



UNC
SCHOOL OF LAW

University of North Carolina School of Law
Carolina Law Scholarship Repository

Faculty Publications

Faculty Scholarship

1987

Federalism, State Courts, and Section 1983

Gene R. Nichol Jr.

University of North Carolina School of Law, gnichol@email.unc.edu

Follow this and additional works at: https://scholarship.law.unc.edu/faculty_publications



Part of the [Law Commons](#)

Publication: *Virginia Law Review*

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

VIRGINIA LAW REVIEW

VOLUME 73

SEPTEMBER 1987

NUMBER 6

FEDERALISM, STATE COURTS, AND SECTION 1983

*Gene R. Nichol, Jr.**

THE law of federal courts is hardly a model of clarity. The body of judicial decisions catalogued roughly under the case or controversy requirement embraces principles that are both elusive and inconsistently applied.¹ The features that distinguish the powers of article III and article I judges are notoriously unfathomable.² The "arising under" jurisdiction defies definition.³ The content of the eleventh amendment limitation of judicial authority cannot be ascertained by either logic or examination of the constitutional text.⁴ And the power of the Congress to manipulate the appellate jurisdiction of the United States Supreme Court remains both controverted⁵ and, to our good fortune, largely untested.⁶

* James Gould Cutler Professor of Constitutional Law, Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia. Martin Redish, Mike Wells, and Paul LeBel provided helpful comments on an earlier draft of this essay. Drew Dolson supplied much-needed research assistance.

¹ See generally Nichol, *Rethinking Standing*, 72 Calif. L. Rev. 68 (1984) (arguing that the "injury" analysis of standing has not resulted in inconsistency of application).

² See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 105 (1982); see also *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 584-600 (1949) (surveying allocation of powers and jurisdiction conferred by articles I and III).

³ See generally *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-12 (1982) (discussing "arising under" jurisdiction); H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* 470 (1984) (same).

⁴ See generally *Ex parte Young*, 209 U.S. 123, 149-56 (1908) (attempting to determine scope of eleventh amendment); *Hans v. Louisiana*, 134 U.S. 1, 10-15 (1889) (same).

⁵ See generally M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 7-34 (1980) (discussing the authority of Congress to control the jurisdiction of article III courts).

⁶ But see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (statute withdrawing appellate jurisdiction of United States Supreme Court upheld).

The principles that regulate the relationship between the state and federal courts, however, easily rank among the most byzantine of the entire federal courts jurisprudence. The operation of two autonomous judicial systems within the same geographical boundary is a matter of no small complexity. The supremacy clause, of course, assures a fundamental primacy to federal tribunals. To mitigate federal intrusion, however, the Supreme Court has fashioned a bevy of related jurisdictional doctrines that channel exercises of the national judicial power. This complex patchwork—requiring, under various circumstances, abstention, exhaustion, equitable restraint, and the like⁷—has substantially complicated the federal litigation process.

No doubt much of this effort, and perhaps even much of the resulting confusion, is unavoidable. In a dual court system, it is not only essential that principles be set forth allocating the powers to be exercised by the constituent judiciaries, but that standards be developed to determine how each tribunal will deal with the other. These, in any circumstances, are not simple tasks.⁸

The problems arising from this natural tension, however, have been further complicated by the nature of the evolving relationship between the state and federal judicial systems. During the first century of our history, state courts enjoyed, at least relatively speaking, a substantial autonomy from their federal counterparts.⁹ After the Civil War, however, a program of federal oversight gradually began to take shape. The provisions of the Civil War amendments promised a significant revision in concepts of state sovereignty. The magnitude of that alteration, however, has provided the focus of our most pervasive, and most tenacious, constitutional

⁷ Consider, for example, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention); *Burford v. Sun Oil*, 319 U.S. 315 (1943) (abstention); *Younger v. Harris*, 401 U.S. 37 (1971) (doctrine of equitable restraint); *Hicks v. Miranda*, 422 U.S. 332 (1975) (limited exhaustion requirement); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (limiting habeas corpus review).

⁸ Consider, for example, de Tocqueville's statement:

As the Constitution of the U.S. recognized two distinct sovereignties, in presence of each other, represented in a judicial point of view by two distinct classes of courts of justice, the utmost care taken in defining their separate jurisdictions would have been insufficient to prevent frequent collisions between those tribunals.

1 A. de Tocqueville, *Democracy in America* 147 (P. Bradley ed. 1945).

⁹ I speak here, of course, of supervision by federal trial courts. Since at least the time of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), state courts have been supervised by the United States Supreme Court.

debate. Substantively, the federalism controversy has played itself out vividly in the interpretation of the clauses of the fourteenth amendment. Procedurally, the debate has been vigorous as well. But surprisingly, the battle has centered on an exercise in statutory interpretation.¹⁰ The modern interplay between state and federal courts has been intricately tied to the meaning, scope, and content of 42 U.S.C. § 1983.¹¹ This essay will consider a particularly troubling subset of the law of federal-state judicial interaction: the relationship between the section 1983 cause of action and state judicial process.

Section 1983 creates a cause of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws of the United States."¹² When the abrogation of civil liberties is alleged to have occurred by means of state judicial process, however, particularly thorny problems arise. The statute, by its terms, applies broadly to all state actors. But local tribunals have traditionally enjoyed a variety of shields from national interference. The Supreme Court's treatment of the dilemma has been less than satisfying. Consider the most prominent examples.

Applying an essentially historical model in *Mitchum v. Foster*,¹³ the high court ruled that the framers of section 1983 intended the cause of action to extend to injunctive claims directed at pending state judicial process.¹⁴ Apparently ignoring that historical argument in *Younger v. Harris*,¹⁵ the Justices announced a doctrine of equitable restraint that all but forecloses injunctive interference with state cases.¹⁶ The Court has used the legislative intent of section 1983 to recognize, despite the language of the statute, an absolute immunity from damage claims for local judicial officers.¹⁷

¹⁰ The *Younger* doctrine appears to be strictly an example of judge-made law, as opposed to statutory interpretation. I argue below, however, that *Mitchum v. Foster*, 407 U.S. 225 (1972), casts doubt on such a vision of *Younger*. Accordingly, the decision must be seen as an interpretation of § 1983. See *infra* notes 70-76 and accompanying text.

¹¹ 42 U.S.C. § 1983 (1982). See *infra* text accompanying note 77 for text of the statute.

¹² 42 U.S.C. § 1983 (1982).

¹³ 407 U.S. 225 (1972).

¹⁴ See *id.* at 242.

¹⁵ 401 U.S. 37 (1971).

¹⁶ See *id.* at 43-44.

¹⁷ See *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967). See generally Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 Va. L. Rev. 833 (1978) (discussing the Supreme Court's reaffirmance of the judicial immunity doctrine).

Recently, however, the Court ruled that the "intention" of section 1983 did not foreclose the issuance of prospective federal relief against state judges.¹⁸ The "history" of section 1983, reflecting a substantial distrust of local judicial process, has been employed to relieve a plaintiff of the burden of exhausting state judicial remedies prior to seeking federal redress.¹⁹ The doctrine of collateral estoppel, however, has been held fully applicable to section 1983 claims, as the result of a refusal by the Court to embrace the same historical premise.²⁰ In short, the Supreme Court has addressed the relationship between section 1983 and state courts desired by the statute's framers in a variety of contexts and by means of a number of supposedly distinct inquiries. With apparent equal facility, the Justices have concluded that the section 1983 cause of action does, and does not, incorporate a heavy dose of deference to state judiciaries. The final judicial product, therefore, is a course that is massively difficult to navigate. The propriety of the Court's handiwork will be the focus of the discussion that follows.

First, I consider in more depth the interrelationship between the interpretation of the Civil Rights Act of 1871²¹ and the development of federal jurisdictional principles. As I have suggested, the Court appears to have implemented dramatically different visions of the appropriate solicitude to be afforded local judicial process in assessing the validity of a section 1983 claim. Given the essentially historical or intentional model of statutory interpretation that the Court has claimed to employ, it is difficult to understand how the Justices can expect to have it both ways. One would guess that the drafters of the Civil Rights Act either meant to incorporate traditional notions of deference to state judicial actors, or they did not. The random and inconsistent use of legislative purpose to measure statutory demands is hardly an advisable method of interpretation. Not surprisingly, the manipulation of statutory intention reflected in the Court's decisions has led to claims that some of the cornerstones of federal courts jurisprudence are illegitimate.²²

¹⁸ See *Pulliam v. Allen*, 466 U.S. 522, 540 (1984).

¹⁹ See *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

²⁰ See *Allen v. McCurry*, 449 U.S. 90, 104 (1980).

²¹ Ch. 22, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1983, 1985-1986 (1982)). Section one of the Civil Rights Act of 1871 (widely known as the Ku Klux Act) was the predecessor to § 1983. See the discussion in Part I *infra*.

²² See, e.g., Redish, *Abstention, Separation of Powers and the Limits of the Judicial*

In Part II, then, I explore the legislative intent behind section 1983. My particular concern is the drafters' design, or lack of it, that the provision secure relief against state judicial process. I conclude that the overwhelming weight of evidence suggests that the statute's framers sought to provide a federal cause of action to remedy miscarriages of justice at the hands of state jurists. It hardly overstates the case, in fact, to suggest that forcing state judicial officers to toe the constitutional mark was one of the *primary* motivations for the enactment of section 1983.

Part III considers the relevance of this historical claim. Section 1983, I argue, was designed to afford an extremely intrusive federal remedy. Given the exigency under which the enactment was passed, deference to local officials was hardly a concern of the drafters. Yet the circumstances of the Reconstruction South are not our own. Nor could the framers of the statute have envisioned the role that section 1983 plays in our present constitutional structure. Rather than serving as a vehicle to assure minimum legal protection for blacks and oppressed Unionists, section 1983 now provides a conduit for the presentation of all constitutional claims against state and local actors. An interventionist cause of action under the Civil Rights Act, therefore, creates frictions with the independent operation of state judiciaries that did not exist a century ago. As a result, the argument for discarding the intention of section 1983's framers carries substantial appeal.

Departing from statutory design, however, poses major problems of judicial legitimacy. Updating statutes, ignoring intention, and modifying enactments to suit present need each suggest substantial departures from traditional visions of the judicial role. In the final Part, I conclude that reasonable modern interpretation of section 1983 does not demand such radical surgery. Given the broad scope of the modern section 1983 cause of action, it may well be that the statute can achieve its underlying purposes only by incorporating aspects of deference to local officials that the framers would not have embraced. Borrowing then from other fields of le-

Function, 94 Yale L.J. 71, 86 (1984); Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 Tex. L. Rev. 1141, 1143 (1977); Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 988; Nichol, *An Activism of Ambivalence* (Book Review), 98 Harv. L. Rev. 315, 320 n.28 (1984).

gal and statutory analysis, I suggest an interpretive strategy that allows section 1983 to accomplish its modern mission as the central vehicle of constitutional enforcement without abrogating the fundamental intentions of the statute's drafters.

I. FEDERAL JURISDICTION AND SECTION 1983

Perhaps the strongest and most direct legislative statement concerning the relationship between the state and federal courts is the Anti-Injunction Act.²³ This statute, 28 U.S.C. § 2283, provides that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."²⁴ It should not be surprising, then, that the most complete judicial exploration of the relationship between the section 1983 cause of action and the deference appropriately afforded state courts appears in a case interpreting the Anti-Injunction Act.

Mitchum v. Foster,²⁵ decided in 1972, ruled that section 1983 is an "expressly authorized" exception to the Act.²⁶ At one level, the decision was a surprising one. The 1871 Civil Rights Act hardly creates an exception to the injunctive ban in express terms. *Mitchum*, however, determined that an "expressly authorized" exception results from any statutory enactment "clearly creating a federal right or remedy [that] . . . could be given its intended scope only by the stay of a state court proceeding."²⁷ This formulation has been vigorously criticized.²⁸ Regardless of its merits, however, the "intended scope" determination required the Court to examine both the goals and the desired breadth of section 1983. The majority opinion's conclusions were of interest.

Citing the 1875 decision in *Ex parte Virginia*,²⁹ the Justices concluded that the Civil Rights Act of 1871 was "intended to enforce

²³ 28 U.S.C. § 2283 (1982).

²⁴ *Id.*

²⁵ 407 U.S. 225 (1972). In *Mitchum*, the plaintiff sought an injunction against a prosecutorial proceeding to close down his bookstore.

²⁶ *Id.* at 243.

²⁷ *Id.* at 238.

²⁸ See Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 329 (1978); Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. Chi. L. Rev. 717, 733-39 (1977).

²⁹ 100 U.S. 339 (1879).

the provisions of the Fourteenth Amendment 'against state action, . . . whether that action be executive, legislative or *judicial*.'"³⁰ Quoting statements offered by several of the statute's key congressional supporters, the *Mitchum* opinion suggested that the framers of section 1983 viewed state judiciaries as having "proven themselves [in]competent":³¹ either "powerless to stop deprivations or . . . in league with those who were bent upon abrogation of federally protected rights."³² According to the Court, the statute's drafters debated "not about whether the predecessor of § 1983 extended to actions of state courts, but whether this innovation was necessary or desirable."³³ Having determined that state judicial officers shared the prevalent Southern antipathy toward nationally secured liberties, the proponents of the legislation attempted to ensure both legal and equitable relief in federal tribunals.³⁴ Accordingly, *Mitchum* held that section 1983 "is an Act of Congress that falls within the 'expressly authorized' exception of [the Anti-Injunction Act]."³⁵

For present purposes at least, it is unimportant whether the *Mitchum* decision is an acceptable reading of 28 U.S.C. § 2283. Regardless of the validity of that interpretive claim, the portrait the opinion paints of the design of the Civil Rights Act of 1871 is clear. The evils that the enactment sought to cure—in general terms, wholesale deprivations of basic civil liberties—were thought to be ignored, or even aided, by state judiciaries. The intended scope of the legislation, therefore, necessarily demands the availability of equitable interference with state judicial process. That vision of section 1983's purposes, however, creates real tensions with the Court's decision from the previous term in *Younger v. Harris*.³⁶

Younger's conclusion is well known. In this case too a section 1983 litigant sought injunctive relief against a pending state suit. Writing for the Court, Justice Black concluded, however, that "the

³⁰ *Mitchum*, 407 U.S. at 240 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (emphasis added in *Mitchum*)).

³¹ *Id.* (quoting remarks of Sen. Osborn, Cong. Globe, 42d Cong., 1st Sess. 653 (1871) [hereinafter 42 Globe]).

³² *Id.* at 240.

³³ *Id.* at 241-42.

³⁴ See *id.*

³⁵ *Id.* at 243.

³⁶ 401 U.S. 37 (1971).

national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances" barred the action.³⁷ According to Justice Black, "[t]he notion of 'comity,' that is, a proper respect for state functions," rooted in "Our Federalism," was the "vital consideration" demanding dismissal.³⁸ The subsequent *Mitchum* decision, of course, claimed not to "question or qualify in any way" the "principles of equity, comity, and federalism" on which *Younger* had so recently been based.³⁹ As a number of commentators have stressed, however, the distinction is less than convincing.⁴⁰ *Mitchum* suggests that the Reconstruction Congress enacting section 1983 weighed the federal-state balance, at least when the normal principles of equity jurisprudence were met,⁴¹ in favor of national intervention. *Younger*, then, appears to be at odds with the congressional mandate.⁴²

Setting aside for the moment the question of *Younger's* legitimacy, it is clear that the deference toward state judiciaries that *Younger* demands of section 1983 litigants cannot be squared with the language of the *Mitchum* decision. *Mitchum* bespoke distrust of "incompetent" and "powerless" local tribunals.⁴³ *Younger's* progeny offer "scrupulous regard [to] the rightful independence of state governments."⁴⁴ Although *Mitchum* described state judges as a significant part of the problem,⁴⁵ the *Younger* cases refuse to depart from the "principle that state courts have the solemn responsibility equally with the federal [courts] to safeguard constitutional rights."⁴⁶ *Younger's* doctrine of restraint is expressly rooted in a fear that intervention would "reflec[t] negatively upon the state court's" willingness to recognize these federal rights.⁴⁷ The premise that the *Younger* cases take such strides to avoid lies at

³⁷ Id. at 41.

³⁸ Id. at 44.

³⁹ *Mitchum*, 407 U.S. at 243.

⁴⁰ See sources cited supra note 22.

⁴¹ See Redish, supra note 22, at 88; see also infra note 214 (discussion of *Younger* as a principle of equity jurisprudence).

⁴² See Nichol, supra note 22, at 320 n.28.

⁴³ See *Mitchum*, 407 U.S. at 240-41.

⁴⁴ *Trainor v. Hernandez*, 431 U.S. 434, 441 (1979) (quoting *Beal v. Missouri Pac. R.R.*, 312 U.S. 45, 50 (1941)).

⁴⁵ See *Mitchum*, 407 U.S. at 240-42.

⁴⁶ *Trainor*, 431 U.S. at 443 (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974)).

⁴⁷ Id. at 443 (quoting *Steffel*, 415 U.S. at 462)).

Mitchum's, if not section 1983's, core.

But this long-recognized tension in jurisdictional analysis is only the most prominent example of the inconsistent application of section 1983 to state judiciaries. Injunctions are not the sole tools by which federal judges can be said to interfere with their local counterparts. In *Pierson v. Ray*,⁴⁸ for example, the Supreme Court ruled that state and local judges are absolutely immune from section 1983 damage claims arising from their judicial actions.⁴⁹ The statute, of course, alludes to no such immunity. Its terms suggest, rather, that a cause of action at law or in equity lies against "every person" who under color of law causes a deprivation of federally protected rights. So the *Pierson* Court grounded the case for immunity in the legislative intent of the framers of the statute. Primarily because "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages," the Justices concluded that the "legislative record gives no clear indication that Congress meant to abolish" such traditional protections.⁵⁰

More recently, however, *Pulliam v. Allen*⁵¹ seemed to take a different tack.⁵² There the Court ruled that judicial immunity was not a bar to prospective injunctive relief under section 1983. Again, the result was based on legislative intent. Almost as if *Pierson* and *Younger* had never been decided, the opinion declared that "Congress enacted § 1983 . . . to provide an independent avenue for the protection of federal constitutional rights . . . because 'state courts were being used to harass and injure individuals' . . ."⁵³ Even more surprisingly, the Court noted that "every member of Congress who spoke to the issue assumed that judges would be lia-

⁴⁸ 386 U.S. 547 (1967).

⁴⁹ See *id.* at 553-55.

⁵⁰ *Id.* at 553-54.

⁵¹ 466 U.S. 522 (1984).

⁵² *Pulliam* made an explicit holding of the dicta from *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 735 (1980) ("[W]e have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts."). See *Pulliam*, 466 U.S. at 536.

I realize, of course, that there are distinctions to be drawn among the circumstances presented in *Younger*, *Pulliam*, and *Pierson*. Some of these are discussed in Section III.C of this Article. The inconsistency I mean to emphasize lies in the Court's use of Reconstruction history.

⁵³ *Pulliam*, 466 U.S. at 540 (quoting *Mitchum*, 407 U.S. at 240).

ble under § 1983."⁵⁴ *Pierson's* history and *Pulliam's* history are impossible to square. Nor, unfortunately, do the judicial pirouettes stop there.

Injunctive decrees and damage awards enforced by federal courts against state judges are perhaps the most direct, and the most threatening, interchanges between the two judicial systems. The judiciaries necessarily interact in more subtle ways. If the subject matter of a federal section 1983 action involves claims that have been previously litigated in a state forum, the appropriate deference to be afforded the prior ruling must be determined. *Allen v. McCurry*,⁵⁵ speaking to that issue, held that normal principles of collateral estoppel apply to section 1983 claims.⁵⁶ Accordingly, a section 1983 tribunal must give binding effect to a state court determination in which the parties have been given a full and fair opportunity to litigate federal claims.⁵⁷ *McCurry's* theory is reminiscent of *Younger* and *Pierson*. According to the opinion, "nothing in the language or legislative history of § 1983 proves any Congressional intent to deny binding effect to a state-court judgment."⁵⁸ The acceptance of collateral estoppel principles was thought essential to avoid the expression of a "general distrust of the capacity of state courts to render correct decisions on constitutional issues."⁵⁹ That very distrust, of course, is the underlying premise of *Mitchum* and *Pulliam*. It also provides the rationale for yet another cornerstone of federal jurisdiction, *Monroe v. Pape*.⁶⁰

McCurry addressed the ramifications of a section 1983 plaintiff's prior litigation in the case forum. *Monroe*, on the other hand, explored the significance of the failure of a federal civil rights litigant to seek available redress in the state courts before filing suit.⁶¹ Besides ushering in a major transformation of the section 1983 cause of action by offering a more generous interpretation of the "under color of law" requirement,⁶² *Monroe* ruled that civil rights plain-

⁵⁴ Id. at 540 (citing *Pierson*, 386 U.S. at 558-64 (Douglas, J., dissenting)).

⁵⁵ 449 U.S. 90 (1980).

⁵⁶ See id. at 105.

⁵⁷ See id. at 103-05.

⁵⁸ Id. at 103-04.

⁵⁹ Id. at 105.

⁶⁰ 365 U.S. 167 (1961).

⁶¹ See id. at 174-82.

⁶² See id. at 181-87 ("under color of state law" includes actions by state officials that are in violation of state law). It is not my purpose in this essay to consider the propriety of

tiffs are not required to exhaust state judicial remedies before seeking federal relief.⁶³ Once again, the Court's conclusion was grounded in the legislative history of section 1983.⁶⁴ Citing the statements of a variety of the statute's sponsors, the Court determined that the framers of the Civil Rights Act saw state courts as part of the problem, not as a potential solution to the abrogation of federal interests. In the "judicial tribunals [of the states] one class is unable to secure the enforcement of their rights."⁶⁵ "Justice closes the door of her temples."⁶⁶ The "courts of the southern states fail and refuse to do their duty."⁶⁷ These and similar statements by members of the 1871 Congress were offered to demonstrate that it would be inconsistent with the statute's design to relegate the victims of oppressive state actions to local courts.⁶⁸ Thus *Monroe v. Pape*, the centerpiece of section 1983 jurisprudence, is founded on the historical premises embraced by *Mitchum* and *Pulliam*, but rejected by *Younger*, *Pierson*, and *McCurry*.⁶⁹

To be sure, these diverse lines of federal courts analysis are treated as autonomous and independent entities by the Supreme Court. Their contradictory results are rendered less apparent by a jurisprudence that seemingly demands no interrelationship between the interpretation of the Anti-Injunction Act and the principles of equitable intervention, for example, or between the prospective and retrospective liability of state judges for civil rights violations. So rigid a formalism, however, hides little and reveals much.

Monroe's holding on the under color of law issue. Justice Douglas' opinion in *Monroe* has recently been criticized in Zagrans, *Under Color of What Law?: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499 (1985). Professor Zagrans essentially resurrects Justice Frankfurter's dissenting argument in *Monroe v. Pape*. See *Monroe*, 365 U.S. at 202-59 (Frankfurter, J., dissenting). The extent to which this argument bears upon my thesis is discussed *infra* note 165.

⁶³ See *Monroe*, 365 U.S. at 183.

⁶⁴ See *id.* at 172-84.

⁶⁵ *Id.* at 177 (quoting Rep. Burchard, 42 Globe, *supra* note 31, app. at 315).

⁶⁶ *Id.* at 178 (quoting Sen. Pratt, 42 Glohe, *supra* note 31, at 505).

⁶⁷ *Id.* at 179 (quoting Rep. Voorhees, 42 Globe, *supra* note 31, app. at 179 (speaking in opposition to the bill)).

⁶⁸ See *id.* at 176-80.

⁶⁹ *Patsy v. Board of Regents*, 457 U.S. 496 (1982), reached a similar conclusion on the issue of exhaustion of state administrative remedies. See *id.* at 502-12. Like *Monroe*, *Patsy* justified its conclusion by turning to the legislative history of § 1983. *Patsy* determined that the framers of the Civil Rights Act expressed "mistrust . . . for the factfinding processes of state institutions." *Id.* at 506. *Patsy*, therefore, is at odds with the reading of § 1983 intention reflected in *Younger*, *McCurry*, and *Pierson*.

None of the six cases, or lines of cases, described purport to be exercises in constitutional interpretation. *Mitchum*, *Pulliam*, and *Monroe*, the decisions authorizing federal judicial intervention, offer statutory justifications for their assertions of power. The rulings demanding heightened deference to state courts, *Younger*, *Pierson*, and *McCurry*, do so without reference to constitutional mandate. And there is good reason for the omission. *Younger's* vision of "Our Federalism" would be difficult to locate in the constitutional charter. Justice Black, a theorist who usually had no trouble identifying the demands of constitutional principle,⁷⁰ characterized it only as a "national policy."⁷¹ The tenth amendment, one supposes, would be the most likely textual source. But that provision has repeatedly eluded judicial efforts to measure its content.⁷² And, at a minimum, *Mitchum* would have to be read as a "carving out" from traditional notions of state sovereignty any immunity from injunctive intervention enjoyed by state courts.⁷³ *Pierson's* doctrine of judicial immunity from damage actions, like the host of other absolute and qualified section 1983 immunities, finds its genesis in the common law.⁷⁴ In addition, if *Pulliam's* determination that state judges enjoy no similar shield from prospective relief is correct, then a residual constitutional protection from damage suits seems even more implausible. *McCurry* applied concepts of collateral estoppel to section 1983 claims because it uncovered no "congressional intent" to dislodge traditional rules of preclusion.⁷⁵ Implicitly, the opinion suggests that a contrary determination would have withstood constitutional scrutiny.⁷⁶

As a result, it seems impossible to avoid the conclusion that the opinions described above are nonconstitutional in nature. All are section 1983 cases as well. That leaves the question of their inter-

⁷⁰ See, for example, Justice Black's opinion in *New York Times v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring) (arguing for absolutist view of the first amendment).

⁷¹ *Younger*, 401 U.S. at 41.

⁷² Compare *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the tenth amendment limited the federal government's authority to regulate state and local governments) with *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities*).

⁷³ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

⁷⁴ See *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

⁷⁵ See *Allen v. McCurry*, 449 U.S. 90, 104 (1980).

⁷⁶ See *id.* at 104-05.

relationship in a more complex posture than the opinions of the Supreme Court suggest. *Mitchum*, *Pulliam*, and *Monroe* interpret section 1983 to provide an intrusive cause of action that is to operate largely undeterred by traditional notions of deference to local judicial officers. *Younger*, *Pierson*, and *McCurry*, on the other hand, read the same statute to demand substantial solicitude for the independence of state judiciaries. It simply cannot be the case that both camps of decisions represent accurate interpretations of the language and legislative history of section 1983. Accordingly, it is to that task that I now turn.

II. THE LEGISLATIVE HISTORY OF SECTION 1983

The language of section 1983 provides that:

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 person injured in an action at law, suit in equity, or other proper proceeding for redress.⁷⁷

In seeking to determine whether the section 1983 cause of action extends to deprivations of "rights, privileges, or immunities" at the hands of state judges, the phrase "every person" must provide the point of departure. It is uncontroversial that "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent."⁷⁸ And "every person," as Justice Douglas claimed, presumably means "*every person*, not every person *except* judges."⁷⁹ Although the Civil Rights Act of 1871, at the time of its enactment, read "any person" rather than "every person,"⁸⁰ both terms denote all-inclusiveness. The source of the language eventually codified in section 1983 strengthens the suggestion that state judges were intended to be brought within its purview.

⁷⁷ 42 U.S.C. § 1983 (1982).

⁷⁸ 2A J. Sutherland, *Statutes and Statutory Construction* § 46.03, at 82 (4th ed. 1984).

⁷⁹ *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting).

⁸⁰ The present § 1983 underwent minor revision (including the "every person" alteration) and recodification in the general statutory revision of 1874. See Rev. Stat. § 1979 (1873-74); see also *Maine v. Thiboutot*, 448 U.S. 1, 11, 14-16 (1980) (Powell, J., dissenting) (revisions were nonsubstantive); 2 Cong. Rec. 129, 646-48, 825-27 (1874) (congressional remarks emphasizing preservation of statutory substance).

A. *The 1866 Act*

Section one of the Civil Rights Act of 1871, the specific precursor of section 1983, was patterned after a criminal provision in the Civil Rights Act of 1866.⁸¹ Employing the now familiar phraseology, section two of the 1866 statute declared that "any person who, under color of any law, statute, ordinance, regulation, or custom," deprived an inhabitant of a state of certain federally protected rights was subject to a "fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both."⁸² Much to the dissatisfaction of the Reconstruction Congress, President Johnson vetoed the Civil Rights Act of 1866. Johnson's veto message made clear that one of his principal objections to the statute was the alarming impact he believed it would have on state judiciaries.⁸³ The potential conviction of state judges had, in fact, been a theme considered by both houses.⁸⁴ An amendment excluding judges from the operation of the law had been offered and rejected.⁸⁵ Senator Trumbull, one of the 1866 Act's chief proponents, delivered a point-by-point refutation of the veto message on the floor of the Senate. Trumbull argued that the doctrine of judicial immunity "places officials above the law. It is the very doctrine out of which the rebellion was hatched."⁸⁶ On the House side, Congressman Lawrence declared 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."⁸⁷ The Congress responded by overriding the presidential veto and enacting the 1866 Act as law.

The "any person" language of the 1871 Act, therefore, was born in context. The Congress and the President had joined issue on the applicability of the phrase to state judges five years earlier. Thus when Congressman Shellabarger introduced the Civil Rights Act of

⁸¹ Ch. 31, 14 Stat. 27 (current version at 42 U.S.C. §§ 1983, 1985-1986 (1982)).

⁸² *Id.* § 2.

⁸³ See Cong. Globe, 39th Cong., 1st Sess. 1679, 1680-81 (1866) [hereinafter 39 Globe].

⁸⁴ See Zagrans, *supra* note 62, at 544.

⁸⁵ See 39 Globe, *supra* note 83, at 1156.

⁸⁶ *Id.* at 1758 (remarks of Sen. Trumbull). See generally Note, Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322, 327 & n.36 (1969) (quoting similar statements by other members of Congress).

⁸⁷ 39 Globe, *supra* note 83, at 1837 (remarks of Rep. Lawrence).

1871 he described section two of the Act—the predecessor of section 1983—as a straightforward, almost noncontroversial provision modeled on the 1866 Act: “That section provides a criminal proceeding in identically the same case as this one provides a civil remedy”⁸⁸ Shellabarger also informed his colleagues that the proposed act was “remedial, and in aid of the preservation of human liberty.” Accordingly, it would be “liberally and beneficently construed . . . [providing] the largest latitude consistent with the words employed.”⁸⁹ Both the language and the legislative legacy under which section 1983 was proposed, therefore, give rise to at least a substantial presumption that the statute was designed to reach state judicial actors.

B. *The 1871 Congress*

But what of the attitudes of the Congress of 1871? On March 23, 1871, President Grant sent a message to the Reconstruction Congress seeking legislation that would “effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.”⁹⁰ Prior hearings of the Senate Committee on Reconstruction had revealed the existence of violent outrages directed against blacks and sympathetic whites throughout the South.⁹¹ These acts were believed to be the work of the newly emerged Ku Klux Klan, a secretive organization thought to be led by former Confederate officers.

Grant’s message was referred to a select committee created for the occasion, and five days later the bill was reported to the House of Representatives. Catching the tenor of the time, Congressman Stoughton argued that the provision was needed because “[t]here exists . . . in the southern States a treasonable conspiracy against the lives, persons and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion.”⁹² Within a month, section 1983 was one of a number of provisions enacted as the Ku

⁸⁸ 42 Globe, supra note 31, app. at 68 (remarks of Rep. Shellabarger).

⁸⁹ Id.

⁹⁰ Id. at 244 (message of President Grant).

⁹¹ See L. Warsoff, *Equality and the Law* 109-10 (1938); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1329-30 (1952).

⁹² 42 Globe, supra note 31, at 320 (remarks of Rep. Stoughton).

Klux Act of 1871.⁹³ The Supreme Court was thus apparently correct in *Collins v. Hardyman*⁹⁴ when it declared that section 1983 “was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse”⁹⁵

The refusal of state courts to protect the fundamental human liberties of both Unionists and the newly freed slaves was a major focus of the legislative debates on both sections one and two of the Act.⁹⁶ That is hardly surprising. Given the recent passage of the Civil War amendments, if state judiciaries could have been counted on to enforce the provisions of the federal constitution, the entire legislative scheme would have been unnecessary. The proponents of the statute leveled two broad charges at state courts. First, as the result of Klan intimidation, and perhaps empathy, lo-

⁹³ See 1 B. Schwartz, *Statutory History of the United States: Civil Rights* 591-653 (1970). The Senate passed the Act 36-13 on April 19, 1871, and the House followed the next day. See Zeigler, *supra* note 22, at 1019.

⁹⁴ 341 U.S. 651 (1951).

⁹⁵ *Id.* at 657.

⁹⁶ See, e.g., 42 *Globe*, *supra* note 31, at 320 (remarks of Rep. Stoughton) (“[I]t is impossible for the civil authorities . . . to punish those who perpetrate these outrages.”); *id.* at 322 (“[State court] denial of the equal protection of the laws is too clear to admit of question”); see also *id.* at 394 (remarks of Rep. Rainey); *id.* at 429 (remarks of Rep. Beatty); *id.* at 505 (remarks of Sen. Pratt); *id.* at 654 (remarks of Sen. Osborn); *id.* app. at 153 (remarks of Rep. Garfield); *id.* app. at 179 (remarks of Rep. Voorhees); *id.* app. at 277 (remarks of Rep. Porter); *id.* app. at 315 (remarks of Rep. Burchard).

Section one of the Civil Rights Act of 1871 was perhaps the least controversial, and the least debated, provision of the statute. Several of the references that follow relate either to section two (creating certain federal crimes) or to the Act generally. In *Patsy v. Board of Regents*, 457 U.S. 496 (1982), the Supreme Court concluded that “some of the debates relating to § 2 . . . are also relevant to our discussion of § 1.” *Id.* at 502 n.5.

That is a reasonable judgment. Section one, by its terms, creates a broad cause of action—without expressly recognizing protections from scrutiny for state tribunals—against “any person” causing the deprivation of a constitutional right. The remaining provisions of the Act, as well as the debates over their enactment, provide the best circumstantial evidence of the framers’ desire, or lack thereof, to incorporate deference to state actors into this particular legislative scheme. The debates, as a whole, depict a consistent vision of the distrust the 1871 Congress entertained for state courts. That distrust, along with pointed references about the applicability of the statute to state judges and the aggressive nature of the entire enactment, combine, I claim below, to present a strong case for the full cognizability of state judicial acts under § 1983. See *infra* notes 119-20 and accompanying text. “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. . . . Thus it is not proper to confine interpretation to . . . one section to be construed.” 2A J. Sutherland, *supra* note 78, § 46.05, at 90.

cal courts were portrayed as “under the control”⁹⁷ of conspirators and “unable or unwilling to check the evil.”⁹⁸ “Violence and lawlessness [being] universally prevalent,” Republicans characterized state courts as “notoriously powerless to protect life, person and property.”⁹⁹ Congressman Beatty complained that prejudiced southern judges, “by reason of popular sentiment or secret organizations . . . [deny] the rights and privileges due an American citizen.”¹⁰⁰ Senator Morton, speaking in terms fairly representative of the Act’s supporters,¹⁰¹ concluded that “the States do not protect the rights of the people; . . . [and] State courts are powerless to redress these wrongs. The great fact remains that large classes of people . . . are without legal remedy in the courts of the States.”¹⁰² The framers of section 1983, in short, believed that local judges had abdicated their responsibility to ensure evenhanded enforcement of the law.¹⁰³

The second accusation was even more serious. Not only were local judiciaries “impotent,”¹⁰⁴ legislators considered many judges to be in league with the Klan. Senator Osborn argued that state courts were under the influence of the Klan oath.¹⁰⁵ Congressman Rainey claimed that local tribunals were “secretly in sympathy with the very evil against which we are striving.”¹⁰⁶ Congressman

⁹⁷ 42 Globe, *supra* note 31, at 394 (remarks of Rep. Rainey).

⁹⁸ *Id.* at 321 (remarks of Rep. Stoughton).

⁹⁹ *Id.* at 322 (remarks of Rep. Stoughton); see also *id.* at 244 (President Grant’s message: “That the power to correct these evils is beyond the control of State authorities I do not doubt.”).

¹⁰⁰ *Id.* at 429 (remarks of Rep. Beatty).

¹⁰¹ See, e.g., *id.* at 653 (remarks of Sen. Osborn) (“If the state courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all.”); *id.* at 505 (remarks of Sen. Pratt) (“[T]he arm of justice is paralyzed[;] . . . punishment has not been inflicted in a single case of the hundreds of outrages which have occurred.”); *id.* at 368 (remarks of Rep. Sheldon) (“Governors, judges, and juries give way to a mania which sometimes seizes hold of the popular mind.”); *id.* app. at 277 (remarks of Rep. Porter) (“[L]oyal men cannot obtain justice in the courts.”).

¹⁰² *Id.* app. at 252 (remarks of Sen. Morton).

¹⁰³ See, e.g., *id.* app. at 78 (remarks of Rep. Perry) (“[J]udges, having ears to hear, hear not.”).

¹⁰⁴ E.g., *id.* at 459 (remarks of Rep. Coburn) (“[T]he courts are impotent, the laws are annulled[,] . . . the persecuted citizen looks in vain for redress.”).

¹⁰⁵ See *id.* app. at 653 (remarks of Sen. Osborn).

¹⁰⁶ *Id.* app. at 394 (remarks of Rep. Rainey).

Platt took the charge even further, alleging that

the decisions of the county judges, who are made little kings, with almost despotic powers to carry out the partisan demands of the Legislature which elected them—powers which, almost without exception, have been exercised against Republicans without regard to law or justice, make up a catalogue of wrongs, outrageous violations, and evasions of the spirit of the new constitution, unscrupulous malignity and partisan hate never paralleled in the history of parties in this country or any other.¹⁰⁷

Strong stuff, no doubt. But even wading through the demagoguery, the passages suggest that many of the framers of section 1983 considered state judges to be active and energetic participants in a pervasive effort to deprive a substantial segment of the southern populace of fundamental human liberties.

Broadly speaking, therefore, the proponents of the Civil Rights Act of 1871 regarded state judges as central players in the southern tragedy they sought to eliminate. At best, local courts were afraid of the Klan. Accordingly, “[the state courts] only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid.”¹⁰⁸ At worst, southern judges could be “wholly inimical to the impartial administration of law and equity.”¹⁰⁹ As a result, section 1983 sought to address what its framers saw as a near complete breakdown of justice in the South. The “records of the public tribunals,” Republicans claimed, “are searched in vain for any evidence of effective redress.”¹¹⁰

The opponents of the legislation were just as vehement. They also seemed to have little doubt of the provision’s applicability to state tribunals. Congressman Voorhees rejected what he considered to be a central premise of the Civil Rights Act, “that the courts of the southern States fail and refuse to do their duty.”¹¹¹ Others drew vivid portraits of the potential plight of southern judges should the bill be enacted. Congressman Lewis lamented that “[b]y the first section [i.e., section 1983] . . . the judge of a State court, though acting under oath of office, is made liable to a suit in

¹⁰⁷ Id. app. at 186 (remarks of Rep. Platt).

¹⁰⁸ Id. at 505 (remarks of Sen. Pratt).

¹⁰⁹ Id. at 394 (remarks of Rep. Rainey).

¹¹⁰ Id. at 374 (remarks of Rep. Lowe).

¹¹¹ Id. app. at 179 (remarks of Rep. Voorhees).

the Federal court and subject to damages[,] . . . however honest and conscientious [his] decision may be.”¹¹² Congressman Arthur charged that “every judge in the state court . . . will enter upon and pursue the call of official duty with the sword of Damocles suspended over him.”¹¹³ Senator Thurman asked: “What is to be the case of a judge? . . . Is he to be liable in an action? . . . [I]t is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used.”¹¹⁴ Thurman also stressed that fears of application of the statute to state judges were not fanciful: “There have been two or three instances already under the [Civil Rights Act of 1866] of State judges being taken into the United States district court . . . for the offense, forsooth, of honestly and conscientiously deciding the law to be as they understood it to be.”¹¹⁵

In a case from the 1960’s recognizing judicial immunity under section 1983, the United States Court of Appeals for the Third Circuit dismissed the relevance of such objections as “little more than opposition remarks,” not to be given substantial credence unless proponents offered no reply.¹¹⁶ As one commentator has pointed out, Congressman Shellabarger—sponsor of the bill and a debater not unwilling to interrupt an adversary—was on the floor when such statements were made and he presented no rebuttal.¹¹⁷ Had the statute’s drafters desired to escape the power of their opponents’ claim, it would hardly have been difficult to insert language recognizing judicial or other common law immunities into the lengthy enactment. Moreover, as I have indicated, proponents of the Act regarded the need to force state judges to toe the constitutional mark as a central premise of the legislation. But more importantly, these arguments in mitigation are largely beside the point. The cramped interpretation suggested by the Third Circuit approaches the problem from the wrong direction.

¹¹² Id. at 385 (remarks of Rep. Lewis).

¹¹³ Id. at 366 (remarks of Rep. Arthur); see also id. at 361 (remarks of Rep. Swann) (“[The bill] turns the whole current of State jurisprudence into the Federal Courts . . .”).

¹¹⁴ Id. app. at 217 (remarks of Sen. Thurman).

¹¹⁵ Id.

¹¹⁶ *Bauers v. Heisel*, 361 F.2d 581, 588 n.8 (3d Cir. 1966), cert. denied, 386 U.S. 1021 (1967).

¹¹⁷ See Note, *supra* note 86, at 328 n.40. Three times during the debates legislators claimed the Act applied to judges, and no one denied the allegation. See id. at 328.

It is perhaps possible, though only barely so, to claim that the statements of legislators do not conclusively prove that section 1983 was designed to apply to local judges. But such proof, under normal principles of statutory construction, is unnecessary. By its express terms, section 1983 applies to "every person." There is, of course, "no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses."¹¹⁸ It is not apparent to me that the language of section 1983 can be reasonably seen as anything other than a model of clarity concerning its applicability to state judges. Nonetheless, a challenge to its "plain meaning" traditionally demands a showing "that the provision itself is repugnant to the general purview of the act . . . or [that] the legislative history . . . imports a different meaning."¹¹⁹ Given the overwhelming indication from the record that the framers thought the statute would apply to state courts, it is inconceivable that the burden of demonstrating that the legislative history demands a result *contrary* to the language could be met. Justice Blackmun's opinion for the Court in *Pulliam* is apparently correct in its claim that "every Member of Congress who spoke to the issue assumed that judges would be liable under § 1983."¹²⁰

C. *The Legal Landscape*

Even if it is clear that the "any person" phraseology of section 1983 was meant to include state judges, a variety of questions concerning the interrelationship of the two judicial systems remain. It may well be that the legislative history suggests that judges, in their official capacities, can appropriately be the subject of either equitable or damage claims under the statute. But what of the need to exhaust state judicial remedies, or the applicability of traditional principles of collateral estoppel to section 1983 suits? The mere determination that judges are correct defendants hardly provides an answer to these more subtle clashes between state and federal courts. Perhaps because the text of the statute is silent on such issues, in cases like *Monroe* and *McCurry* the Supreme Court

¹¹⁸ 2A J. Sutherland, *supra* note 78, § 46.01, at 73 (quoting *Swarts v. Siegel*, 117 F. 13, 18-19 (8th Cir. 1902)).

¹¹⁹ *Id.* at 74.

¹²⁰ *Pulliam v. Allen*, 466 U.S. 522, 540 (1984).

explored the intentions of section 1983's framers to determine their attitude toward state tribunals. *Monroe*, it will be recalled, concluded that the "legislative history" revealed the bill to be a remedy for state tribunals "unable or unwilling" to administer justice evenhandedly.¹²¹ *McCurry*, on the other hand, found that there was "nothing in the language or legislative history of § 1983" to suggest that Congress intended "to deny binding effect to a state-court judgment . . . when the state court . . . has given the parties a full and fair opportunity to litigate federal claims,"¹²² and dismissed the argument that state courts could not be trusted to "render correct decisions on constitutional issues."¹²³

Monroe and *McCurry* cannot be correct representations of the framers' confidence in state court process. But the inquiry that they suggest seems a sensible one. Judge Posner has advocated a method of statutory interpretation labeled "imaginative reconstruction."¹²⁴ According to its dictates, "the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."¹²⁵ In some measure, that is what *Monroe* and *McCurry* attempt to do. Neither exhaustion of remedies nor collateral estoppel in section 1983 suits has been treated as a constitutional issue. As a result, the Justices have, at least in theory, turned to the statute for guidance. Because the language of the provision offers little direction, opinions have asked, in more and less direct ways, whether the framers of section 1983 would have demanded deference to state courts through exhaustion or collateral bar. Specifically, this inquiry has tended to focus—though reaching diametrically opposite conclusions in the two lines of cases—on the level of trust the 1871 Congress entertained for local judiciaries. The intention of the drafters, therefore, can here be of at least preliminary use.

There is substantial direct evidence that the framers of the Civil Rights Act would have rejected an exhaustion requirement and the use of preclusion. Congressman Bingham, for example, claimed that even "[a]dmitting that the States have concurrent power to

¹²¹ *Monroe v. Pape*, 365 U.S. 167, 176 (1961).

¹²² *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980).

¹²³ *Id.* at 105.

¹²⁴ See R. Posner, *The Federal Courts* 286-87 (1985).

¹²⁵ *Id.*

enforce the Constitution of the United States within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial?"¹²⁶ Arguing against waiting for local process to run its course, Congressman Elliott called for "immediate jurisdiction through [the federal] courts, without the appeal or agency of the state."¹²⁷ And opponents complained that section one of the Act "does not even give the State courts a chance to try questions" prior to federal intervention.¹²⁸ Other comments suggest a heavy legislative preference for litigation in the federal courts, thus casting doubt on the use of collateral estoppel in section 1983 claims. Congressman Coburn suggested that the "United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can."¹²⁹ Congressman Dawes similarly claimed that there "is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, and in severity, if need be, . . . as that great tribunal of the Constitution."¹³⁰

Nor need the inquiry stop there. It is also true, of course, that much of the foregoing analysis of legislative intent is relevant to the issue of deference to local judicial process. The mere fact that the framers of the Civil Rights Act of 1871 created a cause of action to be directed, at least in some instances, to local judges says much about their regard for state judiciaries. The strongest reason that the "any" or "every" person language cannot, on the basis of legislative intent alone, be read as embracing an exception for state judges is that the abuses of local judiciaries played so prominent a role in the evils the statute was designed to address. Although that underlying goal may not, on its own, demonstrate that the framers of the statute would have afforded little deference to local process, it certainly provides support for such a claim.

But perhaps the most telling circumstantial evidence of the Reconstruction Congress' willingness to override local process lies in

¹²⁶ 42 Globe, *supra* note 31, app. at 85 (remarks of Rep. Bingham).

¹²⁷ *Id.* at 389 (remarks of Rep. Elliot).

¹²⁸ *Id.* app. at 86 (remarks of Rep. Storm). For other comments weighing against exhaustion, see *id.* at 332 (remarks of Rep. Hoar); *id.* at 375 (remarks of Rep. Lowe); *id.* at 448-49 (remarks of Rep. Butler).

¹²⁹ *Id.* at 460 (remarks of Rep. Coburn).

¹³⁰ *Id.* at 476 (remarks of Rep. Dawes).

the language of the statute itself. An examination of the remainder of the provisions of the Ku Klux Act of 1871 compels one to conclude that its drafters were basically unconcerned with potential offense to state officials. The modern section 1983 was but one of seven sections of the original Act. The other six provisions, which have since either expired or been repealed or recodified,¹³¹ offer strong medicine. Section two provided a criminal sanction for the commission of a variety of conspiratorial acts. On the checklist of proscribed activities were conspiracy to “overthrow, or to put down, or to destroy by force the government of the United States”; “to levy war against the United States”; “to seize . . . any property of the United States”; “to prevent any person” from holding office “under the United States”; and to prevent “the election of any lawfully qualified person as an elector of the President or Vice-President of the United States.”¹³² Section three addressed cases of “insurrection, domestic violence, [and] unlawful . . . conspiracies” so pronounced that the state government “shall either be unable to protect, or shall, from any cause, fail . . . or refuse protection of the people.”¹³³ The remedy the provision set forth was “the employment of the militia or the land and naval forces of the United States” at the direction of the President.¹³⁴ Section three thus authorized the most intrusive remedy imaginable—martial law. It also anticipated that a state government might intentionally “refuse protection of the people.”¹³⁵

Section four provided, in part, that when “constituted [state] authorities are in complicity with . . . powerful and armed combinations, . . . it shall be lawful for the President of the United States . . . to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown.”¹³⁶ This provision was temporary, expiring “after the end of the next regular session of

¹³¹ Section two of the Act, for example, was the predecessor of 42 U.S.C. § 1985. Section six preceded 42 U.S.C. § 1986. Section four expired “after the end of the next regular session of Congress.” Civil Rights Act of 1871, ch. 22, § 4, 17 Stat. 13, 15 (expired 1873).

¹³² Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13, 13, partially repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (current version of § 2 at 42 U.S.C. § 1985 (1982)).

¹³³ Id. § 3, 17 Stat. 13, 14, repealed by Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641, 644.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id. § 4, 17 Stat. 13, 14-15 (expired 1873).

Congress."¹³⁷ It obviously contemplated, however, a complete disruption of local judicial process during its pendency. It also recognized the possibility that lawful state governments would conspire with anti-Union terrorists. Section five required the taking of a non-conspiracy oath in open court by federal jurors.¹³⁸ The final substantive section created a civil action against "any person" having knowledge of acts which would violate various provisions of the statute and who, "having power to prevent or aid in preventing the same, shall neglect or refuse so to do."¹³⁹

As a package then, the sections of the Civil Rights Act of 1871 offered a massively intrusive set of remedies to deal with what President Grant and the supporters of the legislation regarded as a national crisis only marginally less threatening than the war itself. It is perhaps helpful to recall that within months of its enactment, President Grant was forced to deploy its provisions by suspending habeas corpus in nine counties of South Carolina to combat lawlessness "out of control."¹⁴⁰ The statute thus reflected a legislative belief that drastic circumstances demand drastic responses.¹⁴¹ As Senator Edmonds put it, "every measure of constitutional legislation which will have a tendency to preserve life and liberty . . . ought to be resorted to."¹⁴² And as Senator Poole claimed, if this effort to ensure a "civil equality of all citizens" through the courts should "fail in its enforcement, the military power [would have to] be used."¹⁴³ The various sections authorized the punishment of insurrection, the suspension of habeas corpus, and the use of the armed forces. Legislators who press for such sanctions are unlikely to have worried about the possibility that they might offend local jurists by casting doubt on the ability of state courts to decide on federal claims. Section six is particularly instructive in this regard. By authorizing suit against those who "have power to prevent" vio-

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *Id.* § 6, 17 Stat. 13, 15 (current version at 42 U.S.C. § 1986 (1982)).

¹⁴⁰ W. McFeely, *Grant: A Biography* 370 (1981).

¹⁴¹ *See, e.g.,* 42 *Globe*, *supra* note 31, at 321 (remarks of Rep. Stoughton) ("The whole South . . . is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison. There is no security for life, person, or property."); *id.* app. at 199 (remarks of Rep. Snyder) ("Anarchy and violence are supreme . . .").

¹⁴² *Id.* at 691 (remarks of Sen. Edmonds).

¹⁴³ *Id.* at 609 (remarks of Sen. Poole).

lations of the act but who refuse to do so, the Civil Rights Act expressly pierced sanctuaries of local sovereignty and embraced the use of federal judicial process against state officers who failed to protect civil liberties. The provision, like the bulk of the entire act, is thus anchored in a profound *distrust* of local officials. Were the legislative history of section 1983 to be read as incorporating a heavy dose of deference to state judicial process, it would, at a minimum, be wildly out of step with the remainder of the statute.

The issue, of course, is not completely free from doubt. The section 1983 cause of action, for example, was not placed within the exclusive jurisdiction of the federal courts—a step that would have further expressed misgivings about local courts. But opponents of the statute correctly saw concurrent state court jurisdiction as a gesture based more in form than substance. Litigants asserting federal rights, especially in the Reconstruction climate, would hardly be likely to choose the state forum.¹⁴⁴ Some have argued as well that because section one of the Civil Rights Act was so non-controversial, it can be regarded as distinct from the tenor of the remainder of the statute.¹⁴⁵ Emphasizing these factors, however, goes against the overwhelming weight of the legislative evidence. Section one was thought to provide no basis for objection because it offered far less potential for national domination than the bulk of its statutory counterparts.¹⁴⁶ Reading the provision as incorporating a deferential posture to local judges badly misses the forest in favor of an isolated tree or two. Basic canons of statutory interpretation suggest that an act “is passed as a whole and not in parts or sections and is animated by one general purpose and intent.”¹⁴⁷ No doubt the “general purpose and intent” of the Civil Rights Act of 1871 is to assert the national power to guarantee protection of “any rights, privileges, or immunities secured by the Constitution of the United States.” To the extent that deference to local decisionmakers interferes with that mission, the statutory mandate falls strongly on the side of federal intervention.¹⁴⁸

¹⁴⁴ See, e.g., *id.* app. at 216 (remarks of Sen. Thurman); see also Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 *Nw. U.L. Rev.* 859, 868 (1976) (“the concurrent jurisdiction of state courts was probably considered to be of little practical importance”).

¹⁴⁵ See Zagrans, *supra* note 62, at 548-60.

¹⁴⁶ See 42 *Globe*, *supra* note 31, at 568 (remarks of Sen. Edmonds); *id.* at app. 68 (remarks of Rep. Shellabarger).

¹⁴⁷ 2A J. Sutherland, *supra* note 78, § 46.05, at 90.

¹⁴⁸ See Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the*

III. INTERPRETING SECTION 1983

The legislative history of section 1983 clearly indicates that its drafters were untroubled by such niceties as solicitude for local jurists. It is also clear, however, that this attitude was shaped by their perceptions of emergency in the Reconstruction South. The severity of the moment called for a remedy that was effective, not deferential. But over a century later, the exigencies of Reconstruction no longer exist. If the draftsmen of the Civil Rights Act of 1871 could reasonably worry that state judges were in league with the Ku Klux Klan, or fundamentally antithetical to civil liberties, we need not. Accordingly, some have argued that section 1983 should be interpreted to take this change of circumstance into account.¹⁴⁹ It seems doubtful, however, that change of condition alone merits the judicial creation of a large exception to a broadly phrased statutory mandate. Deciding when a regulatory scheme is no longer needed is a particularly legislative function. The overt judicial authority to modify or update archaic statutes remains, at present, but a glimmer in Dean Calabresi's eye.¹⁵⁰

But our remove, constitutionally speaking, from 1871 is not so easily dismissed. Change of circumstances is perhaps common to all statutes—at least all old ones. And updating statutes to conform with the times should be done by legislatures, not courts. But the degree of commitment to the federal Constitution exhibited by state judges is not the only alteration the intervening century has wrought. The “rights, privileges, and immunities” secured by the United States Constitution—and thus the scope of section

Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 5-6 (1985) (statute designed to be part of a general pattern of federal supervision); see also F. Frankfurter & J. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 64 (1928) (“Sensitivity to ‘states’ rights’ fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War.”).

¹⁴⁹ See, e.g., M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 274 n.100 (1980) (one possible reconciliation of *Younger* and *Mitchum* is that “while Congress’ mistrust was justified in the 1870’s, it no longer is today”); see also Wells, *Why Professor Redish Is Wrong About Abstention*, 19 Ga. L. Rev. 1097, 1098 (1985) (“the statute was never intended to create such a broad cause of action”).

¹⁵⁰ See G. Calabresi, *A Common Law for the Age of Statutes* 176 (1982) (advocating a general “doctrine of judicial sunset”).

1983—have undergone a massive transformation. The cause of action under the Civil Rights Act, therefore, has been subject to more than mere changing times. The scope of the provision has been so broadened that construing it in line with the framers' intent could threaten the dual judicial system.

Though section 1983 was designed as an extremely intrusive tool, in comparative terms, its scope was exceedingly narrow. In 1871, the liberties assured by the constitution against the states did not include, for example, the provisions of the Bill of Rights. As a result, the typical practices of local criminal process did not implicate federal guaranties. States could not violate the first amendment's speech, press, or religion clauses. Decisions recognized no fundamental right to travel¹⁵¹ or vote,¹⁵² nor any right to privacy.¹⁵³ The equal protection clause carried no weight outside the race context,¹⁵⁴ and precious little even there.¹⁵⁵ In short, none of the cornerstones of our modern system of constitutional review was yet in place. And this distinction is reflected in the legislative history of section 1983.

The character of constitutional injury that the Civil Rights Act sought to remedy was hardly subtle. As Congressman Coburn explained: "The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, and the persecuted citizen looks in vain for redress."¹⁵⁶ Given the threatened outrage, the proponents of the statute claimed a willingness "to go to the extreme verge of fair construction that will justify Federal intervention."¹⁵⁷ But the harshness of the exercise of power was tempered by the perceived ease of avoiding liability. As one supporter claimed, speaking of the statute as a

¹⁵¹ See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring unconstitutional a one-year residency requirement for state welfare program).

¹⁵² See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax).

¹⁵³ See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (declaring unconstitutional a limitation of right to marry).

¹⁵⁴ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

¹⁵⁵ The *Slaughterhouse Cases* envisioned little use for the equal protection clause outside the racial discrimination context. See *id.* at 81; see also *Plessy v. Ferguson*, 163 U.S. 537 (1896) (equal protection clause not violated by regime of separate-but-equal).

¹⁵⁶ 42 *Globe*, *supra* note 31, at 459 (remarks of Rep. Coburn).

¹⁵⁷ See *id.* app. at 312 (remarks of Rep. Burchard); see also *id.* at 609 (remarks of Sen. Poole) ("The reconstruction policy, by which the political and civil equality of all citizens is made a constitutional right, is meant to be enforced as a measure of national safety.").

whole: "Every man can escape the stringency of [the bill's] action by remaining a quiet and peaceful citizen, and not infringing the rights of person, property, or liberty of another . . ." ¹⁵⁸ Today, with the tremendous expansion of the substantive scope of the federal Constitution brought about in the last several decades, any local law enforcement official, public university president, state agency administrator, school board member, prison warden, or other government actor finds it considerably more difficult to avoid the rigors of section 1983. But, as I argue below, state judges are placed in a particularly exposed position. ¹⁵⁹ In 1871, section one of the Civil Rights Act could be violated primarily by the continued enforcement of some of the more egregious examples of overtly racist legislation or, perhaps, by manipulating legal process to harass blacks and Union sympathizers. A constitutional infraction by a local judge, therefore, was regarded as an intentional flouting of federal authority. Now it may be no more than a mistake.

In one sense, this tension between the concerns of the Reconstruction era and our own is a reflection of what Professor Eisenberg has characterized as "two competing visions of section 1983." ¹⁶⁰ As he puts it, in "one perspective, section 1983 addresses a limited historical problem in post-Civil War race relations. In another, it is the primary civil mechanism for vindicating . . . constitutional rights." ¹⁶¹ But if the section 1983 cause of action is not to be limited to the particular evils that brought it into being—which I argue below would be an inappropriate turn ¹⁶²—the potential for conflict between federal and state judiciaries under the "modern" statute is markedly increased. The flowering of the incorporation doctrine has resulted in the constitutionalization of a substantial segment of the work of state courts. The demands of the fourth, fifth, sixth, and eighth amendments play a predominant role in state criminal process. The standards of procedural due process and equal protection of the laws, to name but two obvious choices, pervade local civil process. It is hardly the case, therefore, that a

¹⁵⁸ Id. at 450 (remarks of Rep. Butler).

¹⁵⁹ See *infra* notes 192-94 and accompanying text.

¹⁶⁰ Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 *Cornell L. Rev.* 482, 483 (1982).

¹⁶¹ Id.

¹⁶² See *infra* notes 165-79 and accompanying text.

state jurist can with ease "escape the stringency" of section 1983 by not "infringing the rights of person, property, or liberty of another." A section 1983 cause of action that literally calls local judges to task for the "deprivation of any rights, privileges, or immunities secured by Constitution and laws" of the United States is much closer to a system of complete federal supervision over state courts now than it would have been in the late nineteenth century. If section 1983 were to be given its full intrusive power, the frictions resulting from federal supervision would be unmitigated by protections from injunctive obstruction, immunities from damage claims, and the respect afforded through collateral estoppel. Like it or not, interference with even the good faith decisionmaking of state courts under an expansive section 1983 would pose problems that are potentially crippling to both judiciaries.

A. *Addressing the Dilemma*

Correctly interpreting section 1983 thus presents something of a dilemma. The statute was intended to be intrusive. Yet the scope of its original mission, at least if we tie it to the concerns of the framers, was quite limited. As its purview has expanded to conform to the provision's language, the potential for interference with local judicial process has expanded dramatically. If the section is applied with the full intrusive force that its drafters envisioned, complications that the framers would perhaps have rejected, or at least did not contemplate, arise.

There are a number of ways one might propose to deal with the dilemma. The first, and probably the least satisfactory, is the tack the Supreme Court has chosen. The Court's decisions on section 1983 and state courts¹⁶³ deal with the tensions of section 1983 interpretation by pretending that they do not exist. When the Justices opt for intervention, they cite passages of legislative history to support federal intrusion. When deference carries the day, opinions typically maintain that "nothing in the legislative history of section 1983" demands a contrary conclusion.¹⁶⁴ Even if the results of the various decisions can be supported on one ground or an-

¹⁶³ See *supra* notes 25-76 and accompanying text.

¹⁶⁴ *Allen v. McCurry*, 449 U.S. 90, 104 (1980). This point is made effectively in Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 Conn. L. Rev. 53, 60-68 (1986).

other, the methodology is indefensible.

The claim that the scope of section 1983 should be tied to its origins is more plausible. This argument has two principal variants. The first is that *Mitchum v. Foster* and, by implication, *Pulliam* and *Monroe* were wrongly decided. Those cases, authorizing strong federal intervention, cannot be supported, because the framers of the 1871 Civil Rights Act sought to remedy a very specific and dramatic evil—racial suppression in the South. To root the modern section 1983 cause of action, which is the conduit for a broad system of constitutional adjudication, in an emergency Reconstruction measure is erroneous. The tension between the broadened scope of the statute and the intrusive nature of its original design is thus cured by returning the Act to its earlier confines.¹⁶⁵ The second claim is closely related to the first. If the legislative history of section 1983 demonstrates that it was designed to be strongly interventionist, its full power should be reserved for the circumstances the framers had in mind—actions alleging racial discrimination. Accordingly, section 1983 litigation would develop along two tiers. In race cases, no deference to local judicial officers would be afforded. In the great bulk of other disputes now falling under section 1983's broad mantle, traditional solicitude for state government actors would be mandated.¹⁶⁶

The primary shortcoming of these suggested alterations, of course, is the language of the statute. Section 1983 unambiguously affords relief for the "deprivation of *any* rights, privileges, or im-

¹⁶⁵ This is perhaps the simplest way to categorize a recent article by Professor Zagrans calling for an extremely cramped interpretation of the "under color of law" requirement. See Zagrans, *supra* note 62. Professor Zagrans argues that the framers of § 1983 sought to reach only actions demanded or authorized by unconstitutional state law. Accordingly, he claims that *Monroe* was wrongly decided. The "under color" requirement applies, in his view, only to the enforcement of statutes that require unconstitutional behavior, specifically allow unconstitutional behavior, or grant unlimited powers to state actors who then proceed to inflict deprivations of constitutional rights.

In my view, Zagrans dramatically underplays one of the central premises of § 1983—distrust of local judiciaries. His conclusion that the actions of judicial officers are cognizable under § 1983 I accept, but find inconsistent with his central premises. Moreover, I think that any interpretation of the Ku Klux Act that leaves the actions of the Ku Klux Klan unregulated—as Zagrans' would—should be rejected out of hand.

Professor Currie, writing that "there was no excuse for the *Mitchum* decision," has argued that *Mitchum* was wrongly decided. Currie, *supra* note 28, at 329. His position, however, turns on his reading of the appropriate contours of the Anti-Injunction Act. See *id.*

¹⁶⁶ See Eisenberg, *supra* note 160, at 485.

munities secured by the Constitution and laws” of the United States. The text of the statute thus provides an insurmountable barrier to at least the stronger of the two claims. The scope of the rights embraced by the Act could simply not be clearer. “Reasonably well-informed people”¹⁶⁷ could hardly conclude, from the language of the statute alone, that the evils addressed are limited to race discrimination. As a result, the legislation must be “held to mean what it plainly expresses.”¹⁶⁸ Moreover, if the scope of section 1983 were to be dramatically reduced, a new set of even more intractable problems would result. Without the benefit of the spaciouly worded statute, the federal courts would be forced to develop a body of decisions outlining the causes of action against state actors created directly by the fourteenth amendment. At the federal level, this has proven to be a particularly thorny problem.¹⁶⁹ The confusion should be compounded only as a last resort.

The two-tiered approach at least conflicts less dramatically with the wording of the Act. Under its premises the scope of section 1983 would be unchanged. Only in cases of “racial [discrimination] and Klan . . . violence”¹⁷⁰ would the full intrusion of federal power be employed.¹⁷¹ An accommodation of sorts is thus achieved between the broad terms of the Act and a legislative history that calls for strong federal intervention. Of course, tension with the language of the Civil Rights Act remains. The provision suggests no hierarchy of rights. The phrase “deprivation of any rights,” in fact, seems to represent the strongest declaration possible to the contrary. Functionally, the two-tiered methodology would leave the section 1983 cause of action out of step with the fourteenth

¹⁶⁷ 2A J. Sutherland, *supra* note 78, § 46.04, at 87.

¹⁶⁸ *Id.* § 46.01, at 73.

¹⁶⁹ The line of decisions launched by *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), has been a troubled one. Not the least of its problems has been the determination of whether the rulings are constitutional or statutory in nature. Compare *Bivens* (Constitution supports a private cause of action) with *Bush v. Lucas*, 462 U.S. 367 (1983) (capacity of courts to award damages stems from federal courts' statutory jurisdiction).

¹⁷⁰ Eisenberg, *supra* note 160, at 485 (emphasizing the 1871 Act's concern with specific race-based problems and arguing that applications of § 1983 beyond that context must “seek justification in something more than the intent of section 1983's framers”).

¹⁷¹ Eisenberg argues that although the 1871 Act dealt with a “limited problem,” its history nonetheless “suggests a firm congressional resolve that the problem feel the full effect of federal power.” *Id.*

amendment—the provision it was primarily designed to enforce.¹⁷² No doubt we are far removed from the time when that amendment's protections provided special scrutiny only for claims of racial inequality.¹⁷³ Ultimately even this strategy suffers from a failing more familiar to the most rigid originalist doctrines of constitutional interpretation.¹⁷⁴ Section 1983, like the fourteenth amendment itself, embraces a principle that is substantially broader than the evils that brought it into being.¹⁷⁵

There is also a significant practical problem with a two-tiered vision of section 1983. Commentators have rather easily characterized the core concern of the statute as race discrimination.¹⁷⁶ The legislative history of the Civil Rights Act, however, indicates that the provision is not so easily cabined. No doubt protecting the newly freed slaves from the abuses of hostile southerners was a central goal of the 1871 statute. The Congressional Globe also reveals, however, a related and substantial concern for the plight of Republicans and Unionists. As Senator Pratt complained, for example, redress in the state courts “only fail[s] . . . when a man of known Union sentiments, white or black, invokes their aid.”¹⁷⁷ The hearings that preceded the passage of the Act “demonstrated that the Negro was not alone in his tribulations; white persons who had supported the Union cause or who were bold enough to advocate civil rights for the Negro were also the victims of terrorism in the South.”¹⁷⁸ Any core of section 1983 defined by the circumstances that led to the statute's passage, then, would need to encompass a broader universe than racial injustice. “Causal” wrongs include, at a minimum, manipulation of legal process to punish political opposition, to suppress freedom of speech, and apparently, to discour-

¹⁷² See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); see also 42 *Globe*, supra note 31, at 375-76 (remarks of Rep. Lowe) (“Is not this appropriate legislation to enforce the provisions of the [fourteenth amendment]?”).

¹⁷³ This point is made quite vividly in Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 292-99 (1978).

¹⁷⁴ See, e.g., R. Berger, *Government by Judiciary* 37-134 (1977).

¹⁷⁵ See generally R. Dworkin, *A Matter of Principle* 46-50 (1985) (indicating that “abstract” intent of framers of fourteenth amendment may have been broader than concrete problems the amendment addressed).

¹⁷⁶ See Eisenberg, supra note 160, at 485-86.

¹⁷⁷ 42 *Globe*, supra note 31, at 505.

¹⁷⁸ Gressman, supra note 91, at 1329-30.

age the exercise of the right to travel.¹⁷⁹ But once that door is opened, the effort to define the heart of the expansive provision is lost.

It has also been suggested that the friction between section 1983's intrusive intention and its modern scope should lead to a very different conclusion—that the legislative history of the statute is no longer relevant to its appropriate interpretation.¹⁸⁰ To any reader of the Supreme Court's section 1983 decisions, this proposal carries obvious appeal. At a minimum, it calls for the end of the inconsistent and haphazard use of legislative intent. It also recognizes that judicial opinions have on occasion attributed more to the framers of the Civil Rights Act than their century-old deliberations can reasonably be asked to bear. The Supreme Court's flip-flop on the applicability of the statute to municipalities provides a ready example.¹⁸¹ If governmental entities carrying out the responsibilities and exercising the prerogatives of modern cities did not meaningfully exist at the local level in 1871, it is hardly fruitful to scour the debates in search of references to municipalities.¹⁸² The drafters' intentions are simply unhelpful on many of the issues of modern section 1983 jurisprudence.

Courts should be reluctant, however, to disregard the intention of the statute's proponents when it is both ascertainable and capable of being carried forward under our existing litigation framework. Rejecting legislative intent in favor of a complete system of

¹⁷⁹ Consider, for example, the remarks of Rep. Platt: "[N]o Republican white or black, especially if he is a citizen who has come here from another State[,] . . . can secure as plaintiff or defendant anything like equal justice before the courts of the State." 42 *Globe*, supra note 31, app. at 185.

¹⁸⁰ See Wells, supra note 164, at 68. I do agree, however, that the legislative intention of the Civil Rights Act of 1871 simply does not speak to a great number of modern § 1983 issues. See generally Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 *Ark. L. Rev.* 741 (1987) (criticizing the Court's use of history in § 1983 cases).

¹⁸¹ *Monroe v. Pape*, 365 U.S. 167 (1961), ruled that municipalities were not "persons" for purposes of § 1983. That determination was reversed in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). See generally Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983*, 1986 *Wis. L. Rev.* 633 (offering a method of interpreting the "policy or custom" requirement established in *Monell*); Whitman, *Government Responsibility for Constitutional Torts*, 85 *Mich. L. Rev.* 225, 230-38 (1986) (discussing *Monell's* overruling *Monroe*).

¹⁸² See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-66 (1981) (relevance of original intent of § 1983 to question of punitive damage awards against municipalities).

common law development poses several problems. First, section 1983 does not furnish the apparent textual warrant to construct judicially a set of freestanding principles for decision of the sort that some other federal statutes have been held to provide. Section 301(a) of the Labor Management Relations Act,¹⁸³ for example, has been determined to authorize "federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."¹⁸⁴ But 42 U.S.C. § 1988 indicates that in cases under the Civil Rights Act "the laws of the United States," or, if they are "deficient," the "common law, as modified and changed by the constitution and statutes of the State wherein the . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States" shall apply.¹⁸⁵ Section 1988 has hardly proven a model of clarity.¹⁸⁶ It does at least indicate that judges, in measuring the demands of section 1983, are not simply to make it up as they go.

A freewheeling common law process poses legitimacy dangers from the other direction as well. If judge-made section 1983 standards result in a more restrictive cause of action than the framers contemplated, the judiciary apparently usurps legislative mandate. *Mitchum*, for example, declares that the Civil Rights Act was designed to afford injunctive relief against state judiciaries. *Younger* largely takes away what *Mitchum* grants. If we are to characterize *Younger* as an exercise in common law decisionmaking, it is hard to comprehend the judicial warrant for rejecting, as Professor Redish has put it, "the product of the congressional balancing process"¹⁸⁷ reflected in section 1983.

This point hints at yet a third approach to the interpretation of section 1983. Under this theory, the courts should allow both the intrusive design of the statute and its expansive modern scope to be given full play. The legislative history of the Civil Rights Act

¹⁸³ 29 U.S.C. § 185 (1982).

¹⁸⁴ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

¹⁸⁵ 42 U.S.C. § 1988 (1982).

¹⁸⁶ The relevance of § 1988 to the determination of § 1983 damages, for example, has proven to be complex. See, e.g., *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Carey v. Phipps*, 435 U.S. 247 (1978).

¹⁸⁷ Redish, *supra* note 22, at 88 (1984). But see Bator, *The State Courts and Federal Constitutional Litigation*, 22 *Wm. & Mary L. Rev.* 605, 622 n.49 (1981) (concluding that *Younger* "should not be criticized as an act of judicial usurpation").

demands that the statute be read to penetrate traditional concepts of state sovereignty. The language of the provision, meanwhile, requires that it be applied broadly. This analysis leads Professor Redish to claim that *Younger v. Harris* is illegitimate "judicial lawmaking of the most sweeping nature."¹⁸⁸ *Younger's* premise, Redish correctly indicates, "rests largely on the desire to avoid insulting state judiciaries by questioning their competence or good faith."¹⁸⁹ Given *Mitchum's* ruling that section 1983 was designed to provide injunctive relief against distrusted state courts, however, Congress appears to have left little room for a contrary judicial conclusion.

Professor Redish's logic is unassailable. The problem with his position, however, flows from carrying his premises to their natural conclusion. It is true that *Mitchum* calls into question *Younger's* legitimacy. But for exactly the same reasons, *Mitchum* and the legislative history of section 1983 cast doubt on *Allen v. McCurry* and *Pierson v. Ray*. And, as I shall argue below, a section 1983 cause of action that provides federal relief for the "deprivation of any rights" at the hands of state judges without the implementation of immunities, freedom from injunctive interference, or the safeguard of collateral bar would necessarily result in a debilitating clash between the two judicial systems. If this claim is true, then there are reasons apart from sheer judicial willfulness to interpret section 1983 to avoid such friction.

B. Section 1983 and Deference to State Courts

A number of conclusions may be drawn on the basis of this reading of the legislative history of section 1983. First, regardless of the intricacies of proper interpretation of the Anti-Injunction Act, *Mitchum's* conclusion that the framers of the Civil Rights Act would have authorized equitable relief against state courts is correct. Second, the 1871 Congress had grave misgivings about the reliability of state court process. It is very unlikely, therefore, that the statute's proponents would have considered the possibility of presenting a constitutional defense to the state courts an appropriate substitute for a section 1983 cause of action. *Younger*, as a re-

¹⁸⁸ Redish, *supra* note 22, at 114.

¹⁸⁹ *Id.* at 87.

sult, seems to be at odds with legislative intention. Third, state courts played a central role in the evil the Civil Rights Act was designed to abate. Given the broad language of the statute, it is very difficult to make a case based on framers' design for *Pierson's* grant of absolute judicial immunity from damage claims.¹⁹⁰ Nor, for that matter, would the 1871 Congress have been likely to demand the exhaustion of state remedies or to apply principles of collateral estoppel to limit the issues cognizable under section 1983. In short, the circumstances of the Civil Rights Act's passage lead reasonably to its characterization as a fully intrusive assertion of federal power, designed to ensure the protection of basic civil liberties even at the cost of displacing, and offending, traditional state prerogatives. *Mitchum*, *Pulliam*, and at least the nonexhaustion rule of *Monroe*,¹⁹¹ therefore, are supported by the intent of section 1983's drafters. *Younger*, *Pierson*, and *McCurry* are not.

The inquiry, however, cannot stop there. Given the tremendous expansion in substantive scope that the "rights, privileges, and immunities" protected by the statute have undergone in the past three decades, a fully intrusive section 1983 would lead to ramifications unforeseen in 1871. The gradual constitutionalization of a substantial portion of the state judicial process has led to a considerable overlap, and thus to considerable opportunity for friction, between the two court systems. Consider a simple example.

Suppose that a Virginian is indicted in the courts of his state for possession of cocaine. In his defense, along with declaring his inno-

¹⁹⁰ I think, therefore, that the Third Circuit correctly read the legislative design of the Civil Rights Act in the 1945 decision *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), rejecting judicial immunity under § 1983:

[T]he privilege was . . . a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act . . . intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the . . . Civil Rights Act explicitly applied to 'any person.' . . . We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity.

Id. at 250.

I argue below, however, that where necessity, rather than intent, is at issue, immunity can be justified. See *infra* notes 194-203 and accompanying text.

¹⁹¹ As I have said, it is not my intent to defend *Monroe v. Pape's* broad interpretation of the under color of law requirement. Nor is the appropriate scope of the under color standard central to my claims. See *supra* note 165. I do contend, however, that Justice Douglas was correct in concluding that the framers of § 1983 were reluctant to relegate the victims of southern abuses to the vagaries of state judicial process.

cence, he claims that the drugs were the subject of an unreasonable search, that a statement was introduced against him in violation of his *Miranda* rights, and that his right to confront his accusers was breached by the admission of certain hearsay testimony. The motions he files to present the challenges are denied in both pretrial and trial rulings. Eventually, he is convicted. If the section 1983 cause of action provides the strongly interventionist remedy the framers probably intended, the defendant's federal options are numerous.

As soon as the state judge denies his pretrial motions to suppress, he could move to the federal forum seeking an injunction to stop the state prosecution.¹⁹² The claim could easily be made that the trial judge is a "person" acting "under color of" state law who has deprived the new federal plaintiff of a right secured by the Constitution of the United States. As *Mitchum* suggests, injunctive relief against a state tribunal is envisioned by section 1983. Nor would *Younger* stand as a bar to interference with the local prosecution: the legislative history of section 1983 offers strong rebuttal to the assertion that the framers of the statute would have considered the possibility of presenting a constitutional defense to the state court an adequate remedy at law.¹⁹³

If the criminal defendant should choose to wait until he is convicted to seek federal relief, he might again find a hospitable forum. After final judgment, a section 1983 damages action could be filed against the convicting judge. Alleging wrongful admission of

¹⁹² It could be argued at this point that no "deprivation" has occurred for purposes of § 1983 until conviction. Once a conviction has been obtained, of course, the habeas corpus statute—rather than § 1983—takes over. It is unclear to me, however, why the very use of a coerced confession or the fruits of an illegal search, or why forcing a defendant to be tried without counsel, for example, does not amount to a deprivation under the Civil Rights Act. If the defendant were subsequently acquitted and if judges did not enjoy immunity, I would think that a cause of action for such constitutional violations could be had pursuant to § 1983.

The potential liability for damage claims arising from the applicability of § 1983 to state court processes is immense. If the disappointed state court litigant seeks to challenge the underlying state court conviction, however, the cause of action would lie under, and be governed by, the federal habeas corpus statute, 28 U.S.C. § 2254 (1982). See generally *Preiser v. Rodriguez*, 411 U.S. 475, 488-99 (1973) (bolding writ of habeas corpus appropriate remedy for prisoners claiming unconstitutional prolongation of prison term).

¹⁹³ See *Redish*, supra note 22, at 186 ("[T]he drafters of section 1983 were especially concerned with the good faith of the state courts, [and] it is unlikely that they assumed that the ability to raise a federal defense in state court constituted an adequate remedy.").

the evidence contested under the fourth, fifth, and sixth amendments, the new plaintiff could seek actual and punitive damages, as well as attorney's fees. *Pierson* would no longer stand as a bar to retroactive monetary claims because it is inconsistent with the language and intent of section 1983. Of course, the constitutional issues would have been given a full and complete airing in the convicting court. The rejection of the constitutional defenses by the local judge, however, would carry no weight in the federal tribunal. *McCurry's* determination that collateral estoppel applies to civil rights actions cannot be squared with the framers' distrust of state judiciaries. Accordingly, the fourth, fifth, and sixth amendment issues would be retried in the federal suit. If the federal district court disagreed with the local judge's disposition, an award of damages and attorney's fees would be mandated.

Under a fully intrusive version of section 1983, this hypothetical scenario would hardly be aberrant. Theoretically, this ping-pong adjudication could transpire daily in every jurisdiction in the nation, at least until both judicial systems broke under the pressure. Section 1983, if given both its complete scope and its full mandate of intervention, would serve to extinguish the separate existence of the state courts and massively overburden the federal courts. Such a result would hardly be the product of reasoned statutory construction.

It is hard to disagree with the claim that a piece of remedial legislation like section 1983 should be "construe[d] in such a way as to make it a more rather than a less effective cure"¹⁹⁴ for the ills it set about to address. In the broadest terms, section 1983 was designed to provide a federal cause of action that assures state constitutional compliance. It is certainly possible, however, that *if* the statute is interpreted in too intrusive a fashion, the final result would be a remedy that is less rather than more effective. The easiest example is the question of judicial immunity. It is certainly plausible that a state judge would be debilitated from carrying out her appointed tasks if she should be adjudged liable for damages, without benefit of immunity, for any deprivation of constitutional rights resulting from her actions. The sheer volume of "constitutional" decisions made by trial courts, especially criminal trial

¹⁹⁴ R. Posner, *supra* note 124, 278 (discussing the canon of construction that remedial statutes should be read broadly).

courts, would engender a level of risk that even the most learned, and the most solvent, jurist would find unacceptable. In addition, the flood of section 1983 claims would likely overwhelm the federal docket, thus impeding those with serious constitutional claims from obtaining swift redress through the federal courts. Is it possible to conclude, therefore, that regardless of the designs of the framers, section 1983 can be read to embrace an absolute immunity for state judges?

Curiously, it may be that a body of decisions interpreting the provisions of an antitrust statute is instructive. The Sherman Act provides that "every contract . . . in restraint of trade or commerce . . . is . . . illegal."¹⁹⁵ But as Justice Brandeis pointed out in *Chicago Board of Trade v. United States*, "every agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence."¹⁹⁶ If a buyer closes a deal with a seller, the contract ties both to a particular course, limiting options and restraining the efforts of others who might offer different bargains. Surely, the argument goes, the Sherman Act does not render all contracts that affect interstate commerce illegal. Accordingly, "some mode of confining the generality of the language" of the act must be sought.¹⁹⁷ To that end, in *Standard Oil Co. v. United States*,¹⁹⁸ the Supreme Court announced that the Sherman Act would be interpreted pursuant to a "Rule of Reason," forbidding only contracts that constitute "undue restraint[s]" of trade.¹⁹⁹

The majority position in *Standard Oil* was not achieved without a fight. The first Justice Harlan dissented vehemently, proclaiming that the opinion of the Court "may well cause some alarm for the integrity of our institutions."²⁰⁰ It was his position that the adoption of the "Rule of Reason" was nothing more than "judicial legislation"; it altered the Sherman Act with an "exception" that was "not placed there by the lawmaking branch of the Government."²⁰¹ The statute, in short, says every contract in restraint of trade, not only unreasonable ones.

¹⁹⁵ 15 U.S.C. § 1 (1982).

¹⁹⁶ 246 U.S. 231, 238 (1918).

¹⁹⁷ L. Sullivan, *Handbook of the Law of Antitrust* 165 (1977).

¹⁹⁸ 221 U.S. 1 (1911).

¹⁹⁹ *Id.* at 60.

²⁰⁰ *Id.* at 83 (Harlan, J., dissenting).

²⁰¹ *Id.* at 88.

Of course, Chief Justice White's opinion, the majority opinion in *Standard Oil*, has carried the day. And its theory is useful in addressing the dilemma presented by the disjunction between section 1983's genesis and its modern application. *Standard Oil* suggests that the Sherman Act cannot be read to proscribe every contract because it simply would not work. The statute's drafters could not have intended for such a result to transpire. Or if they did, they clearly failed to think the problem through. A statute should not be interpreted in a manner that will render it impossible to carry out.

If we focus for the moment on the question of judicial immunity from damage claims under section 1983, it is possible to see the problem in a similar light. The Civil Rights Act applies, by its terms, to "every person." Judges are persons. The legislative history of the provision, if anything, actually bolsters the claim that no immunities for judges were contemplated. Thus both the statute and its legislative circumstances suggest full judicial liability. Yet surrounding circumstances, as well as the scope of section 1983, have changed. But these changes have not merely rendered the statute less useful or necessary. Rather, the Civil Rights Act, like the Sherman Act, cannot be interpreted in accord with its language. It simply will not work. It might well have been possible in 1871 to hold state judges fully accountable under section one of the Civil Rights Act. Without an incorporated Bill of Rights and invigorated substantive visions of the various clauses of the fourteenth amendment, a state judge could perhaps have conscientiously performed his duties without the paralyzing specter of threatened federal damage claims. Very likely, however, that is no longer the case. State adjudication involves the determination of too many constitutional questions, too many potential deprivations. A cautious, or perhaps wise, judge would, at the least, steer far clear of deciding any constitutional issues against a criminal defendant. Her pocketbook would be threatened only if she erred on behalf of the state. It is possible, one might counter, that local judges could survive under a mere qualified immunity—thus the case I make is overstated. But that only moves the debate back a step. The language and history of section 1983 support no judicial immunities, no matter what their degree. The recognition of any shield for state courts, strong or weak, results from necessity, not intention. But the necessity is real. Accordingly, it is reasonable to conclude

that section 1983 should be read to countenance judicial immunity so that the statute remains possible to effectuate. By embracing immunity, the statute is construed "to make it a more rather than less effective" tool of constitutional supervision.

This methodology suggests a model for the interpretation of section 1983 as it applies to state courts.²⁰² The language and history of the Act imply full accountability, both in law and in equity, for state judges. Because the statute provides no grant of authority to create a common law of federal-state judicial relations, especially a common law that is at odds with the terminology and design of the statute, the full breadth of federal supervision countenanced by the Act should, as a general matter, be exercised. Given the dramatically increased opportunities for friction between state and federal courts that result from the modern expansion of constitutional decisionmaking, however, it is necessary to incorporate some key aspects of deference to local judiciaries into the section 1983 cause of action regardless of the attitudes of the framers. The "exceptions" to section 1983's regime of supervision should thus be measured by necessity. Deferential rules should be adopted only if the application of the statute's intrusive original design would render it a less effective tool of constitutional enforcement by debilitating state judicial actors or overwhelming federal oversight capacity.

There would be several advantages to such an approach. First, it would pay continued respect to the language and mission of the Civil Rights Act. Legitimacy questions that arise from the unexplained recognition of limitations on section 1983 liability—typified by cases like *Younger* and *Pierson*—would be miti-

²⁰² I realize that the arguments put forth here may have relevance beyond the determination of the appropriate relationships between state and federal courts under § 1983. The claims I make for judicial immunity, for example, could support findings of legislative and executive immunity as well. Those issues, however, are beyond the scope of this Article. Professor Matasar has recently criticized the Supreme Court's use of history in the personal immunity cases. See Matasar, *supra* note 180. In his view, the immunity rulings underestimate the common law's attempts to mitigate immunity by expanding forms of compensatory relief as well as the "fundamental reordering" undertaken by the Reconstruction Congress. *Id.* at 179. Obviously, much of my effort here supports Matasar's claim—at least with regard to judicial immunity. On *that* score, as indicated, I disagree with his assertion that "history is so contextual . . . [and] multi-leveled" as to be of little use in measuring § 1983 claims. *Id.* at 785. It is essential, of course, to determine whether judges come within § 1983's "any person" terminology. I have attempted to show here that the case for inclusion, as a matter of legislative intention, is ascertainable with reasonable certainty.

gated.²⁰³ Judicial decisions could recognize and implement one consistent, rather than two diametrically inconsistent, visions of the legislative history of section 1983. Finally, and perhaps most importantly, the debate over whether to afford deference to local courts would be altered. In making the determination to embrace injunctive oversight, to allow the estoppel of claims, or to recognize immunities, for example, the decisive factor would be the necessity that such protections be provided for state tribunals. The harms resulting from federal intrusion would be made an overt, and largely determinative, aspect of the section 1983 decisionmaking process. And only if a clear and compelling case for state protection, one rooted in necessity, were made, would a departure from section 1983's mandate be called for.

C. Application

The series of Supreme Court decisions that set the present contours of the relation between section 1983 and state courts²⁰⁴ would, at least in some particulars, receive different treatment under the interpretive strategy suggested above. *Mitchum*, as already noted, provides an essentially accurate vision of section 1983's legislative intent.²⁰⁵ The Civil Rights Act was designed, at

²⁰³ If, for example, judicial immunity were recognized under such a methodology, it would be accomplished clearly as a matter of statutory interpretation. The determination would not be plagued, as *Pierson* is, by a faulty reading of legislative intent. The interpretation, recognizing limits born of necessity, could arguably be seen as incorrect. It would not, however, be subject to the claims of illegitimacy that Professor Redish has lodged, for example, against the *Younger* doctrine. See Redish, *supra* note 22, at 86-87. The judgment could also be overturned by Congress.

²⁰⁴ See *supra* notes 25-76 and accompanying text.

²⁰⁵ It is less clear, as I have said, that *Mitchum* is an appropriate reading of the Anti-Injunction Act. Professor Currie, for example, considers the decision clearly wrong in its determination that § 1983 is an "express" exception to § 2283. See Currie, *supra* note 28, at 329. It is not my primary goal here to consider the rigors of the Anti-Injunction Act. If *Mitchum* is wrong on that issue, however, *Younger* becomes irrelevant. Professor Redish has suggested an "in aid of jurisdiction" exception to the statute that would achieve many of the same results as *Mitchum*. See M. Redish, *supra* note 5, at 285-90.

To my mind, *Mitchum* can survive in result, even if its methodology is too sweeping, as an express exception. Given the ambiguous nature of the injunctive prohibition as of 1871, it is not surprising that the Reconstruction Congress did not expressly characterize the Civil Rights Act as an exception to a general prohibition against injunctive interference. See the discussion of the modern Anti-Injunction Act's predecessors in M. Redish, *supra* note 5, at 260-62. It is also true, as I have argued, that the framers of § 1983 meant to afford litigants an equitable claim against state jurists. At the least, then, *Mitchum* is correct in its conclu-

least in part, to afford injunctive relief against state jurists. Nor can the demands for independence by state courts justify a *total* proscription of equitable intervention. Certainly patterns of harassment, systematic constitutional abridgements, or dramatically erroneous interpretations of federal law can be envisioned that mandate federal intrusion, and yet pose no overwhelming dangers to state judiciaries.²⁰⁶ As a result, a section 1983 methodology that gives credence to original intention, tempered by the essential demands of local judicial prerogative, would reject an across the board no-injunction rule.

Monroe's principle of nonexhaustion is even more easily justified. The historical case against exhaustion of judicial remedies is very strong.²⁰⁷ Intrusion upon local process, on the other hand, is minimal and indirect. At the other end of the spectrum, *Pierson* presents an undeniable argument for deference. Accordingly, I think that in ruling that state judges are absolutely immune from damages, the Supreme Court made the right decision—but for the wrong reason. Judicial immunity should be recognized under section 1983 not because the framers contemplated it, but because local judiciaries would be crippled without it.²⁰⁸

Pulliam, the recent decision refusing to apply the *Pierson* rule to actions for prospective relief against state jurists, initially appears to conform to the approach I suggest. The decision, however, strikes me as more complex. I start from the premise that the

sion that the right to redress created by the Civil Rights Act of 1871 cannot be given its full scope without recognizing an exception to the Anti-Injunction Act. The "express" language of the 1948 revision of the Anti-Injunction Act, if applied with stringency, results in something of a repeal by implication of § 1983. It seems unlikely that this is what the 1948 Congress intended, especially given the moribund state of the § 1983 cause of action at that time. The statute does declare a right to equitable relief for the deprivation of constitutional rights at the hands of every person. This language, combined with the strong legislative history upon which *Mitchum* only incompletely draws, should be enough to escape the ban of § 2283.

²⁰⁶ *Dombrowski v. Pfister*, 380 U.S. 479 (1965), for example, is such a case. *Dombrowski* was based on allegations that state court prosecutions were made not "with any expectation of securing valid convictions, but rather [as] part of a plan . . . to harass and discourage [plaintiffs] . . . from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana." *Id.* at 482; see also *O'Shea v. Littleton*, 414 U.S. 488 (1974) (pattern of discriminatory actions by state courts).

²⁰⁷ See *supra* notes 126-28 and accompanying text.

²⁰⁸ See generally Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 Duke L.J. 879 (addressing the importance to the appellate system of judicial immunity).

draftsmen of the Civil Rights Act envisioned no judicial immunity. And, as the Court has recognized in other contexts, prospective remedies tend to prove considerably less debilitating than the possibility of looming damage actions.²⁰⁹ As I have just claimed, it is difficult to justify a complete ban on injunctive intervention. Yet something troubles me about a ruling that a successful action for an injunction against a state judge can be accompanied by an award of attorney's fees under 42 U.S.C. § 1988.²¹⁰ To my mind, Justice Powell's claim in dissent is difficult to counter: "[T]he availability of injunctive relief under § 1983, combined with the prospect of attorney's fees under § 1988, poses [a] serious threat of harassing litigation with . . . potentially adverse consequences for judicial independence."²¹¹ It may well be, as the majority concluded,²¹² that *Pulliam's* result is compelled by the clear intention of the Civil Rights Attorney's Fees Awards Act of 1976.²¹³ As a matter of section 1983 interpretation, however, the threat of a fee award can intimidate as easily as the threat of a damage claim.

Under the interpretive scheme I propose, *Younger v. Harris* takes on something of a different cast. It seems clear that the "national policy" on which "Our Federalism" is based was rejected by the framers of the Civil Rights Act of 1871. Had they been acting according to its dictates, one doubts that the section 1983 cause of action would have been deemed necessary. Nor, for that matter, would they have been apt to violate traditions of state sovereignty so rudely by authorizing the employment of the national militia or the suspension of habeas corpus. The tenor of the debates over sec-

²⁰⁹ Compare, for example, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity for president from damage claims) with *United States v. Nixon*, 418 U.S. 683 (1974) (president subject to at least some forms of prospective relief).

²¹⁰ See *Pulliam v. Allen*, 466 U.S. 522, 544 (1984).

²¹¹ *Id.* at 557 (Powell, J., dissenting).

²¹² See *id.* at 543-44.

²¹³ 42 U.S.C. § 1988 (1982). It remains to be asked, of course, why I would not apply a "rule of necessity" to § 1988 as well as § 1983. First, it seems to me that some deference to state judicial process is necessary not only to ensure that those processes are workable, but also to foster the general purposes of constitutional compliance reflected in § 1983 itself. The same argument is tougher to make for § 1988—granting an attorney's fee award against state jurists embraces rather than threatens the goals of § 1988. Second, and more practically, a recent and pointed enactment like § 1988—if modified by the judiciary—obviously poses greater separation of powers problems. If the attorney's fees provision burdens state court judges, and if, as the *Pulliam* Court held, Congress meant to impose such liability, it is properly left to Congress to cure the problem.

tions one and two of the Act also engenders a firm conviction that the forty-second Congress would have spurned the notion that the opportunity to present a federal defense to a state court constitutes an adequate remedy at law, thus precluding section 1983 relief. The essential premises underlying *Younger*, therefore, are at odds with the language and legislative history of the Civil Rights Act.²¹⁴

At least some aspects of the intrusiveness claim that justifies *Pierson*, however, are relevant to *Younger*. Direct injunctions against state court process can obviously be highly disruptive. Not only are proceedings interrupted midstream, but the state judicial system is subjected to an inference that it cannot be trusted to run

²¹⁴ Professor Bator has sought justification for *Younger* in traditional equity doctrine. “[I]t seems to me implausible to assume that the cause of action created by . . . the Civil Rights Act of 1871 [was] meant wholly to supersede the preexisting equity doctrine that a good faith criminal prosecution will not ordinarily be enjoined simply because the plaintiff asserts that he has a valid defense to it.” Bator, *supra* note 187, at 622 n.49.

There are two types of responses to Professor Bator’s claim. First, the modern *Younger* doctrine does not represent “pre-existing equity doctrine.” Professor Redish has argued, for example, that the development of principles of equitable restraint took place within a unitary court system—where one constituent part must obviously be reluctant to supersede another. See Redish, *supra* note 22, at 85. Other commentators have argued that the *Younger* principle actually works to remove equitable discretion. It is a “single, rigid commandment of federal judicial inaction that violates even such rules as equity and comity could be said to have contained.” Soifer & Macgill, *supra* note 22, at 1143; see also *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 n.22 (1976) (“where a case is properly within [the scope of the *Younger* doctrine], there is no discretion to grant injunctive relief”).

Moreover, as Professor Laycock has shown, *Younger* moves beyond equitable doctrine in other ways. A federal injunction against state court process was said in *Younger* to demand not only “irreparable,” but “great and immediate” injury. *Younger v. Harris*, 401 U.S. 37, 46 (1971). Traditionally, a legal remedy has been deemed “adequate” only if it is as “complete, practical and efficient as that which equity could afford.” *Terrace v. Thompson*, 263 U.S. 197, 214 (1923). But, as Professor Laycock has shown, “[t]hree important powers of equity courts are not available to criminal courts in Anglo-American jurisprudence: the power to give interlocutory relief, the power to give prospective relief, and the power to give class relief.” Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 199. The Supreme Court has been essentially unconcerned with the actual adequacy of relief state process affords in the *Younger* cases because the doctrine is one of federalism, not equity.

I would add a second argument to these claims. After a review of the legislative history of the Civil Rights Act, I find it entirely “plausible” that the framers would have rejected any equitable doctrine that incorporated as its working premise an assumption that state courts will evenhandedly apply the law. State tribunals afford an adequate remedy at law only if they fairly and systematically enforce federal interests. The framers of § 1983 thought state courts fell far short of that mark.

its course. Granted, this "insult" to state jurists and the costs of possible obstruction of state proceedings were perceived by the framers of section 1983,²¹⁵ but were thought to be outweighed by the need to further state constitutional compliance. Still, the opportunities and the obligations of federal injunctive oversight of state process are dramatically expanded under the modern section 1983 cause of action. From the state courts' viewpoint, federal interference is perhaps less daunting than potential liability for damage claims. At least injunctions operate prospectively, and compliance, even if reluctant, can be achieved. But the possibility of federal intervention as the result of "any deprivation" sustained at the hands of state courts would be debilitating both for the federal intruder and the local victim of national supervision.²¹⁶

The *Younger* question seems to turn, therefore, on the extent to which the normal requisites for equitable relief should be bolstered by the requirement of deference to state courts. Justice Black concluded that federal interference ought to be barred unless the state case is brought in "bad faith," or pursuant to a statute "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph."²¹⁷ The bad faith or harassment exception, with its apparent demand for ill-motivated or repeated prosecutions,²¹⁸ surely poses no great threat to state judicial

²¹⁵ Congressman Storm, for example, claimed that the bill "does not even give the State courts a chance. . . ." 42 *Globe*, supra note 31, app. at 86. Congressman Holman asserted that "the jurisdiction of the federal courts . . . is to invade the provinces of the State courts with new laws and systems of administration." *Id.* at 258. Congressman Arthur stated that "[h]aving swallowed up the States and their institutions, tribunals, and functions, [the Act] leaves them the shadow of what they once were." *Id.* at 365.

²¹⁶ A variety of justifications have been offered for the *Younger* doctrine of deference: avoiding interference with state substantive goals, the desire to preserve the discretion of state executive officers, avoiding insult to the competence of state courts, and preventing interference with the orderly functioning of state judicial process. See Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 *Cornell L. Rev.* 463, 465-66 (1978). The first two of these are directly at odds, given a showing of unconstitutionality, with the goals of § 1983. I have indicated as well that the "insult" implicit in the shift of power to the federal judiciary accomplished by the 1871 Act was certainly contemplated by the framers. I agree, then, with Professor Redish that the "strongest justification for *Younger* . . . is the recognized need to avoid disrupting the state judicial process." *Id.* at 484. I recognize that the framers of § 1983 envisioned disruption of state court process. But the magnitude of disruption a modern, intrusive §1983 cause of action would visit on state courts is far beyond their contemplation.

²¹⁷ *Younger*, 401 U.S. at 53 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)).

²¹⁸ *Id.* at 49-53. *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975), suggests that "bad faith"

independence. For purposes of section 1983 jurisprudence, however, the “flagrantly and patently violative” standard is of greater interest.

Given the central premise of the *Younger* decision—trustworthiness of state judicial decisionmaking—the patently violative exception is anomalous. Surely if state judges can be trusted, they can be trusted to handle the most clear-cut cases. And if the deferential doctrine is based on an unwillingness to assume the worst about state courts, why construct an exception that anticipates that judges might intentionally violate the Constitution’s demands? Perhaps the standard represents, therefore, an unelucidated compromise between the goals of section 1983 and the unfettered operation of state judiciaries. A legal standard that exposes state courts to easy and repeated injunctive interference threatens local judicial independence. But if principles of federal jurisdiction prohibit both equitable and legal claims against judicial process, a major segment of section 1983’s mission has been lost. The “patently violative” standard, then, can be seen as an effort to temper the original designs of the Civil Rights Act with the concessions to necessity. If injunctive relief against state courts is available under section 1983, but only in cases of clear and obvious mistake, the constitutional oversight envisioned by the statute’s framers is at least partially saved without crippling local adjudicators.²¹⁹

means that “the prosecution has been brought without a reasonable expectation of obtaining a valid conviction.” Harassment has been read to require “a series of repeated prosecutions.” *Robinson v. Stovall*, 473 F. Supp. 135, 145-46 (N. D. Miss. 1979) (quoting *Younger*, 401 U.S. at 49), rev’d in part on other grounds, 646 F.2d 1087 (5th Cir. 1981). In operation, however, the exception has proven extremely difficult to meet. See, e.g., *United Books, Inc. v. Conte*, 739 F.2d 30 (1st Cir. 1984) (six obscenity prosecutions in two years insufficient). A commentator in 1979 reported that the exception “has never been successfully invoked.” Comment, *Limiting the Younger Doctrine: A Critique and Proposal*, 67 Calif. L. Rev. 1318, 1329 (1979). But see, for example, *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1288-89 (W.D. Tenn. 1983) (finding evidence of harassment). Justice Brennan argued in 1977 that the *Younger* exceptions required showings that were “probably impossible to make.” Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 498 (1977).

²¹⁹ I have characterized the use of a “meaningful” patently unconstitutional standard as federal oversight of state judicial process. At present, the *Younger* doctrine bars federal interference with pending state actions. A patently unconstitutional pending state prosecution, under the regime I advocate, would be subject to injunctive interference by a federal tribunal under § 1983. Of course a state court may, or may not, have actually been presented with the federal constitutional claim in a pending state case. Because the exception I describe is designed to rectify the clear mistake, a requirement that the federal plain-

This, however, is hardly the way the "patently violative" standard has been implemented. The Supreme Court's view of the exception is so rigid that it has never been deemed satisfied.²²⁰ *Trainor v. Hernandez*²²¹ presented the Court with a viable opportunity to explore the standard, and the results were not encouraging. The trial judge had found the state attachment provision challenged in *Trainor* to be "patently violative of the due process clause of the Fourteenth Amendment."²²² The Supreme Court overturned the conclusion, maintaining (somewhat surprisingly given the language of the trial opinion) that "even if such a finding was made below, which we doubt, . . . it would not have been warranted in light of our cases."²²³ *Trainor's* curt treatment of the exception has led commentators to conclude, not unreasonably, that it "has become meaningless."²²⁴

Under the reading of section 1983 that I propose, the Supreme Court's effective interment of the *Younger* exceptions is unfortunate, and wrong. It is true, of course, that if *Younger's* stated rationale is dispositive, the exclusions are misguided from the outset.²²⁵ But "Our Federalism," whatever its content, cannot be defined without reference to the demands of section 1983. If the *Younger* exceptions are in fact not that, but mere illusory components of an absolute bar to injunctive intervention, then, at a minimum, *Mitchum* has been buried.²²⁶ A central tenet of the Civil

tiff have actually presented the constitutional claim in the pending state trial would be called for. I would reject, however, the requirement announced in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), that a federal litigant, under *Younger* principles, "must exhaust his state appellate remedies before seeking relief in District Court." *Id.* at 608.

²²⁰ See Comment, *supra* note 218, at 1329.

²²¹ 431 U.S. 434 (1977).

²²² *Hernandez v. Danaher*, 405 F. Supp. 757, 762 (N. D. Ill. 1975), *rev'd sub nom. Trainor v. Hernandez*, 431 U.S. 434 (1977).

²²³ *Trainor*, 431 U.S. at 447.

²²⁴ See Laycock, *supra* note 214, at 198; see also Soifer & Macgill, *supra* note 22, at 1210 (addressing *Trainor's* refusal to make a substantive acknowledgement of the exception); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4255, at 583-84 (1978) (the "universe" of exceptions "that can be established is virtually empty").

²²⁵ See Comment, *supra* note 218, at 1329 (1979) ("exception[s] seem[] inconsistent with the principles underlying equitable restraint").

²²⁶ I realize, of course, that *Younger* has not expressly been construed to extend to all civil cases, thus leaving some potential room for *Mitchum* to survive. The civil-criminal distinction, however, is not a compelling one given the premises of the doctrine. Nor, ultimately, do I think it is long for this world. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 (1987); *Moore v. Sims*, 442 U.S. 415, 423 (1979).

Rights Act of 1871—that the actions of state jurists are federally cognizable—is lost as well.

A handful of federal trial courts have treated the exception in a meaningful way. In one case, for example, the court found that a statute clearly violating the first amendment and recently upheld by the highest court of the state “appear[ed] to be patently unconstitutional,” thus excusing the rigors of *Younger*.²²⁷ In another, the district judge determined that a pending state action presented dangers of an “appalling infringement of the rights of free speech and free exercise of religion,”²²⁸ and thus concluded that the *Younger* doctrine “must give way.”²²⁹ Such an approach secures a core of federal supervision so that the intentions of the Civil Rights Act are given at least some vitality. And unlike an open balance of federal and state interests,²³⁰ a “patent” unconstitutionality standard leaves state judiciaries a broad range of unencumbered operation. With the implementation of meaningful exception, therefore, *Younger* itself can be justified as an effort to bend the intentions of section 1983 to accommodate modern necessity.

Allen v. McCurry is a harder case. As an interpretation of section 1983, the opinion is simply wrong. Justice Stewart concluded that “nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment.”²³¹ “[P]roves,” of course, is the operative word. It is literally true that the framers never mentioned collateral estoppel in express terms. Given the restrictive state of the doctrine in 1871, it would have been unnecessary for them to have considered the question had they desired to do so.²³² But the demand for such proof is hardly a fair way to read the intention of section 1983. The

²²⁷ Tolbert v. City of Memphis, 568 F. Supp. 1285, 1289 (W.D. Tenn. 1983).

²²⁸ New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ., 482 F. Supp. 968, 976 (D.N.J. 1980).

²²⁹ Id. at 978.

²³⁰ See, for example, Redish, supra note 216, at 486-87 (advocating case-by-case balance weighing (1) potential for disruption of state court process, (2) familiarity of issue to state tribunals, and (3) reviewability of the claim on habeas corpus). Of course, such a standard would greatly increase the call for federal supervision. First, the balance would be more easily swayed in favor of federal intervention than would a patently unconstitutional standard. Second, even if ultimately unsuccessful under the balancing approach, a far greater number of litigants would be encouraged to seek federal review as the result of the open-ended inquiry demanded.

²³¹ *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980) (emphasis added).

²³² See Currie, supra note 28, at 329.

Civil Rights Act of 1871 was rooted in distrust for state officials, including state judges. If the *McCurry* Court had asked simply, "Would the drafters of section 1983 have foreclosed federal consideration of any issues that were presented, or could have been presented, in a prior state trial?," the legislative history reveals that the response would have been an unequivocal "no."²³³

But the Supreme Court has now apparently followed Professor Currie's lead and ruled that preclusion, even in section 1983 cases, is demanded by the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738.²³⁴ That conclusion may be the correct one, though it seems a strange way to treat a federal cause of action that was designed, at least in part, to operate against state tribunals. It would also appear that the analysis of legislative history that rendered section 1983 an exception to the Anti-Injunction Act would go a long way toward a determination that the Civil Rights Act is not bound by the normal dictates of section 1738. Still, the question is hardly an easy one. It should be added, though, that when this decision is added to *Younger* and *Pierson*, the result is striking. If *Younger* completely bars injunctive oversight of pending claims, *Pierson* obviates damage actions, and principles of collateral estoppel prevent even subsequent equitable or declaratory re-

²³³ See, e.g., the remarks of Senator Osborn:

The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate . . . at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; i.e., the full and complete administration of justice in the courts. And the courts . . . must be . . . the United States courts.

42 *Globe*, supra note 31, at 653.

It seems to me unlikely that Senator Osborn actually meant to provide a federal forum, unless precluded by local rules of res judicata and collateral estoppel.

²³⁴ 28 U.S.C. § 1738 (1982) provides in part: "Such acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." See Currie, supra note 28, at 325-32 (advocating application of preclusion via § 1738 in § 1983 actions). *Allen v. McCurry's* embrace of § 1738 was tenuous. See *McCurry*, 449 U.S. at 95-99 (discussing a "background" of common law and § 1738 preclusion). More recently, however, in a § 1983 case the Court indicated that "[i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered," and cited § 1738. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

view of state judicial process, the sweep is clean. A cause of action that was designed in no small measure to ensure state judicial accountability essentially has no applicability to state courts. If section 1738 does demand preclusion in section 1983 cases, therefore, the call for a meaningful exception to the *Younger* principle is heightened, rather than diminished.

IV. CONCLUSION

The body of judicial decisions outlining the relationship between the section 1983 cause of action and state judicial process is a troubled one. Our highest Court has done a poor job of handling the tensions resulting from the application of a seemingly intrusive statutory claim to local tribunals traditionally enjoying independence from federal trial court supervision. Rather than openly confronting and attempting to accommodate the disparity between the language and design of section 1983 and the present demands of state judicial process, opinions have employed two diametrically opposed visions of the legislative history of the statute to accomplish either deference, or intervention, as the Justices have thought appropriate. Clearly, there are better ways to decide cases. And the inconsistent uses of legislative intention have led, not surprisingly, to claims that one aspect or another of the Court's jurisdictional doctrine is either incorrect, illegitimate, or both.

This essay has suggested that the legislative history of the Civil Rights Act of 1871 reveals that the framers of the statute were far more concerned with achieving constitutional compliance than with respecting traditional notions of state sovereignty. As a result, they fashioned a highly interventionist cause of action that was designed, in no small measure, to assure the constitutional accountability of state courts. It is very unlikely, therefore, that they would have supported the recognition of the various immunities and shields from national intervention that litter the law of federal courts.

Still, the legislative design of section 1983 does not resolve all of our problems. The dramatic expansion in recent decades of the "rights, privileges, [and] immunities secured by the Constitution and laws" of the United States has made it impossible to implement a fully intrusive section 1983 cause of action without doing substantial damage to the independence and operation of the state courts. Accordingly, I have suggested a method of interpreting the

demands of section 1983 as it applies to state judiciaries that respects the aims of the provision without debilitating local decisionmaking. Under the analysis suggested here, the bulk of the decision outlining the relationship between the section 1983 claim and state judicial actors, with some modifications, can be justified. Those determinations would constitute a more coherent jurisprudence, however, if they would directly explore the aims of the Civil Rights Act and the impact that the implementation of those aims will have on the legitimate demands of state court process.