

# Section 1983 Remedies for the Violation of Supremacy Clause Rights

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More than two decades and two hundred thousand dollars in legal fees ago, fifty White Mountain Apaches began work hauling trees to a saw-mill on the Fort Apache Reservation in Arizona.<sup>1</sup> In 1971 the state highway department demanded that Pinetop Logging, the Apaches' employer, pay back taxes for its highway and fuel use.<sup>2</sup> As a "contract motor carrier of property," the company conceded that it should have been liable.

On behalf of Pinetop and its Native American employees, however, the Tribe filed suit in state court. It alleged that the Arizona taxes were preempted by federal regulations, thus violating the supremacy clause of the Constitution.<sup>3</sup> The United States Supreme Court ultimately agreed with the Tribe and declared the taxes invalid.<sup>4</sup> The Apaches then used that judgment to revive a federal suit<sup>5</sup> for declaratory and injunctive relief and attorney's fees under section 1983,<sup>6</sup> charging that Arizona had deprived them of their constitutional rights under the supremacy clause.

On appeal, the Ninth Circuit dismissed the Tribe's suit. The supremacy clause, the court decided, secures no constitutional rights.<sup>7</sup> And

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1. See *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.), cert. denied, 479 U.S. 1060 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138-41 (1980). On the Tribe's problems and prospects, see also *Apaches Striving for Self-Sufficiency*, N.Y. Times, Jan. 9, 1985, at A14, col. 3.

2. The tax provision may be found in ARIZ. REV. STAT. ANN. §§ 28-1552, 40641(A)(1) (Supp. 1979).

3. See *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 585 P.2d 891 (Ct. App. 1978), rev'd, 448 U.S. 136 (1980).

The supremacy clause provides:

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

U.S. CONST. art. VI, cl. 2.

4. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

5. See *Williams*, 810 F.2d at 846-47 (detailing procedural history).

6. 42 U.S.C. § 1983 (1982). Section 1983 reads in relevant part:

Every person who, under color of any statute, ordinance, [or] regulation . . . of any State . . . , subjects, or causes to be subjected, any . . . person . . . 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.

Section 1988, *id.* § 1988, gives courts discretion to award attorney's fees to winning section 1983 plaintiffs.

7. *Williams*, 810 F.2d at 848; see also *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1143-44 (8th Cir.) (similar analysis for section 1983 dormant commerce clause action), cert. denied,

even if it does, the court continued, section 1983 does not embrace "structural" provisions of the Constitution.<sup>8</sup> The Apaches had no cause of action.

This Note challenges the Ninth Circuit's ruling<sup>9</sup> and argues that section 1983 does provide a remedy to persons<sup>10</sup> deprived of their rights<sup>11</sup> under the supremacy clause.<sup>12</sup> The Note asks two questions: First, what is a "right . . . secured by the Constitution"? Second, given a definition, does the supremacy clause secure any section 1983 constitutional rights?<sup>13</sup>

In answering those questions, this Note concludes that the Tribe should have won. Yet the Apaches' unusual coupling of section 1983 and the supremacy clause also points to the Note's broader theme. By denying the

469 U.S. 834 (1984).

8. *Williams*, 810 F.2d at 848-50; see also *Kassel*, 730 F.2d at 1143-44.

9. Cases in which courts agreed with the Ninth Circuit include *Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 750 F.2d 608 (7th Cir. 1984); *Pirola v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 663 F. Supp. 682 (W.D. Wis. 1987); *New York Airlines v. Dukes County*, 623 F. Supp. 1435 (D. Mass. 1985); *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735 (E.D. Wash. 1985); *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581 (D.R.I. 1983). But see *ANR Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 608 F. Supp. 43 (W.D. Mich. 1984); see also *City Investing Co. v. Simcox*, 633 F.2d 56, 57, 64 n.18 (7th Cir. 1980).

10. Section 1983 (and constitutional) "persons" include corporations. See, e.g., *Fulton Mkt. Cold Storage Co. v. Cullerton*, 582 F.2d 1071 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979); see also *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886). But cf. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 514 (1939) (opinion of Roberts, J.) (corporations not entitled to constitutional protections afforded "citizens").

11. This Note will use the word "right" as defined below, see *infra* text accompanying notes 83-87, and the word "interest" to mean any claim or desire that may or may not be a "right," "privilege," or "immunity." See 4 R. POUND, JURISPRUDENCE 56-57 (1959).

12. But see Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. (forthcoming 1989) (arguing that section 1983 should not be available to supremacy clause plaintiffs, nor, more generally, to plaintiffs suing for violations of so-called "economic rights").

13. In cases of statutory interpretation, courts should construe a statute's words before deciding whether that statute covers a particular claim. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1921); see also, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980). Sometimes courts construct their own, unstated definition of particular terms, decide whether a plaintiff's claim fits their definition, and then declare that the claim falls outside the statute. This pretextual approach may lead to results consistent with this Note's analysis. E.g., *ANR Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 608 F. Supp. 43 (W.D. Mich. 1984) (upholding section 1983 action for supremacy clause violation); cf. *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980) (upholding section 1983 action for dormant commerce clause violation); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985). However, it would also lead courts to reinterpret the word "rights" each time a section 1983 plaintiff invokes a different constitutional clause. After exploring section 1983's broad purposes, this Note offers a more principled framework for applying section 1983—one which holds for other contexts as well, including, most significantly, the dormant commerce clause. Cf. *Private Truck Council of Am. v. Secretary of State*, 503 A.2d 214 (Me.), cert. denied, 476 U.S. 1129 (1986) (denying section 1983 action for dormant commerce clause violation); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), cert. denied, 469 U.S. 834 (1984); Collins, *supra* note 12 ("most claims under the dormant commerce clause should probably not be actionable under section 1983"); cf. also cases cited *supra* note 9 (relying on dormant commerce clause cases to dismiss section 1983 supremacy clause actions); Case Note, 7 U. ARK. LITTLE ROCK L.J. 757 (1984) (using pretextual method to argue for section 1983 actions for dormant commerce clause violations); Note, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right To Be Free of Protectionist State Action*, 84 MICH. L. REV. 157 (1987) (same).

Apaches their fees, this Note argues, the Ninth Circuit ignored section 1983's role in "the commitment of society to be governed by law."<sup>14</sup> Section I examines section 1983's language and history and concludes that the statute is best understood as a tool for "transformative constitutionalism." Section II proposes a definition of the statute's terms that fits its purpose. Section III demonstrates that supremacy clause claims fall within the definition and discusses this Note's ramifications.

## I. SECTION 1983: INTERPRETING THE STATUTE'S LANGUAGE

A court considering a supremacy clause claim under section 1983 should turn first to the statute's language.<sup>15</sup> Section 1983 provides a private cause of action to those deprived of "any rights, privileges, or immunities secured by the Constitution and laws."<sup>16</sup> The words "rights," "privileges," and "immunities" appear in innumerable statutes, including the Reconstruction era civil rights laws.<sup>17</sup> In spite of—or because of—their common use, none of the words has a "plain meaning."<sup>18</sup> Section 1983's ambit thus depends on a definition of its terms that comports with the statute's origins, purposes, and historical development.<sup>19</sup>

14. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 28 (1985).

15. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535-36 (1947); see also *supra* note 13. For an irreverent look at the canons of statutory construction, see K. LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960).

16. 42 U.S.C. § 1983 (1982).

17. See, e.g., 18 U.S.C. § 241 (1982); *id.* § 242; 42 U.S.C. § 1985(3) (1982).

18. Despite a constant barrage of criticism, see, e.g., Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983), and the Supreme Court's less-than-confident application of it, see, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 569-74 (1982), the "plain meaning rule" is still accepted doctrine. See, e.g., *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'") (citations omitted). Yet while "analytical jurists" in the academy have tried to narrow each word's meaning, see, e.g., W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1923), the Supreme Court has used the words "rights," "privileges," and "immunities" with far less precision. Compare, e.g., *Morgan v. Louisiana*, 93 U.S. 217 (1876) ("franchise" includes "rights" and "privileges" but not "immunities") with, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 89 (1873) (Constitution's "privileges and immunities" protects, among others, "right" to petition the federal government). While "right" may have a "normal and customary meaning" in the Internal Revenue Code, *United States v. Byrum*, 408 U.S. 125, 136 (1972), in general "[t]here is no more ambiguous word in legal and juristic literature." 4 R. POUND, *supra* note 11, at 56; see also J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 7-8 (1921); cf. Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 988-89 (1987) (section 1983's "unambiguous[]" language "provides an insurmountable barrier" to its being limited).

19. See, e.g., R. DWORKIN, *LAW'S EMPIRE* 313-54 (1986) (courts' statutory interpretations should "fit" legislative intent and subsequent judicial development in manner which shows "legislative process" in "best light"); Fuller, *Positivism and Fidelity to the Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958) (questioning whether courts can "interpret a word in a statute without knowing the aim of the statute"); see also *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("purpose of Congress is the ultimate touchstone"); cf. A. Hart & H. Sacks, *The Legal Process* 1410 (tent. ed. 1958) ("The function of a court in interpreting a statute is to decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before it.").

### A. *The Original Definition of Section 1983 Constitutional Rights*

A definition of section 1983's terms should be grounded in the words of the Congress that debated and ultimately passed the statute.<sup>20</sup> Yet even though they thoroughly vented their views over section 1983's constitutionality, the members of the Forty-second Congress hardly discussed the statute's substantive reach.<sup>21</sup>

The few Congressmen who mentioned its scope put forth conflicting opinions. Senator Edmunds, for example, thought section 1983 uncontroversial because it tracked the Civil Rights Act of 1866,<sup>22</sup> which criminalized interference with specific, delineated interests, such as "the right to make and enforce contracts."<sup>23</sup> In contrast, Representative Shellabarger, who sponsored section 1983, reassured its opponents that the bill protected only the "privileges and immunities of citizens in the several States"<sup>24</sup> which Justice Washington had listed in *Corfield v. Coryell*.<sup>25</sup>

Only two Congressmen tried to offer more precise definitions. Representatives Kerr<sup>26</sup> and Burchard<sup>27</sup> agreed that "privileges and immunities" referred to specific interests, but Kerr insisted that "[i]t is most erroneous to suppose that the words 'rights,' 'privileges,' and 'immunities' are synonymous. They are not."<sup>28</sup> Despite the latter words' restricted meaning,

20. On the dangers of determining the collective "intent" of a legislature, see *United States v. Public Util. Comm'n*, 345 U.S. 295, 319-21 (1953) (Jackson, J., concurring).

21. Congressman Dawes expressed his concern: "The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. They are not defined in it, and there is no attempt in it to put limitation upon any of them; but whatever they are, however broad or important, however minute or small, . . . they are in this law." CONG. GLOBE, 42d Cong., 1st Sess. 475 (1871) (Rep. Dawes); see also *id.* app. at 216-17 (Sen. Thurman) (similar); *id.* at 485 (Rep. Cook) (similar).

22. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (Sen. Edmunds); see also *id.* app. at 68 (Rep. Shellabarger); Collins, *supra* note 12.

23. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. The current version of the 1866 Act, codified at 18 U.S.C. § 242 (1982), now protects "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Sections 242 and 1983 are considered *in pari materia*. *United States v. Price*, 383 U.S. 787, 797 (1966); *Monroe v. Pape*, 365 U.S. 167, 185 (1961). *But cf.* *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 643-44 & n.29 (1979) (Powell, J., concurring) (doubting that sections 1983 and 242 have same scope). Since the two statutes are now worded almost identically, the *Price* construction makes sense. However, the statutes' different terms in 1871 suggest that had it originally tracked section 242, section 1983 would have been drastically limited. See *id.* at 617 n.34.

24. CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871) (Rep. Shellabarger); see also *id.* at 334 (Rep. Morgan); *id.* at 500-01 (Sen. Frelinghuysen); *id.* at 660 (Rep. Vickers); *id.* app. at 91 (Rep. Duke); *id.* app. at 117 (Sen. Blair); *id.* app. at 228 (Sen. Boreman). Representative Shellabarger's role as sponsor may account for his contradictory statements. Compare *id.* app. at 68 with *id.* app. at 69 (declaring both that section 1983 tracks, and goes beyond, section 241).

25. 6 F. Cas. 546, 4 Wash. C.C. 371 (C.C.E.D. Pa. 1823) (No. 3,230). Justice Washington included on his list "the right of a citizen of one state to pass through, or reside in any other state . . . ; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; [and] to take, hold and dispose of property." *Id.* at 551-52, 4 Wash. C.C. at 380.

26. See CONG. GLOBE, 42d Cong., 1st Sess. app. 47 (1871) (Rep. Kerr).

27. See *id.* app. at 313 (Rep. Burchard).

28. *Id.* app. at 47. Representative Kerr strongly opposed the bill, and in the instant speech he tried to show that Congress could have no power under the Fourteenth Amendment's "privileges and

"[t]he word 'rights' is generic, embracing all that may be lawfully claimed."<sup>29</sup>

Section 1983's legislative history thus suggests that the Forty-second Congress collectively considered "privileges" and "immunities" terms of legal art. "Rights," in contrast, meant something different.<sup>30</sup> While ultimately inconclusive,<sup>31</sup> Kerr's and Burchard's definitions are useful beginnings. Section 1983's historical context helps give them shape.

### B. *The Purposes of Section 1983*

By 1871 the fallout from the Civil War had spawned a "condition of affairs . . . rendering life and property insecure and the carrying of mails and the collection of the revenue dangerous."<sup>32</sup> The Forty-second Congress responded by passing the Civil Rights Act of 1871.<sup>33</sup>

Section 1983's legislative history reveals that Congress forged the statute's remedial features<sup>34</sup> in direct response to the Ku Klux Klan's crimes<sup>35</sup>

immunities" clause to protect, more broadly, people's "rights." *See id.* app. at 49-50 ("The word 'rights' does not occur [in the Fourteenth Amendment]. Why insert it in the bill?"); *see also id.* app. at 88 (Rep. Storm) (word "'rights' craftily superadded to the terms 'privileges and immunities'"); *id.* app. at 91 (Rep. Duke) ("Was there not an object in interpolating the words 'any rights'?").

29. *Id.* app. at 47; *see also id.* app. at 313 (Rep. Burchard) (quoting *Citizenship*, 10 Op. Att'y Gen. 382, 407 (1862)); CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (Rep. Wilson) (quoting same in debate over section 242). A contemporary reference book, 2 BOUVIER'S LAW DICTIONARY 484 (12th ed. 1868), and a contemporary state court, *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 306-07 (1871), defined "right" similarly.

30. *See Collins, supra* note 12, at n.214 ("the so-called plain meaning of 'rights, privileges, or immunities' in the statute would seem to be more directly tied to the similarly phrased but long-neglected privileges or immunities clause of the fourteenth amendment . . . , [but of] course, the inclusion of the word 'rights' (in addition to 'privileges or immunities') arguably makes § 1983 broader than that particular constitutional provision"); *see also Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882) (courts must "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed").

31. *Cf. Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921) ("the views and motives of individual members [of Congress] are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body"); *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

32. CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871) (President Grant's message "recommend[ing] such legislation as in the judgement of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States").

33. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Section 1 of the act is now section 1983. The Supreme Court struck down the part of section 2 criminalizing private conspiracies to interfere with constitutional rights in *United States v. Harris*, 106 U.S. 629 (1882); it upheld the part of section 2 providing civil remedies against conspiracies, now codified at 42 U.S.C. § 1985(3) (1982), in *Griffin v. Breckinridge*, 403 U.S. 88 (1971).

34. First, and most fundamentally, plaintiffs might use the statute to overturn state laws that threaten constitutional rights. *See Monroe v. Pape*, 365 U.S. 167, 173 (1961). Second, section 1983 offers victims a federal remedy when state remedies are inadequate or non-existent. *See id.* at 173-74. Finally, section 1983 supplements adequate state remedies that may not be available in practice. *See id.* at 174-75. The *Monroe* Court downplayed the first advantage because the majority meant to emphasize that an official need not necessarily obey a statute to be acting "under color of law." *See id.* at 173-74. Justice Frankfurter argued that Congress mainly, if not exclusively, sought to deter the enactment of unconstitutional laws. *See id.* at 202 (Frankfurter, J., dissenting).

35. *See, e.g.,* CONG. GLOBE, 42d Cong., 1st Sess. 441-51, 605-07 (1871) (reporting Klan's outrages); *id.* app. at 29-40, 190-201, 283-98 (same); S. REP. NO. 1, 42d Cong., 1st Sess. (1871)

and to Southern officialdom's condonation of disorder.<sup>36</sup> Implicit in section 1983's legislative history is Congress's more general goal. The Reconstruction amendments<sup>37</sup> and civil rights statutes<sup>38</sup> were Congress's legal means of consolidating the changes wrought by the Union's victory.<sup>39</sup> The Civil War had been fought over more than just racial equality—it had been a war over the soul of the Constitution.<sup>40</sup> Section 1983 was meant to further the winners' constitutional vision.

The Reconstruction Congresses "insist[ed] that We the People were emphatically more than a confederation of states,"<sup>41</sup> but the specific components of that broad vision were often discordant. During the debates over the Civil Rights Act, Congressmen differed over who could seek a remedy under the bill.<sup>42</sup> They worried about the constitutional sources of Congress's power to pass the bill,<sup>43</sup> about the constitutionality of criminalizing private conspiracies,<sup>44</sup> and about the constitutionality of empowering the President to suppress insurrection<sup>45</sup> and suspend the writ of habeas

(same).

36. See CONG. GLOBE, 42d Cong., 1st Sess. 394 (1871) (Rep. Rainey); *id.* app. at 190-94 (Rep. Buckley); *id.* app. at 213-14 (Sen. Johnston); see also *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1154 (1977) [hereinafter *Developments*].

37. U.S. CONST. amends. XIII, XIV, XV.

38. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (outlawing "Black Codes"); Act of May 31, 1870, ch. 14, 16 Stat. 140 (protecting voting rights); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (same); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (described *supra* note 33); Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (outlawing racial discrimination in public accommodations).

39. See Blackmun, *supra* note 14, at 3-6; *Developments, supra* note 36, at 1143-47.

40. See H. BELZ, EMANCIPATION AND EQUAL RIGHTS 1 (1978) ("The Civil War was a constitutional crisis of the most profound sort. . . . [T]he purpose of the war in the most fundamental sense became the determination of how American government would be constituted."); P. PALUDAN, A COVENANT WITH DEATH 27 (1975) ("When war broke out, . . . more than a question of armed might was at issue—the foundation of law itself had been challenged. . . . [T]he fight was for the Constitution itself."); *id.* at 27-60 (describing conflicting interpretations of Constitution motivating North and South); H. HYMAN, A MORE PERFECT UNION 124-40 (1973) (describing evolution of constitutionalist discourse under effects of war); President Lincoln's Message to Congress in Special Session (July 4, 1861), reprinted in DOCUMENTS OF AMERICAN HISTORY 393-96 (H. Commager 8th ed. 1968); see also Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1065-69 (1984) (discussing "Article V difficulties" of Civil War Amendments and concluding that "the Framers of the Fourteenth Amendment . . . were exercising the full powers of a 'Constitutional Convention' in the way they proposed to make their constitutional amendment a part of our higher law"). For a recent exploration of similar themes, see also W. SAFIRE, FREEDOM (1987).

41. Ackerman, *supra* note 40, at 1068; see H. BELZ, *supra* note 40, at 142 ("in political and constitutional development the war produced significant nationalizing changes"). *But cf.* H. HYMAN, *supra* note 40, at 307-46 (discussing concurrent strengthening of states' powers); *Developments, supra* note 36, at 1142 ("overall shift in the balance of power between the federal and state governments . . . was moderate").

42. While some Congressman hoped that the bill would help blacks achieve civil equality, see, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 340-41 (1871) (Rep. Kelley); *id.* at 505-06 (Sen. Pratt), others stressed that the law would not simply "protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes, will be benefitted alike." *Id.* app. at 190 (Rep. Buckley); see also *id.* app. at 265 (Rep. Barry); *id.* at 569-70 (Sen. Ames).

43. See, e.g., *id.* app. at 46-50 (Rep. Kerr); *id.* app. at 157-60 (Rep. Golladay); *id.* app. at 240-47 (Sen. Bayard).

44. See, e.g., *id.* at 337 (Rep. Whitthorne); *id.* app. at 304 (Rep. Slater).

45. See, e.g., *id.* app. at 154-55 (Rep. Garfield); *id.* app. at 220-21 (Sen. Thurman).

corpus.<sup>46</sup> Common to all the rhetoric, however, were each Congressman's professions of faith in the Constitution.<sup>47</sup> Different Congressmen might have understood the Constitution differently,<sup>48</sup> but all were animated by their concern for the Constitution's integrity.<sup>49</sup>

The Civil War, in short, "settled the question of whether the Americans as a national people had an authentic national government,"<sup>50</sup> and reestablished the supremacy of the Constitution over military might.<sup>51</sup> Left unsettled were the contents of specific constitutional provisions. Constitutional history since Reconstruction can thus be understood as the continuing battle between different visions of different constitutional clauses in a legal, not martial, setting. By providing citizens a sword,<sup>52</sup> section 1983—the creation of a Congress itself engaged in the struggle over constitutional meaning—became the vehicle for what Justice John Harlan described as the faith in litigation as "the great moral substitute for force in controversies between the people, the states, and the Union,"<sup>53</sup> or what this Note calls "transformative constitutionalism."<sup>54</sup> The statute's development bears that out.

46. See, e.g., *id.* at 352 (Rep. Beck); *id.* app. at 245 (Sen. Bayard).

47. See, e.g., *id.* app. at 86 (Rep. Bingham); *id.* app. at 158 (Rep. Golladay); see also P. PALUDAN, *supra* note 40, at 44-47. On Constitution worship and its origins, see Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-1929).

48. Compare, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 206-08 (1871) (Rep. Blair) (describing Constitution as limited charter checked by states' rights) with, e.g., *id.* at 332 (Rep. Hoar) (viewing Constitution as affirmative, welfare-maximizing).

49. Representative Merriam's fervor was typical: "[I]f any man doubts, I would say to the terror-stricken, . . . 'Come! come! come!' and I would wrap them in the folds of our starry flag, and in the presence of God and my country I would say 'Here is our Constitution, as it was, as it is, as it shall ever be.'" *Id.* app. at 283 (Rep. Merriam); see also *id.* at 339 (Rep. Kelley); *id.* at 490 (Rep. Butler); *id.* app. at 149 (Rep. Garfield). But see J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 633-37 (2d ed. 1969) (criticizing Reconstruction Congresses' "disregard for the Constitution").

50. H. BELZ, *supra* note 40, at 142.

51. Cf. S. BARBER, *ON WHAT THE CONSTITUTION MEANS* 59-61 (1984) ("continuing reaffirmation" of Constitution's supremacy "essential to a constitutional state of affairs").

52. See Blackmun, *supra* note 14, at 3-7.

53. H. HYMAN, *supra* note 40, at 261.

54. By "transformative constitutionalism" this Note means to imply a concept that rests between Professor Cover's "redemptive constitutionalism," see Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), and Professor Chayes's less mystical "public law litigation," see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Cf. also Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1983) (courts, like Jesus's disciples, serve as mediators and teachers in divisive disputes). Professor Cover describes "redemptive constitutionalism" as a "transformational politics that cannot be contained within the autonomous insularity" of the group asserting it, and writes that "[r]edemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other." Cover, *supra*, at 33-35. Professor Chayes explains that "public law litigation" focuses primarily on "vindication of constitutional or statutory policies." Chayes, *supra*, at 1284.

Transformative constitutionalism is best exemplified by the story of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), told in R. KLUGER, *SIMPLE JUSTICE* (1975). In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court decided that the Fourteenth Amendment did not prohibit states from segregating passengers on railroad cars. For sixty years blacks fought a legal war to vindicate their

### C. Section 1983: Subsequent Judicial Development

For many years the Supreme Court read section 1983 narrowly.<sup>55</sup> Eventually, however, the Court gave full effect to the statute's unqualified words. By gradually including different claims within the statute's bounds,<sup>56</sup> the Supreme Court slowly revived section 1983's part in the process of transformative constitutionalism.<sup>57</sup>

Early on, for example, the Court decided in *United States v. Cruikshank*<sup>58</sup> that section 1983's criminal analogue—which, like section 1983 itself, reached violations of rights “secured by the Constitution”—only covered rights which the Constitution *created*, and not extra-constitutional rights which the Constitution merely *protected*.<sup>59</sup> The *Cruikshank* Court also restricted section 241's reach to those rights arising from the relationship between an individual and the federal government.<sup>60</sup> Lower courts limited section 1983 accordingly.<sup>61</sup> In *Holt v. Indiana Manufacturing Co.*,<sup>62</sup> the Court held that section 1983 only protected “civil rights.”<sup>63</sup> Later, in *Hague v. Committee for Industrial Organization*,<sup>64</sup> Justice

contrary constitutional vision. In *Brown*, they succeeded—and they used section 1983.

55. See Collins, *supra* note 12 (“External pressures and the politics of compromise” meant that while “race-centered view of section 1983 may not have been the view of its framers, . . . it quickly became the dominant one”); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 487–515 (1982) (identifying and contrasting courts’ “historical” approach, which saw section 1983 as direct response to Klan, and later “functional” approach, which viewed section 1983 more broadly).

56. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court held that a state official acts “under color of law” even when defying, rather than obeying, a state statute. Section 1983 actions have increased exponentially since.

57. See B. CARDOZO, *supra* note 13, at 84–85 (discussing evolution of statutes’ meanings); cf. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (proposing that courts adopt “common law” method of “updating” statutes).

58. 92 U.S. 542 (1876).

59. See *id.* at 553–54; see also *Logan v. United States*, 144 U.S. 263, 287 (1892). See generally Collins, *supra* note 12 (contrasting meaning of “secured by the Constitution” with “arising under the Constitution”).

60. The Court thus read section 241 the same way it had read the privileges or immunities clause of the Fourteenth Amendment, U.S. CONST. amend. XIV § 1; see *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (limiting clause to those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws”); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 526 (1939) (opinion of Stone, J.) (attributing *Cruikshank* result to decision in *Slaughter-House Cases*), even though section 241 protected “rights” as well “privileges or immunities.” Cf. Collins, *supra* note 12 (suggesting that section 1983’s “openendedness simply may have been in recognition that the privileges or immunities clause of the Fourteenth Amendment might incorporate one or more of the limitations on government mentioned elsewhere in the Constitution”).

61. *E.g.*, *Browner v. Irvin*, 169 F. 964 (C.C.N.D. Ga. 1909).

62. 176 U.S. 68 (1900).

63. *Id.* at 73. What “civil rights” were was sometimes unclear, so the Court often found it easier to say what civil rights were not. According to the *Holt* Court, civil rights did not include those under the equal protection or due process clauses. Nor did civil rights include “political rights,” such as the right to vote, see *Baldwin v. Franks*, 120 U.S. 678, 691 (1886); see also *Ex parte Virginia*, 100 U.S. 339, 367–68 (Field, J., dissenting), or “social rights,” such as equal access to public facilities, see *The Civil Rights Cases*, 109 U.S. 3 (1883). See generally H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW 394–98* (1982) (discussing nineteenth century understanding of “civil,” “social,” and “political” rights).

64. 307 U.S. 496 (1939).



Stone wrote for a plurality that section 1983's jurisdictional twin<sup>65</sup> only protected rights "of personal liberty, not dependent for [their] existence upon the infringement of property rights."<sup>66</sup>

The Court has since repudiated each of those decisions.<sup>67</sup> Section 1983 covers rights which the Constitution protects as much as those which the Constitution creates,<sup>68</sup> including, for example, First Amendment rights,<sup>69</sup> Fifteenth Amendment rights,<sup>70</sup> Fourteenth Amendment equal protection rights,<sup>71</sup> and Fourteenth Amendment due process clause property rights.<sup>72</sup> It also protects rights secured by federal laws—which means, the Court has held, *all* laws,<sup>73</sup> including, for example, laws enacted pursuant to the appropriations clause,<sup>74</sup> the compacts clause,<sup>75</sup> or the interstate or Indian commerce clauses.<sup>76</sup> Section 1983 has retained its transformative vitality: The Supreme Court has never placed a constitutional provision outside section 1983.<sup>77</sup>

65. 28 U.S.C. § 1343(3) (1982). This provision was separated from section 1983 during the statutory overhaul of 1874. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608-10 (1979).

66. *Hague*, 307 U.S. at 531 (opinion of Stone, J.). Justices Black and Roberts thought that the union's right to assemble was one of *Cruikshank's* "privileges or immunities" of national citizenship.

67. See *United States v. Price*, 383 U.S. 787 (1966) (overruling *Cruikshank* limits on section 241); *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972) (overruling Justice Stone's *Hague* distinction between "personal" and "property" rights, and limiting *Holt* to its facts). *But cf.* Collins, *supra* note 12 (proposing that Supreme Court resurrect and reformulate Justice Stone's *Hague* opinion).

68. See *Hague*, 307 U.S. at 526-27, quoted in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979) ("The argument that the phrase in the statute 'secured by the Constitution' refers to rights 'created,' rather than 'protected' by it, is not persuasive. The preamble of the Constitution, [for example,] . . . uses the word 'secure' in the sense of 'protect' or 'make certain.'"); see also CONG. GLOBE, 42d Cong., 1st Sess. 429 (1871) (Rep. Beatty).

69. See, e.g., *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (rights under free exercise clause).

70. See, e.g., *Lane v. Wilson*, 307 U.S. 268 (1939); *Giles v. Harris*, 189 U.S. 475, 485-86 (1903).

71. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Brown* is perhaps the triumphant pinnacle of transformative constitutionalism.

72. See, e.g., *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972).

Sections 241 and 242 criminalize invasions of Fourth Amendment rights, see, e.g., *Irvine v. California*, 347 U.S. 128 (1954), and Fifteenth Amendment rights, see, e.g., *Anderson v. United States*, 417 U.S. 211 (1974); see also, e.g., *United States v. Classic*, 313 U.S. 299 (1941) (voting rights under U.S. CONST. art. I, § 2). They also protect the right to interstate travel, see, e.g., *United States v. Guest*, 383 U.S. 745 (1966), which is clearly a constitutional one, though its source is a matter of dispute. See *Shapiro v. Thompson*, 394 U.S. 618, 630 & n.8 (1969) (citing possibilities).

73. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) ("the phrase 'and laws,' as used in § 1983, means what it says").

74. See, e.g., *id.* at 1; see also, e.g., *United States v. Waddell*, 112 U.S. 76 (1884) (section 242 prosecution for interference with rights under Homestead Acts, passed under Congress's territory clause power, U.S. CONST. art. IV, § 3, cl. 2).

75. See *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467 (9th Cir. 1984) (section 1983 action for violation of rights under Hawaiian Homes Comm'n Act, passed under Congress's implied compacts clause power, U.S. CONST. art. I, § 10, cl. 3, and its admission of new states power, *id.* art. IV, § 3, cl. 1).

76. See, e.g., *United States v. Johnson*, 390 U.S. 563 (1968) (section 241 prosecution for interference with rights under Civil Rights Act of 1964, 42 U.S.C. § 2000a (1982)); *Chase v. McMasters*, 573 F.2d 1011, 1017 (8th Cir. 1978) (section 1983 action for violation of rights under statute passed under Congress's Indian Commerce and treaty making powers, U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2).

77. In *Carter v. Greenhow*, 114 U.S. 317, 320 (1884), the Court distinguished between constitutional provisions that "protect" rights and those that "create" rights, and it decided that the contracts

## II. SECTION 1983 CONSTITUTIONAL RIGHTS

### A. Pennhurst State School and Hospital v. Halderman

The Supreme Court has never delimited the range of constitutional rights actionable under section 1983. In *Pennhurst State School and Hospital v. Halderman*,<sup>78</sup> however, the Court held that section 1983 afforded plaintiffs no remedy for a statutory violation when that statute itself created no section 1983 statutory rights. The Court's statutory focus in *Pennhurst* aids our inquiry into section 1983's constitutional bounds.

In *Pennhurst*, residents of an institution for the mentally retarded sued under section 1983 to enforce the Developmentally Disabled Assistance and Bill of Rights Act,<sup>79</sup> which granted them, they argued, a federal statutory right to " 'minimally adequate habilitation' in the 'least restrictive environment.' "<sup>80</sup> The Court found otherwise. The statute's preamble mentioned Congress's intention to "assist" states to help the retarded by providing state agencies with federal money; but the statutory section at issue imposed no specific requirements as conditions for the receipt of funds. The statute's words, therefore, "express[ed] no more than a congressional preference . . . , and, as such, [are] too thin a reed to support [any] rights and obligations."<sup>81</sup> When Congress *encourages*, rather than *orders*, a statute creates no federal "rights" within the meaning of section 1983. Since section 1983 remedies the deprivations of "rights . . . secured by the Constitution and laws," *Pennhurst* should help define section 1983 constitutional rights as well.<sup>82</sup>

### B. A Proposed Definition

The definition of section 1983 constitutional rights that best fits its origins and development combines those formulations suggested by *Penn-*

clause fell within the former, but that section 1983 only reached the latter. As Professor Collins has shown, the Court later repudiated *Carter's* reading of "secured." Collins, *supra* note 12. The contracts clause thus has the same effect as other constitutional provisions, and plaintiffs subject to state laws that violate it should be entitled to remedies under section 1983. *See* McGuire v. Sandler, 337 F.2d 902 (5th Cir. 1964) (upholding contracts clause action under section 1983); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) (same).

78. 451 U.S. 1 (1980).

79. 42 U.S.C. § 6010 (1982).

80. *Id.*; *see* 451 U.S. at 7.

81. 451 U.S. at 19; *see also* Rosado v. Wyman, 397 U.S. 397, 413 (1970).

82. The constitutional and statutory inquiries are not identical. Most lower courts trying to apply *Pennhurst* have used the Supreme Court's test from *Cort v. Ash*, 422 U.S. 66 (1975), for finding implied private rights of action. *See, e.g.*, New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435, 1444-45 (D. Mass. 1985). Under *Cort's* first prong, a federal statute implies a cause of action if the plaintiff claiming it shows that she is " 'one of the class for whose *especial* benefit the statute was enacted.' " 422 U.S. at 78 (emphasis in original) (citation omitted). As the Court has stressed, however, the Constitution does not "partake of the prolixity of a legal code," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), and the question, therefore, "of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis v. Passman*, 442 U.S. 228, 241 (1979) (emphasis in original).

*hurst* and by Representatives Kerr and Burchard:<sup>83</sup> in order to serve section 1983's function as vehicle for transformative constitutionalism, a section 1983 "right" should include any "claim of duty"—any argument that the Constitution imposes a legal obligation on a person or government entity to act or not to act in a particular way.<sup>84</sup> By its own terms section 1983 requires that the rights it protects be "secured" by the Constitution; a section 1983 *constitutional* right should therefore include any claim of duty that the Constitution creates or protects.<sup>85</sup> Section 1983 provides a cause of action for the victims of constitutional torts—it did not create any substantive rights,<sup>86</sup> and by the same logic, should not of its own force destroy any. A decision that the Constitution does not guarantee certain rights should rest on a construction of the Constitution itself.<sup>87</sup>

### C. *Objections to This Note's Definition*

#### 1. *Section 1983 and the Fourteenth Amendment*

Some courts<sup>88</sup> and commentators<sup>89</sup> have averred that section 1983 extends as far as, but no farther than, the Fourteenth Amendment. Section

83. See *supra* notes 26–29 and accompanying text.

84. Cf. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 493 n.5 (1982) (Brennan, J., dissenting) ("When the Constitution makes it clear that a particular person is to be protected from a particular form of government action, then that person has a 'right' to be free of that action."); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867 (1987) ("rights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted"); see also *Carey v. Phipus*, 435 U.S. 247, 254 (1978).

85. As section 1983's drafters and the Supreme Court have recognized, the Constitution both protects pre-existing rights and creates new ones. See CONG. GLOBE, 42d Cong., 1st Sess. 429 (1871) (Rep. Beatty); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979) (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 526–27 (1939) (opinion of Stone, J.)); *United States v. Guest*, 383 U.S. 745, 779 (1966) (Brennan, J., concurring in part and dissenting in part).

One commentator suggests that because commerce clause plaintiffs have article III standing to sue for commerce clause violations, they must have a constitutional "right" to engage in interstate commerce. The same reasoning would presumably apply to supremacy clause plaintiffs. With no extrinsic definition of "right" supporting the major premise, however, that argument is tautological. See Note, *supra* note 13, at 167–69. A plaintiff might have standing to challenge a putative right's violation but no section 1983 constitutional right, see, e.g., *Baker v. McCollan*, 443 U.S. 137 (1979); conversely, she might have a right, but no standing to vindicate it in federal court, see *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 483 (1982) ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III").

86. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

87. Cf. *Collins*, *supra* note 12.

88. See, e.g., *Thompson v. New York*, 487 F. Supp. 212, 220 (N.D.N.Y. 1979); *Poirier v. Hodges*, 445 F. Supp. 838, 842 (M.D. Fla. 1978). The *Poirier* court leaned on the Supreme Court's comment in *Monroe v. Pape*, 365 U.S. 167, 171 (1961), that section 1983 protected the Fourth Amendment and other Bill of Rights provisions through the Fourteenth Amendment's due process clause. But *Poirier* involved a contracts clause claim, so the court's holding was illogical: Since the contracts clause applies directly to the states, see U.S. CONST. art. I, § 10, cl. 1, it could never be incorporated against the states through the Fourteenth Amendment. But cf. *infra* note 94 (explaining why such "incorporation" might be justifiable).

89. See, e.g., *Developments*, *supra* note 36, at 1169; cf. S. NAHMOM, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 75 (2d ed. 1986) ("relation between § 1983 and Fourteenth Amendment is best described as very close").

1983 was part of a statute entitled "An Act to enforce the Provisions of the Fourteenth Amendment and for other purposes,"<sup>90</sup> and Congress passed it under its Fourteenth Amendment enforcement power.<sup>91</sup> Therefore, they argue, section 1983 should only protect Fourteenth Amendment rights, including, presumably, those rights secured by Bill of Rights provisions incorporated in the due process clause.<sup>92</sup>

A statute's title, however, does not affect the substantive reach of the law.<sup>93</sup> Moreover, although Congress enacted section 1983 under the Fourteenth Amendment, section 1983 definitely goes beyond the amendment's confines.<sup>94</sup> Section 1983 also protects rights secured by laws passed under

90. See CONG. GLOBE, 42d Cong., 1st Sess. app. 335 (1871).

91. U.S. CONST. amend. XIV, § 5; see *Monroe v. Pape*, 365 U.S. 167, 171 (1961). *But cf.* sources cited *supra* note 43 (disputing origins of Congress's power); Collins, *supra* note 12 (in *Maine v. Thiboutot*, 448 U.S. 1 (1980), Supreme Court "seemed to conclude that Congress had acted pursuant to powers other than the Civil War amendments when it passed" section 1983) (emphasis in original).

92. *Cf.* Collins, *supra* note 12 (arguing on policy grounds that section 1983 should be limited to victims of racial bias or violence). *But see* Nichol, *supra* note 18, at 989 ("Reasonably well-informed people" could hardly conclude, from the language of the statute alone, that the evils addressed are limited to race discrimination") (footnote omitted).

93. See *Hadden v. The Collector*, 72 U.S. (5 Wall.) 107, 110 (1867) (statute's title "cannot be used to extend or to restrain any positive provisions contained in the body of the act"). Furthermore, "[t]he words 'for other purposes,' frequently added to the title in acts of Congress, are considered as covering every possible subject of legislation." *Id.* at 111.

94. The Supreme Court has confirmed as much in dicta. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 n.16 (1972); see also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 667 & n.43 (1979) (White, J., concurring); *supra* notes 68-77 and accompanying text (section 1983 covers, e.g., Fifteenth Amendment rights and all statutory rights). Moreover, section 241 was also grounded in section 5 of the Fourteenth Amendment, see *United States v. Guest*, 383 U.S. 745, 755 (1966), and the Supreme Court has suggested that its scope, too, is broader than the amendment itself. See *United States v. Price*, 383 U.S. 787, 800 (1966) (section 241 "embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States") (emphasis in original); *id.* at 797 (similar).

The *Lynch* dictum accords with Supreme Court precedent, despite Representative Shellabarger's suggestion that the bans on state action listed in U.S. CONST. art. I, §§ 9, 10, along with, presumably, those derived from the commerce and supremacy clauses, are only "enforceable" when a court strikes down state laws that violate those prohibitions. See CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871), quoted in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-49 (9th Cir.), cert. denied, 479 U.S. 1060 (1987); cf. *Carter v. Greenhow*, 114 U.S. 317, 322 (1884) (contracts clause only secures "right to have a judicial determination, declaring the nullity of the attempt to impair [a contract's] obligation"). In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536, 618-22 (1842), for instance, the Court decided that Congress could enforce the fugitive slave clause, U.S. CONST. art. IV, § 2, cl. 1, even though the clause contains no provision for congressional legislation. See also *Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (Congress may enforce extradition clause, U.S. CONST. art. IV, § 2); *Logan v. United States*, 144 U.S. 263, 293 (1892) ("every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, . . . may in its discretion deem most eligible and best adapted to attain the object"). *But see* Collins, *supra* note 12 ("[i]t is highly problematic . . . whether Congress has the power to enforce naked limitations on government in the original body of the Constitution by remedial legislation such as section 1983").

*Prigg's* logic leads to the conclusion that even though the supremacy clause contains no explicit enforcement provision, Congress may still create a private cause of action for supremacy clause violations. If the Court endorses Professor Collins' powerful criticisms, two avenues remain for recognizing non-Fourteenth Amendment claims under section 1983. First, most claims for violations of other constitutional provisions could be translated into Fourteenth Amendment terms. A state bill of attainder, U.S. CONST. art. I, § 9, cl. 3, for example, would surely deny someone life or liberty without due process. In fact, "such an incorporation may have been the very purpose of the derelict privileges and immunities clause of the Fourteenth Amendment." Collins, *supra* note 12. Second, Congress itself

virtually all of Congress's delegated powers.<sup>95</sup> When section 1983 covers statutory rights grounded in a particular constitutional provision, it should also protect constitutional rights secured by the provision itself.<sup>96</sup>

## 2. *A Hierarchy of Constitutional Rights?*

Courts that apply section 1983 beyond the Fourteenth Amendment claims still limit its reach. In a section 1983 dormant commerce clause case, for example, the Eighth Circuit wrote that Congress meant only to protect "important personal rights akin to fundamental rights protected by the Fourteenth Amendment."<sup>97</sup> Excluded from this group are rights derived from those constitutional provisions that allocate government power.<sup>98</sup>

That a right is labeled "personal," however, signifies only that it inures to individuals' benefits and may, therefore, be waived.<sup>99</sup> And while certain constitutional rights are popularly viewed as somehow more important than others,<sup>100</sup> as a matter of constitutional law, any ranking of rights' relative "worth" is unsupportable.<sup>101</sup> A right may have to be "fundamental" for it to come within the Fourteenth Amendment's due process clause,<sup>102</sup> for example, or to trigger strict scrutiny review under the equal

might "incorporate" any rights it wants to under section five itself. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (section five "authoriz[es] Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" subject to rationality standard of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); *see also* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975). A more detailed exploration of these possibilities is beyond the scope of this Note.

95. *See* *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1146 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984); *see also supra* notes 73-76.

96. *Cf. Eisenberg, supra* note 55, at 511 (criticizing *Thiboutot*).

97. *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1146 (8th Cir.) *cert. denied*, 469 U.S. 834 (1984); *see also, e.g., First Nat'l Bank of Omaha v. Marquette Nat'l Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980) (same limits on statutory rights), *cert. denied*, 450 U.S. 1042 (1981); Collins, *supra* note 12 (noting that such distinctions "enable[] Justices to take an 'I know it when I see it' approach to section 1983").

98. *See Kassel*, 730 F.2d at 1144-45 (commerce clause); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-50 (9th Cir.) (supremacy clause), *cert. denied*, 479 U.S. 1060 (1987); *see also* J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 174-75, 201-02 (1980).

99. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986) (right to article III court); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial in criminal case); *cf. Davis v. Passman*, 442 U.S. 228, 235 n.10 (1974) ("This right is personal; it is petitioner, after all, who must suffer the effects").

100. Popular notions of rankings of rights derive partly from the Supreme Court's Fourteenth Amendment's jurisprudence, which distinguishes among "fundamental" and garden-variety rights, *see infra* notes 102-05 and accompanying text, and partly from philosophers' normative rights theories, which typically go no farther than generalized rights of liberty, property, equality, and the like. *See, e.g.,* J. RAWLS, *A THEORY OF JUSTICE* chs. 2, 3 (1971).

101. *But cf. Collins, supra* note 12 (proposing that Supreme Court limit section 1983 to plaintiffs or constitutional rights deserving more rigorous Fourteenth Amendment review under *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

102. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion).

protection clause;<sup>103</sup> but one constitutional right—once a *constitutional* right—is as important as any other.<sup>104</sup>

Furthermore, one constitutional clause may serve different functions simultaneously.<sup>105</sup> A provision that allocates governmental power, such as article three,<sup>106</sup> also confers on individuals the right to an unbiased, independent federal judiciary;<sup>107</sup> and a provision that ostensibly confers rights, like the ex post facto clause,<sup>108</sup> may also serve separation of powers principles by forcing the legislature to act like a legislature, and not like a judiciary.<sup>109</sup> A constitutional provision's phrasing<sup>110</sup> and functions<sup>111</sup> do not affect its status as a source of rights.

### 3. Chapman v. Houston Welfare Rights Organization

Courts dismissing supremacy clause actions under section 1983 have nonetheless relied on *Chapman v. Houston Welfare Rights Organization*<sup>112</sup> for the proposition that section 1983 does not reach supremacy clause rights, or, more generally, rights under "structural" constitutional provisions.<sup>113</sup> *Chapman's* holding, however, is far more technical<sup>114</sup>—and

103. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (freedom of association). *But cf.* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29–39 (1973) (no "fundamental" right to free public education).

104. Cf., e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values"); *Reid v. Covert*, 354 U.S. 1, 9 (1957) ("[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on . . . the Federal Government by the Constitution and its Amendments"); *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (similar).

105. See CONG. GLOBE, 42d Cong., 1st Sess. app. 46 (1871) (Rep. Kerr).

106. U.S. CONST. art. III (establishing structural guidelines for "the judicial Power of the United States").

107. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (article III "serves both to 'protect the role of the independent judiciary within the constitutional scheme . . .' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government'") (citations omitted); see also THE FEDERALIST No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

108. U.S. CONST. art. I, § 9, cl. 7.

109. See J. ELY, DEMOCRACY AND DISTRUST 90–91 (1980); see also *In re Quarles*, 158 U.S. 532, 534 (1895) ("The right of a citizen informing of a violation of law, . . . to be protected against lawless violence, does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government . . .").

110. The same is not necessarily true for federal statutes. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1980) (if Congress intends to preclude it, section 1983 action unavailable for statutory violations); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1980) (statute must create rights and duties, not merely express Congress's preferences); *supra* note 82.

111. Cf. J. CHOPER, *supra* note 98, at 174–75 (suggesting that extent of judicial review depend on "primary function" of constitutional provision involved).

112. 441 U.S. 600 (1979); see, e.g., *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.), cert. denied, 479 U.S. 1060 (1987); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1143–44 (8th Cir.), cert. denied, 469 U.S. 834 (1984).

113. See, e.g., *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 748 (E.D. Wash. 1985).

114. See *Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 750 F.2d 608, 616 n.16 (7th Cir. 1984) (acknowledging *Chapman's* limits), *aff'd*, 475 U.S. 282 (1986).

congressional action since the decision has deprived it of precedential force.

The *Chapman* plaintiffs brought section 1983 actions to overturn state regulations that conflicted with the federal Social Security Act. The plaintiffs argued—and the Court agreed—that the supremacy clause “does ‘secure’ federal rights by according them priority whenever they come in conflict with state law.”<sup>115</sup> Parsing the jurisdictional statute’s language, however, the Court decided that section 1343(3) could not cover rights secured by the supremacy clause. Section 1343(3) provides federal jurisdiction for suits to vindicate rights secured by the Constitution, or by “any Act of Congress providing for equal rights.”<sup>116</sup> If section 1343(3)’s “Constitution” included the supremacy clause, a claimant would always be able to sue in federal court, even when her otherwise-statutory right was not one providing for equal rights. Instead of ignoring the import of the specific statutory text, the Court excepted supremacy clause claims from section 1343(3)’s scope.<sup>117</sup>

The *Chapman* Court reserved the question of whether sections 1343(3) and 1983 are coextensive. Congress’s later repeal of the \$10,000 threshold for general federal question jurisdiction<sup>118</sup> made section 1343(3)—and *Chapman*—superfluous.

### III. SECTION 1983 ACTIONS FOR SUPREMACY CLAUSE VIOLATIONS

#### A. *Rights Under the Supremacy Clause*

This Section argues that the supremacy clause creates a right to the supremacy of federal law.<sup>119</sup> The framers’ unhappy experiences under the Articles of Confederation spurred them to forge a central government with stronger powers.<sup>120</sup> To ensure that those powers be effective,<sup>121</sup> the Convention wrote in the supremacy clause that “This Constitution, and the

115. 441 U.S. at 613.

116. 28 U.S.C. § 1343(3) (1982).

117. See 441 U.S. at 614–16. *Swift & Co. v. Wickham*, 382 U.S. 111, 126 (1965), quoted in *Chapman*, 441 U.S. at 614, held specifically that “cases of actual conflict with a federal statute or treaty” were not “constitutional” within the meaning of 28 U.S.C. § 2281 (1970) (three judge court required in suits to enjoin state statutes on grounds of unconstitutionality), repealed, Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119 (1976). *Swift’s* reasoning might mean that cases “where state action is in actual conflict with the explicit provisions of federal law,” *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 850 n.8 (9th Cir.), cert. denied, 479 U.S. 1060 (1987), are not “constitutional” within the meaning of section 1983 either. If so, a plaintiff would only be able to sue under section 1983 when the federal law with which the state law conflicted itself met the test of *Pennhurst State School & Hosp. v. Halderman*, 453 U.S. 1 (1981) (discussed *supra* section II-A). This Note argues that plaintiffs’ constitutional supremacy clause rights are violated whenever a state law is preempted, even when that law does not actually violate a federal statute. While *Chapman* referred more ambiguously to “allegation[s] of incompatibility between federal and state statutes and regulations,” 441 U.S. at 615, *Swift* provides little support for such a reading.

118. Pub. L. 96-486, 94 Stat. 2369 (1980).

119. See *supra* section II-B (proposing definition of “rights”).

120. See 1 THE FOUNDERS’ CONSTITUTION 147–84 (P. Kurland & R. Lerner eds. 1987).

121. See 4 *id.* at 592–97; THE FEDERALIST No. 44 (J. Madison).

Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."

Although its text reads like a straightforward declaration,<sup>122</sup> the supremacy clause has a self-executing effect:<sup>123</sup> The clause deprives states of the "power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."<sup>124</sup> A state law is pre-empted through the supremacy clause<sup>125</sup> if it conflicts with a federal statute,<sup>126</sup> if it frustrates Congress's goals,<sup>127</sup> or if it invades a field that Congress has chosen to occupy.<sup>128</sup> In effect, the unwritten supremacy clause reads like the Fourteenth Amendment: "No State shall make or enforce any law which shall unduly interfere with

122. Some thought the supremacy clause at best a truism, and therefore unnecessary. *See, e.g.*, Debates in N.C. Ratifying Convention (July 29–30, 1788), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 120, at 602–03; 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1837 (1833). Others thought the clause might serve as a blank check for tyranny. *See* H. STORING, THE COMPLETE ANTI-FEDERALIST 110, 280–81 (abr. ed. 1985); J. MAIN, THE ANTIFEDERALISTS 124 (1961).

123. The commerce clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing a substantial burden on interstate commerce." *South Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); *see also* *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873). The supremacy clause operates in similar ways. *See* *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 849 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984); *cf.* *The Banks v. The Mayor*, 74 U.S. (7 Wall.) 16 (1868) (finding "right, privilege, or immunity" under negative implications of affirmatively worded credit clause, U.S. CONST. art. I, § 8, cl. 2).

124. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (Marshall, C.J.); *see also* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). *See generally* *Fidelity Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141 (1982) (outlining preemption analysis); *Maryland v. Louisiana*, 451 U.S. 725 (1981). *Cf.* *Rothschild, A Proposed "Tonic" for Florida Lime to Celebrate our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. MIAMI L. REV. 829 (1984) (criticizing Supreme Court's supremacy clause jurisprudence); *Engdahl, Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); *cf. also* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978) (offering new approach).

125. Most supremacy clause cases involve congressional exercises of its interstate commerce power, U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), but Congress may preempt state laws interfering with any field in which Congress may constitutionally act, such as immigration and naturalization, *see, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52 (1941), patents and copyrights, *see, e.g.*, *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compro Corp. v. Day-Brite Lighting Inc.*, 376 U.S. 234 (1964), or bankruptcy, *see, e.g.*, *Perez v. Campbell*, 402 U.S. 637 (1971).

126. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *McDermott v. Wisconsin*, 228 U.S. 115 (1913); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Congress can explicitly preempt state laws in a federal statute itself. *See, e.g.*, *Medical Device Amendments of 1976*, Pub. L. No. 94-295, § 521(e), 90 Stat. 539, 574 (codified at 21 U.S.C. § 360k(a) (1982)); 42 U.S.C. § 1973 (1982) (preempting state literacy tests). Conversely, Congress may explicitly save state laws from preemption. *See, e.g.*, 33 U.S.C. § 1321(o)(2) (1982); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295–96 (1987) (Scalia, J., concurring).

127. *See, e.g.*, *Philko Aviation, Inc. v. Shackel*, 462 U.S. 406 (1983); *McCarty v. McCarty*, 453 U.S. 210 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *cf.* *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987).

128. *See, e.g.*, *North Dakota v. United States*, 460 U.S. 300 (1983); *Amalgamated Ass'n v. Lockridge*, 403 U.S. 274 (1971); *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *cf.* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).



federal supremacy." When a state does so, a plaintiff should be able to vindicate her supremacy clause rights using section 1983.<sup>129</sup>

## B. Section 1983 Relief for Supremacy Clause Claimants

A section 1983 plaintiff is entitled, as a matter of law, to an injunction, damages, and attorney's fees.<sup>130</sup> Together, those remedies compensate injury and deter future constitutional violations.<sup>131</sup> Supremacy clause suits under section 1983 will thus force governments to pause before they burden the exercise of supremacy clause rights.

### 1. Money, Injunctions, and Sovereign Immunity

Section 1983 expressly provides that any person who successfully vindicates a constitutional right can hold the defendant liable "in an action at law, suit in equity, or other proper proceeding for redress."<sup>132</sup> A supremacy clause plaintiff who wins a section 1983 suit should therefore be entitled to enjoin the operation of the unconstitutional statute and to recover damages.<sup>133</sup>

In practice, however, section 1983 injunctions will make little difference. Without section 1983, a supremacy clause plaintiff typically sues for a declaratory judgment<sup>134</sup> that a statute is unconstitutional.<sup>135</sup> Injunctions usually follow as a matter of course.<sup>136</sup>

Furthermore, section 1983 has no effect on the states' constitutionally conferred sovereign immunity. The Eleventh Amendment<sup>137</sup> precludes any recovery of money damages,<sup>138</sup> in federal court, from the states *qua*

129. The Supreme Court has never referred to a supremacy clause interest as a "right." *Cf. e.g.*, *ANR Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 608 F. Supp. 43, 48 (W.D. Mich. 1984) ("rights under the Supremacy Clause and the Commerce Clause"); *cf. also* *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one.") (dictum); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Yet the Court's words are hardly dispositive. Whether the supremacy clause secures a "right" depends on what the word "right" means. *Cf.* Case Note, *supra* note 13, at 761-62 (relying on Court's commerce clause language without offering definition of "rights"); Note, *supra* note 13, at 165-67 (same).

130. See 42 U.S.C. §§ 1983, 1988 (1982).

131. See *Carey v. Phipus*, 435 U.S. 247 (1978). *But see* *Whitman, Constitutional Torts*, 79 MICH. L. REV. 5, 47-56 (1980) (discussing failure of tort remedies to serve section 1983's deterrence and compensatory functions).

132. 42 U.S.C. § 1983 (1982).

133. *But cf.* *Whitman, supra* note 131, at 6, 70 (proposing that section 1983 be limited to suits for injunctions).

134. See Declaratory Judgment Act, 28 U.S.C. § 2201 (1982).

135. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

136. See 28 U.S.C. § 2202 (1982).

137. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

138. Plaintiffs may sue states in federal court for injunctions. *Ex parte Young*, 209 U.S. 123 (1908); see also *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (state officials acting in official capacities amenable to suits for prospective relief).

states<sup>139</sup> or from state officials acting in their official capacities.<sup>140</sup> States may, of course, waive their sovereign immunity.<sup>141</sup> Some states permit selected section 1983 actions to proceed in state court,<sup>142</sup> where state judges can award damages. It seems unlikely, though, that many states would voluntarily expose their treasuries to potentially high damages.

On the other hand, a plaintiff subjected to local regulation might choose to sue the city or county that injured her. Local governments enjoy no sovereign immunity in section 1983 actions.<sup>143</sup> In its role in the process of transformative constitutionalism, section 1983 redresses injured plaintiffs in full.<sup>144</sup> A supremacy clause plaintiff should be compensated for all the damages she suffered. Typically, her damages would include any unconstitutional taxes she paid, and the city retained;<sup>145</sup> any out-of-pocket costs the plaintiff expended, which the city proximately caused; and, if she can prove them, any profits that the plaintiff might have earned while the city left its law in effect.<sup>146</sup>

## 2. *From Here to Attorney's Fees*

With the Eleventh Amendment blocking her recovery, a supremacy clause plaintiff suing a state might have little reason to use section 1983. One hundred years after Reconstruction, however, Congress perfected the

139. *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974). *But see* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1475-81 (1987) (criticizing Supreme Court's Eleventh Amendment jurisprudence).

140. Section 1983 plaintiffs must also contend with the doctrines of equitable restraint, *see* *Younger v. Harris*, 401 U.S. 37 (1971), *Pullman* abstention, *see* *Boehning v. Indiana State Employees Ass'n*, 423 U.S. 6 (1975), *res judicata*, *see* *Migra City School Dist. Bd. of Educ. v. Warren*, 465 U.S. 75 (1984), and collateral estoppel, *see* *Allen v. McCurry*, 449 U.S. 90 (1980). *But cf.* *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (section 1983 plaintiffs need not exhaust administrative remedies before suit).

141. *Cf.* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one").

142. *See, e.g.*, *Private Truck Council of Am. v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *cf.* *Martinez v. California*, 444 U.S. 277, 283-85 (1980) (state courts may, but need not, entertain section 1983 suits); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981) (arguing that state courts must hear section 1983 claims).

143. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (overruling in part *Monroe v. Pape*, 365 U.S. 167 (1961)).

144. *See* *Carey v. Phipus*, 435 U.S. 247 (1978).

145. Unconstitutional taxes can mount considerably before courts strike them down, and plaintiffs denied a Fourteenth Amendment refund action, *see* *Carpenter v. Shaw*, 280 U.S. 363 (1930), may have to forfeit considerable sums. In *Private Truck Council of Am. v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986), for example, Maine withheld nearly \$700,000. Telephone interview with Richard D. Henderson, Executive Vice-President, Private Truck Council of Am. (Oct. 27, 1987).

146. In *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985), the district court did not grant the Andersons a temporary restraining order until nine days after the ordinance took effect. The Andersons estimate that they forfeited "at least a few thousand" in lost profits. Telephone interview with Jim Anderson (Oct. 29, 1987). *But cf.* Collins, *supra* note 12 (contending that "the incentive of damages in every case of proven injury . . . for successful constitutional plaintiffs is arguably less needed in cases challenging broad scale social welfare or economic legislation").

instrument it created for transformative constitutionalism.<sup>147</sup> Section 1988 sharpened section 1983's sword by permitting a successful plaintiff to recoup some of her lost damages by recovering her legal expenses.<sup>148</sup> The specter of high fees should not deter her from suit at the outset.<sup>149</sup>

Supremacy clause cases underscore section 1988's significance. The White Mountain Apache Tribe, for example, paid \$206,012.07 in court costs and legal fees.<sup>150</sup> Many might have found it cheaper to forgo suit than to pay the lawyers they would have required.<sup>151</sup> Shifting attorney's fees to losing government defendants would ensure that section 1983 not become a "mere hollow pronouncement,"<sup>152</sup> but remain, instead, an effective means for the vindication of constitutional rights.

### 3. Policy Objections to Section 1983 Relief

Since section 1983's coming of age,<sup>153</sup> courts, as well as commentators, have expressed concerns over section 1983's effects on federalism and on governments' financial stability.<sup>154</sup> Of course, these policy arguments should be addressed to the policy making branch of government: a court should not emasculate section 1983 because *it* thinks Congress drafted an unwise law.<sup>155</sup>

147. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)) ("In any action or proceeding to enforce [section 1983] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.").

148. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986). A winning plaintiff should ordinarily receive her attorney's fees so long as no special circumstances make the award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citing H.R. REP. NO. 1558, 94th Cong., 1st Sess. (1976)).

149. See 461 U.S. at 429; S. REP. NO. 1011, 94th Cong., 1st Sess. 2, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5910 ("In many cases . . . the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.").

150. *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 847 (9th Cir.), cert. denied, 479 U.S. 1060 (1987); see also *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1471-72 (10th Cir. 1985); Anderson interview, *supra* note 146 (\$8665.75 completely sapped year's cash flow for commerce clause plaintiffs). The Tribe's suit lasted almost fourteen years.

151. In retrospect, Jim Anderson said, he "regret[ed] ever bothering." Anderson interview, *supra* note 146. And according to the Apaches' lawyer in *Williams*, most tribes have given up challenging state taxes that might otherwise be found unconstitutional—taxes that undermine reservations' economic bases, and threaten, in the end, Native American cultural autonomy as well. Telephone interview with Neil Wake of Phoenix, Ariz. (June 29, 1988). *But cf.* Collins, *supra* note 12 ("the attorneys' fee incentive is not needed for most cases involving ordinary economic regulation . . . , [where] there is a large pool of competent counsel ready and willing to litigate").

152. S. REP. NO. 1011, 94th Cong., 1st Sess. 6, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5913.

153. See *supra* section I-C.

154. For judicial criticism, see *Paul v. Davis*, 424 U.S. 693, 697-701 (1976); *Rizzo v. Goode*, 423 U.S. 362, 377-80 (1976); see also *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1143-44 (8th Cir.), cert. denied, 469 U.S. 834 (1984). For scholarly criticism, see H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 87-107 (1973); Whitman, *supra* note 131, at 6-10 & 6 n.10; *Developments*, *supra* note 36, at 1172-75. *But see* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 644-52 (1987).

155. See Blackmun, *supra* note 14, at 23.

In any event, the critics' fears are exaggerated. Section 1983 supremacy clause actions will add only slightly to the federal courts' caseload, since most supremacy clause plaintiffs file suit in federal court to begin with. Only state court plaintiffs who now hope a state will waive its immunity would turn instead to a federal forum. To the extent, therefore, that supremacy clause rights deserve protection, section 1983 guarantees that federal courts be available precisely when state courts would be inadequate.

Courts might also dismiss section 1983 supremacy clause actions on the policy grounds that granting damages spells fiscal disaster for municipal defendants.<sup>156</sup> Governments forced to reimburse lost revenue could risk high awards. Better, courts might propose, to reduce a plaintiff's damages to arbitrary limits;<sup>157</sup> best, courts have implied, to reject the claims entirely. The same logic applies to section 1988 attorney's fees: Instead of dooming the American Rule, dismiss the cause of action.

In *Maine v. Thiboutot*, however, the Supreme Court encountered, and rejected, similar arguments.<sup>158</sup> Section 1983 is now the "primary means"<sup>159</sup> of transformative constitutionalism. That section 1983 works as planned should hardly count against it.

#### IV. CONCLUSION

Since Reconstruction, section 1983 has become an indispensable part of the constitutional process.<sup>160</sup> Some courts, though, are reluctant to implement the Forty-second Congress's whole vision. This Note has offered a definition of section 1983's core terms that would give the statute its full effect—ensuring thereby that people like the White Mountain Apaches receive the succor section 1983 was meant to provide.

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156. *Cf.* Collins, *supra* note 12 (bemoaning "sheer scale of interim damages to regulated business").

157. *Cf. id.* ("it might be possible to give section 1983 an all-inclusive constitutional scope, but to give district judges the discretion to deny damages when . . . the injunctive remedy was adequate").

158. In his dissent, Justice Powell wrote that giving force to the words "all laws" would "harass state and local officials"; "creat[e] a major new intrusion into state sovereignty under our federal system"; and establish, in effect, the regular shifting of fees. 448 U.S. 1, 22-23, 33 (1980) (Powell, J., dissenting).

159. Blackmun, *supra* note 14, at 3.

160. Had Congress not enacted section 1983, the Supreme Court might eventually have crafted an equivalent. *Cf.* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).