respecting the integrity of state procedure, and the belief that to interpret the FELA as imposing federal jury trial law on the states would be to allow Congress to bootstrap its way into applying the seventh amendment right to a jury trial to the states. In light of these concerns, the Court found that the rights conferred under the FELA were to be administered "in accordance with the modes of procedure prevailing in [state] courts." *Id.* at 218. See also *Dickinson v. Stiles*, 246 U.S. 631 (1918).

In the later case of *Douglas v. New York, New Haven & Hartford R. R.*, 279 U.S. 377 (1929), the Court's concern with the integrity of state procedure led to upholding a state's refusal to hear an FELA case when the state had a "valid excuse" based on its own neutral procedure — in this case state law imposing limitations on suits against out-of-state corporations.

<sup>192</sup> 338 U.S. 294 (1949).

<sup>193</sup> *Id.* at 298.

<sup>194</sup> See *id.*; see also *Davis v. Wechsler*, 263 U.S. 22, 24 (1923), where Justice Holmes appears to have first used this term.

<sup>195</sup> 338 U.S. at 299.

mode, *Dice v. Akron C. & Y.R.R. Co.*<sup>196</sup> required a state court to employ federal law on the allocation of function between judge and jury.<sup>197</sup> The Court in *Dice* waxed eloquent about the supremacy of federal law and the critical importance of uniform application of the FELA<sup>198</sup> and developed a theory enabling any "procedure" disadvantaging plaintiffs to be overridden, for if it disadvantaged plaintiffs, it would not be considered procedural.<sup>199</sup> Justice Frankfurter, dissenting in both these cases,<sup>200</sup> argued that a litigant who chooses to enforce a federal right in state rather than federal court should not be heard to complain about the state's procedures.<sup>201</sup> His view that choosers should not be beggars never came to command a majority of the Court.<sup>202</sup>

On occasion, the Court relinquished its concern for uniformity and allowed the state courts to use a "procedure" benefiting FELA plaintiffs.<sup>203</sup> But for the most part, the Court has federal-

---

<sup>196</sup> 342 U.S. 359 (1952).

<sup>197</sup> Clearly disliking the state law at issue — that the validity of a release relied upon by defendant was to be determined by the judge rather than the jury — the Court reasoned that the right to a jury trial is part and parcel of the remedy afforded by the FELA, and that the federal right might be defeated if the state were permitted to apply its own law. *Id.* at 361, 363. In *Brown*, the Court had also disliked the state law in question, referring to it as "harsh" and out of date. *Id.* at 362.

<sup>198</sup> Uniform application was described as "essential" to effectuate the purposes of the FELA. *Id.* at 361.

<sup>199</sup> This concept bears a striking resemblance to the test for choice of law in diversity cases prevailing when *Dice* was decided: the outcome-determinative test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). The Supreme Court's reliance in *Felder* on the FELA cases may explain why that opinion harkens back to the outcome-determinative concept. It was in *Brown*, in fact, that Justice Frankfurter first suggested that concurrent jurisdiction cases pose an *Erie* question in reverse. 338 U.S. at 301.

Compare *Dice* to *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), in which the Court, faced with a similar issue, held that the federal housekeeping interest prevailed, and that the federal court was to use its own procedure. *See* text accompanying note 231 *infra*.

<sup>200</sup> As the Court's view of Congress's intent to supplant state procedures and ensure uniform results grew more generous, opposition mounted. From the unanimity of *Bombolis*, *supra* note 191, the Court moved to a 7-2 decision in *Brown*, and then to a 5-4 decision in *Dice*.

<sup>201</sup> *Dice*, 342 U.S. at 364; *see also Brown*, 338 U.S. at 299-300.

<sup>202</sup> More recent FELA cases continue in the *Dice* mold. *See, e.g., Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) (federal law governs introduction of evidence about the effect of taxes on a decedent's projected earnings in a state court FELA action).

<sup>203</sup> *See Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924) (state court FELA plaintiff secured jurisdiction by attachment to hold an initial carrier liable

ized FELA litigation in the state courts, and not always to the benefit of the plaintiff. In one recent FELA case, for example, the Court held that federal common law governing damages applies in state court FELA cases and bars a state court from applying a state law awarding prejudgment interest to an FELA plaintiff.<sup>204</sup> Here is a brand of uniformity inimical to plaintiffs.

Are the FELA cases, with their heavy imposition of federal procedure on state court litigation, truly analogous to the section 1983 cases? Certainly many of the themes are familiar. But the context is distinguishable, and so are the results. The FELA cases do establish that Congress possesses the power to impose federal procedure to accompany the substance of its enactments. They also reflect the Supreme Court's willingness, here as in *Felder*, to devalue the state's interest in its own procedures when necessary to serve federal goals, and to aggrandize the interest in uniformity. But Congress's goals in the FELA cases make the generous imposition of federal procedure more appropriate than it would be in the section 1983 context.

The congressional intent underlying the FELA is significantly different from the intent of section 1983. Congress was deemed to have contemplated nationwide uniformity as a central aim in enacting the FELA.<sup>205</sup> Railroads susceptible to federal control by definition operate in interstate commerce. If railroads were subject to different standards<sup>206</sup> in each state in which they operated, they would suffer the problem of Pavlov's dogs and experience difficulty in planning their behavior. Section 1983, in contrast, is aimed at the misconduct of state officials and, unlike the FELA, deals with intrastate activity. If the fifty states were to develop different modes of procedure for adjudicating the constitutionality of state officials' behavior, symmetry would be lost, but the officials of each state would have no trouble determining which state's law to watch.

The statutory scheme surrounding the FELA is also differ-

---

for the negligence of a connecting carrier, without personal service of process — a procedure unavailable in federal court).

<sup>204</sup> *Monessen Southwestern Ry. Co. v. Morgan*, 108 S. Ct. 1337 (1988).

<sup>205</sup> See text accompanying notes 187-88 *supra*.

<sup>206</sup> The railroads would not, of course, be subject to different substantive standards. But having different procedures apply to a prospective defendant in more than one jurisdiction would certainly affect that prospective defendant's ability to assess the likelihood of a certain course of conduct leading to liability.

ent from that of section 1983 in several ways. First, Congress gave FELA plaintiffs an absolute choice of forum, which it did not give to civil rights plaintiffs.<sup>207</sup> If this discrepancy represented a decision and not mere inattention, it could be significant. One might speculate that giving defendants removal power makes it less critical to force the state courts to adopt federal procedure for the sake of fairness to defendants. It is one thing to impose federal procedure on a state court where an unwilling defendant is trapped; it may be quite another to do so when the defendant is free to use removal to avoid any undesirable state procedure, or to gain any perceived benefit federal court might provide defendants. (If, in fact, the federal procedure benefited the plaintiff, the plaintiff presumably would have chosen the federal forum in the first place.) In both circumstances, either party has access to a forum Congress presumably deems fair. In the FELA context, Congress wished to allow a state forum, but that desire was balanced by a desire for nationwide uniformity; Congress wished to allow plaintiffs a unilateral choice of forum, but also recognized a defendant's entitlement to fair procedures.<sup>208</sup> The compromise forged out of these competing goals, to serve the interests both of uniformity and of fairness, was a generous approach in applying federal procedure in the state court context.<sup>209</sup>

In addition, in the FELA context there is no statute comparable to 42 U.S.C. section 1988,<sup>210</sup> which requires the federal courts to follow state law in some instances. Thus, Congress had not allocated any role for state law in FELA cases. In fact, the primary goal of the FELA was not, unlike section 1983, to provide a federal forum, but rather to provide federal rules of deci-

---

<sup>207</sup> See text accompanying notes 119-42 *supra*.

<sup>208</sup> Congress may also have had some interest in sparing the federal courts the burden of this fount of litigation in cases in which plaintiffs were content with state court.

<sup>209</sup> One problem with this theory is that it does not explain the Supreme Court's generally pro-plaintiff stance in the FELA cases. The Court showed little or no concern with making the state forum fair for defendants, but instead regularly enhanced the desirability of the state court for plaintiffs. In addition, as I noted above, *see text accompanying notes 120-41 supra*, I doubt that the difference in removal power is significant because I doubt that it is purposeful. Defendants' ability to remove to federal court might justify a lesser imposition of federal law on the state courts, but I am unwilling to place much weight on a distinction I think should be eliminated.

<sup>210</sup> For the text of this statute, *see text accompanying note 86 supra*.

sion, including changes in substantive tort law,<sup>211</sup> and, according to the Court, a right to jury trial with federal accoutrements<sup>212</sup> and federal damages law.<sup>213</sup> Thus, the Court might well have concluded that Congress's goals were to be served by lending the state courts federal law generous to FELA plaintiffs, even if the loan were compulsory, and thereby sparing the federal courts the burden of this tort litigation.<sup>214</sup> Although the FELA and section 1983 share a pro-plaintiff orientation, they differ in the need for uniformity represented, and in the significance of the role of federal law as opposed to merely a federal forum. The Court's willingness to impose federal procedure on the state courts in the FELA cases is telling but is also tied to the statute being interpreted.

## 2. The Diversity Cases

The idea that the state court's choice between using federal or state collateral law in adjudicating a federal law claim is simply the mirror image of the decisions federal courts must make in diversity cases has proved intriguing to commentators and Supreme Court justices alike.<sup>215</sup> On the basis of this analogy, it is suggested that the determinations made in the diversity cases about when the law of the forum should apply may simply be borrowed and applied to state court section 1983 actions.<sup>216</sup>

Certainly the issue of choice of law in diversity cases has much in common with the choice of law issue here — there is a choice between federal and state collateral law, the forum state

---

<sup>211</sup> See notes 184-85 *supra*. See 56 CONG. REC. 4041, 4044, 61st Cong., 2d Sess. (1910); 52 CONG. REC. 4601 (1906) (statement of Rep. Sterling).

<sup>212</sup> See text accompanying notes 196-99 *supra*.

<sup>213</sup> See cases cited in notes 202 & 204 *supra*.

<sup>214</sup> The absence of a statute like section 1988 also means that to the extent federal/state uniformity of procedure was deemed desirable (perhaps for the purpose of encouraging FELA plaintiffs to frequent state court), it could only be achieved by imposing federal law on the state courts, as state law would not be used in the federal courts.

<sup>215</sup> The first commentary proposing this analysis seems to have been Hill, *Substance and Procedure in State FELA Actions — The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384 (1956). See also Neuborne, *supra* note 4, at 766-77; Note, *supra* note 72, at 759-62; Note, *State Enforcement*, *supra* note 5, at 1557-61.

For judicial fans of the doctrine, see *Brown v. Western Ry.*, 338 U.S. 294, 301 (1949) (Frankfurter, J., dissenting) and *Felder v. Casey*, 108 S. Ct. 2302, 2313 (1988) (Brennan, J.).

<sup>216</sup> See Neuborne, *supra* note 4, at 780-86 (applying the diversity case results as part of a general cross-forum law).

is applying the substantive law of the other jurisdiction, and there is probably no way to make a choice except by balancing the interests involved.<sup>217</sup> Beyond these observations, however, the analogy to the diversity cases is no more helpful than the analogy to the FELA cases.<sup>218</sup> Just because the Supreme Court decided in a diversity case that the law of the forum governs the allocation of function between judge and jury,<sup>219</sup> for example, does not necessarily mean that the law of the forum should govern that issue in state court section 1983 actions.

First, the key question is once again congressional intent. The system of statutes applicable in the two contexts is obviously different. With respect to choice of law decisions pertaining to state court, the Rules Enabling Act,<sup>220</sup> the Rules of Decision Act,<sup>221</sup> and even section 1988 do not apply. The constitutional questions that loom in the background of Congress's hypothesized attempt to use federal procedure are quite different. The constitutional grant of diversity jurisdiction<sup>222</sup> does not apply; the fourteenth amendment does. The tenth amendment,<sup>223</sup> or whatever is deemed to be the constitutional issue lurking in *Erie*,<sup>224</sup> does not apply; the supremacy clause

---

<sup>217</sup> See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

<sup>218</sup> This analogy may in fact be less helpful because of the nature of the law in the diversity cases. The *Erie* line of cases has passed through a number of metamorphoses, focusing first on substance and procedure, see *Erie R. R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring), then on the impact of the rule in question on the outcome of the case, see *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), then on a balancing of the forum state's interest in its procedure with the generative state's interest in the outcome of the proceeding, see *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

"*Erie*" questions must be analyzed differently depending on the context of relevant statutory law, see Ely, *supra* note 145, at 697-98. Some "*Erie*" questions, like the question of the applicability of a Federal Rule of Civil Procedure posed in *Hanna v. Plumer*, 380 U.S. 460 (1965), implicate fairly specific congressional statements about which law to apply, see Rules Enabling Act, 28 U.S.C. § 2072 (1982); while others involve different statutory schemes or policies, see Rules of Decision Act, 28 U.S.C. § 725 (1982), discussed in *Erie*, 304 U.S. at 71-73. Therefore, it is difficult to draw any general rule from "the diversity cases" at all. Cf. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 123, § 4511, at 175 (there is no workable diversity rule in cases not involving the Federal Rules of Civil Procedure).

<sup>219</sup> See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

<sup>220</sup> Rules Enabling Act, 28 U.S.C. § 2072.

<sup>221</sup> Rules of Decision Act, 28 U.S.C. § 725.

<sup>222</sup> See U.S. CONST. art. III, § 2.

<sup>223</sup> See note 194 *supra*.

<sup>224</sup> *Erie* has been said to have an "unmistakable, if only vaguely definable aspect of

does. In either context, there is a question of Congress's power, but in the one case, the issue is of power to impose federal procedure on state law claims, simply because a federal forum is hearing those claims; in the other, the issue is the power to force federal procedure on the state courts hearing a federal claim.

The comity issues that troubled the Court in the *Erie* cases and that would lead to a hesitancy to apply the forum's procedural law cut the other way here. Comity considerations would lead to a hesitancy not to apply the forum's procedural law. Also, as noted above, the forum-shopping concerns that dominate the later *Erie* cases<sup>225</sup> diminish when a defendant can remove the proceeding to the court of the generative forum.

The principal purpose of diversity jurisdiction is to provide a disinterested forum for out-of-state plaintiffs who fear bias in the defendants' state courts.<sup>226</sup> The desire to be fair to those plaintiffs is at war with the principles of federalism. The most practical compromise is to offer plaintiffs a federal forum, but not to attempt to make that forum particularly attractive or even different. The federal courts are disinterested and should not desire to lure diversity plaintiffs. State courts hearing section 1983 actions, on the other hand, are not disinterested. The behavior of officials of that state is at issue, so state court judges may be perceived as having a greater stake in the outcome of the case.<sup>227</sup> At the same time, the state courts may wish to attract civil rights litigants so as to avoid the intrusion of federal judges

---

the constitutional about it." Ely, *supra* note 144, at 696. Ely does not believe that the tenth amendment is at issue, but rather the lack of constitutional power for Congress to make substantive law in diversity cases. *Id.* at 700-06. See Friendly, *supra* note 144, at 384-85 (stressing the significance of the constitutional underpinnings of *Erie*).

<sup>225</sup> See note 161 and text accompanying notes 207-08 *supra*.

<sup>226</sup> See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 123, § 3601, at 337-38 (James Madison's assertion that diversity jurisdiction was created for this reason is the traditional and most often cited explanation); H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 139-52 (1973); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROB. 216, 234-40 (1948). This theory would explain why defendants are permitted to remove a diversity case to federal court only if they are not citizens of the forum state. See 28 U.S.C. § 1441(b).

For a rejection of the traditional view, see R. POSNER, *THE FEDERAL COURTS* 141-43 (1985) (local bias played smaller role in creation of diversity jurisdiction than generally assumed and is not a major motivating factor for lawyers bringing diversity cases to federal court).

<sup>227</sup> See note 125 *supra*.



into state affairs.

The state's interest in retaining its own procedure in section 1983 cases is also strengthened by the fact that there is such extensive overlap between civil rights causes of action and other state causes of action, such as torts. If a state procedure is used in federal court in a diversity case, it is unlikely to have much impact on the remainder of the federal docket;<sup>228</sup> if a federal procedure is used in state court, the impact on the course of the litigation as well as on comity might well be greater.

Furthermore, the message of the diversity cases is inconsistent with the FELA cases. Although the goal of the *Erie* cases originally seemed to be a maximization of the federal courts' use of the law of the generative jurisdiction,<sup>229</sup> the Court has been interpreting the various statutes involved as reflecting a congressional intent that results in a fairly expansive use of the law of the forum.<sup>230</sup> Despite the purported concerns for comity, the Supreme Court's diversity cases place a high value on the practical need for the federal forum to follow its own procedural law. This position is in marked contrast with the Court's assessment in the FELA cases of the significance of the state court's interest in following its own procedural law. For example, contrast the decision in *Dice* that a state court adjudicating an FELA claim must follow federal law — the law of the generative jurisdiction — on allocation of function between judge and jury with the holding of *Byrd* that a federal court in a diversity case should follow federal law — the law of the forum jurisdiction — on essentially the same issue.<sup>231</sup> In my view, these cases are not necessarily in-

---

<sup>228</sup> The Administrative Office of the United States Courts does not keep records of the number of diversity jurisdiction cases that also raise federal questions. Telephone interview with Pamela Crawford, Administrative Office of the United States Courts, Statistical Analysis and Reports Division (March 9, 1989). The fact that of the thirty-five civil opinions written by the Second Circuit in January 1988, there were no cases brought on both grounds is some slight evidence supporting my intuition that the overlap of diversity and federal question cases is not great. The research on this point is available in the files of Brooklyn Law Review.

<sup>229</sup> See note 144 *supra*; Neuborne, *supra* note 4, at 776-77.

<sup>230</sup> See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965). Professor Currie has criticized the Court for placing a higher value on the federal court's interest in following its own procedural rules, as in *Byrd*, 356 U.S. 525, in which the Court decided that the federal or forum court rule on allocation of function between judge and jury should be applied, than on the state court's interest in following its own procedure, as in the FELA cases. See D. CURRIE, *supra* note 153, at 526.

<sup>231</sup> Of course, the *Byrd* case, litigated in federal court, did implicate the seventh

consistent. They are simply interpreting, rightly or wrongly, two different statutory and constitutional contexts. The distance between *Byrd* and *Dice* shows the futility of trying to swallow whole the conclusion of another line of cases, and also the impossibility of melding the FELA cases and the diversity cases together as a model for section 1983 decision making.

The *Erie* cases, like the FELA cases, are interesting and instructive experiences with similar problems, but do not provide any simple answers. In sum, there is simply no substitute for a careful balancing of the state and federal interests involved on a case-by-case basis, an exercise the next section will attempt.

### III. GETTING DOWN TO CASES

Previous sections discussed the extent to which Congress or the Supreme Court should impose federal collateral law on the state courts in section 1983 actions. This section will consider the perspective of state court judges, who have a freer choice in evaluating the same concerns. Just as Congress can decline to exercise its presumed power to compel the state courts to adopt federal collateral law, the state courts or legislatures are free to borrow as much federal collateral law as they wish, at least where that federal law would benefit civil rights plaintiffs.<sup>232</sup>

It is easy to conclude that if disparate state collateral law benefits plaintiffs, the state courts are free to use that law.<sup>233</sup> The federal interest in serving the goals of section 1983 and the state's interest in following its own procedure coalesce, with only the previously discredited interest in uniformity on the other side of the scales.<sup>234</sup> The problem arises when neutral state col-

---

amendment right to a jury trial. See U.S. CONST. amend. VII. This fact partly explains why the Court reached its result. But the difference in context underscores my point that cross-forum choice of law cannot be homogenized.

<sup>232</sup> See *Felder v. Casey*, 108 S. Ct. 2302, 2308 (1988).

<sup>233</sup> The states that have considered this issue have had no difficulty reaching this conclusion. See, e.g., *Langford v. Superior Court*, 43 Cal. 3d 21, 37 n.6, 729 P.2d 822, 833 n.6, 233 Cal. Rptr. 387, 398 n.6 (1987) (Bird, C.J., concurring); *Suffolk Hous. Serv. v. Town of Brookhaven*, 91 Misc. 2d 80, 87, 397 N.Y.S.2d 302, 309 (Sup. Ct. Suffolk Cty. 1977), *aff'd as modified*, 63 A.D.2d 731, 405 N.Y.S.2d 302 (2d Dep't 1978), *aff'd*, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987); *South Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 337, 456 A.2d 390, 483 (1983); *White v. Davis*, 13 Cal. 3d 757, 763-65, 533 P.2d 222, 226-27, 120 Cal. Rptr. 94, 98-99 (1975); *Stocks v. City of Irvine*, 114 Cal. App. 3d 520, 532, 170 Cal. Rptr. 724, 731 (4th Dist. 1981).

<sup>234</sup> In fact, I will argue that the balance of interests is so clear that the Supreme

lateral law is less favorable to plaintiffs, and the state courts view a legitimate state interest in using accustomed procedure as strong enough to warrant using the state law anyway.

State court judges can prevent such crises from arising by selecting procedures that will make state court at least as hospitable a forum for civil rights litigants as federal court.<sup>235</sup> This posture will better serve the state's interests in the long run because if state courts become plaintiffs' primary choice for conducting civil rights litigation, the friction of federal court intervention into state affairs will be eased. However, if a state procedure is neutral, not inconsistent with the goals of section 1983<sup>236</sup> and serves a strong enough legitimate state interest that the state courts wish to insist on its application, allowing the state courts to apply a procedure plaintiffs might dislike may be simply the other side of the coin of allowing state court generosity.

#### A. *Differences in Federal/State Justiciability Doctrine*

When the state collateral law at issue is a justiciability doctrine, which will generally be easily categorized as favoring or disfavoring plaintiffs, application of these principles is fairly simple. If a state wishes to confer standing on a plaintiff the federal courts would not have heard, it should certainly be allowed to do so; if it wishes to deny standing to a plaintiff the federal courts would have heard, the state's doctrine is likely to be inconsistent with federal law. There are also several exceptional situations that deserve comment. May a state follow its own generous justiciability doctrine if it would then be rendering a decision not subject to review by the Supreme Court? On the other hand, may a state apply an unfavorable justiciability doctrine in a case in which a federal forum would have been unavailable for other reasons?

---

Court should leave room in its interpretation of the scope of section 1983 for the states to use more generous doctrine and perhaps even allow the states to be more generous concerning the definition of section 1983 itself. See text accompanying notes 252-54 *infra*.

<sup>235</sup> See, e.g., *Bach v. County of Butte*, 147 Cal. App. 3d 554, 562-63, 195 Cal. Rptr. 268, 272-73 (3d Dist. 1983) (assuming that applying federal law on construction of pleadings will be consistent with section 1983 and playing it safe by doing so).

<sup>236</sup> How broadly these goals should be defined was discussed at text accompanying notes 145-48 *supra*.

## 1. State Doctrine Tending to Benefit Plaintiffs

### a. Collateral Law

Only a fanatical advocate of intrastate uniformity would suggest that the state courts should follow all of the collateral restrictions applicable to federal courts in section 1983 litigation. By their very terms, constitutional provisions like article III's case or controversy requirement<sup>237</sup> or the eleventh amendment<sup>238</sup> apply only to the federal courts.<sup>239</sup> Limitations derived from these provisions, like the restrictions on the availability of federal injunctive relief declared in *Pennhurst State School & Hospital v. Halderman*,<sup>240</sup> and *City of Los Angeles v. Lyons*,<sup>241</sup> or the standing restrictions of *Warth v. Seldin*,<sup>242</sup> therefore need not apply in state court.<sup>243</sup> Neither should restrictions on federal injunctive relief based on prudential concerns of federalism and comity that, like the eleventh amendment, are simply inapplicable in state court.<sup>244</sup> The only basis for arguing that state courts

---

<sup>237</sup> U.S. CONST. art. III, § 2.

<sup>238</sup> See note 168 *supra*.

<sup>239</sup> The eleventh amendment is not applicable to the states. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (interpreting eleventh amendment as applying only to suits against a state in federal court). For a historical discussion of the eleventh amendment's application, see Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

<sup>240</sup> 465 U.S. 89 (1984) (The eleventh amendment bars a federal court from issuing certain injunctive relief against state officials, regardless of whether on a federal or a pendent state claim.).

<sup>241</sup> 461 U.S. 95 (1983) (plaintiff who had been subjected to a police chokehold, pursuant to an avowed city policy, had no standing to enjoin a continuation of this practice because he could not demonstrate sufficient likelihood that he personally would be subjected to a chokehold in the future).

<sup>242</sup> 422 U.S. 490 (1975) (finding an impressive array of potential plaintiffs to have no standing).

<sup>243</sup> See *Stocks v. City of Irvine*, 114 Cal. App. 3d 520, 527, 170 Cal. Rptr. 724, 728 (4th Dist. 1981) (describing the constitutional and prudential standing limitations delineated in *Warth* as responding to concerns "peculiarly federal in nature" (quoting *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 262 n.8 (1977)). Accord *Suffolk Hous. Serv. v. Town of Brookhaven*, 91 Misc. 2d 80, 87, 397 N.Y.S.2d 302, 309 (Sup. Ct. Suffolk Cty. 1977), *aff'd as modified*, 63 A.D.2d 731, 405 N.Y.S.2d 302 (2d Dep't 1978), *aff'd*, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987); *Urban League v. Township of Mahwah*, 147 N.J. Super. 28, 33, 370 A.2d 521, 524, *certif. denied*, 74 N.J. 278, 377 A.2d 682 (1977). See Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1400-01 (1978) (state courts unaffected by *Warth* standing doctrine, at least with respect to state claims).

<sup>244</sup> One example of a federal restraining doctrine that should be inapplicable in state

should follow these federal principles would be the urge for uniformity. But even the argument for uniformity is undercut where a federal forum is unavailable, because disparate results in identical cases are as impossible in this situation as forum shopping. In contexts, like *Felder*, in which state courts are required to adopt more generous federal law, the compulsory uniformity serves federalism in one way by ensuring that the state courts will continue to attract a fair share of civil rights litigation, even as it disserves another conception of a federalist model by preventing the states from employing their usual procedures. To prevent a state from using its own more generous collateral law would not serve any purpose.

What if a state court does not wish to afford the benefit of a more generous state justiciability doctrine to section 1983 plaintiffs? One New Jersey court, for example, seemed to suggest that its state's generous standing doctrine in exclusionary zoning cases might be available in claims under the state but not the federal Constitution.<sup>245</sup> I think this is another example of the well-intentioned but misguided striving for uniformity with federal court, even in an instance where plaintiffs would benefit from disparate treatment. There is no reason, uniformity aside, for a state court adjudicating federal claims to adopt a limiting justiciability doctrine that arose out of the federal courts' concern with their proper role in a federalist system. If the state shared the federal courts' concerns — perhaps as a matter of

---

court is the equitable restraint doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, the Court declined to enjoin a state criminal statute that allegedly chilled rights of free speech and press. The decision rests on a strong policy against federal courts interfering with state court proceedings — a policy based on considerations of comity and federalism, *see id.* at 43-49. Therefore, if a state court wishes to enjoin a pending state criminal prosecution, it should not be considered barred from doing so (unless, perhaps, the state court has a parallel policy of its own, *see text accompanying notes 267-88 infra*).

However, if the Court were to recast *Younger v. Harris* as an interpretation of the remedies provided by section 1983, the doctrine would be binding on the state courts and prohibit such injunctions.

Professor Steinglass notes that the plaintiff-benefitting aspects of a doctrine like *Younger v. Harris* should apply to state court judges so that the federal principle acts as a floor. *See* S. STEINGLASS, *supra* note 4, at 18-7-8. For example, a state court could not refuse to enjoin a pending criminal prosecution the federal courts would have been permitted to enjoin under the bad faith exception. *See* *Allee v. Medrano*, 416 U.S. 802 (1974) (bad faith as exception to *Younger v. Harris* equitable restraint doctrine).

<sup>245</sup> *See* *Urban League v. Township of Mahwah*, 147 N.J. Super. 28, 33, 370 A.2d 521, 524, *certif. denied*, 74 N.J. 278, 377 A.2d 682 (1977).

state separation of powers principles — presumably its justiciability doctrine would not be so generous to plaintiffs, and there would be little choice to make.<sup>246</sup>

In fact, there is some basis for arguing that not only *may* the state court apply its own more generous doctrine, but it *must*. Failure to do so might be considered discrimination against a plaintiff with a federal claim. If the state courts must worry that by failing to apply federal collateral rules in section 1983 actions they might run afoul of the supremacy clause, the antidiscrimination doctrine is a constitutional Charybdis. An old line of cases establishes, presumably also on the authority of the supremacy clause, that a state court may not refuse to hear a federal cause of action when it has jurisdiction over analogous causes of action.<sup>247</sup> If a state court may not be less generous to plaintiffs with federal claims than to those with state claims, should this principle extend to prohibit a state court from denying federal statutory litigants the benefit of procedures it would afford litigants with a state cause of action? Under this theory,

---

<sup>246</sup> A state court might in the past have chosen to follow federal justiciability law because to do so would serve a number of interests. Federal law was generally more favorable to civil rights litigants and, thus, served the goals of section 1983; federal law was a safe choice for a state court not wishing to be overruled, and following federal justiciability law eliminated the necessity of parsing the substantive and procedural aspects of section 1983 actions. Now that federal law is becoming more restrictive, state courts have to choose among these goals. In Wisconsin, for example, the courts have been using federal justiciability doctrine despite the inapplicability of article III to the state courts on the theory that "our application of the federal law of standing insures that federal claims raised in Wisconsin can be fully litigated." *State ex rel. First Nat'l Bank v. M. & I Peoples Bank*, 95 Wis. 2d 303, 308 n.5, 290 N.W.2d 321, 325 n.5 (1980). Wisconsin courts have a policy that the law of standing is not to be construed narrowly or restrictively. See *Fox v. Wisconsin Dep't of Health & Social Serv.*, 112 Wis. 2d 514, 518, 334 N.W.2d 532, 537 (1983). But in the same case describing these goals, Wisconsin borrowed the restrictive standing doctrine of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), see text accompanying notes 256-57 *infra*. The Wisconsin courts have not yet undertaken to choose among the conflicting desires to follow federal law, and to apply generous standing doctrine to federal rights plaintiffs. Gordon and Gross, *supra* note 5, who argue that the state courts must hear section 1983 actions despite state justiciability doctrines, and despite any lack of jurisdiction to hear those cases, assume that federal justiciability standards will be more generous, *id.* at 1180, and do not discuss whether states must give civil rights plaintiffs the benefit of favorable state law.

<sup>247</sup> See *Mondou v. New York, New Haven & Hartford R.R.*, 223 U.S. 1, 59 (1912) (state courts may not refuse to entertain FELA claims when their jurisdiction extends to analogous state law claims); *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377, 388 (1929) (state court refusal to exercise jurisdiction over FELA claims must be based on a valid excuse); *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230 (1934); Neuborne, *supra* note 4, at 753-59.

once it is determined that a particular doctrine, such as a standing doctrine, is not part of the substance of section 1983, the state courts would be required to apply their usual doctrine, at least where that doctrine is more favorable to section 1983 plaintiffs than federal law would be.

While I doubt that the Court would extend the antidiscrimination doctrine to compel state courts to afford civil rights plaintiffs the benefit of more generous state justiciability principles,<sup>248</sup> the state courts nevertheless should be wary of such discrimination and should offer their own more generous collateral law to federal claim plaintiffs rather than pursue a foolish consistency with federal court.

### b. *Noncollateral Law*

The foregoing discussion has focused on doctrines, like standing, presumed to be extrinsic to section 1983 and, therefore, offering the state courts room to maneuver. The Supreme Court has posited that once federal common law has been created in a given area, the states may be neither more nor less generous than federal law provides. This was the explanation, in *Monessen Southwestern Ry. Co. v. Morgan*,<sup>249</sup> for refusing to allow a state court to afford an FELA plaintiff prejudgment interest on a damages claim. If a state court hearing a section 1983 action wished to award prejudgment interest, the existence of federal common law on damages under section 1983 presumably would stymie that generous impulse also.<sup>250</sup>

The more expansively the Court interprets section 1983 and its concomitant common law, the less opportunity the state courts have to afford civil rights plaintiffs the benefit of advantageous state law. Even doctrines now considered collateral, like standing, might be federalized if the Court were to decide to interpret the availability of injunctive relief, for example, as being a matter of "statutory interpretation" of section 1983. *Lyons*, for example, could be characterized as a restriction on the availabil-

---

<sup>248</sup> As Professor Meltzer points out, even the precise constitutional origins of the antidiscrimination doctrine are unclear. Meltzer, *supra* note 85, at 1161-64.

<sup>249</sup> *Monessen Southwestern Ry. Co. v. Morgan*, 108 S. Ct. 1837 (1988). See text accompanying note 204 *supra*.

<sup>250</sup> The law of damages is considered to be part of the federal common law created under section 1983. See text accompanying notes 97-98 *supra*.

ity of injunctive relief rather than as a doctrine derived from article III or prudential concerns only applicable in federal court.<sup>251</sup> The nationalized doctrine would then bind the state courts. This situation is undesirable because the interests of both the state courts and civil rights plaintiffs are disserved.

There are two approaches the Court might take to avoid glorifying uniformity above all other interests. First, the Court could exercise restraint in "interpreting" section 1983 and make more liberal use of section 1988's direction to use hospitable state law in federal court section 1983 actions. This would leave space for the state courts to create plaintiff oriented law concerning justiciability and remedies. Decisions restraining state court generosity could be narrowly construed. Further, decisions resting on uniquely federal considerations could be restricted in their applicability to *federal* court section 1983 actions. The cases creating a federal common law of damages and immunities were, for the most part, decided in the context of federal court section 1983 actions, where providing a uniform federal common law is less intrusive and more desirable than in the context of state court. These cases might be distinguished in the state court context.

The other possible solution is truly radical. The state courts could be given license to apply even the "substance" of section 1983 in any way at least as generous to plaintiffs as federal doctrine. The state courts would then be permitted to use a more generous damages rule, immunity doctrine, or statute of limitations, and perhaps even to expand the scope of section 1983 by entertaining actions based on a theory of *respondeat superior*,<sup>252</sup> or permitting suits against entities not considered "persons" under section 1983. Professor Sager has proposed that state

---

<sup>251</sup> 461 U.S. 95 (1983). See notes 268-69 and accompanying text *infra*. The same might be true of other federal court restrictions on the availability of injunctive relief, like the *Younger v. Harris* equitable restraint doctrine, see note 244 *supra*.

<sup>252</sup> This doctrine is considered inapplicable to section 1983 cases, see *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 691 (1978); *Moor v. County of Alameda*, 411 U.S. 693 (1973) (prohibiting federal court from using section 1988 to borrow state statute providing for vicarious liability of county on the ground that such statute was inconsistent with federal law).

*Moor*, dealing with the power of a federal court to use section 1988 to expand upon section 1983, does not necessarily answer the question of whether a state court might use its own statute to impose vicarious liability, although it certainly suggests what the Court's attitude toward this question would be. See note 12 *supra*.



courts be permitted to be more generous in interpreting federal constitutional provisions underenforced by the federal courts.<sup>253</sup> The same proposal could be applied to section 1983, as an underenforced federal statute.<sup>254</sup>

This is not a proposal the Supreme Court is likely to adopt. Awareness of the problems created by blanket federal rules, however, should lead the Court to consider carefully whether there really is a need to federalize any more of the collateral law surrounding section 1983 litigation, and whether it would indeed be desirable to federalize less.

## 2. Article III and Supreme Court Review

If the state courts do hear cases the federal courts would be unable to hear, however broadly that power is defined, an additional problem is posed if the state courts hear a case deemed not to present a case or controversy under article III. This was ostensibly the case with the standing doctrine of *City of Los Angeles v. Lyons*.<sup>255</sup> Should a state court be free to reject the restrictive views of *Lyons*<sup>256</sup> despite the fact that its decision

---

<sup>253</sup> See Sager, *supra* note 113. The basis for this proposal is that the federal courts' restrictive interpretations of federal constitutional rights sometimes derive from modest notions of the proper role of federal courts. The state courts, free from these restrictions, are in a better position to enforce constitutional guarantees fully.

<sup>254</sup> This theory could be limited to situations in which the federal courts' restrictive views are in fact based on uniquely federal concerns, and not applied to decisions considered to derive from an interpretation of congressional intent, such as who is a "person" within the meaning of section 1983. See *Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978).

<sup>255</sup> 461 U.S. 95, 107 (1983). See note 241 *supra*.

<sup>256</sup> In *Lyons*, Justice White invited the state courts to reject the federal limitations imposed in that case. ("Beyond these considerations the 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.") *Id.* at 113. California has responded to Justice White's invitation. See *Langford v. Superior Court*, 43 Cal. 3d 21, 37 n.6, 729 P.2d 822, 833 n.6, 233 Cal. Rptr. 387, 398 n.6, *cert. denied sub nom.*, *Gates v. Langford*, 108 S. Ct. 87 (1987) (granting preliminary injunction to plaintiffs who had suffered from city police department's use of motorized battering rams, enjoining future use of this practice, without discussing whether plaintiffs had made the showing required under *Lyons* of a likelihood that they would suffer from this police practice in the future).

In *White v. Davis*, 13 Cal. 3d 757, 763-65, 533 P.2d 222, 225-27, 120 Cal. Rptr. 94 (1975) (en banc), the California Supreme Court in this pre-*Lyons* case allowed plaintiffs standing as taxpayers to challenge police surveillance practices. In *Langford*, a post-*Lyons* case, 43 Cal. 3d at 32, 729 P.2d at 830, 233 Cal. Rptr. at 395, the court reiterated that taxpayer standing to challenge police practices is available and provides another route

would be unreviewable by the Supreme Court?<sup>257</sup>

The Supreme Court has been unwilling to review cases not presenting a case or controversy, but also has been unwilling to vacate state court decisions in such cases simply because of the unavailability of Supreme Court review.

In *Doremus v. Board of Education*,<sup>258</sup> a state taxpayer was initially granted standing in state court to challenge a state statute providing for Bible reading in the schools. The Supreme Court declared itself unable to review the case in light of its previous determination that such taxpayer standing is insufficient to satisfy article III.<sup>259</sup> The Court then dismissed the appeal, remarking, "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory."<sup>260</sup>

---

around the restrictions of *Lyons*.

<sup>257</sup> It might be argued that the Supreme Court should be permitted to review a case properly considered in the state courts. This argument might be based on a theory that the limitation article III imposes on the Supreme Court's jurisdiction is narrower than the limitation imposed on the district courts because the Supreme Court reviews the actions of state courts which have already fully developed a record and intensified the adversary nature of the proceeding. Justice Stevens, at least, has suggested that standing issues should be analyzed differently depending upon whether the question is one of standing in the Supreme Court or in the lower courts. *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 970-72 (1984) (Stevens, J., concurring). His conclusion, however, is that the Supreme Court has no more power to review a state court decision on an issue in which the requirements of article III have not been met than a district court would to entertain such a claim initially. *Id.* Stevens's colleagues on the Court also have adopted the position that the case or controversy requirement precludes such review. See *Bateman v. Arizona*, 429 U.S. 1302 (Rehnquist, Circuit Justice) (1976); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952). This is certainly not an untenable interpretation of article III, and also is not one the Court is likely to modify.

<sup>258</sup> 342 U.S. 429 (1952).

<sup>259</sup> *Id.* at 434-35. See also *Frothingham v. Mellon*, 262 U.S. 447 (1923) (status as federal taxpayer insufficient to confer standing on a plaintiff who wishes to challenge a federal statute).

<sup>260</sup> 342 U.S. at 434. On the other hand, in the later case of *DeFunis*, the Court vacated a state court decision found to be moot under article III, despite the fact that under state law the case was saved from mootness by the great public interest in the continuing issues present in the case. See 416 U.S. at 316. It is probably reading too much into the Court's different handling of these cases to suggest that the vacatur in *DeFunis* makes the suggestion the Court declined to make in *Doremus*. Members of the Court seem to assume that the principle stated in *Doremus* is still law. See *Bateman v. Arizona*, 429 U.S. 1302, 1305 (Rehnquist, Circuit J.) (1976) ("The courts of a State are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of

I think that the Court was right in *Doremus* and that there is no good reason for resolving that a state court cannot hear a federal claim simply because the Supreme Court will be unable to review it. Why should there not be "advisory" state court opinions about the constitutionality of a Bible reading statute, or of an affirmative action program in that state? Uniformity of state court results with federal court results is not, for the reasons already described, a good reason to impose the limitations of article III on the state courts.

A state's highest court already has the final word in interpreting the provisions of its own constitution.<sup>261</sup> Because of the adequate state ground doctrine, these state constitutional rulings are not subject to Supreme Court review. Why should the lack of availability of Supreme Court review of similar cases for a different reason — article III — prevent the state courts from rendering advisory opinions to the officials of its own state as to what the federal Constitution would require in circumstances the federal courts would have difficulty considering?

If states were permitted to hear section 1983 claims unreviewable under article III, it is unlikely that the power would be abused. Section 1983 was created precisely because most states were perceived as being unreceptive to civil rights claims. Commentators are still deploring restrictive state justiciability doctrine and its impact on federal civil rights litigation.<sup>262</sup> The state court would have the opportunity to render an unreviewable federal constitutional decision only if the state's usual justiciability doctrine were more beneficial to plaintiffs than federal doctrine. A state adventurous enough to have created a generous

---

case and controversy and standing associated with Art. III of the United States Constitution. See, e.g., *Doremus v. Board of Education* . . ."). See also *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 971-73 (1984) (Stevens, J., concurring) (if article III is not satisfied, the Supreme Court should deny *certiorari* and let the state court decision stand).

<sup>261</sup> This is because of the adequate and independent state ground theory, under which Supreme Court jurisdiction is barred. See *Michigan v. Long*, 463 U.S. 1032 (1983). *Long* demonstrates the Supreme Court's suspicion of allowing the states final say on any constitutional law issue, state or federal. The Court in *Long* threatens to reach out to overrule any constitutional ruling not explicitly based on the state constitution. See *id.* at 1040 ("[A]n important need for uniformity in federal law . . . goes unsatisfied when we fail to review [a state court] opinion that rests primarily upon federal grounds and where independence of an alleged state ground is not apparent from the four corners of the opinion.").

<sup>262</sup> See, e.g., Gordon & Gross, *supra* note 5, at 1177-81.

standing doctrine would, in all likelihood, have reached a similar result on the basis of a state law claim.<sup>283</sup> Is it likely that permitting New Jersey courts hearing section 1983 exclusionary zoning cases to utilize a broader theory of standing than *Warth*, or California courts hearing police misconduct cases to entertain a claim for injunctive relief that would be barred by *Lyons*, would significantly change the law in those jurisdictions? The potential defendants are not likely to be affected, and the prospective plaintiffs will be encouraged to bring their actions in state rather than federal court.

## 2. State Court Doctrine Tending to Disadvantage Plaintiffs

In the previous section, benefits to civil rights plaintiffs lined up with the state's interest in the integrity of its own procedures and other interests to present a very strong case for permitting a state to use its own generous justiciability doctrine in section 1983 actions. But what if state justiciability doctrine is different in a way that disadvantages plaintiffs?

### a. *Preclusive Justiciability Doctrine*

If a state's unique justiciability doctrine prevents a state court section 1983 plaintiff from bringing a case the federal courts would have heard — if the state has a special standing requirement, or a restrictive mootness doctrine, for example<sup>284</sup> — it might be said, as the Court suggested in *Felder*,<sup>285</sup> that the doctrine is “outcome-determinative,” imposes an inordinate burden on federal rights and may not be used. This is a relatively easy rule when applied to justiciability doctrines, which will tend to be outcome-determinative, and is probably preferable because of its predictability. But there could be room to reach different conclusions on a case-by-case basis.

---

<sup>283</sup> This was the case in *White v. Davis*, 13 Cal. 3d at 764, 765 n.3, 533 P.2d at 227, 228 n.3, 120 Cal. Rptr. at 99, 100 n.3, as discussed at note 256 *supra*.

<sup>284</sup> Happily, it is difficult to find examples of state courts applying restrictive justiciability doctrines in section 1983 actions. Before *Felder*, some state courts rejected plaintiffs who had not exhausted their state administrative remedies. See note 272 *infra*. But this practice is now prohibited, subject to some possible exceptions, see text accompanying notes 273-87 *infra*.

<sup>285</sup> See 108 S. Ct. at 2308.

Suppose that a state has a particularly harsh mootness doctrine, for example. The Supreme Court has announced that mootness of a federal question is itself a federal question,<sup>266</sup> but this decisive sounding pronouncement only asserts federal power to displace state law if necessary to serve federal interests.<sup>267</sup> The question to be asked, as described in the preceding section, should focus not only on whether the federal right is burdened, but also on the nature, weight, and legitimacy of the state interest involved. If a state had a strong legitimate interest in its doctrine — if, for example, the state had a particular need to keep moribund cases off its crowded docket and applied this doctrine equally to state and federal claimants alike<sup>268</sup> — then it could be said that the doctrine was not an “unnecessary” burden on the federal right,<sup>269</sup> that the state had a “valid excuse,”<sup>270</sup> or that the doctrine is not so inconsistent with federal law as to require the state to forego a neutral procedure, even if it would be outcome-determinative.

In areas like justiciability in which negative state doctrine is so likely to be inconsistent with the purposes of section 1983 — which was enacted on behalf of plaintiffs who had difficulty getting their claims heard in state court — I think a blanket rule is justifiable. This is particularly true in light of the fact that the state doctrines falling into this category are uncommon and subject to the self-restraint of state court judges. The issue-by-issue balance just described is more appropriately used in the area of procedure, where it is not always clear whether it is plaintiffs or defendants who are favored.

---

<sup>266</sup> *Liner v. Jafco, Inc.*, 375 U.S. 301, 304 (1964).

<sup>267</sup> This could be so either via the adequate state ground doctrine, on the theory that the state's dismissal of the case is an inadequate ground because it imposes a burden on a federal right, or under an FELA-type theory that Congress intended federal justiciability law to accompany the federal right being litigated into court.

<sup>268</sup> This would be in contrast to the *Liner* case, 375 U.S. 301, in which the Court may well have believed that the state court was discriminating against the federal claim at stake. See text accompanying note 247 *supra*.

<sup>269</sup> See text accompanying note 193 *supra*.

<sup>270</sup> See *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377 (1929).

b. *The Unavailable Forum —  
Exhaustion and the Tax Cases*

The Court's decision in *Felder* that the outcome-determinative requirement of exhaustion of state administrative remedies may not be applied in a state court section 1983 action<sup>271</sup> was simply an extension of a prohibition previously applied in the federal courts. According to the Court, Congress had more or less explicitly viewed an exhaustion requirement as repugnant to the goals of section 1983.<sup>272</sup> The state courts were required to make themselves no less readily available than the federal courts.

There are circumstances, however, in which the federal courts are permitted to impose various doctrines remitting would-be federal court section 1983 plaintiffs to state judicial remedies. One good example of this situation arises in federal court section 1983 litigation involving the constitutionality of state tax decisions;<sup>273</sup> another is state prisoner challenges to the length or fact of custody.<sup>274</sup> May a state court impose an exhaustion of administrative remedies requirement, despite *Felder*, in a case in which the federal courts are permitted to impose a judicial exhaustion rule? Is it the goal of state courts to replicate federal court, even in its unavailability, or to open its doors to civil rights plaintiffs precisely because the federal courts are unavailable?

There are compelling reasons why the state courts have be-

---

<sup>271</sup> See 108 S. Ct. at 2308.

<sup>272</sup> Before *Felder* was decided, some state courts had concluded that the Court's decision in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982), that exhaustion of administrative remedies could not be required in federal court section 1983 actions, would not apply in state court. See, e.g., *Kramer v. Horton*, 128 Wis. 2d 404, 383 N.W.2d 54, cert. denied, 479 U.S. 918 (1986); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), rev. denied, 313 N.C. 508, 329 S.E.2d 392 (1985). See Note, *supra* note 47, at 1042-43 (state court reaction to *Patsy* varied, but most state court opinions did not sufficiently analyze the applicability of *Patsy* to their decisions whether to apply an exhaustion requirement).

Most state courts imposing an exhaustion of administrative remedies requirement on section 1983 plaintiffs have done so in the context of tax cases, which present a somewhat different situation. See text accompanying notes 275-87 *infra*.

<sup>273</sup> See text accompanying notes 279-87 *infra*.

<sup>274</sup> See text accompanying note 288 *infra*.

come the primary forum for constitutional challenges to a state or local government's system of taxation.<sup>275</sup> Congress, showing a particularly strong concern for comity when a state's finances are involved, prohibited federal courts from enjoining a state's collection of its taxes "where a plain, speedy and efficient remedy may be had in the courts of such State."<sup>276</sup> In *Fair Assessment in Real Estate v. McNary*,<sup>277</sup> the Supreme Court then held, on the basis of similar comity concerns, that plaintiffs seeking damages should also be precluded from a federal forum if the state provided adequate remedies.<sup>278</sup> Thus, the federal courts will not consider a constitutional challenge to a state tax system or decision in a section 1983 action, but only the adequacy of existing state remedies.<sup>279</sup>

In many jurisdictions, plaintiffs wishing to challenge the constitutionality of a particular tax system arrive in state court only to be confronted with the state's requirement that they exhaust administrative remedies.<sup>280</sup> It seems clear that the tax anti-injunction act should not be held to bar injunctions issued in section 1983 taxpayer actions in state court,<sup>281</sup> and that *Mc-*

---

<sup>275</sup> For a general discussion of the phenomenon of taxpayer state court section 1983 tax cases, see Note, *State Taxation*, *supra* note 5.

<sup>276</sup> 28 U.S.C. § 1341 (1982).

<sup>277</sup> 454 U.S. 100 (1981).

<sup>278</sup> *Id.* Four justices in dissent deplored this judicially created exception to section 1983 jurisdiction. *Id.* at 117.

<sup>279</sup> This restriction parallels the Court's treatment of due process claims under *Parrott v. Taylor*, 451 U.S. 527 (1981), see note 78 *supra*; and of habeas corpus claims based on the fourth amendment under *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>280</sup> See, e.g., *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (*en banc*); *Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (3d Dist. 1986); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). Some courts have not applied state exhaustion of administrative remedies requirements. See *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96, 99 (3d Dist. 1983) (state conceded requirement inapplicable under *Patsy*), *cert. denied*, 466 U.S. 951 (1984).

Other courts have reached the same result as the courts imposing an exhaustion requirement, but on the theory that a tax assessment that has not been administratively appealed is not "final," see, e.g., *Cook County Treasurer v. Rosewell*, 124 Ill. App. 3d 797, 465 N.E.2d 494 (1984), or that injunctive relief is unavailable because adequate remedies at law — namely the tax review procedures — exist. See *Zizka v. Water Pollution Control Auth.*, 195 Conn. 682, 490 A.2d 509 (1985).

<sup>281</sup> Before the decision in *McNary*, several states had declined to entertain section 1983 actions for injunctive relief in the tax area, reasoning that if the federal courts did not have to hear such claims under section 1983, neither did the state courts. See *State Tax Comm'n v. Fondren*, 387 So. 2d 712, 723 (Miss. 1980), *cert. denied sub nom.*, *Redd*

Nary should not be held to bar state court actions for damages.<sup>282</sup> But does *Felder* prevent a state from applying its administrative exhaustion doctrine in this context?

In contrast to the usual situation governed by *Felder*, the Supreme Court has already weighed the significance of the availability of a federal forum for taxpayers under section 1983 against considerations of comity, and found that comity should prevail. The *McNary* opinion is cast as resolving a conflict between the policies of section 1983 and the policies of the tax anti-injunction act (albeit in a broadened application). If Congress agrees with the Supreme Court's preference for the comity interests and with the concomitant exception to section 1983 jurisdiction, why should a state not be able to create a comparable exception to the exhaustion doctrine in order to implement its own similar concerns with the proper balance of power between state administrative agencies and state courts? Some state courts have reasoned that if *McNary* gives federal courts permission to carve out an exception to section 1983 jurisdiction, it must give similar permission to the state courts.<sup>283</sup> If Congress were to become concerned with the lack of an immediately available forum, it could overrule *McNary* and make federal court more available, at least for damages actions, or even go so far as to amend the tax anti-injunction statute.<sup>284</sup>

---

v. Lambert, 450 U.S. 1040 (1981). After *McNary*, in which Justice Rehnquist, writing for the majority, noted that the availability of state court section 1983 actions on tax issues justified the holding, see 454 U.S. at 116-17, it seems clear that state courts may entertain such claims. See *Zizka*, 195 Conn. at 685, 490 A.2d at 513; *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983); see also *Coeur d'Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai County*, 104 Idaho 590, 661 P.2d 756 (1983). *McNary* does not say they must do so.

<sup>282</sup> This is another context, like those discussed in text accompanying notes 239-44 *supra*, where the reasons underlying the restrictions on federal court are irrelevant in state court, so striving for uniformity would be inappropriate.

<sup>283</sup> See, e.g., *Zizka*, 195 Conn. at 685, 490 A.2d at 513. ("Although § 1341 does not operate as a jurisdictional barrier in state courts, it nonetheless points the way to the proper standard by which state tax challenges should be measured. In a section 1983 suit seeking relief from the collection of state taxes, we may impose limitations that, like those of § 1341, inquire into whether the claimants have been afforded a statutory remedy that is 'plain, speedy and efficient.'").

<sup>284</sup> Another reason to allow the states to apply their usual exhaustion requirements in tax cases is that a decision prohibiting the states from requiring exhaustion would have little effect on state proceedings, other than perhaps taxing the ingenuity of state court judges. There are several unobjectionable grounds on which the state courts could otherwise effectively require exhaustion. If a challenge to a state tax is based on due



The existence of a general exhaustion doctrine reflects a state policy concerning state separation of powers or possibly even a jurisdictional bar.<sup>285</sup> Given that it is presumably Congress's will that providing a forum for such tax litigation is less important than federal prudential concerns, I think that a state would not be unwarranted in taking *McNary* as permission to impose a requirement of exhaustion of administrative remedies in the tax cases described.<sup>286</sup> I do not agree with the Court's conclusion in *McNary* that the tax cases are so unique as to warrant an exception to section 1983, but since this conclusion has created exceptional treatment of these cases in federal court without Congress demurring, the state courts should not have to shoulder a burden the federal courts have been instructed to decline, at least in the absence of any evidence that this is what Congress desires, and therefore should not be required to suspend any exhaustion requirement generally applicable to state cases, regardless of *Felder*, in the tax cases.<sup>287</sup>

---

process grounds, for example, the state courts might legitimately dismiss the case outright on the ground that there has been no due process violation so long as the state administrative agency stands ready to hear plaintiff's claim. See *Parratt v. Taylor*, 451 U.S. 527 (1981). Another reason for deferring section 1983 tax challenges to state administrative agencies would apply to plaintiffs seeking injunctive relief. Injunctions are not generally available where adequate remedies at law exist, and a state administrative process might be considered an adequate remedy at law. See *Zizka*, 195 Conn. at 686, 490 A.2d at 514. There seems little point to deciding whether an exhaustion requirement should be allowed in cases where a remittitur to the state agency would occur anyway, as long as a state agency had the power to change the challenged decision or policy. If this category includes virtually all claims for injunctive relief, the exhaustion requirement would only be likely to affect claims for damages. Here, a state court might nevertheless defer to the agency, not on the grounds of requiring exhaustion, but on the ground that the state decision is not final and may not be challenged in court, or on the ground of ripeness.

<sup>285</sup> See *id.*

<sup>286</sup> At least one state court thought that the Supreme Court gave such permission in *McNary* in adopting the language of section 1341 of title 28 of the United States Code about deferring to state "remedies" instead of referring to state court. If administrative remedies are adequate, reasoned this court, *McNary* says they may be pursued. See *id.* at 685, 490 A.2d at 513.

<sup>287</sup> An exception may, of course, be made to an exhaustion of administrative remedies requirement when exhaustion would be futile or inadequate. See, e.g., *Honig v. Doe*, 108 S. Ct. 592, 606 (1988). Some jurisdictions that imposed an administrative exhaustion requirement on section 1983 actions before *Patsy*, carved out such an exception to the exhaustion requirement. See, e.g., *Ray v. Fritz*, 468 F.2d 586, 587 (2d Cir. 1972) (exhaustion not required where plaintiff seeks only damages and state agency cannot award damages); *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970) (exhaustion of administrative remedies required in section 1983 actions, but not

The same reasoning would apply to allow the state courts to apply an exhaustion requirement in other areas where the federal courts are effectively permitted to do so.<sup>288</sup> As suggested

---

when remedy is inadequate or futile). State remedies obviously are not adequate if damages cannot be granted, and the state courts would be well-advised to follow this doctrine if an exhaustion requirement were allowed. Whether or not the state courts may be required to follow this doctrine is another question.

<sup>288</sup> In cases brought by prisoners challenging the constitutionality of prison disciplinary proceedings, for example, the Court has held that a federal court section 1983 action is unavailable as a vehicle for a prisoner to regain good time credit. See *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Good time credit, permitting a prisoner to be released from prison at an earlier date, may be taken away as a result of a prison disciplinary proceeding.

Such claims are held to be in the nature of habeas corpus proceedings and thus must be exhausted in the state courts. *Id.* See 28 U.S.C. § 2254(b). If a prisoner takes such a case to the state court, and the state wishes to impose an administrative exhaustion requirement of its own, by having the prisoner exhaust an adequate remedy within the prison administration, for example, the state probably should be allowed to do so.

For a discussion of the applicability of *Preiser* in state court section 1983 actions, see S. STEINGLASS, *supra* note 4, at 18-17-23. Professor Steinglass theorizes that *Preiser*, based on comity concerns unique to federal court, might be among the category of doctrines inapplicable in state court section 1983 actions, but also speculates that a state court might be required to apply *Preiser* if that case is considered as a limitation on the scope of section 1983. He ultimately agrees with my conclusion that the state courts should be permitted to apply an exhaustion requirement in *Preiser*-like cases, as long as adequate state court remedies are available, although he reaches that conclusion by applying *Preiser* itself, rather than looking to the state's accustomed doctrine. In either event, the adequacy of the available state remedies is plainly significant. The definition of the exhaustion requirement in habeas cases and of the scope of section 1983 is fully within Congress's control, and Congress has not questioned this exception to section 1983 either. One limitation on section 1983 adjudication Congress has not only considered but has created is the abstention provision of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(a) (1982). This provision permits a federal court to continue a prisoner's section 1983 action while the prisoner exhausts effective administrative remedies (the adequacy of which must be certified by the Attorney General according to preestablished standards). For a discussion of whether this provision should be considered applicable to state court section 1983 actions, see S. STEINGLASS, *supra* note 4, at 17-12-14. Why should the state not be permitted to pursue some neutral policy that might restrict section 1983 claims in circumstances in which the federal courts have been permitted to do so?

I do not think that the states should apply an exhaustion requirement simply because they may. Under *Preiser*, the Supreme Court creates the possibility that litigation over the constitutionality of a prison disciplinary proceeding will simultaneously take place on two fronts — federal court, where damages may be sought, and state court, where restitution of wrongfully removed good time credit may be ordered. See note 84 *supra*. Requiring exhaustion of state administrative remedies would add a third forum and truly exhaust the claimant. Allowing the states to use their own doctrine may lead to some curious results. See *Butler v. Bensinger*, 377 F. Supp. 870, 880-82 (N.D. Ill. 1974) (Illinois doctrine of prematurity would prevent claimant from having his case heard by state court, therefore, the exhaustion doctrine does not apply and plaintiff may enter

earlier, however, the fact that the states have the power to impose limits on section 1983 cases does not mean that they should do so, any more than the fact that Congress may have power under the supremacy clause to void those limits means that that power should be exercised. Discretion is involved in both instances.

Subject only to a few exceptions, like article III, Congress may remedy any situation it finds insufficiently receptive to civil rights — like the holes in section 1983 created by *McNary* and *Preiser* — by making the federal forum more available. This is a more appropriate first step than flexing the muscles of the supremacy clause to require the states to do what Congress will not or cannot require the federal courts to do.

### B. *Federal/State Disparities in Procedure*

While with justiciability doctrine, it is usually clear which of two different doctrines will favor the plaintiff, with many procedural rules that is not the case. If a state procedure differs from a federal procedure — if, for example, a state permits a nonunanimous jury verdict — plaintiff's counsel would need to be clairvoyant to know before the litigation begins whether that rule would help or hinder plaintiff's chance of prevailing. Other procedures may be easier to categorize — liberal class action rules, for example, or a generous right to a jury trial will generally be attractive to civil rights plaintiffs, while strict pleading rules will not. The state should be permitted to apply its own procedures as long as, balancing the relevant factors, the procedure is not so inconsistent with the purposes of section 1983 as to warrant an exercise of the supremacy clause.

#### 1. Procedures Favoring Plaintiffs

For the same reasons discussed in connection with justiciability, if a unique state procedure does favor plaintiffs, there is no doubt that the state should be permitted to use that procedure in section 1983 litigation. In one FELA case in which the state had attachment procedures far more attractive to plaintiffs than federal court procedures, Justice Brandeis had no difficulty in concluding that the plaintiff should be given the benefit of the

state rule.<sup>289</sup> If other state procedures are similarly generous to plaintiffs — if, for example, the state does not require that a bond be posted as a prerequisite to injunctive relief<sup>290</sup> — all interests other than uniformity combine on the same side of the balance.

## 2. Procedures Disfavoring Plaintiffs

A procedure that is generally and predictably adverse to plaintiffs might be impermissible. One example, familiar from the FELA cases, is strict state pleading rules.<sup>291</sup> Courts declaring that it is a federal question whether state pleading rules are so exacting as to be inconsistent with federal policy<sup>292</sup> are correct. This does not necessarily mean that the conclusion in the FELA cases rejecting strict local pleading rules should apply to section 1983 cases.<sup>293</sup> State courts differ on whether the federal rules on construing pleadings should apply in this context.<sup>294</sup> Are strict pleading rules so inconsistent with federal interests that they should be displaced? This depends on the particular rule involved. On some pleading issues, like construction of the pleadings, or the relation back of amendments to the complaint,<sup>295</sup>

---

<sup>289</sup> *Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200, 208-09 (1924).

<sup>290</sup> See *FED. R. CIV. P.* 65(c).

<sup>291</sup> See text accompanying notes 192-95 *supra*.

<sup>292</sup> See *Bach v. County of Butte*, 147 Cal. App. 3d 554, 195 Cal. Rptr. 268 (3d Dist. 1983).

<sup>293</sup> The context of the FELA cases is distinguishable from section 1983. See text accompanying notes 205-14 *supra*.

<sup>294</sup> Compare *Bach v. County of Butte*, 147 Cal. App. 3d 554, 195 Cal. Rptr. 268 (3d Dist. 1983) (prohibiting use of overly exacting state pleading rule) and *Greene v. Zank*, 158 Cal. App. 3d 497, 204 Cal. Rptr. 770 (2d Dist. 1984) (applying standards of *FED. R. CIV. P.* 12 to a motion to dismiss section 1983 complaint) with *International Society for Krishna Consciousness, Inc. v. City of Evanston*, 89 Ill. App. 3d 701, 411 N.E.2d 1030 (1980), *cert. denied*, 454 U.S. 878 (1981) (strict state pleading rules should be enforced in section 1983 actions).

In *Bach*, as in *Brown*, see note 192 *supra*, the pleading issue had distinctly substantive overtones. The issue in *Bach* centered on pleading requirements concerning immunity defenses, a matter the Court has held to be part of the substance of section 1983. See text accompanying notes 95-96 *supra*. *Brown*, similarly, involved a pleading question that implicated what plaintiff would be required to prove. In these instances, there is a stronger argument for applying federal law than in an instance in which the pleading issue is purely formal.

<sup>295</sup> This has been another area of concern to the state courts. See *Willson v. Des Moines*, 386 N.W.2d 76 (Iowa 1986), *cert. denied*, 479 U.S. 948 (1986) (in which the federal rule happened to be the same as the state rule); *Cooper v. Hutchinson Police Dep't*, 6 Kan. App. 2d 806, 636 P.2d 184 (1981) (amendment found to relate back).

either party might suffer from state restrictions.<sup>296</sup>

At least as I see the balance of interests on some of these questions, the particular results reached in the FELA cases and the *Erie* cases need not apply here. In contrast to the conclusion in the diversity cases, the forum's law should, I think, apply on issues like the relation back of amendments or when a suit is deemed to have commenced.<sup>297</sup> These procedures, which do not generally disadvantage plaintiffs, are not inherently inconsistent with the purposes of section 1983.<sup>298</sup>

Some pleading issues are so entwined with the elements of the case the plaintiff must prove that federal law clearly should govern.<sup>299</sup> If the issue is specificity of the pleadings, however, I think the state should be probably permitted to apply its usual rules, even though it is predictable that some plaintiffs might be discomfited by the rule.<sup>300</sup> Unlike restrictive standing requirements, or a state court's misapprehension over plaintiff's burden of proof, strict pleading requirements may be overcome by competent counsel,<sup>301</sup> and, thus, are not inherently inconsistent with

---

<sup>296</sup> Should it matter whether the plaintiff is actually disfavored in a particular case, or should the state law be judged in the abstract for its potential inconsistency with federal interests? This question is similar to the thorny question posed by *Henry v. Mississippi*, 379 U.S. 443 (1965), whether the state's interests in a procedural rule should be examined on the face of the rule itself, or in the context of alternative methods a state might have adopted to serve its goals in the particular case. See Meltzer, *supra* note 85, at 1181.

For the same reason that I favor a blanket rule prohibiting states from using justiciability doctrine predictably disfavoring plaintiffs, see text accompanying notes 264-70 *supra*, I would not follow the case-specific approach of *Henry*, but would judge the state procedural rules on their face (as long as the rules are being applied neutrally and do not discriminate against civil rights plaintiffs).

<sup>297</sup> See, e.g., *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (state law governs when action is "commenced" in diversity case); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (reaffirming *Ragan* after *Hanna v. Plumer*, see note 218 *supra*).

<sup>298</sup> One interesting example of an arguably disadvantageous procedure is the application of state indemnification statutes that provide for the payment of attorney's fees and damages for public officials who violate the civil rights of citizens. Given that such statutes would in all likelihood reduce the deterrent effect of section 1983, are such provisions inconsistent with federal policy? The few states to have considered this question have held that they are not. See, e.g., *Williams v. Horvath*, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976); see also *King v. Watertown*, 195 Conn. 90, 486 A.2d 1111 (1985). An indemnification statute has even been borrowed for application in federal court. See *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

<sup>299</sup> See note 294 *supra*.

<sup>300</sup> Accord S. STEINGLASS, *supra* note 4, at 12-7.

<sup>301</sup> Given that counsel is not always easy to obtain in section 1983 actions, I would,

the goals of section 1983.

Other disparities between federal and state court, such as issues concerning the scope and nature of the right to a jury trial,<sup>302</sup> and class action rules, must also be examined carefully. If a procedure cannot be characterized as advantaging or disadvantaging plaintiffs, outside the context of a particular case, the state should not be prohibited from using its own neutral rules. If a rule might be thought to be disadvantageous to plaintiffs, that does not end the inquiry into whether the state may be permitted to use its own procedure, but is the beginning of a process of analysis and balancing.

My balance of the relevant interests maintains a presumption in favor of state court procedures, plaintiff-oriented or not, that is overcome only if the procedure is inherently hostile to section 1983 plaintiffs. The result of this approach would lead to less uniformity between federal and state court, or among state courts, than would Professor Neuborne's position. I do not find this result troubling. Uniformity trims the good as well as the bad. While the availability of a federal forum does not give the state courts license to eviscerate the remedies of section 1983, it is, as Hart argued, relevant when debatable questions concern-

---

on the other hand, favor compelling the state courts to adopt the federal courts' forgiving attitude to the pleadings of pro se plaintiffs. See *Haines v. Kerner*, 404 U.S. 519 (1972) (pro se pleadings to be liberally construed).

<sup>302</sup> In *Dice*, as discussed previously, the Court was willing to apply federal law to the allocation of function between judge and jury, on the theory that the jury trial was an integral part of the rights conferred by the FEHA. See text accompanying notes 196-99 *supra*. In section 1983 actions, the subject matter varies enormously. Some claims, such as the tort-like claim of police brutality or prisoners' deprivation of medical treatment, would be tried before a jury under most states' laws; others, like the tax claims *McNary* remits to the state courts, might not. See *Coeur d'Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai Co.*, 104 Idaho 590, 661 P.2d 756 (1983) (no jury trial right in tax cases). If a section 1983 claim would be tried before a jury in federal court, whether because of the seventh amendment, see note 231 *supra*, which is not applicable in state court, or because of federal statutory law, see 28 U.S.C. § 1346(a)(1) (1954) & 28 U.S.C. § 2402 (1948), is a plaintiff entitled to a jury trial in state court? If there is a jury trial, should federal law control issues such as the allocation of decision-making responsibilities between judge and jury, or whether a jury may be nonunanimous? In the FEHA cases, provision of a jury trial was held to be an essential part of the rights Congress was conferring, see text accompanying notes 196-99 *supra*. The role of the jury in Congress's design for section 1983 is more debatable. For a discussion of the legislative history on this point, see S. STEINGLASS, *supra* note 4, at 14-3-5. (concluding that Congress would have wished jury trials to be available in section 1983 actions). Again, the results of the FEHA cases do not necessarily apply. Independent statutory analysis and balancing of the interests involved is necessary.

ing the applicability of state collateral law arise.

The state courts and legislatures have the power to minimize any disparities in justiciability or procedure between state and federal court. The ideal result would be for the state courts or legislatures to maintain a posture at least as generous as the federal courts, particularly with regard to justiciability doctrine. But when the states find a neutral but restrictive procedure important enough to force the issue, in many cases the Supreme Court should permit the state courts their choice in exchange for those instances in which the states' choice will favor civil rights plaintiffs.

## CONCLUSION

This Article has examined statutes, case law, and principles relevant to the question of when state courts should or must apply federal collateral law in section 1983 actions. I have not attempted to answer all possible questions, but to explore how decisions should be made.

The Supreme Court has emphasized the value of federal/state court uniformity of procedure, apparently on the dual assumptions that civil rights plaintiffs will benefit from a heavy imposition of federal collateral law and that parity is a good in itself. But federal law is not always superior, and parity does not always consist of identity; it is a form of parity if state and federal court each offers its own advantages and disadvantages.

The missing piece of the puzzle is congressional intent. Should Congress legislate to answer some of these questions? I doubt that legislation on choice of law would be very helpful. Congress could clarify that an inconsistency principle such as that embodied in section 1988 should apply to choice of law analysis in state as well as federal court, or take a position on the relative merits of the Hart and the Neuborne positions. As my own discussion probably demonstrates, formulating rules in this area is only slightly less difficult than applying them. No matter what Congress does, vexing individual decisions will have to be confronted.

This Article has identified other important and useful jobs for Congress to do. First, Congress should amend the removal statutes to give civil rights plaintiffs the same final choice of forum that FELA and antitrust plaintiffs enjoy. There is simply no good reason for allowing state defendants the power to re-

move state court civil rights actions to federal court. The accident of law allowing them to do so seriously impedes the civil rights plaintiff's ability to control not only the choice of forum, but also the course of litigation. If state court procedures are favorable enough to attract plaintiffs to what for institutional reasons should be the preferred forum, those same procedures are likely to repel defendants, who will remove to federal court. Despite their efforts to be generous to civil rights plaintiffs, the state courts nevertheless will have to cede a primary role in civil rights litigation to the federal courts as long as defendants hold the ultimate choice of forum.

Congress also has work to do in ensuring that the federal forum for section 1983 actions is itself fair. Too many Supreme Court decisions cutting holes in section 1983 jurisdiction have gone unquestioned. It is difficult to justify using the supremacy clause to compel the state courts to give up an accustomed procedure in entertaining a case Congress permits the federal courts to reject. If Congress were to provide a truly fair and receptive forum for civil rights litigation in federal court, plaintiffs would have a meaningful choice of forum.

Even without congressional action, the state courts have enormous power to further the goals of section 1983 and to avoid painful litigation over the extent of federal power. The state courts may simply agree not to use state procedures that adversely affect civil rights plaintiffs. Whether the removal statute is amended or not, the state courts could develop procedures that would enhance their role in civil rights litigation. The state courts are beginning to see the advantages of being the primary forum for litigation against state officials. If the state courts, the problem that caused the creation of section 1983, were to become the better forum for vindicating the rights section 1983 protects, what a wonderful irony it would be.



