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42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983

Jennifer A. Coleman*

I. Introduction

The forty-second Congress in very broad and general terms created a private cause of action to redress deprivations, under color of state law, of an individual's civil rights.[1] This cause of action is now codified at 42 U.S.C. section 1983.[2] Section 1983 is the civil counterpart of a provision passed in 1866 which created criminal penalties for the deprivation of constitutional rights under color of state law.[3] Both the Act of 1871 and the Civil Rights Act of 1866 vested federal courts with jurisdiction to determine violations of their respective provisions.[4]

Section 1983 is a very general provision:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[5]

Courts have been forced beyond the text of section 1983 in order to give

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*Associate, Jaeckle, Fleischmann & Mugel, Buffalo, N.Y. B.A., St. Bonaventure University, 1981; J.D., Boston College Law School, 1985. The author gratefully acknowledges the support of her firm, and the assistance of Philip H. McIntyre, Dr. Edward Eckert and, especially, Professor Robert H. Smith in the preparation of this Article.

[1] Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871). For text of section 1 of the Ku Klux Klan Act of 1871, see *infra* text accompanying note 229.

[2] 42 U.S.C. § 1983 (1982).

[3] Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866). (See *infra* text accompanying notes 166-227 for a detailed description of the Civil Rights Act of 1866 and a listing of the current civil and criminal statutes that this Act gave rise to).

[4] *See infra* text accompanying notes 189-219 and 239-42.

[5] 42 U.S.C. § 1983 (1982).

content to its legislative command. The application or construction of section 1983 frequently involves extensive forays into the debates of the forty-second Congress and into the common law of 1871.[6] These judicial excursions into section 1983's history are largely inconclusive.

The following issues have been addressed by reference to the legislative debates of the forty-second Congress and the common law of 1871: the availability of immunity and good faith defenses,[7] exhaustion of administrative remedies,[8] availability of punitive damages,[9] and municipal liability.[10] In these cases, dissenting justices have consistently reached opposite results based on their own interpretation of section 1983's history.[11] Supreme Court majority and dissenting opinions, and their respective manipulations of section 1983's history, reveal that it is impossible to determine the majority of issues arising in modern civil rights litigation from section 1983's history.[12]

Purported reliance on section 1983's history is unsatisfactory. It provides little guidance to lower federal courts and obscures efforts to identify a process for the interpretation and application of section 1983. Supreme Court decisions may purport to rely on section 1983's history because the statute's language does not address many issues raised in contemporary section 1983 litigation. Section 1983's language is, in fact, deficient in many regards.

Although recourse to legislative history may be justified when the court construes the actual text of a statute, section 1983's terms received scant attention in the legislative debates. It was section three of the Ku Klux Klan Act of 1871, which engendered the most discussion and not section 1983's predecessor.[13] Thus, even when the Court must define section 1983's terms, there is little material in the Congressional Record with which to work.

In section 1983 cases, the issue often is not a matter of textual extrapolation; rather, courts are required to "fill the gaps" of section 1983. In such cases, the historical inquiry becomes even more tenuous and

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[6]*See, e.g.*, Smith v. Wade, 461 U.S. 30 (1983); Monell v. Department of Social Services, 436 U.S. 658 (1978); Monroe v. Pape, 365 U.S. 167 (1961).

[7]Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor immunity); Wood v. Strickland, 420 U.S. 308 (1975) (school official immunity); Pierson v. Ray, 386 U.S. 547 (1967) (judicial and police officer immunity); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislator immunity).

[8]Patsy v. Board of Regents, 457 U.S. 496 (1982).

[9]*Smith*, 461 U.S. 30; Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

[10]*Monell*, 436 U.S. 658; *Monroe*, 365 U.S. 167. These two decisions illustrate how completely polar results are possible when section 1983 construction rests on legislative history.

[11]*See, e.g.*, *Smith*, 461 U.S. at 65-68 (Rehnquist, J., dissenting).

[12]*Id.* at 92-93 (O'Connor, J., dissenting).

[13]Addickes v. S.H. Kress & Co., 398 U.S. 144, 187 (1970) (Brennan, J., dissenting); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1340 (1952).

murky. The Supreme Court has embraced the common law of 1871 as a means to fill the gaps of section 1983. For example, in *Smith v. Wade*,[14] the majority extensively cited pre-1871 precedent to demonstrate that punitive damages were available to redress reckless deprivations of civil rights. The dissenters referred to their own exhaustive list of pre-1871 case law to conclude the opposite.

The position of this Article is that history is an inadequate guide to the construction of section 1983. While history appears to be the touchstone in many cases, courts actually have been tremendously influenced by current developments in law and policy when applying section 1983. The debates of the forty-second Congress and the common law of 1871, despite their age, have shown themselves to be surprisingly malleable. Recitation of historical sources, although an effort to legitimize results, does not describe or further an interpretative process of section 1983.

Congress took steps to ensure that the civil rights acts would be applied as intended. In 1866, as part of its first civil rights legislation, Congress enacted what is now 42 U.S.C. section 1988, which prescribes a method for construing section 1983.[15] Section 1988 imposes a structure on the process of interpreting section 1983 which acknowledges state and federal law and which embraces developments in both.

Courts ruling on civil rights cases have applied section 1988 only sporadically. For example, section 1988 has been used to apply state statutes of limitations to section 1983 and to borrow state rules on the survival of claims. These cases have begun to develop a section 1988 doctrine. They have not, however, delineated when reliance on extrinsic aids to construe section 1983 should yield to the application of federal and state law pursuant to section 1988.

Section 1988 establishes a hierarchy for the borrowing of federal and state law in civil rights cases. Use of other federal law is limited to those cases where it is suitable to effect the purposes of section 1983. When there is no applicable or suitable federal law, state law must be used to fill the gaps in section 1983. Only state law that is inconsistent with section 1983 can be avoided.

At first blush, section 1988's directive to apply state law in federal civil rights actions may appear to be an inexplicable or unjustifiable prescription for the construction of federal civil rights law. Two professors have reacted to this aspect of section 1988. Professor Kreimer argued that section 1988 actually authorizes federal courts to fashion federal common law to fill the interstices of section 1983.[16] Professor Eisenberg argued

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[14]461 U.S. 30.

[15]*See infra* note 152 for text of § 1988.

[16]Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985).

that section 1988 does not apply in the majority of section 1983 suits.[17] Both authors viewed the application of state law in federal civil rights cases as undermining national uniformity in the application of section 1983.[18]

It is this author's position that section 1988 requires the application of state law in civil rights cases. Section 1988's mandate cannot be circumvented by forcing an interpretation of section 1988 which either makes the section effectively inapplicable to section 1983 suits, as Eisenberg argues, or which views it as a mandate for extensive development of federal common law, based on the obsolete doctrine of *Swift v. Tyson*,[19] as Kreimer argues. To the extent that national uniformity is a legitimate policy concern in section 1983 actions it is not subverted by section 1988. Rather, section 1988 establishes that the purposes of section 1983 are the measures against which any law, state or federal, is to be considered before being applied in civil rights cases. A national threshold is thereby fixed as a matter of federal law to afford appropriate protection and vindication of individual rights. It is the position of this author that section 1988 embodies an astute political compromise which balances concerns for national uniformity and federalism while preserving and promoting the purposes of the civil rights acts.

The problem with the construction of section 1983 has been the total lack of direction or purposeful selection from among a number of elements, all of which are important in the interpretive process. This will be shown by surveying certain decisions of the Supreme Court of the United States. In its immunity decisions the Court has relied heavily upon history to construe section 1983. It has, however, quickly traversed the bounds of history in these cases and decided them by fashioning federal common law. In contrast, in its statute of limitations and survivorship cases the Court has applied section 1988. The section 1988 decisions stand in decided juxtaposition to the immunity cases. Rather than wade through history in the statute of limitations and survivorship cases, the Supreme Court has expressly determined that section 1983 is deficient and has turned to section 1988 as a guide to other sources of law.

The point of departure between these two lines of cases is a determination that section 1983 is or is not deficient. History and section 1983 are distorted in the immunity cases, because the Court has avoided the conclusion that section 1983 is in fact deficient. In its statute of limitations and survivorship cases, however, the Court has concluded that section 1983 is deficient and has applied section 1988.

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[17]Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

[18]*Id.* at 516-18; Kreimer, *supra* note 16, at 632.

[19]41 U.S. (16 Pet.) 1 (1842).

II. The Problem of Statutory Construction of Section 1983

A. Monroe v. Pape—*The Debate Is Launched*

From 1871 through 1961 and the Supreme Court's decision in *Monroe v. Pape*,[20] section 1983 did not generate much federal court activity.[21] *Monroe* was a watershed section 1983 decision. Therein, the Supreme Court construed section 1983's "under color of" state law language broadly, holding that conduct in violation of section 1983 by a person clothed with the authority of the state, was conduct "under color of" state law even if the conduct itself was inconsistent with or contrary to state procedures or rules.[22] Justice Douglas, author of the majority opinion, relied heavily on the debates of the forty-second Congress and section 1983's parallels to section two of the Civil Rights Act of 1866[23] to argue that a broad construction was required to effectuate section 1983's overriding purposes.[24]

Monroe provided the arena for the Supreme Court's first attempt to identify and articulate section 1983's fundamental purposes.[25] The Court determined that through section 1983 Congress intended to provide a federal remedy in federal court because state courts had not adequately protected civil rights, to fashion a broad remedial provision that would deter future violations of civil rights, and to provide a remedy that was supplemental to remedies available under state law.[26]

Monroe breathed new life into section 1983 and, simultaneously, initiated its erratic interpretation. Comparison of the majority opinion by Justice Douglas with Justice Frankfurter's dissent exposes the seeds of confusion. Justice Douglas maintained that *stare decisis* compelled that the construction of "under color of" state law espoused in prior cases[27]

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[20]365 U.S. 167 (1961).

[21]*See* Comment, *The Civil Rights Act: Emergence of an Adequate Civil Remedy?*, 26 Ind. L.J. 361, 363-66 (1951) (discussion of cases arising under statutory predecessors to section 1983 prior to 1920); *see also* Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1285 n.1 (1953). "Between 1961 and 1977 the number of cases filed in federal court under the civil rights statutes increased from 296-13,113." Maine v. Thiboutot, 448 U.S. 1, 27 n.16 (1980) (Powell, J., dissenting).

[22]*Monroe*, 365 U.S. at 187.

[23]Section 2 of the Civil Rights Act of 1866 was the prototype for section 1 of the Ku Klux Klan Act of 1871. *Monroe*, 365 U.S. at 185. *See infra* text accompanying notes 186 and 234.

[24]*Monroe*, 365 U.S. at 171-87. Justice Douglas also concluded that section 1983's reference to "person[s]" did not include municipalities. *Id.* at 191.

[25]*See supra* text accompanying notes 80-97.

[26]*Monroe*, 365 U.S. at 173-74.

[27]Screws v. United States, 325 U.S. 91, 108 (1945); United States v. Classics, 313 U.S. 299, 325-26 (1940) (Supreme Court concluded that conduct by a person cloaked with the authority of the state was taken "under color of" state law even though it may have been unauthorized and even contrary to the law of the state).

apply to that language in section 1983.[28] Justice Douglas also relied upon the legislative debates to support the conclusion that section 1983 was to be broadly construed.[29] Justice Frankfurter, in dissent, would have subjugated principles of *stare decisis* to policies of federalism.[30] Rather than addressing the issue anew, he would have found that section 1983 only reached action authorized by state law.[31] This view was based on Justice Frankfurter's reading of section 1983's legislative history.

Monroe set the stage for the ensuing confusion over the construction of section 1983. The issues joined by majority and dissent were the importance of history, the relevance of parallels between section 1983 and other civil rights acts (notably the Act of 1866), the importance and role of federalism in construing section 1983, the role of legal developments subsequent to the enactment of section 1983,[32] the role of *stare decisis*,[33] and the need to construe section 1983 so that its purposes were accomplished. Subsequent cases indicate that an acceptable accommodation of these often competing values has yet to be achieved.[34]

Problems of statutory construction arise in many contexts, and viewpoints on the subject are legion.[35] While in the abstract there may be

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[28]*Monroe*, 365 U.S. at 185-86.

[29]*Id.* at 180-84.

[30]*Id.* at 220-22 (Frankfurter, J., dissenting).

[31]*Id.* at 237 (Frankfurter, J., dissenting).

[32]*Monroe* stated expressly that section 1983 was to be read against the backdrop of tort law. *Id.* at 187.

[33]In Maine v. Thiboutot, 448 U.S. 1 (1980), Justice Powell argued for a diminished role for *stare decisis* in section 1983 cases because he did not wish to perpetuate a broad construction of section 1983. *Id.* at 33 (Powell, J., dissenting).

[34]Federalism values may or may not outweigh the purposes of section 1983. *See, e.g.*, Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100 (1981). *Stare decisis* will or will not yield to the purposes of section 1983. *Compare Monroe*, 365 U.S. at 186-87 *with Monell*, 436 U.S. at 695.

[35]*See* Beaney, *Civil Liberties and Statutory Construction*, 8 J. PUB. L. 66 (1959); Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 So. CAL. L. REV. 1 (1965); Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Dickerson, *Statutory Interpretation: Core Meaning and Marginal Uncertainty*, 29 MO. L. REV. 1 (1964); Dickerson, *Symposium on Judicial Law Making in Relation to Statutes*, 36 IND. L.J. 411 (1961); Frankfurter, *A Symposium on Statutory Construction*, 3 VAND. L. REV. 365 (1950); Gaylord, *An Approach to Statutory Construction*, 5 S.W. L. REV. 349 (1974); Johnstone, *Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1 (1954); Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7 (1965); Mendelson, *Mr. Justice Frankfurter on the Construction of Statutes*, 43 CALIF. L. REV. 653 (1955); Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Radin, *Realism in Statutory Interpretation and Elsewhere*, 23 CALIF. L. REV. 156 (1935); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Note, *Statutes: Construction: The Legislative Silence Doctrine*, 43 CALIF. L. REV. 907 (1955); Note, *Statutory Construction—The Role of the Court*, 71 W. VA. L. REV. 382 (1969); Comment, *The Judicial Function in Statutory Construction*, 8 STAN. L. REV. 293 (1956).

so-called norms of construction,[36] no such abstract set of rules has been endorsed in the context of section 1983 interpretation. Rather than articulating a method of construction for section 1983, the Court has taken an *ad hoc* approach. A significant reason for the difficulties with construing section 1983 is that it and other Reconstruction Era provisions were drafted in general terms to effect highly controversial results.[37] These provisions did not form a comprehensive civil rights code; rather, they provided the superstructure by which an individual's civil rights could be protected.

Since *Monroe*, courts have relied heavily on history and the debates of the forty-second Congress to construe section 1983. Invariably, long-dead senators and representatives are required to speak to the civil rights problems of the late twentieth century. These voices from the past, and the legal context of the passage of the Ku Klux Klan Act, are ostensibly deemed sufficient to fill in the gaps of section 1983 and to ferret out its "true" meaning. Closer inquiry reveals, however, that section 1983's history does not achieve so much.

As stated previously, there are objective rules of statutory construction; primary among such rules is plain meaning. If the plain meaning of a statute is ascertainable from its text, that meaning controls.[38] If the text is incapable of expressing a plain meaning, then the courts consider extrinsic sources to interpret the statute. Foremost among these extrinsic sources of law is legislative history. Supreme Court construction of section 1983 has become mired in history because the Court has repeatedly found, both expressly and implicitly, that the language of section 1983 is not capable of expressing plain meaning.

B. The Plain Meaning Rule

Section 1983 provides that "any person" who deprives another of her constitutional rights "under color of" state law is liable to that individual. Used in the conventional sense, the term "person" means all people and expresses no exception. This language, however, has been con-

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[36] *See, e.g.*, HURST, DEALING WITH STATUTES (1982); 3 SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 72.01-72.08 (4th ed. 1974) (dealing specifically with civil rights statutes); STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING (2d ed. 1984); STATSKY, LEGISLATIVE ANALYSIS: HOW TO USE STATUTES AND REGULATIONS (1975).

[37] *See* Gressman, *supra* note 13, at 1337, 1340, 1357.

[38] *See, e.g.*, SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 194 (1857); Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). *But see* Lyman, *The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation*, 3 MAN. L.J. 53, 54 (1969); Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31, 32 (1979); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 196-99 (1983).

strued to include cities, which are not persons in the plain meaning of the word,[39] and to exclude judges[40] who are, in most cases, persons. Plain meaning in section 1983 cases has either been implicitly dismissed by its absence from reported decisions, or it has been expressly rejected. Justice Powell, for example, has forthrightly stated his view of the plain meaning rule in the context of section 1983 suits:

> Although plain meaning is always the starting point . . . this Court rarely ignores available aids to statutory construction . . . . We have recognized consistently that statutes are to be interpreted not only by a consideration of the words themselves, but by considering, as well, the content, the purposes of the law, and the circumstances under which the words were employed. . . .
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> The rule is no different when the statute in question is derived from the civil rights legislation of the Reconstruction Era. Those statutes must be given the meaning and sweep dictated by "their origins and their language"—not their language alone. . . . When the language does not reflect what history reveals to have been the true legislative intent, we have readily construed the Civil Rights Acts to include words that Congress inadvertently omitted. . . . *Thus, "plain meaning" is too simplistic a guide to the construction of § 1983.*[41]

In short, the terms of section 1983 have become "terms of art;" they have been stripped of their plain meaning, if indeed they ever possessed such meaning.

Because the Court does not tarry long with "plain meaning" in section 1983 cases, history and the "battle of the string citations"[42] are resorted to almost immediately to construe section 1983's terms and fill in its gaps.[43]

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[39]*See* Monell v. Department of Social Services, 436 U.S. 658 (1978).

[40]*See* Pierson v. Ray, 386 U.S. 547 (1967). See *infra* text accompanying notes 99-112 for a discussion of this case.

[41]Maine v. Thiboutot, 448 U.S. 1, 13-14 (1980) (Powell, J., dissenting) (emphasis added); *see also* Allen v. McCurry, 449 U.S. 90, 110 (1980) (Blackmun, J., dissenting); Addickes v. S.H. Kress & Co., 398 U.S. 144, 216-17 (1970) (section 1983's words must be related to its purposes; this is the only proper way to interpret the statute).

[42]Smith v. Wade, 411 U.S. 30, 93 (1983) (O'Conner, J., dissenting).

[43]On several occasions, the Supreme Court has taken the position that because section 1983 is a remedial statute, it ought to be broadly construed. *See* Wilson v. Garcia, 105 S. Ct. 1938 (1985); Owen v. City of Independence, 445 U.S. 622, 636 (1980); Quern v. Jordan, 440 U.S. 332, 357 (1979); *Monell*, 436 U.S. at 684-85. Broad construction is argued for on the basis of section 1983's relationship to the fourteenth amendment. Because section 1983 was enacted pursuant to section 5 of the fourteenth amendment, it has been argued that section 1983 must be given the same latitude in construction as is accorded the fourteenth amendment. *See Quern*, 440 U.S. at 351 n.3 (Brennan, J., concurring); Mitchum v. Foster,

C. Section 1983's History

Section 1983's history consists of the debates surrounding passage of the Ku Klux Klan Act of 1871, recorded in the 42nd Congressional Globe, and of the historical/legal backdrop in which section 1983 was enacted.

1. Legislative Debates.—Frequently, in section 1983 Supreme Court decisions, one sees extensive citation and quotation of text from the debates of the forty-second Congress. These debates are a highly unreliable source of law for the construction of section 1983 in the context of specific and often finely tuned issues. While the debates may provide a general understanding of the statute's overriding purposes and goals, they are far too incomplete and equivocal to be determinative of narrowly drawn problems of section 1983 application.

Debates concerning the Ku Klux Klan Act tended to focus upon section three of that act and also on the events transpiring in the Klan-dominated South.[44] Very little debate concerned section one, the predecessor to section 1983. Reconstruction of the South was a highly charged issue for the Congresses of the post-civil war era. Opposition to federal intervention in the relationship between southern governments and the freed slaves was intense. Many congressmen, both for and against federal involvement in Reconstruction, feared that a strong centralized government would derogate state autonomy.[45] Arguments for vesting the federal government with authority to enforce civil rights were equally passionate in light of the states' ineffectiveness in adequately protecting these rights.[46] On one level, the debate raged over the role of the federal government; on another, more personal level, the debate raged over radically differing views concerning the status of non-whites.

The text of the debates cannot be artificially severed from the then prevailing political climate. Both opponents and proponents of the Act may have overstated its perceived effects to win uncommitted votes. Their remarks cannot be taken wholly at face value. Furthermore, twentieth century readers cannot fully transport themselves beyond their own social

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407 U.S. 225, 240 (1972); *Pierson*, 386 U.S. at 561 n.1 (Douglas, J., dissenting). This approach to section 1983 construction is frequently urged in the context of arguments for increasing the availability and scope of section 1983 remedies.

[44]*See Monell*, 436 U.S. at 665; *Addickes*, 398 U.S. at 215 (Brennan, J., concurring in part and dissenting in part); Gressman, *supra* note 13, at 1334.

[45]*See* CONG. GLOBE, 42nd Cong., 1st Sess. H.p. app. 46-47, 50 (remarks of Rep. Kerr); *id.* at 371-73 (remarks of Rep. Archer); *id.* at 86-87 (remarks of Rep. Storm); *id.* at S.p. app. 216-21 (remarks of Sen. Thurman).

[46]For recitations of the atrocities committed by the Ku Klux Klan in southern states during this period, see, *e.g.*, *Id.* at S.p. app. 154-60 (remarks of Sen. Sherman); *id.* at 107-09 (remarks of Sen. Pool); *id.* at H.p. app. 320-22 (remarks of Rep. Stoughton); *id.* at 78-79 (remarks of Rep. Perry); Message to Congress from President Grant, March 23, 1871, *id.* at S.p. app. 236.

and cultural environment into an era over a century past. The process of drawing meaning from the legislative debates is imbued with bias from the beginning.[47]

Reliance on these legislative debates attributes false omniscience to the actors in 1871 by allowing that these congressmen, themselves bound by their culture, provided for problems one hundred years hence.[48] A judge in 1986 must attempt to get into the mind of an 1871 legislator to determine what that legislator would have intended to do about a situation arising one hundred (plus) years in the future. While this is an interesting and possibly informative process, it cannot and should not be determinative.

The Court speaks of "a" legislative intent in these cases, suggesting that Congress, as a body, acted with a single mind in the passage of the bill and that its intent is discernible. In fact, the division in Congress, even among proponents or opponents to the Reconstruction legislation, was substantial. The claim that Congress acted with a single "intent" is a fiction.

The retrospective view of modern judges is further distorted by the fact that *stare decisis* requires the Court to accomodate precedent. The judge must not only attempt to discern what the debates mean, but she must also make them resonate with judicial precedent. Thus, history is made to be consistent with an ever expanding string of precedent, it becomes a vehicle for the construction of section 1983 and it loses its character as an objective source of law.

Absent conference reports or extensive debate concerning section one of the Ku Klux Klan Act, and in view of the problems discussed above, the legislative debates are not very helpful in the construction of section 1983.[49] While this position is not expressly adopted by the Supreme Court,

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[47]" 'By viewing society's values through one's own spectacles . . . one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported.' It isn't a matter of good or bad faith. Try as we will, we cannot escape the perspectives that come with our particular backgrounds and experiences." Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982); *see also* J. ELY, DEMOCRACY AND DISTRUST 67 (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 219 (1980) [hereinafter Brest, *Misconceived Quest*].

[48]"The act of translation required here is different in kind, for it involves the counterfactual and imaginary act of projecting the adopter's concepts and attitudes into a future they probably could not have envisioned. When the interpretator engages in this sort of projection, she is in a fantasy world more of her own than the adopter's making." Brest, *Misconceived Quest*, *supra* note 47, at 222. *Compare* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 753-68 (1982).

[49]In the words of Justice Brennan, "The 42nd Congress, of course, can no longer pronounce its meaning with unavoidable clarity." *Quern*, 440 U.S. at 365 (Brennan, J., concurring); *see also Owen*, 445 U.S. at 675-76 (Powell, J., dissenting).

it may be implied from the fact that the legislative debates are seldom, if ever, exclusively or primarily relied upon.[50]

2. The Common Law of 1871.—Usually, reliance on history manifests itself by recitation of the common law of 1871. Such references are supported by the argument that the drafters of section 1983 adopted or incorporated the common law of 1871 in section one of the Ku Klux Klan Act. Many Supreme Court decisions construing section 1983 rely on this common law when the text of section 1983 and its legislative debates are inconclusive.

In *Monell v. Department of Social Services*,[51] the Supreme Court overruled its conclusion in *Monroe* that municipalities were not "persons" and not liable under section 1983.[52] Justice Brennan's opinion, on behalf of six justices, first rejected *Monroe's* construction of the Ku Klux Klan Act's legislative history which had led to the conclusion that municipalities were not persons.[53] The *Monell* majority then considered the legal import of the word "person" in 1871. The Court noted that in 1871 municipalities had been treated as persons for purposes of diversity jurisdiction.[54] Reference was made to the remarks of Senator Bingham to illustrate that members of the forty-second Congress thought that municipalities were included in the term "persons."[55] Corporate law was shown to have conferred the status of "person" on municipalities in 1871.[56] Finally, reference was made to a prior definitional act of Congress which stated that the usual meaning of "person" included political bodies.[57] The majority was also influenced by subsequent developments in section 1983 adjudication and in tort law.[58]

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[50]*See infra* text accompanying notes 98-148.

[51]436 U.S. 658 (1978).

[52]*Id.* at 701.

[53]An amendment, known as the Sherman Amendment, was proposed in connection with debate over the Ku Klux Klan Act of 1871. This amendment would have imposed liability on municipalities for damage caused as a result of riotous conduct within a city's territorial limits. The amendment was rejected; the debate emphasized that it would be unfair to hold cities accountable for the conduct of persons who might or might not be citizens. More importantly, the statute would have imposed an affirmative duty on cities to provide police protection necessary to prevent such riotous associations. This affirmative duty was viewed as too great an intrusion by Congress into the prerogatives of local government, and thus the Sherman Amendment was rejected. In Monroe v. Pape, the rejection of the Sherman Amendment was construed to reflect congressional disapproval of any municipal liability under those provisions of the Ku Klux Klan Act which had become law. 365 U.S. at 188-90. This same debate was subsequently reconstrued in *Monell* as reflecting only congressional apprehension that it lacked power to impose positive duties on local government to protect its citizens. *Monell*, 436 U.S. at 664-69.

[54]*Id.* at 681-82.

[55]*Id.* at 685 n.45. Nothing, however, in Senator Bingham's remarks is expressly on point.

[56]*Id.* at 687.

[57]*Id.* at 688. Act of Feb. 25, 1871, § 2, 16 Stat. 431 (1871).

[58]*Monell*, 436 U.S. at 698-700.

Reliance on 1871 common law in *Monell* and in other cases[59] is problematic. In most cases, it is impossible to identify *the* common law of 1871 concerning a given issue. Further, there is little justification for hamstringing modern courts by requiring them first to unearth 1871 common law and then to reach results based on such common law. By 1871, each state had its own legislative and judicial system and its own common law traditions. Federal courts were also generating common law.[60]

It is difficult to freeze the common law of 1871 in place and thereby derive a definitive pronouncement of *the* common law of 1871 on a particular subject. Such an historical, suspended animation of the common law, even if possible, would provide only a cross section, showing how different legal systems treated particular matters.[61] Especially with respect

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[59]*See, e.g.*, Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-66 (1981); *Allen*, 449 U.S. at 97-99; *Owen*, 445 U.S. at 638-44; *Quern*, 440 U.S. at 343; *Pierson*, 386 U.S. at 553-55; *Tenney*, 341 U.S. at 376.

[60]The jurisprudence of 1871 included an idealized vision of the common law as a unitary, almost Platonic reality, to which all legal systems aspired and in which all systems participated. Regardless of territorial or jurisdictional limits, all courts were viewed in theory as adding to the development of a single body of common law. The Supreme Court acknowledged in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), that the various court systems actually had their own separate bodies of law, which often varied significantly from one jurisdiction to another. Pursuant to the Rules of Decision Act, Federal Judiciary Act of Sept. 24, 1789, codified at 28 U.S.C. § 725 (1982): "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Id.* Prior to *Erie*, federal courts applied only the statutory law of the state in which they resided; case law was not binding and federal courts could ignore state common law. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). Recognition, however, that judges actually do make law led to the result in *Erie* that state decisional law was no less law than state statutes and hence had to be applied by federal courts in diversity actions. Justice Brandeis stated:

> The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is a "transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, . . . 'but law in the sense which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . .' the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."

Erie, 304 U.S. at 79 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910)).

[61]But, the common law, by its nature, does not provide systematic treatment of issues. Rather a rule of law must be implied from a body of precedent which, to a greater or lesser degree, may be on point. Therefore, even if the court successfully accumulated all the decisions of any common law system prior to 1871 to see how they treated an issue, a court is likely to find that the exact issue was not answered authoritatively at all. Argument based on factual distinctions and argument based also on the need to change the law were, and are, always available in any given common law system.

to matters regarding the freed slaves and civil rights, unanimity among jurisdictions hardly existed. The failure of consensus among the several states over the most basic precepts of individual liberty was the impetus for the Civil Rights Act and renders illusory the view that the various common law systems held concurring views on many issues.[62]

In theory, per the reported jurisprudence of the day, a single, general common law existed and was participated in by all judicial tribunals, regardless of territorial boundaries. It is difficult to accept the proposition that the Reconstruction Era legislators operated under such a view given the tenaciousness with which they debated over preserving and protecting state law and state tribunals.[63]

Civil rights legislation was aimed precisely at divergent state law treatment of basic rights. Constitutional minimums were established[64] and federal law was enacted to enforce statutory and constitutional guarantees.[65] Whatever the common law of 1871 was, Congress supplanted it with the Reconstruction Era legislation. It hardly makes sense, therefore, to assume that this same legislative body incorporated static 1871 common law in its civil rights enactments.

Nowhere in the debates accompanying passage of the Ku Klux Klan Act of 1871 did members of Congress state that common law was incorporated into the 1871 Act. The Court has nevertheless attempted to deduce a rationale for implying such incorporation. The first premise in this deduction is typically a statement by the Court that a given legal position on the controverted issue existed in 1871.[66] Using *Monell* as an illustration, this would be stated: "Municipalities were treated as persons in 1871."[67] This premise is then supported by recitation of ancient cases interpreted as endorsing the conclusion. Recitation of contrary precedent to rebut the first premise invariably appears in dissenting opinions.[68]

After declaring the status of 1871 common law, the premise is added that the forty-second Congress must have known about the Court-identified common law rule. For example, again using *Monell*, the Court referred to the legislative debates to illustrate that a senator, Senator Bingham,

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[62]While this is obviously true regarding matters expressly dealing with civil rights, it is also true of matters which, at first blush, did not deal expressly with civil rights. For example, matters relevant to contracts, land sales, and testifying in court often distinguished between whites and non-whites in operation. These varied among the several states.

[63]*See infra* text accompanying notes 212-222.

[64]U.S. CONST. amends. XII, XIV and XV.

[65]*See infra* text accompanying notes 149-242.

[66]Given the divergence of common law in 1871, it is possible to find support therein for almost any proposition. *See, e.g., Smith*, 461 U.S. 30, in which the majority and dissent each found abundant authority in 1871 common law for polar conclusions.

[67]*See supra* text accompanying notes 53-58.

[68]*See, e.g., Smith*, 461 U.S. at 60-64 n.3 (Rehnquist, J., dissenting); *Monell*, 436 U.S. at 720-24 (Rehnquist, J., dissenting).

probably knew that municipalities were treated as persons.[69] In *Carey v. Piphus*,[70] this argument for imputing legislative knowledge of 1871 common law took the following form: because many members of Congress were lawyers and because lawyers would presumably be familiar with the law of damages then existing, Congress in 1871 must have known about the rules concerning compensatory damages when it enacted the Ku Klux Klan Act.[71] On other occasions, congressional knowledge has been grounded on the Court's own sense of disbelief that members of the forty-second Congress could have intended something at variance with the law of 1871 as perceived by the Court.[72]

The members of Congress were representatives of different states, each of which claimed and fiercely defended a unique legal system and body of law. This fact alone makes suspect the proposition that Congress itself knew of a particular common law rule. Additionally, it is unlikely that the individual members of Congress even knew of, or contemplated, the myriad common law rules and impliedly assented to their incorporation into section 1983's predecessor.[73]

Despite these problems with the first two premises of the Supreme Court's justification for reliance on 1871 common law, the Court has repeatedly maintained that section 1983 incorporates this common law. Frequently this conclusion is stated thus: if Congress had meant to alter the common law rule as to a specific issue it would have done so expressly when enacting the Ku Klux Klan Act.[74] Occasionally, this conclusion is stated somewhat differently: because Congress did not address a particular issue in enacting the Civil Rights Act of 1871, the common law status of that matter in 1871 was not abrogated or affected by section 1983's predecessor.[75]

The real threat of such a process is that section 1983 may become shackled to obsolete common law doctrines.[76] Such a result can be and

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[69]*Monell*, 436 U.S. at 685 n.45.

[70]435 U.S. 247 (1978).

[71]*Id.* at 255-56.

[72]*Owen*, 445 U.S. at 677 (Powell, J., dissenting); *Quern*, 440 U.S. at 343; *Monell*, 436 U.S. at 707 (Powell, J., concurring); *Pierson*, 386 U.S. at 554. It is interesting to note at this stage that even the Justices of the United States Supreme Court, with benefit of briefs and arguments on the subject of the common law of 1871 vis-a-vis specific topics, cannot agree. Nevertheless, there is continued insistence that the common legislator of 1871 knew what the common law of 1871 was regarding these often narrow points of law.

[73]*See infra* text accompanying notes 212-22.

[74]*See, e.g.*, *Monell*, 436 U.S. at 692-93 n.57; Scheuer v. Rhodes, 416 U.S. 232, 243-44 (1974); *Pierson*, 386 U.S. at 554-55; *Tenney*, 341 U.S. at 376.

[75]*See, e.g.*, *Newport*, 453 U.S. at 258-59; *Allen*, 449 U.S. at 98; *Owen*, 445 U.S. at 637; *Quern*, 440 U.S. at 343; *Monell*, 436 U.S. at 720 (Rehnquist, J., dissenting); *Carey*, 435 U.S. at 255-56. *But see Owen*, 445 U.S. at 676 (Powell, J., dissenting) (arguing that no inference may be drawn from congressional silence).

[76]For example, although punitive damages are now universally available in negligence

has been avoided in some cases, usually by propounding unconvincing arguments as to the status of a particular legal matter in 1871, or by application of a quasi-implied repeal analysis to conclude that the 1871 common law rule was simply too contrary to the purposes of section 1983 to be given effect.[77]

The common law history of section 1983, like the congressional debates of the forty-second Congress, is not a very reliable or legitimate source of law for section 1983. It is subject to considerable nuance and to contradictory arguments about meaning and relevance. Justice O'Connor stated this concisely in her dissent in *Smith v. Wade*, condemning the historical exegesis by both the majority and dissent therein:

> In interpreting § 1983, we have often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. . . . This approach makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly in a case like this one [punitive damages], in which those interpreting the common law of 1871 must resort to dictionaries in an attempt to translate the language of the late 19th century into terms that judges of the late 20th century can understand, . . . and in an area in which the courts of the earlier period frequently used inexact and contradictory language, . . . we cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions. The battle of the string citations can have no winner.[78]

The most valid conclusion that may be drawn from section 1983's history is that it is inconclusive in the majority of cases that have come before

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actions, Justice Rehnquist, in Smith v. Wade, read 1871 common law as allowing the award of punitive damages only upon a showing of intentional conduct. Despite this dissonance with the modern view, Justice Rehnquist would have applied his version of the 1871 rule to section 1983. *Smith*, 461 U.S. at 87 (Rehnquist, J., dissenting). The majority in *Smith* also played the historical game and argued that intent was not required at 1871 common law. Significantly, however, the majority also considered post 1871 decisions in its opinion. *Id.* at 34-36.

[77] *Newport*, 453 U.S. at 258-59; *Carey*, 435 U.S. at 258; *Wood*, 420 U.S. at 317-18; *Scheuer*, 416 U.S. at 243-47; *Monroe*, 365 U.S. at 186-87.

[78] 461 U.S. at 92, 93 (O'Connor, J., dissenting).

the Supreme Court.[79] It can be expected to fare no better as civil rights litigation enters the twenty-first century.

D. The Purposes of Section 1983

Section 1983's fundamental purposes are those general goals which a majority of the forty-second Congress attempted to achieve via section one of the Ku Klux Klan Act of 1871. While pronouncements of section 1983's primary purposes are subject to some extent to the same critique as specific exegeses of legislative intent relative to narrow issues of section 1983 construction,[80] as broader, animating purposes, they are more readily distilled from the fact of the Act's passage, its language and the creation of federal liability and jurisdiction where none had previously existed. In addition to the fact that the extrapolation of section 1983's overriding purposes is a more primary task which relies on more readily apparent data than that previously discussed, there is also substantial, if not unanimous consent by the Court as to what these purposes are. Majority and dissent universally identify section 1983's fundamental purposes; however, the balance struck among them and the extent to which they are forced to yield to competing policies is hardly consistent from case to case.[81]

From the United States Supreme Court's section 1983 decisions, four basic purposes of section 1983 emerge:

1. Section 1983 Was Intended to Make a Federal Forum Available for the Vindication of Civil Rights.—Section one of the Ku Klux Klan Act of 1871 created a civil cause of action, subsequently codified as section 1983; it granted original jurisdiction to federal courts to determine

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[79]*See* Patsy v. Board of Regents, 457 U.S. 496, 507 (1982); *Newport*, 453 U.S. at 266; *Owen*, 445 U.S. at 675; *Monell*, 436 U.S. at 675-76; *id.* at 719-20 (Rehnquist, J., dissenting); Wood v. Strickland, 420 U.S. 308, 316-17 n.8; *Monroe*, 365 U.S. at 193 (Harlan, J., concurring).

[80]*See supra* text accompanying notes 48-50.

[81]While the basic purposes of section 1983 are universally acknowledged, some members of the Court maintain that one or more of these purposes have been completely fulfilled and therefore that they should cease to be guides to construction. This is most apparent in cases raising issues of federal jurisdiction over section 1983 claims. Frequently, to support restricting access to federal courts, it is asserted that federal jurisdiction was granted solely because the state courts could not be trusted to protect civil rights, but that these courts are now fully capable of protecting these rights. Thus, it is argued, the purpose to provide a federal forum no longer has the same compelling force in modern litigation under section 1983. The result in cases arguing on this basis frequently is that federal jurisdiction over civil rights claims is undermined or given a restrictive interpretation. *See Allen*, 449 U.S. at 99; Huffman v. Pursue Ltd., 420 U.S. 592, 605-06 (1975); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941). For cases wherein the purpose to provide a federal forum was given greater deference, see *Patsy*, 457 U.S. at 503; *Mitchum*, 407 U.S. at 239; England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964).

actions arising under the Act of 1871. This jurisdictional grant is now codified at 28 U.S.C. section 1343.[82] That the 1871 act was intended to create federal jurisdiction is beyond contention.[83]

2. Section 1983 Was Intended to Make Liable Persons Who Acted Under Color of State Law to Deprive Individuals of Their Civil Rights.— Prior to passage of section two of the Civil Rights Act of 1866[84] and section one of the Ku Klux Klan Act of 1871, persons clothed with the authority of the state could violate any individual's civil rights with impunity. Unless state courts intervened in such situations, which was especially unlikely in southern states, the aggrieved party was without recourse. Congressional efforts to remedy such injustice, begun by passage of section two of the Civil Rights Act of 1866, continued with enactment of section one of the Ku Klux Klan Act. The latter expressly made state officials answerable in federal court for conduct which violated federal law. Although the specific parameters of state officials' liability were not articulated in a comprehensive manner by either statute, the essential proposition that section 1983 was intended to render state actors accountable is clearly established.[85]

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[82]28 U.S.C. § 1343 (1982) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1343 was relied upon frequently in section 1983 cases prior to the elimination of 28 U.S.C. section 1331's jurisdictional amount. Because federal question jurisdiction no longer requires a minimum amount in controversy, section 1983 actions are frequently brought pursuant to section 1331 as well as 1343.

[83]*See Patsy*, 457 U.S. at 503-04; Parratt v. Taylor, 451 U.S. 527-34 (1981); Preiser v. Rodriguez, 411 U.S. 475, 513-14 (1973) (Brennan, J., dissenting); *Mitchum*, 407 U.S. at 240-41; *England*, 375 U.S. at 415; McNeese v. Board of Education, 373 U.S. 668, 671-72 (1963); *Monroe*, 365 U.S. at 252-53 (Frankfurter, J., dissenting).

[84]Section 2 of the Civil Rights Act of 1866 created criminal sanctions against persons who acted under color of state law to deprive another of the rights enumerated in section 1 of that Act. Section 2 was the prototype for section 1 of the Ku Klux Klan Act of 1871, which created a private action for damages and other relief to redress the deprivation of constitutional rights. *See infra* text accompanying notes 178-88.

[85]*See Newport*, 453 U.S. at 259; *Monell*, 436 U.S. at 682; Imbler v. Pactman, 424 U.S. 409, 433 (1976) (White, J., concurring); *Scheuer*, 416 U.S. 243; *Monroe*, 365 U.S. at 172.

3. Section 1983 Was Intended to Alter the Balance of Power Between the State and the Federal Governments.—The grant of federal jurisdiction to federal courts to hear causes of action against officials of the states necessarily involved an alteration of power in the republic in favor of the federal government.[86] Like other grants of federal jurisdiction,[87] the creation of competency in the federal courts to enforce civil rights inserted the federal government—by operation of its legislative and judicial branches[88]—between the people and the states.[89] Further, in creating liability attaching to state officials, section 1983 superseded state laws that conferred sovereignty on such persons.[90] The interest of the state in immunizing its agents was forced to yield to the civil rights of the individual.

Without federal enforcement, the Civil Rights Acts and the Reconstruction Era amendments would have been without effect.[91] Post-Civil War legislatures established federal jurisdiction where there had been none and expressly provided for national enforcement of newly emerged rights. This national civil rights enforcement and vindication scheme was targeted exclusively at persons who acted pursuant to state authority. Necessarily,

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[86]This balance of power between the state and federal government is known as federalism. *See* Gressman, *supra* note 13, at 1336.

[87]28 U.S.C. § 1331 (1982) (federal question jurisdiction); 28 U.S.C. § 1332 (1982) (federal diversity jurisdiction); *see also* 28 U.S.C. § 1441 (1982) (federal removal jurisdiction).

[88]It should be noted that the power of the executive was also brought to bear in this alteration of federalism. The Act of 1866 and the Act of 1871 clearly contemplated that when the Civil Rights Acts were not complied with by the states, the President could call out the militia and force the states to submit to these federal laws. *See* Civil Rights Act of 1866 § 9; Act of 1871, § 3. *See also* CONG. GLOBE, 39th Cong., 1st Sess., 476 (remarks of Sen. Trumbull). An amendment to delete this provision in the Act of 1866 was rejected by the Senate. *Id.* at 606. After the Act of 1866 was passed by the House of Representatives, on March 9, 1866, Mr. LeBlond, a vehement opponent to the bill noted what he perceived to be the Act's effect on federalism: "I desire to move to amend the title of the bill by making it read, 'A bill to abrogate the rights and break down the judicial system of the states.' " *Id.* at 1367. His comment was declared to be out of order. *Id.*

[89]The people of the United States enjoy dual citizenship. They are citizens of their respective states as well as national citizens. Gressman, *supra* note 13, at 1336.

[90]The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . 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.", U.S. CONST. art. VI cl. 2. State law defenses are not available in federal suits alleging violations of federal law. The immunity cases, however, have served to bridge section 1983 with some state law defenses. *See infra* text accompanying notes 98-148.

[91]Regarding the Act of 1866, Mr. Wilson remarked in the House of Representatives: "If the states would all observe the rights of our citizens there would be no need of this bill . . . . But, sir, the practice of the states leaves us no avenue of escape, and we must do our duty by supplying the protection the states deny." CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866); *see also id.* at 600 (remarks of Sen. Trumbull); *id.* at 603 (remarks of Mr. Lane).

it involved an alteration of the balance of power in the republic affected by constitutional amendment and federal legislation.[92] The fact that section 1983 affected federalism to the derogation of state autonomy is clearly established.[93]

4. Section 1983 Was Intended to Deter the Violation of Civil Rights.—The Reconstruction Era congresses, by creating criminal[94] and civil[95] penalties for the violation of individual rights, erected a deterrent against future abrogations of those rights. Section 1983's deterrent purpose has proven influential in cases wherein the issue of damages is presented to a court. Courts have consistently determined that substantial monetary and injunctive relief is available in section 1983 actions because the availability of such damages creates an incentive for states to comply with civil rights laws and such relief deters violations.[96]

In all cases construing section 1983, the Court has weighed its result against these identifiable purposes of section 1983. Not only *has* the Court considered the purposes of section 1983 as, to some degree, controlling its interpretation of that statute; on a more theoretical level courts *should* be animated by section 1983's discernible purposes.[97] Any construction of section 1983 must accommodate its broadly stated goals.

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[92]Section 2 of the thirteenth amendment was seen by some legislators as conferring upon Congress only the power necessary to eliminate slavery. Hence the constitutionality of the Civil Rights Act of 1866, which concededly did more than eliminate slavery, was questioned. *See* CONG. GLOBE, 39th Cong., 1st Sess. 479 (remarks of Sen. Cowan); *id.* at 576 (remarks of Sen. Davis); veto message of President Johnson, *id.* at 1681. To resolve this constitutional issue, section 5 of the fourteenth amendment was passed by Congress and adopted by the states in 1868. Congress thereby has broad power to legislate pursuant to the substantive provisions of the fourteenth amendment. The Act of 1866 was then reenacted pursuant to the fourteenth amendment in the Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144. The Ku Klux Klan Act was passed pursuant to section 5 of the fourteenth amendment.

[93]*See Patsy*, 457 U.S. at 503; *Allen*, 449 U.S. at 99; *Quern*, 440 U.S. at 342; *Mitchum*, 407 U.S. at 238-39, 242; Younger v. Harris, 401 U.S. 37, 62 (1971) (Douglas, J., dissenting).

[94]Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866). *See infra* text accompanying notes 178-88.

[95]Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871). *See infra* text accompanying notes 228-37.

[96]*See Smith*, 461 U.S. at 49; *Newport*, 453 U.S. at 268; *Mitchum*, 407 U.S. at 242; Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); *Carey*, 435 U.S. at 256-57. Also, in 1976 Congress passed the Civil Rights Attorney's Fees Act, which was added to 42 U.S.C. § 1988 by amendment in 1976. Motivating this legislation was the desire to make it easier for plaintiffs to bring meritorious civil rights actions and thereby deter violations under color of state law.

[97]Professor Fiss argues that the prescriptive force of a statute, i.e., the purpose for which it was created, should be "given concrete meaning and expression" through the process of adjudication. Fiss, *supra* note 48, at 751. He argues that courts should focus on what a statute was meant to do, its purpose, rather than statements by the legislators of the way things were at the time of its passage. This attention to a statute's prescriptive

E. Summary of Statutory Construction Problems

In *Monroe v. Pape*, the Supreme Court, without establishing a rule of construction for section 1983, established a model for such adjudication. The acknowledged elements in this interpretive process are: the history of section 1983—both congressional debates and the common law of 1871—and the purposes of section 1983. Plain meaning has little utility as a rule of construction in these cases. In addition, and without much elucidation, developments in law subsequent to 1871 are also considered. The latter are explored more fully in the next section of this article.

History is a very suspect springboard for resolution of modern questions of construction arising under section 1983. It is deficient and usually too tangential to be a fruitful source of law in these matters. Further, it is easily manipulated and attributes false omniscience and objectivity to the legislators of 1871.

The purposes of section 1983 are more legitimate as sources of law because they are capable of more objective ascertainment. The apparent consensus as to section 1983's fundamental purposes further affirms this legitimacy. However, as the next part of this Article will demonstrate, the

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force lends objectivity to the process of adjudication by establishing the parameters for interpretation. "Bounded objectivity is the only kind of objectivity to which the law—or any interpretive activity—ever aspires and the only one about which we care. To insist on more, to search for the brooding omnipresence in the sky, is to create a false issue." *Id.* at 745-46. Professor Fiss argues that objectivity in construction is possible in this manner. He disagrees with advocates of the "nihilist" school whom he characterizes as insisting that there was no objective element in the interpretive process. Professor Brest responded to Professor Fiss by attempting to demonstrate that objectivity in interpretation is impossible because of the inability of a court to discern the intent behind statutes. Brest, *Misconceived Quest*, *supra* note 47, at 209-17. Even Professor Brest, however, acknowledges that moderate originalists, those "concerned with the framers' intent on a relatively abstract level of generality—abstract enough to permit the inference that it reflects a broad social consensus rather than notions peculiar to a handful of the adopters . . . ," have the best argument for objectivity. *Id.* at 214. Section 1988 places express bounds on courts in adjudicating section 1983 and expressly limits the respective roles of federal law, state law, and the purposes of section 1983 in application of that provision. *See infra*, discussion of section 1988's role, at text accompanying notes 313-70. *See generally* Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975); Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119 (1932); Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439 (1961); Johnson, *Retreat from the Common Law?: The Grudging Reception of Legislative History by American Appellate Courts in the Early Twentieth Century*, 1978 DET. C. L. REV. 413; Nunez, *THe Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CALIF. W. L. REV. 128 (1972); Richardson, *Judicial Law Making: Intent of Legislature vs. Literal Interpretation*, 39 KY. L.J. 79 (1951); Smith, *Legislative Intent: In Search of the Holy Grail*, 53 CAL. ST. B.J. 294 (1978); Sparkman, *Legislative History and the Interpretation of Laws*, 2 ALA. L. REV. 189 (1950); Comment, *Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court*, 25 CALIF. L. REV. 326 (1937).

Court has not been consistent in attaching importance to the purposes of section 1983 when accommodating those purposes to conflicting values and policies. Fulfillment of the purposes of section 1983 has been a measure against which decisions are evaluated rather than a source for results. Instead, history is emphasized as a primary source of law for section 1983 interpretation.

The next section of the Article demonstrates the use that has been made of section 1983's history and purposes. A review of some important section 1983 decisions shows that the Court has been tremendously influenced by policies and values quite distant from the legal horizon of 1871 and the purposes of section 1983. The immunity cases make it abundantly clear that section 1983 adjudication has involved the foregoing elements. What is lacking however is an articulation, as a matter of policy and process, of a method for the interaction of these various elements.

III. The Immunity Cases

In many, if not most, cases construing section 1983, the Supreme Court has undertaken a two-tiered approach to the application of section 1983. First, the Court has expressly scoured the history and purposes of section 1983 focusing on the debates and the common law of 1871 with only passing comment on the purposes of section 1983. Second, the Court has considered and been influenced by legal developments and policy considerations subsequent to section 1983. The Court has balanced the historical data against other policy considerations and has rendered decisions which are essentially federal common law decisions. The immunity cases provide the clearest examples of this *de facto* section 1983 analysis.[98]

A. Pierson v. Ray

A majority on the Supreme Court concluded in *Pierson v. Ray*[99] that judges were absolutely immune from liability under section 1983. Further, the Court concluded that police officers had a qualified, or "good faith," immunity from section 1983 liability.[100]

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[98] *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1295-96 & n.54 (1953).

[99] 386 U.S. 547 (1967).

[100] *Id.* at 555-57. The first of the major immunity decisions was Tenney v. Brandhove, 341 U.S. 367 (1951), which held that legislators, as a matter of political history, were absolutely immune from section 1983 liability for conduct relevant to their legislative function. Justice Frankfurter's opinion focused on art. 1, section 6 of the United States Constitution, the Speech and Debate Clause, to reason that he could not believe Congress in 1871 meant to impinge on the tradition of legislative immunity grounded in the Speech and Debate Clause. *Id.* at 373, 376. Justice Douglas dissented and argued that if and when the conduct of a legislator went beyond the federal law, that legislator should be liable under the Civil Rights Act. *Id.* at 383 (Douglas, J., dissenting).

Chief Justice Warren's majority opinion first deduced that judicial immunity was firmly established at common law in 1871: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[101] He then noted that "[t]he common law has never granted police officers an absolute and unqualified immunity."[102] While the question of judicial immunity was settled by the existence of an absolute immunity at common law in 1871, the non-existence of police officer immunity did not resolve that issue for the purposes of section 1983.

Instead of concluding that police officers were not immune because they were not immune in 1871, the Court fashioned a qualified immunity based on the "good faith" of the police officer. This good faith defense was dictated by the "prevailing view."[103] Chief Justice Warren referred to the Restatement of Torts[104] and to other twentieth century tort treatises and cases to argue that the good faith defense was generally available to police officers under modern tort law. Relying on the admonition in *Monroe* that section 1983 "should be read against the background of tort liability,"[105] the Court held that the defense of good faith "is also available to [police officers] in the action under § 1983."[106] Clearly, the creation of a good faith defense for police officers in section 1983 actions was not required by the plain meaning of section 1983 nor by its history.[107] Rather, the reasonableness of this modern defense to tort suits coupled with the belief in the "fairness" of the defense controlled.

Justice Douglas, dissenting, pointed out that the plain meaning of section 1983 allowed no defense of immunity in favor of judges or police officers.[108] He argued that section 1983 was a remedial statute which was to be broadly construed.[109] While Chief Justice Warren looked for express abrogation of judicial immunity by section 1983, Justice Douglas would have required express creation of such immunity.[110] Regarding the

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[101] *Pierson*, 386 U.S. at 553-54. Chief Justice Warren cited Bradley v. Fischer, 80 U.S. (13 Wall.) 335 (1871), to show that judicial immunity existed at common law in 1871. *Bradley*, however, did not rely on common law decisions as much as on the functional requirement that judges be immune from liability for judicial conduct to assure the independence of the judiciary. *Id.* at 347. The emphasis on the requirement that coordinate branches of government function independently of each other was grounded on the notion of separation of powers.

[102] *Pierson*, 386 U.S. at 555.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 556.

[106] *Id.* at 557.

[107] Chief Justice Warren did not cite the legislative debates, but rather relied on the common law backdrop in which the 42nd Congress acted.

[108] *Id.* at 559 (Douglas, J., dissenting).

[109] *Id.* at 560-61 (Douglas, J., dissenting).

[110] *Id.* at 563 (Douglas, J., dissenting).

separation of powers argument, Justice Douglas responded that the federal legislature had power pursuant to section five of the fourteenth amendment to make state judges liable.[111] Although he argued that judges were liable for intentional conduct, he would nonetheless have allowed honest mistake as a defense.[112]

B. Scheuer v. Rhodes

Chief Justice Burger, writing for a unanimous Court,[113] concluded in *Scheuer v. Rhodes*[114] that state executive officers did not have an absolute immunity from section 1983 liability; like police officers, they had a good faith defense to such actions.[115] The decision briefly considered English common law which conferred an absolute immunity on the king and his chief officials; the Court noted that this immunity had been "gradually eroded."[116]

No attempt was made to determine 1871 rules pertaining to executive liability. Rather, Chief Justice Burger stated: "Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government as well as the purposes of 42 U.S.C. § 1983."[117] The Court created a doctrine of qualified immunity for executive officials based on the "prevailing view,"[118] and the implicit reasonableness of executive, qualified immunity.[119]

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[111] *Id.* at 565 (Douglas, J., dissenting).

[112] *Id.* at 566 (Douglas, J., dissenting). In this regard, Justice Douglas was also motivated by concerns for fairness. Section 1983 does not require a showing of intent to establish liability.

[113] Justice Douglas took no part in the deliberations or decisions in the case.

[114] 416 U.S. 232 (1974).

[115] *Id.* at 247.

[116] *Id.* at 239 n.4.

[117] *Id.* at 243.

[118] *Id.* at 245.

[119] *Id.* at 246. The Court noted that executives were analogous to legislators and judges in support of the position that they should all enjoy some immunity. To the extent that judicial and legislative immunity was grounded on separation of powers principles, it is somewhat surprising that executives were not given a similar, absolute, immunity. It would seem that because the executive is the third coordinate branch of government, concerns for the independent functioning of the different branches of government would have compelled the same result vis-a-vis executive officials. The distinction lies in the fact that in *Tenney* and *Pierson*, the Court could point definitively to 1871 case law to support the immunity as pre-existing section 1983 and as not expressly abrogated by that statute. The Court, apparently, was not presented with such definitive case law regarding the status of executive liability in 1871. Instead, the Court fashioned a doctrine of qualified immunity for such officers based on its sense of fairness to such persons and the need to protect their offices while accommodating the purpose of section 1983 to make such persons liable. Also, given that judges and legislators were absolutely immune, conferral of similar protection against liability upon state executives could have seriously eroded section 1983's utility, for then there would have been virtually no one left who acted literally under color of state law.

While exercising common law powers and creating this defense, Chief Justice Burger did not go so far as to establish absolute immunity. He concluded, "[section] 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' "[120]

The Court in *Scheuer* balanced the systemic demand for an independent executive branch, unfettered by potential liability for its executive conduct,[121] against section 1983's purpose to " 'give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.' "[122]

C. Wood v. Strickland

Justice White's majority opinion in *Wood v. Strickland*[123] concluded that school boards had a limited good faith immunity from section 1983 liability. Only if the school board, through its members, knew or should have known that its conduct would violate constitutional rights, or if it acted with malicious intent, was it liable for damages in section 1983 actions.[124]

The Court's decision began by tracing the development of good faith immunity in section 1983 actions through its decisions in *Tenney v. Brandhove*, *Pierson*, and *Scheuer*. Rather than relying on the common law of 1871 or the legislative debates,[125] the Court stated, "Common law tradition, recognized in our prior decisions [which did not deal with school boards], and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability for damages under that section."[126]

The Court borrowed the rather superficial historical inquiries of *Pierson* and *Scheuer* regarding judicial and executive immunity to conclude that it was justified in granting some immunity to school boards. Primarily, the Court was motivated by concerns for reasonableness, fairness, and public policy:

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[120] *Id.* at 248 (citation omitted).

[121] *Id.* at 241-42.

[122] *Id.* at 243 (citation omitted).

[123] 420 U.S. 308 (1975).

[124] *Id.* at 322.

[125] Justice White's opinion did not attempt to deduce specifically what the status of school board liability had been in 1871. Although he referred to state law decisions on this issue, all but one of the decisions he cited were post 1871 opinions. *Id.* at 318 n.9.

[126] *Id.* at 318.

> *Tenney v. Brandhove*, *Pierson v. Ray*, and *Scheuer v. Rhodes* drew upon a very similar background and were animated by a very similar judgment in construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983. We think there must be a degree of immunity if the work of the schools is to go forward.[127]

The standard of good faith immunity created for school boards represents a judicial balancing of the systemic demand for independent functioning[128] against the remedial purposes of section 1983.[129]

Justice Powell dissented to the standard of qualified immunity created by the majority. Together with Chief Justice Burger and Justices Blackmun and Rehnquist, he would have granted school boards qualified immunity on par with executive officials as articulated in *Scheuer*.[130]

D. Imbler v. Pachtman

A majority of the Court concluded in *Imbler v. Pachtman*[131] that prosecutors enjoyed an absolute immunity from section 1983 liability for prosecutorial conduct. Justice Powell's majority opinion began by noting, "The statute [section 1983] . . . creates a species of tort liability that on its face admits of no immunities."[132] Next, his opinion established that the modern practice was to grant prosecutors absolute immunity for acts relevant to the initiation and prosecution of criminal proceedings.[133] Having established this "modern rule" of prosecutorial immunity, Justice Powell indicated that an historical inquiry was mandated by prior Supreme Court immunity decisions.[134] He noted: "The first American case to address the question of a prosecutor's amenability to such an action was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896)."[135] Thus, to the

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[127]*Id.* at 320-21.

[128]School boards do not constitute one of the three coordinate branches of government; therefore, separation of powers concerns are not directly implicated. But, analogous concerns for autonomy, and a tacit belief that independent functioning is preserved if concern for liability is minimized were considered in the decision.

[129]The Court said, "[A]ny lesser standard would deny much of the promise of section 1983." *Id.* at 322.

[130]*Id.* at 327-31 (Powell, J., dissenting).

[131]424 U.S. 409 (1976).

[132]*Id.* at 417.

[133]Justice Powell's authority for this modern rule was twentieth century, federal courts of appeal decisions. *Id.* at 420 n.16.

[134]*Id.* at 421. This historical inquiry is, somehow, seen as guarding against the exercise of judicial fiat in these cases. *Id.*

[135]*Id.*

extent Justice Powell felt obliged in *Imbler* to undertake a historical inquiry, it was launched from a post-1871 state court decision. This historical inquiry considered subsequent state and federal courts' treatment of the issue of prosecutorial liability.[136] Justice Powell then returned to the "well settled," modern, common law rule of prosecutorial immunity[137] and stated that the inquiry was "whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under § 1983."[138]

The majority in *Imbler* focused primarily on the heavy cost to the criminal justice system if prosecutors were potentially liable for conduct related to the performance of their jobs.[139] The majority never really considered the purposes of section 1983 as a counter-balance:

> [T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.[140]

Anything less than absolute immunity for prosecutorial conduct in section 1983 suits was viewed as impairing the prosecutor's independent exercise of judgment and thus undermining the criminal justice system.[141]

Justice White, with Justices Brennan and Marshall, concurred that prosecutors had some immunity from suit, but disagreed that this immunity was absolute.[142] The concurrence considered the purposes of section 1983 and maintained that only qualified immunity should be available because absolute immunity denied the "promise of section 1983."[143] Justice White agreed with the majority that the integrity of the criminal justice system had to be preserved by clothing the prosecutor with absolute immunity regarding the decision to initiate criminal prosecution.[144] To rebut the majority's historical analysis, he referred to other common law deci-

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[136] *Id.* at 422-24.

[137] *Id.* at 424.

[138] *Id.*

[139] *Id.* at 424-27.

[140] *Id.* at 427-28.

[141] The Court left open, however, the possibility that prosecutors may be criminally liable. *Id.* at 429.

[142] *Id.* at 434 (White, J., concurring).

[143] *Id.* (White, J., concurring).

[144] *Id.* at 438 (White, J., concurring). The concurrence also agreed with the majority that the prosecutor should be absolutely immune for damages arising from testimony that the prosecutor knew or should have known was false. *Id.* at 440 (White, J., concurring).

sions to show that this immunity went no further.[145] Justice White expressly rejected the proposition that the forty-second Congress incorporated into section 1983 all immunities existing at common law.[146] The concurring justices would have found that prosecutors were liable for the unconstitutional suppression of exculpatory evidence alleged in *Imbler*.[147]

E. Conclusions Regarding the Immunity Cases

The immunity decisions present a body of cases construing section 1983 wherein the elements involved in its interpretation are most clearly exposed for analysis. The elements that have informed the Court's construction in these cases are the common law, both historical and current, the legislative debates, consideration of public policy vis-a-vis the potential systemic costs of the Court's construction of section 1983, and the purposes of section 1983. The Court has not treated the express text of the statute, admitting of no immunities, as dispositive.

From case to case the balance struck among these factors in the construction of section 1983 varies. It is clear from the crazy-quilt interplay of policy, common law, and the purposes of section 1983 that the Court in the immunity cases has engaged in the creation of common law. Fashioning an extensive immunity doctrine, the Court has selectively chosen from the common law of 1871, modern tort law, public policy, and the purposes of section 1983. The Supreme Court has, implicitly and correctly, recognized that the legal horizon of 1871 and the language of section 1983 do not resolve the immunity issues and has sought guidance from developments in state and federal law and public policy. This typifies the process of construction used by the Supreme Court in its more significant decisions construing section 1983.[148]

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[145] *Id.* at 437-41 (White, J., concurring). The concurrence, like the majority, referred to post 1871 case law.

[146] *Id.* at 441-42 (White, J., concurring).

[147] *Id.* at 443 (White, J., concurring); *see also* Smith v. Wade, 461 U.S. 30 (1983). "[I]n *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted." *Id.* at 35 n.2.

[148] While the immunity cases present the clearest example of this process of tacit acknowledgment of the deficiency of section 1983 and its legislative history and subsequent recourse to later developments in law and public policy, many Supreme Court decisions "construing" the language of section 1983 have engaged in a similar process. *See Patsy*, 457 U.S. at 513-14 (recitation of twentieth century decisions as being influential); *Newport*, 453 U.S. at 261-62 (recitation of post 1871 cases to support position that punitive damages were not available against a city in a section 1983 action); *Owen*, 445 U.S. at 657 (section 1983 opinions should reflect changes in notions of governmental responsibility over the last century); *Carey*, 435 U.S. at 255-57, 258 n.13 (common law of damages relevant to section 1983); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975) (*Younger v. Harris* applied to section 1983 litigation in federal court); Moor v. County of Alameda, 411 U.S. 693, 703 (1973) (section 1988 allows consideration of evolving common law in section 1983 cases);

The next section of this article will discuss 42 U.S.C. section 1988 as a substitute for the relatively unguided interplay of history, policy and the purposes of section 1983 in these cases. Section 1988 accommodates all the factors previously identified as involved in the construction of section 1983 while providing a road map for their use. Section 1988 also justifies and limits the borrowing of contemporary developments in state and federal law.

IV. Section 1988 in Context

A. Introduction

When a court is called upon to adjudicate a matter that is not provided for in the text of section 1983 nor in its contemporaneous debates, the historical inquiry frequently becomes a search for the status of that issue at 1871 common law. Even when the court is arguably interpreting the specific language of the statute (for example the meaning of "person"),[149] it has been demonstrated that the inquiry is often more far-reaching than mere textual definition. Always, the result is informed by consideration of extrinsic policies.

The interplay of the elements in section 1983 construction differs from case to case without any apparent rhyme or reason resulting in virtually unbounded judicial creation of federal common law. This provides little guidance to lower courts attempting to deal with novel issues arising under section 1983.[150] It also gives appellate courts relatively unrestricted license continually to readjust the balance among the various elements in the interpretation of section 1983.

Originally enacted as section three of the Civil Rights Act of 1866,[151] section 1988 places boundaries on the exercise of judicial power in the construction of section 1983.[152] It prescribes a method of construction for section 1983.

Prieser v. Rodriguez, 411 U.S. 475, 485 (1973) (evolution in the law of habeas corpus is relevant to the historical inquiry); Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969) (section 1988 allows consideration of state law in construing section 1983); *Monroe*, 365 U.S. at 187 (section 1983 should be read against the background of tort liability).

[149]*See supra* text accompanying notes 39-40.

[150]Indeed, it is most important to focus on how trial courts deal with these issues because very few cases reach the appellate level.

[151]Entitled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication," the Civil Rights Act of 1866 was passed by two-thirds vote of the House and Senate, overriding the veto of President Johnson. Cong. Globe, 39th Cong., 1st Sess. 196 (1866) (House of Representative's vote); 1809 (senate vote). Passage of the Civil Rights Act of 1866 followed closely upon the enactment of the thirteenth amendment and its ratification by the states. See 1 Schwartz, Statutory History of the United States—Civil Rights (1970), for a discussion of other major civil rights legislation during the Reconstruction Era.

[152]42 U.S.C. § 1988 (1982) provides:

> The jurisdiction in civil and criminal matters conferred on the district courts

It is the thesis of this article that section 1988 supplies a rule of statutory construction for section 1983.[153] Section 1988 directs that when section 1983 is deficient, the court should fill that gap with other applicable federal law, provided that such law serves the purposes of section 1983. If there is no applicable or suitable federal law, the court is directed to apply the law of the state where it sits, again, only if such law is consistent with the purposes of section 1983.[154]

The use of section 1988 as a rule of construction for section 1983 fosters uniformity in the protection of civil rights while according deference to state law.[155] It is the position of this author that section 1988 represents a compromise between uniformity and comity.[156] Recognition that section 1988 is a rule of construction for section 1983 is necessary to preserve this compromise. Section 1988 maintains the balance struck between state and federal power in the redefined federalism of the Reconstruction Era. By providing a congressionally mandated approach to the construction of section 1983, section 1988 also tempers policy-based excesses in the construction of section 1983.[157]

> by the provisions of this Title, and of Title "CIVIL RIGHTS" and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The latter part of 42 U.S.C. § 1988 is known as the Civil Rights Attorney's Fees Act. It was added to section 1988 by amendment in 1976.

[153]Arguably, it supplies a rule of construction for all civil rights legislation, both civil and criminal. The language of section 1988 states that all provisions under the title of "Civil Rights" in the United States Code are subject to its command.

[154]This tiered process of construction is described in detail *infra* at text accompanying notes 313-69.

[155]Both Professors Eisenberg and Kreimer apparently view national uniformity and section 1988's language to apply state law as mutually exclusive. This is not always the case—deference to one does not necessarily signal the demise of the other. Rather, it is the essence of compromise that competing interests co-exist by each making some sacrifice. Section 1988 is a congressionally mandated compromise which it is a court's responsibility to enforce.

[156]*See infra* discussion at text accompanying notes 209-24.

[157]"The question is whether we can insist that adjudication is an interpretive activity and still find that it possesses an objective character in the face of these differences. I think we can." Fiss, *supra* note 48, at 750-51. Justice Douglas is quoted as having said "With

The next section of this article discusses the Civil Rights Act of 1866 with special emphasis on the first three sections of that Act. Section three, predecessor to section 1988, was an important enforcement provision of the Act of 1866. The next section also discusses the original text of section one of the Ku Klux Klan Act, section 1983's predecessor. Section one of the Ku Klux Klan Act expressly incorporated the enforcement provisions of the Civil Rights Act of 1866.

Professors Kreimer and Eisenberg have both relied on historical arguments to urge that section three of the Act of 1866, and its directive to federal courts to apply state law, be narrowly construed.[158] Professor Kreimer argued that in 1866 the "common law" was understood to refer to a universal common law which was supplemented and modified by federal court judges who exercised general federal common law powers. Kreimer argued that section 1988's predecessor did not require that state decisional law be applied in civil rights cases because the statute's reference to "common law" invited federal courts to expound common law under the then existing doctrine of *Swift v. Tyson*.[159] Professor Eisenberg argued that section three, when viewed as part of the Act of 1866, only made sense when applied to actions commenced in state court and removed to federal court pursuant to a removal provision in the Act of 1866.[160]

It is the position of this author that the history and text of section three of the Act of 1866, and its subsequent enactment in the Ku Klux Klan Act, do not support such deviations from its apparently clear and expressed directive that state law be applied in federal civil rights actions.

B. The Civil Rights Act of 1866

1. Passage of the Act.—The Civil Rights Act of 1866 was passed over the presidential veto of Andrew Johnson.[161] Its passage, despite heated

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five votes we can do anything." *Id.* at 758. Abuse comes in the manner in which the balance is struck between competing values in the adjudication of section 1983.

[158]Only a few other articles have dealt with section 1988. *See* Theis, Shaw v. Garrison: *Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976); Recent Developments, *Federal Civil Rights Act Incorporates State Wrongful Death and Survival Laws*, 14 STAN. L. REV. 386 (1962); Recent Decisions, *Civil Rights—Survival of Actions—Since Failure to Provide Suitable Remedy for Wrongful Death Renders Civil Rights Acts Deficient Within Meaning of 42 U.S.C. § 1988 (1958), State Survival Statute May Be Utilized to Enable Vindication of Abrogated Federally Guaranteed Civil Rights*, 47 VA. L. REV. 1241 (1961).

[159]*See* Kreimer, *supra* note 16, at 619-20.

[160]*See* Eisenberg, *supra* note 17 at 500.

[161]President Johnson vetoed the bill on March 27, 1866, and returned it to the Senate with exceptions. CONG. GLOBE, 39th Cong., 1st Sess., 1679-81 (1866). By a two-thirds vote of the Senate on April 6, 1866, and a two-thirds vote of the House of Representatives on April 9, 1866, the Civil Rights Act of 1866 became law. CONG. GLOBE, 39th Cong., 1st Sess., 1679-81, 1809 (1866).

debate in both houses of Congress and the lack of executive support, presaged the role the Congress would play in determining the course of Reconstruction and in protecting civil rights. Part of the impetus behind the Act of 1866 was that Congress disagreed with President Johnson's Reconstruction policies.[162]

Senate Bill No. 61 was introduced in the upper House by Senator Trumbull on January 5, 1866.[163] It was supported in both houses by Republicans who maintained that Congress possessed the power to interpose itself in state government and thereby remedy grossly inequitable circumstances which confronted the freed slaves. Democrats opposed the bill on its merits; however, their arguments were frequently couched in constitutional rhetoric.[164] Moderate Republicans provided the pivotal votes and offered the most interesting comments in the debates. These moderates clearly endorsed the Act of 1866's ends, but questioned whether Congress had constitutional authority to pass such a measure. Many of these individuals subsequently supported the legislation which lead to the fourteenth amendment.[165]

Whether Congress had power to pass the Civil Rights Act of 1866 rested on construction of the thirteenth amendment and its enabling sec-

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[162]*See* discussion between Senator Wade and Senate Lane, *id.* at 1801-02. President Johnson is also the only American President to be impeached by Congress. This stemmed, in part, from intense opposition to his Reconstruction policies.

[163]*Id.* at 474. The original bill also sought to enact S. No. 60, The Freedmen's Bureau Bill, which had been vetoed by President Johnson. This veto was not overriden by Congress. In a twist of irony, which was probably intended, many provisions of the Civil Rights Act of 1866 were modeled on the Fugitive Slave Act of 1850, a statute whose constitutionality had been affirmed by the Supreme Court. *See id.* at 475, 500, 605, 1760.

[164]*See, e.g., id.* at 1120 (remarks of Rep. Rogers). He was fundamentally opposed to granting constitutional liberties to blacks. His arguments opposing S. No. 61, however, focused on the alleged lack of power to legislate in the manner implicated by the bill. Opponents challenged that Congress had no grant of power to declare that the freed slaves were citizens of the United States or the states, nor to tell the states how to deal with the freedmen in matters relevant to contracts, sales of real property, etc. *See infra* note 172.

[165]For example, Representative Bingham voted against S. No. 61 in the House of Representatives. *Id.* at 1367. He subsequently abstained on the vote to override President Johnson's veto. *Id.* at 1861. Subsequently he supported the bill that became the fourteenth amendment. Representative Thayer voted for S. No. 61 and also voted to override the veto. *Id.* at 1367, 1861. In debate, however, he indicated that a constitutional amendment would have been a more appropriate way to achieve the ends sought by S. No. 61. *Id.* at 1153. Representative Raymond expressed the same ambivalence over Congress' power to enact S. No. 61. *Id.* at 1266. He abstained on the vote of the bill in the House of Representatives and he voted against overriding the Presidential veto. *Id.* at 1367, 1861. Representative Shellabarger also questioned the constitutionality of S. No. 61, but he determined to vote for it nonetheless. *Id.* at 1293, 1367. He also voted to override the veto of President Johnson. *Id.* at 1861. Shellabarger was subsequently the House sponsor of the Ku Klux Klan Act of 1871. *See also id.* at 1719 (introduction of bill to protect all persons in their civil rights); *id.* at 1782-83 (remarks of Sen. Cowan).

tion.[166] Democrats and moderate Republicans maintained that the thirteenth amendment did no more than abolish slavery. They argued that Congress had authority under section two of the thirteenth amendment only to enact legislation necessary and proper to the eradication of slavery.[167]

The Act of 1866, however, granted the freedmen the right, on the same basis as whites, to contract, to buy and sell property, to sue and be sued, and to enjoy the same benefits of state laws.[168] This did not create new rights *per se*; rather, it required that if state law treated a white person in one manner respecting any of the enumerated issues, a black person was to receive the same treatment. This was aimed, among other things, at state criminal statutes which often imposed harsher punishment on non-whites and at property laws which treated blacks and whites differently. Because the Act would effectively strike down such discriminatory laws, some opponents saw it as superseding state criminal and civil law. Opponents of the bill refused to find that the thirteenth amendment provided constitutional authorization for such congressional abrogation of state law.[169] The perceived intrusion on the prerogatives of the states was viewed by the bill's opponents as making serious inroads into state power and as eroding the federalism scheme established by the framers of the Constitution.[170]

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[166]U.S. CONST., amend. XIII, § 1, provides: "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 states, "Congress shall have power to enforce this article by appropriate legislation."

[167]*See* CONG. GLOBE, 39th Cong., 1st Sess., 476 (1866) (remarks of Sen. Saulsbury); *id.* at 479, 1784 (remarks of Sen. Cowan); *id.* at 576 (remarks of Sen. Davis); *id.* at 1156 (remarks of Rep. Thornton); *id.* at 1265 (remarks of Rep. Davis); *id.* at 1266 (remarks of Rep. Raymond); *id.* at 1292-93 (remarks of Rep. Bingham); *id.* at 1680 (veto message of President Johnson).

[168]*See infra* text accompanying notes 172-77.

[169]*See supra* note 164.

[170]*See* CONG. GLOBE, 39th Cong., 1st Sess. 47 (1866) (remarks of Sen. Saulsbury) ("Let us see whether this bill in its provisions is not a total subversion of the true theory and character of our federal system."); *id.* at 477 (remarks of Sen. Davis) ("As to everything not within the Federal jurisdiction the states are considered separate and foreign goverments."); *see also id.* at 603 (remarks of Sen. Cowan); *id.* at 1120 (remarks of Rep. Rogers) ("Congress is without power . . . to enter the domain of the state and interfere with its internal policy, statutes and domestic relations."); *id.* at 1154 (remarks of Rep. Eldridge) ("This bill is, it appears to me, one of the most insidious and dangerous of the various measures which have been directed against the interest of the people of this country. It is another of the measures designed to take away the essential rights of the states."); *see also id.* at 1156 (remarks of Rep. Thornton) (referred to James Madison for the idea that the federal government was very limited); *id.* at 1269 (remarks of Rep. Kerr) ("The right to exclude them ['Negroes' and 'Coolies'] or to limit them in their civil or political rights and privileges is fundamental and necessary to the state. It antedates all constitutions. It is original in the state."); *id.* at 1415 (remarks of Sen. Davis) ("If Congress has the power to regulate

2. Content of the Civil Rights Act of 1866.—This article will primarily focus on sections one, two and three of the Act of 1866.[171] Section one provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.[172]

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the subjects which this bill assumes to regulate, it is but the beginning of a new and most important era of its legislation. There will, indeed, be a development of our system of government of which the fathers neither spoke or wrote, or which their sons never dreamed until the acme of the present great national fury."); *id.* at 1680 (veto message of President Johnson) ("Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the states. They all relate to the internal policy and economy of the respective states."); *id.* at 1777 (remarks of Sen. Johnson) ("The result, therefore, of the three provisions in this section is, that contrary to state constitutions and state laws, it converts a man that is not a citizen of a state into a citizen of the state, and it provides that his punishment shall only be such as the state laws impose upon white citizens. Where is the authority to do that? If it exists, it is still more obvious that the result is an entire annihilation of the power of the states.").

[171]Sections 4-8 are still in existence today, sections 9-10 have been repealed. See WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS Appendix at 44-49 (1970), for the subsequent histories of the various sections of the Act of 1866.

[172]Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866), reenacted, Act of May 31, 1870, c.114, sec. 16, 16 Stat. 144 (1870). The first part of section 1, declaring that all persons born in the United States were citizens of the United States (except un-taxed Indians) was added by amendment after the bill was introduced in the Senate from the Judiciary Committee. CONG. GLOBE, 39th Cong., 1st Sess., 498 (1866). The amendment was adopted by the Senate and became part of the bill on February 1, 1866. *Id.* at 575. There was considerable debate regarding this conferral of national citizenship. Several members of Congress argued that the legislature had no authority to naturalize the freed blacks. *See id.* at 497 (remarks of Sen. Van Winkle) (argued that only a constitutional amendment could grant such citizenship); *id.* at 479 (remarks of Sen. Cowan) (argued against the provision because he was concerned it would extend citizenship to everyone and not just the freedmen); *id.* at 523 (remarks of Sen. Davis) (argued that congressional power to naturalize extended only to European immigrants and not to freed blacks. His argument rested on a very narrow construction of article 1, § 8, cl. 4 of the Constitution which confers power on Congress to "establish a uniform rule of naturalization." He argued that this constitu-

First, section one conferred national citizenship on the freed blacks;[173] then it established that all citizens possessed the right to equal treatment. Proponents of the bill were careful to distinguish the civil right to equal treatment under state law, conferred by section one, from political and social rights; the right to vote, for example, was purposefully excluded from the bill.[174] Exclusion of the voting issue most likely reflected a political choice; whether the freed men were to be given the right to vote was an issue even more polarizing than issues raised by the Act of 1866.[175]

The latter portion of section one has survived and is codified at 42 U.S.C. sections 1981[176] and 1982.[177] Section 1981 guarantees the equal right to contract, give evidence, and receive equal benefit of law. Section 1982 guarantees equality in the purchase and sale of real and personal property.

Section two of the Civil Rights Act of 1866 provided:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any

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tional power extended only to foreigners, and since the freed blacks were not foreign born, they were not foreigners within the terms of the Constitution. *Id.* at 524). The purpose of this provision in section 1 of the Act of 1866 was to reverse congressionally the decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). This language was subsequently incorporated in H.R. No. 63, which, when adopted and ratified, became the fourteenth amendment. *See* SCHWARTZ, *supra* note 151, at 255-56. For text of the fourteenth amendment, see *infra* note 235.

[173]Some members of Congress argued that section 1 merely declared what already existed in fact, that blacks were citizens of the United States by virtue of their birth in the United States. *See* CONG. GLOBE, 39th Cong., 1st Sess., 569 (1866) (remarks of Sen. Merrill); *id.* at 1291 (remarks of Sen. Bingham). The western Indians were excepted from this section because of the desire of Senator Trumbull not to have the Indian question "embarrass" the bill. *Id.* at 527 (remarks of Sen. Trumbull).

[174]Many members of Congress distinguished between civil and political rights and understood expressly that section 1 did not encompass the right to vote. *See id.* at 1159 (remarks of Rep. Windom); *id.* at 1117 (remarks of Rep. Wilson, House sponsor of the bill).

[175]The right to vote was conferred subsequently on black males by the fifteenth amendment to the United States Constitution. "Section 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST., Amend. XV §§ 1 and 2.

[176]42 U.S.C. § 1981 (1982) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[177]42 U.S.C. § 1982 (1982) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

> inhabitant of any State or Territory to the deprivation of any right secured or protected by this Act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, or both, in the discretion of the court.[178]

This provision created a criminal sanction in the event a person's section one right to equal treatment under state law was violated. Primarily aimed at the judiciary and exclusively targeted at agents of the state, this section provoked intense debate in both houses of Congress.[179] Because this section imposed federal criminal penalties on state actors who enforced unequal state laws, it was viewed by the bill's opponents as nullifying the criminal, property, and domestic relations laws of the states.[180]

Just as it is possible to distill general or basic purposes animating the passage of the Ku Klux Klan Act of 1871,[181] it is evident that the thirty-ninth Congress, by enacting section two, meant to target state court judges for liability.[182] Section two has survived and is codified at 28 U.S.C.

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[178]Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866).

[179]*See* remarks of Senator Eldridge, opponent of the bill, who stated that without any doubt section 2 was aimed at the state judiciary. CONG. GLOBE, 39th Cong., 1st Sess., 1155 (1866) (remarks of Sen. Eldridge). Representative Raymond, proponent of the bill, stated he was concerned about the constitutional power of Congress to punish state judges in the manner prescribed by section 2. *Id.* at 1267 (remarks of Rep. Raymond). Representative Bingham, opponent of the bill, stated that Congress could not make it a crime for state judges to follow state law. *Id.* at 1293 (remarks of Rep. Bingham). (Rep. Bingham advocated creation of a direct civil remedy versus a criminal penalty. *Id.* at 1295). The veto message of President Johnson, *id.* at 1680, stated that section 2 was an unconstitutional infringement on the state judiciary, legislature and ministerial officers. Senator Trumbull stated that legislators who passed discriminatory state laws would not be liable under section 2; rather, judges who acted with "vicious will," i.e. knowingly enforced discriminatory state law, would be liable. *Id.* at 1758 (remarks of Sen. Trumbull). Senator Johnson stated that section 2 usurped the power, independence and integrity of state judges. *Id.* at 1778 (remarks of Sen. Johnson). In response, Representative Lawrence stated, "I answer that it is better to invade the judicial power of the state than permit it to invade, strike down and destroy the civil rights of citizens." *Id.* at 1837 (remarks of Rep. Lawrence). Representative Miller, proponent of the bill, moved to amend section 2 and add that state judges acting in accord with state law would be immune from section 2 liability. *Id.* at 1156 (remarks of Rep. Miller). This amendment was not adopted.

[180]*See* CONG. GLOBE, 39th Cong., 1st Sess. 1156 (1866).

[181]*See supra* text accompanying notes 80-97.

[182]Compare the decision in Pierson v. Ray, 386 U.S. 547 (1967), discussed *supra* text accompanying notes 99-112. In *Pierson*, the Court concluded that no legal developments prior to 1871 suggested that anything but absolute immunity was contemplated by the United

section 242.[183] Judicial immunity is no defense to claims brought pursuant to section 242.[184]

Section two of the Civil Rights Act of 1866 did not create a private remedy for individuals whose section one rights were violated.[185] It served, rather, as the predecessor and prototype for section one of the Ku Klux Klan Act.[186] Section 1983 is the civil extension of section two of the Act of 1866[187] and is drafted in substantially the same terms as section two.[188]

Federal civil rights legislation is significantly indebted to the first two sections of the Act of 1866. These sections have, through modification and reenactment, become the backbone of contemporary civil rights law: the fourteenth amendment and sections 1981, 1982, and 1983. Due to its

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States Congress when it enacted section 1983's predecessor in 1871. On the contrary, however, section 2, the prototype for section 1983, demonstrates that Congress, in debate, expressly contemplated the liability of state court judges pursuant to that provision. *See supra* note 179.

[183]18 U.S.C. § 242 (1982) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Section 2 of the Civil Rights Act of 1866, the predecessor of 18 U.S.C. § 242, was held to be constitutionally valid in *Ex Parte* Yarbrough, 110 U.S. 651 (1884), and reaffirmed in Motes v. United States, 178 U.S. 458 (1900). *See also* United States v. Shafer, 384 F. Supp. 483 (D. Ohio 1974) (withstood a vagueness attack). 18 U.S.C. § 242 was adjudicated in Screws v. United States, 325 U.S. 91 (1945).

[184]*See* United States v. Ramey, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965). *But see* United States v. Chalpin, 54 F. Supp. 926 (S.D. Cal. 1944) (§ 242 not applicable to judges acting in their official capacity).

[185]Two congressmen advocated the creation of a civil remedy because that was viewed as potentially more effective in redressing the wrong than the criminal penalty, which did not compensate the victim of the discrimination. Representative Bingham proposed amending section 2 to create a civil cause of action. CONG. GLOBE, 39th Cong., 1st Sess., 1295 (1866) (remarks of Rep. Bingham); *id.* at 1805 (remarks of Sen. Doolittle). Section 242 has been construed to foreclose a private cause of action. *See* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980); Pawelek v. Paramount Studios Corp., 571 F. Supp. 700 (N.D. Ill. 1983); Powell v. Kopman, 511 F. Supp. 700 (S.D. N.Y. 1981). Sections 1981 and 1982, however, derived from section one of the Act of 1866, have been construed to allow for a private damages action in conjunction with section 1983 and 28 U.S.C. §§ 1343 and 1331.

[186]*See Schwartz*, *supra* note 151, at 591.

[187]*See Monroe*, 365 U.S. at 185; CONG. GLOBE, 42nd Cong., 1st Sess., 68 (1871) (remarks of Rep. Shellabarger, House sponsor of the Ku Klux Klan Act of 1871); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last*: Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272 (1969).

[188]See *infra* text accompanying note 229 for the text of section 1 of the Ku Klux Klan Act of 1871, the predecessor of section 1983.

pervasive influence, it is necessary to understand the policies behind the Act of 1866, the issues joined in the congressional debates, and the challenges raised to the Act's passage.

Section three of the Civil Rights Act of 1866, the predecessor to 42 U.S.C. section 1988, provided for enforcement of the first two substantive sections of the Act.[189] Section three began:

> *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this Act. . . .[190]

This is essentially a preamble to the Act's enforcement provisions which declared that the federal courts were the only courts with competency to hear and determine violations of the Civil Rights Act of 1866. Exclusive jurisdiction reflected a fundamental distrust of the state judiciaries; state courts were denied a role in the vindication of rights under the Act.[191]

Although section one of the Act did not create a civil remedy, sections 1981 and 1982,[192] together with 28 U.S.C. sections 1343[193] and 1331[194] have been construed to create a private right of action and civil remedies. Federal jurisdiction in such cases, however, has been held non-exclusive.[195] Jurisdiction over the criminal civil rights provision, section 242, the heir

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[189]Sections 3-10 of the Act of 1866 were enforcement provisions relevant to sections 1 and 2. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1119 (1866) (remarks of Rep. Wilson, House sponsor); *id.* at 1151 (remarks of Rep. Thayer).

[190]Act of 1866, ch. 31 § 3 (1866).

[191]*See supra* note 179.

[192]*See supra* notes 176-77 and accompanying text.

[193]See *supra* note 82 for discussion and text of section 1343. Section 1343 is derived from section 1 of the Ku Klux Klan Act of 1871. *See infra* notes 239-42 and accompanying text.

[194]28 U.S.C. § 1331 (1982) provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Prior to 1980, there was a $10,000 jurisdictional amount required under section 1331. When this was omitted by amendment, federal question jurisdiction formed the basis of many civil rights suits because these *arose* under the laws of the United States. Civil actions pursuant to sections 1981-1983 may, therefore, be brought under section 1331 or section 1343.

[195]For cases concluding that 28 U.S.C. § 1343 does not confer exclusive jurisdiction, see New Times, Inc. v. Arizona Bd. of Regents, 20 Ariz. App. 422, 513 P.2d 960 (1973), *vacated on other grounds*, 110 Ariz. 367, 519 P.2d 169 (1974); Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E.2d 110 (1974); Rzeznik v. Chief of Police of Southhampton, 374 Mass. 475, 373 N.E.2d 1128 (1978); Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978), *cert. denied*, 444 U.S. 831 (1979). For cases concluding that federal jurisdiction conferred by 28 U.S.C. § 1331 or its forerunners is concurrent, see United States v. Sayward, 160 U.S. 493 (1895); League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072 (9th Cir. 1976).

to section two of the Civil Rights Act of 1866, remains exclusively vested in the federal courts.[196]

Section three continued by stating that the district courts had:

> concurrently with the circuit courts of the United States, [jurisdiction over] . . . all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act. . . .[197]

This grant of federal jurisdiction was a very controversial provision. Federal judicial power was previously limited to matters enumerated in article III of the United States Constitution[198] and in the Judiciary Act of 1789.[199] Many congressmen questioned whether Congress had authority to expand federal jurisdiction in this manner.[200] By this provision, section three guaranteed federal court access to persons who were unable in state courts to enforce contracts, inheritances, and land transactions[201] on the same basis as was afforded white persons.

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[196]*See supra* note 183.

[197]Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

[198]U.S. CONST., art. III, §§ 1 and 2 provide:

> 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: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[199]An Act to Establish the Judicial Courts of the United States, ch. 20 (1789).

[200]*See* CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866) (remarks of Sen. Saulsbury). He also challenged jurisdiction because it was exclusive of the state courts. *Id.* at 1680; *see also id.* at 1778 (remarks of Sen. Johnson).

[201]See *supra* text accompanying notes 172-77 for the matters specifically set forth in section 1 of the Act of 1866. Some of these matters were typically covered by state common law while other matters were subject to codification. There was very little debate over the precise operation of section 3 of the Act of 1866. One senator, however, questioned whether section 3 required that the person alleging discriminatory treatment first seek recourse in state court and actually suffer the deprivation of equality or whether disparate treatment at law was sufficient to allow access to federal courts without actual prior recourse to state courts. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1782 (1866) (remarks of Sen. Cowan). Senator Trumbull's comments on this aspect of section 3 indicated his understanding that prior resort to state courts was a prerequisite to the federal suit. *Id.* at 1759 (remarks of Sen. Trumbull). But he was quick to note that Congress also had the power to confer jurisdiction whenever there was a discriminatory state custom or law, without the middle step of state court refusal of remedy. *Id.*

For example, if one man contracted with another to buy some equipment, paid the money agreed upon but was subsequently refused delivery, ordinarily the buyer would have a contract action against the seller. If state law recognized an action in contract to enforce such an agreement among white persons, but denied the same cause of action to a black purchaser, section three of the Act of 1866 allowed this purchaser to bring his contract action in federal court. The disparate treatment of contract rights under state law would constitute a violation of section one of the Act of 1866.

However, if state law did not recognize such an action at all, neither for white nor black purchasers, no federal forum would be available because there would be no unequal treatment violative of section one.[202] Federal action pursuant to this part of section three was triggered if state law applied differently to white and black persons.

The next part of section three contained a further grant of federal jurisdiction:

> [A]nd if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act . . . or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper federal district or circuit court. . . .[203]

Thus, in addition to original jurisdiction, the federal courts had removal jurisdiction pursuant to section three. Removal was available to civil and criminal state court defendants in certain situations.

For example, in the civil context, if a seller failed to deliver goods to a purchaser who subsequently refused payment because of the nondelivery, the purchaser would ordinarily have a defense to an action by the seller for the contract price. If this defense could be pleaded and proved by a white defendant/purchaser but not by a black defendant/purchaser, the latter could remove the civil contract action to federal court because the unequal treatment under state law would violate section one of the Act of 1866. In the criminal context, if a black defendant was prohibited from testifying on his own behalf in a situation where a white defendant would have that right, the criminal action could be removed to federal court by the black defendant.

Removal was also available if a person was prosecuted in state court for enforcing the Act of 1866 or if a state official, on authority of the

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[202] *See supra* text accompanying notes 168-70.

[203] Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

Act of 1866, refused to comply with discriminatory state laws and was subsequently prosecuted for violating state law.[204] Removal ensured that biased state court judges would not dispose of these cases in a manner inconsistent with the Act of 1866. Section three's removal provision has become 28 U.S.C. section 1443.[205] Section 1443(1) expands the availability of removal beyond the Act of 1866 to all cases alleging violations of federal statutes intended to secure equal rights.[206] "Equal rights," as used in section 1443 has, however, been construed narrowly to embrace only cases alleging disparate treatment based on racial discrimination.[207]

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[204]*See* CONG. GLOBE, 39th Cong., 1st Sess. 1266-67, (1866) (remarks of Rep. Raymond); *id.* at 1271 (remarks of Rep. Kerr); *id.* at 598 (remarks of Sen. Davis).

[205]28 U.S.C. § 1443 (1982) provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

[206]*See* City of Greenwood v. Peacock, 384 U.S. 808 (1966) (tacking section 3 of the Civil Rights Act of 1866 to 28 U.S.C. § 1443); Georgia v. Rachel, 384 U.S. 780 (1966) (language of section 3 of Civil Rights Act of 1866 was not intended to limit scope of removal to rights recognized in statutes of the Reconstruction Era, but permitted removal in cases involving rights under both existing and future statutes providing for equal civil rights).

[207]This provision has been construed narrowly to apply only to those actions asserting denial of equal rights based on racial discrimination. *See* Georgia v. Rachel, 384 U.S. 780 (1966); *see also* Louisiana v. Rouselle, 418 F.2d 873 (5th Cir. 1969); Sweeney v. Abramovitz, 449 F. Supp. 213 (D. Conn. 1978) (both holding that section 1983 was only a law providing for equal rights when invoked for purposes of asserting racial equality). Section 1443 is distinguished from 28 U.S.C. § 1441(a) (1982), which allows removal by the defendant, as a matter of right, of any action commenced in state court that could have been brought originally in federal court. 28 U.S.C. § 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Hence, actions brought in state court pursuant to 42 U.S.C. §§ 1981-1983 may be removed by defendants to federal court pursuant to section 1441 because they could have been brought in federal court in the first instance pursuant to 28 U.S.C. §§ 1331 or 1343. Removal pursuant to section 1443 allows removal of claims that could not have been brought originally in federal courts. The latter is premised on the interest in protecting certain defendants from illegal discrimination in administration of state justice. Because the perception is that the gross disparity in judicial process for whites and blacks has been remedied in the state systems since the 1860's, removal pursuant to section 1443 is rare. *See, e.g.*, Johnson v. Mississippi, 421 U.S. 213, 219 (1975); New York v. Jenkins, 422 F. Supp. 412, 415 (S.D.N.Y. 1976).

Removal pursuant to section 1443 is rare since it has been held that express discrimination at state law is a prerequisite to removal. A state defendant must establish express constitutional or statutory racial bias in the state court process, or the actual bias of the judge, for removal to be granted.[208]

Section three of the Civil Rights Act of 1866, therefore, created exclusive jurisdiction in the federal courts over direct violations of the Act and removal jurisdiction when equal justice was unobtainable from the state judicial system. The final part of section three prescribed the manner in which the federal courts were to exercise their jurisdiction:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.[209]

Congress was acutely aware that the Civil Rights Act of 1866 was to have a major effect on the allocation of power, especially judicial power, between the state and federal government.[210] With the creation of federal jurisdiction by section three, the thirty-ninth Congress opened the doors of the federal courthouse to persons adjudicating claims that, but for discriminatory state laws or process would be exclusively within the province of the state judiciary.[211] It created, in effect, federal judicial supervision over state officials and state legal process. To mitigate the inroads on federalism made by these substantive and enforcement provisions of the Act of 1866, the latter part of section three, the predecessor to sec-

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[208]*See* Johnson v. Mississippi, 421 U.S. 213 (1975); Texas v. Gulf Water Benefaction Co., 679 F.2d 85 (5th Cir. 1982); United States *ex rel.* Sullivan v. State, 588 F.2d 579 (8th Cir. 1978); Northside Realty Assocs., Inc. v. Chapman, 411 F. Supp. 1195 (N.D. Ga. 1976); Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971), *aff'd*, 468 F.2d 639 (4th Cir.), *cert. denied*, 411 U.S. 920 (1972).

[209]Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

[210]*See supra* text accompanying notes 169-70 and 179-84.

[211]Matters relevant to contracts, possession of real estate, inheritance, and criminal justice are matters typically within state control.

tion 1988, provided that federal courts could consider state law in their adjudication of these claims.

By its terms, section three of the Act of 1866 required federal courts to exercise their jurisdiction "in conformity with the laws of the United States." However, if such laws were not "suitable" or not "adapted to the object" or if they were "deficient," then the court was to apply the "common law" as modified by the constitution or statutes of the state in which the court was located. Professor Kreimer has argued that the statute's use of the terms "common law" is ambiguous because of the decision of the Supreme Court in *Swift v. Tyson* and its statements regarding the nature of the common law.[212]

Decided in 1842, *Swift* construed the Rules of Decision Act which provided: "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."[213] The issue presented was whether the term "laws" as used in the statute included the decisions of state tribunals. The court held that it did not.

Justice Story explained that the "laws" of the states usually referred to rules and enactments promulgated by legislative authority or to long established local customs having the force of laws. The Court decided that judicial opinions were "at most, only evidence of what the laws are, and are not of themselves laws."[214]

The common law was not the law of a single country or state but of the world. Judges were to ascertain "upon general reasoning and legal analogies" the *true* rule of law which governed the case.[215] Although federal courts were to give "deliberate attention and respect" to the decisions of state tribunals, state decisional law could not "furnish positive rules, or conclusive authority" by which the judgments of federal courts were to be "bound up and governed."[216]

Kreimer argued that the view of the common law expressed in *Swift* should be read into section three of the Act of 1866. He urged that section 1988's predecessor which directed that such courts apply the common law, be read as authorizing federal courts to engage in the creation of federal common law.

An important distinction between section three of the Act of 1866 and the Rules of Decision Act is that the former expressly directed courts to apply the "common law" whereas the latter directed the courts to apply

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[212]Kreimer, *supra* note 16, at 618-21.

[213]*Swift*, 16 Pet. at 18.

[214]*Id.*

[215]*Id.* at 19.

[216]*Id.*

"the laws" of the several states. Section three does not say that the courts were to create common law. The ambiguity in the Rules of Decision Act was whether "laws" included court decisions. It cannot seriously be contested that the term "common law" is imbued with such vagueness.

Erie Railroad Co. v. Tompkins[217] exploded the myth that a universal body of general common law existed and overruled *Swift's* authorization of federal judicial creation of general common law. There were several grounds for reversal. First, the Court in *Erie* reviewed *Swift's* discussion of the Judiciary Act of 1789 and concluded that the construction given it was erroneous.[218] Second, the Court held that *Swift's* construction of the Rules of Decision Act had developed a new "well of uncertainties" and that there was no "satisfactory line of demarcation between the province of general law and that of local law."[219] Third, and most importantly, the Court held:

> And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power upon the federal courts.[220]

Erie did not merely reconsider the view of the common law espoused in *Swift*, it rejected the original validity of *Swift's* observations.[221] *Erie* and the authority cited therein reflect the fact that among judges and academics in the late 1800's and early 1900's no consensus existed with respect to a theory of general common law. The historical sources recited in the immunity cases and the variation among states in the rule of law applied also support the view that state common law judges did not subscribe to a theory of general common law.[222]

It is hard to believe that the congressmen of the Reconstruction Era subscribed to the view that their state court judges did not make law for their respective states. The debates are full of diatribes concerning the perceived impact of the Act of 1866 upon state judges and upon the functioning of state courts.[223] Conversely, there is little, if anything, in the

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[217] 304 U.S. 64 (1938).
[218] *Id.* at 71-74.
[219] *Id.* at 74-75.
[220] *Id.* at 78.
[221] *Id.* at 72-73.
[222] *See supra* text accompanying notes 98-147.
[223] *See supra* note 179.

debates to suggest that these same congressmen were versed in the jurisprudential vagaries of the *Swift v. Tyson* theory of common law.

It is the view of this author that the most plausible reading, and the reading most consistent with the context of the Act and its history, is that section three of the Act of 1866 required federal courts to apply the common law of the state in which they were located. This directive was not unrestricted; state law applied only if it was consistent with the purposes of the Civil Rights Act.

Section one of the Act concerned state laws pertaining to contracts, property, inheritances, etc. These subjects were then and are now largely within the province of common law. One of the possible scenarios for federal court involvement under the Act of 1866 was that a state contract action could be removed to federal court because a black party defendant was denied fair process in state court. The underlying contract action would then proceed in the federal forum. It makes sense that section three of the Act, directing federal courts to apply common law, referred to the common law of the state where the action arose rather than the common law of all states, or federal common law. This construction of section three of the Act of 1866 is necessary to give effect to the obvious spirit of the statute.

Allowing state law to apply where it did not breach the equality rights prescribed by section one created an incentive for the states to eliminate disparate treatment. If discrimination in connection with the substantive issues enumerated in section one were eliminated and if the access to justice concerns of section two could be assuaged, the states could assure that disputes among their citizens would be determined by state tribunals applying state law.

Section three was a compromise. Federal courts were to be resorted to when state law and state courts were inadequate to protect the equal rights of the freed slaves. In the event of federal involvement in civil or criminal disputes arising under state law, federal courts were allowed to utilize state law to the extent it did not abrogate the laws of the United States.[224]

The Act of 1866 established a national minimum of liberty; if state law addressed an issue, it had to do so in a manner which treated freed slaves equally. States were free to go further in the creation and protection of civil rights, but if the minimum of equality prescribed by the Act of 1866 was not achieved, state law and state courts would be bypassed. Where federal jurisdiction was invoked pursuant to the Act, the balance continued to be struck. If federal law was not available, non-discriminatory state law would control and preempt the federal court from exercising common law powers. On one level, national uniformity would be sacrificed in this manner; on another level, however, a national minimum of protection was established and guaranteed by the Civil Rights Act of 1866.

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[224] *See supra* notes 151-52 and accompanying text.

Clearly Congress endeavored to cause a reformation of state judicial process and law, vis-a-vis racial distinctions in criminal, property, inheritance, and contract law.[225] The federalism concerns of the opposition did not go unheeded. Resolution of these competing values was accomplished in section three of the Act of 1866 with its conditions precedent to federal jurisdiction and its prescription for the interplay of state and national law in federal adjudication of claims under the Act.

3. Defining the issues.—Issues raised by the passage and content of the Civil Rights Act of 1866 foreshadowed all subsequent debate regarding the scope of federal civil rights legislation. The issue of federalism and the need to balance national protection of civil rights against preservation of state autonomy was one of the most fundamental concerns debated. The power of Congress to interpose the United States government into the relations between a state and its citizens through the federal judiciary implicated federalism values. The Act of 1866 shared a common conception with all other Reconstruction Era legislation; it was spawned in a whirlwind of conflict over the most basic notions of federal and state power. It became law at a period in United States history where there existed, at all levels of government, vehement disagreement over passionately held attitudes concerning racial equality and individual liberties. At no time since has the legislative branch seemed so sharply or expressly divided on the issue of civil rights.

Few cases have arisen under the Act of 1866, *per se*. Subsequent recodification separated the provisions of the Act so that it now survives as separate parts of United States civil rights legislation.[226] Despite its relative obscurity in the civil rights enforcement scheme today, the Act of 1866 was the predecessor to the most significant components in the civil rights vindication scheme: the fourteenth amendment and section 1983.[227] Enforcement provisions from the Act of 1866, modeled on the Fugitive Slave Act of 1850, were expressly adopted by the forty-second Congress in the passage of the Ku Klux Klan Act.

C. The Ku Klux Klan Act of 1871

Section one of the Ku Klux Klan Act of 1871[228] created a civil remedy for persons deprived of constitutional rights by persons acting under color

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[225] *See* CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (remarks of Sen. Trumbull) ("The bill draws to the federal government no power whatsoever if the states will perform their constitutional obligations"). Representative Wilson stated, "[I]f the states would all observe the rights of our citizens there would be no need of the bill." *Id.* at 1117 (remarks of Rep. Wilson).

[226] *See supra* text accompanying notes 171-224.

[227] While sections 1981 and 1982 are used somewhat regularly, the lion's share of civil rights cases arises under section 1983 and the fourteenth amendment.

[228] An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes. ch. 22, 17 Stat. 13 (1871).

of state law. It was expressly linked to the Civil Rights Act of 1866. The predecessor to section 1983 provided:

> That any person who, under color of state law, statute, ordinance or 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, 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, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the Act of the ninth of April, eighteen hundred and sixty-six, entitled "An Act to protect all persons in the United States in their civil rights and to further the means of their vindication;"* and other remedial laws of the United States which are in their nature applicable in such cases.[229]

The Ku Klux Klan Act, section one, first provided that a private civil action could be brought against any person whose conduct, under color of state law, violated the Constitution of the United States. This portion of section one is currently codified at 42 U.S.C. section 1983.[230] As originally enacted it applied only to conduct under color of state law which caused the plaintiff to suffer a constitutional deprivation.[231] Subsequently, section 1983's language was changed, and conduct resulting in the deprivation of rights secured by either the Constitution *or laws* of the United States is now actionable pursuant to section 1983.[232]

Like section one of the Act of 1866, the Ku Klux Klan Act expressly declared that state law, custom or practice which was contrary to the civil rights act was to be ignored.[233] The Act of 1871 accomplishes this in substantially the same language as the Act of 1866. The forty-second Congress created a civil remedy by borrowing the language employed by the thirty-ninth Congress in the latter's enactment of section two of the Act of 1866.[234] The remedy provided for in the Act of 1866, however, was

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[229]*Id.* at § 1 (emphasis added).

[230]See *supra* text accompanying note 5 for the text of 42 U.S.C. § 1983.

[231]Primarily a deprivation under the thirteenth, fourteenth, and fifteenth amendments to the Constitution.

[232]See Maine v. Thiboutot, 448 U.S. 1 (1980), for a discussion of the "and laws" addition to the text of § 1983.

[233]See *supra* text accompanying note 172 for text of section 1 of the Civil Rights Act of 1866.

[234]See *supra* text accompanying note 178 for text of section 2 of the Civil Rights Act of 1866.

only criminal in nature and was available only to redress violations of the 1866 Act's section one right to equal treatment.

In the interim between 1866 and 1871, the fourteenth amendment was ratified.[235] The Act of 1871 was broader than its predecessor; like the Act of 1866, it conferred a remedy for violation of equal protection at state law, but further provided a remedy for violation of the right to due process conferred by the fourteenth amendment. Unlike its predecessor, the Act of 1871 did not contend with fierce opposition based on the constitutional authority for the exercise of congressional power.[236] Acting pursuant to section five of the recently ratified fourteenth amendment, Congress clearly had constitutional authority to enact section one of the Ku Klux Klan Act.[237] The Act of 1871 did, however, meet opposition based on arguments similar to those which had been raised in the debates over the Civil Rights Act of 1866.[238]

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[235]U.S. CONST., amend. XIV §§ 1 and 5 provide:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The equal protection clause of the fourteenth amendment is not restricted to equal treatment among races as was section one of the Act of 1866. Hence violations of equal protection based on classifications unrelated to race are actionable through section 1983. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (gender-based classifications violate the fourteenth amendment unless shown to serve an important governmental purpose and to be related substantially to achievement of those objectives); Graham v. Richardson, 403 U.S. 365 (1971) (welfare benefits and aliens). Actions pursuant to section 1 of the Act of 1866's successors, 42 U.S.C. §§ 1981 and 1982, must be premised on racial classifications. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white person may maintain an action under § 1981 based on racial discrimination); Runyon v. McCrary, 427 U.S. 160 (1976) (crucial factor in a § 1981 case is racial discrimination); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (section 1982 bars discrimination in housing only in forms of racial discrimination); Olivares v. Martin, 555 F.2d 1192 (5th Cir. 1977) (race must be a factor in discrimination actionable under § 1981). To the extent, however, that sections 1981 and 1982 reach private conduct as well as conduct under color of state law, they provide a broader remedy than section 1983. *See Runyon*, 427 U.S. at 170; Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 435 (1973); *Jones*, 392 U.S. at 425-26.

[236]See *supra* text accompanying notes 164-70 for questioning of constitutional authority surrounding the passage of the Civil Rights Act of 1866.

[237]*See* Quern v. Jordan, 440 U.S. 332, 351 n.3 (1979) (Brennan, J., concurring); Mitchum v. Foster, 407 U.S. 225, 239-40 (1972); Gressman, *supra* note 13, at 1328-29, 1333.

[238]*See supra* note 170.

Section one of the Ku Klux Klan Act granted original jurisdiction to the federal courts. Jurisdiction thereby conferred was expressly subject to the provisions of the Civil Rights Act of 1866.[239] Today this grant of jurisdiction is codified at 28 U.S.C. section 1343.[240] Section 1343 does not contain the original reference to the Act of 1866, but such reference is now unnecessary due to the way in which the 1866 Act has been recodified in title 42. Section three of the Act of 1866—directly related to the exercise of federal judicial power in civil rights cases—has been recodified at 42 U.S.C. section 1988 and is expressly applicable to all civil rights statutes.[241] By its terms, section 1988 applies to "jurisdiction in civil and criminal matters conferred on the district courts by provisions of . . . the Title 'CIVIL RIGHTS,' and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights and for their vindication."[242] Section 1983 is, therefore, subject to the requirements of section 1988.

The next section of this article will discuss the use that the Supreme Court has made of section 1988. Section 1988 has been applied in only a few situations and the doctrine which has been generated is largely consistent with the use of that statute proposed in this article.

V. Section 1988—Precedent

The Supreme Court has applied section 1988 as a source of law in civil rights actions arising under 42 U.S.C. sections 1981,[243] 1982,[244] and 1983.[245] However, the cases in which the Court has referred to section 1988 have typically involved rather narrow questions, such as the applicable statute of limitations, measure of damages, suspension and tolling of the statute of limitations, and survivorship of the cause of action.[246] Section 1988 has been "triggered" upon the conclusion that a particular civil rights provision did not address the issue at hand. The Court has not, however, consistently applied section 1988 nor has it clearly established guidelines

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[239]*See supra* text accompanying note 229.

[240]See *supra* note 82 for text of 28 U.S.C. § 1343.

[241]See *supra* note 152 for the text of § 1988. Professor Eisenberg viewed section 1988 as applicable to federal civil rights actions only in cases removed from state court to federal court. *See* Eisenberg, *supra* note 17, at 533-35. The language of section 1988 is not so limited. Also, it is the position of this author that section 1988 represents a compromise in the struggle between state and federal power. *See infra* text accompanying notes 209-14. Thus, consideration of state law enhances and preserves the restructured federalism of the post-Civil War era.

[242]42 U.S.C. § 1988 (1982).

[243]*See supra* note 176.

[244]*See supra* note 177.

[245]*See supra* text accompanying note 5.

[246]*See infra* text accompanying notes 247-309.

for determining when the civil rights provisions are deficient. Cases which have utilized section 1988 illustrate this point.

This discussion of section 1988 precedent is intended to demonstrate that the Court has not entirely ignored section 1988 in its decisions under the Civil Rights Acts, notably section 1983. When it has utilized the statute, its application has typically been consistent with the method of application proposed in this article.

A. Statute of Limitations Cases

In *Board of Regents v. Tomanio*,[247] Justice Rehnquist's majority opinion on behalf of six Justices concluded that pursuant to section 1988, federal courts were bound to apply state statutes of limitations when federal law provided no rule of decision for actions under section 1983.[248] Relying on *Johnson v. Railway Express*[249] and *Robertson v. Wegmann*,[250] the Court held, "In 42 U.S.C. Sec. 1988 . . . Congress quite clearly instructs [federal courts] to refer to state statutes when federal law provides no rule of decision for actions brought under section 1983."[251] The Court also concluded that state tolling provisions were applicable.[252]

Only if state law was not consistent with federal law would the majority hold state law inapplicable.[253] Justice Rehnquist concluded that the New York rule against tolling was not inconsistent with the purposes of section 1983[254] because section 1983 claims were *per se* separate and independent of state law claims.[255] The majority opinion rejected balancing

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[247]446 U.S. 478 (1980).

[248]*Id.* at 483-86.

[249]421 U.S. 454 (1975). In *Johnson*, the Supreme Court concluded that filing a Title VII claim with the Equal Employment Opportunity Commission did not toll the running of the statute of limitations relevant to petitioners section 1981 claim. The Court summarily concluded that Tennessee law supplied the statute of limitations for section 1981. The issue then became whether this statute was tolled because Tennessee law provided no extension of time in similar circumstances. The Court concluded that the statute was not tolled and that petitioner's section 1981 claim was time barred. The Court cited section 1988 to support its contention that state law fully determined the matter. No consideration was given to whether state law was compatible with the policies of section 1981.

[250]436 U.S. 584 (1978).

[251]*Tomanio*, 446 U.S. at 484 (quoting Robertson v. Wegmann, 436 U.S. 584 (1978)).

[252]*Id.* at 485-86.

[253]*Id.* at 486.

[254]*Id.* at 491.

[255]Petitioner had first brought an action in state court based on state law challenging the respondent's refusal to grant petitioner a license to practice chiropratic medicine. When the state suit was concluded against petitioner, she brought a section 1983 claim in federal court. She argued therein that the pendency of her state proceedings tolled the running of any applicable statute of limitations. The separate and independent status of section 1983 claims has been substantially eroded in recent preclusion decisions of the Burger Court. Although the Court avoided the *res judicata* issue in *Tomanio*, it has since held that section

the purposes of section 1983 against the purposes of repose embodied in statutes of limitations, refusing to find that a section 1983 plaintiff could reject a state statute as inconsistent with section 1983 merely because a federal, common law rule would be more permissive. Justice Rehnquist stated, "If success of the section 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant."[256]

Justice Brennan, joined by Justice Marshall, dissented. He concluded that the New York provision was inconsistent with section 1983's purpose to provide a federal forum to section 1983 litigants.[257] The majority had not focused on this purpose of section 1983 in its determination that the New York statute was consistent with the federal civil rights provision.

In *Chardon v. Juan Fumero Soto*,[258] the Court held, pursuant to Puerto Rican law, that a plaintiff's section 1983 claim did not lapse during the pendency of an attempted federal class action. Puerto Rican law stated that the statute of limitations began to run anew following denial of class certification. Justice Stevens wrote for a majority of six and concluded that, in accord with *Tomanio*, section 1988 required the application of local law concerning the tolling of the statute of limitations.

Justice Rehnquist dissented. On behalf of three Justices, he argued that section 1988 first required recourse to applicable federal law that was "adapted to the object."[259] Tolling of the statute of limitations pending class certification under rule 23 of the Federal Rules of Civil Procedure had been discussed in a federal antitrust case.[260] The dissent argued that in *American Pipe v. Utah*,[261] the Court fashioned a tolling doctrine from

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1983 claims similar procedurally to the one at issue in *Tomanio* are barred by claim preclusion from being brought in federal court proceedings subsequent to a state court action. *See* Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980); *see also* Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59 (1984).

[256] *Tomanio*, 446 U.S. at 488 (quoting Robertson v. Wegmann, 436 U.S. 584 (1978)).

[257] *Id.* at 497 (Brennan, J., dissenting). The primacy of section 1983's purpose to provide a federal forum would, for the dissent, likewise justify the rejection of New York rules of *res judicata* which would bar a subsequent section 1983 action in federal court. This argument was rejected in *Migra*, 465 U.S. 75. The Supreme Court held recently that the purposes underlying a federal statute may very well result in the federal court refusing to give the same preclusion effect to a state court judgment as would the rendering state where the state preclusion rules would deny the litigation of the claim. *See* Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985). The Court therein rejected the possibility of a federal court ever according greater preclusive effect to a state court judgment than would the rendering state. *Id.* at 1333 n.3-1334.

[258] 462 U.S. 650 (1982).

[259] *Id.* at 663 (Rehnquist, J., dissenting).

[260] *Id.* at 663-64 (Rehnquist, J., dissenting).

[261] 414 U.S. 538 (1974).

rule 23 which prescribed that statutes of limitation were to be suspended during the pendency of class certification; when certification was denied the statute of limitations resumed running where it left off.[262]

Justice Rehnquist understood section 1988 first to require recourse to federal law which, apparently, included federal decisional law.[263] The majority agreed that section 1988 first required recourse to federal law.[264] Although Justice Stevens did not argue the applicability of decisional law, he construed the federal case law narrowly, and concluded that it did not supply a rule of law for section 1983.[265] Finding no applicable federal law, Justice Stevens considered state law pursuant to section 1988 and *Tomanio*.[266] Neither the majority nor the dissent discussed whether non-civil rights federal case law could supply applicable federal law pursuant to section 1988's initial inquiry. The majority, however, demonstrated a disinclination to apply decisional law that did not expressly relate to civil rights. The dissent would have been more liberal and would have applied roughly analogous decisional law.

Two recent decisions shed further light on section 1988. In *Burnett v. Grattan*,[267] the Court affirmed its general approach to statute of limitations problems in section 1983 cases.[268] The Court also discussed, for the first time, section 1988's proscription against application of state law found to be inconsistent with the purposes and policies of section 1988.

Emphasizing the uniqueness of section 1983 actions, the majority stated, through Justice Marshall, "A state law is not 'appropriate' if it fails to take into account particularities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Act."[269] Because section 1983 provided an independent remedy, a Maryland statute of limitations requiring prior administrative proceedings was held to be in-

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[262]*Chardon*, 462 U.S. at 665 (Rehnquist, J., dissenting).

[263]*Id.* at 663 (Rehnquist, J., dissenting).

[264]*Id.* at 657.

[265]*Id.* The distinction was critical. If the law of the federal decision applied, then the section 1983 plaintiffs were time-barred from bringing suit. Pursuant to Puerto Rico's rule that the statute began to run anew, the respondents were not time-barred.

[266]*Id.* at 656-57.

[267]104 S. Ct. 2924 (1984).

[268]*Id.* at 2929-30. The Court affirmed its general approach to statute of limitations problems in section 1983 cases. However, the majority held that the district court had improperly borrowed a state statute of limitations which required recourse to administrative proceedings. The Court characterized section 1988 as mandating a three-step approach: first, consideration of whether United States law was responsive to the issue; second, whether state statutory and common law was applicable if there was no appropriate federal law; and third, utilization of a state law unless it was inconsistent with the Constitution and laws of the United States. *Id.* at 2928-29.

[269]*Id.* at 2930.

consistent with section 1983 and, therefore, inapplicable pursuant to section 1988.[270]

In *Wilson v. Garcia*,[271] the Supreme Court affirmed that state statutes of limitations govern section 1983 cases pursuant to section 1988. It found, however, as a matter of federal law, that section 1983 was to be uniformly characterized as a personal injury remedy.[272] The Court criticized the myriad characterizations of section 1983 actions which had evolved in different opinions attempting to determine, in various circumstances, which state statute of limitations was most closely analogous. The Court noted that in any given litigation a section 1983 cause of action is potentially subject to three or more different limitations periods depending on how the conduct alleged or the cause of action was characterized.[273] Relying on the history of section 1983,[274] the Court declared, as a matter of statutory interpretation, that section 1983 was primarily intended to redress personal injury. Although this construction of section 1983 was hardly dictated by the statute's history,[275] *Garcia* does not undermine *Tomanio's* conclusion that state statutes of limitations apply. The result of *Garcia* is merely that a state's statute of limitations for personal injury actions will be the relevant statute.[276]

The Supreme Court has definitively concluded that section 1983 is subject to section 1988 and that section 1983 is deficient in not providing for a statute of limitations. Following *Garcia*, all section 1983 suits should be subject to the state's personal injury statute of limitations. However, recent case law reveals that *Garcia* may not be able to meet the task of establishing reasonable certainty in the determination of applicable statutes of limitations. Unless the state statute of limitation is inconsistent with the purposes of section 1983, it must be applied.[277]

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[270]*Id.* at 2931. Justice Rehnquist concurred, but he based his opinion on the belief that the Maryland legislature had not intended that the contested statute of limitations be applicable to section 1983 actions. *Id.* at 2936 (Rehnquist, J., concurring). He would measure the consistency of the state statute of limitations with section 1983 by looking at the intent of the state legislature. Where the legislature intended the statute to apply to civil rights cases, it would be presumptively valid. *Id.* at 2935 (Rehnquist, J., concurring). Further, Justice Rehnquist stated that it was improper for the Court to value the policies of section 1983 higher than the values of repose underlying statutes of limitations. *Id.* (Rehnquist, J., concurring).

[271]105 S. Ct. 1938 (1985).

[272]*Id.* at 1948.

[273]*Id.* at 1948-49.

[274]*Id.* at 1947-48.

[275]*Id.* at 1948. In this regard the decision was similar to the immunity cases. *See supra* text accompanying notes 98-148.

[276]*Id.* at 1949.

[277]Courts have infrequently concluded that the most analogous state statute of limitations was inconsistent with the purposes of section 1983. *See, e.g.*, Childers v. Independent School

B. Computation of Damages Cases

In *Jones v. Mayer*,[278] the Supreme Court implied a private cause of action from 42 U.S.C. section 1982 to redress private racial discrimination in housing.[279] A question left open in *Mayer* was what damages, if any, were appropriate to redress violations of section 1982.[280] The Court answered this in *Sullivan v. Little Hunting Park*,[281] where a majority of the Justices turned to section 1988 for an answer. Maintaining that section 1343 created federal jurisdiction over the section 1982 cause of action,[282] the Court held that "the existence of a statutory right implies the existence of all necessary and appropriate remedies."[283] Then, without elaboration and relying on only one federal court of appeals case, the Court stated, "Compensatory damages for deprivations of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. section 1988."[284] Although the Court did not explore the issue of damages further, Justice Douglas' majority opinion maintained that, pursuant to section 1988, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."[285]

Dist. No. 1 of Bryan County, 676 F.2d 1338 (10th Cir. 1982) (six-month statute of limitations for administrative filing of claims pursuant to state tort claims act was inconsistent with § 1983). *But see* Osgood v. District of Columbia, 567 F. Supp. 1026 (D.D.C. 1983); Stewart v. City of Northport, 425 So. 2d 1119 (Ala. 1983) (both holding a six-month statute of limitations barred a § 1983 claim).

[278]392 U.S. 409 (1968).

[279]The majority, in an opinion by Justice Stewart, concluded on the basis of section 1982's "plain and unambiguous terms" that private discrimination was reached by former section 1 of the Civil Rights Act of 1866. *Id.* at 420. Legislative history was cited by the majority to support this construction of section 1982. *Id.* at 422-37. Further, the Court concluded that Congress did indeed have power pursuant to the thirteenth amendment to enact such legislation. *Id.* at 444. Because the Supreme Court reversed a lower court order of dismissal, it did not have to address the question of what damages would be available under this section 1982 action. The construction of section 1982 espoused in *Jones* does not accord with the legislative history of section 1 of the Civil Rights Act of 1866. *See supra* text accompanying notes 171-224. The express language of section 1982 also does not create a private cause of action. In the context of the Civil Rights Act of 1866, section 1982's predecessor was enforceable only through the criminal remedy and only against public persons versus private actors. "[T]he language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable." *Jones*, 392 U.S. at 473 (Harlan, J., dissenting). *But see* Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274 (1967).

[280]*Jones*, 392 U.S. at 414-15.

[281]396 U.S. 229 (1969).

[282]*Id.* at 238.

[283]*Id.* at 239.

[284]*Id.*

[285]*Id.* at 240.

In *Carey v. Piphus*,[286] Justice Powell, for a majority of seven, concluded that section 1983 damages should be compensatory in nature. The majority stated that without a compensatory theory of section 1983 relief, the purposes of section 1983 would be defeated.[287] The "initial inquiry" in computing such damages was the common law of torts, and where such common law was inappropriate, the Court held it must adapt the common law rule[288] by tailoring it to suit the purposes of section 1983.[289] Section 1988 was viewed by the Court as authorizing federal courts to consider state common law.[290]

Together, *Carey* and *Sullivan* express the rule that compensatory damages are available under section 1983 and that they are to be computed pursuant to federal or state law, including state common law, whichever better serves the purposes of section 1983.[291] Further, if state common law does not provide suitable relief, then the federal courts are to fashion a suitable federal common law rule of damages. The authority for these rules of section 1983 jurisprudence is section 1988.[292]

The *Sullivan* approach to the computation of damages in section 1983 cases is result oriented. The theory appears to be that for the plaintiff,

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[286] 435 U.S. 247 (1978).

[287] *Id.* at 258. This conclusion was premised on the belief that Congress must have known about the compensatory nature of damages when it enacted section 1983, *id.* at 255; as well as on the Court's belief that such damages would further the purpose of section 1983 to deter violations of civil rights. *Id.* at 256.

[288] *Id.* at 258.

[289] *Id.* at 258-59. This process of considering and then rejecting the common law because such would not fulfill the purposes of section 1983 is the same methodology employed, tacitly, in the immunity cases. *See supra* text accompanying notes 98-148; *see also* Smith v. Wade, 461 U.S. 30, 34 (1983):

> We noted in *Carey* that there was little in the section's legislative history concerning the damages recoverable for this tort liability. . . . In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute. . . . We have done the same in other contexts arising under § 1983, especially the recurring problem of common-law immunities.

[290] *Carey*, 435 U.S. at 258 n.13.

[291] Although *Sullivan* arose in the context of section 1982, the Court's holding that compensatory damages were to be computed through section 1988's application of state or federal law, whichever better fulfills the purposes of the civil rights legislation, has been relied upon in the context of section 1983. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1234 (7th Cir. 1984); McFadden v. Sanchez, 710 F.2d 907, 913 (2nd Cir.), *cert. denied*, 464 U.S. 961 (1983); Dobson v. Camden, 705 F.2d 759, 764 (5th Cir. 1983); Garrick v. City and County of Denver, 652 F.2d 969, 971 (10th Cir. 1981); Williams v. United States, 353 F. Supp. 1226, 1232 (E.D. La. 1973).

[292] *See* Monell v. Department of Social Services, 436 U.S. 658, 701 n.66 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 231 (1978) (Brennan, J., concurring in part and dissenting in part); Monroe v. Pape, 365 U.S. 167, 251-52 n.79 (1961) (Frankfurter, J., dissenting).

"more is better," and since section 1983 is a plaintiff's remedial provision, its purposes are better served by awarding the greatest possible measure of damages. Clearly, this use of section 1988 is inconsistent with its use in the statute of limitations cases. As has been demonstrated in those decisions, the outcome of the application of differing statutes of limitations was not a legitimate basis for courts to choose between state and federal law.

As a matter of construction and application of section 1988, the damages cases are an aberration. The systemic development of section 1988 doctrine in the statute of limitations cases is a more legitimate guide to a correct use of section 1988. The cases determining whether section 1983 suits survive the death of the plaintiff are consistent with the statute of limitations cases.

C. Survival of Section 1983 Actions

The Supreme Court, in *Robertson v. Wegmann*,[293] concluded that section 1983 and other federal law were deficient in providing for whether section 1983 claims survived the death of the injured party, thus triggering an inquiry into state law pursuant to section 1988.[294] The lower court had rejected a Louisiana survivorship statute and had instead created a common law rule that section 1983 claims survived in favor of a decedent's personal representative.[295]

The Supreme Court reversed. Instead of fashioning a federal common law rule, the Court considered the applicability of Louisiana law. It held that Louisiana law was to be applied unless it was inconsistent with section 1983:

> Despite the broad sweep of section 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship. The policies underlying section 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law. . . . No claim is made here that Louisiana's survivorship laws are in general inconsistent with these policies, and indeed most Louisiana actions survive the plaintiff's death.[296]

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[293] 436 U.S. 584 (1978).

[294] *Id.* at 588.

[295] *Id.*

[296] *Id.* at 590-91. Louisiana had codified its survival law, which granted survival in favor of a spouse, children, parents or siblings. This was a statutory modification of the common law rule of no survivorship. Thus, this case fell squarely within the language of section 1988. Since the decedent had no relatives with the statutory relationship, the section 1983 claim

The majority noted in *Robertson* that the use of the term "common law" was ambiguous in section 1988: "[The] reference to 'the common law' might be interpreted as a reference to the decisional law of the forum State, or as a reference to the kind of general common law that was part of our federal jurisprudence by the time of section 1988's passage in 1866."[297] The Court referred to *Swift v. Tyson*[298] for the understanding of common law in 1866. Because the Louisiana law at issue was statutory in nature, however, the Court in *Robertson* did not have to determine whether section 1988 extended to state common law.

The Court's consideration of Louisiana law, and whether it was consistent with section 1983, turned on the general application of the state law and not on the outcome of a specific case in which it might be applied.[299] Rejecting an argument that national uniformity was required, the Court stated:

> [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which section 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.[300]

National uniformity was trumped by the command of section 1988.[301]

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would have abated if state law controlled. Section 1988 provides in relevant part that "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held" governs where it is not inconsistent with section 1983. *See also* Theis, Shaw v. Garrison: *Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976).

[297] *Id.* at 589-90 n.5.

[298] 41 U.S. (16 Pet.) 1 (1842). *See supra* note 60.

[299] "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson*, 486 U.S. at 593. As in *Tomanio*, the Court rejected a *Sullivan*-like construction of section 1988 which would have allowed a plaintiff to choose the more favorable of state or federal law. "If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." *Id.*

[300] *Id.* at 593-94 n.11.

[301] Justice Blackmun dissented with Justices Brennan and White. The dissent took exception to the majority's starting point — that section 1983 and federal law were deficient. *Id.* at 595 (Blackmun, J., dissenting). Rather than conclude that federal law was not "adapted to the object," the dissent would have found a federal rule through the interplay of section 1983 and federal doctrine. Justice Blackmun noted that in *Sullivan*, the section 1983 plaintiff had a choice between state and federal law, depending on which better served the plaintiff's needs. *Id.* at 596-97 (Blackmun, J., dissenting). Although there was no civil rights case on point, the dissent would have found that section 1983 was not deficient due to the ability to derive a rule from its policies, i.e. the creation of federal common law. Justice Blackmun also

After *Robertson*, the Court decided *Carlson v. Green*.[302] *Carlson* was a *Bivens* action[303] in which the question of survivorship of a fourth amendment claim against a federal official arose. Justice Brennan's majority opinion concluded that uniformity was an overriding concern in that case.[304] Further, he concluded that section 1988 did not apply and that there was no interest in applying state law in a federal action against federal officials.[305] The majority fashioned a uniform rule that *Bivens* actions absolutely survived.

Both Justice Powell concurring and Justice Rehnquist dissenting would have applied section 1988 and its directive to apply state law.[306] Justice Powell thought it unseemly that federal and state officials were covered by different rules of liability.[307] Justice Rehnquist rejected uniformity as being a compelling reason for not following *Robertson*. He viewed section 1988 as accommodating federalism values by allowing federal courts to defer to state rules.[308]

This precedent established that section 1988 directs courts to apply state survivorship laws to section 1983 actions against persons acting under color of state law.[309] Only when such state law is inconsistent with section 1983 may it be rejected.

D. Summary: Section 1988 Precedent

The Supreme Court has recognized section 1988 provides a guide to sources of law in section 1983 cases and in suits involving other civil rights statutes. Section 1988 is triggered by a determination that section 1983 is deficient—that section 1983 does not sufficiently prescribe the rule of

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advocated a lesser standard establishing inconsistency with section 1983 and allowing more frequent rejection of state law in cases where section 1988 applied. *Id.* at 596 (Blackmun, J., dissenting). Further he would have limited operation of section 1988 to matters of procedure and remedy only. *Id.* (Blackmun, J., dissenting).

[302]446 U.S. 14 (1980).

[303]A *Bivens* action refers to claims asserted against federal officials by implying a cause of action from the Constitution itself. Because section 1983 reaches only action under color of *state* law, claims against federal officials cannot be asserted under section 1983. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[304]*Carlson*, 446 U.S. at 24.

[305]*Id.* at 24 n.11.

[306]*Id.* at 29 (Powell, J., concurring); *id.* at 48 (Rehnquist, J., dissenting).

[307]*Id.* at 30 (Powell, J., concurring).

[308]*Id.* at 48, 50 n.16 (Rehnquist, J., dissenting).

[309]The Court has left open the possibility that a state law that does not allow survival or that abates actions wherein the decedent died as a result of the alleged civil rights deprivation may be inconsistent with section 1983. *See Robertson*, 436 U.S. at 594. *But see* Black v. Cook, 444 F. Supp. 61 (W.D. Okla. 1977) (a § 1983 suit based on plaintiffs' minor son's death from injuries sustained in a beating while incarcerated in county jail which was dismissed pursuant to state law governing abatement of actions).

law for the case at bar.[310] The courts are not free, in the first instance, to fashion common law rules to fill in the gaps of section 1983. After considering other federal law, they must look to state law. State law is applied unless it is inconsistent with the purposes of the civil rights act in issue.[311] If there is no applicable state law, then the courts may fashion a federal rule based on the purposes of section 1983. Lower courts generally follow this section 1988 analysis.[312]

Confusion remains, however, regarding when section 1988 is triggered—that is, when section 1983 is deficient—and there are no clear standards to govern a determination of whether state law is consistent with the purposes and policies of section 1983. These issues will be discussed in the next part of this article.

VI. Proposed Application of Section 1988 to the Construction of Section 1983

Section 1983 is not a comprehensive statutory provision, and it provides for few contingencies in its enforcement. Rather, it is a very general expression of a fundamental proposition—the deprivation of civil rights under color of state law will not be tolerated and may be redressed by private, civil actions for damages and equitable relief. Because it does not provide a cohesive scheme for enforcement or execution of the private remedy created, difficult problems of construction and interpretation plague section 1983, often impairing its efficacy as a vehicle for the vindication of civil rights.[313]

The use of section 1988 will not cure all problems inherent in section 1983 construction. Section 1988 nevertheless provides a very pragmatic, procedural approach to the resolution of some issues. It mandates a structure for the construction of section 1983 and establishes some basic guidelines for its application.[314] Analysis under section 1988 improves on

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[310]This determination is the key distinction between the immunity cases and statute of limitations cases. In the immunity cases, the Court *de facto* concluded that section 1983 and federal law were not deficient by drawing from history and fashioning doctrines in accord with the perceived purposes of section 1983. *See supra* text accompanying notes 98-148. By not recognizing that section 1983 and federal law were deficient in the immunity cases, the Court avoided operation of section 1988.

[311]This article argues that both state common law and statutory law are to be considered pursuant to section 1988. *See supra* text accompanying notes 219-22.

[312]*See* Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984); McFadden v. Sanchez, 710 F.2d 907 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983); Guyton v. Phillips, 532 F. Supp. 1154 (N.D. Cal. 1981). These cases all refer to, but decline to follow, Professor Eisenberg's restricted use of section 1988.

[313]Section 1983 suits can become bogged down in collateral litigation. Wilson v. Garcia, 105 S. Ct. 1938, 1945 (1985).

[314]Section 1988 also operates in the context of sections 1981 and 1982. For the purposes of this article, section 1988 will only be discussed vis-a-vis its application to section 1983.

the *ad hoc* application section 1983 typified in the immunity cases. As an express congressional command, section 1988 fully justifies consideration of developments in common law after 1871, an issue which has polarized the Court in some section 1983 decisions.[315] Further, section 1988 requires that almost absolute primacy be accorded the basic purposes of section 1983, clearly protecting those purposes from random infringement and erosion by competing policy considerations.[316]

Section 1988 analysis consists of discrete inquiries that are undertaken in serial order: (a) determination of whether or not section 1983 is deficient; (b) determination of whether or not there is any other applicable federal law; (c) examination of state law if other federal law is deficient; (d) application of state law if it is not inconsistent with the purposes of section 1983; and (e) if both federal and state law are inadequate to fill the interstices of section 1983 then the Court may exercise common law powers and fashion a federal rule. The remainder of this article will discuss each of the above steps as they relate to the proposal for a more active role for section 1988 in section 1983 adjudication.

A. Determining the Deficiency of Section 1983

1. Avoidance of the Issue.—The immunity cases present a classic study of heroic attempts by the Supreme Court to find that section 1983 is responsive to many issues which in fact were not addressed in its text or history. Although section 1983's language and legislative history contain no express statements regarding the immunity of governmental officials and in fact indicate a strong presumption that such persons are liable, the Court has purported to find that the section provides for an elaborate scheme of immunity defenses. However, to achieve this the Court has had to consider subsequent developments of policy and law in fashioning a doctrine of immunities for section 1983.[317]

In a non-immunity case, the Court has recognized that a strictly historical approach has not been taken in its decisions:

> [I]n constructing immunities under section 1983, the Court has consistently relied on federal common-law rules. . . . [I]n attributing immunity to prosecutors, *Imbler v. Pactman* . . . to judges, *Pierson v. Ray* . . . ; and to other officials, matters on which the language of section 1983 is silent, we have not felt bound by the tort immunities recognized in the particular forum State and, only after finding an "inconsistency" with federal standards, then considered a uniform federal rule. Instead, the im-

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[315]See *infra* text accompanying notes 353-62 for discussion of Smith v. Wade, 461 U.S. 30 (1983).

[316]*See infra* text accompanying notes 343 and 367-70.

[317]*See supra* text accompanying notes 99-148.

> munities have been fashioned in light of historic common-law concerns and the policies of the Civil Rights Acts.[318]

The Court has exercised federal common law powers to fashion federal immunities. Although state law frequently informed this exercise of judicial lawmaking, it did not receive the deference it would have commanded under section 1988. The purposes of section 1983 were not weighed against countervailing policies in the manner required by section 1988.

In the immunity cases, the Court engaged in a process of construing section 1983 which expressly relied on its language, which was largely uninfluential,[319] and on its history. Other section 1983 decisions have been rendered on a similar basis.[320] By relying on history,[321] and supplementing it with subsequent developments in law and policy, the Court has effectively concluded that the statute is not deficient and that Congress, in section 1983's one hundred seven words,[322] addressed the questions of executive, prosecutorial, judicial, legislative, police officer, prison guard, school board, municipal and county immunity;[323] whether or not state court actions could be stayed pending federal section 1983 actions;[324] the relationship of section 1983 to habeas corpus;[325] stay of federal court proceedings;[326] nature of damages available under section 1983;[327] the relationship of section 1983 to the eleventh amendment;[328] and the applicability of res judicata and collateral estoppel to section 1983 suits.[329]

Realistically, the forty-second Congress in passing the Ku Klux Klan Act in 1871 did not provide for all these matters in section 1983. Although the Court appears to have conceded as much by considering post-1871 common law and policy developments and by exercising of common law

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[318]Robertson v. Wegmann, 436 U.S. 584, 597 (1978) (Blackmun, J., dissenting) (citations omitted). For a similar acknowledgment by the Supreme Court, see Carey v. Piphus, 435 U.S. 247, 258 n.13 (1978).

[319]*See supra* text accompanying notes 40-43.

[320]*See, e.g.*, Wilson v. Garcia, 105 S. Ct. 1938 (1985); *see also infra* text accompanying notes 320-29.

[321]*See supra* text accompanying notes 44-79.

[322]See *supra* text accompanying note 5 for text of section 1983.

[323]See *supra* text accompanying notes 99-148 for discussion of immunity cases; *see also* Moore v. County of Alameda, 411 U.S. 693 (1973) (county liability) and discussion of municipal liability in *Monell* and *Monroe, supra* text accompanying notes 20-37 and 51-68.

[324]*See* Mitchum v. Foster, 407 U.S. 225 (1972).

[325]*See* Prieser v. Rodriguez, 411 U.S. 475 (1973).

[326]*See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941).

[327]*Carey*, 435 U.S. 247.

[328]Quern v. Jordan, 440 U.S. 332 (1979).

[329]Migra v. Warren City School Dist. Bd. Of Education, 465 U.S. 75 (1984); Haring v. Prosise, 462 U.S. 306 (1983); Allen v. McCurry, 449 U.S 90 (1980).

powers,[330] it has not made an express determination of deficiency. Thus, section 1988 has been avoided.

It is abundantly clear that section 1983 is deficient as to most of the foregoing issues. The crux of the section 1988 problem is: in what circumstances should the Court acknowledge this deficiency and turn to section 1988? The mounting frustration of some members of the Supreme Court and lower federal courts with the fantastic voyages through the minds of the forty-second Congress and the legal history of 1871 suggests that increased recognition of section 1988's role is past due. The act of expressly acknowledging that section 1983 is deficient with respect to many issues is all that is required to trigger section 1988.

2. When It Should Be Determined That Section 1988 Is Deficient.— Because "plain meaning" does not play a significant role in the interpretation of section 1983,[331] the determination of deficiency becomes a matter of articulating when reliance on extrinsic aids to construe section 1983 has become so attenuated that it is an unjustifiable basis on which to proceed. Where history reveals that a specific issue was explicitly addressed in congressional debate or was universally established under state and federal common law in 1871, a modern court may be justified in relying upon such sources of law. For example, judicial immunity was firmly entrenched in 1871 in all states. Perhaps it is reasonable to assume that congressmen were aware of such a clearly established rule and would have either discussed it in debate or expressly referred to it in the statutory text if they intended to modify or abrogate it. This is to be distinguished from cases where a common law rule was vague in 1871 and lacked any universal acceptance, such as is the case with the availability of punitive damages.[332]

Even where the existence of a common law rule was notorious in 1871, the problem remains to establish the theoretical justification for asserting that such a rule was incorporated into section 1983.[333] Such incorporation may cause section 1983 to be hamstrung by doctrines that arguably existed in 1871 but which have undergone significant rethinking and evolution in the past century.[334]

Recent section 1983 litigation suggests that very few issues will be resolved on the basis of express and notorious 1871 common law. Even regarding the question of judicial immunity under section 1983, the Court has apparently felt pressed to justify its creation of absolute immunity

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[330] *See supra* text accompanying notes 99-148.

[331] *See supra* text accompanying notes 38-43.

[332] *See Smith*, 461 U.S. 30, discussed *infra* text accompanying notes 353-62.

[333] *See supra* text accompanying notes 66-77.

[334] *Id.*

by reference to considerations beyond the legal vista of 1871.[335] Where a matter did not have almost universal recognition in 1871, reliance on the "common law of 1871" is misplaced.[336]

Very few section 1983 issues will be found to have been explicitly addressed by members of the House or Senate in their deliberations on section 1983's predecessor.[337] Even when an issue was impliedly discussed, such debates are a dubious source of law for section 1983. For example, the forty-second Congress tangentially considered the question of municipal liability in its debate over the Sherman Amendment to the Ku Klux Klan Act.[338] In *Monroe v. Pape*,[339] the rejection of the Sherman Amendment was interpreted as conclusive proof that Congress did not intend to make municipalities accountable under section 1983.[340] In *Monell v. Department of Social Services*, the Court concluded exactly the opposite after it rejected *Monroe's* reading of this same legislative history.[341] Few issues received even this indirect discussion in the debates of the forty-second Congress. The debates' utility as a source of law for filling in the gaps of section 1983 is therefore minimal.

When a court is called upon to grope beyond the clear and notorious common law of 1871[342] or the express discussion of an issue in the congressional debates of the forty-second Congress, it should acknowledge that section 1983 is deficient. Once this conclusion is reached, section 1988 is triggered and should be utilized by courts in their efforts to apply section 1983.

B. Determination of Whether Other Federal Law Applies

Once it is determined that section 1983 is deficient and section 1988 is triggered, the first inquiry is whether other federal law is available to fill the gaps in section 1983. Any statutory federal law that addresses the

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[335]*See* Pierson v. Ray, 386 U.S. 547 (1967), discussed *supra* text accompanying notes 99-112.

[336]*See supra* text accompanying notes 78-79.

[337]*See supra* text accompanying notes 44-50.

[338]The Sherman Amendment was rejected by Congress. It would have made municipalities liable for injuries caused by riotous conduct of persons within the city's jurisdiction. *See supra* note 53.

[339]365 U.S. 167.

[340]*Id.* at 188-90.

[341]*Monell*, 436 U.S. at 692 n.57; *see also* Owen v. City of Independence, 445 U.S. 622, 664-65 (1980) (Powell, J., dissenting); Moor v. County of Alameda, 411 U.S. 693, 709-10 (1973).

[342]This will almost always be the case since very few issues will be clearly addressed in the debates or by 1871 common law. With the exception of *Pierson*, 386 U.S. 547, the section 1983 cases surveyed in this article have involved ambiguous congressional debate or divergent analyses of 1871 common law.

deficiency in section 1983 is potentially applicable. Even federal law, however, is applied "only so far as such laws are suitable to carry . . . [section 1983] into effect;" where they are "not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," they cannot be applied.[343]

Federal statutory law should be presumptively applicable if it addresses an issue on which section 1983 is silent. The standard to overcome the presumptive applicability of such a federal statute should not require the same burden as an implied repeal analysis. Congress in section 1988 prescribed a standard that is less strict than that articulated for implied repeal. Complete incompatibility is not required; rather, the standard is unsuitability. A federal statute should be deemed unsuitable if it can not be adapted to the purposes of section 1983. To determine suitability, courts should decide whether, on the whole, application of the other federal statute would be compatible with the purposes and policies of section 1983.

The Court has often dealt with the question of the applicability of other federal statutes to section 1983 by addressing the issue in terms of implied repeal. For example, in *Allen v. McCurry*,[344] the Supreme Court concluded that section 1983 did not impliedly repeal the Full Faith and Credit statute.[345] Thus, section 1983 was held subject to 28 U.S.C. section 1738's command that state rules of preclusion control federal litigation of civil rights claims.[346]

If the inquiry in *Allen* had been carried out in the manner prescribed by section 1988, it arguably would not have required a finding of implied repeal to avoid the absolute command of section 1738.[347] Rather, a showing that the Full Faith and Credit statute was not suited to the purposes of section 1983 would have sufficed.[348] The language of section 1988 re-

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[343]42 U.S.C. § 1988 (1982).

[344]449 U.S. 90 (1980).

[345]*Id.* at 97-98.

[346]*Id.* at 99; *see also Migra*, 465 U.S. at 83-85.

[347]Implied repeal is a very high standard. To prevail on a theory of implied repeal, a party must demonstrate that the two statutes cannot be read consistently. In Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985), the Supreme Court indicated that there may be an additional exception to preclusion under section 1738 based on the intent of Congress vis-a-vis the federal statute giving rise to the subsequent action. *Id.* at 1334-35.

[348]Justice Marshall indicated in Haring v. Prosise, 462 U.S. 306 (1983), that additional exceptions to section 1738 could possibly be found based on section 1988. This reference may have been in relation to the test that other federal law must be consistent with section 1983 and, in some circumstances, section 1738 preclusion will not be consistent with the policies underlying section 1983. Justice Marshall's remark may have also been by way of analogy to the limits on the incorporation of state law pursuant to section 1988, i.e. consistency with section 1983, which are not contained in section 1738. *Id.* at 313-14.

quires only a showing of inconsistency with section 1983; it is a lower standard than that required for implied repeal.[349]

There is some question whether federal courts should also consider existing federal common law at this level of section 1988 analysis. *Chardon v. Juan Fumero Soto* is particularly illuminating on this point. Both the majority and dissenting opinions discussed federal case law as potentially supplying an answer to the section 1983 issue before the Court.[350] The majority apparently concluded, because the particular precedent under discussion did not involve section 1983, that it did not supply a rule of law for section 1983. Dissenting, Justice Rehnquist argued that the non-section 1983 case law did apply because it dealt with the same procedural issue before the Court. Both suits raised the question of whether or not a statute of limitations was tolled pending the denial of class certification under rule 23 of the Federal Rules of Civil Procedure.

The language of section 1988 does not differentiate between common law and statutory law where it directs that federal jurisdiction should be exercised in conformity with "the laws" of the United States. While an argument could be made that only statutes and the Constitution are included, it is the position of this author that federal section 1983 decisional law should apply at this level of analysis.[351]

The argument for section 1988 advanced herein is prospective and functional. It is not necessary to disturb existing precedent on a wholesale basis to promote section 1988 as a guide to resolving new issues in section 1983 cases.

Section 1983 decisions, where on point, carry the independent authority of *stare decisis* and thus control in the jurisdiction to which they are relevant. In effect, the presence of section 1983 precedent, if on point, goes to the heart of the deficiency found to exist in section 1983. Therefore, the question of municipal liability, for example, would not be addressed

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[349]*See infra* text accompanying notes 367-70. Arguably, therefore, the full faith and credit statute would not be applicable to section 1983 claims because strict adoption of state preclusion rules does not always serve the purposes of section 1983.

[350]*See supra* text accompanying notes 258-66.

[351]Section 1988 provides that "federal law" is applicable to section 1983 analysis. Later, section 1988 speaks of the "common law" as modified by state statutes and constitutions. Although it is unclear whether decisional law was expressly incorporated as federal "law," there are at least two arguments for its application. First, since *Erie Railroad Co. v. Tompkins*, court decisions are expressly acknowledged as carrying the authority of law in the jurisdiction to which they relate. The Rules of Decision Act has been construed to require application of state decisional law in diversity suits. *Erie*, 304 U.S. at 79-80; *see also* Eisenberg, *supra* note 17, at 513. Second, case law arising in section 1983 cases carries the authority of *stare decisis*. Other, non-section 1983 decisional law may also be considered in analyzing applicable federal law. The Supreme Court in *Chardon*, 462 U.S. 650, has established some precedent for the proposition that non-section 1983 case law will not be treated as relevant and/or consistent. *Id.* at 662; *see supra* text accompanying notes 264-66.

anew pursuant to state law because available federal law, *Monell*, supplies a rule which is presumptively consistent with the purposes of section 1983. An exception would lie only if authoritative federal precedent was overruled. Pursuant to section 1988, federal section 1983 precedent should be subject to review to determine if it is consistent with the purposes of section 1983. Issues which have not been authoritatively addressed by a court and which are not the subject of a federal statute cannot be resolved by application of federal law.[352]

The first two steps of section 1988 analysis break down into related, discrete inquiries: a) is the matter expressly covered by the language of section 1983; do the debates expressly deal with the issue; was common law in 1871 clear and notorious and did Congress incorporate such common law; and b) does federal statutory law deal with the issue; would its general application be consistent with the underlying purposes of section 1983; and is there available section 1983 federal case law that supplies an answer and is it consistent with the purposes of section 1983?

As an illustration of these initial inquiries, consider the question of the availability of punitive damages under section 1983, which was decided by the Supreme Court in *Smith v. Wade*.[353] Both the majority and dissent therein engaged in extensive forays through the history of section 1983. Justice Brennan, for the majority, expressly stated that post-1871 common law was relevant to the inquiry:

> Justice Rehnquist's dissent faults us for referring to modern tort decisions in construing section 1983. Its argument rests on the unstated and unsupported premise that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve. . . . The dissents are correct, of course, that when the language of the section and its legislative history provide no clear answer, we have found useful guidance in the law prevailing at the time when section 1983 was enacted; but it does not follow that that law is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general law had changed substantially in the intervening century (which is not the case here) we might be highly reluctant to assume that Congress intended to perpetuate a now obsolete doctrine.[354]

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[352]Although it is the position of this article that as a matter of interpretive process, many section 1983 decisions were wrongly decided, it is not necessary to disturb the body of section 1983 precedent to begin giving appropriate attention to section 1988.

[353]461 U.S. 30 (1983).

[354]*Id.* at 34-35 n.2. Justice Brennan relies on the immunity cases to support this position.

The majority concluded, nonetheless, that punitive damages were available for reckless as well as intentional conduct at 1871 common law.[355] Justice Rehnquist, dissenting, concluded that punitive damages were not available for reckless conduct under 1871 common law.[356] Justice O'Connor, also dissenting, was exasperated with the historical inquiry of both the majority and dissent.[357]

Smith stands as a recent example of a historical construction of section 1983 run amok. According to the model of application advocated in this article, it is clear that the availability of punitive damages for nonintentional conduct was not addressed by section 1983.[358] The majority appears to have acknowledged this: "We noted in *Carey* that there was little in the section's history concerning the damages recoverable for this tort liability."[359] Justice Brennan essentially determined that a uniform federal rule in favor of awarding punitive damages based on reckless conduct was consistent with the purposes of section 1983. Justice Rehnquist, on the other hand, most likely believed that such a rule of damages was not justified and would result in an increased number of section 1983 claims.[360]

Justice O'Connor simply would have rejected the pretense that the result was dictated by history and would have allowed creation of a uniform federal rule against such punitive damages in accord with the result reached by Justice Rehnquist.[361] She noted that the common law status of such punitive damages in 1871 was not readily discernible. Even if it were possible to state with certainty that a particular treatment of the issue prevailed in 1871, Justice O'Connor would not necessarily have allowed such a potentially obsolete rule to control the issue of construction for section 1983.[362]

None of the opinions in *Smith* considered the operation of section 1988. All three opinions effectively exercised common law powers to fill the gap in section 1983. No modern federal or state law was considered as being applicable to the issue or as controlling. Under the model of adjudication advocated in this article, however, the Court is not free to

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[355] *Id.* at 39-44.

[356] *Id.* at 58-70 (Rehnquist, J., dissenting). Justice Rehnquist imputes knowledge of 1871 common law to the members of the 42nd Congress by stating that most of the congressmen were lawyers and as such must have known what the law was. *Id.* at 66 (Rehnquist, J., dissenting).

[357] *Id.* at 92-94 (O'Connor, J., dissenting). *See supra* text accompanying note 78.

[358] *Id.*

[359] *Id.* at 34 (citations omitted); *see also id.* at 92-93 (O'Connor, J., dissenting).

[360] *Id.* at 90-91 n.17 (Rehnquist, J., dissenting).

[361] *Id.* at 94 (O'Connor, J., dissenting).

[362] *Id.* at 93 (O'Connor, J., dissenting).

exercise common law discretion until it first considers and rejects any potentially applicable federal law. Moreover, after rejecting federal law as a source of guidance, the Court must consider state law pursuant to section 1988.

C. Consideration of State Law

Once a court concludes that federal law is deficient, section 1988 requires the court to consider "the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil . . . cause is held."[363] Both codified and decisional law of the state in which the federal court sits must be considered.[364] Initially, this amounts to no more and no less than the task confronting federal courts in diversity suits.

Section 1988 was designed to allow the interplay of state law in the enforcement of federal civil rights where state law was at least as protective of civil rights as federal law. At this level of section 1988 application, the court must attempt to identify state law which is arguably relevant to the issue presented by the civil rights litigation. The court should be guided by the characterization of section 1983 as a personal injury or tort-like provision when reviewing state law.[365]

D. State Law Is Applied Unless It Is Inconsistent with Section 1983

Once a court has identified analogous state law, it is required to apply such law to the section 1983 case unless its use would be inconsistent with the "Constitution and laws of the United States."[366] Analysis of a state law's consistency with federal law must focus on the purposes of section 1983.[367] Further, the section 1988 precedent previously discussed indicates that this inquiry is not limited to the outcome of a specific case but, rather, concerns the operation of a specific state rule vis-a-vis section 1983 generally.[368] Where the use of state law would substantially undermine the fundamental purposes of section 1983, such law should be found to be inconsistent with federal law.

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[363]42 U.S.C. § 1988 (1982).

[364]*See supra* text accompanying notes 212-22.

[365]This characterization of section 1983 was pronounced in Wilson v. Garcia. *See supra* text accompanying notes 271-77. In addition, given the clear purpose of section 1983, to render state actors liable, the court should also contemplate the applicability of provisions found in state tort claims acts.

[366]42 U.S.C. § 1988 (1982).

[367]*See supra* text accompanying notes 80-97.

[368]*See supra* text accompanying notes 243-311.

Where state law is found to be inconsistent with the purposes of section 1983, arguments in favor of its application, premised on federalism, must be rejected. Section 1988 embodies federalism principles. It defines the deference to be accorded state law in section 1983 cases; if section 1988 has been properly applied, federalism concerns will be fully served.

The other end of federalism tension—the need for national uniformity—is also accommodated at this step of section 1988 application. When a court considers whether application of a state law rule would be inconsistent, generally, with section 1983, it is attempting to preserve and fulfill the purposes of the civil rights law. If the court concludes that, again generally, the very fact of application of different rules vis-a-vis a particular matter would itself be inconsistent with the purposes of section 1983, that may be cause to reject state law, regardless of its specific content. National uniformity may at times be inextricably linked to the fundamental purposes of section 1983 which are primary in section 1988.

For example, in *Garcia* the Court was appropriately concerned that the lack of a uniform characterization of section 1983, for the purpose of determining the most analogous state statute of limitations, seriously threatened section 1983's efficacy as a remedial provision. Because the confusion and delay generated by attempts to characterize section 1983 were inconsistent with the purposes of section 1983, the Court went no further than to designate all section 1983 actions as personal injury actions as a matter of federal common law.[369] It did not prescribe a uniform statute of limitations as a matter of federal law. Rather, it preserved the *Tomanio* rule that pursuant to section 1988, state statutes of limitations apply. This indicates that only very serious threats to the fundamental purposes of section 1983 will be sufficient to preclude the application of state law that is itself not inconsistent with section 1983.

In *Smith v. Wade*, if Missouri law allowed punitive damages to be awarded in personal injury actions based on reckless conduct, there would be nothing inconsistent with applying such state law to the section 1983 action. The purposes of section 1983 would in no way be undermined, and in fact, the purpose to deter violations of civil rights would be promoted. If, however, under Missouri law no punitive damages were available in an analogous situation, then the court would have to consider whether this denial of punitive damages abrogated the purposes of section 1983, most specifically, section 1983's purpose to deter violations of constitutional rights. On balance, even though deterrence would not be furthered by a prohibitive Missouri law, neither would section 1983's deterrent purpose be impaired, since compensatory damages and equitable relief would remain available remedies. Thus, it would not be inconsistent with the purposes of section 1983 to apply state law of punitive damages regardless of its content.

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[369] *Garcia*, 105 S. Ct. at 1945-47.

E. Creation of Federal Common Law

When no federal or state law is applicable pursuant to the foregoing analysis, a court must exercise its common law powers to resolve the section 1983 construction issue. For example, assume arguendo that there were no federal doctrine of immunity for executive officials; if state law abrogated executive immunity, application of such state law would be fully consistent with the purposes of section 1983. On the other hand, if state law provided that executive officials were absolutely immune from liability, such an immunity would be inconsistent with the purpose of section 1983 to make state actors liable. Because absolute immunity would be clearly inconsistent with the purposes of section 1983, this state law rule would be inapplicable pursuant to section 1988. The federal court would then have to fashion a rule taking into consideration the purposes of section 1983.

Essentially, this is what the Court did in the immunity cases. However, under the section 1988 proposal advocated herein, the Court must, in the first instance, be guided by the purposes of section 1983. Section 1988 requires that these purposes be given very high priority when balanced against other policy considerations. Section 1988 analysis differs from the methodology in the immunity cases by shifting the focus away from history and emphasizing the purposes of section 1983.

IV. Conclusion

Utilization of section 1988 as a rule of construction for section 1983 cases provides clarity to lower federal courts regarding the process of construing section 1983. It justifies the consideration of modern common law developments while placing appropriate limits on the operation of such law. Further, as a federalism provision, it strikes a balance between state and federal law in the civil rights enforcement scheme. Hence, comity is served and states' interests are protected through the required deference towards state law. The integrity of section 1983 is guaranteed by granting primacy to its fundamental purposes.