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I. INTRODUCTION

Supreme Court opinions about federal jurisdiction usually feature painstaking analysis of the text of statutes and constitutional clauses[1] and the intentions of those who authored them, or they are based on long-standing traditions of equity jurisprudence.[2] But, as the Court's many divided decisions attest, these materials are scarcely clear enough to determine all outcomes. Thus, the Justices often seem to weigh various interests when they draw the lines around federal jurisdiction. The Court sometimes openly acknowledges this interest weighing, referring to "state interests" and "federal interests."[3]

Justice Stevens has taken exception to this process. He has observed that much of the Court's complicated doctrinal meandering reflects a balancing of state and federal interests.[4] He has criticized this balancing approach on the ground that the "federal courts 'have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution' [and] generally should not eschew this responsibility based on some diffuse, instrumental concern for state autonomy."[5] If one conceives of the relevant state interests as some vague claim to a separate sphere—a sort of right of privacy possessed by a governmental entity—and the federal interest as the enforcement of individual rights embodied in the Federal Constitution, this balancing

1. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167 (1961).

2. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

3. *See, e.g.*, Harris v. Reed, 489 U.S. 255 (1989); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Papasan v. Allain, 478 U.S. 265 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984); Moore v. Sims, 442 U.S. 415 (1979).

4. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2288 (1989) (Stevens, J., concurring) (discussing the Eleventh Amendment and abstention); *see also* Harris v. Reed, 109 S. Ct. 1038, 1045 (1989) (Stevens, J., concurring) (discussing habeas corpus).

5. *Union Gas*, 109 S. Ct. at 2288 (quoting *Harris*, 109 S. Ct. at 1045 (Stevens, J., concurring)).

approach indeed seems intolerable. Only hostility toward the constitutional rights at stake explains deference to state interests.[6]

This Article accepts interest analysis as inevitable, and sympathizes with Justice Stevens's belief in the preeminence of rights and the inappropriateness of allowing state interests to diminish those rights. It reviews federal jurisdiction with an eye toward understanding the interests that explain the Court's doctrinal choices.

Even if one rejects the notion that individual rights should yield to state autonomy interests, the interests at stake in federal jurisdiction remain surprisingly complex. First, state courts have some capacity to enforce federal rights. Even if they do not equal the federal courts in expertise ahout federal law and their enthusiasm for federal rights, state courts do have an obligation to enforce federal law, and they vastly outnumber the federal courts.[7] Moreover, questions of federal rights often arise in state proceedings. Those rights are most expeditiously enforced by requiring state courts to field them at that time. Allowing state courts to decide some federal rights cases, therefore, could enhance the enforcement of rights, at least in the first instance, subject to later review by the Supreme Court or perhaps a lower federal court on habeas. This deference to state courts is not really deference at all, but exploitation, pushing the state courts to fulfill their responsibilities under the supremacy clause. To the extent that federal courts stand ready to correct state court errors, the state courts have not won a form of autonomy premised on their own interests. Rather, they have received a required task and remain subject to federal court intrusion to the extent they fail to perform it.

There is a second reason interest analysis remains complex even when one places the highest value on the enforcement of rights. Federal rights are not the only rights available to individuals. States also may create individual rights. References to state interests tend to mean state concerns in running their affairs and pursuing their policies without having to account for individual rights. But at least some of the time the state's policy is to *grant* a right. While Justice Stevens spoke of the importance of putting federal individual rights above state interests that run counter to those rights, a more complete model of rights-oriented interest analysis would not emphasize federal interests as opposed to state interests, but would give priority to individual rights derived from any source. Some federal interests run counter to individual

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6. For an extended argument that the Court's jurisdictional doctrine depends on its view of the underlying substantive law, see Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499 (1989).

7. *See infra* note 21.

rights. For example, the Supreme Court sometimes expresses concern for burdening federal judges with too much work. This federal interest would probably not impress Justice Stevens or others who place the greatest value on the enforcement of rights. With rights, from state or federal law, put first, some deference to state courts may promote the development and enforcement of individual rights.

There is more to interest analysis than saying that increased federal court access serves federal interests and restricted federal court access serves state interests, to the detriment of federal rights. Placing the highest value on the enforcement of individual rights, this Article takes the role of the state courts seriously. It does not view state courts as invariably second-rate eroders of rights, but rather as abundant resources capable of having either a positive or a negative effect on rights. This Article concludes that by imposing obligations on state courts and by making federal courts available when state courts are inadequate or when added safeguards are needed, jurisdictional doctrine can serve as a mechanism for utilizing state courts and encouraging them to further the enforcement of rights.

Part II of this Article turns to the much-discussed parity question. It shows the misguidedness of trying to determine whether state courts are really as good as federal courts, and it redirects the discussion toward considering state courts as an important resource to be exploited, encouraged, and improved. The rest of the Article then reviews a range of jurisdictional doctrines, analyzing them in terms of enforcing individual rights. It divides this analysis into two parts. Part III looks at doctrines affecting rights claimants who initiate litigation with the states. The general rule is to give this plaintiff a choice of forum, though there are exceptions to the rule, which the Article critiques. Part IV considers litigation initiated by the states in state court, such as criminal prosecutions and civil enforcement proceedings. The rights claimant, now the defendant, has several means of attempting to gain access to federal court, such as Supreme Court review, habeas corpus, or filing a separate lawsuit under Section 1983. This part of the Article looks at the numerous doctrines that severely restrict the rights claimant's federal court options in this context. Considered in light of the need to exploit the state court resource, many of these doctrines make sense, but others deserve criticism. The Article reaches some surprising conclusions about some of these doctrines, finding value in doctrines that frequently draw criticism and providing new explanations for the coexistence of some doctrines that are usually seen as incompatible.

II. Assuming Parity—Ulterior Motives

Many legal scholars believe that the Warren Court increased access to federal courts to give an advantage to the individual who claims a violation of her rights and the Burger-Rehnquist Courts have restricted access to federal courts to cut back on those rights.[8] The patterns connecting the expansion or contraction of rights to the expansion or contraction of jurisdiction have become so clear over time that it is difficult to avoid this conclusion. But the Supreme Court never writes about whether rights claimants will do better in federal court or state court—the notorious parity question. The submerged nature of the parity question in Court opinions should scarcely surprise us. It may be that the Court sometimes restricts access to federal court precisely because it hopes the state courts, pressured by local politics and lacking respect for federal rights or expertise in enforcing them, will diminish rights, but the Court certainly does not advertise this motive. And it may be that the Court sometimes deliberately preserves access to federal courts to give rights claimants the advantage of a court that is knowledgeable about federal law, sympathetic to individual rights, and free from direct political pressure. But it will still refrain from disparaging the state courts. The Court—in majority and dissenting opinions alike—scrupulously ties its discussion of state court inferiority to the perceptions of the Congresses that passed the relevant statutes, particularly the Reconstruction Era Congress that enacted Section 1983.[9] The Justices that have addressed the parity issue in terms of their current beliefs have written that they assume state courts are equally willing and able to enforce federal law, or that they refuse to assume otherwise.[10]

This assumption of parity and the reliance on the beliefs of a century-old Congress whenever a desired doctrinal development depends on the opposite assumption do not establish that the Court actually be-

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8. *See, e.g.*, Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988).

9. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972). This pattern is most apparent in the opinions of Justice Brennan. Professor Redish, notably, follows Justice Brennan's example, dismissing the need to debate about parity on the ground that Congress has already made the relevant determination of state court inferiority in creating federal jurisdiction. Professor Redish thus turns the federalism question of parity (deference to state courts) into a separation of powers question (deference to Congress). *See* Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing,"* 40 CASE W. RES. L. REV. 1023 (1990); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). *But see* Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035 (1990) (arguing that Redish iguores the effect of judicial ideas about parity on interpretation of jurisdictional statutes).

10. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976).

lieves that parity exists. Although some commentators have tried to show that the state courts come closer to the federal courts than most legal scholars believe,[11] parity to the Court is quite simply an assumption, not a determination of fact. The question thus becomes: Why does the Court assume parity?

First, the Court is not in a position to make a factual finding about the quality of state courts. It can structure doctrine so that federal access will ensue in individual cases when a litigant encounters a demonstrably inferior state court,[12] but the Court never has enough empirical evidence to determine whether state courts on the whole are inferior to federal courts. It is unlikely that the Court would regard a slight difference in the odds of victory for the rights claimant as proof that the federal courts are superior, despite the importance of this difference to the parties. Even if the accurate and vigorous enforcement of federal law ought to provide the sole test of superiority, one cannot simplistically view a given party as embodying that value and the other side as opposing it.[13] A reliable assessment of the relative quality of the two judicial systems would require measuring more than just rights claimants' victories. A low-quality court can mistakenly overextend individual rights by egregiously misreading precedent or by holding a bias in favor of the party claiming that a right exists. A high-quality court can deny a claim to a constitutional right for which there is no principled basis in the law.

Second, there are fifty states with fifty judicial systems of varying quality, not to mention the variation among judges within a single state.[14] Some states have taken greater steps to improve their courts

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11. *See, e.g.*, Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

12. An obvious example is Stone v. Powell, 428 U.S. 465 (1976), in which the Court cut off federal habeas review of Fourth Amendment issues, leaving an exception for the state court's failure to offer a full and fair hearing on the issue. *See infra* notes 177-83 and accompanying text.

13. *Cf.* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 632 (1981). Professor Bator observed:

> [T]he reality is more complex. Even in the sphere of individual rights, it is misleading to suppose that the rejection of a particular constitutional claim imports less fidelity to constitutional values than its vindication. It was Holmes who reminded us that the limits contemplated for the coverage of a statute are as significant a part of its purpose as its affirmative thrust. When a court upholds a state criminal statute against the claim that it violates the first amendment, it is rejecting one sort of constitutional claim, but it is also upholding principles of separation of powers and federalism which themselves have constitutional status. And, increasingly, cases no longer even present clean-cut confrontations between "individual" and "governmental" interests. (Which side represents "the individual" in a case involving the validity of affirmative action?)

Id. at 632-33.

14. *See* Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 259-60 (1988).

than others. Some states isolate their judges from political pressures, much as the federal judges are protected.[15] Some states' courts have long records of recognizing individual rights far in advance of the Supreme Court's interpretation of the Federal Constitution.[16] Other states' courts lag behind federal requirements. The federal courts too can vary by geographic region, further complicating the comparison. A single conclusion on parity is therefore inappropriate.

Third, the quality of state courts is not static; it changes over time as state judges adapt to innovations in federal constitutional law, as states change procedure and judicial selection processes in their courts, and so on. State courts during the Reconstruction Era may have been useless, if not actively harmful to civil rights claimants. State courts during the Warren Era, particularly in some regions, had difficulty absorbing the many innovations in federal law rapidly imposed on them. Many state courts today take the lead in developing individual rights, and the great majority have grown accustomed to the many provisions of federal law found incorporated in the Fourteenth Amendment during the 1960s and 1970s. The federal courts also change over time.[17] Thus, any conclusion the Court makes will relate to one frozen moment in this history of change, unless it were to reassess the parity question constantly.

Fourth, doctrines based on a conclusion about the inferiority of state courts and even the announcement of the conclusion itself would have an impact on the quality of the state courts.[18] Since state courts have the capacity for change, the Court ought to take into account the effect that its actions have on them. Telling state courts that they are inferior will not likely encourage them to enforce rights. The point is not that it is unseemly to insult state judges, but that insulting them could demoralize them and impair the capacity they do have. On the other hand, expressing the assumption that state courts will do their part in enforcing federal law may boost the morale of state judges, en-

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15. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 n.45 (1977).

16. *See* Abrahamson, *Reincarnation of State Courts*, 36 TEX. L. REV. 951, 955-57 (1982) (citing Carpenter v. Dane County, 9 Wis. 274, 278 (1859) (presaging the holding of Gideon v. Wainwright, 372 U.S. 335 (1963), by more than a century)).

17. *See* Neuborne, *supra* note 15, at 1106-15.

18. Professor Neuborne took note of the "self-fulfilling prophecy" problem. *Id.* at 1129. His answer to the problem was two-fold. First, the state courts could become even worse if trusted with more constitutional litigation because they would thus attract more political pressures than those from which tbey now suffer. Second, giving them more cases might eventually improve state courts, but it is not worth the cost of "sacrific[ing] several waves of litigants." *Id.* at 1129-30. He also proposes abolisbing diversity jurisdiction first, as a means of improving the state courts, noting that pressure for improvement of state courts would then come from the "politically powerful groups[,] . . . the corporate bar and its generally well-heeled clients," who now take advantage of diversity jurisdiction. *Id.* at 1130 n.88.

couraging them to rise to the task entrusted to them.[19] Structuring doctrine to allow litigants to bypass state court will not only send a demoralizing message of distrust, it will also deprive those state courts of the opportunity to adjudicate federal issues and consequently prevent them from developing the expertise and sensitivity to federal law that might bring them closer to parity.

It is not surprising, therefore, that all Supreme Court Justices consistently refrain from expressing a conclusion that the state courts are inferior.[20] And yet, even without any of the problems outlined above—even if the Court could accurately conclude, once and for all, that all state courts are worse than any federal courts and would continue to be so, and even if expressing and acting upon that conclusion would not further impair the state courts—there would still be reason to refrain from creating jurisdictional doctrines that maximize access to federal courts. State courts are, above all, far more plentiful than federal courts. There are more than fifteen times as many state trial judges as federal district judges.[21] It would be an absurd waste of a valuable federal law enforcement resource to attempt to confine all federal rights issues to federal court.[22] Suppose the federal courts do surpass the state courts in understanding novel legal arguments about federal law and handling cases that require independence from political pressures: it would still make sense to approve of jurisdictional restrictions that keep the volumes of more routine litigation involving states and state actors in the state courts. Using the state courts to adjudicate cases that do not demand the special strengths of the federal courts would preserve that scarcer judicial resource for cases in which it is most needed. Should there be immediate access to federal courts whenever federal

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19. *See* Bator, *supra* note 13, at 624 (stating that "[c]onscientiousness, dedication, idealism, openness, enthusiasm, willingness to listen and to learn—all the mysterious components of the subtle art of judging well—are at least to some extent best evoked by a sense of responsibility, by the realization that one has been entrusted with a great and important task").

20. Expressions of state court inferiority, when needed to support a particular argument, are culled from the legislative history of jurisdictional statutes. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972).

21. The State Court Caseload Statistics Annual Report, issued by the National Center for State Courts (1987), indicated that there were 8859 state trial judges in courts of general jurisdiction (excluding trial courts of limited jurisdiction, such as traffic courts, probate courts, and misdemeanor courts). There were 778 state intermediate appellate judges and 355 judges on state courts of last resort. *Id.* at 224. The Reports of the Judicial Conference, Report of the Administrative Office, United States Courts (1989), shows that there were 575 federal district judges and 156 federal court of appeals judges. *Id.* at 2, 7.

22. Some scholars do lean toward this position, however, for theoretical reasons, ignoring its impracticability. *See, e.g.*, M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 3 (1980) (arguing that "[i]t seems intuitively appropriate to provide *federal* courts the primary responsibility for adjudicating *federal* law, and leave as the primary function of state courts the defining and expounding of state policies and principles") (emphasis in original).

rights against the state arise? Would it be wise to transfer every motion to suppress evidence allegedly seized in violation of the Fourth Amendment to federal court?[23] If state courts were truly execrable, the answer would be yes. But as long as the state courts are good enough, even if they fall short of parity, the interest in enforcing rights supports allocating some federal questions to state court in order to relieve federal courts of the burden of unnecessarily duplicative cases and to take advantage of the plentiful state courts, training them to handle rights claims routinely, as they arise in context.

Some federal rights litigation will inevitably take place in state court. It would be unacceptably complicated and inefficient to attempt to gather all federal questions into federal court. Even if it were possible, the Supreme Court's long-standing adherence to federalism-based doctrines of restraint would doom any proposal to restrict federal law to federal courts or to guarantee all federal rights claimants the choice of immediate access to federal court. Concern for federal rights and for individual rights in general, to be realistic, must take a different form.

This Article proposes that federalism-based jurisdictional doctrine should emphasize enforcement of individual rights and should take into account the state courts' capacity to serve that goal. The Supreme Court should not design doctrine as an exhibit of respect for state autonomy (although properly designed doctrine will inform states of what they must do to avoid federal intrusion and thus to gain autonomy).[24] Ideally, state courts should function alongside the federal courts, doing the same work in a different context, enforcing rights with full vigor and expertise. In this light, one can see the real reason for assuming parity: it is not a belief expressed through doctrine, it is a goal that doctrine can help achieve.

Thus, what Supreme Court opinions euphemistically call deference to the states is not a mere bow to autonomy but an exploitation of the more plentiful judicial resource for pursuing federal interests. The euphemisms of deference and comity and respect may disturb the Court's observers because they seem to denigrate rights. But these words should not be read as the real justification for the jurisdictional doctrine the Court creates; it is wise, in delegating a task, to ask nicely and to express confidence in the outcome. The real concern should not be about the euphemisms of deference, but about the content of the interests that motivate the Court as it desigus doctrine. We should look not

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23. *See* Perez v. Ledesma, 401 U.S. 82 (1971) (barring this practice under the *Younger* doctrine, Younger v. Harris, 401 U.S. 37 (1971)).

24. *See* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1537-38 (1987).

at the saccharin statements the Court makes about the state judges' ability, but at whether the Court sets up mechanisms that will enhance the enforcement of individual rights. If individual rights do not form the basis of the Court's conception of the federal interests that underlie federal jurisdiction doctrine, then the Court deserves criticism.

III. When the Rights Claimant Initiates Litigation

A. *Concurrent Jurisdiction and the Obligation of the State Courts*

Plaintiffs determine where to file their cases, choosing from among courts that have jurisdiction. Those who assert claims based on federally guaranteed rights will meet the requirements of federal question jurisdiction,[25] but other doctrines, premised on notions of federalism, may cut off the option of filing in federal court. On the other hand, the state courts will nearly always be available; although it is within Congress's power to make federal jurisdiction exclusive and thereby to cut off the choice of state courts, Congress has not explicitly placed claims asserting federal rights within the exclusive jurisdiction of the federal courts.[26] In the absence of a clear message from Congress cutting off the state courts, the Supreme Court could have interpreted federal jurisdiction-granting statutes as implying the exclusion of state courts. It could have decided to read grants of federal jurisdiction as exclusive unless they specified concurrent state court jurisdiction, but it chose instead to establish a strong presumption favoring concurrent jurisdiction.[27] Less drastically, it might have permitted a state that declared itself hostile to federal rights to close its own courts to federal claims, but it chose instead to force the state courts—against an asserted state policy—to enforce federal law.[28] Imposing this obligation, the Court emphasized

25. 28 U.S.C. § 1331 (1988). It should be noted that statutes govern the reach of federal jurisdiction, but the courts carry out a fairly extensive role both in interpreting and applying the statutes and in creating free-standing doctrines that limit jurisdiction. This Article concentrates entirely on the judicial interpretations and doctrines. For a discussion of the basis of this exercise of judicial power, see Althouse, *supra* note 9; Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U.L. REV. 1 (1990).

26. *See* Claflin v. Houseman, 93 U.S. 130 (1876).

27. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455 (1990) (describing the "deeply rooted presumption"); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479 (1981) (stating "[i]t is black letter law that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action"); *Claflin* (explaining that "[w]here the jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it"). Exclusive federal jurisdiction is rarely found, but when it is, it is either because Congress has made it clear or because the Court finds "a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore*, 453 U.S. at 478.

28. Testa v. Katt, 330 U.S. 386 (1947).

that federal policy was state policy; the state, as a part of the union, cannot maintain a contrary policy as though it were an independent sovereign.[29]

Both the decision to presume concurrent jurisdiction and the decision to require that state courts adjudicate federal question cases reflect a vision of the state courts performing a task parallel to that of the federal courts. Within this vision, the state courts provide a useful and plentiful resource for the enforcement of federal law. There is no bowing to state autonomy, no deference to countervailing state interests, and no concern about intruding on the states. There is no intimation that it might be better to allow the state courts to decline the job of enforcing federal law, even when they have manifested an active hostility to it. The only deference is to the capacity of the state courts to contribute to the enterprise of enforcing federal law.[30] And whenever the Court determines that federal interests are incompatible with state court jurisdiction, it casts that deference aside and finds federal jurisdiction exclusive.[31]

Concurrent jurisdiction and the obligation to enforce federal law in no way disadvantage the rights claimant plaintiff. Although the state courts cannot decline the task, the plaintiff still can choose between state and federal court.[32] Some jurisdictional doctrine, however, does limit the ability of the rights claimant plaintiff to select a forum; most notably doctrine created under the Eleventh Amendment[33] and some of the judge-made abstention doctrines have this effect.[34] But, as this Article later shows, there are very few actual restrictions on the choice of a plaintiff who is taking the first step in initiating litigation with the state. When there is no threat of interference with the functioning of the state courts, the Court has almost entirely equated the enforcement of federal law with federal court access.[35] The limitations that do exist, for the most part, seem designed to use the state courts to accomplish a task deemed undesirable to the federal courts, rather than to demonstrate respect for the autonomy of the states.[36]

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29. *Id.* at 390-91.

30. *See, e.g., Gulf Offshore*, 453 U.S. at 478 n.4 (stating that "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights").

31. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455 (1990).

32. If the plaintiff chooses state court, however, the defendant may remove. 28 U.S.C. § 1441 (1988).

33. *See infra* subpart III(C).

34. *See infra* subpart III(D).

35. *Cf.* Chemerinsky, *supra* note 14 (arguing for jurisdiction based on the forum choice of the rights claimant in all or most contexts).

36. *See, e.g., infra* notes 67-69, 107-10 and accompanying text.

B. *The Interpretation of Section 1983 and Its Effect on Forum Allocation*

Section 1983 grants a federal cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[37] Because Section 1983 serves as a vehicle for the enforcement of federal constitutional rights against state actors, it plays an important role in the allocation of cases between state and federal courts. Even though it is not technically a jurisdictional statute,[38] interpretations of Section 1983 frequently determine whether a rights claimant will be able to proceed in federal court or will be forced into state court. Section 1983, therefore, has a powerful jurisdictional effect.

As interpreted in *Monroe v. Pape*[39] Section 1983 does not require a plaintiff to seek relief under state law in state court before filing a case under the federal law in federal court. Thus, Section 1983 plaintiffs do not need to exhaust state remedies. The majority of the Court interpreted the "under color of" state law language of the statute to permit suit against any state officials regardless of whether the state authorized their actions.[40] Thus, even though state law, like federal law, may forbid the deprivation that is the subject of a lawsuit, a plaintiff can sue under Section 1983 and, consequently, invoke federal court jurisdiction.

The Court rejected an alternate interpretation, advocated by Justice Frankfurter in dissent, that would have been far more deferential to the state courts. According to Justice Frankfurter, an action by a state official cannot be considered "under color of" state law unless the state authorized it.[41] Since state law would impose liability on an official who committed such an unauthorized action, the victim could seek redress in state court. Under Justice Frankfurter's interpretation the availability of an adequate state law remedy in state court would preclude federal jurisdiction.

The text of the statute lends particular support to Justice Frank-

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37. 42 U.S.C. § 1983 (1988).

38. It provides a cause of action for deprivations of rights, but it does not itself grant any rights. Rights found elsewhere, in federal statutes and in the Federal Constitution, must be plugged into § 1983. Section 1983 was originally enacted as the Civil Rights Act of 1871, which also included a jurisdictional grant. That grant is now codified as 28 U.S.C. § 1343 (1988). Section 1983 claims also fall within general federal question jurisdiction. 28 U.S.C. § 1331 (1988).

39. 365 U.S. 167 (1961).

40. *Monroe* 365 U.S. at 172 (citing Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913), for the proposition that the Fourteenth Amendment extends this far and then going on to find that Congress intended equal breadth for § 1983).

41. *Monroe*, 365 U.S. at 246 (Frankfurter, J., dissenting).

furter's position. Legislative history, however, provided the grist for the argument on both sides. The majority noted the Reconstruction Congress's profound lack of confidence in the state courts and its desire to provide a vigorous remedy despite intrusiveness upon the states.[42] The majority then concluded that the federal remedy is supplementary to any state remedy and that the existence of a state law remedy had no effect on the availability of the federal remedy. Justice Frankfurter, on the other hand, saw the southern Black Codes as the primary target of the legislation, thus indicating that Section 1983 was intended to cover only authorized state acts. If state law barred the challenged state act, then the plaintiff could not satisfy Section 1983 unless she could show that the state law remedy was a mere paper right not available in practice.

The *Monroe* majority discussed the role of federal courts in the enforcement of federal rights as if the state courts had no positive role to play. It apparently accepted Congress's portrayal of the post-Civil War Era southern courts—perhaps because it had a similar opinion of the southern courts in 1961, the year of the *Monroe* decision. The majority's rhetoric would seem to support exclusive federal jurisdiction under Section 1983[43] were it not for the strong general presumption of concurrent jurisdiction.[44] The majority, though speaking only of the predominance of the federal courts, in practical effect embraced a "plaintiff's choice" approach: the decision to take the case to federal court and to bypass the state court rests with the plaintiff.

Justice Frankfurter's restriction of plaintiffs to state court when state law offered a remedy revealed a less negative view of the state courts. Nevertheless, he did not mention taking advantage of the state courts to apply federal law. He took for granted that federal courts would be available if federal law provided the only remedy, even though state courts also may be capable of handling federal law.[45] Justice Frankfurter's vision restricted the plaintiff to state court when state law remedies were available, avoiding reliance on federal law altogether. His concern, echoed in later Supreme Court cases,[46] was that too many rou-

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42. *See Monroe*, 365 U.S. at 172-87; *see also* Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987).

43. *Monroe*, 365 U.S. at 172-83.

44. *See supra* notes 25-29 and accompanying text.

45. *See also Monroe*, 365 U.S. at 194 (Harlan, J., concurring) (stating that "[i]f the state remedy was considered adequate when the official's unconstitutional act was unauthorized, why should it not be thought equally adequate when the unconstitutional act was authorized?").

46. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (restricting the scope of the right to due process). Justice Frankfurter's position apparently has strong appeal with the current Supreme Court: numerous recent Supreme Court cases (*e.g.*, City of Saint Louis v. Praprotnik, 485 U.S. 112 (1988); Harlow v. Fitzgerald, 457 U.S. 800 (1982); *Parratt*, 451 U.S. 527; Younger v. Harris, 401

tine tort actions would be transformed into federal cases.

Justice Frankfurter's analysis provided a mechanism for sifting through cases and finding the ones deserving federal access. One could justify his position, in interest analysis terms, by noting that it would channel many cases to the more abundant state courts and preserve the scarcer resource, the federal courts, for the cases in which they were most needed. This would spare the federal courts the drudgery of routine and uninspiring work. Justice Frankfurter's analysis simultaneously would put a burden on the plaintiff to establish that the state remedy was not practically available. The plaintiff would have to show that the conduct she complains of is "engaged in 'permanently and as a rule,' or 'systematically.' "[47] Since this burden will be difficult to meet,[48] Justice Frankfurter's approach would lessen the enforcement of federal rights, relegating some plaintiffs to state court where they will find the purported state law right illusory. Some of the cases channelled to state court, therefore, would not have been mere routine drudgery. Perhaps the federal courts should shoulder a greater burden of insignificant cases to ensure that they will also be available to hear the important cases that assert federal rights, where state law rights are in fact unavailable, although not provably so.

Another value of Justice Frankfurter's approach, quite apart from its potential to channel unimportant cases away from the federal courts, is its encouragement of the development of state law remedies for rights claimants. Because states may perceive an interest in confining claims against state actors to their own courts, Justice Frankfurter's approach could provide an incentive to the states to create or strengthen their alternative remedies. It also gives the state courts a chance to demonstrate that they are serious about remedying injuries caused by state actors. The majority's "plaintiff's choice" model, however, also gives the states some incentives: offering superior state law remedies or doing a better job of enforcing federal rights would influence plaintiffs to choose state courts.[49]

A more drastic form of deference, not advocated by any of the Justices in *Monroe*, would force the rights claimant to litigate federal claims in state court before coming to federal court. The rights claimant would have to file in state court regardless of whether state law offered any remedy, and the state court would exercise jurisdiction over the

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U.S. 37 (1971)) reflect a low-visibility shift to Justice Frankfurter's vision of § 1983.

47. *Monroe*, 365 U.S. at 236.

48. The plaintiff likely will find it difficult to provide evidence about events other than the one that occurred to her and to establish a pattern of behavior amounting to a "custom or usage."

49. *See* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

federal claims.[50] The focus shifts here to state courts rather than state law. If the state courts were adequate to handle the federal claim, rights claimants would be required to use them, with federal courts reserved as a fallback when the state courts fail. *This is precisely the approach the Court takes in litigation initiated by the state.* If state-initiated litigation were pending in state court, the *Younger* abstention doctrine would bar federal court access unless the state court were actually inadequate.[51] If the state court proceeding resulted in a criminal conviction and state custody, the rights claimant would need to use federal habeas corpus jurisdiction, which includes an express exhaustion requirement.[52]

Why, then, did the *Monroe* Court allow direct and immediate access to federal court? One answer is that *Monroe* was decided in the midst of the Warren Era when concern about enforcing rights was high and deference to states was low. Yet this answer does not seem to explain Justice Frankfurter's disinclination to require the litigation of federal claims in state courts. Another, perhaps better, answer is that when the rights claimant is the party initiating litigation with the state, the interests at stake are different than when the state initiated the litigation and the state court's jurisdiction has already been invoked. Although considerations about relative resources remain significant, it makes sense to allow the plaintiff initiating the litigation to choose the forum. But when the state court has already become involved in the litigation, it is harder to countenance institution of a second suit at the behest of the rights claimant, the state court defendant. This is true not because two cases are inefficient or because a second case would offend the state judge, but rather because requiring states to field federal questions as they arise will benefit the enforcement of federal rights in the long run. It, therefore, is not surprising that the following pattern forms: When the rights claimant initiates the litigation, she will almost always have a choice of forum; when the rights claimant attempts to break her federal claim away from a state court proceeding already in progress, she will almost never succeed.

C. The Eleventh Amendment As a Forum Allocation Device

1. The Eleventh Amendment in Federal Question Cases

The Eleventh Amendment is an anomaly in the context of federal court access for rights claimant plaintiffs. Even when the rights claimant plaintiff initiates the litigation, the Eleventh Amendment may bar

50. For a discussion of concurrent jurisdiction, *see supra* notes 25-29 and accompanying text.
51. *See infra* text accompanying notes 181-216.
52. *See* 28 U.S.C. § 2254 (1988).

suit against the state or its officials. This subpart evaluates the notoriously complex doctrine that has evolved under the Eleventh Amendment.

The majority of the Court adheres to the long-standing interpretation of the Eleventh Amendment[53] that extends its application to all cases against the state, even when jurisdiction rests on the existence of a federal question and even when the plaintiff is a citizen of the state she is suing.[54] In recent years, however, a minority of the Court has argued vociferously that the Amendment only bars suits against the states when federal jurisdiction is premised solely on the existence of state-citizen diversity.[55] According to this position[56] a plaintiff with a federal claim against the state would never face an Eleventh Amendment obstacle to suit in federal court. This argument is unlikely to win enough votes to succeed in the near future. The fervor with which the minority has written about it, however, indicates the strength of the assumption that a federal rights claimant should have access to federal court.

This assumption finds support even in Eleventh Amendment majority opinions rejecting diversity interpretations. Thus, the majority has tailored doctrine that minimizes the forum-closing effect of the traditional Eleventh Amendment interpretation. First, by naming a state official as the defendant and seeking only prospective relief, a

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

54. *See, e.g.*, Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

55. According to the four-Justice minority (consisting of Justices Brennan, Marshall, Stevens, and Blackmun), the Eleventh Amendment was intended to overturn only Chisholm v. Georgia, 2 U.S. 419 (1793), which allowed a suit against the state premised on the existence of citizen-state diversity jurisdiction. The minority believes that the Eleventh Amendment, therefore, should have no effect on the other headings of jurisdiction permitted by Article III, such as federal question jurisdiction. The most comprehensive exposition of this position is found in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting). Many commentators take the same or similar positions. *See, e.g.*, Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

56. Another proposal for limiting the reach of the Eleventh Amendment emphasizes the "Citizens of another State" textual language. It is argned that the Eleventh Amendment bars all suits brought by a noncitizen of a state, without regard to whether the suit is based on state or federal law. *See* Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989). The Court has not supported this proposal. It was rejected forcibly by four members of the Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (Scalia, J., concurring in part and dissenting in part). If it were to prevail, however, in-state plaintiffs with federal claims still would have Eleventh Amendment obstacles to suit in federal court.

plaintiff may gain access to federal court.[57] *Ex Parte Young* creates the legal fiction that an agent of the state is not the state if she acts in violation of federal law.[58] This Eleventh Amendment doctrine represents a rights-oriented interest analysis: it seems to rest on the conclusion that ongoing violations of federal law by the state are so important that federal court jurisdiction must exist.[59]

Second, Eleventh Amendment limitations also fall whenever Congress enacts a federal statute that explicitly permits suits against the state.[60] This congressional abrogation doctrine also reflects concern for individual rights. In *Fitzpatrick v. Bitzer*[61] the Supreme Court unanimously supported Congress's power, under the Fourteenth Amendment, to make the state suable in federal court. But the Court is split about Congress's abrogation power under other constitutional grants, such as the commerce clause. In *Pennsylvania v. Union Gas Company*[62] five members of the Court found broad abrogation power.[63] Four Justices dissented, but they reaffirmed the special status of the Fourteenth Amendment.

While one could debate the tensions and inconsistencies of *Union Gas* at great length,[64] the key point is the centrality of individual rights in jurisdictional analysis. Thus, *Fitzpatrick* is more important than *Union Gas*, for the rights of individuals against the state usually flow from the Fourteenth Amendment. The willingness of the entire Court, including those Justices who preserve the continuing vitality of the Eleventh Amendment, to affirm abrogation power under the Fourteenth Amendment shows an appreciation for the way individual rights should shape jurisdiction.[65]

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57. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

58. *Ex Parte* Young, 209 U.S. 123, 159-60 (1908). This is true even though her acts are "state action" capable of violating the Fourteenth Amendment. *Id.*

59. Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989).

60. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

61. 427 U.S. 445 (1976).

62. 491 U.S. 1 (1989).

63. *Id.* at 13-23. Four of those five Justices were the same four who interpret the Eleventh Amendment to cover only diversity cases. Note that Justices Brennan and Marshall were among the four. With their replacement, it is now conceivable that the *Union Gas* dissenters could gain a fifth vote and choose to overrule. Indeed, language in the dissent indicates an unusually strong intent to overcome the strictures of stare decisis. *See id.* at 45 (Scalia, J., dissenting) (pronouncing the majority's holding "an unstable victory[,] . . . too much at war with itself to endure"). Only Justice White has embraced both the traditional interpretation of the Eleventh Amendment and broad abrogation power.

64. *See, e.g.*, Althouse, *supra* note 59, at 1158-63.

65. The other Reconstruction Era amendments function in the same way, but the logic of *Fitzpatrick* and the minority's limiting approach to abrogation in *Union Gas* strongly indicate that the minority would recognize power to abrogate under the Thirteenth and Fifteenth Amendments.

Under current doctrine, the Eleventh Amendment bars only one category of claims asserting federal rights[66] against the state: claims for retrospective relief not based on statutes that explicitly subject the states to suit in federal court. Is this one island of immunity justified? One could argue that burdening the states with accumulated liability for past actions makes them reluctant to rectify future violations of federal law. In many instances, it may not be clear whether a particular activity violates federal law or not, and the threat of retrospective relief might inhibit state actors from performing their jobs vigorously, thereby deterring them from taking actions that a court later would uphold. Thus, overlooking past harms and concentrating on avoiding future violations might enhance federal law enforcement.

But even if future enforcement is far more important than compensation for past harms, it is difficult to accept the bar against retrospective relief. Past damages affect ongoing violations; concern about incurring liability can deter violations of federal law.[67] Moreover, official immunity doctrine of the kind that applies to individual state actors cures the subtle problem of overdeterrence more effectively and precisely than a bar on retroactive relief. In most instances, when state actors are sued personally for past damages under Section 1983, they can claim only qualified immunity, available only when the federal law involved was unclear at the time the action was taken.[68] The prevailing Eleventh Amendment doctrine extends a broader immunity, shielding actions that are clearly illegal, thus moving beyond merely avoiding overdeterrence.

Concerns about resource allocation might explain the denial of retrospective relief in federal court in a way that is still consistent with placing individual rights at the center of jurisdictional analysis. Frequently, federal judicial doctrine appears to be designed to free the federal courts from the most routine tasks. Under current Eleventh Amendment doctrine, the federal courts address the overriding legal question of whether the state has violated the law, and they also pro-

66. State claims are a different matter, discussed in the following section. *See infra* Part IV.

67. *See* Employees of the Dep't of Pub. Health and Welfare, Missouri v. Department of Pub. Health and Welfare, Missouri, 411 U.S. 279, 282-98 (1973) (Marshall, J., concurring).

68. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). There are serious problems, however, in attempting to develop an official immunity doctrine applicable to the state. The Supreme Court tends to recognize "official immunity" only if that particular kind of immunity existed in the common law at the time § 1983 was enacted. Thus, in Owen v. City of Independence, 445 U.S. 622 (1980), the Court denied cities official immunity even though there were some types of immunity available to the city in the common law. Pursuant to the Court's present mode of analysis, state sovereign immunity, then, would seem to bar any recognition of a lesser form of immunity, like official immunity, since it would not have existed at common law. For a critique of the Court's mode of analysis, see Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989).

vide the relief that is most pressing: stopping the violation. State courts then can carry out the largely administrative effort of calculating the specific dollar amounts for each individual harmed by the state's particular past violations.[69] Use of the more abundant resource—state courts—for certain routine tasks may preserve the scarcer resource—federal courts—for the more difficult, challenging work. Taking advantage of the plentiful state judicial resource through this division of labor could improve the overall enforcement of rights. Moreover, the risk that a state court might not perform as well as a federal court might seem more worth taking with respect to past relief. Past relief is less urgent; the harm already has occurred and the potential for delay pending appellate review[70] is less troublesome than when there is an ongoing violation and a consequent need for immediate relief.

If this is the explanation for the retroactive relief exception, it does not reflect an assumption of parity.[71] Rather, it suggests that the federal courts are superior; state courts should be exploited to do the dirty work. Federal judges can also avoid this kind of drudgery, however, by utilizing the federal magistrates.[72] Since using federal magistrates is more convenient than using state judges and is subject to federal judicial control, this justification for the retroactive relief exception ultimately fails.

In addition, this justification loses force when only the claim for retrospective relief remains alive. If the state has stopped the behavior that allegedly violated federal law and prospective relief is no longer appropriate,[73] the court adjudicating the claim for past relief also will need to perform the task of determining whether the state's actions violated federal law, hardly a routine task. In *Green v. Mansour*,[74] however, the Court declined to characterize the declaration of federal law, unconnected to any other injunctive relief, as itself a form of prospective relief permissible under the Eleventh Amendment. With no declaration of law from the federal court, the state court that adjudicates the

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69. *But see infra* text accompanying notes 76-80 (discussing Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)).

70. Even those who disagree about the relative quality of federal and state trial courts agree that state appellate courts approach the federal courts in quality. *See, e.g.*, Neuborne, *supra* note 15, at 1118 n.51. Moreover, there is at least the possibility of Supreme Court review, although its extreme scarcity makes it a safeguard only against the most egregious abuse by the state courts. *Cf.* Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988) (suggesting that federal habeas court be viewed as essentially appellate given the low availability of Supreme Court review of state court criminal proceedings).

71. For a discussion of the assumption of parity, see *supra* text accompanying notes 8-24.

72. *See* 28 U.S.C. §§ 631-639 (1988).

73. The state cannot make a claim for prospective relief moot by mere "voluntary cessation" of the complained-of practice. *See* Green v. Mansour, 474 U.S. 64 (1985).

74. 474 U.S. 64 (1985).

claim for past relief also must decide the question of law.[75] This particular jurisdictional limitation nevertheless seems to be nothing more than a bow to the state's interest in being left alone to pursue its own policies, even if those policies are contrary to federal law.

As a matter of substantive law, the availability of retrospective relief against the state was abruptly limited in *Will v. Michigan Department of State Police*.[76] Under *Will* the state and state officials named as defendants to reach the assets of the state are not "persons" within the meaning of Section 1983. Before that case Section 1983 provided the cause of action in state court for retrospective relief based on constitutional provisions and some statutes. For example, in *Edelman v. Jordan*,[77] the case in which the Supreme Court announced the rule that the *Ex Parte Young* fiction does not extend to claims for retrospective relief, the claimants against the state subsequently used Section 1983 to receive retrospective relief in state court.[78] Under *Will*, which involved a claim for retrospective relief brought in state court, it now appears that those Section 1983 claims would be subject to a motion to dismiss.[79] This constricted interpretation of Section 1983 greatly weakens the assertion that excluding retrospective relief claims from federal court is designed to relieve the federal courts of tedious administrative work and to foist that work onto the state courts. Even if the Court shifted Eleventh Amendment doctrine to allow retroactive relief claims, as long as Section 1983 is the vehicle of relief, *Will* would retain the same concession to state interests.[80] The inevitable conclusion, therefore, is that this last vestige of Eleventh Amendment vitality is purely a

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75. This kind of case is exceptional, particularly since mere "voluntary cessation" of the practice challenged in the lawsuit will not render the case moot. In addition, the Supreme Court eventually can correct errors of law, and the delay before it does is less important in retroactive relief cases than in prospective relief cases. For a discussion of Supreme Court review, see *infra* subpart IV(B).

76. 491 U.S. 58 (1989).

77. 415 U.S. 651 (1974).

78. *See* Lichtenstein, *Retroactive Relief in the Federal Courts Since* Edelman v. Jordan*: A Trip Through the Twilight Zone*, 32 CASE W. RES. L. REV. 364, 375 n.73 (1982) (noting that the federal claimants ultimately did receive retrospective relief in state court).

79. It remains possible to use rights of action, if there are any, that are present in statutes other than § 1983. It is also possible to argue that there are rights of action implied by the Constitution alone. *Cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (finding a private right of action in a constitutional provision when § 1983 is not available because defendants were federal, not state, officials).

80. If plaintiffs sue under a federal statute that provides a right of action for damages, they will suffer no setback from *Will*. In statutory cases there is, moreover, the possibility that Congress will have abrogated Eleventh Amendment immunity. Plaintiffs claiming violations of constitutional rights face the greater problem, for they have had to rely on § 1983 for their cause of action for damages. It is possible, however, that the constitutional provision they depend on gives an implied right of action for damages. *See supra* note 79.

concession to the state's autonomy interest. The double doctrinal protection given retroactive relief claims under *Will* and the Eleventh Amendment manifests the extreme, fetishistic importance state autonomy sometimes can have.

The application of the Eleventh Amendment to federal question cases, complex and unaesthetic though it is, for the most part, does provide for the enforcement of individual rights. With the retroactive relief exception, the Court has carved out an area that probably reflects nothing more than respect for state autonomy—but it is a relatively small area. There are at least two ways to restructure this doctrine to remove any Eleventh Amendment impediment to the enforcement of federal rights in federal court. First, it is possible to distinguish between the statutory federal questions, susceptible to the abrogation doctrine, and constitutional cases, which not only fall outside of the abrogation doctrine but also present the strongest claim for judicial activism.[81] Second, as a minority of the Court has argued, along with numerous commentators, the Eleventh Amendment could be interpreted not to refer to federal question cases.[82]

While both of these doctrinal variations give greater protection to federal rights than the majority's approach, the majority at least has felt compelled to find ways to protect federal jurisdiction when it is most needed. It is easy to conceive of a much more rigid approach to the Eleventh Amendment, not influenced by the fundamental concern for individual rights: strict adherence to the traditional interpretation, without the *Ex Parte Young* fiction and without the abrogation doctrine. That approach certainly would cure the much-criticized complexity of the Eleventh Amendment, but it would make state interest in autonomy the central organizing principle. The Court's complete lack of interest in this broad interpretation of the Amendment demonstrates the distinct pull of individual rights in jurisdictional analysis.

2. The Eleventh Amendment and Pendent State Law Claims

When rights claimant plaintiffs rely on federal claims, they often can evade Eleventh Amendment immunity. According to *Ex Parte Young*,[83] Eleventh Amendment immunity does not extend to a person who acts for the state but acts unconstitutionally because the state is powerless to authorize the person to act in violation of the Constitution. But, according to *Pennhurst State School & Hospital v. Halderman*,[84]

81. Althouse, *supra* note 59, at 1156-68.
82. *See supra* notes 55-56 and accompanying text.
83. 209 U.S. 123 (1908).
84. 465 U.S. 89 (1984).

rights claimant plaintiffs cannot take advantage of the *Ex Parte Young* fiction to add pendent state law claims. The Eleventh Amendment presents a flat bar. Naming only the state official and asking only for prospective relief will no longer avail.[85] *Pennhurst* reached this conclusion by restricting *Young* to cases invested with a federal interest. It then cursorily proclaimed that any federal interest disappears when the claim is based on state law.[86] Thus, the Court wrote, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."[87]

The Court's statement demands scrutiny. State and federal courts must apply each other's law with tremendous frequency. If a court has jurisdiction, it must apply the appropriate law and cannot avoid interpreting it and binding the parties to the result. If a federal court has jurisdiction in a case asserting state law claims against state actors, the federal court must "instruct state officials on how to conform their conduct to state law." Similarly, when state courts handle federal law, as jurisdictional doctrines and litigant choice ensure they will, they must interpret it and bind the parties.[88] Within a single nation, there is no workable notion of separate sovereigns. At most, sovereignty[89] should refer to a belief that the states and the federal government usually will function better by operating separately and not interfering with each other's work.[90]

This pragmatic approach to allocating the tasks of government differs from the abstraction of sovereignty, which suggests that intermin-

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85. 209 U.S. at 159-60.

86. *Pennhurst*, at 106. The dissenting Justices in *Pennhurst* attempted to extend this logic to mean that whenever a state agent acts *ultra vires* that agent cannot acquire the state's immunity. *Id.* at 140 (Stevens, J., dissenting).

87. 465 U.S. at 106.

88. But note that in Tarble's Case, 80 U.S. (13 Wall.) 397 (1871), the Court denied state courts the power to bind federal officials through habeas corpus. It is not clear whether state courts can issue injunctions against federal officials. The Court in *Tarble's Case* considered it an infringement of federal sovereignty to permit the state courts to interfere with federal officials in this way. Since the state court cannot aspire to parity if it is deprived of the power to give relief, a rights-centered analysis would find *Tarble's Case* wrong. *See also*, Amar, *supra* note 49, at 1509-10 (criticizing *Tarble's Case*). It should be noted that there is now federal statutory law to prevent the issue from arising: under 28 U.S.C. § 1442a, a federal official defendant can remove a case to state court.

89. Note that the five members of the Court that uphold the traditional view that the Eleventh Amendment applies to federal question as well as diversity cases refer to the immunity as "sovereign immunity," while the four members of the Court that would apply the Amendment only to diversity cases call it "state immunity." *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

90. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (referring solely to the separate functioning of the states).

gling the two systems produces some intrinsic offense to be avoided even when there is no practical reason to refrain from intermingling. The proper work of jurisdictional doctrine is not to make a fetish out of avoiding interminghing but to determine whether or not separate functioning enhances the expeditious and reliable enforcement and development of rights. *Pennhurst* stands or falls not on state sovereignty principles but rather on whether the judicial work of enforcing individual rights is best carried out by allocating state law cases to the state courts.

The *Pennhurst* Court asked a similar question: Was there a federal interest in retaining federal jurisdiction over the pendent state claim? By framing the question in federal interest terms, rather than in terms of individual rights, the Court simply wrote off the state law claim. There is, of course, a federal interest in the federal claims brought in federal court.[91] But permitting the litigation of pendent state claims would facilitate the litigation of the federal claims in federal court and remove pressure to switch to state court, where the plaintiff could bring all claims. To require the plaintiff to bifurcate the litigation to bring the federal claim in federal court and still pursue the state claim burdens the litigation of the federal claim in federal court. Dangers of res judicata or collateral estoppel also burden the federal claim. So federal interests do not "disappear[]," [92] as the majority stated, simply because the claim is based on state law. The federal claims implicate the state claims and, therefore, the federal interest in the federal claims gives rise to an indirect federal interest in the state claims.

On a more subtle level, there may seem to be a direct federal interest in the state claim. In *Pennhurst* the state had created rights of the same sort, in pursuit of the same goals embodied in the Federal Constitution and federal statutes.[93] Although the Pennsylvania law came from a different power source, it essentially stands in for federal rights. If the federal government cares about maximum enforcement of those rights, it may have an interest in encouraging state law alternatives. States can fine-tune their law to local conditions and local preferences, and can experiment on a small scale, in classic federalism style,[94] giving state law some special qualities that could not be duplicated by federal law. Moreover, Congress might deliberately constrict remedies provided in its statutes out of deference for the states' financial limitations or antic-

91. *See* Althouse, *supra* note 24, at 1488.

92. *Pennhurst*, 465 U.S. at 106.

93. In *Pennhurst* the federal, and state, goal was improving the lot of the mentally handicapped.

94. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

ipating their resistance.[95] The federal government, therefore, may have federal interests that have not been written into federal law. There is perhaps a federal interest in encouraging the state to engage in lawmaking that mirrors federal law, extends broader remedies, or embodies somewhat different conceptions of basic individual rights also recognized by federal law.

In this light, however, the significance of federal interests begins to pale. The reason for encouraging the states in this context is not that they somehow accomplished something federal, but rather, it is that they are undertaking to advance individual rights against government. Of course, the state cannot create rights that conflict with federal law. Nor can it confine rights claimants to state court just by creating a right. All *Pennhurst* does is restrict the plaintiffs to state court if they decide they want to pursue the state-created right. Plaintiffs may stay in federal court and rely only on their federal rights if they want. The point is that if a state creates rights directed against itself, it has the power[96] to confine the litigation of those rights to state court.[97]

Within an individual rights analysis, as opposed to the more strained federal interest analysis, the importance of the state's law becomes clearer. Jurisdictional doctrine should not simply promote the interests that can qualify for the label "federal." The important goal is to preserve the role of the courts, both state and federal, in the enforcement of individual rights.

D. Pullman *Abstention and the Rights Claimant's Forum Choice*

The term "abstention" applies to a variety of judge-made doctrines that enable federal courts to decline to exercise jurisdiction they admittedly have. Thus, along with the Eleventh Amendment, abstention doctrine mars an otherwise clear picture of choice of forum for the rights claimant who initiates litigation with the state. The Court, however, carefully restricts the use of abstention, frequently calling it "the exception and not the rule."[98] Through this restriction—though not through

95. The requirement to care for the mentally handicapped in the least restrictive environment, at issue in *Pennhurst*, provides a good example of the kind of remedy that Congress might not embody in federal law, but that a state may choose to impose on itself, and that one still might perceive as serving the federal interest expressed in the federal law.

96. Note that if the state wanted the plaintiff to have the option to go to federal court, it could consent to suit.

97. A state legislature deciding whether to create a new right against itself may fear that federal courts will give the language of the statute too broad a sweep or enforce it with unintended remedies. This risk is particularly troublesome since the state courts never have the opportunity to review interpretations of state law made by federal courts and since plaintiffs may routinely choose federal courts to adjudicate these claims.

98. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

its creation of abstention—the Court acknowledges the importance of bringing all sorts of federal claims, including diversity claims, in federal court.[99] It deviates from that basic commitment to federal jurisdiction only in narrowly circumscribed situations, which, at least to some extent, correspond with federal interests. If abstention doctrine were only about deferring to states' autonomy interests, abstention would be far more common.

Of the abstention doctrines, only the *Pullman* doctrine and the *Younger* doctrine[100] have significant potential to limit the forum choice of a federal rights claimant. The *Younger* doctrine[101] is the only frequently used abstention doctrine,[102] but it basically only limits suit in federal court when the state has initiated the litigation with the rights claimant and has already selected the state court forum.[103] It is the *Pullman* doctrine that applies even when the rights claimant has initiated suit in federal court. The other abstention doctrines—*Thibodaux*,[104] *Burford*,[105] and *Colorado River*[106]—are mentioned far more often than used. Even when used, these doctrines will rarely, if ever, interfere with an initial federal forum choice by a rights claimant. *Thibodaux*[107] and *Burford*[108] abstentions arise in diversity cases, not in

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99. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943).

100. *See* Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988).

101. *See* Younger v. Harris, 401 U.S. 37 (1971).

102. *Younger* is properly considered, therefore, in the next section of the Article, which deals with jurisdictional doctrines applicable to cases in which the state has initiated the litigation with the rights claimant. That section explains that jurisdictional restrictions are far more common when the state has taken the first step. *Younger* occasionally can apply to litigation initiated by a rights claimant plaintiff. A plaintiff may anticipate a criminal prosecution and attempt to block it with a federal lawsuit. *See* Steffel v. Thompson, 415 U.S. 452 (1974). If the plaintiff in the federal case fails to secure preliminary relief, see Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the state may then initiate a criminal proceeding. As long as the state begins the case in state court "before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." Hicks v. Miranda, 422 U.S. 332, 349 (1975). On the appropriateness of *Hicks*, see *infra* subpart IV(D)(2).

103. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

104. *See* Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959).

105. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943).

106. *See* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

107. In *Thibodaux*, 360 U.S. 25 (1959), which began as a state court case initiated by the city and was removed to federal court based on diversity jurisdiction, the Court created an abstention doctrine to refer a question of state law that was "intimately involved with the sovereign prerogative" to the state court for resolution. *Id.* at 28. This federalism-based doctrine does not implicate the central concern for enforcing federal rights—it does not even involve the enforcement of federal law. Indeed, it makes no sense to put any diversity case into the scarcer and, here, less expert federal resource. *See* Report of the Federal Courts Study Committee 38-43 (1990) (proposing to abolish diversity jurisdiction). Perhaps what is surprising is not that the Court required abstention in *Thibodaux* but that the Court so dutifully has limited it to instances when there is both a need to take advantage of the state court's expertise in interpreting state law and an issue of state law

cases initiated by federal rights claimants. *Colorado River* abstention occurs only to avoid duplicating a procedure already under way in state court and only under "exceptional circumstances," such as those in *Colorado River* itself, in which there was a federal statutory policy against piecemeal litigation (and, hence, a federal interest in using the state court).[109]

It is the *Pullman* doctrine that can force a rights claimant plaintiff who has properly invoked the federal court's federal question jurisdic-

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particularly important to the state. *Compare* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (holding that abstention was proper because the case involved a water rights issue crucial to the state) *with* Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959) (holding abstention improper in an eminent domain diversity case when state law is clear). *But see* Lehman Bros. v. Schein, 416 U.S. 386, 390 (1974) (expressing a greater willingness to use state courts to clarify state law when the state has a certification procedure). By searching for an important state interest in the state law, the Court does exhibit an autenomy view of federalism, contrary to the analysis proposed in this Article. But the Court's imposition of some limitation on diversity abstention is understandable given the statutory grant of diversity jurisdiction. Since Congress has not yet motivated itself to abolish diversity jurisdiction, it is not surprising that the Court restrains itself from creating abstention doctrines capable of entirely eliminating the category of jurisdiction. The Court does exercise a certain amount of power to fill in the gaps and fine-tune federal jurisdictional law, but the basic jurisdictional decisionmaking rests with Congress. *See* Althouse, *supra* note 9, at 1046-50. A doctrine requiring abstention in diversity cases whenever the state law was unclear would probably strike most judges as too much of an abdication of a duty imposed by statute.

108. *Burford*, 319 U.S. 315 (1943), permits abstention to allow the state to apply its own law when that law is unclear and when the state has set up a complex administrative system. *Id.* at 332-34. In *Burford* itself, the State of Texas had undertaken to regnlate the drilling of oil within an oil field. The interdependence of the many wells within a single field created a special need for coherent administration. The *Burford* doctrine works to create a necessary exclusivity in the state procedure, which the state lacks power to dictate, since it cannot control the jurisdiction of the federal courts. *Cf. supra* text accompanying notes 96-97 (noting how *Pennhurst* enables the state to claim exclusive state court jurisdiction over questions of state law asserted against state acters). The usefuhiess of the state agency and its great superiority over federal court jurisdiction clearly support an abstention doctrine extricating the federal courts from a particularly burdensome type of diversity case. Quite appropriately, the Court has rejected attempts to invoke *Burford* in cases asserting federal rights claims. *See* New Orleans Public Service, Inc. v. City of New Orleans, 491 U.S. 350 (1989); Zablocki v. Redhail, 434 U.S. 374 (1978) (challenge to state statute barring marriage by persons delinquent in paying child support); McNeese v. Board of Educ., 373 U.S. 668 (1963) (challenge to segregated schools); *cf.* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 294 (2d ed. 1990) (noting that the *Burford* abstention is not harmful to federal interests as long as no significant question of federal law is involved, but questioning the propriety of abstention without statutory authorization). Like *Thibodaux*, *Burford* also suggests a state interest analysis. Important to the Court's analysis was the significance of the matter regulated to the state (gas and oil are significant to Texas). But the true test of whether the Court would allow "state interest analysis" to prevail would come only when state and federal interests conflict. Allocating these cases—which are particularly burdensome—to state court frees the scarcer federal courts for other work.

109. For a discussion of federal interests at stake in this form of abstention and an argument that it would not be appropriate for a federal court to abstain if a rights claimant pursued bifurcated litigation because of the Eleventh Amendment bar to litigating the state claim in federal court, *see* Althouse, *supra* note 24, at 1535-37.

tion and who initiates the litigation with the state to move to state court to obtain an authoritative interpretation of a question of state law arising in the federal case.[110] A plaintiff asserting a federal constitutional right in order to void a state law might file a case in federal court only to be told that she must seek a state court interpretation of the state law. When a federal court abstains under *Pullman*, it enlists the state court's help in answering a state law question in the hope that it might thereby avoid the task of deciding a federal constitutional question.[111] The state court thus relieves the federal court—at the cost of severe delay[112]—of a difficult task in an area in which the state court possesses special authority. The rights claimant may return to federal court, however, for the adjudication of any federal constitutional question that remains after the state court decides the state law question.[113] Of course, shifting back to federal court further delays the resolution of the case, burdening the enforcement of the federal right.

The Supreme Court has strictly controlled *Pullman* abstention's applicability, perhaps in recognition of the doctrine's shortcomings. The challenged state law must be "obviously susceptible" to an interpretation that will avoid the federal constitutional question.[114] The Court does not look sympathetically at attempts to play up the ambiguity of a particular state law,[115] nor does it require abstention to give the state the opportunity to use its own constitution to invalidate the statute.[116] And, as mentioned above, the Court recognizes the rights claimant's entitlement to return to federal court for adjudication of any remaining federal questions.[117] The Court thus recognizes the importance of preserving the rights claimant's choice of forum for the litigation of the federal question. Given the importance of the rights claimant plaintiff's forum choice and the problem of delay, a better approach might be simply to forgo this abstention doctrine entirely. *Pullman* is, after all, an anomaly in the overall federal jurisdictional scheme. As this section has demonstrated, the general rule is for federal courts to exercise jurisdiction in litigation initiated by a federal rights claimant against a state

110. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

111. The Court worried that if a federal court undertook the task of state law interpretation, it then might go on to strike down something that is not state law at all but an erroneous federal court guess about what state law might be. *Id.* at 500.

112. *See* Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 317 (1969).

113. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

114. Zwickler v. Koota, 389 U.S. 241, 251 & n.14 (1967); *see also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 237 (1984) (rejecting strained attempt to find the ambiguity needed for *Pullman* abstention).

115. *See supra* note 114.

116. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

117. *England*, 375 U.S. at 411.

actor.[118]

The *Pullman* opinion itself, written by Justice Frankfurter, clearly displays deference to state autonomy interests. It expresses, in fulsome prose, the desire not to offend, insult, or annoy the state. After laying out the troubling facts,[119] Justice Frankfurter conceded that the case presented a substantial constitutional issue. He then converted the assertion of rights into a cause for deference, embracing the dubious but classic notion that the importance of a federal constitutional law question suggests that the Court ought not answer it.[120] The state's countervailing interests in a policy that allegedly violated substantial individual rights perversely intensified this urge to avoid articulating the law: the issue "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."[121]

The *Pullman* opinion characterized friction with the state as an evil to be avoided regardless of what the state had done. It professed to find a high public interest in avoiding needless friction with state policies, and recommended abstention to "further[] the harmonious relation between state and federal authority."[122] But what is "*needless* friction"? The *Pullman* Court went quite far in its respect for state autonomy, seemingly viewing any avoidable friction as unnecessary, regardless of the delay entailed. A rights-centered analysis would instead suggest that the importance of speed in the enforcement of federal rights gives rise to a need for friction, and concern about friction with a state that has generated law that violates rights has no place in the jurisdictional balance. The only friction with the state that jurisdictional doctrine ought to avoid is friction that impedes a state court from contributing to the enterprise of enforcing rights, either by enforcing federal rights or by developing its own alternative rights.

There is another perspective on *Pullman*. The language about deference to the state, avoidance of friction, and desire for harmony may

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118. The other anomaly, of course, is the Eleventh Amendment immunity that persists with respect to claims for retrospective relief. *See supra* notes 66-82 and accompanying text. There, however, one strongly senses that as a matter of substantive law the Court has determined that the state should not have to make retrospective payments. *See supra* notes 76-80 and accompanying text (noting the withdrawal of a substantive cause of action for damages under *Will v. Michigan Dep't of State Police*, 492 U.S. 58 (1989)).

119. The Texas Railroad Commission required a white "conductor" rather than a black "porter" on all of its sleeping cars. 312 U.S. at 497-98.

120. *Id.* at 500; *see* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (stating that "it is emphatically the province and duty of the judicial department to say what the law is").

121. *Pullman*, 312 U.S. at 498. Perhaps this language suggests that Justice Frankfurter did not believe there really was a right and thought only policy was at stake.

122. *Id.* at 500-01.

simply be icing on the exploitation cake. As noted above, the Court frequently indulges in euphemisms of deference which perhaps should not be considered the real justification for the jurisdictional doctrine it creates.[123] By asking nicely and expressing its camaraderie with the state judges, the Court may hope to increase the quality of the work it delegates to the state judges.

There may be an additional reason why the Court delegated this task to the state court in *Pullman*. The right involved may appear clear to us now, but in 1941 the Court may not have recognized it. The Court, by not reaching the constitutional question, may have avoided rejecting that right. In palming off the task on the state court, the Court was able to imply substantial concern for the asserted right and to suggest that the state court very seriously consider narrowing state law to avoid the conflict with that asserted right. If this is so, a concern for individual rights did motivate the Court to embrace its position of restraint.[124]

Another way to think about the *Pullman* doctrine is to focus on the state law itself. The state law in the *Pullman* case clearly indicated that the state was up to no good. Thus, today we may reflexively assume that the states are up to no good; we need to police them, not to encourage them. Yet if we can look beyond the original case, we will see some instances in which the state law in question does accord new, alternative rights to the individual.[125] The federal claim, of course, will assert that some federal right conflicts with that state right and, under the supremacy clause, the federal claim, if sound, will prevail. But, at the time of the jurisdictional decision, the court has not yet answered the question whether the state law violates federal constitutional law. The purpose of the litigation is to resolve the conflict and thus to determine whether the state law may stand. The federal court must resolve the jurisdictional question before it says whether the state law violates federal law, so the state law's possible conflict with federal law coexists with the positive sense that the state is trying to further rights.[126]

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123. *See supra* note 23 and accompanying text.

124. *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J., dissenting) (denial of standing in reapportionment case tied to failure to recognize "one person one vote" right). In this light, his restraint actually would favor the asserted right because the Court could avoid announcing that the right did not exist. *Cf.* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 282 (1979) (asserting that the Court embraced a mootness holding in DeFunis v. Odegaard, 416 U.S. 312 (1974), because at least some of the Justices favored affirmative action, believed that it was unconstitutional, and wanted to allow it to continue).

125. The value of alternative state rights was also discussed in connection with the *Pennhurst* case, *supra* subpart III(C)(2).

126. One must recognize that rights can conflict. When two federal rights conflict—*e.g.*, the free exercise clause and the establishment clause—the Court is at pains to reconcile them in some way, perhaps by narrowing one of the rights to achieve the needed fit. If federal and state rights conflict, the supremacy clause dictates that federal rights prevail, although it is still possible that

Hawaii Housing Authority v. Midkiff[127] illustrates that the positive potential impact of the state law deserves as much concern as the negative. The State of Hawaii had created a legislative scheme for the redistribution of land to deal with a distinctive local problem, the ownership of land by a grossly disproportionate number of landowners. Hawaii's legislation reflected its concept of equal protection, a concept also embodied in the Federal Constitution, though not in the specific form of requiring the redistribution of real property. It is inconceivable that Congress would pass a federal statute designed to address such a particularized local problem, even though that problem implicated equal protection. Thus, the encouragement of alternative state law in this area was particularly compelling. But Hawaii's law also presented a serious conflict with a federal right—due process. Just as desirable federal statutes must fall if they conflict with federal constitutional requisites,[128] alternative state law, despite its positive character, must fall if it violates federal law. Yet when the federal courts made the decision about whether state or federal courts should have jurisdiction over the meaning of the Hawaii statute, it had not decided whether the state law violated federal law or provided salutary alternative rights.

In *Midkiff* the Court held abstention improper, despite attempts to characterize the state law as ambiguous. In heightening the level of ambiguity required for abstention, the Court preserved the plaintiff's choice of the federal forum for the litigation of the federal issue. It also limited the state's opportunity to say what its own law meant, and it created the possibility that the federal court might strike down this elaborate state program without giving the state court a chance to create narrowing statutory interpretations that could preserve the statute's constitutionality. On the other hand, by demanding abstention, the Court would have sent the message that the state ought to consider restricting the sweep of the statute in order to eradicate doubts about its constitutionality. Thus, in addition to denying the rights claimant's forum choice, abstention might have undercut the enforcement of individual rights.

This Article thus far has looked at various jurisdictional doctrines that affect a rights claimant who is taking the first step and initiating litigation with the state. Despite the general sense among commentators that the Supreme Court has laid a mine field of doctrine to thwart the rights claimant, the Court actually has set up a structure that, for the

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the Court, seeing the positive nature of a state-created right, might tailor the federal right so that the state law right can survive.

127. 467 U.S. 229 (1984).

128. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

most part, is sensitive to rights claimants. This structure is responsive even to the preference for litigating in federal court, which, as the next part reveals, is not a necessary component of rights enforcement except as a backup to the state courts. The primary federalism-based obstacles for the rights claimant plaintiff are the *Pullman* doctrine and the Eleventh Amendment bar to suits for retrospective relief or suits based on state law. These obstacles are anomalies in the basic "plaintiff's choice" jurisdictional structure. The Court may have created these exceptions out of pure deference, granting unearned autonomy to the states. There is, however, a more complex and creditable reason for deferring to the state courts: improving the overall enforcement of individual rights.

IV. When the State Initiates Litigation with the Rights Claimant

A. *Introduction*

The previous section considered jurisdictional doctrines that affect the forum choice of a rights claimant plaintiff. This section examines litigation initiated by the state, such as criminal cases and civil enforcement actions. The state does not have the option of filing these cases in federal court because they do not fall within the statutory bounds of federal jurisdiction. State law is the basis for state criminal and civil enforcement proceedings; federal law enters into the cases only as a defense, and the federal courts' federal question jurisdiction is limited to cases in which the federal question appears on the face of the "well-pleaded complaint."[129] For that reason, the defendant—the federal rights claimant—does not have the option of removing the state's case to federal court under the general removal statute.[130] There is also a specialized removal statute, the Civil Rights Removal Act,[131] which seems to promise greater access to federal court for the rights claimant defendant, but it has acquired a very limited interpretation, rendering it virtually useless.[132]

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129. Louisville & Nashville Ry. Co. v. Mottley, 211 U.S. 149 (1908).

130. 28 U.S.C. § 1441 (1988).

131. 28 U.S.C. § 1443 (1988).

132. *See* Georgia v. Rachel, 384 U.S. 780 (1966) (limiting removal to cases based on rights involving racial equality and attacking a specific state law requiring discrimination or to cases based on violation of federal law hy the prosecutor); City of Greenwood v. Peacock, 384 U.S. 808 (1966) (no removal based merely on claim that defendant will not receive a fair trial in state court). These cases might seem to have it backwards. If there were a state law requiring discrimination, the state court ought to be able to strike it down. Its capacity is not impugned by the unconstitutional statute enacted by the state legislature. But if the state court's own qualities are impugned, as they would be if the state court defendant showed that she could not receive a fair trial, it would seem that the state court ought not to be trusted. Nevertheless, one can understand why the Court (even a Court known for its high valuation of constitutional rights) might latch onto

There are three paths of entry into federal court for the rights claimant who begins as a defendant. First, the rights claimant, after submitting to the state court's jurisdiction, may seek review in the Supreme Court. This is clearly an option of limited availability, but it remains a theoretically important component of judicial federalism and thus deserves consideration here.[133]

Second, if the state law case has resulted in custody of the federal rights claimant, she can file a petition for a writ of habeas corpus in federal court. Complex doctrine regulates the availability of this option, and this section analyzes how well that doctrine reflects concern for individual rights.[134]

Third, the rights claimant can become a plaintiff in a second case, filed in federal court, that addresses the federal question involved in the state court case. The erstwhile defense becomes the claim in a Section 1983 suit against the state. The Supreme Court, through the *Younger* doctrine,[135] has severely restricted this strategy when the move to federal court takes the form of a request to end the state court proceeding. Nevertheless, within a certain narrowly circumscribed scope, this option remains open. This section considers the *Younger* doctrine and its limitations in light of the central concern for individual rights.

B. Supreme Court Review

In *Martin v. Hunter's Lessee*[136] the State of Virginia argued that the state and federal court systems were separate, belonging to separate sovereigns, and that it, therefore, made no more sense for a United States court to review a state court than for it to review a court of a foreign country.[137] Virginia's argument, soundly rejected in *Martin*, called for clear state autonomy: the state had a right to be left alone, regardless of how it performed. State courts would be entirely trusted

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the interpretation of the removal statute chosen by the Warren Court in 1966. Claims of anticipated unfairness would be frequent, requiring the federal courts to recognize the shortcomings of state courts and to respond by taking the case away from the state court. Yet, as this part demonstrates, particularly in connection with the *Younger* doctrine, it is important, in tapping the state court resource, not to allow the state courts to back out of their obligation to conduct their criminal trials lawfully. Federal jurisdictional doctrine tends to force state courts to live up to their obligations and to review their work after the fact through Supreme Court review and habeas corpus, not to relieve them of their task, essentially rewarding them for their inferiority. The focus here has been on the long-term amelioration of state court processes, not on the short-term rescue of individual defendants.

133. *See infra* subpart IV (B).

134. *See infra* subpart IV(C).

135. *See infra* subpart IV(D).

136. 14 U.S. (1 Wheat.) 304 (1816).

137. *See* Hunter v. Martin, 18 Va. (4 Munf.) 1 (1815).

to carry out their duty to enforce federal law,[138] and no federal court could scrutinize their work.

Martin v. Hunter's Lessee provides one of the Court's earliest statements of the assumption of parity. Justice Story wrote—"cheerfully admit[ted]"—"judges of the state courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States."[139] When he needed to justify intrusion on the states, however, true to classic form,[140] he found text to blame: "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, control, or be supposed to obstruct or control, the regular administration of justice."[141]

Interestingly, the text that forced Justice Story to turn his back on his own asserted belief in parity did not provide explicitly for Supreme Court review of state court judgments. He made several technical arguments suggesting that the Constitution envisioned this jurisdiction. Most notably, he argued that the potential for no lower federal courts would render Supreme Court appellate jurisdiction meaningless in the absence of jurisdiction over state cases.[142] But *Martin* essentially rested on the importance of articulating and enforcing federal law. The Court found unreviewable state court decisions of federal law intolerable.[143]

Given that state courts might misinterpret or fail to follow federal law, Supreme Court review is a necessary corrective device. Scrutiny of state court decisions of federal law, of course, is a broader proposition than just ensuring the enforcement of federal rights and protecting the individual from the abuses of government. The rule of *Martin v. Hunter's Lessee* also opens the Supreme Court to litigants who rely on interpretations of federal law that have nothing to do with the rights of the individual. This rule even opens the Supreme Court to a state's appeal of a state court federal law interpretation recognizing an individual right.

When state courts recognize rights as a matter of state law, on the other hand, they cut off any recourse to Supreme Court review, even if they also interpret federal law.[144] This is the so-called "adequate and independent state ground" doctrine. This reward of autonomy encour-

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138. Virginia did recognize its duty to enforce federal law, which the supremacy clause explicitly states. *Id.* But there is no corresponding explicit provision for Supreme Court review of state court cases. *Id.*

139. 14 U.S. (1 Wheat.), at 346.

140. *See supra* text accompanying note 39.

141. 14 U.S. (1 Wheat.), at 347.

142. *Id.* at 339-40.

143. *Id.* at 348. In the words of Justice Story, it was "truly deplorable."

144. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

ages the state to develop its own rights as alternatives to the rights found in federal law.[145] But problems arise when it is unclear whether the state court is developing an individual right under state law or is simply attempting to interpret federal law. At this point, the Supreme Court must decide whether it should intervene because of the importance of ensuring accurate and uniform interpretations of federal law or respect the autonomy of a state court that is engaged in the core function of protecting the individual from the abuses of government.

In *Michigan v. Long* the Supreme Court decided to presume in favor of jurisdiction whenever the state court intertwined its discussion of state and federal law.[146] *Long* has drawn immense criticism, beginning with Justice Stevens's scathing dissent.[147] According to Justice Stevens, if the Court needs to use a presumption to extricate itself from the problem of mixed state and federal law, it should presume against jurisdiction and in favor of state autonomy.[148] Justice Stevens went on to say that federalism dictates restraint as a general rule, and only the interest in federal rights justifies deviating from that rule.[149] Justice Stevens's position is consistent with the rights-oriented approach taken in this Article. Even if the state court uses federal (and not state) law and gets it wrong, it does not deprive the individual of any rights. Rather, it overprotects the individual.

Shielding against state court misinterpretation of federal law, however, allows the other branches of state government to pursue their policies unrestricted by false limitations purporting to emanate from

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145. *See supra* subpart III(C)(2).

146. 463 U.S. 1032 (1983); *see also* Coleman v. Thompson, 59 U.S.L.W. 4789, 4792 (U.S. June 24, 1991) (citing *Long*, 463 U.S. at 1040-41, in stating that no independent and adequate state ground will be presumed when the state decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law").

147. *Id.* at 1065-72 (Stevens, J., dissenting). The commentary criticizing *Long* is extensive. *See, e.g.*, Baker, *The* Ambiguous *Independent and Adequate State Grounds in Criminal Cases: Federalism Along a Möbius Strip*, 19 GA. L. REV. 799 (1985); Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory:* Michigan v. Long, 18 CREIGHTON L. REV. 1 (1984); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 N.D. L. REV. 1118 (1984).

148. *Long*, 463 U.S. at 1066-67 (Stevens, J., dissenting).

149. This position is consistent with his position in the Eleventh Amendment case *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), discussed *supra* at subpart III(C)(1). He criticized the way the Court balanced state and federal interests instead of recoguizing that the "federal courts 'have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution' . . ., and generally should not eschew this responsibility based on some diffuse, instrumental concern for state autonomy." 491 U.S. at 27-28 (Stevens, J., concurring) (in part quoting Harris v. Reed, 489 U.S. 255, 267 (1989) (Stevens, J., concurring)). These recent statements by Justice Stevens, emphasizing the centrality of individual rights in federal jurisdictional analysis, influenced the position taken in this Article. The major difference is Justice Stevens's emphasis on federal rights and federal courts, as opposed to the broader concerns for rights, both state and federal, and courts, both state and federal.

federal law.[150] If the state's political branches could not be sure that the state court's decision rested on state law, they could not recognize that they had the power to alter that law.[151] Without Supreme Court review to unravel the confusion, the state would become dysfunctional, bound by illusory law. Nevertheless, these are considerations that diverge from the central concern of protecting individuals rights.

Long stands out as an example of the Supreme Court shaping jurisdiction only to give itself the opportunity to lessen the amount of protection given to the individual.[152] But *Long* also makes an important statement about the meaning of federalism (although it does so in a context in which many understandably will throw up their hands and say the Court is hostile to rights). It shows that the state cannot claim autonomy without regard to what it has done; the Court will not defer to the states just because they are states. If a state were developing state law rights openly and clearly, without causing dysfunction in the state lawmaking process, the Court would respect the state court's autonomy. But the Court is entirely unsympathetic to the argument that states have an unqualified right to be left alone.

C. Habeas Corpus

1. Taking the State Judge's Perspective

The rights-centered analysis proposed in this Article gives a new way of answering a question that has perplexed and divided the Supreme Court in recent years: When does a failure to raise a constitutional issue in state court preclude a federal district judge from granting a habeas petition? In *Wainwright v. Sykes*[153] the Court decided that federal courts should refrain from giving habeas relief if a state procedural default rule would bar the state court from considering the federal issue. For example, if the state had a contemporaneous objection rule, and the state criminal defendant did not object to the introduction of a confession, the state court would view the issue as procedurally barred. The federal habeas court then could not consider whether the confession was coerced. The state procedural rule gains an odd precedence over a federal constitutional right. This outcome seems

150. *See* Althouse, *supra* note 24, at 1508-11.

151. *Id.*

152. If the rights claimant were appealing an interpretation of federal law, there could be no independent and adequate state ground bar arising out of the problem of mixing state and federal rights. (There could be, however, an independent and adequate state ground bar based on a state rule of procedural default. *See, e.g.*, Ylst v. Nunnemaker, 59 U.S.L.W. 4808 (U.S. June 24, 1991)). It would simply be irrelevant whether the state right existed or not; if there was a federal right, under the supremacy clause, the state court would have to enforce it.

153. 433 U.S. 72 (1977).

particularly troubling since the state defendant who fails to comply with the state procedural rule receives no consideration of her constitutional right, while the defendant who complies with the rule receives not only the state court consideration, including appeals, but also federal habeas review.[154] There is a way around this procedural bar: the petitioner who has defaulted can show "cause" for her default and "prejudice" affecting the outcome of the case.[155]

The "cause and prejudice" test takes the perspective of the state trial judge. According to Justice Rehnquist, writing for the majority in *Sykes*, "the trial judge is *not to be faulted* for failing to question the admission of the confession himself."[156] This statement implies that the fundamental concern in habeas corpus is the offense or insult federal relief might give to the state court judge. Indeed, most of the Court's doctrine makes sense if one accepts this perspective.[157] In this view, the federal court should review only the work the judge has actually done, correcting it if the judge has erred, and should refrain from casting aspersions on a judge who has not been presented with an issue and thus has done no wrong.

Is this mere deference to the state's interest in autonomy? Perhaps not. Error correction provides an incentive to state judges to take their duty to enforce federal law seriously and in the long run can produce greater enforcement of federal rights.[158] But if the interest in enforcing federal rights is paramount, why shouldn't the federal court go on to consider other federal rights, even though the state court has not con-

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154. This kind of unfairness troubles those who view the federal habeas corpus petition as the only meaningful opportunity a state criminal defendant will have for federal review of her federal constitutional claims. *See, e.g.*, Friedman, *supra* note 70, at 259.

155. *Sykes*, 433 U.S. at 87 (rejecting the "deliberate bypass" standard of Fay v. Noia, 372 U.S. 391 (1963), for "cause and prejudice" standard but leaving the definition of those terms open). After *Sykes* the Court ruled that "cause" could be shown when the performance of defense counsel was so deficient as to constitute "ineffective assistance" on a level that would violate the Sixth Amendment right to counsel, Strickland v. Washington, 466 U.S. 668 (1984), and when a constitutional claim is so novel that its legal basis was not reasonably available to defense counsel, Reed v. Ross, 468 U.S. 1 (1984). "Cause" must, however, "be something *external* to the petitioner, something that cannot fairly be attributed to him." Coleman v. Thompson, 59 U.S.L.W. 4789, 4797 (U.S. June 24, 1991). Federal habeas relief also may be possible in the "extraordinary case" in which a constitutional violation probably has resulted in the custody of someone who is actually innocent, even without a showing of "cause." Murray v. Carrier, 477 U.S. 478, 496 (1986).

156. *Sykes*, 433 U.S. at 91 (emphasis added).

157. *Cf.* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963) (deeming federal habeas review as subversive of a state judge's "sense of responsibility").

158. *See* Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1988). Professor Hughes urges that state trial judges assume a more active role protecting criminal defendants by "identifying and addressing the full range of possible constitutional questions" and "inquir[ing] into the degree of defense counsel's preparation and investigation." *Id.* at 334-35.

sidered them? To answer that it is not very nice to penalize a state judge who has not erred is to indulge in the state autonomy view of federalism. Respect for state procedural default rules, however, should relate to the vindication of rights. One would need to argue that requirements like the contemporaneous objection rule actually increase the likelihood that rights will be enforced. Timely presentation of criminal procedural rights arguably makes it possible to give these rights their full play. At a later stage, the extreme inefficiency of reversal and retrial[159] may prompt a court to take a crabbed view of the asserted right or to rely on notions of harmless error.

The reality of criminal litigation suggests a way to justify respecting state rules of procedural default. A criminal defendant must rely on a lawyer. That lawyer is far more likely to make inadvertent mistakes than to withhold an issue from the state court deliberately. Thus, the acceptability of the Court's procedural default doctrine may hinge on how seriously the doctrine permits the scrutiny of the lawyer's performance at trial.

Under *Fay v. Noia*,[160] procedural default did not bar habeas relitigation unless the state criminal defendant had deliberately bypassed the state procedure. This rule seems more accurately adjusted to the enforcement of federal rights. It does not condone circumventing the state court, which may be capable and ready to enforce federal law, and to enforce it in the most immediate and effective way at the initial trial.[161] Yet it does not allow federal rights to go unattended simply because the lawyer forgot to raise them according to proper procedure.[162] One could argue, however, that the *Noia* rule does not give the lawyer enough of an incentive to present federal issues to the state and that a more drastic, unforgiving preclusion like the *Sykes* standard is

159. *See* Engle v. Isaac, 456 U.S. 107 (1982) (discussing "social costs" of granting habeas relief); *see also* Bator, *supra* note 157, at 452 (importance of finality). *But see* Hughes, *supra* note 158, at 331 (noting that emphasis on finality, particularly in capital cases, is "impatient" and a "fetish").

160. 372 U.S. 391 (1963). *Sykes* limited *Noia* to its facts (failure to appeal), and last Term, in Coleman v. Thompson, 59 U.S.L.W. 4789 (U.S. June 24, 1991), the Court overruled *Noia* explicitly.

161. *See Sykes*, 433 U.S. at 90 (urging that the trial be the "main event" and not merely a "tryout on the road," with the habeas proceeding becoming more important).

162. *Sykes* does permit default to result from mere mistake. Interestingly, the *Sykes* Court talked not about the problem of mistakes but about the problem of sandbagging by lawyers. Sandbagging signifies deliberately holding back federal arguments, and even *Noia* barred habeas relief if the state court had been deliberately bypassed. Many commentators have noted the speciousness of the Court's sandbagging argument. *See, e.g.*, Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 790-91 (1987) (stating that sandbagging is "given far too much weight," and that inadvertent defaults should not be barred); Hughes, *supra* note 158, at 336-37 (poking holes in the sandbagging argument by examining the practical realities of criminal defense and suggesting that the attorney, not the client, suffer the penalty for default); Friedman, *supra* note 70, at 291-92 (suggesting that the sandbagging argument is not persuasive).

needed to improve the lawyer's performance and, consequently, to achieve the maximum use of the state courts. Significantly, ineffective assistance of counsel qualifies as "cause" for a procedural default even within the *Sykes* doctrinal framework.[163] The lawyer's mistake, therefore, might not foreclose federal habeas review of a federal right. Here, the effect on federal rights depends on the ineffective assistance of counsel standard. Given the extreme difficulty of showing ineffectiveness under the current law,[164] however, this alternative hardly seems sufficient.

Another aspect of "cause" under *Sykes* concerns the development of new rules of federal constitutional law. If the enforcement of federal rights is central to jurisdictional decisionmaking, then the evolution of new rules of constitutional law is also important—for all rights were once newly articulated. One cannot say that the Court fashions jurisdictional rules to protect individual rights if it imposes serious constraints on the development of federal law. Recently, in *Teague v. Lane*,[165] the Court dramatically curtailed the ability of federal courts to articulate new law at the habeas stage.

Before *Teague* the Court had decided that the novelty of the constitutional right asserted in a habeas petition was "cause" sufficient to excuse a procedural default under *Sykes*.[166] If the state court defendant could not have known of the existence of a constitutional right, she had "cause" for failure to assert it. But in *Teague*, the Court, purporting to adhere to the principle that courts must treat similarly situated persons alike, decided that a federal habeas court may not enforce a new constitutional right unless that new right would apply retroactively to all habeas petitioners.[167] Since occasions for the retroactive application of

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163. *See* Murray v. Carrier, 477 U.S. 478 (1986) (requiring an actual violation of the Sixth Amendment).

164. *See* Smith v. Murray, 477 U.S. 527 (1986). The required showing of a Sixth Amendment violation refers to the standard recently set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under this standard the issue is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686. *Strickland*'s two-part test requires that the defendant show: (1) the counsel's deficiency ("errors so serious that counsel was not functioning as 'counsel' "), and (2) that the deficiency prejudiced the defense ("errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). *Id.* at 687.

165. 109 S. Ct. 1060 (1989). *Teague* was a plurality opinion, and Justice White wrote a separate, somewhat reluctant, concurring opinion. He subsequently followed the *Teague* rule, however, in Penry v. Lynaugh, 492 U.S. 302 (1989) (*Teague* rule applies in capital cases). *See also* Butler v. McKellar, 494 U.S. 407 (1990) (very broadly defining "new rule" to include any rule that would be "susceptible to debate among reasonable minds" under existing precedent).

166. Reed v. Ross, 468 U.S. 1 (1984) (cause shown when factual or legal basis for the constitutional claim was not reasonably available to counsel).

167. *See Teague*, 109 S. Ct at 1077-78. Nor could the habeas court even announce the law with respect to the asserted new right, since, as the Court saw it, the duty to say what the law is

new constitutional rights at the habeas phase are rare,[168] *Teague* renders the "novelty as cause" argument almost a nullity.[169]

If one cares most about whether the state judge deserves to be faulted, then *Teague* is probably right. The trial judge could not have known about the unarticulated rule of constitutional right and, therefore, showed no hostility or inadequacy in failing to enforce that right.[170] But why take the state trial judge's perspective? The central concern in jurisdictional line drawing should be the enforcement of rights, which must include the evolution and emergence of rights not yet set forth in judicial opinion.[171] Clearly, jurisdictional rules should not be shaped to avoid ever intruding on a state court's autonomy. Less clear, but also important, is that jurisdictional rules ought not focus on avoiding offending state judges. One could justify *Teague* by saying the state judge did nothing wrong and, thus, does not deserve the offense of

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only exists in the context of affecting the parties to a lawsuit. *Id.* As I have written elsewhere, I suspect that the Court wanted to keep the lower federal courts from expanding federal rights, particularly given its own much-lamented inability to review the number of cases it thinks it should. *See* Althouse, *The Federalist Five*, 76 A.B.A. J. 46, 54 (Jan. 1990); *see also* Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing that the Supreme Court should decline to grant certiorari and tolerate a fair amount of lower court diversity with respect to criminal procedural rights, like those governed by the Fourth Amendment, that turn on individualized assessment of circumstance and do not provide the occasion for announcing a rule of general application); *cf.* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046-54 (1977) (noting salutary effects of an ongoing dialogue between federal and state courts about the meaning of constitutional rights).

168. *See Teague*, 109 S. Ct. at 1075-77. The occasions for retroactivity are: (1) when the asserted new rule would constitutionally protect the very act that the state has criminalized, and (2) when the rule is needed to ensure both "fundamental fairness" and the "likelihood of an accurate conviction." The Court doubted that any new rules entailing fundamental fairness remained to be discovered. For a discussion of what rights fall within the second *Teague* exception, compare Justice Kennedy's majority opinion in Saffle v. Parks, 110 S. Ct. 1257, 1264 (1990) (setting a high standard, giving Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel), as the paradigm, and noting *Gideon*'s "primacy and centrality"), with Justice Brennan's dissent in *Saffle*, 110 S. Ct. at 1270 (Brennan, J., dissenting) (setting a lower standard, particularly when the case involves capital punishment, and considering whether the new rule is "integral to the proper functioning of the capital sentencing hearing").

169. *See* Friedman, *supra* note 70, at 301.

170. One could say, however, that the trial judge falls short if she does not anticipate and actively play a role in the evolution of law. *See* Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WISC. L. REV. (forthcoming Oct. 1991).

171. On whether habeas reversal is really such an offense, see Chemerinsky, *supra* note 162, at 777 (noting the lack of evidence that busy state trial judges pay much attention to the disposition of their cases at the habeas stage, and that federal habeas review rarely produces a reversal) and Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 290 (1983) (noting that habeas is "no longer the irritant to state court judges that it once was" and that "members of the *federal* judiciary have become increasingly dissatisfied with the scope of federal review of state convictions") (emphasis added). *See also* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1010-12 (1985) (discounting the problem of friction with state courts because they "may have their own poor record to blame").

reversal. But one instead ought to ask whether leaving the state court alone promotes the enforcement of federal rights. It is precisely because the state judge could not have done a better job of enforcing federal law that federal intrusion in the form of habeas review is needed. The separateness accorded the state under *Teague* merely condones a stagnant situation in which federal law cannot develop. It should be irrelevant that the state judge has done no wrong. Although federal jurisdiction certainly is warranted when state courts are inadequate, that does not mean the reverse is true and nondefective state courts can claim an entitlement to autonomy. The stagnation in the development of federal rights justifies federal jurisdiction.

Because habeas corpus review follows state court handling of federal law questions, federal courts must analyze the state court role quite differently from the way they view the state courts under the *Younger* doctrine, which applies prior to the state court's attempt to deal with federal law.[172] The presumption of parity plays a functional role under *Younger* in promoting state court participation in the enterprise of enforcing individual rights. At the habeas stage, however, the state court's role has concluded. A presumption is no longer functional and, indeed, no longer needed to overcome the inability to assess the parity of the state court[173] or to avoid wholesale channelling of state cases into federal court. The federal habeas court is in a position to examine what the state court has done. The rules laid down in *Sykes* and *Teague* make sense, at least theoretically, in this light. Having trusted the state courts with the task of interpreting federal law, the federal courts now consider the work they have done and correct any errors. There is no need for a presumption that state courts may be trusted to do the work well enough, since they have already done the work and it can be inspected.

Yet an approach to habeas jurisdiction premised on the enforcement of federal rights could go further. Discarding a vision of federalism centered on solicitude for the feelings of state court judges, federal courts could simply take up the task of enforcing federal law where the state court left off. If there are undecided issues or new rules of law undeveloped by the state courts, the federal habeas court could continue with the unfinished work.

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172. *See infra* subpart IV(D).
173. *See supra* Part II.

2. Relitigating Fourth Amendment Claims Using Section 1983 and Habeas Corpus

A civil rights plaintiff, asserting a claim under Section 1983, may initiate litigation with a state actor in federal court even though the state court might offer a state law remedy and be capable of enforcing the federal right.[174] *Monroe v. Pape*, as discussed above,[175] opened the federal courts and enumerated the shortcomings of state courts, albeit in reliance on a congressional finding. When the dispute between a Section 1983 claimant and the state begins with a case filed by the state, on the other hand, the right of federal court access evaporates along with the concession of disparity. The Court, in that instance, reverts to expressing confidence that the state courts will carry out their obligation to enforce federal law. In *Allen v. McCurry*[176] the rights claimant began as a defendant in a criminal case filed by the state in state court. He raised his federal claim in state court in the form of a motion to suppress evidence allegedly seized in violation of the Fourth Amendment. The state court denied the motion and McCurry was convicted. Aside from the direct review of the Supreme Court, there were two potential routes into the federal forum: habeas corpus and a Section 1983 suit for damages. McCurry argued that federal rights deserve federal forums, an idea that rested squarely on the *Monroe* Court's rhetoric mistrusting state courts' ability to enforce federal rights.[177]

But the *McCurry* Court rejected the notion of federal court access based on an assumption of state court inadequacy. Instead, it structured the jurisdictional doctrine so that both forms of postconviction federal access—habeas corpus and Section 1983—require the rights claimant to show the state court's inadequacy. That is, it imposed the precise burden that the *Monroe* Court rejected. At this stage in the dispute between the rights claimant and the state, the rights claimant no longer has a free choice of forum and must show that the state court failed to provide a "full and fair opportunity to litigate" the federal claim.

Stone v. Powell[178] had established four years before *McCurry* that one cannot use habeas corpus to relitigate Fourth Amendment claims without making this showing. The *Stone* Court theorized that Fourth Amendment claims, because they do not suggest that an innocent person is in custody, are not worth the cost of overturning a conviction.

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174. Monroe v. Pape, 365 U.S. 167, 183 (1961).

175. *See supra* subpart III(B).

176. 449 U.S. 90 (1980).

177. *Id.* at 93 (majority opinion). The Court of Appeals had accepted McCurry's argument. 606 F.2d 795 (8th Cir. 1979).

178. 428 U.S. 465 (1976).

This reasoning inspired the hope that the Section 1983 route remained open. Under Section 1983 the rights claimant would gain only damages, a remedy directly tied to the specific harm caused by the state and not, like release from custody under habeas, a remedy arguably unrelated to the harm.[179] *McCurry*, however, cut off the Section 1983 route by requiring the application of state law rules of collateral estoppel to preclude relitigation so long as the state court provided a full and fair opportunity to litigate the Fourth Amendment issue in the first instance.[180]

One might say that the *Stone-McCurry* combination shows that the Supreme Court places a low value on Fourth Amendment rights. Fourth Amendment rights receive only one pass at judicial review, most likely in the context of a criminal trial[181] in which the pressure to admit probative evidence often cramps the enforcement of rights.[182] This result deserves criticism. Matters of lesser federal interest, such as the interest in efficiency or in reducing the federal caseload, should not be permitted to override the enforcement of federal constitutional rights. Even more troubling is the likelihood that the Court in formulating the *Stone* and *McCurry* doctrines simply deferred to state autonomy inter-

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179. *See* Comment, *The Collateral-Estoppel Effect to be Given State-Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471, 1493-94 (1980).

180. *McCurry*, 449 U.S. at 100-01. *McCurry* found that § 1983 could not be read as an exception to the general statutory directive, in 28 U.S.C. § 1738, that federal courts apply state law of preclusion. It had been argued that the legislative history, referred to in *Monroe*, indicating distrust of state courts implied an intent to supersede § 1738. The Court, *inter alia*, relied on the rule of construction disfavoring repeal by implication. *McCurry*, 449 U.S. at 99.

181. Fourth Amendment rights, however, will escape the confines of motions to suppress in three settings: (1) if the criminal defendant goes to trial without making a motion to suppress (this, of course, is highly unlikely, since a criminal defendant will necessarily place the highest value on escaping conviction); (2) if the criminal defendant pleads guilty without actually litigating the Fourth Amendment issue, *see* Haring v. Prosise, 462 U.S. 306 (1983) (this might occur if the evidence against the defendant were strong enough to convict without using the questionably seized evidence); and (3) if no criminal action were filed and no need for suppression arose (this was the case in *Monroe*; a search occurred but no evidence of criminal activity was found). Thus, *McCurry* and *Stone* do not entirely banish Fourth Amendment claims against state actors from the federal courts, but in severely limiting these claims they do invite the criticism that the Court has expressed hostility to these rights through the use of jurisdictional doctrine, a criticism given added weight by decisions during the same period that restricted Fourth Amendment claims on the merits. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); Illinois v. Gates, 462 U.S. 213 (1983).

182. In the words of the *McCurry* dissenters, "A trial court, faced with the decision whether to exclude relevant evidence, confronts institutional pressures that may cause it to give a different shape to the Fourth Amendment right from what would result in civil litigation of a damages claim." *McCurry*, 449 U.S. at 115 (Blackmun, J., dissenting). Note that the disparity problem here is not between state and federal courts, for a federal court dealing with a motion to suppress evidence in a criminal trial would face the same distorting "institutional pressures" that a state court would. The disparity problem centers on the nature of the proceeding: a criminal trial with a motion to suppress as a side issue, or a civil trial centrally focusing on the federal right.

ests. If the Court has permitted the interest in enforcement of state criminal law to thwart the enforcement of federal rights, then it has committed the most fundamental error in federalism-based jurisdictional decisionmaking.

The Court in *McCurry* and *Stone*, as in other cases discussed in this section, increased deference to the states when the litigation began in the state courts. In both types of cases, the federal courts were faced with decisions of federal law already made by the state courts. By asking whether the states offered a "full and fair opportunity to litigate" rather than routinely redoing states' work outright, the Supreme Court sacrifices enforcement of rights. But the incentive given to state courts may compensate. Only the state that has performed adequately, by giving a full and fair opportunity to litigate, is rewarded with autonomy. Jurisdictional doctrine should not rest on solicitude for state autonomy. It, rather, should seek to buy vigorous enforcement of federal rights in the state courts by promising autonomy in return. The state that fails to consider federal rights adequately suffers federal intrusion. Structured this way, doctrines have the potential to push the state courts toward enforcing rights.

The validity of *Stone* and *McCurry*, therefore, depends entirely on how scrupulously the federal courts examine the fullness and fairness of the state court's proceeding. If the required showing is too difficult to make, if a mere formal procedure masking hostility to the federal right satisfies the inquiry,[183] then these doctrines will not further the enforcement of rights. Regardless of whether the *Stone* and *McCurry* doctrines grew out of an antagonism to Fourth Amendment rights, they can now produce favorable results if they are applied with a keen awareness of the need to move the state courts toward the active enforcement of federal rights. This is obviously a big "if," and the federal courts' chronic hesitation to scrutinize the behavior of state courts gives little reason for optimism. Yet unless the federal courts abandon their traditional hesitation and engage in vigorous scrutiny, *Stone* and *McCurry* represent mere deference to state autonomy and deserve only condemnation.

One might argue that *McCurry* and *Stone* are more intrusive on the states than routine relitigation that dispenses with any inquiry into whether the state courts have adequately enforced federal law. Tying federal review to an assessment of the state courts, one might say, is more destructive to federalism than simply redoing their work without

183. *See McCurry*, 449 U.S. at 108 (Blackmun, J., dissenting) (criticizing the majority for relying on "procedural regularity," which may exist even when "substantive justice" is "unobtainable," a problem that concerned the Congress that enacted § 1983).

commenting on it. To anyone holding this view, the suggestion in this section, that federal courts should heighten their scrutiny of the state court's procedures, will seem to offer only greater insult to the states.[184] But appropriate federalism values should have nothing to do with avoiding intrusion or insult per se. State autonomy should not be perceived as a right to be respected regardless of what the state does. It is better viewed as a reward dispensed according to the state's performance in enforcing federal rights and in providing state law alternatives. Thus, it is entirely consistent with federalism values to scrutinize closely what the state has done and to base federal relitigation on the state's performance. It protects federal rights, offering federal review when the states have failed, and it gives the state, which will want to preserve its criminal judgments and to avoid the payment of damages, an incentive to enforce rights on its own.

D. The Younger *Doctrine: Recognizing the State Court's Capacity to Field Federal Questions As They Arise in Context*

1. Justifying *Younger*

Under the *Younger* doctrine, the federal court must refuse to hear certain cases, otherwise properly framed within Section 1983 and falling within federal question jurisdiction, when the relief requested is aimed at stopping an ongoing proceeding in state court.[185] Much of the Court's rhetoric about the *Younger* doctrine refers to "state interest." In expanding *Younger* beyond its original application to state criminal proceedings, the Court has repeatedly asked whether the state proceeding in question represented an "important state interest."[186] Instead of simply requiring abstention whenever a federal lawsuit seeks to enjoin a state court proceeding, the Court has looked piecemeal at individual types of state proceedings.[187] Yet it has quite easily found the "impor-

184. *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 108 (1984); Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 886 n.157 (1984).

185. An attempt to stop a state court proceeding that cannot be framed as a § 1983 claim because the defendant is not a state actor is barred flatly by the Anti-Injunction Act, 28 U.S.C. § 2283. Section 1983 has been interpreted as an "expressly authorized" exception to the Anti-Injunction Act, Mitchum v. Foster, 407 U.S. 225 (1972), although, as explained in this section, Younger v. Harris, 401 U.S. 37 (1971), makes injunctions of state proceedings using § 1983 nearly as unavailable. That small amount of availability is, nevertheless, an important recognition of the need for federal court access in those instances when state courts cannot protect federal rights.

186. *See* Althouse, *supra* note 100, at 1074-82.

187. *See, e.g.*, Juidice v. Vail, 430 U.S. 327 (1977) (contempt proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (nuisance action by local government); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (state bar disciplinary proceedings); Moore v. Sims, 442 U.S. 415 (1979) (child custody proceeding brought by state).

tant state interest" it sought,[188] even in a case in which the state itself disclaimed any interest.[189] This pattern indicates that the Court is not really very concerned with state interests.[190] *Younger* is least tolerable when state interests are strongest because of the danger that federal rights will not be fully enforced, and most acceptable when state interests are weak or nonexistent because state courts then are most trustworthy.[191] The Court speaks of the importance of various enforcement proceedings to the state as though the reason for deferring were to give the state freer reign in fulfilling policies that may run counter to federal rights. This seems wrong for the very reasons that Justice Stevens had in mind when he noted that federal courts should not avoid their primary obligation to protect individual rights by invoking some "diffuse, instrumental concern for state autonomy."[192]

But recognizing the wrongheadedness of deferring to the state just to let it carry out its policies does not inexorably lead to condemning the *Younger* doctrine. The state courts have the ability and the obligation to enforce federal law. Unless they fail in their task, they must recognize the supremacy of federal law over state laws, interests, and policies. So there is, at least, potential that the state courts will succeed in enforcing the federal law, thus doing precisely what the federal court would do, and doing it far more efficiently. Since the state court already has jurisdiction over a case raising the issue, the ideal would be for it to field the federal question efficiently and routinely. There is, admittedly, potential for the state court to fail to live up to that ideal. But for that reason, in the short run, the exceptions to *Younger*—based on inadequacy,[193] appeals to the Supreme Court, and lower federal court review through habeas corpus—remain important.

The normal operation of the *Younger* doctrine, nevertheless, seems suited to the long-term exploitation of the state courts to enforce federal rights. Requiring them to perform their supremacy clause duty instead of letting them off the hook at the behest of a criminal defendant who would rather be a federal plaintiff, will expose state courts to criticism and correction by the federal courts and will give them experience

188. *See* Althouse, *supra* note 100, at 1075-82.

189. Pennzoil v. Texaco, 481 U.S. 1 (1987).

190. Althouse, *supra* note 100, at 1083-84.

191. *Id.* If the state really had no stake at all in the state court case, there would be no state action; the § 1983 cause of action, thus, would not be available, and, as a result, the Anti-Injunction Act, 28 U.S.C. § 1738, would apply and bar the federal court suit. This issue is discussed in Texaco, Inc. v. Pennzoil, 784 F.2d 1133, 1145-46 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987) (finding state action in a very marginal case).

192. Pennsylvania v. Union Gas Co., 491 U.S. 1, 28 (Stevens, J., concurring).

193. These exceptions are discussed and resolved under the single concept of inadequacy, *infra* subpart IV(D)(2).

in enforcing important rights. Enforcing federal rights should be a routine, normal part of handling state court cases, not a matter that the state courts can ignore, relying on the federal courts to pick up the slack. Federal rights arise with such frequency in cases involving state actors that the scarcer federal courts could not successfully adjudicate all these disputes. Rather than multiplying the number of cases and imposing more of them on the federal courts, full enforcement of federal rights demands state courts' active participation. It is difficult to see how this full participation could come about if the forum choices of individual rights claimants govern the allocation of federal rights questions.

Of course, state courts may perform in a different way from the federal courts. Even if they fully intend to fulfill their supremacy clause obligations, they act in a different context. Because of their status as state judges, more in touch with the local environment and the local political processes, they may infuse their interpretations of federal law and their shaping of remedies with state interests even without specifically meaning to do so. One could view this infusion of state interests as a detriment to federal rights enforcement, particularly if one seeks the maximum breadth for federal rights.[194] If one seeks the best interpretation of federal rights, however, an understanding of the greater social context in which those rights operate may be an advantage. This advantage seems compelling considering the ultimate role of the Supreme Court in articulating federal rights. Not only can it correct for any overvaluation of state interests, it can make its final interpretation in the detailed, informative context developed by the state court.

Moreover, questions of state law frequently intertwine with federal questions. By layering state courts into the decisionmaking process, it becomes possible to obtain authoritative opinions on state law issues. Were the case to begin in federal district court, there would be no resort to a state court appeal and the only way to obtain a state court opinion on the state law question would be to resort to the inefficient *Pullman* abstention.[195]

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194. The prediction of federal court generosity seems dubious in any event. Recent trends in federal court appointments suggest that the perception of federal courts as vigorously expanding federal rights belongs to a bygone era. Today's federal courts, like many federal courts in other times, seem likely to invoke deference to state interests when asked to broaden substantive rights against the states. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989) (declining to find a duty to rescue an abused child as a matter of federal due process, but indicating the appropriateness of state law in the area).

195. *See supra* notes 110-28 and accompanying text.

2. State Court Inadequacy: The Only Exception to *Younger*

Despite the seeming detail to the Supreme Court's piecemeal development of the *Younger* doctrine and its repeated listing of a number of exceptions, the lack of an adequate opportunity to assert the federal claim in the state court proceeding is the only real exception.[196] The Court's patchwork forms a coherent pattern if one accepts the justification for the *Younger* doctrine given in the previous section. *Younger* tells us what the "normal thing"[197] to do is: take advantage of the already-engaged state court, press that court to assume a task that the full enforcement of rights requires it to assume, and reserve federal intervention for an after-the-fact backstop in the event the state court falls short. But what if it is apparent that this "normal thing" will fail and that it will put the rights claimant through an expensive, time-consuming, and empty exercise in litigation? These situations invoke the federal courts' backstop function at the very outset. This section examines the myriad *Younger* exceptions in this light and finds them roughly tailored to move the federal courts into a primary position in cases in which the usual justifications for *Younger* do not work.

Younger does not apply if a state court proceeding is merely threatened. In *Steffel v. Thompson*[198] the Court announced that federal courts could issue a declaratory judgment concerning the constitutionality of a state statute although state court prosecution under the statute appeared imminent.[199] If it were truly enamored of state autonomy, the Supreme Court might have required federal courts to avoid interfering with the state's pursuit of its own policies. That the Court did not require abstention indicates that the seeming deference to the state is really an allocation of the job of federal law enforcement to the state

196. *Cf.* Stone v. Powell, 428 U.S. 465 (1976).

197. Younger v. Harris, 401 U.S. 37 (1971).

198. Steffel v. Thompson, 415 U.S. 452 (1974). The plaintiff may have difficulty, however, establishing the ripeness of such a case. For example, in *Younger* itself, several of the plaintiffs, who were not defendants in the state court criminal case, sought an injunction because of their concern that the state would use the challenged statute to prosecute them. The Court deemed their suits unripe because the threat was not imminent enough. *Younger*, 401 U.S. at 42. Thus, *Steffel* defines a very narrow "window of opportunity" for suit in federal court.

199. The Court has not finally answered the question whether the federal court could issue an injunction. Although Samuels v. Mackell, 401 U.S. 66 (1971), decided concurrently with *Younger*, held that declaratory judgments fell within the limitations *Younger* placed on injunctions, Justice Rehnquist, concurring in *Steffel*, saw the declaratory judgment as a nonbinding statement of rights, distinguishable from an injunction and thus more acceptable. *Steffel*, 415 U.S. at 482 (Rehnquist, J., concurring). Justice Rehnquist expressed concern about the degree of offensiveness or intrusiveness of the different kinds of relief, rather than concern for the availability of a state judicial forum for the enforcement of federal law. This declaratory judgment-injunction distinction thus stems from state autonomy concerns. Justice White, also concurring in *Steffel*, found both forms of relief permissible in the absence of pending state proceedings. *Id.* at 477 (White, J., concurring).

courts. With no state court proceeding instituted, there is clearly a lack of an adequate opportunity to assert the federal claim in a state court proceeding and federal jurisdiction, therefore, must be exercised.

Hicks v. Miranda[200] requires abstention if a state court proceeding begins just after the commencement of the federal case aimed at enjoining it.[201] Under *Hicks*, as long as the federal court has not begun "proceedings of substance on the merits,"[202] the federal court must abstain. If the federal courts have already begun the work of enforcing the federal law, the reasonably efficient choice is to let them finish the task. If they have not yet done anything significant, *Hicks* reverts to the "normal thing": requiring the adequate state court to enforce federal rights as part of a unitary judicial proceeding to dispose of the entire dispute between the parties.

Criticism of *Hicks* views the problem of allocating the enforcement of federal rights as a power struggle between the state courts and the federal courts. Seen this way, *Hicks* unacceptably inverts the federal-state hierarchy. It allows the state to unseat the federal court. But the two courts are not fighting each other over jurisdiction, although the parties are jockeying for the positions they prefer.[203] The courts share a common task: resolving the dispute between the parties through the application of federal and state law. The only clear hierarchy is that expressed in the supremacy clause—federal law supersedes conflicting state law. Jurisdictional rules allocate the judicial work in a reasonable and mutually beneficial fashion. *Hicks* does not so much empower the state to destroy the federal court's jurisdiction as it recognizes the help that the state court can give, once the initiation of a proceeding has invoked its authority. It is a different matter, of course, if the state court cannot or will not perform this task. Yet that possibility is not unique to the *Hicks* type of case and, thus, is properly handled with

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200. 422 U.S. 332 (1975).

201. *See, e.g.*, Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1135-36 (1977); Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1192 (1977).

202. *Hicks*, 422 U.S. at 349.

203. It is true that *Hicks* gives the state prosecutorial authority the power to answer the federal complaint with a state criminal indictment. *See id.* at 357 (Stewart, J., dissenting). If the assertion of a federal right in federal court can draw the penalty of a criminal indictment, *Hicks* seems seriously detrimental to federal rights. But the Court, for the most part, has solved this problem. In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), decided shortly after *Hicks*, the Court validated the federal court's power to issue a preliminary injunction barring the institution of the threatened state court proceeding that was the target of the federal lawsuit. Of course, the federal plaintiff must satisfy the requirements for a preliminary injunction. For example, if the federal plaintiff cannot show likelihood of success on the merits, the state will avoid the preliminary injunction and will be able to proceed with the criminal case. This does not seem to present much of a detriment to federal rights, for the state statute alleged to violate federal rights will have passed the federal court's preliminary review.

rules applicable to all *Younger* doctrine cases. Again, the basic exception needs to be—and is—the absence of an adequate state forum.

Younger does not require abstention if it "plainly appears" that the state court proceeding "would not afford adequate protection."[204] The Court thus denies abstention when the state proceedings lack jurisdiction to handle the federal claims[205] or are biased.[206] Federal plaintiffs, in these instances, are held to a high standard of proof. In accordance with the usual assumption that state courts will perform their supremacy clause duty,[207] the federal court will "assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."[208] While the standard here is high—too high—this exception to *Younger* at least reflects the idea that the state court must have the capacity to perform the task before the federal court can back away from it. If the state court lacks that parallel capacity, the federal court must exercise its jurisdiction.[209] If *Younger* were only about respecting the state's autonomy and avoiding friction with state judges, this exception would not have been needed. Indeed, the exception increases friction, in that it forces the federal court to assess the adequacy and the impartiality of the state's courts.[210]

Younger also does not require abstention when the state proceed-

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204. Younger v. Harris, 401 U.S. at 45.

205. Moore v. Sims, 442 U.S. 415, 428 (1979).

206. *See* Gibson v. Berryhill, 411 U.S. 564 (1973) (finding state forum inadequate because of bias). It should he noted that *Gibson* found bias in a nonjudicial state proceeding, and that the Supreme Court has never upheld a finding that a state court is too biased to provide an adequate forum. *See* Kugler v. Helfant, 421 U.S. 117 (1975) (noting state procedures for disqualifying judges).

207. *See supra* Part II.

208. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

209. In this light, it is easy to see the error of citing *Younger* as support for refusals to enjoin nonjudicial state institutions. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (citing *Younger* for deference to state hospital, but also relying on Eleventh Amendment doctrine); Los Angeles v. Lyons, 461 U.S. 95 (1983) (deference to police department, but also relying on standing doctrine); Rizzo v. Goode, 423 U.S. 362 (1976) (deference to police department, but also relying on justiciability doctrine). This error is discussed in more detail in Althouse, *supra* note 24. On the other hand, it justifies the expansion of *Younger* to cover state administrative proceedings that do have this capacity. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982). Some commentators criticize expansion on the ground that *Younger* should be restricted to state courts because only courts deserve "comity," defined as "the respect owed to the courts of another sovereign." E. CHEMERINSKY, FEDERAL JURISDICTION 646 (1989); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 207 (2d ed. 1988). Because it depends on a state autonomy definition of federalism, this criticism holds no weight within the framework proposed in this Article. The important question is whether the administrative body in question has the capacity to hear the constitutional claims, which is the same question asked with respect to the state courts.

210. It may be that desire to avoid this friction led the Court to adopt such a high standard for showing inadequacy. If the Court were to free itself from inappropriate deference to state autonomy interests, it could institute a more relaxed test here.

ing is not judicial in character. In *New Orleans Public Service, Inc. v. Council of New Orleans*[211] the Supreme Court found abstention in deference to a state ratemaking proceeding improper. Even though the Court previously had applied *Younger* to a proceeding that did not take place in a state court,[212] it made clear in *New Orleans* that it had done so only because the proceeding was "judicial in nature."[213] The ratemaking proceeding, on the other hand, was "plainly legislative,"[214] and, therefore, warranted no deference. Why not? Clearly, the state had an interest in setting the consumer rates. But even if the state's interest were stronger, the federal court would not have had to allow the ratemaking council to set rates and potentially to violate federal law in the process. Although the Court did not spell it out, the state ratemaking procedure did not deserve deference because it did not offer an adequate forum for the adjudication of the federal claim—indeed, it offered no forum at all.[215]

Exceptions to *Younger* also extend to "bad faith" or "harassing" prosecutions.[216] The limited meaning of this exception makes clear that it is really only another way of saying that abstention is not required when the state court proceeding does not offer an adequate forum for the adjudication of the federal claim. As long as the state judge is not implicated in the accusation of bad faith or harassment,[217] the exception only applies when the state court, because of the prosecutor's bad faith, never has the opportunity to address the federal claim. In *Dombrowski v. Pfister*[218] the state prosecutor used the state judicial system to harass the federal rights claimants. The prosecution's scheme of harassment included the initiation of criminal proceedings without intending to pursue them to conviction. The series of abortive state proceedings did not present the state court with the opportunity to give

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211. 491 U.S. 350 (1989).

212. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

213. *New Orleans Public Service*, 491 U.S. at 369-70.

214. *Id.* at 371.

215. It was also true that a state court had become involved in reviewing the council's action. Deference to this court would make sense in the same way that Justice Frankfurter's dissent in Monroe v. Pape, 365 U.S. 167 (1961), made sense. *See supra* text accompanying notes 42-52. But, as noted throughout this Article, the Court has taken a very different approach with respect to intervening in ongoing parallel proceedings and simply going forward with work that might have been taken to the state courts. The *New Orleans* case in federal court did not address the legality of the state court suit. The state court was just another forum asked the same question about the legality of what the ratemaking council had done. To say that the federal plaintiff has to take advantage of the availability of a state court remedy would be to establish the exhaustion requirement rejected in *Monroe*. The Court's conception of federal jurisdiction does not dictate sending the state court all the work it is capable of doing.

216. *See Younger*, 401 U.S. at 47-51 (explaining Dombrowski v. Pfister, 380 U.S. 479 (1965)).

217. *See* Juidice v. Vail, 430 U.S. 327 (1977).

218. 380 U.S. 479 (1965).

the kind of relief sought in the federal case—to stop the harassment. Even though the state court acted properly with respect to the few federal claims that surfaced within its jurisdiction (it repeatedly quashed search warrants), it did not stand in a position in any of the pending proceedings to stop the harassment.

Of course, the federal rights claimants could have initiated their own state court cases asserting their federal rights affirmatively, but the *Younger* doctrine does not require this. It is limited to deference to pending proceedings.[219] Thus, the bad faith exception is virtually the same as the "no pending proceeding" limitation of *Younger*. Both limitations avoid deference to the state court because deference only properly extends to a state court that is already handling the matter. Thus, the bad faith exception to *Younger* is actually a subcategory of the "no pending proceeding" limitation in which the behavior that makes the state court unavailable is the very action challenged as the violation of federal law.

Another exception to *Younger* receives lip service: when the federal lawsuit takes aim at a state statute that is "flagrantly and patently violative of express constitutional provisions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[220] This exception runs counter to the assertion that *Younger* applies unless the state court proceeding is not adequate to adjudicate the federal claim. It fails to address the adequacy of the state court and, in fact, pinpoints a federal claim that ought to be unusually easy for the state court to handle. One could perhaps justify the exception by noting that such a thoroughly unconstitutional state statute warrants immediate correction. Yet, there is no more reason to mistrust the state court simply because the state legislature has "flagrantly" violated federal law than there is to mistrust it in the face of a flagrant violation from any other state actor. Moreover, mistrust of the state courts ought to increase as violations become more subtle, harder to detect, and more easily confused with permissible policy choices by the legislature. Perhaps courts sense the needlessness of this exception; it is never used.

With this last supposed exception disposed of, it becomes clear that the *Younger* doctrine requires abstention whenever a federal court suit, framed under Section 1983, seeks to terminate an adequate state

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219. To require the initiation of a state court civil rights suit would run counter to the basic principle of Monroe v. Pape, 365 U.S. 167 (1961). In *Monroe* the Court determined that a rights claimant could bring a § 1983 claim in federal court even though relief also was available in the state courts. *Monroe*, it will be noted, is another example of the generosity of federal jurisdictional doctrines governing initiation of litigation by the rights claimant.

220. Younger v. Harris, 401 U.S. 37, 53-54 (1971).

proceeding that commences before the federal court has invested significant time in resolving the case. The doctrine therefore serves as a classic illustration of meaningful deference to state courts, taking advantage of and promoting their capacity to enforce individual rights.

V. CONCLUSION

Disparity abounds. Some state systems are better than other state systems; some state judges are wiser or fairer than other state judges; some state supreme courts are more willing to interpret state constitutional law more expansively than federal constitutional law. Some federal circuits are better than other federal circuits; some federal circuit panels within one circuit are more likely to uphold claims of constitutional rights; some federal district judges are more sympathetic to First Amendment claims than to Fourth Amendment claims. And, yes, some federal judges are wiser, fairer, braver, or more proplaintiff than some state judges. In a given city, the state judges may on the average be more liberal than the local federal district judge. And the Supreme Court over the years varies in how much it protects constitutional rights. Disparity is real life. But is it so permanent and one-sided that jurisdictional doctrine should be designed to rescue federal claimants from the state courts? When the Supreme Court incants "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states,"[221] we should not take this to be an empirical conclusion that state courts are really the equivalent of federal courts. Rather, we should view the Supreme Court's doctrinemaking as part of an ongoing campaign to enlist the state courts in the enterprise of enforcing the values contained in federal law. Thus, we should take care not to be overly concerned with whether or not there is parity now. Recognizing that moving closer to parity would serve the interest in enforcing rights better than giving up on the state courts, we should judge the appropriateness of jurisdictional doctrine according to the effect that it has on the development of the capacity of the state courts.

When we see the state courts as a resource to be tapped, we can begin to revise our understanding of judicial federalism, distinguishing between mere deference to the state's interest in being left alone to pursue its own policies and deference to the state's capacity to enforce federal rights and to develop alternative rights in state law. Federal jurisdictional doctrine can be designed to encourage state courts to enforce federal law vigorously and knowledgeably and to find state law alternatives to federal rights. It should not insulate abuse and dysfunc-

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

tion in the state courts. There is no place for empty deference and notions of avoiding friction and state sovereignty. Meaningful deference, prior to litigation, looks to what the state ought to do and ought to be required to do. Meaningful deference, following the state court's processing of a case, looks seriously at what the state court actually has done, correcting it as needed.