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TOWARD PROCEDURAL PARITY IN CONSTITUTIONAL LITIGATION

BURT NEUBORNE*

THE ROLE OF CONCURRENT JURISDICTION IN CONSTITUTIONAL LITIGATION

The debate over the relative efficacy of state and federal courts as constitutional enforcement forums may have reached an impasse.¹ Despite encouraging signs of vigor at the state level,² many

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1. See generally Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Professor Fischer argues that Congress is the appropriate forum to determine the allocation of business between state and federal courts. One can hardly quarrel with his abstract proposition. Unfortunately, Congress rarely manifests its intention clearly, forcing courts to "discover" legislative intent. It is somewhat artificial to pretend, as does Professor Fischer, that judicial perception of relative institutional competence will not play a large role in the search for an often fictive legislative intent.

2. An unscientific sampling of recent state cases exhibiting serious concern for constitutional values includes: *Flores v. Flores*, 598 P.2d 893 (Alas. 1979) (right to appointed counsel in certain custody proceedings); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (leafleting in shopping centers protected by California constitution), *aff'd*, 100 S. Ct. 2035 (1980); *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979) (right to appointed counsel in paternity suit); *Tracy v. Municipal Court*, 22 Cal. 3d 760, 587 P.2d 227, 150 Cal. Rptr. 785 (1978) (misdemeanants facing \$100 fine entitled to appointed counsel); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (invalidation of racially discriminatory use of peremptory challenges); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (equalization of school financing); *Coxon v. State*, 365 So. 2d 1067 (Fla. Dist. Ct. App. 1979) (indigent's probation cannot be revoked because unable to pay fine); *State v. Brown*, 371 So. 2d 751 (La. 1979) (invalidation of racially discriminatory use of peremptory challenges); *District Attorney v. Watson*, — Mass. —, 411 N.E.2d 1274 (1980) (invalidation of capital punishment under state constitution); *Commonwealth v. O'Neal*, 369 Mass. 242, 339 N.E.2d 676 (1975) (invalidation of death penalty for rape); *People v. Johnson*, — Mich. —, 283 N.W.2d

civil rights-civil liberties lawyers remain persuaded that federal courts, especially federal trial courts, continue to provide a "better" forum for the enunciation and enforcement of constitutional values.³ It may prove impossible, however, to develop empirical support for what is, after all, a subjective impression, albeit a widely shared one. Given the value judgments which inevitably affect one's measurement of the quality and correctness of constitutional jurisprudence, objective techniques such as statistical analysis seem woefully inadequate in attempting to determine the "better" forum. Qualitative analysis, with its subjective pitfalls, is probably our only valid comparative tool.⁴

632 (1979) (right to appointed counsel in grand jury contempt proceedings); *Hepfel v. Bashaw*, — Minn. —, 279 N.W.2d 342 (1979) (right to appointed counsel in paternity suit); *Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979) (system based solely upon money bail would violate equal protection clause); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (prohibition of exclusionary zoning), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (equalization of school financing), *cert. denied*, 414 U.S. 976 (1973); *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971) (right to appointed counsel at probation revocation hearing); *People v. McCray*, 104 Misc. 2d 782, 429 N.Y.S.2d 158 (Sup. Ct. 1980) (validation of racially discriminatory use of peremptory challenges); *Oregon v. Hass*, 267 Or. 489, 517 P.2d 671 (1973) (criminal defendant's statements after refusal of request to talk to attorney inadmissible for impeachment purposes), *rev'd*, 420 U.S. 714 (1974); and *State v. Ashbaugh*, 90 Wash. 2d 432, 583 P.2d 1206 (1978) (criminal defendant cannot lose appeal rights because unable to pay filing fee).

Law review comment on the increasing significance of state courts as forums for constitutional enforcement include: Black, *Obscenity and Freedom of Expression in Michigan*, 56 U. DET. J. URB. L. 27 (1978); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); and Vitiello, *Independent and Adequate State Grounds: A Stone Unturned by Louisiana's Criminal Defense Bar?*, 25 LOY. L. REV. 745 (1979).

3. I have attempted to explain my institutional preference for federal trial courts as constitutional enforcement mechanisms in Neuborne, *supra* note 1. For an analysis of choice of forum in diversity litigation see Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962), and Hill, *Substance and Procedure in State F.E.L.A. Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384 (1956).

4. It is helpful in comparing state and federal courts to note the relatively rare situations in which a jurisdiction's state and federal courts are simultaneously confronted with the identical constitutional issue. *Compare* *Long Island Lighting Co. v. New York State Pub. Serv. Comm'n*, No. 77-972 (E.D.N.Y. Mar. 30, 1979), *aff'd in part and rev'd in part mem.*, (E.D.N.Y. July 18, 1980), *with* *Consolidated Edison Co. v. Public Serv. Comm'n*, 93 Misc. 2d 313, 402 N.Y.S.2d 551 (Sup. Ct.), *rev'd*, 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), *aff'd*, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), *rev'd*, 100 S. Ct. 2326 (1980), and *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 63 A.D.2d 364, 407 N.Y.S.2d 735

Comparative qualitative analysis, of course, presupposes the existence of a consensus as to what we mean by "better." My definition, which I hope is widely shared, views the better forum as the one more likely to assign a very high value to the protection of the individual, even the unreasonable or dangerous individual, against the collective, so that the definition of the individual right in question will receive its most expansive reading and its most energetic enforcement. Such a definition of "better" is based on an assumption that it is socially desirable to route controversies involving asserted constitutional rights of individuals to those judicial forums most likely to resolve them in favor of the individual. Since I believe that the preeminent political challenge posed by what is left of the twentieth century—at least in the industrialized west—is the preservation of the individual as a force capable of effectively checking the collective, it follows that routing constitutional cases to the judicial forum most sympathetic to the individual is desirable.

If, however, one were to reject the notion that the individual is an endangered species in need of all the shoring up he can get, in favor of a view that there already is too much individual self-indulgence in our society, the better forum may become the forum less likely to favor the individual at the expense of a democratic consensus.⁵ I suspect that much of the disagreement over forum allocation in constitutional cases turns, first, on an unarticulated disagreement of policy over which meaning "better" should have and, second, on an often unarticulated disagreement of fact over which forum more closely approximates a given definition of "better."

In seeking to define the meaning of "better," I have made what to some will appear an arbitrary distinction between constitutional issues involving individual rights and constitutional issues involving the allocation of power between branches and components of the government. I have ignored the allocation of power issues and concentrated on the individual rights issues. Why, one may ask, is one species of constitutional issue more important than the other

(1978), *aff'd*, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), *rev'd*, 100 S. Ct. 2343 (1980).

5. Cf. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (judicially imposed rules of conduct erode democratic values).

in assessing the relative merits of potential constitutional enforcement forums? The answer lies in a distinction between two broad categories of constitutional values—"means values," which define the proper mechanism of government, and "ends values," which express the purposes of government. I believe that ends values are more important than means values and would argue that a decision solicitous of first amendment values is worth more than an equally well reasoned decision protective of the eleventh amendment.

Of course, one cannot ignore the "means" strictures of the Constitution. To do so would not only weaken the constitutional fabric generally, but would directly jeopardize ends values which can best be realized in a setting which respects the separation of powers and the exigencies of federalism. If, however, one assumes—rightly, I think—that state and federal courts will each grapple in good faith with both means and ends cases, it is reasonable to be more concerned with a relative propensity to decide ends values cases in a given way, without regard to the relative propensity of each system to decide means values cases.

I know of no more acceptable way to resolve the policy dispute over the best meaning of "better" than by reference to a majoritarian consensus, expressed legislatively by the enactment of the precursor to 42 U.S.C. § 1983⁶ and judicially by the liberal construction afforded section 1983 by the modern Supreme Court,⁷

6. 42 U.S.C. § 1983 (1976) provides:

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

The legislative history of the Civil Rights Act of 1871, which contained the original version of § 1983, has been exhaustively discussed by the Supreme Court. *E.g.*, *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980); *Owen v. City of Independence*, 100 S. Ct. 1398 (1980); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961).

7. The modern history of § 1983 in the Supreme Court begins with *Monroe v. Pape*, 365 U.S. 167 (1961), which freed § 1983 from a century of conceptual restraints which had imposed a de facto requirement of exhaustion of state judicial remedies on many attempts to enforce constitutional rights in federal court. For a discussion of the evolution of the nonexhaustion model and its current application, see 1 N. DORSEN, P. BENDER & B. NEUBORNE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1535-53 (4th ed. 1976); Neuborne, *The Procedural Assault on the Warren Legacy*, 5 HOFSTRA L.

that constitutional cases should be routed to the forum most likely to rule in favor of the individual. Although such a consensus, if it exists, fixes the meaning of "better," it does not tell us, in fact, which forum is more likely to rule in favor of the individual. Moreover, even if empirical data existed which would enable us to determine which forum, state or federal, were generally better at deciding constitutional cases, permutations of space, time, and subject matter would almost certainly dictate substantial deviations from the general norm.⁸ Accordingly, it is probably impossible to establish definitively which, if either, judicial system is uniformly better at deciding constitutional cases. In the absence of such a definitive resolution, a choice among three forum-allocation approaches must be made.

First, we might simply assume that neither forum is better and, having assumed substantive parity between state and federal courts, route cases into one forum or another on the basis of "neutral" factors having nothing to do with potential impact on the merits. Given the legitimate claims of federalism, such an assumption of substantive parity would incline many constitutional cases involving state and local officials toward state court, at least in the first instance. Of the various forum-allocation approaches, an assumption of substantive parity is the most beguiling because it permits us to engage in wishful thinking. However, lawyers know—at least they think they know—that choice of forum often affects outcome in constitutional cases. That is why they spend so much time fighting about it. And, after a tentative gesture in the direction of an assumption of parity,⁹ the Supreme Court appears to have drawn back, recognizing that choice of forum in constitutional cases is, if not outcome-determinative, at least outcome-relevant.¹⁰

REV. 545, 556-60 (1977).

8. See notes 15-17 & accompanying text *infra*.

9. *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

10. *Rose v. Mitchell*, 443 U.S. 545 (1979); *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Rose*, the Court declined to apply *Stone v. Powell* to a claim of discrimination in the selection of the grand jury that indicts the habeas petitioner, reasoning, "A federal forum must be available if a full and fair hearing of such claims is to be had." 443 U.S. at 561. Similarly, in *Jackson*, the Court authorized a federal habeas corpus court to ascertain whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," noting that a state jury or a trial judge "may occasionally convict" lacking such

Second, we might make an arbitrary judgment on the best available data as to which forum is better and route all constitutional cases to it as a matter of exclusive jurisdiction. While no significant support for a regime of exclusive constitutional jurisdiction, either state or federal, exists, a category of de facto exclusive state jurisdiction is created whenever preclusion is added to an exhaustion requirement.¹¹ One can hardly imagine a less appropriate mechanism for deciding whether exclusive constitutional jurisdiction should exist.

Finally, we might recognize that choice of forum in constitutional cases is often relevant to the outcome, but also recognize that we cannot know in advance which forum will be better in every case. Accordingly, we might delegate the forum allocation decision, on an ad hoc basis, to the person most likely to possess the data and motivation necessary to make a sophisticated guess, plaintiff's counsel. Such a model, essentially one of concurrent jurisdiction, permits plaintiffs a relatively free choice of forum in the expectation that enlightened self-interest will guide constitutional cases into the forum most likely to enunciate an expansive vision of the rights of the individual. Despite conceded federalism and efficiency costs, we have operated under such a system of concurrent constitutional jurisdiction since 1961,¹² and, although members of the Supreme Court have occasionally waffled,¹³ we seem firmly committed to it for the foreseeable future.¹⁴

evidence. 443 U.S. at 317.

11. In *Stone v. Powell*, 428 U.S. 465 (1976), the Court linked preclusion with exhaustion to create a judge-made exclusive state jurisdiction over fourth amendment claims arising in the context of state criminal proceedings. A similar danger of judge-made exclusive jurisdiction occurs in *Pullman* abstention settings when a plaintiff fails to file an "England reservation" in state court. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). The *Pullman* abstention doctrine is discussed in Field, *Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977). Finally, if preclusion is added to *Younger* abstention, that is, the prohibition of federal intervention with pending state criminal proceedings, *Younger v. Harris*, 401 U.S. 37 (1971), a substantial danger exists of judge-made exclusive jurisdiction over many constitutional controversies. But see *Wooley v. Maynard*, 430 U.S. 705 (1977) (allowing relitigation of prospective claim despite adverse determination in prior state criminal proceeding). See generally Neuborne, *supra* note 7, at 560-68; see also *Ellis v. Dyson*, 421 U.S. 426 (1975).

12. *Monroe v. Pape*, 365 U.S. 167 (1961).

13. *E.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (Burger, C.J., & Blackmun, J., dissenting); *id.* at 443 (Black & Blackmun, JJ., dissenting).

14. The current Supreme Court's fidelity to a concurrent jurisdiction model is illustrated

As I have suggested, the principal argument in favor of a regime of concurrent jurisdiction is its capacity to act as a self-correcting constitutional compass, guiding litigation into the forum most likely to enunciate an expansive definition of the rights of the individual. Today, for many civil rights-civil liberties lawyers, that still means federal courts. However, choice of forum in constitutional cases is not writ in stone. Numerous settings exist where a contemporary lawyer might opt, on substantive grounds, to litigate a constitutional case in state rather than federal court. A state court may have already ruled in favor of the right in question on either state or federal constitutional grounds.¹⁵ An institutional preference for state over federal courts may exist in a given geographical area;¹⁶ or, in those situations where the Supreme Court appears hostile to a given position, state courts may be the only game in town, regardless of general institutional preference.¹⁷ Moreover, if we are lucky, the healthy movement toward serious constitutional jurisprudence in the state courts will continue to the point where civil rights-civil liberties lawyers in large numbers will be tempted to resort to them. Such a process, should it occur, would not only be a welcome application of the principle of concurrent jurisdiction as a self-correcting constitutional compass but would also promise several important collateral benefits.

As a matter of resource allocation, it would be desirable to eliminate the need to expend resources of both bench and bar on the elegant procedural jurisprudence associated with sung state and

by *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), in which the Court rejected an attempt by the Second Circuit to encourage litigants to exhaust state judicial remedies prior to filing a § 1983 action by refusing to toll the § 1983 limitations period during the pendency of state proceedings. *Id.* at 492.

15. *E.g.*, *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 100 S. Ct. 2035 (1980); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

16. The institutional preference may be purely local, reflecting the decisional patterns of a single set of state and federal judges, or broader, reflecting the decisional pattern of a state or even a circuit. Moreover, such a preference may exist only for certain issues.

17. One would think twice about litigating a shopping center free speech case in a federal court after *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (rejecting application of first amendment protections to shopping centers).

local defendants in federal court.¹⁸ Of course, if the federal forum is significantly more likely to provide an expansive definition of the rights of the individual, the time is well spent. If, however, state courts appear to offer rough substantive parity, many lawyers would gladly opt for them and put the time which would have been spent seeking to decipher Hart and Wechsler's *The Federal Courts and the Federal System*¹⁹ to more productive, although not more enjoyable, use.

Moreover, apart from the pragmatic question of optimum use of the time of the bench and bar, effective enforcement of constitutional values by state courts might afford a more harmonious and effective method of checking local majorities. Whatever the validity of the concern, federal judges have occasionally been pictured as "outsiders," rendering their controversial decisions subject to more resistance than an equally controversial opinion handed down by the "local" judge.²⁰ To the extent the "local" judge can be relied upon to check a local majority, some friction may be avoided and the potentially unpopular decision may be received with better grace. Finally, once judicial intervention is deemed appropriate, an energetic state bench has at its disposal a more flexible remedial armory than does a federal judge, doubly constrained by the article III case or controversy requirements and federalism concerns.²¹

18. While I know no systematic study in the area, I estimate that more than 25% of my litigation time has been devoted to arguing federalism issues.

19. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*].

20. The "outsider" argument is overstated because it ignores the very substantial roots which federal trial judges have in the communities they serve. Neuborne, *supra* note 1, at 1120. Moreover, the very links between a local judge and his constituents render it less likely that a local judge will articulate and enforce countermajoritarian norms in a sustained manner.

21. *Compare* *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment forbids federal retrospective awards against state), *with* *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980) (affirming state award of retrospective § 1983 relief). *See also* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (*respondeat superior* liability unavailable in § 1983 cases); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (article III standing doctrine restricts access to federal courts); *Rizzo v. Goode*, 423 U.S. 362 (1976) (article III and federalism concerns restrict scope of remedial decree); *Warth v. Seldin*, 422 U.S. 490 (1975) (article III standing doctrine restricts access to federal courts); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (federalism concerns restrict scope of equity decree).

THE IMPACT OF PROCEDURAL DISCREPANCIES ON THE CONCURRENT JURISDICTION MODEL

Thus, under a system of concurrent jurisdiction over constitutional controversies, were the needle of the forum-allocation compass to incline more toward state courts, it would be an occasion for genuine satisfaction.²² The needle, however, is currently jammed in the "federal" position. For even when conditions of rough substantive parity might exist, the comparative procedural drawbacks of litigating a constitutional claim in many state courts are often so dramatic that only a clear showing of state substantive superiority can overcome them.²³ In precisely those situations where rough substantive parity may be emerging, lawyers are dissuaded from testing the waters in state court by three procedural concerns.

The Uniformity Principle

Whatever else one may say about federal procedure, it is uniform. Once the basics are mastered, the same rules apply in Oregon as in Mississippi. Moreover, because they are uniform, federal procedural rules are shaped and applied by a single body of precedent using a single set of concepts. The existence of a fair degree of nationwide procedural uniformity, whatever its content, acts as a powerful magnet drawing constitutional litigation into the federal courts. The economic realities of constitutional litigation have resulted in the emergence of a relatively small national civil rights-civil liberties bar, based largely in major urban centers or in academe, which is called upon to litigate constitutional cases in numerous states, often simultaneously.²⁴ Were each constitutional

22. I am not suggesting the imposition of compulsory state jurisdiction over constitutional controversies involving state or local officials, since the proper operation of a concurrent jurisdiction model assumes a free choice of forum. I am suggesting that if local lawyers began to perceive a rough parity between state and federal courts as constitutional enforcement forums, it would be all to the good.

23. One should not overstate the importance of procedure in choice of forum. Where a clear perception of substantive superiority exists, a lawyer is unlikely to be diverted from the substantively superior forum by procedural concerns, unless they act as door-closing devices. Where the forums are perceived as roughly equivalent, differences in procedure will exert the strongest influence on choice of forum.

24. The evolution of a decentralized civil rights-civil liberties bar capable of responding

case to be litigated under the bewildering array of state procedures currently in use, the capacity of a relatively small, centralized bar to respond to complex cases in unfamiliar procedural settings would be seriously impaired. Thus, as between relatively equivalent forums, the civil rights-civil liberties bar will and should gravitate toward a national forum of uniform procedure. To the extent state courts are concerned with establishing a concurrent forum capable of attracting a share of constitutional litigation, the salutary trend toward procedural uniformity, evidenced by the adoption of the Federal Rules of Civil Procedure in twenty-three states,²⁵ should continue. A state that insists on maintaining a parochial system of procedure should not expect a substantial influx of constitutional cases.

The Familiarity Principle

Closely allied with, yet distinct from, the uniformity principle is the tendency of civil rights-civil liberties lawyers to litigate in a forum with familiar procedures. Obviously, it is easier to master a single federal rule than to learn the multiple procedural systems operating in the state courts. Because a sense of procedural familiarity is a precondition to careful litigation strategy, many lawyers are reluctant to pilot a complex constitutional case through unfamiliar state procedural shoals.²⁶

The familiarity principle is fed, moreover, not only by the multiplicity of state procedures, but by a curious quirk of academe. For a variety of reasons, some perfectly legitimate, some perfectly foolish, federal procedure is treated as worthy of serious intellectual concern at our leading law schools, while state procedure, when no-

locally to issues is the goal of each of the major civil rights-civil liberties organizations. While one cannot underestimate the contributions of local counsel, it has proved extremely difficult for lawyers in many localities to make a living practicing law on behalf of clients who cannot pay. The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 (1976), is designed to permit the growth of an indigenous civil rights-civil liberties bar. However, it is too early to know whether the award of fees in appropriate cases will result in the growth and decentralization of the civil rights-civil liberties bar.

25. See the list compiled in Cox & Newbern, *New Civil Procedure: The Court that Came in from the Code*, 33 Ark. L. Rev. 1, 2 n.6 (1979).

26. The concern is magnified by the fact that defendant's counsel in a § 1983 case is generally a state or local government lawyer with substantial expertise in local practice.

ticed at all, is relegated to a secondary niche.²⁷ Many, perhaps most, students of national law schools graduate without ever having been exposed to a systematic course in comparative state procedure. Accordingly, even if they acquire a superficial familiarity with procedures in one or more states in order to pass the bar examination, they remain more comfortable with, and better at manipulating, the conceptual vocabulary of federal procedure.

When a young civil rights-civil liberties lawyer is confronted with forums of rough substantive comparability, it is natural to expect the lawyer to tilt toward the forum for which he or she has been trained. Accordingly, the proper operation of the concurrent jurisdiction model requires a greater familiarity with state procedures than has generally existed among the civil rights-civil liberties bar. Obviously, as state procedures take on greater uniformity, familiarity will increase. However, law schools should not await the emergence of a uniform state-federal procedure. There is no reason why national law schools, capable of offering an astonishing variety of courses in an attempt to justify the third year, cannot offer courses keyed to a comparative examination of state procedural systems. It is true, given the content of many state procedural rules, that increased familiarity may breed contempt; but continued unfamiliarity with state procedures will certainly prolong avoidance.

The Hospitality Principle

Uniformity and familiarity alone cannot render even a substantively comparable state forum attractive if the governing procedures are hostile to the effective prosecution of a constitutional case. A civil rights-civil liberties lawyer generally will shun any forum, state or federal, that:

27. Among the legitimate reasons for favoring federal over state procedure in a law school with a geographically diverse student body are: (1) a desire to expose students to a body of law under which all will practice; (2) the existence of a richer academic literature in the area of federal procedure; (3) the existence of an arguably richer and better written body of case law; (4) the prevailing philosophy that law school should seek to acquaint students with a general overview of the problems of procedure rather than seek to teach a series of rules; and (5) the ability to teach federalism as a by-product of procedure. Unfortunately, a preoccupation with elitism and national status may also translate itself into a disdain for the study of state procedure.

1. imposes burdensome pleading requirements;
2. applies an unfairly short statute of limitations;
3. refuses to acknowledge the importance of class actions;
4. fails to afford broad discovery;
5. imposes archaic notions of immunity, especially executive immunity;
6. applies technical evidentiary rules in civil cases; and
7. fails to provide for an award of attorney's fees in appropriate circumstances.

Federal procedure is hospitable to the effective prosecution of a constitutional claim. The generally liberal aspects of notice pleading are at their most permissive when section 1983 complaints are involved.²⁸ Moreover, federal courts, with few exceptions, are loath to dismiss a constitutional claim at the pleading stage.²⁹ Statute of limitations issues generally have been resolved in favor of a reasonably long limitations period ranging from three to six years.³⁰ Federal courts, with few exceptions, have declined to apply potentially applicable state limitations periods of unreasonably short dura-

28. See, e.g., *Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (pleading of conspiracy in considerable detail without mentioning immunities involved held sufficiently specific); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978) (complaint alleging conduct violating the Constitution, the time of violation, and listing the responsible officials deemed sufficiently specific); *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976) (*in forma pauperis* affidavit in civil rights case demanded "broadest and most liberal standard of pleading"); *Brook v. Thornburgh*, 497 F. Supp. 560 (E.D. Pa. 1980) (complaint alleging attempt by officers of the Commonwealth to drive employees from state jobs was not sufficient to state claim). See generally C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 1230 (1969 & Supp. 1979).

29. See, e.g., *United States ex rel. Brzozowski v. Randall*, 281 F. Supp. 306 (E.D. Pa. 1968); *United States v. International Bhd. of Elec. Workers Local 683*, 270 F. Supp. 233 (S.D. Ohio 1967).

The leading exception to the rule of pleading liberality in § 1983 cases occurs when plaintiffs seek to sue superior officers for the misdeeds of subordinates. In the absence of more than mere conclusory assertion of individual responsibility, courts have dismissed such § 1983 claims at the pleading stage. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). Such dismissals are almost always accompanied by a decision sustaining the complaint as against one or more defendants, thus permitting discovery which may result in the reinstitution of the dismissed claim. See, e.g., *Brook v. Thornburgh*, 497 F. Supp. 560 (E.D. Pa. 1980).

30. Since Congress has not enacted a statute of limitations for § 1983 claims, federal courts borrow the most appropriate analogous state limitations period. See notes 268-273 & accompanying text *infra*. See generally *Runyon v. McCrary*, 427 U.S. 160 (1976); *Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980); *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978); *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1978).

tion.³¹ Class action practice in federal court, while far from ideal, recognizes the Rule 23(b)(2) action under the Federal Rules of Civil Procedure as an integral part of constitutional adjudication.³² Liberal discovery is a hallmark of federal procedure. Executive immunity rules are reasonable,³³ and entity liability is a distinct possibility.³⁴ The rules of evidence are codified in a form which simplifies a plaintiff's burden of proof,³⁵ and an award of attorney's fees in a successful case is routine.³⁶

When one contrasts the hospitable procedural climate of the federal courts with the procedures in vogue in certain states, the procedural impediments to litigating a constitutional case in those state courts are starkly illustrated. I do not pretend to know enough state procedure to attempt a state-by-state analysis. The uniformity and familiarity principles operate equally on law professors. Instead, I have chosen the state of New York to illustrate my point. Other jurisdictions may be more or less procedurally hostile to litigating a constitutional claim. However, I believe that New York presents a fair basis for comparing state and federal procedural law.

1. *Pleadings*

As I have suggested, pleading a section 1983 claim in federal

31. *E.g.*, *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978); *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1978); *Clark v. Louisa County School Bd.*, 472 F. Supp. 321 (E.D. Va. 1979); *Van Horn v. Lukhard*, 392 F. Supp. 384 (E.D. Va. 1975); *Edgerton v. Puckett*, 391 F. Supp. 463 (W.D. Va. 1975). *But see* *Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980).

32. *See generally* C. WRIGHT & A. MILLER, *supra* note 28, § 1776.

33. The ground rules governing eleventh amendment immunity are spelled out in *Quern v. Jordan*, 440 U.S. 332 (1979), *Hutto v. Finney*, 437 U.S. 678 (1978), *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ex parte Young*, 209 U.S. 123 (1908). Executive immunity in § 1983 cases is defined by *Virginia Supreme Court v. Consumers' Union*, 100 S. Ct. 1967 (1980), *Wood v. Strickland*, 420 U.S. 308 (1975), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *See also* *Butz v. Economou*, 438 U.S. 478 (1978).

34. *Owen v. City of Independence*, 100 S. Ct. 1398 (1980); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

35. *See* E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 32-33 (1963); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 92 (2d ed. 1977). *But see* *Brown, Giveller & Lubin, Treating Blacks as if They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1, 35-42 (1975).

36. 42 U.S.C. § 1988 (1976); *see, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1977).

court is a relatively straightforward matter. The federal rules provide for a single form of action and adopt nontechnical notice pleading. Moreover, federal courts have properly read civil rights complaints with a liberality bordering on indulgence.³⁷ It is, unfortunately, considerably more difficult to plead a constitutional case in a New York court. New York forces a lawyer contemplating constitutional litigation to engage in a complex process of determining whether the claim sounds in common law mandamus, in which case it must be pleaded as a petition for relief under Article 78 of the Civil Practice Law and Rules³⁸ or whether the claim states a request for more traditional plenary common law relief, in which case it must be pleaded as a claim for declaratory and other appropriate plenary relief.³⁹ As a matter of theory, Article 78 petitions appear designed to provide speedy relief, in the nature of mandamus, from the improper application of the law by an administrative official; plenary actions appear designed to provide relief from unconstitutional legislative action. The dichotomy works well enough until an administrative official seeks to apply a statute or regulation challenged as unconstitutional, or until a plaintiff seeks to combine a state law challenge with a challenge to the constitutionality of the enabling legislation, or until a plaintiff seeks both equitable and legal relief.⁴⁰ Because the theory of common law mandamus is even less understood today than it was fifty or one hundred years ago, and because the artificial distinction between challenges to the application of a law and challenges to the law itself often proves impossible to apply in practice, the choice of the appropriate pleading for a constitutional case in a New York court is often shrouded in mystery. Although choosing the wrong form of

37. See notes 28-29 & accompanying text *supra*.

38. See generally N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1963 & Supp. 1980).

39. See generally Gabrielli & Nonna, *Judicial Review of Administrative Action in New York: An Overview and Survey*, 52 ST. JOHN'S L. REV. 361 (1978).

40. Examples of confusion over whether to plead a given case as an Article 78 petition or as a plenary action include: *Bey v. Hentel*, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826 (1975); *Kovarsky v. Hous. & Dev. Administration*, 31 N.Y.2d 184, 286 N.E.2d 882, 335 N.Y.S.2d 383 (1972); *Phelan v. Theatrical Protective Union*, 22 N.Y.2d 34, 238 N.E.2d 295, 290 N.Y.S.2d 881 (1968); *Adams v. New York State Civil Serv. Comm'n*, 51 A.D.2d 668, 378 N.Y.S.2d 171 (1976); *Hoffman v. Poston*, 49 A.D.2d 316, 374 N.Y.S.2d 774 (1975); and *Jackson v. McCabe*, 47 A.D.2d 730, 365 N.Y.S.2d 202 (1975). See generally 8 J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 7801-02 (1980).

action should not result in dismissal,⁴¹ counsel may find himself prosecuting a wholly different case with radically different procedural attributes.⁴² For example, plenary constitutional claims are governed in New York by no less than a three year and perhaps as long as a six year statute of limitations.⁴³ Article 78 petitions are burdened with an absurdly short four month limitations period.⁴⁴ If we assume a hypothetical civil rights lawyer who has made a judgment that rough substantive parity exists between a New York and a federal court, the ease of drafting an acceptable and predictable federal pleading and the difficulty of drafting a predictable state pleading will naturally incline the lawyer toward federal court.

2. *Statute of Limitations*

The limitations period governing constitutional cases in federal district courts in New York is either three or six years.⁴⁵ The limi-

41. N.Y. CIV. PRAC. LAW § 103 (McKinney 1972). *E.g.*, Phelan v. Theatrical Protective Union, 22 N.Y.2d 34, 238 N.E.2d 295, 290 N.Y.S.2d 881 (1968).

42. In addition to the dramatic difference in the length of the limitations period, Article 78 claims suffer from other procedural shortcomings. Since an Article 78 petition is a "special proceeding" under New York practice, leave of court must be obtained before engaging in discovery. N.Y. CIV. PRAC. LAW § 408 (McKinney 1972 & Supp. 1980). Moreover, since an Article 78 petition sounds in common law mandamus (or certiorari), doubts exist concerning the power of an Article 78 court to grant remedies, such as damages and injunctive relief, which were not associated with a writ of mandamus. *E.g.*, Schwab v. Bowen, 41 N.Y.2d 907, 363 N.E.2d 341, 394 N.Y.S.2d 616 (1977) (damages); Allen v. Eberling, 24 A.D.2d 594, 262 N.Y.S.2d 121 (1965) (damages). See also Ornstein v. Regan, 574 F.2d 115, 118 (2d Cir. 1978); Williams v. Codd, 459 F. Supp. 804, 813 (S.D.N.Y. 1978). On the issue of injunctive relief, see Plumley v. County of Oneida, 57 A.D.2d 1062, 395 N.Y.S.2d 850 (1977) (denying relief), Jerry v. Board of Educ., 44 A.D.2d 198, 354 N.Y.S.2d 745 (denying relief), *modified on other grounds*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974), and Tuck v. Heckscher, 65 Misc. 2d 1059, 320 N.Y.S.2d 419 (Sup. Ct.) (recognizing power to grant injunction, but denying relief on merits), *aff'd*, 37 A.D.2d 558, 323 N.Y.S.2d 659, *aff'd*, 29 N.Y.2d 288, 277 N.E.2d 402, 327 N.Y.S.2d 351 (1971).

43. New York courts have not ruled on the limitations period governing a claim premised directly on the constitution since 1895, when the court of appeals ruled that a claim for the taking of property founded directly on the New York state constitution was governed by the ten year catch-all period, which has now been shortened to six years. Clark v. Water Comm'rs, 148 N.Y. 1, 42 N.E. 414 (1895) (current version of statute of limitations at N.Y. CIV. PRAC. LAW § 213 (McKinney 1972 & Supp. 1980)).

44. N.Y. CIV. PRAC. LAW § 217 (McKinney 1972).

45. *E.g.*, Regan v. Sullivan, 557 F.2d 300 (2d Cir. 1977). The argument over whether a three or six year limitations period should govern § 1983 claims in New York turns on whether § 1983 is a statute creating a liability within the meaning of § 214(2) of the New

tations period governing large categories of constitutional litigation in New York is four months.⁴⁶ In addition, notice of claim requirements often impose de facto limitations periods on the prosecution of constitutional claims in New York courts, but not in federal court.⁴⁷ The refusal of federal courts in New York to apply unreasonably short limitations periods to section 1983 claims mirrors a national federal tendency to select, as most appropriate, a reasonably long analogous state limitations period to govern constitutional adjudication in federal court.⁴⁸ Few lawyers would wish to risk the imposition of a four month limitations period by bringing their constitutional claim in a New York state court.

3. *Class Actions*

One need hardly rehearse the significance of the class action as a means of effecting institutional change through litigation. In virtually every setting in which the judiciary has intervened to impose institutional change on behalf of the politically powerless, the procedural vehicle has been the Rule 23(b)(2) "prospective" class action or, to a lesser extent, the Rule 23(b)(3) "damage" class action.⁴⁹

York Civil Practice Law and Rules (CPLR). If so, a three year period governs. However, in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979), the Supreme Court held that § 1983 did not create rights. Rather, the Court held, it acted as a procedural vehicle to enforce preexisting rights. The New York Court of Appeals has held that such conduit statutes do not fall within CPLR § 214(2). *State v. Cortelle Corp.*, 38 N.Y.2d 83, 341 N.E.2d 223, 378 N.Y.S.2d 654 (1975). If CPLR § 214(2) does not govern, the catch-all period of six years should control the preexisting constitutional liabilities. *Clark v. Water Comm'rs*, 148 N.Y. 1, 42 N.E. 414 (1895).

46. N.Y. CIV. PRAC. LAW § 217 (McKinney 1972).

47. Examples of notice of claim statutes lurking in New York practice include N.Y. GEN. MUN. LAW § 50-e (McKinney 1977 & Supp. 1979) (notice of tort claim against public corporation must be given within 90 days after claim arises) and N.Y. EMPL'RS LIAB. LAW § 2 (McKinney 1955 & Supp. 1979) (notice of injury must be given to employer within 120 days). State notice of claim statutes cannot be used to block a federal cause of action which does not provide for a notice of claim. *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909) (local notice of claim statute cannot block Federal Employers' Liability Act action). Notice of claim statutes, held to be preconditions to suit, are found in other jurisdictions. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 1175, § 6 (Vernon 1963).

48. *See generally* Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97.

49. FED. R. CIV. P. 23(b)(2), (3). Litigation seeking institutional reform—educational, penal, or medical—poses the most obvious example of the importance of the class action.

Until 1975 New York courts steadfastly clung to an extraordinarily narrow vision of the class action.⁵⁰ In 1975 the New York legislature enacted class action rules modeled closely on Rule 23.⁵¹ However, before the ink was dry on the 1975 legislation, the New York Court of Appeals seriously inhibited the widespread use of the 23(b)(2) class action in New York by ruling that, in the absence of special circumstances, challenges to governmental behavior should not be prosecuted as class actions because principles of *stare decisis* afforded sufficient protection to similarly situated persons.⁵² Of course, it was precisely because principles of *stare*

50. *E.g.*, *Onofrio v. Playboy Club, Inc.*, 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965) (Playboy Club members unable to maintain class action); *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965) (blacks unable to maintain class action for improper exclusion from labor union). *See also* *Moore v. Metropolitan Life Ins. Co.*, 33 N.Y.2d 304, 307 N.E.2d 554, 352 N.Y.S.2d 433 (1973); *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). Some states have failed to change their class action statutes to parallel the federal rule, continuing to certify classes on the basis of the "common or general interest" test of the old Field Code of New York. *See, e.g.*, *ARK. STAT. ANN. § 27-809* (1962); *CONN. GEN. STAT. ANN. § 52-105* (West 1960); *NEB. REV. STAT. § 25-319* (1964); *OKLA. STAT. tit. 12, § 233* (1971); *S.C. CODE § 10-205* (1962); *WIS. STAT. ANN. § 260.12* (West 1957); *FLA. R. CIV. P. 1.220* (1967).

51. *N.Y. CIV. PRAC. LAW § 901* (McKinney 1976). A major difference between § 901 and Rule 23 is the proviso in § 901(b) that the New York class action may not be used to enforce a penalty. The precise impact of the proviso remains unclear.

52. *Bey v. Hentel*, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826 (1975). The court of appeals stated:

Preliminarily, in *Bey* we conclude that it was an abuse of discretion on the part of the courts below to grant class relief since in the circumstances here presented, governmental operations being involved, on the granting of any relief to the petitioners comparable relief would adequately flow to others similarly situated under principles of *stare decisis*.

Id. at 749, 329 N.E.2d at 661, 368 N.Y.S.2d at 827. Cases following *Bey* in refusing to certify class relief when governmental action is at stake include: *Baumes v. Lavine*, 38 N.Y.2d 296, 342 N.E.2d 543, 379 N.Y.S.2d 760 (1975); *Brady v. Kelley*, 51 A.D.2d 797, 380 N.Y.S.2d 69 (1976); *Hoffman v. Poston*, 49 A.D.2d 316, 374 N.Y.S.2d 774 (1975); *Brown v. Lavine*, 49 A.D.2d 49, 371 N.Y.S.2d 184 (1975); and *Mazzie v. Staszak*, 85 Misc. 2d 24, 379 N.Y.S.2d 624 (Sup. Ct. 1975). *See also* *Beekman-Downtown Hosp. v. Whalen*, 44 N.Y.2d 124, 375 N.E.2d 395, 404 N.Y.S.2d 335 (1978); *Perez v. Dumpson*, 58 A.D.2d 887, 396 N.Y.S.2d 883 (1977); *Cohen v. D'Elia*, 55 A.D.2d 617, 389 N.Y.S.2d 406 (1976); *Community Serv. Soc'y v. Welfare Inspector Gen.*, 91 Misc. 2d 383, 398 N.Y.S.2d 92 (Sup. Ct.), *aff'd*, 65 A.D. 734, 411 N.Y.S.2d 188 (1977); *Flushing Nat'l Bank v. Municipal Assistance Corp.*, 89 Misc. 2d 342, 393 N.Y.S.2d 873 (Sup. Ct. 1977).

The nadir was reached in *Sinhogar v. Parry*, 98 Misc. 2d 28, 412 N.Y.S.2d 966 (Sup. Ct. 1979), *rev'd*, 74 A.D.2d 204, 427 N.Y.S.2d 216, *appeal dismissed*, 50 N.Y.2d 1022, 410 N.E.2d 746, 431 N.Y.S.2d 813 (1980), when a trial court erroneously declined to certify a class consisting wholly of similarly situated incompetents.

decisis, or even preclusion,⁵³ do not afford adequate protection to similarly situated persons in constitutional cases that the Rule 23(b)(2) action came into being.⁵⁴ Constitutional litigation often involves a clash of deeply held values. It is overly sanguine to assume that a judicial victory, often in a lower court, will be followed by a prompt modification of government activity. In the absence of class relief, it has often proved necessary to prosecute multiple actions to secure widespread bureaucratic compliance.⁵⁵ Where the plaintiff class consists of poorly educated, politically powerless persons who generally lack both information about their "new" rights and the means to enforce them, failure to certify a class renders the practical efficacy of a constitutional precedent a function of the willingness of the defendants to implement it. Faced with one court system that routinely certifies and enforces Rule 23(b)(2) claims and another in which the availability of class certification is problematic, civil rights-civil liberties lawyers will opt for the forum capable of granting the broadest relief.

4. *Official Immunity*

The evolution of a sensible, logically coherent theory of executive liability has been one of the unsung triumphs of the current Supreme Court.⁵⁶ It is now settled that neither federal⁵⁷ nor state⁵⁸

Despite *Bey*, New York courts have granted class relief in a substantial number of cases. *E.g.*, *Ammon v. Suffolk County*, 67 A.D.2d 959, 413 N.Y.S.2d 469 (1979); *Knapp v. Michaux*, 55 A.D.2d 1025, 391 N.Y.S.2d 496 (1977). See generally *J & A Roofing & Siding Co. v. New York State Dep't of Law*, 68 A.D.2d 880, 413 N.Y.S.2d 762 (1979); *Eisenstark v. Anker*, 64 A.D.2d 924, 408 N.Y.S.2d 129 (1978). However, given *Bey* and the cases following it, refusal to certify is a distinct possibility.

53. Given the decline of the mutuality doctrine, I assume that the state would be precluded by collateral estoppel from seeking to relitigate an issue which it has already lost. *E.g.*, *Montana v. United States*, 440 U.S. 147 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

54. See *Proposed Amendments to the Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 102 (1966); 3B MOORE'S FEDERAL PRACTICE ¶ 23.02, at 23-52 (2d ed. 1980).

55. Indeed, some question exists as to whether a government defendant, having lost a case in a lower court, is obliged to modify its behavior vis-à-vis nonparties to the litigation. While the outcome of future litigation may be foreordained by preclusion, in the absence of additional litigation, a recalcitrant government may legally, if not morally, simply "stonewall."

56. Briefly summarized, when prospective equitable relief is at issue, neither sovereign immunity, executive immunity, judicial immunity, nor the eleventh amendment precludes the issuance of effective relief. *E.g.*, *Virginia Supreme Court v. Consumers' Union*, 100 S. Ct.

administrative officials are immune from suit for damages caused by their unconstitutional actions. Instead, an affirmative defense of subjective good faith and objective probable cause shields administrative officials from unwarranted personal liability.⁵⁹ Moreover, even if an individual defendant succeeds in establishing a good faith defense, the governmental entity whose orders he executed remains potentially liable.⁶⁰

In New York,⁶¹ as in many states,⁶² the immunity of an executive

1967 (1980); *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908). However, legislative immunity may block even prospective relief. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

When compensatory relief is sought, individual defendants performing executive functions may not claim an official immunity. *Virginia Supreme Court v. Consumers' Union*, 100 S. Ct. 1967 (1980); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). *See also* *Butz v. Economou*, 438 U.S. 478 (1978). Instead, they may establish a good faith defense premised on subjective good faith and reasonable belief in legality. *Gomez v. Toledo*, 100 S. Ct. 1920 (1980). Even if a good faith defense is established, the governmental defendant may be independently liable for actual damages caused by the good faith execution of its unconstitutional policies. *Owen v. City of Independence*, 100 S. Ct. 1398 (1980); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Individual defendants performing judicial or legislative functions continue, however, to enjoy a common law immunity. *E.g.*, *United States v. Helstoski*, 442 U.S. 477 (1979); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976). Whether a defendant is performing executive, judicial, or legislative roles is to be determined functionally rather than by labels. Thus, executive officials may be entitled to "judicial" immunity for certain adjudicative tasks. *E.g.*, *Butz v. Economou*, 438 U.S. 478 (1978). Conversely, judges lose their immunity when they perform executive tasks. *E.g.*, *Virginia Supreme Court v. Consumers' Union*, 100 S. Ct. 1967 (1980).

57. *E.g.*, *Butz v. Economou*, 438 U.S. 478 (1979).

58. *E.g.*, *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

59. *Gomez v. Toledo*, 100 S. Ct. 1920 (1980).

60. *Owen v. City of Independence*, 100 S. Ct. 1398 (1980). Of course, if the government agency falls under the protection of the eleventh amendment, retrospective relief may not be possible in federal court unless premised on a statutory cause of action that supersedes the eleventh amendment. *See Maine v. Thiboutot*, 100 S. Ct. 2502 (1980). *See generally* *Quern v. Jordan*, 440 U.S. 332 (1979) (§ 1983 is not such a statute); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974).

When a federal defendant establishes a good faith defense, entity liability may be complicated by notions of sovereign immunity. Federal sovereign immunity has been expressly waived in connection with a number of torts often associated with law enforcement activity. 28 U.S.C. § 2680(h) (1976).

61. *E.g.*, *Rottkamp v. Young*, 21 A.D.2d 373, 249 N.Y.S.2d 330 (1964), *aff'd mem.*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965).

62. *E.g.*, *Malvernia Inv. Co. v. City of Trinidad*, 123 Colo. 394, 229 P.2d 945 (1951); *Wolfe v. Town of Branford*, 22 Conn. Supp. 239, 167 A.2d 924 (1960); *City of Elberton v. J.C. Pool*

official from suit turns, not on a pragmatic analysis of where the loss caused by constitutional tort should fall, but rather on the baffling dichotomy between ministerial acts, for which no immunity exists, and discretionary acts, which are immune from suit. Few distinctions have proved as confusing and, ultimately, as useless as the attempt to distinguish between ministerial and discretionary acts in determining the scope of tort immunity. As a practical matter, the ministerial-discretionary dichotomy establishes an uncertain but very real possibility that an official will escape liability for even a willful violation of the Constitution.⁶³ Moreover, because individual immunity is often linked with a derivative immunity for the government employer, the net result may be the commission of a willful constitutional tort causing substantial damage for which no compensation is possible.⁶⁴ Until very recently, New York adhered to precisely such an archaic view of executive immunity.⁶⁵ Accordingly, the ability to secure compensation for constitutional torts in New York turned on the unpredictable characterization of the defendant's act as discretionary or ministerial.⁶⁶ Even if a New York plaintiff succeeded in labeling a defendant's acts as ministerial, a good faith defense might nonetheless preclude recovery not only against the "innocent" official, but against the agency which

Realty Co., 111 Ga. App. 765, 143 S.E.2d 407 (1965); *Grundy County v. Dyer*, 546 S.W.2d 577 (Tenn. 1977). See generally 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.10 (1956); W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 132 (4th ed. 1971).

63. See, e.g., *Rottkamp v. Young*, 21 A.D.2d 373, 375, 249 N.Y.S.2d 330, 333 (1964), *aff'd mem.*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965).

64. *Id.*

65. Cases applying *Rottkamp v. Young*, 21 A.D.2d 373, 249 N.Y.S.2d 330 (1964), *aff'd mem.*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965), include *Firelands Sewer & Water Constr. Co. v. Rochester Pure Waters Dist.*, 67 A.D.2d 813, 413 N.Y.S.2d 53 (1979); *Schanbarger v. Kellogg*, 35 A.D.2d 902, 315 N.Y.S.2d 1013 (1970); *VanBuskirk v. Bleiler*, 77 Misc. 2d 273, 354 N.Y.S.2d 93 (Sup. Ct. 1974); *Harrington v. Norco Fruit Distribs., Inc.*, 70 Misc. 2d 471, 333 N.Y.S.2d 794 (Sup. Ct. 1972). Of course, *Rottkamp* recognized an exception to the immunity rules for deprivations of elective franchise, 21 A.D.2d at 376 n.1, 249 N.Y.S.2d at 334 n.1 (citing *Schwartz v. Heffernan*, 304 N.Y. 474, 109 N.E.2d 68 (1952)), and hinted that an exception might apply in civil rights cases generally. *Id.* See also *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954). The contrast between the uncertain language of *Rottkamp* and the rules prevailing in the federal courts is, of course, pronounced.

66. E.g., *VanBuskirk v. Bleiler*, 77 Misc. 2d 273, 354 N.Y.S.2d 93 (Sup. Ct. 1974) (decision to deny hearing held to be ministerial, thus permitting recovery). See also *154 East Park Ave. Corp. v. City of Long Beach*, 76 Misc. 2d 445, 350 N.Y.S.2d 974 (Sup. Ct. 1973) (granting relief), *rev'd*, 49 A.D.2d 949, 374 N.Y.S.2d 569 (1975) (denying relief).

employed him. There is some hope that New York has begun to reexamine its executive immunity-good faith defense rules.⁶⁷ However, even a cursory comparison of New York's immunity rules with the immunity doctrine currently prevailing in federal court would make any lawyer think twice before litigating a constitutional tort case in New York.⁶⁸

5. *Discovery*

Given the Supreme Court's increasing emphasis on fact-intensive issues in constitutional cases, discovery may often be critical in establishing issues such as scienter,⁶⁹ personal responsibility,⁷⁰ and entity liability.⁷¹ No impediment exists to effective and relatively inexpensive discovery in federal court.⁷²

Discovery in New York is, unfortunately, more difficult. Although nonparty witnesses are subject to full discovery in federal

67. In *Teddy's Drive In, Inc. v. Cohen*, 47 N.Y.2d 79, 390 N.E.2d 290, 416 N.Y.S.2d 782 (1979), the New York Court of Appeals reversed the refusal of two lower courts to grant damages for willful government misconduct. The opinion, unfortunately, does not attempt to reconcile conflicting authority.

68. Broad differences between state and federal immunity doctrines render the subconstitutional tort analysis of *Paul v. Davis*, 424 U.S. 693 (1976), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Ingraham v. Wright*, 430 U.S. 651 (1979), particularly troublesome. Labeling categories of official misconduct "subconstitutional" not only shifts the forum from federal to state court, it also may render it impossible to secure redress under the prevailing state immunity doctrine. Thus, plaintiffs in *Paul*, *Estelle*, and *Ingraham* may well have been barred by state immunity from seeking effective relief.

69. *E.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

70. *E.g.*, *Gomez v. Toledo*, 100 S. Ct. 1920 (1980); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

71. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

72. Discovery in some states is more limited, while pleading requirements are more severe than the federal rules. In Illinois, for example, a defendant can request a bill of particulars. ILL. ANN. STAT. ch. 110, § 33 (Smith-Hurd 1968). In contrast, a party can be prevented from using interrogatories to discover conclusions and contentions. *Reske v. Klein*, 33 Ill. App. 3d 302, 179 N.E.2d 415 (1961).

Discovery in connection with § 1983 cases in federal court often involves an initial phase, consisting of written interrogatories propounded both to parties and to nonparty witnesses. Demands for the inspection and copying of relevant documents often accompany the written interrogatories. A second phase, consisting of oral depositions, may follow. The availability of written interrogatories and document demands as a precursor to or a substitute for oral depositions is particularly important in § 1983 cases, because written discovery does not require substantial cash outlays, while oral discovery generally requires a skilled, relatively highly paid stenographer.

court, leave of court must be obtained before deposing a nonparty witness in New York.⁷³ If the New York claim is ultimately characterized as sounding in mandamus, no discovery at all is possible without leave of court.⁷⁴ In addition to the familiar exception of attorney work product,⁷⁵ New York recognizes an amorphous privilege for material prepared in anticipation of litigation.⁷⁶ Whether such a privilege immunizes information assembled by a government defendant in response to a constitutional challenge is unclear, but no one would choose to litigate the question in a New York court when the information is clearly subject to federal discovery. Finally, some doubt exists in New York whether written interrogatories and oral depositions can be used in connection with the same witness.⁷⁷ Since the *seriatim* use of both devices is not only good litigation strategy, but also saves a great deal of money, substantial doubt as to the availability of both is yet another factor impelling New York lawyers to litigate constitutional claims in federal court.

6. Attorney's Fees

Attorney's fees are recoverable as a matter of course by a prevailing plaintiff in a federal section 1983 action.⁷⁸ New York, on the other hand, has not authorized its courts to award attorney's

73. See *Dixon v. 80 Pine Street Corp.*, 516 F.2d 1278 (2d Cir. 1979); *Bonito Maritime Corp. v. St. Paul Mercury Ins. Co.*, 68 A.D.2d 864, 414 N.Y.S.2d 1022 (1979); *Kurzman v. Burger*, 98 Misc. 2d 244, 413 N.Y.S.2d 609 (Sup. Ct. 1979). See generally Siegel, *Practice Commentary*, N.Y. CIV. PRAC. LAW C3101.22 (McKinney 1970 & Supp. 1980).

74. N.Y. CIV. PRAC. LAW § 408 (McKinney 1972 & Supp. 1980). Since an Article 78 proceeding is denominated a "special proceeding" under New York practice, it falls within the coverage of CPLR § 408, barring all discovery, except notices to admit, in the absence of leave of court. *E.g.*, *Pasta Chef, Inc. v. State Liquor Auth.*, 47 A.D.2d 713, 364 N.Y.S.2d 638 (1975). While leave of court should be freely granted in light of *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), which urged a liberal discovery policy in New York, a time consuming skirmish can almost certainly be anticipated over the scope and timing of discovery in an Article 78 proceeding.

75. FED. R. CIV. P. 26(b)(3) (codifying *Hickman v. Taylor*, 329 U.S. 495 (1947)).

76. The confusion surrounding the scope of the privilege for material prepared for litigation is illustrated by *Gugliuzza v. Gugliuzza*, 45 Misc. 2d 868, 257 N.Y.S.2d 693 (Sup. Ct. 1965).

77. N.Y. CIV. PRAC. LAW § 3130 (McKinney Supp. 1980); *id.* § 3103 (McKinney 1970).

78. 42 U.S.C. § 1988 (1976); see *Hutto v. Finney*, 437 U.S. 678 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

fees in constitutional cases. Until very recently, therefore, a prevailing plaintiff in a constitutional case in New York was unable to recover attorney's fees unless the stringent preconditions of the American rule were satisfied.⁷⁹ The disparity between the power of a state or federal court to award fees in constitutional cases hardly inclined lawyers toward state court.⁸⁰

However, in *Maine v. Thiboutot*,⁸¹ the United States Supreme Court ruled that state courts are authorized to award attorney's fees to successful plaintiffs in connection with section 1983 claims brought in state as well as federal court, regardless of the prevailing local rule.⁸² *Thiboutot*, therefore, establishes a degree of procedural parity between state and federal courts on the critical issue of fee awards.

TOWARD UNIFORM PROCEDURES GOVERNING CONSTITUTIONAL LITIGATION IN BOTH STATE AND FEDERAL COURTS

The implications of *Thiboutot* do not stop with attorney's fees. *Thiboutot* points the way toward general procedural parity in constitutional litigation by inviting, and in certain circumstances compelling, state courts to apply collateral rules hospitable to the effective enforcement of section 1983 claims. Following *Thiboutot*, the way is open for state courts to identify and to apply those federal collateral rules, such as the power to award fees, that are "integral" to the enjoyment of the federal cause of action.⁸³ Such an

79. See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); S. SPEISER, ATTORNEYS' FEES § 12.3 (1973).

80. *Maine v. Thiboutot*, 100 S. Ct. 2502, 2507 n.12 (1980).

81. 100 S. Ct. 2502 (1980).

82. The Court in *Thiboutot* held: (1) the phrase "and laws" in § 1983 was intended to establish a cause of action for the violation of federal statutory, as well as federal constitutional, rights, *id.* at 2504; and (2) the power to grant attorney's fees was deemed by Congress "an integral part of the remedies necessary to obtain compliance with § 1983." *Id.* at 2507 (quoting S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976), reprinted in [1976] U.S. CODE CONG. & ADMIN. NEWS 5908, 5913).

83. I am assuming, as in *Thiboutot*, that counsel will be careful to plead the § 1983 claim explicitly in state court. Of course, given traditional notice pleading, if the facts of a case make out a § 1983 cause of action, the state court is free to recognize the existence of the federal claim whether or not it has been explicitly pleaded.

Section 1983 is available only in connection with federal constitutional or statutory claims. Claims based solely on state law grounds will not constitute a § 1983 claim. If one joins a federal § 1983 claim with a state constitutional claim in state court, however, it is

approach, which resembles the obverse of the analysis required of federal courts under *Erie Railroad v. Tompkins*,⁸⁴ should result in immediate procedural parity in at least two critical areas: attorney's fees awards⁸⁵ and the definition of executive immunity.⁸⁶ Furthermore, this approach provides a framework for a more general achievement of procedural parity in constitutional litigation.

In assessing the significance of *Thiboutot* as a vehicle for achieving procedural parity, two issues must be confronted. First, are state courts obliged to entertain a section 1983 cause of action, and second, what are the collateral federal rules, if any, that such a federal cause of action imports into state practice?

As a matter of logic, state jurisdiction over section 1983 claims should be approached in two stages: first, whether state courts may entertain a section 1983 claim, and second, whether they must. Under current Supreme Court guidelines, however, the "may" and the "must" have been collapsed into a single issue. If Congress permits a state court to entertain a section 1983 claim, it must.

The Presumption of Concurrency

When Congress enacted section 1 of the Civil Rights Act of 1871,⁸⁷ the precursor of 42 U.S.C. § 1983, it obviously intended to provide freedmen with a federal cause of action for violation of rights, both statutory and constitutional, conferred upon them by the Reconstruction Congresses. Over the years, section 1983 has been judicially expanded⁸⁸ until today it provides a federal cause of action for the violation of virtually all federal constitutional and most federal statutory rights.

possible that the entire litigation will enjoy the favorable procedures applicable to the § 1983 claim. For an example, see *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), discussed at note 210 *infra*.

84. 304 U.S. 64 (1938). The first use of the phrase "converse *Erie*" to describe the process of applying federal collateral rules in state FELA cases occurred in *Hill*, note 3 *supra*.

85. *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980).

86. *Martinez v. California*, 100 S. Ct. 553 (1980).

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

88. The principal substantive expansions of § 1983 occurred in *Monroe v. Pape*, 365 U.S. 167 (1961) (activities in violation of state law within scope of § 1983), *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972) (§ 1983 protects both personal and property rights), and *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980) (§ 1983 protects statutory as well as constitutional rights).

Jurisdiction over the newly established federal cause of action was lodged in an appropriate federal court.⁸⁹ Congress said nothing, however, about whether section 1983 claims were also cognizable in state court.⁹⁰ Moreover, while the legislative history of section 1983 bristles with statements urging access to federal court, nothing in the legislative history sheds light on whether Congress wished the access to be exclusive.

When, as with section 1983, Congress has created a federal right and has provided for federal jurisdiction to enforce it, the Supreme Court has consistently presumed that Congress did not intend to oust state courts of concurrent jurisdiction to enforce the federal claim.⁹¹ Such a presumption of concurrent jurisdiction may be

89. Act of April 20, 1871, ch. 22, 17 Stat. 13. The 1871 Act read:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States.

Id.

90. During the 1873-74 recodification, Congress dropped the original jurisdictional phrase "such proceeding to be prosecuted in the several district or circuit courts of the United States" and added a separate jurisdictional provision. REV. STAT. § 1979 (1875) (now codified at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)). See generally REV. STAT. § 563(12) (1875) (district court jurisdiction); REV. STAT. § 629(16) (1875) (circuit court jurisdiction). See also REV. STAT. § 699(4) (1875) (Supreme Court appellate jurisdiction). Thus, the original section 1 of the Civil Rights Act of 1871 was divided into four statutes: REV. STAT. §§ 1979, 563(12), 629(16), and 699(4), each with troublesome changes in wording. Several courts have found the change persuasive evidence of a congressional intent to establish concurrent state and federal jurisdiction over § 1983 claims. *E.g.*, *Young v. Board of Educ.*, 416 F. Supp. 1139 (D. Colo. 1976); *Brown v. Pritchess*, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975). It is true that the continued existence of a similar phrase was deemed by the Supreme Court to establish exclusive federal jurisdiction over Clayton Act claims. *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261 (1922). My own view is that the congressional intent associated with the 1873-74 recodification is so equivocal that I would be loath to draw dramatic conclusions from changes in organizational structure. See *Chapman v. Houston Welfare Rights Org.*, 446 U.S. 600, 623 (1979) (Powell, J., concurring); *Maine v. Thiboutot*, 100 S. Ct. 2502, 2508 (1980) (Powell, J., dissenting).

91. The presumption of concurrent jurisdiction flows initially from Alexander Hamilton's assertion that "the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." THE FEDERALIST No. 82, 514 (A. Hamilton) (H. Lodge ed. 1888).

overcome only by an express or necessarily implied congressional assertion of exclusive jurisdiction.⁹² Thus, in *Houston v. Moore*,⁹³ the Court applied the presumption to uphold the constitutionality of a Pennsylvania statute providing for concurrent jurisdiction to punish persons for failing to respond to a federal militia levy. In *Clafin v. Houseman*,⁹⁴ the Court discussed the presumption at length in holding that states possessed concurrent jurisdiction to entertain litigation involving bankrupts. In *Robb v. Connolly*,⁹⁵ the Court applied the presumption to uphold the exercise of state concurrent habeas corpus jurisdiction in challenges to extradition procedures. In *United States v. Bank of New York & Trust Co.*,⁹⁶ the Court noted that the grant of jurisdiction to the federal courts in cases in which the United States is a party-plaintiff⁹⁷ did not preclude the exercise of concurrent state jurisdiction.⁹⁸ In *Dowd Box Co. v. Courtney*,⁹⁹ the Court recognized concurrent jurisdiction in the state courts to enforce principles of federal labor law distilled from section 301 of the Labor Management Relations Act in the wake of *Lincoln Mills*.¹⁰⁰ Most recently, in *Sullivan v. Little Hunt-*

Cases applying the presumption include: *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *Robb v. Connolly*, 111 U.S. 624 (1884); *Clafin v. Houseman*, 93 U.S. 130 (1876); and *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). See also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 626 (1842) (Taney, C.J., concurring); *id.* at 633 (Thompson, J., concurring); *id.* at 650 (Daniel, J., concurring). See generally Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976); Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960).

92. *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261 (1922) (Clayton Act). Rare examples of nonexplicit situations calling for exclusive federal jurisdiction may be found in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *id.* at 608 (Story, J., plurality opinion); *id.* at 636 (Wayne, J., concurring); *id.* at 658 (McLean, J., concurring). See also *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859).

93. 18 (5 Wheat.) 1 (1820).

94. 93 U.S. 130 (1876).

95. 111 U.S. 624 (1884).

96. 296 U.S. 463 (1936).

97. 28 U.S.C. § 1333 (1976).

98. See also *California v. Arizona*, 440 U.S. 59, 66-68 (1979).

99. 368 U.S. 502 (1962).

100. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (construing 29 U.S.C. § 185 (1976)). In *Lincoln Mills*, the Supreme Court held that federal courts were empowered to fashion a federal common law of labor relations within the interstices of section 301 of the Labor Management Relations Act. But see *Romero v. International Terminal Operating Co.*,

ing Park,¹⁰¹ the Court noted with apparent approval the concurrent jurisdiction of state courts to enforce housing discrimination claims arising under 42 U.S.C. § 1982.¹⁰²

On the other hand, the few examples of refusal to recognize presumed concurrent jurisdiction seem clearly distinguishable. In *Prigg v. Pennsylvania*,¹⁰³ five members of the Court¹⁰⁴ ruled that states were without power to enact legislation establishing concurrent jurisdiction to enforce the fugitive slave clause¹⁰⁵ of the Constitution. Given the unique attributes of the fugitive slave clause discussed by Justice Story¹⁰⁶ and the intensely emotional overtones of *Prigg*,¹⁰⁷ it is hardly persuasive federalism law today. In *San Diego Building Trades Council v. Garmon*,¹⁰⁸ the Court ruled that state courts were not free to adjudicate claims which would consti-

358 U.S. 354 (1959) (declining to apply similar reasoning to admiralty claims).

101. 396 U.S. 229 (1969).

102. *Id.* at 238.

103. 41 U.S. (16 Pet.) 539 (1842).

104. Justice Story wrote for himself and for Justices Catron and McKinley, *id.* at 608, and Justices McLean, *id.* at 658, and Wayne, *id.* at 636, concurred separately.

105. U.S. CONST. art. IV, § 2, cl. 3.

106. The peculiar importance of uniform application of the Fugitive Slave Law, coupled with the fact that free states might well be hostile to its enforcement, led Justice Story to argue that the Fugitive Slave Law was the exclusive province of the federal government. 41 U.S. (16 Pet.) at 622.

107. *Prigg* was a cornerstone of abolitionist legal strategy, which initially sought to funnel rendition proceedings into state courts unsympathetic to the slave-owner. In *Prigg*, Pennsylvania had passed an antikidnapping statute forbidding slave-catchers from removing suspected fugitives from the state in the absence of judicial authorization. Since the federal courts were geographically inaccessible, the practical effect of the Pennsylvania statute was to force rendition proceedings into Pennsylvania state courts.

The Supreme Court invalidated the statute as an interference with a slave-owner's constitutional right of recaption. The Court divided along proslavery and antislavery lines, however, on the question of whether any state judicial role in the rendition process was permissible. The antislavery wing of the Court, led by Justice Story, argued that states should play no role in the process, forcing the slave-owner to seek, when necessary, judicial relief in geographically remote federal courts. 41 U.S. (16 Pet.) at 615-16. The proslavery wing, led by Chief Justice Taney, argued that states possessed concurrent jurisdiction to aid in the rendition process. *Id.* at 627.

Justice Story's position led several free states to seek to close their courts to fugitive slave claims. The constitutionality of the Personal Liberty Laws, closing state courts to fugitive slave claims, is discussed at notes 118-123, 167 *infra*. Whatever the legal merits of the strategy, it failed as a political matter, since the Compromise of 1850 established a federal corps of quasi-judicial slave commissioners to provide a federal enforcement apparatus for the fugitive slave clause. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

108. 359 U.S. 236 (1959).

tute unfair labor practices under sections 7 and 8 of the National Labor Relations Act.¹⁰⁹ Instead, such claims must fall within the exclusive primary jurisdiction of the National Labor Relations Board. However, *Garmon* should be contrasted with *Dowd Box Co. v. Courtney*,¹¹⁰ where the Court, in the absence of a federal administrative scheme, recognized concurrent state jurisdiction over post-*Lincoln Mills* federal labor law claims which would not constitute unfair labor practices. Moreover, in *Smith v. Evening News Ass'n*,¹¹¹ the Court further narrowed *Garmon* by holding that cases involving acts which constitute both unfair labor practices and section 301 violations were within the state courts' concurrent jurisdiction.

Given the Supreme Court's consistent application of the presumption of concurrent jurisdiction, the Court's rather casual recognition in *Maine v. Thiboutot*¹¹² and *Martinez v. California*¹¹³ that state courts possess concurrent jurisdiction to enforce section 1983 claims comes as no surprise.¹¹⁴ After deciding the "may" is-

109. 29 U.S.C. §§ 157, 158 (1976).

110. 368 U.S. 502 (1962).

111. 371 U.S. 195 (1962).

112. 100 S. Ct. 2502 (1980).

113. 100 S. Ct. 553 (1980).

114. The Court had hinted at its decision in *Aldinger v. Howard*, 427 U.S. 1, 36 n.17 (1976) (Brennan, J., dissenting). See also *Jones v. Hilderbrandt*, 432 U.S. 183 (1977) (per curiam).

State courts have consistently exercised concurrent jurisdiction over § 1983 claims. *E.g.*, *New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 519 P.2d 169 (1974); *Brown v. Pritchess*, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); *Silverman v. University of Colo.*, 36 Colo. App. 269, 541 P.2d 93 (1975); *Bohacs v. Reid*, 63 Ill. App. 3d 477, 379 N.E.2d 1372 (1978); *Alberty v. Daniel*, 25 Ill. App. 3d 291, 323 N.E.2d 110 (1974); *Hirych v. State*, 376 Mich. 384, 136 N.W.2d 910 (1965); *Dudley v. Bell*, 50 Mich. App. 678, 213 N.W.2d 805 (1973); *Brody v. Leamy*, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977); *Commonwealth ex rel. Saunders v. Creamer*, 464 Pa. 2, 4 n.3, 345 A.2d 702, 703 n.3 (1975); *Terry v. Kolski*, 78 Wisc. 2d 475, 254 N.W.2d 704 (1977). See also *Tobeluk v. Lind*, 589 P.2d 873 (Alas. 1979); *Thorpe v. Durango School Dist.*, 41 Colo. App. 473, 591 P.2d 1329 (1978), *aff'd*, — Colo. —, 614 P.2d 880 (1980); *Ramirez v. County of Hudson*, 169 N.J. Super. 455, 404 A.2d 1271 (Ch. Div. 1979); *James v. Board of Educ.*, 37 N.Y.2d 891, 894, 340 N.E.2d 735, 737, 378 N.Y.S.2d 371, 373 (1975) (Fuchsberg, J., dissenting); *Young v. Toia*, 66 A.D.2d 377, 413 N.Y.S.2d 530 (1979); *Lange v. Nature Conservancy, Inc.*, 24 Wash. App. 416, 601 P.2d 963 (1979); *Board of Trustees v. Holso*, 584 P.2d 1009 (Wyo. 1978).

Two state courts have declined to exercise jurisdiction over § 1983 claims. *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976) (partial); *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). However, the rationale of the Tennessee Supreme Court in *Chamberlain*, which turned on a presumed grant of exclusive jurisdiction to the federal courts,

sue, the Court in *Martinez* purported to reserve the question of whether states "must" entertain section 1983 claims.¹¹⁵ However, having decided that states "may," the "must" inevitably follows.¹¹⁶

The Antidiscrimination Principle

The Supreme Court has considered the obligation of a state court to enforce a federal claim on at least six occasions.¹¹⁷ In *Prigg v. Pennsylvania*,¹¹⁸ Justice Story, writing for three members of the Court,¹¹⁹ suggested that Congress lacked power to confer concurrent jurisdiction over fugitive slave claims.¹²⁰ Three members of the Court apparently disagreed, holding that states were vested

seems undercut by the Supreme Court's recognition in *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), that jurisdiction over § 1983 claims is not exclusive.

115. 100 S. Ct. at 558 n.7.

116. Although the Court has reversed the question, it has come very close to deciding that § 1983 claims must be entertained in state courts of general jurisdiction. Writing for a unanimous Court, Justice Stevens noted:

We have never considered the question of whether a State *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim.

Id.

117. *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950) (FELA claims); *Testa v. Katt*, 330 U.S. 386 (1947) (Emergency Price Control Act treble damage claims); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) (FELA claims); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929) (FELA claims); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912) (FELA claims); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (fugitive slave claims). See also *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942); *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44 (1941).

118. 41 U.S. (16 Pet.) 539 (1842).

119. Justice Story delivered the opinion of the Court in *Prigg*. *Id.* at 608. His opinion was joined by Justices Catron and McKinley. Chief Justice Taney, *id.* at 626, and Justices Thompson, *id.* at 633, Wayne, *id.* at 636, Daniel, *id.* at 650, and McLean, *id.* at 658, each filed separate opinions. Justice Baldwin concurred only in the result. *Id.* at 636.

120. The Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302, conferred jurisdiction to enforce the claims of slave-owners on both federal and state courts. *Id.*

Justice Story's position would have emasculated the 1793 Act, since access to a federal court was more often than not geographically impossible. However, Justice Story upheld a slave-owner's right to resort to self-help, so long as a breach of the peace did not ensue. 41 U.S. (16 Pet.) at 613.

Thus, the net effect of his opinion was to afford some protection only to fugitives who could resist self-help either by themselves or with the aid of sympathetic whites. It fell far short, however, of the hopes of the abolitionist bar. See generally R. COVER, *JUSTICE ACCUSED* (1975).

with concurrent power to enforce the fugitive slave clause.¹²¹ Justice McLean explicitly disagreed, holding that Congress could impose concurrent jurisdiction on state courts.¹²² Justices Wayne and Baldwin, while agreeing that states could not legislate in the area, did not discuss the power of Congress to confer concurrent jurisdiction on the states.¹²³

Were *Prigg* the only case in the area, Justice Story's opinion would cast considerable doubt on any attempt to impose obligatory concurrent jurisdiction on state courts to enforce federal rights.¹²⁴

121. Although the opinions of Chief Justice Taney and Justices Thompson and Daniel explicitly approve state legislation designed to enforce the clause, they are silent on the validity of congressional legislation conferring obligatory concurrent jurisdiction on state courts. 41 U.S. (16 Pet.) at 626, 633, 650.

122. *Id.* at 666. The practical value of Justice McLean's recognition that Congress possessed power to confer concurrent jurisdiction over fugitive slave claims was greatly lessened by his observation that no mechanism existed to force states to comply. *Id.*

Of the opinions in *Prigg*, Justice McLean's comes closest to fulfilling the hopes of the abolitionist bar. He condemned self-help and commented that he would have upheld state legislation prohibiting the removal of an alleged fugitive without judicial warrant. Moreover, he forbade states from enacting legislation designed to aid slave-catchers and suggested that state courts could refuse to cooperate with a slave-catcher. *Id.* at 668-73.

Under Justice McLean's opinion, fugitives able to resist self-help could be removed from a state only upon the warrant of a geographically inaccessible federal judge or a local judge willing to participate in the process. Fugitives unable to resist self-help could be removed from a state only if local authorities refused to cooperate in obtaining judicial sanction. If local authorities were willing to cooperate, a slave-catcher could not remove his prey until judicial remedies under the 1793 Act, either state or federal, had been exhausted. *Id.* at 668-71. Since access to the federal forum was often impracticable, most rendition proceedings would unfold in a state court presumably sympathetic to the fugitive.

123. *Id.* at 636-50. Justice Baldwin did not write a separate opinion, arguing that since the alleged fugitive in *Prigg*, Mary Morgan, was concededly a runaway, no basis existed to consider whether self-help could be used in a contested case.

Justice Baldwin's suggestion that no real case or controversy existed in *Prigg* is compelling. Mary Morgan had long since been returned to slavery. The indictment against *Prigg*, the slave-catcher, was *pro forma* designed merely to test the constitutionality of the Pennsylvania statute barring self-help. The case had all the earmarks of a request for an advisory opinion by Pennsylvania and Maryland. Justice Wayne noted, however, that Justice Baldwin agreed with Justice Story that states lacked power to enforce the clause. *Id.* at 637.

124. Of course, *Prigg* is, to say the least, an equivocal precedent since four members of the Court appeared to support Congress' power to establish concurrent jurisdiction (Chief Justice Taney and Justices Thompson, Daniel and McLean), while only three appeared to oppose it (Justices Story, Catron and McKinley). Justices Wayne and Baldwin, caught between personal aversion to slavery and principled commitment to strong federal power, remained silent.

Any student of *Prigg* is deeply indebted to Robert Cover for his extraordinary study of antislavery judges and their role in the enforcement of the fugitive slave clause. R. COVER,

However, in *Mondou v. New York, New Haven & Hartford Railroad*,¹²⁵ Justice Story's analysis was rejected by a unanimous Court. In *Mondou*, Connecticut state courts had declined to entertain a claim based on the newly enacted Federal Employers' Liability Act (FELA)¹²⁶ on the ground that the modified defenses established by the Act were in violation of Connecticut's public policy and would force Connecticut courts to apply radically different rules to railway accidents depending upon whether the plaintiff was engaged in intrastate or interstate commerce.¹²⁷ The Supreme Court reversed, holding that, because Connecticut courts were vested with conceded jurisdiction over analogous state law claims, they could not discriminatorily refuse to entertain a federal claim merely because Connecticut disagreed with the federal policies underlying it.¹²⁸ The Court was careful to couch its opinion, not in terms of an affirmative obligation to provide a forum for federal claims, but rather as a negative prohibition on discriminating against plaintiffs asserting federal claims.¹²⁹

The antidiscrimination rationale of *Mondou* was applied in *Douglas v. New York, New Haven & Hartford Railroad*¹³⁰ and *McKnett v. St. Louis & San Francisco Railway*.¹³¹ In *McKnett*, Ala-

supra note 120. I am also grateful for the assistance of my colleague, William Nelson, in helping me to understand the issues raised by the abolitionist bar. See generally Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

125. 223 U.S. 1 (1912).

126. Pub. L. No. 60-100, 35 Stat. 65 (1908). Congress, in enacting the FELA, intended to provide a federal cause of action to railroad employees injured while engaged in interstate commerce. An earlier version, covering all railroad employees whether or not engaged in interstate commerce, had been invalidated by the Supreme Court in *The Employers' Liability Cases*, 207 U.S. 463 (1908).

The Act's primary purpose appears to have been to override certain state defenses, such as the fellow-servant rule and contributory negligence, which prevented recovery by some injured employees.

127. *Mondou v. New York, N.H. & H.R.R.*, 82 Conn. 373, 73 A. 762 (1909), *rev'd*, 223 U.S. 1 (1912).

128. 223 U.S. at 59. As with the Fugitive Slave Act of 1793, the grant of concurrent jurisdiction in the second FELA was explicit. Congress reinforced the explicit grant of concurrent jurisdiction in FELA cases with an antiremoval provision. Pub. L. No. 61-117, 36 Stat. 291 (1910) (codified at 45 U.S.C. § 56 (1976)). See generally *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942).

129. 223 U.S. at 56-59.

130. 279 U.S. 377 (1929).

131. 292 U.S. 230 (1934).

bama declined to entertain FELA claims by nonresidents against foreign corporations, while accepting similar state-law-based claims brought by similarly situated plaintiffs. Because the discrimination against federally based claims was blatant, the Court applied *Mondou* and required Alabama to entertain the claim.¹³²

However, in *Douglas*, a New York statute authorized its courts to decline to entertain any transitory action, state or federal, between a nonresident plaintiff and a foreign corporation. Pursuant to the statute, a New York court declined to accept an FELA claim by a nonresident plaintiff against the New York, New Haven & Hartford Railroad because it was incorporated in Delaware. The Supreme Court affirmed, since New York treated all claims, state and federal, identically.¹³³ Had *Mondou* established an affirmative obligation rather than a prohibition on discrimination, New York courts would not have been free to decline to entertain a claim which was properly venued under the FELA, solely on the fiction that the New York, New Haven & Hartford Railroad was a foreign corporation.¹³⁴

In *Testa v. Katt*,¹³⁵ the Court purported to apply *Mondou* to require Rhode Island to entertain a federal treble damage claim based on wartime Emergency Price Control Act regulations¹³⁶ because Rhode Island courts were authorized to enforce similar Rhode Island claims.¹³⁷ However, the rationale adopted by Justice Black in *Testa* for a unanimous Court appears to have expanded *Mondou* in two significant directions. First, the Court's opinion does not appear to turn on whether Congress explicitly provided

132. *Id.* at 232-33.

133. 279 U.S. at 387-88.

134. The FELA provided injured plaintiffs with very liberal venue and choice of forum rules. See generally *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942); *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44 (1941). The plaintiff in *Douglas* fell comfortably within them. Of course, to suggest that *Douglas* fails to give an FELA plaintiff the full enjoyment of his FELA claim by truncating his choice of forum is not to suggest that the virtually unlimited choice of forum granted by the FELA is necessarily wise.

135. 330 U.S. 386 (1947).

136. Emergency Price Control Act, Pub. L. No. 77-421, 56 Stat. 23 (1942), as amended by Act of June 30, 1944, Pub. L. No. 383, 58 Stat. 632.

137. Rhode Island courts had already enforced claims for double damages arising under the Fair Labor Standards Act (FLSA). See *Newman v. George A. Fuller Co.*, 72 R.I. 113, 48 A.2d 345 (1946). The court did not specify a Rhode Island based claim which the Rhode Island courts would have entertained.

for state court jurisdiction. Rather, Justice Black invoked the presumption of concurrent jurisdiction discussed in *Clafin v. Houseman*¹³⁸ and linked it to the antidiscrimination principle announced in *Mondou* to create a de facto obligation on the part of state courts to enforce federal claims.¹³⁹ Second, the Court found a violation of the antidiscrimination principle merely because Rhode Island courts were empowered to entertain generically similar, as opposed to factually identical, state law claims.¹⁴⁰

After *Testa*, whenever the presumption of concurrent jurisdiction establishes state power to entertain a federal claim, a state will violate the antidiscrimination principle of *Mondou* if it declines to exercise the concurrent power, while continuing to empower its courts to entertain generically similar state law claims. By linking the presumption of concurrent jurisdiction to an expansive view of what constitutes discriminatory treatment, the Court in *Testa* imposed a de facto obligation on state courts to entertain those federal claims which Congress has not explicitly confided to the exclusive jurisdiction of the federal courts. Of course, the antidiscrimination rationale continues to provide a narrow escape valve. Thus, in *Missouri ex rel. Southern Railway v. Mayfield*,¹⁴¹ the Court reverted to its analysis in *Douglas* and upheld the application to FELA cases of a Missouri statute which forbade Missouri courts from entertaining any transitory claim, state or federal,

138. 93 U.S. 130 (1876). See also note 90 *supra*.

139. It was unnecessary to invoke the presumption of concurrent jurisdiction in *Testa*, since Congress had explicitly provided for concurrent state jurisdiction. "The district courts shall have jurisdiction of criminal proceedings and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act." Emergency Price Control Act, Pub. L. No. 77-421, 56 Stat. at 33 (1942).

140. The discrimination condemned in *Mondou* and *McKnett* involved two sets of identical tort claims based on identical facts. Thus, the sole basis for discrimination in *Mondou* was a disagreement with the policy underlying the federal claim.

The discrimination condemned in *Testa* was more attenuated. No precisely analogous state cause of action existed and the only example of discriminatory activity cited by the Supreme Court was Rhode Island's willingness to entertain double damage claims under the FLSA. 330 U.S. at 394 & n.12. The actual discrimination in *Testa* thus was not between state and federal claims, but between types of federal claims. Of course, the potential for discrimination in favor of state claims was present, since Rhode Island courts possessed power to hear "penalty" cases. *Testa*, therefore, involved only a potential discrimination against generically similar federal claims, while in *Mondou* the discrimination was actual and involved precisely the same subject matter as the federal claim.

141. 340 U.S. 1 (1950).

brought by a nonresident plaintiff against a foreign corporation. However, as applied to section 1983 claims, the safety valve gives a state scant comfort, since it is highly unlikely that any state will take itself out of the business of adjudicating state and federal constitutional claims. Because each state will continue to enforce state and federal constitutional claims in their respective courts, no state may decline to afford a similar judicial forum to section 1983 plaintiffs. And, while the Supreme Court has been careful to reserve the question, it has recognized that the issue of obligatory state jurisdiction over section 1983 claims is virtually foreclosed by a combination of the presumption of concurrency and the prohibition on discrimination against federal claimants.¹⁴²

Although I applaud the result imposed by *Testa*, I am more than a little troubled by the process. First, the linkage of the presumption of concurrency with a broad antidiscrimination principle appears to render potentially significant variations in congressional language superfluous because the same results appear to follow whether or not Congress has explicitly provided for state judicial enforcement of a given federal right. It is one thing to indulge in a presumption that Congress always intends to vest concurrent jurisdiction in state courts when the consequences to the states are permissive; it is quite another when the inevitable consequence of such a presumption is to impose de facto obligatory jurisdiction. Moreover, it is one thing for a state to decline to adjudicate a federal claim when Congress is silent about choice of forum; it is quite another to override an explicit congressional forum choice.¹⁴³ If obligatory jurisdiction is to be imposed in the absence of explicit congressional language, or if obligatory jurisdiction is to be avoided in the teeth of explicit congressional language, it should be pursuant to a more convincing analysis.

More fundamentally, cases like *Testa* mask a difficult substantive judgment behind a facade of equality. The extent to which federal rights must be enforced in state courts poses a fundamental

142. *Martinez v. California*, 100 S. Ct. 553, 558 n.7 (1980). See note 116 *supra*.

143. Each of the cases imposing obligatory, as opposed to permissive, state jurisdiction over federal claims involved explicit congressional grants of concurrent jurisdiction. See generally *Testa v. Katt*, 330 U.S. 386 (1947) (Emergency Price Control Act); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (Fugitive Slave Act of 1793).

issue of federalism which deserves to be considered on its own merits. The antidiscrimination solution embraced by the Court frees it from being forced to grapple with a difficult substantive federalism issue and avoids the necessity of a potentially controversial opinion. After all, it is hard to argue with the antidiscrimination principle. Unfortunately it also deprives the system of a carefully considered answer to an important federalism issue, substituting instead a facile formula which imposes a de facto obligatory jurisdiction without really thinking about whether, and under what circumstances, such jurisdiction should exist.¹⁴⁴

The Affirmative Duty Model

In fact, when the question of obligatory state jurisdiction over federal section 1983 claims is confronted directly, it stands on its own feet without a nondiscrimination crutch. The structure of the Constitution itself and the lessons of history combine to demonstrate that state courts are the residual judicial organs of the federal union, with presumed responsibility to enforce the "Constitution, and the laws of the United States which shall be made in Pursuance thereof."¹⁴⁵

144. Using antidiscrimination principles to erect de facto substantive rules is hardly confined to esoteric questions such as state jurisdiction over federal causes of action. For example, the Court has compensated for an embarrassing lapse in our Constitution—it says virtually nothing about the right to vote—by using the equal protection clause to fill the void. *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Similarly, troublesome first amendment questions have been avoided, and covertly resolved, by couching them in nondiscrimination terms. *E.g.*, *Police Dep't v. Mosley*, 408 U.S. 92 (1972). Whatever benefits may flow from such mental gymnastics—and I confess that I have applauded the short-term results—we would be better off confronting the underlying issues directly and resolving them openly.

It is not at all clear that tying voting rights to the vagaries of equal protection law is the best way to secure the right to vote. After all, a substantive right to vote could easily have been found in the first amendment or the guaranty clause. Nor am I comfortable with resolving free speech questions by converting them into discrimination cases, since, taken at its word, such an analysis would tolerate widespread censorship, so long as it were equally applied.

145. Article VI of the Constitution, the supremacy clause, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As a matter of textual interpretation, the language of the supremacy clause itself obviously contemplates the existence of a broadly based state responsibility over federal claims. There would hardly have been a need to bind the "Judges in every State" if the draftsmen of the Constitution had not contemplated that much, if not all, litigation involving federal claims would unfold in state courts. Moreover, because state trial courts were and still are typically courts of general jurisdiction, there was no need to tack a specific jurisdictional provision onto article VI because, under widely shared assumptions, courts of general jurisdiction are presumed to be empowered to decide all cases not specifically forbidden them.¹⁴⁶ Finally, Chief Justice Marshall's opinion in *Marbury v. Madison*¹⁴⁷ illustrates the view of judicial responsibility in vogue when the Constitution was adopted. Under the *Marbury* model, a judge is essentially passive until someone deposits a case within his jurisdiction on his doorstep. Once such an event occurs, the judge becomes obliged to resolve the case by announcing which of the conflicting sources of law advanced by the parties is to take precedence. In exercising such a responsibility, a state judge could not be forbidden from looking to potential federal sources of law, even by an explicit prohibition.

If one links the language of article VI with prevailing notions of the jurisdictional reach of state courts of general jurisdiction with the *Marbury* vision of a judge's obligation to search out governing law, a persuasive case can be made that the Framers probably viewed state jurisdiction over federal claims as presumptively obligatory, subject only to a congressional decision to create exclusive federal jurisdiction.

Moreover, apart from the probable assumptions of the Founders, the institution of judicial review itself suggests the existence of presumptively obligatory state jurisdiction. Judicial review consists of the substitution of the judiciary's view of the meaning of a given provision of the Constitution and/or laws for that of a legislative or executive official.¹⁴⁸ As such, it substitutes the decision of a

U.S. CONST. art. VI, § 2.

146. See 21 C.J.S. *Courts* § 2 (1972).

147. 5 U.S. (1 Cranch) 137 (1803).

148. *Marbury* presents an example of the various aspects of judicial review since it combines judicial review of legislative action on constitutional grounds and a request for judicial

nonmajoritarian, or at least less majoritarian, official for that of more democratically responsible officials. However, the jurisdiction of the federal courts is subject to plenary control by the very majoritarian forces whose will the courts must question. Article III¹⁴⁹ leaves to the shifting fortunes of majority rule the question of whether inferior federal courts should exist at all and what their jurisdiction should be. A generation of law students is now familiar with Henry Hart's demonstration of the theoretical fragility of federal judicial review.¹⁵⁰ Indeed, Chief Justice Marshall's construction of article III in *Marbury* has rendered even the appellate jurisdiction of the Supreme Court vulnerable to majoritarian attack.¹⁵¹ Thus, no guarantee exists that a federal judiciary will ex-

review of executive action on nonconstitutional grounds. While we often treat judicial review as if it were confined to constitutional situations, in fact, most judicial review takes place in a nonconstitutional context.

149. Article III of the Constitution provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, §§ 1, 2.

150. HART & WECHSLER, *supra* note 19, at 330-60 (quoting Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953)). See also Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts*, 124 U. PA. L. REV. 45 (1975).

151. In *Marbury*, Chief Justice Marshall construed article III, § 2, cl. 2 to provide Congress with plenary control over the appellate jurisdiction of the Supreme Court. While the *Marbury* construction is plausible—perhaps even compelling—an alternative construction exists that would read the final fragment of the second clause as providing Congress with power to alter the balance of original and appellate jurisdiction, but would forbid Congress from wholly removing particular issues from the cognizance of the Supreme Court. Such a construction would read the “exceptions” and “regulations” phrase as modifying the entire clause rather than merely the second sentence. See generally HART & WECHSLER, *supra* note 19, at 79-80 (2d Supp. 1977); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. Recent unsuccessful majoritarian attacks on the jurisdiction of the lower federal courts include: S. 450, 96th Cong., 2d Sess. (1979) (no review of any state law that related to “voluntary prayers in public schools”); S. 917, 90th Cong., 2d Sess. (1968) (no review of the highest state court decision admitting in evidence a confession as voluntary); H.R. 11,926, 88th Cong., 2d Sess. (1964) (no review of state apportionment); and S. 2648,

ist to carry out a central function of our constitutional government—judicial review. State courts, the residual judicial organ of the federal union, should, therefore, be viewed as vested with an essential bedrock responsibility to act as the only secure organ of judicial review.¹⁵² For the first one hundred years of the Republic, general federal question jurisdiction did not exist.¹⁵³ Thus, prior to 1875, state courts were the only forum in which certain federal rights could be enforced. It is highly unlikely that the Framers intended to permit, in effect, each state to veto a substantive decision of Congress or to nullify the impact of a constitutional provision by selectively cutting off access to the only judicial forum available to enforce it. Nor is such a concern merely historical. Even today, important federal rights exist which may be enforced only in state courts.

Until recently, a federal claim which failed to satisfy the jurisdictional amount imposed by 28 U.S.C. § 1331(a)¹⁵⁴ was enforceable, if at all, only in a state court. After a Byzantine evolution,¹⁵⁵

85th Cong., 2d Sess. (1958) (no review of any state antisubversive statutes).

152. Of course, state courts are also vulnerable to majoritarian attacks on their jurisdiction. However, assuming the worst, federal courts may be swept away or severely hamstrung by a hostile congressional majority. State courts then would remain subject only to local majoritarian pressure and, given the noncontroversial nature of much state judicial activity, total abolition of a state's courts is not a serious possibility. Moreover, state courts often find more tangible support for their existence in their state constitutions. Finally, piecemeal attempts to prevent a state court from enforcing federal constitutional rights would probably run afoul of a genuine nondiscrimination principle.

153. General federal question jurisdiction was not established until 1875. Act of March 1875, ch. 136, 18 Stat. 470. An abortive Federalist attempt to establish general federal question jurisdiction in the Midnight Judges Bill, Act of Feb. 13, 1801, 2 Stat. 89, was repealed by the Jeffersonians. See generally *Stuart v. Laird*, 5 U.S. (1 Cranch) 298, 299-308 (1803).

154. Until 1980, 28 U.S.C. § 1331(a) provided:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1331(a) (1976) (amended 1980). The 1976 amendments to § 1331(a) eliminated the jurisdictional amount in many actions against federal defendants. The jurisdictional amount continued to apply to actions against state and local government officials until 1980. See notes 163-165 & accompanying text *infra*. The very existence of a jurisdictional amount exemplified a congressional assumption that state courts would hear those cases falling outside the jurisdictional amount.

155. In *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979), the Court ruled

the Supreme Court ruled that allegations by welfare recipients that state or local officials have violated the restrictions contained in the Social Security Act make out a cause of action under section 1983;¹⁵⁶ such claims, however, fall outside the jurisdictional grant of 28 U.S.C. § 1343(a)(3).¹⁵⁷ Because the Court has declined to permit welfare recipients to aggregate their claims for jurisdictional purposes,¹⁵⁸ and because, even if the \$10,000 jurisdictional amount of section 1331(a) could have been satisfied, the eleventh amendment¹⁵⁹ would have precluded retrospective relief,¹⁶⁰ the net result was the existence of a significant body of federal claims for which no clear base of federal jurisdiction existed,¹⁶¹ thus rendering ac-

that the surviving jurisdictional component of the Civil Rights Act of 1871, codified at 28 U.S.C. § 1343(a)(3), did not provide for jurisdiction over supremacy clause claims based on the Social Security Act. The Court in *Chapman* reasoned that the Social Security Act was not a law providing for equal rights within the meaning of 28 U.S.C. § 1343(a)(3) and that § 1983, as a passive conduit, could not qualify as such a law. However, in *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), the Court ruled that § 1983 was intended to provide a cause of action for state and local refusal to abide by federal statutory law. Some tension would appear to exist between the *Chapman* view of § 1983 as a passive conduit and the *Thiboutot* view of § 1983 as a dynamic creator of rights. See *Maine v. Thiboutot*, 100 S. Ct. at 2509-11 (Powell, J., dissenting); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. at 31-40 (Powell, J., concurring).

156. *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980).

157. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

158. *E.g.*, *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969).

159. "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.

160. See generally *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974). As with the jurisdictional amount, the very existence of the eleventh amendment appears to contemplate state jurisdiction over claims which are jurisdictionally barred from federal court.

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), supports the argument that states ceded sovereign immunity against federal claims as a necessary concomitant of joining the Union, subject only to the eleventh amendment's bar on suits in federal court. Pursuant to such a theory, states would be freely suable on federal causes of action in state courts, regardless of whether they had waived sovereign immunity for state-law-based claims. Since *Chisholm* was a diversity case, the sovereign immunity of states as against federal claims in state court has not been tested.

161. If a welfare case raises both statutory and constitutional issues, however, clear federal jurisdiction over the constitutional claim is provided by 28 U.S.C. § 1343(a)(3), while pendent jurisdiction authorizes consideration of the statutory claim. Indeed, the pendent statutory claim should be decided before reaching the constitutional claim and may be decided even after the constitutional claim has been mooted. *E.g.*, *Hagans v. Lavine*, 415 U.S.

cess to state courts a necessity.¹⁶²

In 1980, Congress eliminated the jurisdictional amount,¹⁶³ thereby recognizing the responsibility of federal courts to decide federal law regardless of the amount in controversy.¹⁶⁴ Nonetheless, Congress allowed a specific exemption for cases brought against defendants other than the United States under section 23(a) of the Consumer Product Safety Act.¹⁶⁵ This exemption indicates the continued reliance on state courts by the Congress to decide federal law.

Finally, our only historical brush with a regime of permissive state jurisdiction over federal claims supports the view that such jurisdiction should not be left to the decision of local majorities. Acting on the hints contained in the opinions of Justice Story and Justice McLean in *Prigg v. Pennsylvania*,¹⁶⁶ abolitionists in Massachusetts and Pennsylvania succeeded in closing their courts to attempts to enforce fugitive slave rights under the 1793 Act.¹⁶⁷ While

528 (1974); *Rosado v. Wyman*, 397 U.S. 397 (1970).

162. Welfare cases were not the only example of important federal rights falling within exclusive state court jurisdiction. Any claim premised on the pre-1980 version of 28 U.S.C. § 1331(a) which failed to satisfy the jurisdictional amount faced similar problems.

163. The 1980 amendment to 28 U.S.C. § 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369.

164. H.R. REP. NO. 1461, 96th Cong., 2d Sess. 1 (1980). The amendment was meant to resolve "the anomolous [sic] situation faced by persons who, although their federal rights have been violated, are barred from a Federal forum solely because they have not suffered a sufficient economic injury." *Id.* See also S. REP. NO. 827, 96th Cong., 2d Sess. 1 (1980) ("Federal courts should bear the responsibility of deciding Federal law").

165. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 3, 94 Stat. 2369 (amending 15 U.S.C. § 2072(a)).

Congress explained that the exception was needed as the Consumer Product Safety Act was passed with a specific tie-in to the jurisdictional amount. S. REP. NO. 827, 96th Cong., 2d Sess. 2 (1980).

166. 41 U.S. (16 Pet.) 539 (1842); see notes 118-122 *supra*.

167. See generally T. MORRIS, *FREE MEN ALL* (1974); *id.* at 114 (Massachusetts Personal Liberty Law of 1843); *id.* at 118 (Pennsylvania Personal Liberty Law of 1847); *id.* at 119-23 (failure of New York to enact similar legislation). See also R. COVER, *supra* note 120.

The strategy failed when Congress established a corps of federal slave commissioners as part of the Compromise of 1850, rendering resort to state courts unnecessary. Abolitionists promptly attacked the slave commissioners by seeking state habeas corpus writs designed to shift the cases back to state courts in sympathy with the fugitive. The strategy failed in *In re Booth*, 3 Wis. 13 (1854), *rev'd sub nom.* *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859). See generally R. COVER, *supra* note 120; T. MORRIS, *supra*, at 186-201.

one hopes that we will never again be called upon to enforce federal rights which are so morally repugnant as those flowing from the fugitive slave clause, it is the nature of certain federal rights to be controversial. Often a federal right reflects a utilitarian judgment that the greater good requires favoring one geographical section or one economic group over another. While such a utilitarian judgment may seem obvious in Washington, D.C., it may not appear so obvious in areas under the political sway of the disfavored group. Moreover, many federal rights, especially constitutional rights, may be opposed by a majority everywhere. The bruising political battles associated with closing state courts to such unpopular federal rights, even assuming the existence of alternative federal enforcement machinery,¹⁶⁸ and the bitterness and sense of betrayal which closing the state courts would create in the beneficiaries of the rights argue strongly for a presumptively obligatory state responsibility to enforce all federal rights. This responsibility is subject, of course, to a congressional decision to vest exclusive enforcement responsibilities in the federal judiciary.

This suggested formulation differs from the current antidiscrimination model of *Mondou* and *Testa* in two ways. First, it would not permit a state to avoid enforcing a federal claim by imposing similar disabilities on persons asserting state claims. While a state may be free to deny access to its courts to persons asserting state law claims, the constitutional scheme imposes an affirmative responsibility on states—at least as long as they operate courts—to provide judicial machinery to enforce federal rights. Where Congress has prescribed liberal, if possibly misguided, venue rules in connection with the enforcement of federal rights, state courts should not ignore them merely because they apply similar disabilities to persons asserting state law claims.¹⁶⁹ Of course, in the absence of explicit congressional definition of venue or other similar rules, states remain free to treat federal claims identically with state claims for the purposes of venue and territorial jurisdiction.

Second, this formulation would prevent Congress from removing

168. As I have suggested, no guaranty of the existence of adequate enforcement machinery exists. See notes 154-165 & accompanying text *supra*.

169. Thus, I believe that *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929), and *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), were wrongly decided. See notes 130-142 & accompanying text *supra*.

the jurisdiction of the state courts over federal claims unless adequate alternative federal enforcement machinery were in existence. Because, given the vulnerability of federal courts, state courts are vested with an important residual responsibility to provide a mechanism to exercise judicial review, Congress may not interfere with that responsibility unless alternative judicial forums capable of exercising judicial review exist.¹⁷⁰ Thus, even were the worst to occur, that is, were Congress to abolish the federal courts,¹⁷¹ state courts would remain as a last bastion of judicial review.¹⁷² In any event, whether one adopts the antidiscrimination rationale of *Mondou* and *Testa* or the suggestion of an affirmative duty, once state courts are deemed bound to entertain a federal cause of action, they must decide what, if any, collateral federal rules must be applied in connection with the adjudication of the federal claim.

TRADITIONAL CROSS-FORUM APPLICABILITY OF COLLATERAL RULES

Whenever a cause of action generated in one jurisdiction is enforced in the courts of another, the question arises whether collateral rules of the generative jurisdiction should or must be imported

170. Cf. *Carlson v. Green*, 446 U.S. 14 (1980) (statutory remedy does not oust constitutionally based claim unless it provides equivalent and effective protection). See generally Comment, *Carlson v. Green: The Inference of a Constitutional Cause of Action Despite the Availability of a Federal Tort Claims Act Remedy*, 22 WM. & MARY L. REV. 559 (1981).

171. I do not suggest that such an eventuality is even remotely likely. As the Hart dialogue demonstrates, however, one can gain a better understanding of our present institutional structure by rotating it through a series of purely hypothetical extremes. See HART & WECHSLER, *supra* note 19, at 330-60.

172. If state courts are to perform as residual review organs, some rethinking of *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859), and *Tarble's Case*, 80 U.S. 397 (1872), is necessary. Traditional analysis prohibits state courts from entering equitable relief against federal officials, but permits the entry of damage awards against federal wrongdoers. *E.g.*, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391 n.4 (1971). As long as an effective alternative federal forum exists, the prohibition on injunctions is innocuous enough, although the removal statutes would appear to provide sufficient protection against abuse of state equitable power. See *Willingham v. Morgan*, 395 U.S. 402 (1969); 28 U.S.C. § 1442(a) (1976). However, the vulnerability of federal jurisdiction argues against a blanket prohibition on state equitable relief. Removal, stay practice, and ultimate Supreme Court review are sufficient to protect against abuse of state injunctive review of federal actions during normal periods. If, on the other hand, there is no federal court to remove to because its jurisdiction has been abolished, or if the Supreme Court's appellate jurisdiction has been taken away, residual state review power over federal officials is a necessity if judicial review is to occur at all.

by the forum.¹⁷³ The question arises in three contexts, keyed to the degree of deference which the forum jurisdiction must display to the generative jurisdiction's policy judgment. When the degree of deference is relatively weak, as in a garden-variety conflicts of law setting, the choice of whether to import the generative jurisdiction's collateral rule is essentially discretionary, drawing on notions of comity.¹⁷⁴ When the degree of deference is considerably stronger, as when one state is obliged to give full faith and credit

173. By "generative jurisdiction," I mean the political entity which made the policy judgment that a given set of facts should give rise to enforceable legal consequences. By "forum jurisdiction," I mean the political entity which is asked to provide the enforcement machinery for the policy judgment. Obviously, the generative and forum jurisdictions are often identical. Even when they are identical, it may be necessary for the forum to decide whether to borrow certain collateral rules from some other source of law or to generate its own collateral rules. *E.g.*, *Board of Regents v. Tomano*, 446 U.S. 478 (1980); *Carlson v. Green*, 446 U.S. 14 (1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Chevron Oil Corp. v. Huson*, 404 U.S. 97 (1971); *Industrial Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-04 (1966); *Levinson v. Deupree*, 345 U.S. 648 (1953); *Cope v. Anderson*, 331 U.S. 461 (1947); *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946); *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906); *Campbell v. Haverhill*, 155 U.S. 610 (1895); *Bomar v. Keyes*, 162 F.2d 136, 140-41 (2d Cir. 1947); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 546-47 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946). I suggest that the same principle should govern both the question of whether to import and whether to borrow a collateral rule. See notes 235-250 & accompanying text *infra*. See generally Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955).

By "collateral rules," I mean a host of issues which must be faced whenever a legal rule is judicially enforced, including the nature and availability of defenses or immunities, the identity of potential plaintiffs, the survivorship of the cause of action, the applicable limitations period, rules governing the assessment and computation of damages, rules governing the availability and scope of equitable relief, rules governing the form, timing, and sufficiency of the pleadings, rules governing the burden of proof, rules governing the availability and administration of jury trials, rules governing the allocation of functions between judge, jury, and alternative methods of fact-finding, rules governing discovery, rules governing the admissibility of evidence, rules governing the geographical setting of the trial, and rules governing the form and consequences of service of process. Many collateral rules fall within traditional notions of procedure. However, given the tendency to label a rule as either "procedural" or "substantive" without thinking about whether it should or should not be imported or borrowed, it seems wise to use a more neutral term—"collateral."

174. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); see *Davis v. Mills*, 194 U.S. 451 (1904). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 133 (1971) (persuasion burden); *id.* § 134 (production burden); *id.* § 134 (presumptions); *id.* § 135 (sufficiency of evidence); *id.* § 129 (mode of trial); *id.* § 138 (evidence); *id.* § 139 (privileges); *id.* §§ 142-143 (statutes of limitations); see also DE CEVERA, *THE STATUTE OF LIMITATIONS IN AMERICAN CONFLICTS OF LAW* (1966).

to the judgments of another, the obligation of the forum jurisdiction to apply certain collateral rules of the generative jurisdiction is correspondingly increased.¹⁷⁵ When, however, the forum jurisdiction is constitutionally compelled to defer totally to the policy judgments of the generative jurisdiction, the problem is most acute because the forum must refrain from enforcing collateral rules which trench on the policymaking prerogatives of the generative jurisdiction. Under our system, such a maximum-deference level can occur in two settings.

First, state courts may be asked to enforce federal policy judgments to which they must give maximum deference under the supremacy clause.¹⁷⁶ State judicial enforcement of federal rights, while not an everyday phenomenon, is firmly rooted in history¹⁷⁷ and current practice under which state courts routinely enforce federal rights under the FELOA,¹⁷⁸ the Jones Act,¹⁷⁹ section 301 of the Labor Management Relations Act,¹⁸⁰ and the Civil Rights Acts.¹⁸¹

175. See, e.g., *Roche v. McDonald*, 275 U.S. 449 (1928) (state cannot refuse to enforce judgment on grounds the action was barred by its statutes of limitations when the judgment was rendered); *Holbein v. Rigot*, 245 So. 2d 57 (Fla. 1971) (foreign judgment for punitive damages entitled to full faith and credit); *Ferster v. Ferster*, 220 Ga. 319, 138 S.E.2d 674 (1964) (foreign judgment enforced despite pendency of review in generative forum). Nonetheless, the full faith and credit clause limits state choice of law only if it threatens the federal interest in national unity. See generally *Allstate Ins. Co. v. Hague*, 49 U.S.L.W. 4071 (1981).

176. For a discussion of the obligation of state courts to act as federal enforcement forums, see notes 145-172 & accompanying text *supra*.

177. The second Congress to convene under the Constitution vested significant enforcement responsibilities in the state courts. E.g., Act of Feb. 12, 1793, 1 Stat. 302 (fugitive slave enforcement). See generally *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). State courts have played substantial roles in enforcing federal policy. E.g., *Testa v. Katt*, 330 U.S. 386 (1947) (Emergency Price Control Act); *Brown v. Gerdes*, 321 U.S. 178 (1944) (Emergency Price Control Act); *Pufahl v. Parks*, 299 U.S. 217 (1936) (Emergency Price Control Act); *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936) (claims to Russian assets after recognition of Soviet government); *Seabury v. Green*, 294 U.S. 165 (1935) (national bank share assessments); *Forrest v. Jack*, 294 U.S. 158 (1935) (national bank share assessments); *Claffin v. Houseman*, 93 U.S. 130 (1876) (bankruptcy-related litigation). See generally *Redish & Muench*, *supra* note 91; Note, *supra* note 91.

178. E.g., *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952); *Brown v. Western Ry.* 338 U.S. 294 (1949); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912).

179. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (construing predecessor to 46 U.S.C. § 688 (1976)).

180. *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

181. *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980) (42 U.S.C. § 1983 statutory claim); *Marti-*

Conversely, federal courts may be asked, pursuant to diversity¹⁸² or pendent¹⁸³ jurisdiction, to enforce policy judgments that, under the Constitution, are the sole province of the states.¹⁸⁴ In both situations the forum jurisdiction is constitutionally forbidden to interfere with the generative activities of its federal partner. In determining the appropriate collateral rules to govern such cross-forum enforcement, we have sought, under a variety of rubrics, to determine whether substituting the forum partner's collateral rule for the collateral rule of the generative partner would be likely to exert a substantial impact on behavior which the generative forum hoped to modify in establishing the cause of action in the first place. If either the preincident behavior of the targets of the cause of action or the postincident ability of the beneficiaries of the cause of action to enjoy it would be substantially modified by a

nez v. California, 100 S. Ct. 553 (42 U.S.C. § 1983); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (42 U.S.C. § 1983).

182. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1332(a) (1976).

183. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

184. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

There is substantial disagreement as to the precise underpinnings of *Erie*. Professor Ely has argued that *Erie* rests solely on a reinterpretation of the Rules of Decision Act, 28 U.S.C. § 1652 (1976). Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704 (1974). He argues that attempts to develop a constitutional structure underlying *Erie* are needlessly confusing since the Rules of Decision Act and the Rules Enabling Act, 28 U.S.C. § 2072 (1976), cover the field. Ely, *supra*, at 698. According to Professor Ely, when Congress actually enacts legislation which arguably intrudes on reserved state power, there will be time enough to worry about constitutional theory. *Id.* at 706-07 & n.77.

Justice Harlan, on the other hand, viewed *Erie* in broader terms as seeking to distill principles of federalism which govern the relationship of federal power to reserved state rights. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

While Professor Ely's reminder that *Erie* issues involve statutory construction as well as abstract federalism analysis is an important warning and aids in resolving many cases, it does not avoid the necessity of positing a constitutional underpinning. As Professor Chayes has noted, even Ely's formidable analytic powers cannot avoid disputes over the resolution of particular issues. Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974). The resolution of such disputes should depend on a purposive interpretation of *Erie* which, at bottom, will be constitutionally based. *But see* Walker v. Armco Steel Corp., 100 S. Ct. 1978 (1980). More importantly, the Ely formulation merely defers the constitutional issue since one must still decide whether the Rules Enabling Act authorizes certain activity on the basis of whether it is procedural or substantive. Only a purposive, constitutionally based interpretation of *Erie* can guide such a choice. In any event, I take Justice Brandeis at his word that he would not have overturned one hundred years of statutory construction of the Rules of Decisions Act, 28 U.S.C. § 1652 (1976), in the absence of constitutional considerations. *Erie R.R. v. Tompkins*, 304 U.S. at 77-78.

failure to apply the generative jurisdiction's collateral rule, we have labelled the collateral rule "integral to the cause of action"¹⁸⁵ or "substantive"¹⁸⁶ and have required the forum to apply it in order to avoid diluting the impact of the generative jurisdiction's policy choice. When, however, application of the forum's collateral rule would not be likely to modify the impact of the generative jurisdiction's policy choice, we have labelled it merely "procedural" and have permitted the forum to apply its own rule.

Federal Rights Enforced in State Courts

In the years following *Mondou v. New York, New Haven & Hartford Railroad*,¹⁸⁷ the Supreme Court was called upon to anticipate its post-*Erie* role and to define the collateral rules applicable to federally based actions, generally involving the FELA, brought in state court. Four celebrated cases set out the basic principles.

In *Davis v. Wechsler*,¹⁸⁸ when a state pleading rule would have negated a federal venue right, Justice Holmes stated: "Whatever springes the state may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."¹⁸⁹ In *Garrett v. Moore-McCormack Co.*,¹⁹⁰ Justice Black ruled that the right of a Jones Act plaintiff "to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his [federal] cause of action."¹⁹¹

185. Cases considering whether to require a state court to enforce a federal collateral rule often ask whether it is an "integral" part of the federal cause of action. *E.g.*, *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952); *Brown v. Western Ry.*, 338 U.S. 294 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

186. The distinction between substance and procedure in the context of *Erie* has passed into legend.

187. 223 U.S. 1 (1912).

188. 263 U.S. 22 (1923).

189. *Id.* at 24.

190. 317 U.S. 239 (1942).

191. *Id.* at 245. Justice Black's opinion for the Court in *Garrett* is one of the few which recognize the essential similarity of the state and federal cross-forum issues.

It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions under the Merchant Marine Act. The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in

In *Brown v. Western Railway*,¹⁹² the Court, quoting *Davis*, held that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."¹⁹³ Finally, in *Dice v. Akron, Canton & Youngstown Railroad*,¹⁹⁴ the Court ruled that an FELA plaintiff was entitled to a jury trial in state court, despite a contrary local rule, because the jury trial was an integral part of his FELA cause of action. *Davis*, *Garrett*, *Brown*, and *Dice* are merely well-known examples of numerous Supreme Court cases dealing with the obligation of state courts to apply federal collateral rules when the preincident or postincident integrity of the federal cause of action is threatened. Thus, when federal rights are enforced in state courts, in determining the applicable collateral rules governing pleading, federal (generative) standards govern the sufficiency of the pleading,¹⁹⁵ as well

federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to the enforcement in the federal courts of rights created or governed by state law [citing *Erie R.R. v. Tompkins*]. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id. at 245 (footnotes omitted).

192. 338 U.S. 294 (1949).

193. *Id.* at 298-99.

194. 342 U.S. 359 (1952).

195. *Brown v. Western Ry.*, 338 U.S. 294 (1949); *Davis v. Wechsler*, 263 U.S. 22 (1923).

In *Brown*, a Georgia pleading rule required plaintiff's pleading to be harshly construed against him. Plaintiff merely alleged injury from tripping over "clinkers" in the roadbed, without specifying negligence on the railroad's part in connection with the debris. Under principles of notice pleading prevailing in federal court, the allegations would have clearly been sufficient. The Court applied the federal standard and overturned a dismissal of the complaint. Justices Frankfurter and Jackson dissented, stating, "It is not a denial of a Federal right for Georgia to reflect something of the pernickety with which seventeenth-century common law read a pleading." 338 U.S. at 303.

Davis grew out of an action involving railroads under federal control during World War I. Federal regulations required such suits to be brought in the state of the plaintiff's residence or where the cause of action arose. Plaintiff's state court action satisfied neither federal venue requirement. State pleading practice, however, deemed venue objections waived by the filing of an answer which responded to the merits as well as objecting to venue. Justice Holmes ruled that state pleading practice with respect to venue could not defeat the assertion of the federal right. 263 U.S. at 23-25.

as the form of action pleaded,¹⁹⁶ but state (forum) standards govern the time limits,¹⁹⁷ amendment process,¹⁹⁸ and appellate practice.¹⁹⁹

Similarly, in choosing the applicable collateral rules governing the fact-finding process, federal (generative) rules govern the availability²⁰⁰ and administration²⁰¹ of a jury trial, including the suffi-

196. *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923). In *Levee*, plaintiff sued for the value of a lost trunk, in apparent violation of the Interstate Commerce Commission limitation of liability rules. Louisiana courts ruled that the limitation of liability would not apply unless the loss were accidental or uncontrollable. Since plaintiff sued in trover, the burden under Louisiana law was on the defendant to demonstrate that its refusal to deliver the trunk was justifiable. The Supreme Court reversed, saying: "The law of the United States cannot be evaded by the forms of local practice. The local rule applied as to burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law." *Id.* at 21.

197. *Atlantic Coast Line R.R. v. Mims*, 242 U.S. 532 (1917). In *Mims*, plaintiff had failed to allege a violation of the FELA, and was precluded from seeking to prove one. The Court upheld the refusal, stating:

While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the [appellant] to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit testimony tendered in support of such claim is not a denial of a federal right

Id. at 536.

198. *Central Vt. Ry. v. White*, 238 U.S. 507 (1915). In *Central Vermont*, the Vermont Supreme Court permitted a plaintiff to amend his pleading to conform to proof and, thus, to make out an FELA claim. As in *Atlantic Coast Line R.R. v. Mims*, 242 U.S. 532 (1917), the Supreme Court ruled that state rules on amendment and timing of pleadings did not impinge on the federal right. The Court in *Central Vermont* held, however, that federal rules on sufficiency of the evidence and burden of proof must govern. *Id.* at 511-12. *Central Vermont* is, thus, among the first cases to differentiate between collateral rules which affect the generative jurisdiction's policy judgment and collateral rules which do not. The dichotomy recognized by the Court in *Central Vermont* has dominated cross-forum enforcement cases ever since.

199. *John v. Paullin*, 231 U.S. 583 (1913).

200. *Squire v. Wheeling & L.E.R.R.*, 342 U.S. 935 (1952) (per curiam); *Dice v. Akron C. & Y.R.R.*, 342 U.S. 359 (1952). In *Dice*, the Supreme Court required Ohio state courts to provide jury trials in FELA cases despite a contrary local rule. *Dice* purports to rest on a construction of the intent of Congress in enacting the FELA. *Id.* at 363.

201. *Arnold v. Panhandle & S.F. Ry.*, 353 U.S. 360 (1957) (per curiam); *Norfolk S.R.R. v. Ferebee*, 238 U.S. 269 (1915).

In *Ferebee*, the Court ruled that the right of a defendant under the FELA to a reduction in damages proportionate to the degree of the plaintiff's contributory negligence would ordinarily be violated by a local rule providing for separate trials on the issues of liability and damages. *Id.* at 273. In *Arnold*, the Court held that Texas rules on the relationship between

ciency of the evidence needed to sustain a verdict and the propriety of directing a verdict.²⁰² State (forum) rules, however, govern the effect of nonunanimous verdicts.²⁰³ Federal (generative) rules govern the size and allocation of the burden of proof,²⁰⁴ but state (forum) rules probably govern the admissibility of evidence and the availability of discovery.²⁰⁵

The pleading cases and the cases dealing with the collateral rules governing fact-finding seem to draw a pragmatic distinction between those rules likely to affect the distribution of economic costs and benefits established by the generative forum, and those rules which, while significant in a given case, are not likely to alter the general allocation of risks. And while one can quibble with an occasional application of the principle, by and large the cases faithfully maintain the congressional policy judgments which led to the en-

general and special verdicts could not defeat the recovery of an FELA plaintiff who had received a favorable general verdict. 353 U.S. at 361.

202. Among the numerous Supreme Court cases holding that federal standards govern the sufficiency of the evidence are: *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Brady v. Southern Ry.*, 320 U.S. 476 (1943); *Chesapeake & O. Ry. v. Stapleton*, 279 U.S. 587 (1929); *Western & A.R.R. v. Hughes*, 278 U.S. 496 (1929); *Toledo, St. L. & W.R.R. v. Allen*, 276 U.S. 165 (1928); *Chicago, M. & St. P. Ry. v. Coogan*, 271 U.S. 472 (1926); and *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

203. *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916). In *Bombolis*, the Court sustained a nonunanimous verdict for the plaintiff in a state FELA case. *Bombolis* thus anticipated by a half-century the current Supreme Court's perception that unanimity is not integral to the conception of a jury verdict, even in criminal cases. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding verdict rendered by 10 of 12 jurors); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (upholding verdict rendered by 9 of 12 jurors). But see *Burch v. Louisiana*, 441 U.S. 120 (1979) (invalidating verdict of 5 of 6 jurors). See also *Ballew v. Georgia*, 435 U.S. 223 (1978) (invalidating five person jury). Thus no conflict exists between *Dice*, which requires a state to use juries in FELA cases, and *Bombolis*, which permits the juries to act nonunanimously. See also *Chesapeake & O. Ry. v. Carnahan*, 241 U.S. 241 (1916) (upholding seven person juries in FELA cases).

204. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923); *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367 (1918); *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

205. The Supreme Court has not spoken explicitly on the rules governing discovery and the admissibility of evidence in state courts enforcing federal claims. In *Central Vt. Ry. v. White*, the Court suggested that state rules would govern. 238 U.S. 507, 511 (1915). The Supreme Court has twice upheld the applicability of forum discovery rules in diversity cases. See *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). See generally C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE & PROCEDURE: EVIDENCE* § 5135 (1977).

actment of the legislation in question, even to drawing fine distinctions between jury trials and nonunanimous verdicts.²⁰⁶

The concern for maintaining the integrity of the generative forum's policy decision as to risk allocation and behavior modification is equally apparent in the cases choosing collateral rules governing the scope of a defendant's liability.²⁰⁷ Thus, federal (generative) rules govern the availability and computation of damages,²⁰⁸ as well as the existence of immunities and defenses.²⁰⁹ Moreover, because the limitations period is intimately connected both to the allocation of economic risks and the degree of behavior modification, federal (generative) rules have been held to govern its length,²¹⁰ related accrual,²¹¹ and commencement issues.²¹² Fi-

206. *Compare* *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916), *with* *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952).

207. *See generally* *Walsh v. Schlecht*, 429 U.S. 401 (1977); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Erle R.R. v. Winfield*, 224 U.S. 170 (1917); *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917); *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492 (1914).

208. *E.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Chesapeake & O. Ry. v. Kelly*, 241 U.S. 485 (1916); *Chicago, R.I. & P. Ry. v. Devine*, 239 U.S. 52 (1915); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913). *See also* *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Ward v. Love County*, 253 U.S. 17 (1920); *General Oil Co. v. Crain*, 209 U.S. 108 (1908).

The most dramatic insistence on federal damage rules occurred in *Chesapeake & O. Ry. v. Kelly*, 241 U.S. 485 (1916), where the Court required state juries to discount the present value of future receipts in awarding FELA verdicts. The means of proving the appropriate discount was left to state discretion. *Id.* at 491.

209. *E.g.*, *Martinez v. California*, 100 S. Ct. 553 (1980); *Maynard v. Durham & S. Ry.*, 365 U.S. 160 (1961); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *Beadle v. Spencer*, 298 U.S. 124 (1936); *The Arizona v. Anelich*, 298 U.S. 110 (1936); *Chicago, R.I. & P. Ry. v. Wright*, 239 U.S. 548 (1916); *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492 (1914).

210. *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 n.4 (1966); *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199 (1915); *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909). *See also* *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

In *McAllister*, the most dramatic example of federal imposition of a limitation period, a plaintiff had brought a federal claim in state court, linking it with a related state claim. The Court ruled that since both the state and federal claims would most likely be asserted in a single proceeding, the state court must apply the federal period to the state claim in order to provide the plaintiff the full benefit of the federal right. *Id.* at 226.

211. *Urre v. Thompson*, 337 U.S. 163 (1949); *Rankin v. Barton*, 199 U.S. 228 (1905).

212. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Herb v. Pitcairn*, 325 U.S. 77 (1945). In *Herb v. Pitcairn*, Illinois courts had held that an FELA claim was not commenced for the purposes of tolling the limitations period by filing it in a state court which lacked jurisdiction. The Supreme Court reversed, holding that the commencement issue was governed by federal law and that filing an FELA claim in the wrong state court commenced it for limitations purposes. *Id.* at 78. *Compare* *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530

nally, federal (generative) rules govern the definition of the class of eligible plaintiffs,²¹³ including the survivorship of claims by persons whose death is related to the federal cause of action.²¹⁴

When, however, the state (forum) collateral rule is not likely to interfere with the federal (generative) jurisdiction's judgment as to risk allocation and behavior modification, the Supreme Court has permitted the state to apply its collateral rules to the litigation of federal claims. Thus, in addition to the timing²¹⁵ and amendment²¹⁶ of pleadings, the control of appellate practice,²¹⁷ and the use of nonunanimous juries,²¹⁸ state (forum) rules govern the form and territorial reach of service²¹⁹ and door-closing rules associated with venue and *forum non conveniens*.²²⁰

(1949) (filing of complaint with federal court did not toll state statute of limitations), *with* Walker v. Armco Steel Corp., 100 S. Ct. 1978 (1980) (filing of complaint with subsequent service deemed to toll state statute of limitations).

213. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); New York Cent. & H.R.R. v. Tonsellito, 244 U.S. 360 (1917).

214. Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913). *Vreeland* dealt with a plaintiff who died as a result of the injury underlying the FELA suit. Compare Robertson v. Wegmann, 436 U.S. 584 (1978), *with* Carlson v. Green, 446 U.S. 14 (1980).

215. Atlantic Coast Line R.R. v. Mims, 242 U.S. 532 (1917).

216. Central Vt. Ry. v. White, 238 U.S. 507 (1915).

217. John v. Paullin, 231 U.S. 583 (1913).

218. Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211 (1916).

219. Missouri *ex rel.* St. L., B. & M. Ry. v. Taylor, 266 U.S. 200 (1924). In *Taylor*, the Court upheld the use of quasi in rem service by a state court in an FELA action despite the inability of a federal court to exercise quasi in rem jurisdiction. See also Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

220. Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950); Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929). The door-closing rules may not be discriminatorily applied to federal, but not to state, causes of action. McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934).

A distinction may exist between door-closing rules designed to advance a policy of the generative forum and door-closing rules which do not appear linked to the generative jurisdiction's underlying policy judgment. Compare Davis v. Wechsler, 263 U.S. 22 (1923) (applying federal door-closing venue rules to displace state rules), *with* Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929) (applying federal door-closing venue rules to displace state rules), and Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950) (applying state door-closing rules to displace federal rules). See also Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942) (state court cannot enjoin prosecution of an FELA claim in another state's courts on inconvenience grounds). A similar distinction may exist when federal courts enforce state rights. Compare Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (state door-closing statute applicable to federal court when foreign corporation seeks to sue without a registered agent), *with* Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965) (state door-closing statute inapplicable to federal court in wrongful death action).

State Rights Enforced in Federal Court

In the years following *Erie Railroad v. Tompkins*,²²¹ the Supreme Court was called upon to replicate its experience with federal claims in state court in the context of state rights enforced in federal court pursuant to diversity jurisdiction. Happily, a marked parallelism exists between the two efforts. In a diversity context, as in the earlier cases following *Mondou*, the Supreme Court appears to require the forum jurisdiction to enforce those collateral rules of the generative jurisdiction which substantially affect the risk allocation and behavior modification of the cause of action in question. Thus, defenses and immunities²²² are governed by state (generative) law, as is the definition of eligible plaintiffs.²²³ Moreover, burden of proof rules,²²⁴ as well as policy-related rules governing the fact-finding process,²²⁵ are governed by state (generative) law. However, rules specifying the identity of the fact-finder that do not appear to have been designed by the generative jurisdiction to affect the allocation of risks need not be applied by the federal forum.²²⁶

221. 304 U.S. 64 (1938).

222. *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977) (immunity); *Palmer v. Hoffman*, 318 U.S. 109 (1943) (defenses). The parallel citations governing federal rights in state court are collected at note 209 *supra*.

223. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court upheld a New Jersey rule requiring plaintiffs in a shareholder's derivative action to post an expensive security bond, despite the lack of such a requirement in Rule 23 of the federal rules. Justice Harlan may well have developed his views of *Erie* as counsel for the successful corporate defendants in *Cohen*. The parallel federal right/state court citation is *New York Cent. & H.R.R. v. Tonsellito*, 244 U.S. 360 (1917).

224. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Parallel federal right/state court citations are collected at note 204 *supra*.

225. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). In *Bernhardt*, the Court held that the Federal Arbitration Act did not apply to diversity litigation, permitting state rules to govern the identity of the fact-finder. *Bernhardt* is, thus, consistent with cases such as *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952), which apply generative collateral rules to establish the identity of the fact-finder. *But see* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

226. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). In *Byrd*, the Court applied federal jury trial rules to a South Carolina diversity case which would not have received a jury trial in state court. The Court sought to distinguish *Dice* by arguing that Congress, in establishing the FELA, had factored the element of jury trial into its allocation of risks and benefits. Thus, a failure to provide a jury to an FELA plaintiff would result in an improper alteration by the forum of the balance struck by the generative jurisdiction.

As with the post-*Mondou* federal right/state court cases, issues surrounding the length of the limitations period,²²⁷ including accrual²²⁸ and commencement,²²⁹ are governed by state (generative) law. Finally, door-closing rules that are designed to enforce a policy judgment within the competence of the generative jurisdiction must be enforced by the forum.²³⁰ However, door-closing devices that are unrelated to the advancement of a generative jurisdiction policy need not be automatically applied by the forum.²³¹

Conversely, where the forum rule is not likely to alter the behavior of the targets of the generative jurisdiction's policy judgment or change the balance of risks and advantages established by the generative jurisdiction, the Supreme Court has upheld the federal (forum) rule in diversity cases, just as it upheld the state (forum) rule in cases enforcing federal rights in state court. Thus, federal (forum) rules govern the geographical reach of the court²³² and the mode of service,²³³ as well as the scope of discovery.²³⁴

The Court claimed to find no such relationship between the South Carolina jury trial rule and the general allocation of risks and benefits established by the South Carolina cause of action at issue.

If the Court was right, *Byrd* is analogous to cases such as *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916), which apply forum rules to the fact-finding process so long as they do not alter the generative jurisdiction's policy judgment. See note 203 *supra*. If the Court was wrong about why South Carolina decided not to have a jury, *Byrd* was wrongly decided, for, unless the seventh amendment forbids South Carolina from dispensing with a jury, its judgment as to the identity of the fact-finder is as worthy of respect as is Congress' in the context of the FELA.

227. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Parallel federal right/state court cases are collected at notes 210-212 *supra*.

228. *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940). The parallel federal right/state court citation is to *Rankin v. Barton*, 199 U.S. 229 (1905).

229. *Walker v. Armco Steel Corp.*, 100 S. Ct. 1978 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). The parallel federal right/state court citation is to *Herb v. Pitcairn*, 325 U.S. 77 (1945).

230. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). The most analogous parallel federal right/state court citation is *Davis v. Wechsler*, 263 U.S. 22 (1923). See also *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942).

231. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965). The most analogous parallel federal right/state court citations are to *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929), and *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950).

232. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946). *Murphree* sustained the use of Rule 4(f) in diversity cases. The parallel federal right/state court citation is to *Missouri ex rel. St. L., B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924) (upholding state quasi in rem jurisdiction in FELA cases).

233. *Hanna v. Plumer*, 380 U.S. 460 (1965). An analogous federal right/state court citation

Absence of Federal Collateral Rule

A third body of precedent, functionally related to the federal right-state court and post-*Erie* cases, involves the enforcement of federal rights in the absence of an existing federal collateral rule. In such cases, the forum jurisdiction—usually, but not always, a federal court²³⁵—must decide whether to borrow a governing collateral rule from some other source of law—usually the state in which it sits—or to generate an independent federal collateral rule.²³⁶ In deciding whether to borrow an existing state collateral rule or to generate a new one, courts must decide whether the state collateral rule would adversely affect the policy judgments underlying the federal cause of action.²³⁷ Thus, in *Republic Pictures Corp. v. Kappler*,²³⁸ the Supreme Court declined to borrow a state limitations period which was too short to accommodate the federal policies underlying the federal statutory cause of action, and, in *Carl-*

is *Missouri ex rel. St. L. & M. Ry. v. Taylor*, 266 U.S. 200 (1924).

234. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). Surprisingly, given the broader discovery generally available under federal practice, I have been unable to discover a Supreme Court case in which a plaintiff asserting federal rights in state court sought to use federal discovery rules. Unfortunately, neither *Sibbach* nor *Schlagenhauf* attempts a serious analysis of the factors which should guide a forum court in deciding whether to apply generative or forum discovery rules. See Ely, *The Irrepressible Myth of Erie*, *supra* note 184.

235. See generally cases cited note 173 *supra*.

236. See generally Hill, *supra* note 173.

237. E.g., *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Carlson v. Green*, 446 U.S. 14 (1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *Burks v. Lasker*, 441 U.S. 471 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-04 (1966); *Levinson v. Deupree*, 345 U.S. 648 (1953); *Cope v. Anderson*, 331 U.S. 461 (1947); *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946); *O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906); *Campbell v. City of Haverhill*, 155 U.S. 610 (1895); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 546-47 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946).

238. 151 F.2d 543 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946). *Republic Pictures* involved the refusal of an Iowa district court to borrow a six month Iowa limitation period applicable to all federal causes of action. Since the per curiam affirmance cited *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934), it was probably based on the antidiscrimination principle discussed at notes 117-144 *supra*. However, in *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 n.9 (1966), the Court suggested that unduly short limitations periods would raise serious problems, even if applied equally to state and federal claims. See also *Campbell v. City of Haverhill*, 155 U.S. 610, 615 (1895).

son v. Green,²³⁹ the Court declined to borrow a state survivorship rule at variance with the policies underlying a cause of action premised on the Federal Constitution.

In *Carlson*, a state survivorship rule would have barred an action for damages premised on *Bivens v. Six Unknown Named Agents*.²⁴⁰ The Supreme Court declined to borrow the state survivorship rule in cases where the plaintiff's death resulted from the defendant's acts.²⁴¹ However, in *Robertson v. Wegmann*,²⁴² the Court borrowed a state survivorship rule to block a section 1983 claim where the plaintiff's death was unrelated to the cause of action, reasoning that such a rule would have negligible impact on the policies underlying section 1983. Similarly, in *Board of Regents v. Tomanio*,²⁴³ the Court declined to permit the Second Circuit to generate a federal tolling rule designed to encourage potential section 1983 plaintiffs to exhaust state judicial remedies, reasoning that, because New York's failure to provide such a toll did not adversely impact on the policies underlying section 1983, no reason existed to decline to borrow the applicable state limitations period.²⁴⁴ The reasoning underlying *Carlson*, *Wegmann*, and *Tomanio* parallels Justice Harlan's concurrence in *Hanna v. Plumer*,²⁴⁵ and the Court's reasoning in *Davis v. Wechsler*,²⁴⁶ *Garrett v. Moore-McCormack*,²⁴⁷ *Brown v. Western Railway*,²⁴⁸ and *Dice v. Akron, Canton & Youngstown Railroad*.²⁴⁹ The confluence of the three lines of authority²⁵⁰ suggests the following general rule governing the choice of collateral rules in a cross-forum setting: whenever the generative jurisdiction enjoys constitutional primacy

239. 446 U.S. 14 (1980).

240. 403 U.S. 388 (1971).

241. The parallel federal right/state court citation is *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913).

242. 436 U.S. 584 (1978).

243. 446 U.S. 478 (1980).

244. *Id.* at 488.

245. 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

246. 263 U.S. 22 (1923).

247. 317 U.S. 239 (1942).

248. 338 U.S. 294 (1949).

249. 342 U.S. 359 (1952).

250. Similar issues will also arise when the Supreme Court determines whether a decision rests on adequate state grounds. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* §§ 4019-4032 (1977 & Supp. 1981).

in a given area of lawmaking, the forum jurisdiction must apply the collateral rule of the generative jurisdiction if it is likely to exert a substantial impact on the preincident behavior of the targets of the cause of action or if it is likely to affect the ability of the beneficiaries of the cause of action to enjoy its full benefit.

TOWARD PROCEDURAL PARITY: CROSS-FORUM COLLATERAL RULES IN SECTION 1983 ACTIONS IN STATE COURTS

Thus, if the application of a collateral rule of the state forum would be likely to permit behavior which the section 1983 cause of action was designed to deter, the post-*Mondou* and post-*Erie* cases require that the collateral rule of the state forum give way to the collateral rule of the generative jurisdiction. Similarly, if the collateral rule of the state forum is likely to inhibit the class of persons who are the intended beneficiaries of section 1983 from enjoying its protection, the forum's rule should be displaced by the more hospitable rule of the generative jurisdiction. The application of such an obverse-*Erie* analysis to section 1983 cases in state court should result in the emergence of a uniform and hospitable body of collateral rules governing the litigation of federal constitutional claims in both state and federal courts.²⁵¹

Attorney's Fees

Virtual procedural parity now exists between state and federal courts on the question of the power to award attorney's fees in federal constitutional cases so long as counsel is careful to plead a section 1983 action in state court.²⁵² In *Thiboutot*, the Court recognized that Congress had determined that the intended beneficiaries of section 1983 were unlikely to enjoy its full protection in the absence of a provision permitting the award of attorney's fees to prevailing plaintiffs. Since the power to award attorney's fees is

251. A similar evolution took place once before in the area of constitutional litigation. In *Ex parte Young*, 209 U.S. 123 (1908), and *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), the Court established guidelines for the application of the fourteenth amendment to federal judicial challenges to unconstitutional state activity. In *Ward v. Love County*, 253 U.S. 17 (1920), and *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), the Court required those guidelines to be applied in state as well as federal court. See also *General Oil Co. v. Cram*, 209 U.S. 211 (1908).

252. *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980).

critical to the postincident ability of the intended beneficiaries of section 1983 to enjoy its protection, the power exists, not only in federal court, but in any state judicial forum in which the cause of action is enforced.

Defenses and Immunities

Similarly, the important issues of executive immunity, good faith defense, and the potential liability of government entities also appear to have been settled in favor of procedural parity. As we have seen, the Supreme Court has established a workable theory of executive liability in section 1983 cases which rejects absolute immunity in favor of an affirmative defense of subjective good faith and objective reasonableness.²⁵³ Moreover, the Supreme Court has denied government entities a derivative defense based on the good faith of their employees, rendering the entity liable for actual damages caused by its unconstitutional policies.²⁵⁴

The Supreme Court has consistently recognized that the collateral rules of the generative jurisdiction must be applied by the forum in defining defenses and immunities.²⁵⁵ Most recently, the Court noted that a California immunity statute conferring absolute immunity on members of parole boards would not govern a section 1983 action in the California state courts.²⁵⁶ Moreover, it is also

253. See notes 56-60 & accompanying text *supra*.

254. See note 60 & accompanying text *supra*.

255. See note 209 & accompanying text *supra*.

256. *Martinez v. California*, 100 S. Ct. 553 (1980). See also *Ferris v. Ackerman*, 444 U.S. 193 (1979).

Writing for a unanimous Court in *Martinez*, Justice Stevens noted: "It is clear that the California immunity statute does not control this claim even being asserted in the state courts." 100 S. Ct. at 558. As authority, Justice Stevens quoted his own Seventh Circuit opinion: "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law." *Id.* at 558 n.8 (1980) (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)).

Underlying the Supreme Court's recognition that uniform federal law should govern the attributes of liability in state court is the fact that collateral rules surrounding immunity defenses and damages are classic examples of rules which affect, not merely the postincident capacity to seek relief, but the preincident behavior of the targets of § 1983. Since state collateral rules diminishing the prospect of liability would encourage precisely the behavior which § 1983 was designed to deter, such rules must give way to more generous federal standards in § 1983 cases.

clear that the precise contours of the good faith defense²⁵⁷ and the allocation of the burden of proof²⁵⁸ are controlled by federal law, as are the rules governing compensatory and punitive damages,²⁵⁹ and the availability of equitable relief.²⁶⁰ Thus, the basic rules governing the nature and scope of a defendant's liability in a section 1983 case, including the operation of the fact-finding process and the availability of remedies, should now be governed by uniform rules in state and federal court.

Pleading

Third, while state rules will continue to govern the housekeeping aspects of pleading, such as time limits and the amendment process,²⁶¹ the basic sufficiency of a section 1983 pleading in state court, as well as the form of action which must be pleaded, should, under established Supreme Court precedent, be governed by uniform federal standards.²⁶²

257. See note 209 & accompanying text *supra*.

258. See note 204 & accompanying text *supra*.

259. See note 208 & accompanying text *supra*.

260. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

The ultimate collision between differing remedial power in state and federal courts was avoided in *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), when the Supreme Court overruled *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), and held that federal courts were empowered to enjoin strikes in violation of a no-strike clause. During the period when *Sinclair Refining* was good law, courts differed over whether state courts could provide a remedy which was denied to the federal courts. Compare *General Elec. Co. v. Local Union 191*, 413 F.2d 964 (5th Cir. 1969), with *McCarroll v. Los Angeles County Dist. Council*, 49 Cal. 2d 45, 315 P.2d 322 (1957). As a practical matter, since defendants were entitled to remove to federal court, conflicts rarely arose. *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968).

The *Boys Market* decision suggests that states retained power to issue an injunction even in the absence of federal power, since the injunction would not counter, but would reinforce, the primary behavior which the federal cause of action was designed to influence. See also *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 n.4 (1966). *Boys Market*, thus, deals with a forum which affords stronger remedies than would have been available in the generative jurisdiction. Where a forum would afford a weaker remedy, the *Boys Market* analysis suggests that if failure to afford the remedy would permit conduct forbidden by the generative jurisdiction, the full generative remedy must apply.

261. *E.g.*, *Atlantic Coast Line R.R. v. Mims*, 242 U.S. 532 (1917); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

262. *E.g.*, *Brown v. Western Ry.*, 338 U.S. 294 (1949); *Urie v. Thompson*, 337 U.S. 163, 179 n.17 (1949); *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

Class Actions

The general availability of a class action mechanism in state section 1983 cases poses a more difficult question. Traditional cross-forum collateral rule analysis has required the forum jurisdiction to apply the collateral rules of the generative jurisdiction in defining the class of eligible plaintiffs.²⁶³ Thus, in *Cohen v. Beneficial Industrial Loan Corp.*,²⁶⁴ the Supreme Court held that New Jersey's collateral rule governing security for costs in shareholder derivative suits must be applied in federal diversity litigation because it was enacted to regulate the class of eligible plaintiffs. Similarly, in *Michigan Central Railroad v. Vreeland*²⁶⁵ and *Carlson v. Green*,²⁶⁶ the Court applied federal survivorship rules to determine the identity of plaintiffs eligible to enforce federal rights. However, in *Robertson v. Wegmann*,²⁶⁷ when, unlike *Carlson* and *Vreeland*, the plaintiff's death was unrelated to the defendants' acts, the Court elected to borrow a state survivorship rule. In *Cohen*, *Vreeland*, and *Carlson*, the generative jurisdiction's collateral rule defining eligible plaintiffs was closely linked to the policy judgments underlying the very existence of the cause of action. In *Robertson*, the survivorship rule was wholly unconnected to the policies underlying section 1983. The issue, therefore, in the context of section 1983 litigation in state court is whether the collateral rules governing the ability of a class of plaintiffs to enforce section 1983 is linked to the policies underlying section 1983, as in *Cohen*, *Vreeland*, and *Carlson*, or is wholly divorced from them as in *Robertson*.

As with collateral rules governing the nature and scope of liability, the potential for class action relief should exercise substantial deterrent effect on persons contemplating activity at the margins

263. *E.g.*, *Carlson v. Green*, 446 U.S. 14 (1980); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1913). *But see* *Robertson v. Wegmann*, 436 U.S. 584 (1978).

264. 337 U.S. 541 (1949).

265. 227 U.S. 59 (1913).

266. 446 U.S. 14 (1980). *Carlson* involved a decision whether to borrow a state survivorship rule to govern *Bivens* claims in federal court. I have suggested that the "borrowing" cases are functionally identical to the post-*Mondou* and post-*Erie* cases. *See* notes 235-250 & accompanying text *supra*.

267. 436 U.S. 584 (1978).

of constitutional protection. Moreover, as with attorney's fees, the availability of class action relief will significantly affect the capacity of the beneficiaries of section 1983 to enjoy its protection. It is, I suggest, precisely because the availability of class action devices so substantially modifies the preincident and postincident activity of persons whose behavior a cause of action is designed to affect that *Cohen* required the application of New Jersey law. Since the availability of a class action will not merely affect, but will actually control, much preincident behavior by placing direct restraints on an official's freedom of action, and since members of the typical section 1983 class are unlikely to be in a position to assert their rights individually, the availability of class relief is no less integral to the policies underlying section 1983 than the power to award attorney's fees and the ability to define immunity from suit. Accordingly, its availability should similarly be governed by uniformly applicable federal norms.

Statutes of Limitations

Statutes of limitations pose, perhaps, the most complex problem in achieving a degree of procedural parity because, unlike attorney's fees, burden of proof, defenses, fact-finding procedures, immunity doctrine, pleading, and class action rules, there is no federal rule to carry over into state court. Were Congress to enact or had the courts forged a "federal" limitations period for section 1983 actions, the experience with cross-forum enforcement indicates that the federal limitations period would certainly govern the section 1983 action in state as well as federal court.²⁶⁸ In the absence of a federal limitations period, federal courts have obeyed the congressional direction to supplement section 1983 procedure by borrowing analogous state limitations periods.²⁶⁹ In determining

268. *E.g.*, *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199 (1915).

269. *See* notes 238, 243 & accompanying text *supra*. *E.g.*, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *O'Sullivan v. Felix*, 233 U.S. 318 (1914).

The Court held in *Tomanio* that a state's tolling rules constituted an integral part of its statute of limitations and, thus, governed § 1983 actions in federal court, unless they were inconsistent with the policies underlying § 1983. The view in *Tomanio* of the relationship between tolling mechanisms and statutes of limitations is consistent with the Court's position in *Walker v. Armco Steel Corp.*, 100 S. Ct. 1978 (1980), and *Herb v. Pitcairn*, 325 U.S.

the most appropriate analogous state limitations period, federal courts have declined to adopt unduly short periods, recognizing that a limitations period of reasonable length is integral to the efficacy of section 1983 as a deterrent.²⁷⁰ Thus, for example, federal courts in New York have declined to apply unduly short limitations periods to many section 1983 claims, despite the arguable applicability of a four-month limitations period in a New York court.²⁷¹

A similar perception, based on Justice Rehnquist's opinion in *Tomanio*, should accompany section 1983 claims into state court.²⁷² The focus of Justice Rehnquist's analysis is, quite properly, whether the state collateral rule is likely to run counter to the principles of deterrence and compensation which animate section 1983. In Justice Rehnquist's—and, I think, Justice Harlan's—terms, if a state limitations period threatens to dilute the goals of deterrence and compensation because its short duration acts as a de facto grant of immunity which encourages inappropriate pre-

77 (1945).

Justice Harlan doubted whether tolling mechanisms with little practical significance exerted sufficient impact on the parties' primary behavior to warrant being treated as binding by the forum jurisdiction. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Thus, he believed that *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), (and probably *Walker*) should have been decided differently. However, if you take seriously the notion that the forum jurisdiction should defer to the allocation of risks and benefits established by the generative jurisdiction, the limitations period, with all its necessarily arbitrary concomitants, is a prime candidate for cross-forum application.

270. *E.g.*, *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978); *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977); *Van Horn v. Lukhard*, 392 F. Supp. 384 (E.D. Va. 1975); *Edgerton v. Puckett*, 391 F. Supp. 463 (W.D. Va. 1975). *But see Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980). *See generally* Comment, *supra* note 48. Such an approach is consistent with the Court's summary affirmance of *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 546-47 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946). *See also International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 n.9 (1966); *Campbell v. City of Haverhill*, 155 U.S. 610, 615 (1895).

271. *E.g.*, *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977). *See also Meyer v. Frank*, 550 F.2d 726 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977); *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974) (state civil death statute cannot bar § 1983 actions by state prisoners). The Supreme Court in *Tomanio* explicitly left open the applicability of the four-month limitation period. 446 U.S. at 484 n.4.

272. When a state court chooses an appropriate state limitations period for a § 1983 claim, it is applying federal law, which adopts the applicable state limitations period. *See, e.g.*, *Burks v. Lasker*, 441 U.S. 471 (1979); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Pufahl v. Parks*, 299 U.S. 217 (1936).

incident behavior and thwarts reasonable postincident activity, the limitations period is inconsistent with the full enjoyment of section 1983 rights and must give way.²⁷³

Discovery and Evidence

The two remaining areas of collateral significance, discovery and evidence, pose difficult problems in achieving a degree of parity, primarily because no consensus exists as to whether the collateral rules of the forum or the generative jurisdiction should govern. What hints we have indicate a preference for the application of forum rules.²⁷⁴ But, as Professor Ely has noted,²⁷⁵ it is probably wrong to treat discovery and evidence as unitary packages for the purpose of determining whether forum or generative jurisdiction collateral rules should apply. Instead, each collateral rule must be tested against the cause of action, to determine whether it exerts a significant impact on the goals which the generative jurisdiction intended to advance. For example, a state evidentiary privilege for material assembled in preparation for litigation might well render it impossible to enforce section 1983 claims, especially pattern or practice claims, against governmental defendants. Such a rule would be a prime candidate for displacement. Certainly, many aspects of discovery and evidence seem powerful candidates for cross-forum applicability as do the tolling/service rules governing the point at which litigation commences for the purpose of the statute of limitations.²⁷⁶

CONCLUSION

Lawyers may be inhibited from attempting to enforce federal constitutional rights in state courts, not only by substantive con-

273. Of course, if such a limitations period is discriminatorily applied to federally-based, but not to analogous state-based, claims, it violates the antidiscrimination rule. *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934); see *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 546-47 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946).

274. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Chesapeake & O. Ry. v. Kelly*, 241 U.S. 485 (1916); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

275. Ely, *The Irrepressible Myth of Erie*, *supra* note 184.

276. *Walker v. Armco Steel Corp.*, 100 S. Ct. 1978 (1980); *Herb v. Pitcairn*, 325 U.S. 77 (1945).

cerns, but by the existence of a thicket of unfamiliar and inhospitable collateral rules which act as formidable obstacles to the proper operation of a concurrent jurisdiction model for civil rights enforcement. It should be possible, however, using traditional notions of the cross-forum applicability of collateral rules, to establish a uniform and hospitable body of collateral rules governing constitutional litigation in both state and federal court. Parity as between state and federal courts in the critical areas of pleading, fact-finding, remedies, defenses, immunities, fee awards, limitations periods, and class actions is now merely a function of the willingness of state judges to apply traditional post-*Mondou* and post-*Erie* analysis to section 1983 actions in state courts.