1984

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Seth F. Kreimer

University of Pennsylvania Law School, skreimer@law.upenn.edu

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Recommended Citation

Kreimer, Seth F., "The Source of Law in Civil Rights Cases; Some Old Light on Section 1988" (1984). *Faculty Scholarship*. Paper 1412.
http://scholarship.law.upenn.edu/faculty_scholarship/1412

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THE SOURCE OF LAW IN CIVIL RIGHTS ACTIONS: SOME OLD LIGHT ON SECTION 1988

SETH F. KREIMER[†]

INTRODUCTION

The common lawyer's hallmark is a passion for analogies. Confronted with a new question, she naturally responds by searching for the way that similar questions have been answered elsewhere. Yet a federal system, by definition, provides the common lawyer with an embarrassment of riches; in any given case, analogous facts may be found in each of the state systems as well as the federal courts.

Confronted with the untidy uncertainties of several arguably applicable state law systems, the common lawyer experiences distress. The distress is often so acute that one federal judge I know maintains that his most effective technique to encourage settlement in unruly diversity cases is to suggest that the parties brief the choice of law issues.

In federal court actions arising under state law, the distress is often unavoidable.¹ One might hope, however, that at least in constitutional litigation—the heartland of the federal judiciary—courts and attorneys could escape the inconvenience of having to juggle more than one set of laws at a time. Unfortunately, such a hope is unlikely to be fulfilled, for we live in a system of inescapable federalism.

Current constitutional doctrine makes due process claims turn on the state's definition of the property rights at issue.² The scope of relief

[†] Assistant Professor of Law, University of Pennsylvania. B.A. 1974, J.D. 1977, Yale University. An earlier version of the Article was delivered to the Judicial Conference of the United States Court of Appeals for the Third Circuit in October 1983. Both the original and subsequent versions have benefited from the helpful comments of my colleagues Frank Goodman and Steve Burbank and from the invaluable efforts of my research assistants John Rothchild and Teresa Gillen. All responsibility for errors remains my own.

¹ At one time *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), provided hope of assuaging the distress. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), however, ended all of that.

² See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (state law prohibition against public utility's "at will" termination of service gives rise to "a 'legitimate claim of entitlement' within the protection of the Due Process Clause"); *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975) (defining fourteenth amendment property rights on the basis of Ohio law, which created a "legitimate claim of entitlement to a public education"); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (stating that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law").

available in state courts may also affect the constitutional claim.³ In equity doctrine, Pullman abstention⁴ forces federal courts to look over one shoulder at what state courts might do with the case at hand, while Younger abstention⁵ mandates attention to what the state courts are doing now.⁶ In addition, the rediscovered full faith and credit statute⁷ dictates that federal courts pay attention to what their state colleagues have already done.⁸

³ See *Hudson v. Palmer*, 104 S. Ct. 3194, 3204 (1984) (finding no property deprivation without due process where the state provides a satisfactory postdeprivation tort remedy); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982) (determining the contours of a property right by reference to state law and the procedural sufficiency of state-granted remedies by reference to federal law and finding that a state postdeprivation tort remedy does not provide due process where the deprivation results from the state's structures); *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981) (when property was negligently deprived by state official, state postdeprivation remedy providing for an action against the state rather than its individual employees satisfied due process requirements).

⁴ Under *Pullman* abstention, a federal court abstains from decision pending a determination in state court of difficult and unsettled questions of state law that must be resolved before deciding a substantial federal constitutional question. See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321, 2327 (1984); *Moore v. Sims*, 442 U.S. 415, 427-28 (1979); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306-12 (1979); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 477, 480-81 (1977); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976).

⁵ See *Younger v. Harris*, 401 U.S. 37, 43-46 (1971) (holding that federal courts should not enjoin pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate).

⁶ The federal courts have extended *Younger's* concern for "equity, comity and federalism" so that it no longer simply affects their enjoining of state criminal proceedings. It now seems to bar federal courts from entertaining a variety of actions that are thought to interfere with pending state proceedings. See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 7, 9 (1983) (condemnation proceedings); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-32, 434-35 (1982) (disciplinary proceedings against a lawyer); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107-17 (1981) (proceedings challenging constitutionality of state tax laws); *Webb v. Webb*, 451 U.S. 493, 499-500 (1981) (child custody proceedings); *Moore v. Sims*, 442 U.S. 415, 434-35 (1979) (same); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 477-80 (1977) (unemployment benefits appeal proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (welfare benefits appeals proceedings).

⁷ 28 U.S.C. § 1738 (1982) (The "judicial proceedings [of any state court] 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 . . . from which they are taken.").

⁸ Explicit consideration of the full faith and credit statute was absent from federal civil rights cases before 1980. For example, in *Sweet Briar Inst. v. Button*, 387 U.S. 423 (1967) (per curiam), the Supreme Court, in one brief paragraph, reversed a three-judge district court order of abstention. The lower court had abstained because a suit was pending in the state courts in which the plaintiff had already litigated its federal claims. See *Sweet Briar Inst. v. Button*, 280 F. Supp. 312, 315-16 (W.D. Va. 1967). Despite the fact that there was an outstanding state judgment, the Supreme Court never mentioned § 1738. More recently, however, the Court has made clear that § 1738 applies in § 1983 litigation. See, e.g., *McDonald v. City of West Branch*, 104 S. Ct.

Each of these areas is the subject of a recognizable, if not coherent, body of evolving doctrine. In each instance the frequent traveler knows the landmarks and where to look for further developments, if not where the developments will lead. This essay, on the other hand, focuses on a more limited area of interaction between state and federal law in constitutional litigation—an area in which the landmarks are not so well known. I address the source of law to be used to fill in the outlines of causes of action under the Reconstruction Era Civil Rights Acts.⁹

The problem, in short, is this. Laconically drafted over a century ago as section 1 of the 1871 Ku Klux Klan Act,¹⁰ 42 U.S.C. § 1983¹¹ provides a cause of action to persons deprived of constitutional rights under color of state law. Beyond providing a right to sue for redress, however, section 1983 is silent. As a result, it has become a blank canvas upon which the federal courts must sketch the details of a cause of action against state officials for violations of constitutional rights.

It is not entirely clear how the Supreme Court has chosen to fill this canvas. References to legislative history as well as to the common

1799, 1802 (1984) (state arbitration proceedings brought pursuant to a collective bargaining agreement do not constitute a "judicial proceeding" under § 1738); *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892, 896-98 (1984) (Section 1738 accords state court judgments preclusive effect in § 1983 suits as to the entire claim and not only the specific issues litigated in state court.); *Haring v. Prosise*, 103 S. Ct. 2368, 2373 (1983) (applying state law on preclusion pursuant to § 1738 and determining that Virginia rules of collateral estoppel did not bar plaintiff's § 1983 action); *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (rejecting the view that state court judgments have no preclusive effect in § 1983 actions). *But cf.* *Wooley v. Maynard*, 430 U.S. 705 (1977) (authorizing a permanent injunction under § 1983 against future prosecutions pursuant to an unconstitutional state statute despite petitioner's unsuccessful litigation of the constitutional defense in state court in past prosecution); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (permitting petitioners to return to federal court to litigate federal constitutional claims despite previous state court proceedings that adjudicated the same issues).

⁹ This is not to say that this essay traverses a trackless wilderness. The problem of choice of law and 42 U.S.C. § 1988 (1982) has been addressed most prominently by Professor Eisenberg. See Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980); see also Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982). For other paths through the underbrush, see Theis, *Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Comment, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494 (1970); see also Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011 (1980); Note, *Federalism and Federal Questions: Protecting Civil Rights Under the Regime of Swift v. Tyson*, 70 VA. L. REV. 267 (1984).

¹⁰ Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)).

¹¹ 42 U.S.C. § 1983 (1982).

law contemporaneous with the statute's adoption abound. Nonetheless, in elaborating the statutory scheme, recent Supreme Court decisions have, in most areas, constructed an autonomous federal common law of constitutional torts.

At the same time that this federal common law approach has carried the field in most areas of civil rights jurisprudence, a separate line of cases under section 1983 has interpreted another remnant of the Reconstruction Era—originally part of the 1866 Civil Rights Act¹² and now codified as 42 U.S.C. § 1988¹³—as mandating that local state law be incorporated to fill the interstices of constitutional tort actions.

Thus far the two lines of cases have remained largely distinct. The Supreme Court has looked to section 1988 for guidance only in the areas of statutes of limitations and survival of actions. With respect to other issues under section 1983, the Court has simply ignored section 1988 in enunciating a federal common law. It is only a matter of time, however, before the Court will be forced to reconcile these differing approaches toward section 1988 and reach the question of where the mandatory incorporation of state law leaves off and the domain of independent federal statutory interpretation begins.

I. THE PROBLEM

A. *Sources of Law in Civil Rights Cases*

Section 1983, the keystone of modern constitutional litigation, declares with majestic simplicity that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.¹⁴

Although section 1983 obviously provides a cause of action, the extent and conditions of this liability are entirely unclear. The prob-

¹² Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27 (codified at 42 U.S.C. § 1988 (1982)).

¹³ 42 U.S.C. § 1988 (1982). In 1976 Congress appended the civil rights attorney's fees provision to § 1988. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as the second sentence of 42 U.S.C. § 1988 (1982)). There is no apparent reason for this placement of this provision.

¹⁴ 42 U.S.C. § 1983 (1982).

lematic definition of "color of law"¹⁵ has bedeviled a generation of constitutional litigators. The difficulties of causation are no more tractable here than in other areas of tort law. Nor is the substantive scope of "rights, privileges, or immunities" protected by section 1983 without difficulty. Once a relevant deprivation has been established, moreover, courts must find guidance on issues of the measure of damages, available defenses, the applicability of vicarious liability, provisions for contribution, applicable statutes of limitations, the requirement of exhaustion of state remedies, and the burden of proof concerning these matters. In regard to these matters, section 1983 is silent. The statute directs that rights be vindicated, yet it fails to erect any remedial structure.

In the search for guidance on these issues, one might turn first to the statute's legislative history. But two decades of excursions into the *Congressional Globe* of 1871 have convinced most observers that the legislative history of section 1983 is, in the main, unhelpful. Given the passions raised by Reconstruction and the breadth of the issues addressed, few lawyers are unable to find support for their position in those turbulent debates. To take one indicative example, both the abrupt establishment of municipal immunity in *Monroe v. Pape*¹⁶ in 1961 and, seventeen years later, its sudden replacement by a scheme allowing liability on a showing of a link between the violation and some municipal policy in *Monell v. Department of Social Services*¹⁷ rested nominally on readings of legislative history. Both cases, however, had less to do with new-found insight into the mood of the 1871 Congress than with emerging perceptions of the proper scope of government responsibility in the twentieth century.¹⁸ If each nuance of the elabora-

¹⁵ The majority in *Monroe v. Pape*, 365 U.S. 167 (1961), rejected Justice Frankfurter's argument that an action in violation of state law could not constitute action under color of state law. See *id.* at 224-46 (Frankfurter, J., dissenting). The Court relied on the construction it had given to a different Reconstruction Era statute in *United States v. Classic*, 313 U.S. 299 (1941), concluding that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe*, 365 U.S. at 184 (quoting *Classic*, 313 U.S. at 326). Most recently, the Court has equated the "under color of law" requirement with the fourteenth amendment's state action requirement. See, e.g., *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); see also *Polk County v. Dodson*, 454 U.S. 312, 317-19 (1981) (finding that a public defender employed by the county does not act under color of state law when representing an indigent client because canons of ethics required that her actions be independent of the wishes of her employers).

¹⁶ 365 U.S. 167 (1961).

¹⁷ 436 U.S. 658 (1978).

¹⁸ A close reading of both *Monroe* and *Monell* discloses gaping holes at the foundation of their arguments construing legislative history. For a discussion of *Monroe*, see

tion of section 1983's remedial structure must be rooted in explicit leg-

Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 504-15 (1982). For a discussion of *Monell*, see Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979).

The alteration in the Supreme Court's reading of legislative history between *Monroe's* municipal immunity and *Monell's* municipal liability is in fact even sharper than it appears because *Monroe's* cursory discussion of the congressional intent to immunize municipalities was forcefully reaffirmed in a four page analysis of the legislative history of § 1983 in a 1973 Supreme Court case. See *Moor v. County of Alameda*, 411 U.S. 693, 706-710 (1973) ("[I]t cannot be doubted that the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities. . . . [W]e cannot infer any congressional intent other than to exclude all municipalities . . . from the civil liability created in . . . § 1983.").

Monell's contrary conclusion five years later was tempered by the discovery of a legislative intent to impose municipal liability only where the deprivation of rights had been pursuant to municipal policy. Diligent study of *Monell* yields a variety of criteria for determining when a violation is attributable to municipal policy. See *Monell*, 436 U.S. at 690 ("touchstone" of violation is that "official policy is responsible for a deprivation of rights"); *id.* ("action . . . [that] implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated"); *id.* at 694 ("official policy as the moving force of the constitutional violation"); *id.* at 691 ("persistent and widespread discriminatory practices" without formal approval) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)); *id.* at 694 n.58 (a "right to control" combined with "direction . . . exercised" and a "failure to supervise"); *id.* at 692-93 n.57 (parallel statutory provision imposing liability for "neglect[ing] or refus[ing]" to protect constitutional rights against known threats).

A closer study of *Monell's* account of the legislative history, however, reveals no substantial basis for the role of policy as an element of liability. Lacking referents by which to construe the newly-minted requirement, the lower courts have wandered aimlessly. Cf. *Bennett v. City of Slidell*, 728 F.2d 762, 771 (5th Cir. 1984) (en banc) (Politz, J., dissenting) (criticizing majority for exculpating city as long as "the city's official substantive policy, as set forth in a written ordinance or as formally adopted by the city's lawmakers, is facially constitutional"). Compare *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983) (single act by "official [who] has final authority over significant matters involving the exercise of discretion" is policy) and *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983) (personnel decision by city manager constitutes official policy) and *Black v. Stephens*, 662 F.2d 181, 190 (3d Cir. 1981) (a "causal nexus" between the valid regulations promulgated by police chief and the deprivation is sufficient), *cert. denied*, 455 U.S. 1008 (1982) and *Pennsylvania v. Porter*, 659 F.2d 306, 321 (3d Cir. 1981) (en banc) (knowledge and acquiescence in the deprivation of rights constitutes policy), *cert. denied*, 458 U.S. 1121 (1982) and *Turpin v. Maillet*, 619 F.2d 196, 201 (2d Cir.) (official policy exists "where senior personnel have knowledge of a pattern" of violations "but fail to take remedial steps"), *cert. denied*, 449 U.S. 1016 (1980) with *Rowland v. Mad River Local School Dist.*, 730 F.2d 444, 451 (6th Cir. 1984) ("single, discrete" personnel decision by school superintendent not evidence of school district policy) and *Bennett*, 728 F.2d at 768-69 (requiring actual or constructive knowledge of continuing objectionable practice on the part of the city's governing body; "policymaking authority is more than discretion, and it is far more than the final say-so") and *Lopez v. City of Austin*, 710 F.2d 196, 198 (5th Cir. 1983) ("isolated act" by city not policy) and *Batista v. Rodriguez*, 702 F.2d 393, 399 (2d Cir. 1983) (policy must be "moving force" behind objectionable actions) and *Brewer v. Blackwell*, 692 F.2d 387, 401 (5th Cir. 1982) (acts of chief of police not policy).

For other examples of the limited role accorded to legislative history in construing the 1871 Ku Klux Klan Act, see, for example, the short shrift given to Justice Marshall's position that for purposes of defining immunities in the 1871 act, it must be construed *in pari materia* with the provisions of the 1866 Civil Rights Act, which the

islative discussion, the courts face an impossible task. But this task is one that the Court has, in fact, eschewed. Although most opinions still mention the legislative history of section 1983, such references are, in large measure, ceremonial. More often, neither the debates nor the context of the legislative record can be said to provide solid ground for decision.

Forsaking the thickets of legislative history, courts interpreting section 1983 have often attempted to erect a structure of presumptions based on the law as it stood in 1871. Justice Frankfurter argued in *Tenney v. Brandhove*,¹⁹ and subsequent cases have regularly reiterated,²⁰ that if the Congress had intended to impose liability incommensurate with the common law of 1871, it would have said so. Absent statements or statutes to the contrary—runs the argument—the nineteenth century law of government immunities, damages, and torts should govern.²¹

But implication from silence is a risky business.²² Given the unqualified language of section 1983, one might argue with equal force that had Congress intended to limit the scope of liability it would have voiced that intention. There is, moreover, some incongruity in suggesting that a statute adopted to redress a failure of existing legal remedies for violations of constitutional rights should be defined by the scope of those very remedies.²³

Nor is the case for the assimilation of the jurisprudence of 1871 compelling on policy grounds. At least Justice Frankfurter's argument in *Tenney* for the incorporation of legislative immunity into section

authors and sponsors of the Ku Klux Klan Act regarded as identical, *see* *Briscoe v. LaHue*, 460 U.S. 325, 341 n.26 (1983); *cf. id.* at 356-64 (Marshall, J., dissenting), and see the historically remarkable assertion that the Ku Klux Klan Act conspiracy provisions may have been intended to be inapplicable to political conspiracies, *see* *United Bhd. of Carpenters & Joiners v. Scott*, 103 S. Ct. 3352, 3359-60 (1983).

¹⁹ 341 U.S. 367, 376 (1951).

²⁰ *See, e.g.*, *Pulliam v. Allen*, 104 S. Ct. 1970, 1974 (1984); *Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263-64 (1981); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 417-19 (1976); *Wood v. Strickland*, 420 U.S. 308, 316-18 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 244 (1974); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

²¹ *See Tenney*, 341 U.S. at 376; cases cited *supra* note 20.

²² *Cf. R. BOLT, A MAN FOR ALL SEASONS* 87-88 (1960).

²³ *See, e.g.*, *Briscoe v. LaHue*, 460 U.S. 325, 349 (1983) (Marshall, J., dissenting) ("It might be appropriate to import common-law defenses and immunities into the statute if, in enacting § 1983, Congress had merely sought to federalize state tort law . . . [But] [d]ifferent considerations surely apply when a suit is based on a federally guaranteed right . . ."); *Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring) ("It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.").

1983 was bolstered by contentions regarding the continued centrality of legislative immunity to the democratic process²⁴ and by Justice Frankfurter's professed doubt regarding the constitutional ability of Congress to impose liability.²⁵ In contrast, in some recent cases the Court has treated section 1983 as automatically incorporating by reference all of the answers found in the law of 1871.

This increasing attention to contemporaneous common law has generated a boom in law-office history²⁶ in recent Terms. The pages of the *U.S. Reports* fill with the smoke of battle over how many of the thirty-seven states in 1871 required intent as opposed to recklessness as an element of the case for punitive damages,²⁷ over whether an action against a police officer for testifying falsely and thereby denying due process is more closely analogous to the nineteenth century action of defamation or to the common law writ of *crimen feloniam imposuit*,²⁸ and over whether a federal injunction against a magistrate who insists on incarcerating defendants charged with nonjailable offenses pending trial is properly analogized to prerogative writs issued by the King's Bench against the ecclesiastical courts in 1691.²⁹ In similar fashion the Court has disavowed the power to "establish immunities from section 1983 actions in the interests of what we judge to be sound public policy" and denied immunity to public defenders "because there was, of course, no such office or position in existence at that time."³⁰

²⁴ See *Tenney*, 341 U.S. at 377-78.

²⁵ See *id.* at 376.

²⁶ I borrow "law-office history" from Professor Kelly. See Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13 (describing law-office history as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered").

²⁷ Compare *Smith v. Wade*, 461 U.S. 30, 41 (1983) ("[T]he rule in a large majority of jurisdictions was that punitive damages . . . could be awarded without a showing of actual ill will, spite, or intent to injure.") with *id.* at 68 (Rehnquist, J., dissenting) (arguing that the majority relies on decisions from the late nineteenth century that "unambiguously support an actual malice standard").

²⁸ Compare *Briscoe v. LaHue*, 460 U.S. 325, 330-31 n.9 (1983) (finding that a common law immunity insulated witnesses from subsequent damages liability for testimony and that the common law action for false accusation is inapplicable under the circumstances) with *id.* at 350-51 (Marshall, J., dissenting) (arguing that common law immunities would not bar an action based on malicious prosecution or *crimen feloniam imposuit*).

²⁹ Compare *Pulliam v. Allen*, 104 S. Ct. 1970, 1974-75 (1984) (analogizing relief afforded at common law by prerogative writs to the injunction sought in the case at hand) with *id.* at 1987 (Powell, J., dissenting) (arguing that the majority's reliance upon common law application of prerogative writs is misplaced in that "the unique relationship between the King's Bench and England's ecclesiastical courts . . . finds no parallel in this country").

³⁰ *Tower v. Glover*, 104 S. Ct. 2820, 2825 (1984). The Court noted that the English barrister, the most analogous position to public defenders in existence in 1871,

In contrast to the Court's claims of fidelity to the common law as it stood in 1871, from early in its development constitutional tort doctrine in fact looked to modern policy as decisive. Nearly twenty years ago, in *Pierson v. Ray*,³¹ Chief Justice Warren referred to modern rather than nineteenth century tort doctrine in defining the scope of good faith immunities under section 1983.³² Warren relied on the "prevailing view" of the good faith immunity of law enforcement officials under the common law as it stood in 1967, citing *Restatement (Second) of Torts* and *The Law of Torts* by Harper & James,³³ although the scope of official immunity in the nineteenth century may well have been considerably narrower than the good faith immunity accorded by any branch of current doctrine.³⁴

Expansions and refinements of section 1983 immunities have continued this trend away from reliance upon nineteenth century tort law.³⁵ Immunity doctrine under section 1983, moreover, has increas-

enjoyed no immunity. *See id.*

³¹ 386 U.S. 547 (1967).

³² *See id.* at 555.

³³ *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 121 (1965); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 3.18, at 277-78 (1956)).

³⁴ *See, e.g.,* *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80, 95 (1836) (no good faith defense if offending action is "clearly against law"). Moreover, the development of immunity doctrine has apparently overruled sub silentio the earlier determination in *Myers v. Anderson*, 238 U.S. 368, 378 (1915), *aff'g* *Anderson v. Myers*, 182 F. 223, 229-30 (C.C.D. Md. 1910), that official bad faith need not be shown in order to recover damages under § 1983:

[T]here can be no right action under the fifteenth amendment and these sections . . . unless the discrimination and denial was in pursuance of a state law. Therefore, if the defendants' contention could be upheld, the defendant in such a suit could always plead that he did not act . . . in bad faith, because he was acting in obedience to the laws of the state.

The common sense of the situation would seem to be that . . . any one who does enforce [an unconstitutional law] does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff . . . , and no allegation of malice need be alleged or proved.

Anderson, 182 F. at 229-30. *See also* *Brickhouse v. Brooks*, 165 F. 534, 543 (C.C.E.D. Va. 1908) ("It was not necessary that the plaintiff should allege in his declaration that the defendants in rejecting his vote acted either maliciously or intentionally wrongful [sic]. The statute under which the plaintiff proceeded does not so require, and the rules of pleading applicable to common-law suits . . . do not apply to this action.").

³⁵ For example, this trend is evident in the areas of prosecutorial immunity, *see* *Imbler v. Pachtman*, 424 U.S. 409, 421-22 (1976) (first American case establishing prosecutorial immunity was not until 1896), and municipal immunity, *see* *Owen v. City of Independence*, 445 U.S. 622, 644-47 (1980) (rejecting sovereign/proprietary distinction for municipal immunity, concededly prevalent at common law, because of current trend toward rejection of that doctrine). *But cf. id.* at 676-77 (Powell, J., dissenting) (arguing that the Court must look to the sovereign/proprietary distinction as it existed when § 1983 was enacted, while recognizing that most states now use new criteria for ascertaining the scope of municipal liability).

ingly become divorced from any body of law outside of federal civil rights cases. The Court elaborates doctrines conferring quasi-legislative immunity on judicial and regional administrators,³⁶ quasi-judicial immunity on administrative officials,³⁷ and administrative liability on judicial officials,³⁸ without references to either the common law of 1871 or, for that matter, of the twentieth century.

A recent and revealing example of Court-created civil rights law was the elimination, in *Harlow v. Fitzgerald*,³⁹ of the requirement of subjective good faith as a prerequisite for official immunity. Not only did the Supreme Court fail to examine the law of 1871 on the point, but it enunciated the alteration of section 1983 immunity in the context of a federal common law action grounded directly on the first amendment.⁴⁰ After a "balancing of competing values" as a matter of federal common law, to which the intent of the 1871 Congress was entirely irrelevant, the Court announced a new test for official immunity.⁴¹ Acknowledging that no issue under section 1983 was before it, the Court, without elaborating, incorporated the new test into the jurisprudence of section 1983 in a footnote.⁴² This incorporation cannot be read as mere dictum, for last Term, in *Davis v. Scherer*,⁴³—a case brought under section 1983—the Court relied on *Harlow* and the federal common law decision in *Butz v. Economou*⁴⁴ to elaborate this immunity doctrine without reference to the history or context of section 1983.⁴⁵ In light of

³⁶ See *Supreme Court v. Consumers Union*, 446 U.S. 719, 731-34 (1980) (holding Virginia court and its members immune from suit when promulgating a disciplinary code for attorneys and thus acting in a legislative capacity); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402-06 (1979) (extending legislative immunity to regional administrators when acting in legislative capacity).

³⁷ See *Butz v. Economou*, 438 U.S. 478, 508-16 (1978) (granting absolute immunity from suit to administrators who perform functions analogous to that of a judge or prosecutor).

³⁸ See *Supreme Court v. Consumers Union*, 446 U.S. 719, 736 (1980) (refusing to extend absolute immunity to the Virginia court and its members when acting in their enforcement capacity); see also *Consumers Union v. Virginia State Bar*, 688 F.2d 218, 221-22 (4th Cir. 1982) (holding Virginia State Bar, in addition to the Virginia court, liable for its role in enforcing the disciplinary rules at issue).

³⁹ 457 U.S. 800 (1982).

⁴⁰ See *id.* at 813-19.

⁴¹ See *id.* at 816.

⁴² See *id.* at 818 n.30 ("[I]t would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'"; quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

⁴³ 104 S. Ct. 3012 (1984).

⁴⁴ 438 U.S. 478 (1978).

⁴⁵ *Scherer*, 104 S. Ct. at 3108. *Scherer's* determination that an action taken in violation of state regulations can be in good faith, see *id.* at 3019-20, is itself arguably a novel expansion of § 1983 immunities. Earlier cases had premised the immunity on the official's acting within the sphere of her responsibilities, and the policy balance under-

this development, it is clear that what the Court undertakes in most immunities cases is not a search for century-old legislative intent or common law context but the enunciation of a federal common law that the Court regards as appropriate to modern social and political realities.

This analysis is not unique to immunities issues. With respect to the calculation of damages, the Court has decided that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly" and that these rules are the "starting point for the inquiry."⁴⁶ In the absence of a specific statutory mandate, the Court "look[s] first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute."⁴⁷ The Court has apparently decided to incorporate a proximate cause test into section 1983 as a matter of federal common law.⁴⁸ And it is perhaps most accurate to characterize the doctrine limiting municipal damage liability to violations pursuant to municipal policy⁴⁹ as an evolving common law quasi-immunity that will be developed and elaborated on a case-by-case basis as courts gain experience with the doctrine.

B. *The Dissonance of Section 1988*

After issues of immunities, damages, and municipal liability, the most frequently litigated question of law in section 1983 actions may well be that of the applicable statute of limitations.⁵⁰ Because section 1983 contains no more mention of statutes of limitations than of immunities or damage calculations, one might expect the Court to employ the

lying the doctrine generally presumes that officials should be protected in their attempts to implement state interests. If the interest is disavowed by regulation or statute, it is difficult to see why the public interest requires that officials be given discretion to violate constitutional rights.

⁴⁶ *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978).

⁴⁷ *Smith v. Wade*, 461 U.S. 30, 34 (1983). The Court recognized in *Wade* that the law of 1871 is relevant to the inquiry, but it believed that the intent of Congress was to "incorporate applicable general legal principles as they evolve." *Id.* at 34 n.2.

⁴⁸ See *Martinez v. California*, 444 U.S. 277, 285 (1980) ("[A]ppellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.").

⁴⁹ See *Monnell*, 436 U.S. at 690-91. But see *supra* note 18 (discussion of difficulty of defining municipal policy).

⁵⁰ See, e.g., *Burnett v. Grattan*, 104 S. Ct. 2924 (1984); *Chardon v. Fumero Soto*, 103 S. Ct. 2611 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Garcia v. Wilson*, 731 F.2d 640 (10th Cir.), cert. granted, 105 S. Ct. 79 (1984); *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3d Cir. 1983), cert. granted, 104 S. Ct. 3571 (1984).

federal common law process described above to govern this area as well. In the statute of limitations cases, however, as in the field of survival of actions, the Supreme Court does not view this question as a matter of federal common law but as an issue governed by section 1988, the choice of law provision incorporated into the ancestor of section 1983 itself.⁵¹

Section 1983 was originally a part of section 1 of the Ku Klux Klan Act of 1871.⁵² In addition to creating a cause of action for the

⁵¹ See *Burnett v. Grattan*, 104 S. Ct. 2924, 2928 (1984) ("Congress has directed federal courts to follow a three step process to borrow an appropriate rule."); *id.* at 2931 n.14 (rejecting approach of *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), which looked to the importance of uniformity in federal common law); *Chardon v. Fumero Soto*, 103 S. Ct. 2611, 2618 (1983) ("Congress has specifically directed the courts, in the absence of state law, to apply state statute of limitations and state tolling rules . . ."); *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980) (under § 1988 federal courts "obligated not only to apply the analogous [state] statute of limitations . . . but also to apply the [state] rule for tolling"); *Moor v. County of Alameda*, 411 U.S. 693, 701-02 n.12 (1973) ("[T]his is a wholly different case from those in which, lacking any clear expression of congressional will, we have been called upon to decide whether it is appropriate to look to state law or to fashion a single federal rule in order to fill the interstices of federal law."); *cf.* *Carlson v. Green*, 446 U.S. 14, 24 n.11 (1980) (§ 1988's command does not apply to federal common law actions grounded in an implied constitutional right pursuant to *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971)); *Robertson v. Wegmann*, 436 U.S. 584, 594 n.11 (1978) ("[W]hatever the value of nationwide uniformity in areas . . . where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule.").

This approach represents a change from the earlier Supreme Court interpretations that seemed to read § 1988 as simply declarative of authority to enunciate federal common law. See, e.g., *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969) ("[A]s we read § 1988, . . . both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."); see also *Runyon v. McCrary*, 427 U.S. 160, 180 (1976) (citing federal common law cases to justify borrowing state statutes of limitations in civil rights action, without mentioning § 1988); *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975) (borrowing state statute of limitations as a matter of common law and relying on other federal common law cases; citing § 1988 for the proposition that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 231 (1970) (Brennan, J., concurring in part and dissenting in part) (citing, *inter alia*, *Sullivan*, 396 U.S. at 238-40) ("Standards governing the granting of relief under § 1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law."); *cf.* *Burks v. Lasker*, 441 U.S. 471, 479 (1979) (characterizing *Johnson* and *Robertson* as cases that are illustrative of federal common law policies); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (similar case).

News of this alteration in approach appears not to have reached some courts and treatise writers. See *Brown v. United States*, 742 F.2d 1498, 1504 (D.C. Cir. 1984) (*en banc*) (characterizing § 1988 as codifying general federal common law approach); C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4514, at 264-66 (1982) (treating statute of limitations issues in § 1983 cases as matters of federal common law, without mentioning § 1988).

⁵² Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, 13 (codified at 42 U.S.C. §§ 1983,

violation of federal constitutional rights, section 1 provided for federal jurisdiction over the civil actions it authorized, a grant made necessary by the absence of general federal question jurisdiction.⁵³ As part of a series of Reconstruction statutes stretching from 1866 to 1875, the Ku Klux Klan Act incorporated by reference the procedures adopted by the Civil Rights Act of 1866⁵⁴ to govern federal civil rights actions.⁵⁵

The entire body of civil rights statutes was reorganized and codified in the Revised Statutes of 1875. One element of the 1866 Civil Rights Act became section 722 of the Revised Statutes,⁵⁶ which was drafted to govern all remaining civil rights actions, both civil and criminal. Recodified as section 1988, section 722 is the statute to which the Supreme Court looks in deciding statute of limitations questions in actions brought pursuant to the Reconstruction Statutes.⁵⁷

It is worth reproducing section 1988 *in extenso* to remind readers of the full scope of its obscurity:

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

1985 (1982)).

⁵³ Congress did not create such jurisdiction until 1875. *See* Act of Mar. 3, 1875, § 1, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (1982)); *see also* C. WRIGHT, *THE LAW OF THE FEDERAL COURTS* 90 (4th ed. 1983).

⁵⁴ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1981, 1982, 1988 (1982)).

⁵⁵ Section 1 of the Ku Klux Klan Act provided that

[s]uch proceeding [is] to be prosecuted in the several district and circuit courts of the United States, with and subject to the same right of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of [the Civil Rights Act of 1866] and the other remedial laws which are in their nature applicable in such cases.

Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13.

⁵⁶ Ch. 12, § 722, 18 Stat. 134, 137 (1875).

⁵⁷ The Court views § 1988 as governing choice of law in actions brought under 42 U.S.C. § 1981 (1982) and 42 U.S.C. § 1982 (1982) as well as those under § 1983. *See* Runyon v. McCrary, 427 U.S. 160, 180 (1976) (stating that it is federal policy to adopt the local statute of limitations where Congress has been silent and applying this principle to an action brought under § 1981); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462-64 (1975) (applying state statute of limitations in § 1981 action pursuant to § 1988); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969) (holding that compensatory damages for the deprivation of a federal right in a § 1982 action are governed by federal standards, pursuant to § 1988's mandate to look to the laws of the United States first); *see also* *Burnett v. Graton*, 104 S. Ct. 2924 (1984) (alleging causes of action under §§ 1981, 1983, and 1985). For a more extensive discussion of the pedigree of § 1988, *see* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.⁵⁸

The Supreme Court has informed us that in section 1988 "Congress ha[s] plainly instructed the federal courts to refer to state law when federal law provides no rule of decision . . ."⁵⁹ Where state law applies, says the Court, such law is to be treated as "binding rules of law," which the federal courts are "obligated . . . to apply."⁶⁰

Indeed, so forceful is the Court's reading of a mandate to apply state law to statute of limitations questions that recently, in *Chardon v. Fumero Soto*,⁶¹ it disregarded the existence of a clearly-established federal rule regarding tolling in class action practice and applied the local rules instead.⁶² The state rule may be disregarded only if it is "inconsistent with the Constitution and laws of the United States."⁶³

This is, in isolation, a plausible reading of the words of section 1988. In practice, however, we confront an anomaly. If section 1988 requires deference to state law in the absence of governing federal rules,⁶⁴ it would seem that each time a federal court encounters a situa-

⁵⁸ 42 U.S.C. § 1988 (1982) (attorneys' fees provision omitted).

⁵⁹ *Chardon v. Fumero Soto*, 103 S. Ct. 2611, 2616 (1983).

⁶⁰ *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980).

⁶¹ 103 S. Ct. 2611 (1983).

⁶² See *id.* at 2618-19 (looking to Puerto Rican tolling rule that allows the limitations period to begin running anew at the time of class decertification, despite the arguably applicable federal rule in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), pursuant to which the tolling would have had the effect of suspending the limitations period).

⁶³ *Id.* at 2619 ("Congress has decided that § 1983 class actions brought in different States, like individual actions under § 1983, will be governed by differing statutes of limitations and differing rules regarding tolling and tolling effect unless those State rules are inconsistent with federal law."). The Court also addressed this part of the § 1988 inquiry in *Robertson v. Wegmann*, 436 U.S. 584 (1978), in which it rejected the claim that Louisiana's survivorship statute was inconsistent with the federal policies underlying § 1983. See *id.* at 590-93.

⁶⁴ And, apparently, governing federal rules do not include either the Federal Rules of Civil Procedure, compare *Chardon*, 103 S. Ct. at 2618-19 (rejecting in § 1983

tion not covered by the terms of section 1983, it should survey the entire field of potentially applicable state law, choose the appropriate state rule, and measure it against the Constitution and laws of the United States.⁶⁵ One rule of law may be applicable in New Jersey, another in Texas, and a third in Minnesota. The jurisprudence of section 1983 would resemble a patchwork quilt laboriously constructed in each of the fifty states.

Yet, as we have seen, in addressing the important questions of damages and immunities, the federal courts appear to establish rules of decision in section 1983 cases as a matter of federal common law without even a passing reference to the state rules to which section 1988 is thought to direct attention. As the Supreme Court continues to resolve open issues, a substantial degree of national uniformity increasingly prevails. How can this state of affairs coexist with a statute that directs federal courts to treat state rules as "binding rules of law" in civil rights cases?

On the other hand, one might just as plausibly ask why section 1988 should be read as mandating the binding nature of state law. The tortuous syntax of the statute, read in light of its opaque legislative history,⁶⁶ leaves substantial room for interpretation. And there is but a limited case to be made for local experimentation with the protection of civil rights under a federal statute.⁶⁷ Yet the Court in recent Terms, in

action the application of an analogous federal tolling rule that governed antitrust actions) *with id.* at 2619-22 (Rehnquist, J., dissenting) (interpreting Federal Rule of Civil Procedure 23 to mandate a tolling rule applicable not only to antitrust class actions, but all class actions), or survival practices under analogous federal statutes, *see* Robertson v. Wegmann, 436 U.S. 584, 593 (1978) (rejecting Fifth Circuit's approach in *Shaw v. Garrison*, 545 F.2d 980, 985 (5th Cir. 1977), which relied on federal courts' allowance of survival in areas such as maritime law and antitrust law, where federal statutes were also silent as to the limitation periods).

⁶⁵ Courts have used § 1988 as a basis for determining the source of law in civil rights actions to address issues of contribution among tortfeasors, *see* Dobson v. Camden, 705 F.2d 1759, 1761 (5th Cir. 1983), *modified on reh'g*, 725 F.2d 1003 (5th Cir. 1984); *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 105 (3d Cir. 1981); *Johnson v. Rogers*, 621 F.2d 300, 304 n.6 (8th Cir. 1980); survival of actions, *see* Robertson v. Wegmann, 436 U.S. 584 (1978); *Hess v. Eddy*, 689 F.2d 977 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3085 (1983); *Brazier v. Cherry*, 293 F.2d 401, 405 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); tolling of statutes of limitations, *see Chardon*, 103 S. Ct. at 2618-19; *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981); vicarious liability, *see Hesselgesser v. Reilly*, 440 F.2d 901, 903 (9th Cir. 1971); punitive damages, *see* *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir.), *cert. denied*, 104 S. Ct. 394 (1983); *Lenard v. Argento*, 699 F.2d 874, 899 (7th Cir.), *cert. denied*, 104 S. Ct. 85 (1983); available defenses, *see* *Rosa v. Cantrell*, 705 F.2d 1208, 1220 (10th Cir. 1982), *cert. denied*, 104 S. Ct. 85 (1983); and prejudgment interest, *see* *Furtado v. Bishop*, 604 F.2d 80, 97 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

⁶⁶ *See* Eisenberg, *supra* note 57, at 501-25.

⁶⁷ In his dissent in *Chardon*, Justice Rehnquist has instructed us that "[f]ew ar-

resigned deference to what is apparently regarded as the inscrutable will of Congress,⁶⁸ has foresworn the virtues of a uniform federal rule in areas in which it reads section 1988 as governing the choice of law.

This resignation is problematic, for the alleged congressional intent is anomalous. Not only is it difficult to provide persuasive justifications for deference to state law as the basis for the rules of federal civil rights actions today, but such deference is also questionable in light of section 1988's historical context. It requires an incongruous historical vision to picture the Reconstruction Congress establishing the local law of the recently-rebelling states as the linchpin of an avowedly national-ist enforcement program.

As originally adopted, section 1988 formed a part of the Civil Rights Act of 1866,⁶⁹ a statute that, as Justice Marshall has reminded us, "was the first federal statute to provide broad protection in the field

eas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations. A single, uniform federal rule of tolling would provide desirable certainty to both plaintiffs and defendants . . ." *Chardon*, 462 U.S. at 2619-20 (Rehnquist, J., dissenting). Justice Rehnquist's dissent in *Carlson v. Green*, 446 U.S. 14 (1980), on the other hand, suggests that values of federalism support the variation in protection of civil rights from official action from state to state. *See id.* at 48 (Rehnquist, J., dissenting). Similarly, Justice Brennan's majority opinion contains the statement that "it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work." *Id.* at 24 n.11.

These latter statements are baffling, in the context of a statute whose purpose is to provide a supplementary federal remedy, *see* *Monroe v. Pape*, 365 U.S. 167, 183 (1961), unless the suggestion is that states should be free to increase the scope of § 1983 liability beyond the uniform federal minimum. *Compare* *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (enunciating federal rules for *parens patriae* standing) *with* *Pennsylvania v. Porter*, 659 F.2d 306, 318-319 (3d Cir. 1981) (*en banc*) (allowing *parens patriae* standing for state under § 1988 incorporation of Pennsylvania law, although the existence of federal standing was at best dubious), *cert. denied*, 458 U.S. 1121 (1982).

⁶⁸ *See, e.g.,* *Burnett v. Grattan*, 104 S. Ct. 2924, 2931 n.14 (1984) ("Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases."); *Robertson v. Wegmann*, 436 U.S. 584, 594 n.11 (1978) ("[W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, . . . [which] obviously means that there will not be nationwide uniformity on these issues."), *quoted with approval in Chardon*, 103 S. Ct. 2616 n.9; *Board of Regents v. Tomanio*, 446 U.S. 478, 489 (1980).

It is of interest to note that the Court's earliest consideration of the statute of limitations issue in the context of a § 1983 action relied not on § 1988 but on a now-discredited line of cases that saw the applicability of state statutes of limitations as based on the Rules of Decision Act. *See O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (citing *McLaine v. Rankin*, 197 U.S. 154, 158 (1905); *Campbell v. Haverhill*, 155 U.S. 610, 614 (1895)).

⁶⁹ Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27 (codified at 42 U.S.C. § 1988 (1982)).

of civil rights."⁷⁰ The purpose of the Civil Rights Act was to "guarantee the newly emancipated Negro equality with whites before the law,"⁷¹ and its means included provisions for direct federal military intervention,⁷² removal of cases from hostile state courts,⁷³ direct civil actions under the newly-conferred civil jurisdiction,⁷⁴ and the establishment of federal criminal penalties, along with federal enforcement mechanisms against those who denied others equal rights under color of state law.⁷⁵ As was true of other weapons of Reconstruction, the Civil Rights Act "was aimed directly at the State judiciary."⁷⁶

This aim was well warranted. During Reconstruction the judiciary of former confederate states served both as a means of resisting and harassing federal officials⁷⁷ and as a way of attempting to reestablish white hegemony over the recently emancipated Negro.⁷⁸ In the early period of Reconstruction, occupying federal forces responded by establishing parallel judiciary systems, in the form of Army provost courts and Freedman's Bureau courts, to provide more sympathetic forums.⁷⁹ By 1866, however, the emphasis had begun to shift to establishing more permanent federal forums by providing access to federal circuit and district courts.⁸⁰ In this context it seems unlikely that the local common law elaborated by the very judiciary that the federal courts were designed to supersede was to be given primacy.

So, too, the Ku Klux Klan Act of 1871, which contained the pred-

⁷⁰ *Briscoe v. LaHue*, 460 U.S. 325, 358 (1983) (Marshall, J., dissenting).

⁷¹ *Id.*

⁷² See Act of Apr. 9, 1866, ch. 31, § 9, 14 Stat. 27, 29 (codified at 42 U.S.C. § 1988 (1982)).

⁷³ *Id.*, ch. 31, § 3, 14 Stat. 27, 27.

⁷⁴ *Id.*

⁷⁵ *Id.*, ch. 31, §§ 2-6, 14 Stat. 27, 27-28.

⁷⁶ *Briscoe v. LaHue*, 460 U.S. 325, 359 (1983) (Marshall, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1155 (1866) (statement of Rep. Eldridge)).

⁷⁷ See H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW, CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 322-27 (1982); S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 148-50 (1968).

⁷⁸ See L. LITWACK, *BEEN IN THE STORM SO LONG, THE AFTERMATH OF SLAVERY* 282-88 (1979); Westwood, *Getting Justice for the Freedman*, 16 *HOW. L.J.* 492, 503 (1971).

⁷⁹ See D. NIEMAN, *TO SET THE LAW IN MOTION, THE FREEDMAN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868*, at 8-11 (1979); Westwood, *supra* note 78, at 498-502.

⁸⁰ For a review of legislation providing for removal of actions from state to federal courts, see *The Removal of Causes from State to Federal Courts*, 9 *AM. L. REG.* 1 (new series 1870). It appears that one of the purposes of the 1866 legislation that contained § 1988 was to provide a sympathetic judicial forum to replace the military and Freedman's Bureau courts that were being obstructed by President Johnson. See D. NIEMAN, *supra* note 79, at 103-48.

ecessor of section 1983,⁸¹ was crafted to provide an alternative to a hostile and ineffective state judiciary.⁸² The Act provides that civil actions for violations of constitutional rights are "to be prosecuted . . . with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under [the 1866 Civil Rights Act] and the other remedial laws of the United States which are in their nature applicable in such cases."⁸³ But this is hardly a clear-cut congressional mandate that remedies are to vary from state to state in accord with the practices of the local judiciary. If a more plausible interpretation is available, both historical and practical considerations support its adoption.

II. REMEMBERING HISTORY

A. *A First Look*

In fact, such an interpretation is available with the recognition of a single historical fact: section 1988 was originally enacted more than seventy years before *Erie Railroad v. Tompkins*.⁸⁴ In light of this recollection, section 1988 can be parsed as follows. Congress directs courts in civil rights cases to begin by looking at the "laws of the United States," and under *Swift v. Tyson*,⁸⁵ the "laws" of the several states were thought to comprise primarily their statutes.⁸⁶ If the federal stat-

⁸¹ See Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13.

⁸² See *Monroe v. Pape*, 365 U.S. 167, 180 (1961) ("It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . .").

⁸³ Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13.

⁸⁴ 304 U.S. 64 (1938).

⁸⁵ 41 U.S. (16 Pet.) 1 (1842).

⁸⁶ See, e.g., Theis, *supra* note 9, at 684 n.18 (citing Justice Story's opinion in *Swift*, 41 U.S. (16 Pet.) at 18-19, for the proposition that "laws" refers to statutes or "long-established" customs rather than judicial decisions). Professor Eisenberg writes at length to discuss what kind of "deficiency" in federal law must serve as a predicate to trigger § 1988 choice of law principles. See Eisenberg, *supra* note 57, at 508-15. Dominant in this analysis is an inquiry into what the words "laws of the United States" imply. Eisenberg considers four possible interpretations of "laws" in this context: (1) all federal statutory law, (2) only the particular federal statute creating the cause of action (typically § 1983), (3) the federal statute creating the cause of action and its legislative history as it speaks, or does not speak, to the issue in question, and (4) federal common law. In rejecting the last alternative, Eisenberg declines to read § 1988 in light of *Swift* in part because of the nature of the general common law that he views *Swift* as authorizing, see *infra* note 109 and accompanying text, and in part because he views the incorporation of federal common law into § 1988 as untenable because it would render § 1988 meaningless, see Eisenberg, *supra* note 57, at 513-14 (asserting that, if "laws" are to include a federal common law, "federal law will never be deficient, state law will never apply, and section 1988's choice-of-law provision will deteri-

utes are not "adapted" or are "deficient"—if there is no controlling statutory rule—a court should look to "the common law, as modified and changed by the constitution and statutes of the State" in which the court sits.

Note that section 1988 does not say "the common law of the state" in question but "the common law." The Reconstruction Congress lived in the era of *Swift* and, as Justices Brandeis and Holmes told us, *Swift*

rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts, "the parties are entitled to an independent judgment on matters of general law". . . .⁸⁷

Federal courts were wont to expound the common law in diversity cases, and section 1988 is explicit statutory authority to do the same in the newly-created civil rights jurisdiction. As noted above, in elaborating the infrastructure of civil rights enforcement under section 1983, the Supreme Court refers ultimately either to principles of tort law distilled from contemporary precedents and commentary or to the common law evolution of its own recent cases, influenced by the felt necessities of the time. The Supreme Court need not be embarrassed in adopting this approach, for, under the interpretation of section 1988 advanced here, the Reconstruction Congress has made good any want of authority in the Rules of Decision Act,⁸⁸ and there is no lack of constitutional warrant to legislate under the fourteenth amendment.⁸⁹

Nor is the Court tied to the common law of 1871. Under *Swift*, courts sitting in diversity acknowledged the necessity of the evolution of the common law.⁹⁰ And, far from establishing a clear congressional

orate into nonsense"). This rejection of the fourth alternative is, in fact, consistent with *Swift's* own equation of "laws" with "statutes." Whatever the merits of Eisenberg's observations in the context of interpreting § 1988's deficiency test, however, his rejection of federal common law as a source of law under § 1988 fails to come to grips with the issues raised by this essay regarding the nature of the "common law" in § 1988.

⁸⁷ *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

⁸⁸ Rules of Decision Act, ch. 646, 62 Stat. 944 (1948) (codified at 28 U.S.C. § 1652 (1982)).

⁸⁹ See U.S. CONST. amend. XIV, § 5.

⁹⁰ See *The Extent to Which the Common Law Is Applied in Determining What Constitutes a Crime, and the Nature and Degree of Punishment Consequent Thereupon*, 6 AM. L. REG. 65, 73-74, 79 (1866) ("The nature of the common law is to be accommodated to the condition, exigencies, and conveniences of the people . . . as those

mandate that rights and remedies under the civil rights statutes vary from state to state, this reading of section 1988 suggests that the norm is uniformity. In areas not directly governed by federal statute, a uniform "general common law" should be the centerpiece of enforcement.

Only local statutes and state constitutions impinge on the otherwise uniform body of federal civil rights law. Section 1988 instructs federal courts to apply the general common law, as modified by local statutes. This in turn explains the particularly deferential treatment accorded to statutes of limitations and survival statutes. In the cases treating state law as binding, the Supreme Court has deferred to local statutes, pursuant to the mandate of section 1988.⁹¹ In cases announcing federal common law, on the other hand, no state statute applies.⁹²

Finally, even where state statutes appear to modify the common law, a court must still evaluate whether that modification is inconsistent with the Constitution and laws of the United States. Not content with establishing a general common law parallel to the diversity law as the fulcrum of civil rights enforcement, the Reconstruction Congress was aware of the possibility that state statutory modifications adopted by

exigencies and conveniences insensibly grow upon the people. . . . 'It is one of its excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times'" (quoting 5 LAW TRACTS 21, 22). Compare *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 70 (1927) ("[W]hen [a standard of conduct] is clear it should be laid down once for all by the Courts.") with *Pokora v. Wabash Ry.*, 292 U.S. 98, 104 (1934) (modifying the rule laid down "once for all" in *Goodman* and noting that "[s]tandards of conduct are declared at times by courts, but they are taken over from facts of life").

⁹¹ See, e.g., *Burnett v. Grattan*, 104 S. Ct. 2924, 2929 (1984); *Board of Regents v. Tomanio*, 446 U.S. 478, 486 (1980); *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978). It is not clear, however, whether the Puerto Rican tolling rule adopted in *Chardon v. Fumero Soto*, 103 S. Ct. 2611, 2618-19 (1983), should be characterized as a construction of Puerto Rico's statute or as a rule of common law.

⁹² In the immunities area, for example, the Court neither mentions § 1988, nor comments on the existence or, in most cases, the nonexistence of state statutes. See, e.g., *Davis v. Scherer*, 104 S. Ct. 3012 (1984); *Pulliam v. Allen*, 104 S. Ct. 1970 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Supreme Court v. Consumers Union*, 446 U.S. 719 (1980); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Wood v. Strickland*, 420 U.S. 308 (1975); *Pierson v. Ray*, 386 U.S. 547 (1967). The Court has also looked to federal common law, again in the absence of applicable state statutes, to calculate appropriate damages under § 1983. See, e.g., *Smith v. Wade*, 461 U.S. 30 (1983); *Carey v. Phipps*, 435 U.S. 247 (1978).

Judge Wright of the District of Columbia Court of Appeals has recently attempted to develop another scheme to delimit the realm of cases in which the borrowing of state law is required. In *United States v. Brown*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), Judge Wright declared that federal law is deficient only when it fails to provide some element "universally understood to be . . . essential to fair litigation" *Id.* at 1506. His effort, however, appears to ignore the peculiarities of § 1988, see *supra* notes 58-68 and accompanying text, and is inconsistent with both the holding and the reasoning in *Robertson v. Wegman*, 436 U.S. 584 (1978), that federal law is deficient whenever there is no directly dispositive federal statute.

the same legislatures that promulgated the Black Codes might prove inimical to effective vindication of federal rights. Congress thus provided a federal veto of such inconsistent provisions; they would be treated as ineffective, and general common law would govern.⁹³

This interpretation has the virtue of being consistent with the words of section 1988, current practice under section 1983, and the statute's historical context.⁹⁴ It has, moreover, the advantage of leaving opportunities for federal courts to craft sensible and uniform solutions to contemporary problems based on contemporary values. The question remains, however, is it correct?

⁹³ This interpretation avoids the embarrassment that would attend a "state common law" interpretation in determining where courts should look if federal law is not adopted and state law is inconsistent.

Such supersession of state statutes also may explain *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), in which the Court made no mention of any state statute and relied instead on federal common law, despite an amicus's suggestion that the Court apply a state statute that would have foreclosed the availability of punitive damages against municipalities, *see Amicus Curiae Brief of the City of Santa Ana, California, in Support of Petitioners at 27-28, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). *See also* *Martinez v. California*, 444 U.S. 277, 284 (1980) (state statutory immunity does not govern § 1983 action). Arguably, this may also explain *Moor v. County of Alameda*, 411 U.S. 693, 706 (1973) (state statute imposing vicarious liability on counties not followed in § 1983 action because Congress affirmatively intended to exclude municipal liability under § 1983, *see Monroe v. Pape*, 365 U.S. 167 (1961)). The remainder of Marshall's discussion in *Moor* of § 1988 is opaque but could be interpreted as a procedural reading of § 1988. *See infra* note 96.

⁹⁴ Two other historical interpretations are possible. Professor Eisenberg has argued at length that § 1988 was designed to apply only to cases initially brought under state law, usually those removed from state to federal court. *See Eisenberg, supra* note 57, at 525-43. As an interpretation of the 1866 predecessor, this position is plausible, although it rests on the assumption that the second sentence of § 3 of the 1866 Civil Rights Act refers to only half of the first sentence. *See Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27*. As an interpretation of the 1875 Revised Statutes, however, it is at war with the text, for Revised Statutes § 722 applies by its terms to a variety of federal causes of action. In any event, Professor Eisenberg's interpretation appears to have been rejected by the Supreme Court, although in this area, nothing is final.

The other possibility is to view § 1988 not as a mutated version of the Rules of Decision Act, but as an early draft of the Conformity Act of 1872, ch. 255, 17 Stat. 196, 197, which applied to bring federal procedure into line with contemporary rather than historical state practice. This approach has some support in contemporaneous interpretations. *See In re Stupp*, 23 F. Cas. 296, 299 (C.C.S.D.N.Y. 1875) (No. 13,563) ("[Section 1988] manifestly has reference not to the extent or scope of jurisdiction, or to the rules of decision, but to the forms of process and remedy."). Moreover, this approach would explain why § 1988 is never cited as controlling the choice of law in early cases under the Civil Rights Act, *see, e.g., O'Sullivan v. Felix*, 233 U.S. 318 (1914); *Scott v. Donald*, 165 U.S. 58 (1897), and why § 1988 by its terms applies only to cases brought in federal court, *see Sullivan v. Little Hunting Park*, 396 U.S. 229, 256 (1969) (Harlan, J., dissenting). However, this approach would also require the overruling of the corpus of modern Supreme Court cases interpreting § 1988. *But cf. Runyon v. McCrary*, 427 U.S. 160, 180 (1976) (choosing statute of limitations in case governed by § 1988 in light of congressional silence and quoting *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946)).

B. Remembering History More Carefully

The interpretation set forth above is consistent with current judicial practice and with intimations in a number of Supreme Court cases interpreting section 1988.⁹⁵ Nonetheless, some authorities have rejected reference to the common law of *Swift* as not only antiquarian but inaccurate.⁹⁶ Although decidedly mixed, the historical record on balance ap-

⁹⁵ The earliest Supreme Court discussion on the subject, Justice Clifford's dissent in *Tennessee v. Davis*, 100 U.S. 257 (1879), characterized § 1988 as "a mere jumble of Federal law, common law, and State Law," requiring the judge to choose among "three systems of . . . jurisprudence." *Id.* at 299 (Clifford, J., dissenting). Although the methodology of choice was not obvious, in the minds of these dissenters, the common law referred to is clearly a general common law, rather than the local law of an individual state. Similarly, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), Justice Marshall interpreted § 1988 to mandate reference to "principles of the common law, as altered by state law." *Id.* at 702-03, *quoted with approval* in *Runyon v. McGrary*, 427 U.S. 160, 185 (1976). And in *Robertson v. Wegmann*, 436 U.S. 584 (1978), Justice Marshall's opinion noted the possibility of interpreting the common law as either the law of the forum state or as "the kind of general common law that was an established part of our federal jurisprudence by the time of § 1988's passage." *Id.* at 589 n.5. *See also* *Basista v. Weir*, 340 F.2d 74, 85-86 n.10 (3d Cir. 1965) (section 1988 retains vestiges of *Swift*); *Theis*, *supra* note 9, at 684 (section 1988 "seems to state the *Swift* rule"); *Note*, *supra* note 9, at 276 (Section 1988 directs courts "to apply the common law, as modified by the particular state's constitution and statutes . . .").

⁹⁶ *See* H. HYMAN AND W. WIECEK, *supra* note 77, at 415 (interpreting the common law in § 1988 as "the common law of the forum state"); Eisenberg, *supra* note 57, at 517 ("If . . . section 1988 refers to the general common law that existed when section 1988's precursor was enacted, federal courts will forever be referring back to rules of a different legal era to govern modern problems for which those rules will only fortuitously supply suitable answers."); Comment, *supra* note 9, at 498 n.23 (arguing that reference to a pre-*Erie* general common law to justify an award of damages in 1965 is "incongruous").

In *Burnett v. Grattan*, 104 S. Ct. 2924 (1984), Justice Marshall described the § 1988 inquiry as one in which, after it is determined that federal law is not suitable, courts should "consider[] [the] application of state 'common law, as modified and changed by the constitution and statutes' of the forum state." *Id.* at 2929 (citing § 1988). He made this assertion without any reference to his opinions in *Robertson v. Wegmann*, 436 U.S. 584, 589 n.5 (1978), or *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973). *Cf.* *Chardon v. Fumero Soto*, 103 S. Ct. 2611, 2616 (1983) ("Congress ha[s] plainly instructed the federal courts to refer to state law when federal law provides no rule of decision . . ."). Justice Powell has commented that he views § 1988 as codifying a "policy against invoking the federal common law except where necessary to the vitality of a federal claim." *Carlson v. Green*, 446 U.S. 14, 29 (1980) (Powell, J., concurring in the judgment). And Justice Rehnquist has avoided the recognition of textual ambiguities by reading § 1988's command as mandating deference to "the common law . . . of the State wherein the court having jurisdiction of such civil or criminal cause is held," *Smith v. Wade*, 461 U.S. 30, 91 n.17 (1983) (Rehnquist, J., dissenting), omitting the words that render the reference to common law ambiguous, *see* 42 U.S.C. § 1988 (1982) ("the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held") (emphasis added). Professor *Theis*'s rejection of the *Swift* reading rests on his suggestion that § 1988 be simply disregarded in the interests of the "new" federal common law," *see Theis*, *supra* note 9, at 691, a suggestion that has not been adopted.

pears to support the view proposed here.

The crucial determination for the viability of the proposed reading is the nature of the "common law" to which section 1988 mandated reference in the absence of controlling federal statutory law.⁹⁷ Although Professor Fletcher has recently assured us that "in early nineteenth century usage, 'common law' was a general common law shared by the American states rather than a local common law of a particular state,"⁹⁸ it appears that, at least by the middle of that century, courts and commentators were well aware of the possibility of ambiguous usage and took cognizance of the possibility of a common law of each individual state.⁹⁹ The question of what the 1866 Congress intended by the words "common law" simply cannot be answered by consulting the contemporaneous plain meaning of the statute.

Neither do the relevant legislative materials resolve this question. Although there is support for the "general common law" reading in the directly applicable legislative history, other legislative materials lend plausibility to a reading of the "common law" as that of the individual states.

Referring to section 1988 in debate over the 1866 Civil Rights Act, Congressman Kerr, in opposition to the bill, objected that

the things attempted to be prohibited are in themselves so extraordinary and anomalous, so unlike anything ever attempted before by the Federal Government, that the authors of this bill feared, very properly too, that the system of laws heretofore administered in the Federal courts might fail to supply any precedent to guide the courts in the enforcement of the strange provisions of this bill, and not to be thwarted by this difficulty, they confer upon the courts . . . the power to make such other laws as they may think necessary. Such

⁹⁷ In answering this question, the recapitulation of the theoretical underpinnings of *Swift* by Justices Holmes and Brandeis, *see supra* text accompanying note 87, is of limited reliability. *Erie* is phrased as polemic rather than analysis, and the polemic is directed against the doctrine as it existed in the early 20th century, rather than the understanding of a Congress in 1871.

⁹⁸ Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 n.9 (1984).

⁹⁹ *See, e.g.,* *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) ("It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law."); *see also* 1 G. CURTIS, COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 19-20 (Philadelphia 1854) ("[W]hen a question depending upon a common law right arises in the courts of the United States they must look to the law of the states in which the controversy originates, or by the law of which the rights of the parties are to be determined.").

is the practical effect of [section 1988]

That is to say, the Federal courts may, in such cases, make such rules and apply such law as they please, and call it *common law*.¹⁰⁰

In Kerr's view the "common law" in question was a common law at the mercy of federal interpretation, which was a reasonable prediction, given recent developments under *Swift*.¹⁰¹

Similarly, Senator Saulsbury, who opposed the enactment of the 1866 act, characterized the predecessor of section 1988 as obligating courts "to render [their] decisions conformably to the common law as modified by State law."¹⁰² So, too, the marginal note in the official version of the *Statutes at Large* that identifies section 1988 reads "Jurisdiction to be enforced according to the laws of the United States, or the common law, &c."¹⁰³ Reference to "the common law," standing alone, has a strong flavor of a general common law.¹⁰⁴

By contrast, the report of the Revision of Statutes commission in 1872¹⁰⁵ viewed the predecessor of section 1988 as an "anomalous provision," providing for "variable punishment" from state to state according to local common law and hence open to "serious constitutional question."¹⁰⁶ Although there are reasons to discount this interpretation,¹⁰⁷ it

¹⁰⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1271 (1866) (statement of Rep. Kerr).

¹⁰¹ See *infra* notes 111-16 and accompanying text.

¹⁰² CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866) (statement of Sen. Saulsbury). See also *id.* at 480 ("[A]s far as it can be done, the court shall conform to the common law as modified by the laws of the State.").

¹⁰³ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27.

¹⁰⁴ See CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866) (veto message of President Johnson, equating "the common-law" with federal, not state, law). Although contemporaneous sources recognized the existence of state common law, I have not found any use of "the common law" *tout court*, which refers to state common law rather than a general common law. Cf. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658-59 (1834) ("[W]e may inquire, whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania. . . . The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.").

¹⁰⁵ In 1866 Congress appointed a commission to prepare a consolidation of the statutes at large. The report of the commission in 1872 contained a draft of the Revised Statutes that was rejected by Congress, and in 1873 work on the revision was transferred to the control of a joint committee of Congress. The committee's altered version was introduced in December of 1873 and adopted in 1874. See 1 A. DONATH, CHECK-LIST OF UNITED STATES PUBLIC DOCUMENTS 1789-1909, at 1524-25 (3d ed. 1911). One of the few remaining copies of the 1872 draft is in the United States Supreme Court library.

¹⁰⁶ 1 C. JAMES, B. ABBOT & V. BARRINGER, REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE 421 (1872) (located in the United States Supreme Court Library) (copy on file with the University of Pennsylvania Law Review). The passage referred to in the text reads in full:

nonetheless lessens the force of any argument based on legislative history for interpreting "common law" as general common law.

Perhaps the best source of guidance in determining what Congress intended when it enacted section 1988 is the functioning of the federal jurisdiction already in existence at that time. In 1866 a general federal question jurisdiction was still a decade in the future. Diversity jurisdiction, the major source of private federal cases, was the primary precedent for the functioning of the federal judiciary. Thus one might plausibly argue that, in conferring jurisdiction under the Civil Rights Act and the Ku Klux Klan Act, Congress used the diversity experience as a model.¹⁰⁸ And in 1866 the paradigm for federal diversity cases was *Swift*.

Professor Eisenberg is dubious of references to *Swift* in construing section 1988, in part because "*Swift*, even in its heyday, seemed only to bless a federal common law of commerce."¹⁰⁹ His factual premise, however, is almost certainly incorrect. Although early application of the *Swift* doctrine was arguably limited to commercial matters, the province of federally enunciated general law had expanded substantially beyond those boundaries before the adoption of the precursors to sections 1988 and 1983.¹¹⁰

It seems to be the effect of this provision that, for the same offense against civil rights, a variable punishment may be inflicted, according to the common law, as modified by statute, of the State where the offense is committed. The Government of the United States, being charged with the protection of these rights, is also charged with the duty of providing complete and uniform rules of its own for that protection, and the replacement of this anomalous provision by such rules may avert a serious constitutional question.

¹⁰⁷ Congress did not adopt the commissioners' report. Indeed, the scope of the version finally included in the Revised Statutes was substantially broader than the commissioners' draft. Revised Statutes 722 as ultimately adopted governed habeas corpus, all civil rights provisions, and the civil rights criminal provisions. The corresponding section of the draft covered only the 1866 Civil Rights Act. This could indicate either a disagreement with the suggestion that the statute, as interpreted by the commissioners, was open to constitutional challenge on grounds of nonuniformity or a rejection of the interpretation that read it as parasitic on state common law.

¹⁰⁸ See *Briscoe v. LaHue*, 460 U.S. 325, 354 (1983) (Marshall, J., dissenting) ("In an age when federal common law prevailed, [citing *Swift*], a Supreme Court decision would have been the natural focus for a Congress establishing a federal remedy which was accompanied by a new grant of federal jurisdiction."); T. FREYER, HARMONY & DISSONANCE: THE *Swift* & *Erie* CASES IN AMERICAN FEDERALISM 55 (1981).

¹⁰⁹ Eisenberg, *supra* note 57, at 513. Eisenberg's reference to *Swift* is made in the context of his discussion of what constitutes deficient federal law. See *supra* note 94. He also rejects the interpretation of "common law" as a general or federal common law for still other reasons. See *infra* note 120.

¹¹⁰ See R. BRIDWELL & R. WITTEN, THE CONSTITUTION AND THE COMMON LAW 3, 116, 139-41 (1977) (arguing that the application of the *Swift* principle to com-

Discussions in contemporaneous treatises refer to no limitation of the *Swift* doctrine to commercial law issues.¹¹¹ In the field of tort actions, the Court stated that "where private rights are to be determined by the application of common law rules alone, this Court . . . does not feel bound by [state] decisions."¹¹² And in 1866 the most recent and outstanding application of the *Swift* principle was the Court's determination in *Gelpcke v. City of Dubuque*¹¹³ that, in matters affecting municipal bonds, a federal diversity court was not bound by a state supreme court's interpretation of its own constitution.¹¹⁴ In such an

mercial matters was correct as a conflict of laws principle, but recognizing that in the latter part of the 19th century, by extending the *Swift* principle beyond commercial cases, "[federal] judges . . . began to make law in a legislative fashion"; see also T. FREYER, *supra* note 108, at 58-59.

¹¹¹ See, e.g., A. CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 124-26 (4th ed. Albany 1864) (1st ed. Albany 1842); A. CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES IN SUITS AT LAW 138-140 (5th ed. 1870); G. FIELD, A TREATISE ON THE CONSTITUTION AND JURISDICTION OF THE COURTS OF THE UNITED STATES 431-32 n.1 (1883); G. HOLT, THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS 159-88 (1888) (setting forth 28 areas of litigation in which federally construed common law differed from state laws governing rules of decision).

¹¹² *Chicago v. Robbins*, 67 U.S. (2 Black) 418, 428-29 (1862) (rejecting local rule in case involving issue of respondeat superior). See also *Dow v. Humbert*, 91 U.S. 294 (1875) (in suit against town supervisors for negligently administering a creditor's execution, damages were determined by reference to New York and English cases, with no reference made to any cases from the forum state); *Parrot v. Wells Fargo & Co.*, 82 U.S. (15 Wall.) 524, 535-37 (1872) (using English cases and treatises as point of reference in setting standard of liability for negligence); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450, 453 (1872) (relying on a principle of general common law, Court declined to award attorneys' fees in suit against United States customs official for wrongful seizure); *Transportation Co. v. Downer*, 78 U.S. (11 Wall.) 129 (1870) (negligence case citing no cases from forum state); *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 506 (1870) (distinguishing local rule from nuisance case at issue); *Lincoln v. Claflin*, 74 U.S. (7 Wall.) 132, 139 (1868) (in tort case, prejudgment interest awarded at discretion of jury; no forum state cases cited); *Philadelphia, W. & B.R.R. v. Quigley*, 62 U.S. (21 How.) 202, 213 (1859) (deciding liability of corporation in libel case according to general law of corporations); *Day v. Woodworth*, 54 U.S. (13 How.) 362, 371-72 (1851) (deciding issue of punitive damages in trespass case by reference to general common law).

¹¹³ 68 U.S. (1 Wall.) 175 (1864).

¹¹⁴ Both modern commentators and contemporary opinion viewed *Gelpcke*, which ultimately resulted in federal courts' overseeing the collection of municipal taxes to pay the bonds, as a watershed in the expansion of federal court discretion under the *Swift* principle. See R. BRIDWELL & R. WHITTEN, *supra* note 108, at 116-19 ("[Federal] judges . . . began to make law in a legislative fashion, with the result that the sovereign authority of the states was ignored in an unconstitutional manner, and the expectations of the parties to many events was similarly defeated in a constitutionally impermissible fashion."); C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, PART ONE 919 (1971) ("The Court went much further: enforcing bonds which the State court had held invalid without overruling any decision; construing state statutes—on the powers of municipal officers, on debt limits, on the privileges of railroad corporations, etc.—contrary to the construction

environment it seems unlikely that a reference to the common law would require deference to local rules as a binding source of decision. A more reasonable inference is that Congress intended to allow federal courts in civil rights cases at least the same freedom that those courts enjoyed in diversity cases.¹¹⁵

Nonetheless, a mystery remains. If the governing interpretation of the Rules of Decision Act under *Swift* would allow federal courts so much discretion, why should Congress adopt an additional choice of law statute to govern civil rights cases? The answer, I suggest, is that the precise scope of the *Swift* doctrine at that time was, and was to remain, unclear. In matters of local law, state rules governed; in matters of general law, federal courts were free to follow their own interpretations. And the boundary between local and general law was a matter in substantial dispute.¹¹⁶

In such a climate, absent explicit congressional direction, newly-established causes of action for individuals seeking to vindicate their civil rights might, in the view of states-rights advocates, be classed as local.¹¹⁷ To avoid such a result, as well as to guarantee the application of general law to removed cases, Congress provided that the common law would be the primary source of law. Moreover, because the *Swift* doctrine mandated deference to state statutes, regardless of whether the

given them by the State courts; and exercising unrestrainedly that independence in matters of 'general jurisprudence'"); T. FREYER, *supra* note 106, at 58-61; H. HYMAN & W. WIECEK, *supra* note 77, at 366-67 ("The Court created, in effect, a new dimension of general federal common law jurisdiction and jurisprudence Dissenting . . . Justice Miller . . . decried the federal encroachment upon the right of a state court to speak finally upon the construction of its state Constitution and laws."); see also C. FAIRMAN, *supra*, at 1010-1116 (describing subsequent developments in the *Gelpcke* doctrine).

¹¹⁵ In fact, the earliest Supreme Court approach to the problem of filling in the infrastructure of § 1983 actions, in *Scott v. Donald*, 165 U.S. 58 (1897), looked to the federal common law developed pursuant to *Swift* to determine the availability of punitive damages in a § 1983 action.

There is, of course, no way to refute the argument that congressional compromise is inherently irrational and that, hence, irrational action vindicates the will of Congress, cf. *Monroe v. Pape*, 365 U.S. 167, 248-50 (1961) (Frankfurter, J., dissenting) (describing contradictions inherent in congressional adoption of Ku Klux Klan Act but arguing for an interpretation consistent with the statute's contradictions). With respect to the question of what the "common law" in § 1988 refers to, however, there seems to be no history of compromise.

¹¹⁶ See, e.g., C. WRIGHT, *supra* note 53, at 349 ("The dichotomy between matters of 'general' law, which the federal courts were free to find for themselves, and matters of 'local' law, on which state decisions were binding, proved particularly elusive."); Fletcher, *supra* note 98, at 1532-33 (describing the boundary between general and local law as unclear and indistinct).

¹¹⁷ Cf. *Tennessee v. Davis*, 100 U.S. 257, 300-01 (Clifford, J., dissenting) (maintaining that it is within the state's province to raise and regulate its police force and that acts of Congress cannot supersede these police powers).

statutes conflicted with federal policy, Congress added the final inconsistency proviso.¹¹⁸

III. IMPLICATIONS

If I am right and section 1983 is properly to be read in light of *Swift v. Tyson*,¹¹⁹ it seems to me that there are two major implications that the courts and civil rights litigators should heed. The first pertains to the proper role of federal courts and the second to the role of state law in civil rights litigation.

A. *The Development of a Federal Common Law in Civil Rights Actions*

In section 1983 litigation the system cannot function as Congress originally intended. Federal courts have gone out of the business of making general common law, and there is no contemporary body of nationally uniform common law to fill in the gap. Given this fact, three responses are possible, as long as the Supreme Court wishes to retain section 1983 as an active piece of the enforcement system of civil rights legislation. The Court may look to the pre-*Erie* federal common law; it may look to the common law of the state that allegedly violated the Constitution; or it may craft a new set of rules for section 1983 actions.¹²⁰

¹¹⁸ There are two other historical points worthy of note. First, in 1866 an extensive federal equity jurisprudence existed, outside the purview of the Rules of Decision Act. It seems likely that this would have been considered "federal law." See, e.g., *Kirby v. Lake Shore and Mich. S.R.R.*, 120 U.S. 130, 136 (1887). Thus the question in *Pulliam v. Allen*, 104 S. Ct. 1970 (1984), whether a state judge is immune from injunctive actions, should have been answered by a nondeficient federal law.

Second, the *Swift* doctrine did not reach the question of the form of procedure applicable in federal cases; these forms were consigned in the first instance to conformity with the state procedures of 1789. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825); C. WRIGHT, *supra* note 53, at 400-01. To the extent that Congress sought to unify and modernize practice in civil rights cases, § 1983 may in part be characterized as a predecessor of the Conformity Act of 1872, ch. 255, 17 Stat. 196, 197.

¹¹⁹ 41 U.S. (16 Pet.) 1 (1842).

¹²⁰ Professor Eisenberg does not find either of the first two choices "particularly appealing," see Eisenberg, *supra* note 57, at 516-18, and his restrictive reading of the words "common law" prevents him from ever giving a federal common law interpretation full consideration. He first assumes, in reliance on Supreme Court dictum from *Robertson v. Wegmann*, 436 U.S. 584, 589-90 n.5 (1978), that any federal common law would necessarily be pre-*Erie* common law. Although I certainly agree that reliance on such general common law would be problematic, I do not think that such reliance is mandated if § 1983's "common law" is read the way that I suggest.

Second, Eisenberg asserts that in most cases, however interpreted, the "common law" will be "*modified and changed by the constitution and statutes of the State,*" Eisenberg, *supra* note 57, at 517-18 (quoting 42 U.S.C. § 1988 (1976) (emphasis sup-

Reliance on the pre-*Erie* common law would sacrifice the ability of courts to mold civil rights jurisprudence in response to changing times and values. There is no indication that Congress contemplated such an ossified system, and its defects are manifest.¹²¹ The rules forged by common law courts of three and four generations past bear no necessary relation to modern problems. And, indeed, the lesson would not be foreign to a Congress on the verge of replacing static with dynamic conformity in federal procedure.

A focus on state common law would repudiate the congressional intent to look to a uniform body of law as the infrastructure for civil rights litigation. Such repudiation is hardly compelled by policy. Whatever the merits of allowing state courts to determine the boundaries of causes of action created by their domestic law, the norm of equal treatment suggests that identically injured plaintiffs should not be treated differently in federal court on federal claims because of the vagaries of local law. The fourteenth amendment is as valuable in Utah as it is in New York.

Nor are concerns of federalism vindicated by a state-to-state variation in the scope of federal remedies. *Monroe v. Pape*¹²² tells us that section 1983 is designed to supplement the remedies provided by state law, not to mirror them.¹²³ It is neither an infringement of state sovereignty nor an arrogation of judicial authority to suggest that state officials who violate federal constitutional rights have no claim to retain state law immunities or to rely on state damage rules attuned to state rather than federal interests. Moreover, the importance of providing a clear set of guidelines for civil rights claimants suggests a federal interest in uniformity. Any search among state precedents for rules governing federal causes of action is likely to be a choice among parallels of dubious salience. Today, in advance of a decision, there is no real way for litigants to predict, for example, whether the state rules applicable to libel, negligence, or contract will be held to govern an action for disparaging discharge without due process. A uniform federal rule would make it less likely that federal rights will be forfeited by a plain-

plied by Eisenberg)), and that the majority of litigants will thus be unable to "escape from the happenstance of state law." *Id.* at 517-18. The Court's treatment of the most significant § 1983 issues—for example, immunities and damage calculations, *see supra* notes 31-49 and accompanying text—belies this claim. In these cases it is in fact the *absence* of state statutes that makes the nature of the "common law" in § 1983 crucial to choosing the appropriate rule of law in § 1983 actions.

¹²¹ *But see* Hill, *supra* note 9, at 1154-55 (arguing that federal common law rules from the *Swift* era are as suitable for use in constitutional litigation today as are the many state rules and that these rules may be modified as present needs require).

¹²² 365 U.S. 167 (1961).

¹²³ *See id.* at 183.

tiff's incorrect but plausible analogy to state practice.

Federal courts should naturally turn to the third route and undertake to establish a common law of civil rights actions. Such federal common law loses the discipline that reference to a general common law evolving in other areas would have imposed on the federal courts of 1866 and 1871. Nonetheless, the large number of current civil rights cases suggests that federal courts will have ample opportunity to evolve a structure of civil rights law on a case-by-case basis. Of the three options, this one seems the closest to what Congress originally intended, and it is the one that best characterizes the Court's approach in recent cases.

Under section 1988 the lack of a binding federal statute does not mean that a court must survey the entire field of potentially applicable state law. Section 1988 directs the federal courts in the first instance to proceed as a matter of federal common law. State rules may be persuasive, but they are certainly not binding. And, similarly, the courts need not be concerned with uncovering the arcana of nineteenth century tort doctrine. The search is for the best current common law rule in light of federal policies. Let us admit freely that federal courts can and do make law in civil rights litigation. In making such law courts must remember that, in adopting section 1988, Congress has not foresworn an interest in national uniformity. Rather it has put its imprimatur on a federal common law.

B. *The Significance of State Law*

The second implication of my analysis is that federal courts cannot ignore state law. Congress intended that the common law rule tentatively arrived at be modified by applicable state statutes; courts and litigants must be on the lookout for these statutes. Although this modification is a considerably narrower constraint than a general rule of deference to state law, the proliferation of state statutes will generate escalating difficulties.¹²⁴ Courts will increasingly be faced with the problem of classifying rules of mixed origin and addressing the impact of aging, ambiguous, or obsolete statutory systems. In applying state statutes,

¹²⁴ California's unusually comprehensive statutory code has generated several clashes with the purposes of § 1983, and the Supreme Court has responded by refusing to give effect to the statutory provisions. See *Martinez v. California*, 444 U.S. 277, 284 (1980) (holding a California statute granting public officials absolute immunity with respect to parole release determinations not applicable to § 1983 action even when the action is brought in state court); *Moor v. County of Alameda*, 411 U.S. 693, 698-710 (1973) (rejecting the application of California's vicarious liability statute that would have imposed liability on a county, despite the fact that the statute was designed to extend the protection of civil rights).

therefore, federal courts cannot be content with a simple literal reading. Rather, the elaboration of the statute at issue must be sensitive both to the construction state courts have given and are likely to give the statute and to federal civil rights policies.

Indeed, this has been the Court's approach in its two most recent ventures into the interpretation of section 1988. In *Chardon v. Fumero Soto*¹²⁵ the Court approved the First Circuit's extrapolation of the way in which a Puerto Rican court would mesh Puerto Rico's rules on class actions and the tolling of statutes of limitations. Puerto Rico's tolling rule, unlike most federal provisions, causes the statute of limitations to begin running anew when the tolling event ceases. The Puerto Rican class action procedure is modeled after Rule 23 of the Federal Rules of Civil Procedure. Although the Puerto Rican courts had not addressed the issue, the First Circuit concluded that, when a class action in a federal court located in Puerto Rico is decertified, the Puerto Rican rule applicable under section 1988 would cause the statute to begin running anew for the benefit of the unnamed class plaintiffs. The Supreme Court approved this exegesis, despite the contrary federal common law rule adopted for antitrust cases in *American Pipe & Construction Co. v. Utah*.¹²⁶ As long as federal interests are not adversely affected, even a tentative prediction of the state court's interpretation of domestic statutory rules can function as the basis for statutory determinations.

On the other hand, where state law provides a variety of statutory analogies for the rule of decision question, a federal court should feel free to choose the analogous provision that best serves federal interests. The court should defer to the most appropriate state statutory analogy, bearing in mind that "[a] state law is not 'appropriate' if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts."¹²⁷ Thus, in *Burnett v. Grattan*,¹²⁸ the Supreme Court held that a section 1983 action for employment discrimination was to be governed by the three-year residual state statute of limitations rather than the six-month statute of limitations for the filing of administrative complaints with the state equal employment agency. The Court reasoned that the three-year statute better furthered the goals of section 1983:

¹²⁵ 103 S. Ct. 2611 (1983).

¹²⁶ 414 U.S. 538 (1974).

¹²⁷ *Burnett v. Grattan*, 104 S. Ct. 2924, 2930 (1984).

¹²⁸ 104 S. Ct. 2924 (1984).

To the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Act, the resulting state statute of limitations may be inappropriate for civil rights claims.

The divergence between the goals of the federal civil rights statutes and of the state employment discrimination administrative statute is clear in the present case.¹²⁹

This process of construing state statutes consistently with federal interests was, by 1871, a regular feature of the *Swift* regime,¹³⁰ and it is a reasonable concomitant of the interpretation of section 1988 advanced above.

Finally, whatever alterations state statutes make in the underlying federal rule must still be measured against the policies of federal legislation. States cannot immunize themselves from section 1983 actions by passing statutes to that effect,¹³¹ and federal courts should be reluctant to allow restrictive procedural prerequisites to accomplish the same thing by less direct measures.¹³² Application of state law must be contingent on the full availability of the federal remedy.

Nonetheless, in most situations, it is not inconsistent with the policies underlying section 1983 for a state statute to impose a higher level of responsibility or damages than is available under federal law.¹³³ State statutes that augment the effectiveness of the section 1983 remedy may not be immediately obvious, but courts and counsel should be alert for their existence.

CONCLUSION

I realize that there is something anachronistic, perhaps antiquarian, in bottoming modern statutory interpretation on a case that has been overruled for almost half a century. Nonetheless, the elaboration

¹²⁹ *Id.* at 2931 (citations omitted).

¹³⁰ See *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206-07 (1864); *supra* note 115.

¹³¹ See *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980).

¹³² See, e.g., *United States v. Brown*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc) (statutory requirement of notification within six months should not be applied under § 1988); *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir.) (state survival statute limiting remedies under § 1983 for unconstitutional conduct resulting in death is "inconsistent" with federal law), *cert. denied*, 104 S. Ct. 394 (1983); *Knoll v. Springfield Township School Dist.*, 699 F.2d 137, 142 (3d Cir. 1983) (rejecting state's six-month statute of limitations), *cert. granted*, 104 S. Ct. 3571 (1984); *Johnson v. Davis*, 582 F.2d 1316, 1317 (4th Cir. 1978) (rejecting state's special short statute of limitations for § 1983 actions).

¹³³ Cf. *Chardon*, 103 S. Ct. at 2618-19 n.15.

of section 1983 is an anachronistic enterprise. The statute was originally adopted over a century ago, and, because it languished unused until its 1961 resurrection in *Monroe v. Pape*,¹³⁴ there is no history of continuous interpretation to link today's perceptions of section 1983 to those of the statute's framers. Indeed, these many years of inactivity prompted one of Justice Frankfurter's objections to the revival of section 1983 in *Monroe*: "We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960."¹³⁵

If the interpretation advanced in this essay is valid, no torture is necessary. The 1871 Congress itself manifested a preference for the common law power of federal courts to adjust the framework of the law to meet the problems of the changing society. To take that preference at face value allows us to justify the otherwise unsupported but sensible approach that the Court has largely adopted toward elaboration of section 1983 in the last decade. It permits courts to direct civil rights practitioners in most instances to a single and uniform body of precedents from which to seek guidance. The proposed interpretation provides a basis for elevating contemporary policy concerns above both the fruitless search for direct legislative evidence of specific remedial intentions and the interminable excavation of fossilized contemporaneous tort law. It is, I submit, preferable to either willfully ignoring an apparently applicable statute or finding oneself adrift in a raging sea of state law. Until Congress decides to remedy the predicament,¹³⁶ it is the best we can do.

¹³⁴ 365 U.S. 167 (1961).

¹³⁵ *Id.* at 244 (Frankfurter, J., dissenting).

¹³⁶ In the antitrust area, for example, Congress has provided for a statute of limitations period for bringing an action, *see* 15 U.S.C. § 15(b) (1982), as well as rules for the tolling of the limitations period and the effect of such tolling, *see id.* § 16(i). *See also* Chardon v. Fumero, 103 S. Ct. 2611, 2617 nn.11 & 12 (1983).