ESSAY

CUSTOM AND USAGE AS ACTION UNDER COLOR OF STATE LAW: AN ESSAY ON THE FORGOTTEN TERMS OF SECTION 1983

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Here we should expect to find the winds of litigation at their most turbulent. But, just as at the eye of the hurricane the air is undisturbed, so here the law exists as in a vacuum, its purity undefiled by controversy and dispute. There are no cases—or almost none. There have never been any cases. Presumably there never will be any cases. There is only doctrine.

—Grant Gilmore and Charles L. Black, Jr.1

The same might be said of the meaning of “custom” and “usage” under Section 1983, except that even the doctrine is difficult to find. Section 1983 creates a cause of action for the deprivation of federal rights “under color of any statute, ordinance, regulation, custom, or usage, of any State.”2 This last clause is usually thought to limit the statute only to state action, but if “custom” and “usage” are given their ordinary meaning, the statute reaches a wide range of private conduct. Interpreted in this way, these terms would transform the “under color of” clause from a limitation on the statute to a dramatic expansion of its scope. Such an interpretation would allow claims to be brought against private individuals or institutions that acted systematically to deny federal rights. Yet the

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ordinary meaning of these terms contrasts sharply with the other sources of state law listed in the statute. "Custom" and "usage" refer to social practices that have not been expressly adopted as law—nearly the opposite of the express legal enactments referred to by the immediately preceding terms: "statute," "ordinance," and "regulation." Despite the importance and difficulty of the issues raised by these terms, the opinions interpreting Section 1983 contain very little discussion of them. "Custom" and "usage" have meanings that, even if once known, have since been forgotten. Instead, they have been passed over almost entirely in embarrassed silence.

The standard view is that "custom" and "usage" refer only to custom and usage that have the force of law, with little or no explanation of how such social practices come to be treated as law. This was the view taken for granted in the debates over the enactment of Section 1983. The silence then was less embarrassed than it is now because it seemed to rest on some tacit understanding of how "custom" and "usage" could become law. That understanding has since been lost, replaced by other limits, with different origins, reflecting a systematic bias towards legal positivism in the law today: the theory that actions of officials alone are the source of law. The only custom that counts today under Section 1983 is official custom. Custom and usage can be found everywhere in society, but only the custom and usage of officials can have "the force of law." While pervasive and seemingly indelible, this understanding of custom as a source of law neglects the reasons why public officials would depart from the law "in books" to take account of the law "in action:" why they would depart from the law declared in official sources to take account of more general, but less formal, social practices. The current interpretation of Section 1983 takes a wholly one-sided view of the interaction between official policy and private practice and neglects the myriad ways in which custom, even if not explicitly adopted as law, can still have the force of law.

3 See infra Part II.
5 See Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 22 (1910).
This Essay will analyze the meanings of "custom" and "usage" for a twofold purpose: first, to determine the scope of Section 1983; second, to determine the scope of congressional power under Section 5 of the Fourteenth Amendment, which formed the basis for the enactment of this statute. As will become apparent, an analysis of the historical and current meaning of these terms yields one set of implications for interpretation of the statute and quite another for interpretation of the Constitution. This argument will be developed in four parts, tracing the history of Section 1983. Part I will consider the meaning of these terms in the era before the statute was enacted as part of the Civil Rights Act of 1871. Part II will examine the discussion of these terms in the debates over this act and over similar provisions in related civil rights acts. Part III will explore what has become of these terms in modern civil rights decisions and, in particular, in decisions that otherwise expanded Section 1983 but that interpreted the terms narrowly or neglected them altogether. Part IV will examine the implications of this historical inquiry for the current scope of civil rights laws and particularly for the power of Congress under Section 5 of the Fourteenth Amendment. At this late date, it is too much to expect that a reassessment of the meaning of "custom" and "usage" would drastically alter the interpretation of Section 1983. The power of Congress, however, is another matter. A reassessment of these terms would support an expansion of congressional power under Section 5 to counteract the combination of private action and official acquiescence that so often has resulted in the effective denial of constitutional rights.

I. THE JURISPRUDENCE OF ANOTHER AGE

In our legal system today, custom does not function as a freestanding source of law capable of generating legal rules, principles, rights, and duties, without first being adopted by a public official. In the single area in which custom retains a prominent, if controversial, role as a freestanding source of law, it is limited exclusively to the actions of public officials. In customary international law, the practices of national governments and their official representa-
tives are determinative, not the actions of private individuals. In domestic law, when legislatures, courts, and executive officials rely on custom today, they do so only to ascertain what the law should be, using it as evidence of acceptable practices within a community, industry, or society at large. They reserve to themselves the power to change or declare what the law is, allowing custom to speak, if it speaks at all, only through them. Custom was not always confined to such a derivative role. It used to be a source of law that public officials were required to recognize, which preexisted their official acts and often survived afterward as well.

This role of custom is nowhere more evident than in the continuing influence of the law of slavery, even after its explicit abolition during and after the Civil War. Custom did not, of its own force, determine the many issues arising from the unique and antiquated status of slaves in antebellum America. It acted only through the organs of state government, which enacted laws and issued decisions that departed from the common law applied in England. When these official enactments and decisions were invalidated by the constitutional amendments and civil rights acts passed during Reconstruction, the explicit legal force of the customs that supported them disappeared as well. Yet the customs lived on, as we know from the strenuous resistance to Reconstruction throughout the South and the reestablishment of racial castes in the Jim Crow regime that followed. The paradox of "custom" and "usage" in Section 1983 lies in the ambiguity of these terms: Is the reference only to custom and usage as embodied in legal enactments already invalidated by the Reconstruction amendments? Or did Congress also seek to enforce these constitutional provisions against the

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8 See The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[T]he Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery.").
practices that gave rise to and were reinforced by the legal doctrines of antebellum slavery?

These questions arose against the background of the pervasive role that custom had played in the early decades of our legal system, and still earlier in the English legal system. In an era in which government was much smaller than it is today, and its authority, especially over outlying territories, was much less secure, custom filled the gaps unavoidably left by the absence of officially promulgated law. Legislatures met less frequently, courts handed down fewer written decisions (and still fewer were published), and no administrative agencies in the modern sense existed at all. On the frontier or in the backwoods, there may well have been no effective government, and what government there was let cases be decided according to the custom discerned by individual judges and jurors. In fact, the situation in America and England during the early nineteenth century was more complicated than this simple summary suggests, involving struggles between centralized organs of governments, such as the royal courts in England, and local practices and institutions. In America, wholesale adoption of the common law, which might otherwise have filled the void in early American law, was resisted by arguments that the situation in this country was, or ought to be, different from England.

Broadly speaking, however, this explanation of the previously prominent role of custom explains the single most significant fact about its role as a source of law: Custom has been in steady retreat as an independent source of law since the middle of the nineteenth century. If custom thrives in a vacuum devoid of other sources of law, it also declines as that vacuum is filled. As the powers of public officials increase, so do the opportunities and resources available to them to override or displace customs contrary to government policy. Their enactments leave fewer gaps in the law and they have greater means at their disposal to fill those gaps, without con-

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10 Friedman, supra note 9, at 160–63.

11 See Baker, supra note 9, at 11–27 (tracing the origins of the common law in England from the ninth century).

12 Friedman, supra note 9, at 111–13.
ceding an independent role to custom. In our legal system today, legislators, judges, and administrative officials all can change the law, or alter its interpretation, without admitting that custom has dictated what the law is. Hence we find the reference to "custom" and "usage" in Section 1983 no more than a puzzling anachronism.

In the nineteenth century, custom and usage had exactly the opposite significance: They were an accepted source of law sanctioned by such authorities as Blackstone.13 His account of custom as a source of law was taken to be standard, both in England and in this country,14 although it does little to dispel the obscurity that surrounds this subject. Blackstone divided custom into three categories: general customs that form the common law; particular customs that persist in various localities or trades; and laws adopted by the custom of "some particular courts."15 Only the second of these categories would be regarded as custom in any sense familiar to us today, as the first and third include law that partially or wholly resulted from the acts of public officials. Yet Blackstone's broader usage reveals just how remote his concept of custom is from modern concepts influenced by legal positivism. Custom, this broader sense, carried over into American law and into the literal terms of Section 1983 in particular.

The first sense of custom, as the source of common law decisions, has a long history that stretches back before Blackstone. In early modern jurisprudence, local customs gradually were assimilated to the law recognized by the royal courts.16 This process, which also took place in continental legal systems, was part of the general centralization of power in a single national government.17 Local customary law was originally established by witnesses to local customs who testified to the content of the customs to be followed in resolving a particular dispute.18 By the eighteenth century, however, the national courts transformed customary law into

13 1 William Blackstone, Commentaries *67-84.
14 Friedman, supra note 9, at 102.
15 1 Blackstone, supra note 13, at *67.
16 See 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 183–88 (2d ed. 1905) ("The most important of all customs is the custom of the king’s court.").
18 Id. at 1340–44, 1353.
common law by relying more on their own perceptions of reason and on their own past decisions as precedents than on contemporary customs. The latter were gradually pushed to the fringes of actual lawmaking, even as they continued to be recognized as a source of judicial decisions.

At least partly for this reason, Blackstone does not distinguish between custom operating of its own force and custom operating only through judicial decisions. Although he classified the common law as part of the unwritten law, as opposed to written statutory law, he treated it as an uncertain amalgam of custom and official decisions. Not being a legal positivist, he felt no need to identify the actions either of private individuals or of public officials as the exclusive source of legal authority. "As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed." The authority of the common law, even in the form of rules and maxims, "rests entirely upon general reception and usage," but these are known only by the judges of the king's courts. "They are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land." Blackstone presents the common law as a fusion of pervasive private practices and authoritative judicial pronouncements.

The same is true of American commentators, who generally followed Blackstone's account and, if anything, gave greater weight to official pronouncements by emphasizing the need for an official reception of the common law in this country. Thus, in his influential Commentaries on American Law, Chancellor Kent refers to custom only in the sophisticated sense of rules and maxims adopted by the common law courts. As he said:

A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual

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19 Id. at 1345–52, 1357–65.
20 1 Blackstone, supra note 13, at *68; see also A.W.B. Simpson, The Common Law and Legal Theory, in Oxford Essays in Jurisprudence (Second Series) 77, 84–88, 91–94 (A.W.B. Simpson ed., 1973) (defending the view of the common law as custom as opposed to positivist legal rules).
21 1 Blackstone, supra note 13, at *68.
22 Id. at *69.
adoption, and received, from time to time, the sanction of the
courts of justice, without any legislative act or interference. It
was the application of the dictates of natural justice and of culti-
vated reason to particular cases.\footnote{1 James Kent, Commentaries on American Law 514 (George F. Comstock ed.,
Boston, Little, Brown, & Co. 11th ed. 1867).}

This description hardly fits the unreflective creation of custom-
ary law through immemorial usage, rather than the development of
common law principles through the reasoning and decisions of
judges. Kent did not stop there, however, in transforming the cus-
tomy sources of the common law into the product of official ac-
tion. He added a further layer of official approval to the common
law, finding it to be authoritative in this country only through stat-
utes or colonial charters that officially received the common law."\footnote{Id. at 515–16.}

Where Blackstone was equivocal over the precise source of the
common law, Kent resolved most ambiguities over its origins in fa-
vor of official action. This step did not eliminate custom as a source
of law, but confined it to the custom of public officials, a tendency
that only grew stronger with the passage of time and that persists
to this day in the analysis of “custom” and “usage” under Section
1983.

Blackstone’s third category of custom (laws adopted by the cus-
tom of “some particular courts”) also blurs distinctions that would
be sharply drawn by later legal theorists.\footnote{1 Blackstone, supra note 13, at *67.}
This category comprises the civil and canonical law that applied in the specialized courts for
ecclesiastical cases, the military, admiralty, and the universities of
Oxford and Cambridge.\footnote{Id. at *83.}

Even Blackstone admits that this cate-
gory does not quite make sense: Civil and canon law could not be
classified as unwritten law, which was the larger category in which
all customary law fell, because these forms of law were based on
Roman and Roman Catholic sources.\footnote{Id. at *79–80.}

Moreover, his reason for
treating civil and canon law as customary law depended upon a
statute of Henry VIII, so that they had a pedigree doubly mixed
with official pronouncements.\footnote{Id. at *80.}
Only the second of Blackstone's categories includes customs purely in the modern sense. These customs mainly involved local practices, usually with respect to property, that were confined to a specific geographical area or that governed a particular trade or craft, such as the law merchant applied to commercial transactions. These customs were subject to several requirements that restricted their operation: They had to be of long usage ("that the memory of man runneth not to the contrary"), certain, obligatory, and not repugnant to one another. They were also subject to a further requirement that explicitly assured the supremacy of the common law courts and the central authority that they represented: "Customs, in derogation of the common law, must be construed strictly." This category figured most prominently in American law in the nineteenth century without, however, necessarily conforming to all of Blackstone's requirements. The residual role of custom as a source of law, when no officially announced rule was available, assured that its definition and effect would vary from one situation to the next.

An example of how this category of custom could be applied and manipulated for ulterior purposes appears in Justice Story's opinion in *Swift v. Tyson*, the decision ultimately overruled in *Erie Railroad Co. v. Tompkins*. Story was one of the great judges and legal commentators of the nineteenth century as well as one of the great advocates of expanded federal judicial power. He accomplished this aim in *Swift* by asserting that the federal courts could follow their own interpretation of the general common law, even when it was at variance with decisions of the state courts. His treatment of custom narrowed the concept to only a subset of what Blackstone recognized as local custom. Paradoxically, Story treated custom just like he treated local statutes: as a paradigm of positive law. *Swift* itself concerned the negotiability of a bill of exchange, a

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30 1 Blackstone, supra note 13, at *76.
31 Id. at *78.
33 304 U.S. 64, 77–78 (1938).
34 *Swift*, 16 U.S. (1 Pet.) at 18–19.
subject that fell squarely within the law merchant, and the Court held that state decisions on the law merchant did not fall within the "laws of the several states" that federal courts were required to follow under the Rules of Decision Act.\textsuperscript{35} Story excluded mercantile custom from the scope of "laws" over which state courts had final authority because it was local only in the figurative sense that it applied to particular trades and businesses. On his view, the state courts could exercise exclusive authority only over local statutes and customs confined to the geographical limits of the state. Thus, the decision in \textit{Swift} was not governed by New York law since "the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage."\textsuperscript{36}

Other departures from Blackstone's account of custom followed a similar pattern, leaving state law to capture the variety of local practices in this country in any manner that it saw fit, whether by positive enactments or through recognition by local custom. In England, by contrast, local variations in the law could be recognized only through custom, which therefore played a larger role as an independent source of law than in this country. Thus, Kent discusses the reception of the common law with the significant qualification that it had been accepted only "so far as it is applicable to our situation."\textsuperscript{37} State statutes adopting the common law usually retained the qualification that it had been adopted subject to pre-existing statutes and state constitutions.\textsuperscript{38} Once the common law was received, however, it was no longer a matter of custom for Kent. Instead, just as for Blackstone and Story, it was revealed for Kent in reported decisions, which "contain the most certain evidence, and the most authoritative and precise application of the rules of the common law."\textsuperscript{39}

Thomas Cooley, in his influential analysis and commentary on Blackstone, also minimizes the role of custom as an independent source of law. He inserts a long footnote at the beginning of Blackstone's discussion of the prerequisites for a legally recognized custom, devoting virtually all of his attention to customs of particular

\textsuperscript{36} \textit{Swift}, 16 U.S. (1 Pet.) at 18 (emphasis added).
\textsuperscript{37} 1 Kent, supra note 23, at 515.
\textsuperscript{38} Id. at 515–16 n.(a).
\textsuperscript{39} Id. at 517.
businesses and trades. Although he is more liberal than Blackstone in allowing reliance on recently established customs, Cooley confines such customs to the interpretation of contracts and discusses other customs only as they bear upon particular trades or lines of business. Relying on custom in this narrow sense removes any competitive threat that it poses to officially announced law. In all the cases cited by Cooley, the common law provides the grounds for the claim, typically based on some kind of contractual relationship, and custom simply fills in the nature of the relationship. For this reason, Cooley can affirm the role of custom while, at the same time, denying it any power to override the common law. In fact, he quotes Kent to the same effect: “Though usage . . . is often resorted to for explanation of commercial instruments, it never is, nor ought to be, received to contradict a settled rule of commercial law.” For Cooley and Kent, the effect of custom had to be channeled through judicial decisions modifying the common law adopted from England.

Adoption itself raised controversial issues in the late eighteenth and early nineteenth centuries, intertwined as it was with the question of how far the newly independent colonies were to go in departing from the law of the mother country. The general, if usually uninformative, answer was Kent’s: The common law was to be adopted “so far as it is applicable to our situation and government.” In fact, few alternatives were available to the strategy of adoption and modification. Only in some of the states subsequently admitted to the Union, including Louisiana and Texas, was the influence of civil law systems strong enough to provide a functioning alternative to the common law. At every point where the common law was thought to be inadequate, a statute could be enacted or a judicial decision rendered to make the necessary alterations in English law without a direct appeal to custom alone. Moreover, all

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40 1 William Blackstone, Commentaries 68 n.1 (Thomas M. Cooley & James DeWitt Andrews eds., 4th ed., Chicago, Callaghan & Co. 1899) [hereinafter Cooley on Blackstone]. Unless otherwise noted, the references are all to Cooley's notes, which date from the third edition of 1883.
41 Id.
42 Id.
43 Id. (quoting and citing Frith v. Barker, 2 Johns. 335).
44 1 Kent, supra note 23, at 515.
45 See Friedman, supra note 8, at 169–76.
of these alterations could be accomplished at the state level, since apart from the doctrine of *Swift*, the common law recognized in American courts was state law.\(^4\) Starting afresh in the American legal system, custom could be domesticated by the actions of state officials.

The leading decisions on custom and usage before the Civil War bear out the limited role that they played in the development of American law. For instance, in *United States v. Arredondo*,\(^4\) the Supreme Court offered a seemingly unequivocal endorsement of custom as a source of law, but in context, it did so only under the command of a federal statute.\(^4\) A federal statute required an examination of prevailing custom to determine title to land in Florida based on grants "under and in conformity to the laws, usages and customs of the government under which the same originated."\(^9\) This statute required the Court to rely on custom, but only because of the positive act of the legislature. As the Court stated:

> The court [sic] not only may, but are bound to notice and respect general customs and usage as the law of the land, equally with the written law, and, when clearly proved, they will control the general law; this necessarily follows from its presumed origin,—*an act of parliament or a legislative act.*\(^5\)

Very much as Blackstone had done, the Court blurred the distinction between custom as an independent source of law and custom as endorsed by the legislature. Other cases did not go quite so far in tying custom to positive law, but neither did they give it a very broad scope. Some, like *Arredondo*, concerned claims to land based on the title conferred by foreign nations.\(^5\) Others concerned

\(^{4}\) Cooley on Blackstone, supra note 40, at 61 n.1.
\(^{4}\) Id.
\(^{6}\) Id. at 708.
\(^{5}\) Id. at 715.
\(^{5}\) See, e.g, Strother v. Lucas, 12 U.S. (1 Pet.) 410, 445–47 (1838); cf. Leonard v. Peeples, 30 Ga. 61, 63–64 (1860) (finding no proof of custom with respect to payment for mining claims in California and "[i]f there be such a custom, it is so unreasonable, that it was probably enforced by the bowie-knife"); In re Estate of Nakuapa, 3 Haw. 342, 342–48 (1872) (recognizing Hawaiian custom of adoption as valid in an inheritance case). For a compilation of similar examples in federal statutes and in congressional debates, see Charles Fairman, Reconstruction and Reunion 1864–88 Part One,
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particular trades or businesses, and even these did not find that a legally binding custom had been established.\(^2\)

The law of slavery, which the Reconstruction civil rights acts sought to dismantle, also found little support in customary law whose validity was recognized by the common law. By the time Blackstone wrote, in the decade before the Declaration of Independence, slavery had been declared repugnant to the common law, and the very fact that a slave set foot in England resulted in his or her emancipation.\(^3\) The "peculiar institution" of slavery in the American colonies might have had all the earmarks of a local custom, particularly as it was abolished in the North and became confined to the South, but such a custom was powerless, by itself, to override the common law. Hence, the law of slavery developed from the codification of customs in statutes of the colonies and then the newly independent states, supplemented by judicial decisions that recognized a variety of local customs. For instance, different states had different statutes and judicial decisions determining the status of mixed race individuals.\(^4\) How many black ancestors were necessary to make an individual black, and therefore presumptively a slave? State officials were required by the race-based system of slavery in this country to repeatedly address such questions. Whether or not we find them distasteful today, these questions had to be resolved outside of the resources provided by the common law.

Custom was the natural source for any answer to such questions, as well as many others that arose from the contradictory treatment of slaves as property for some purposes and as persons for others. For example, if slaves were executed as a punishment for crime, their masters were deprived of property and therefore had a claim for compensation.\(^5\) The common law had no readily available an-

\(^2\) See, e.g., Adams v. Otterback, 15 U.S. (1 How.) 539, 545 (1853) (finding no usage established for grace period for payment on note); Delaplane v. Crenshaw & Fisher, 56 Va. (1 Gratt.) 457, 465–71 (1860) (finding no custom shown with respect to flour inspectors taking a portion of the flour inspected for personal use, and even if shown, contrary to inspection laws).

\(^3\) Cooley on Blackstone, supra note 40, at *423–25.

\(^4\) Morris, supra note 7, at 22–29.

\(^5\) Id. at 253–56.
swer to the question whether compensation should be granted. The entire enterprise of placing slavery within the structure of American law required ad hoc adjustments of rules drafted for other purposes.\textsuperscript{56} A few writers turned to the civil law and the rules derived from the treatment of slaves in Roman law, but outside of the civilian jurisdictions of Louisiana and Texas, these writers were mainly abolitionists.\textsuperscript{57} They argued that slavery could be justified solely under an alien legal system adopted only by the absolutist monarchies on the continent or in ancient Rome.\textsuperscript{58} This view was not widely accepted in the South, which pieced together different parts of the common law to effect a compromise between the different aspects of slaves as persons and property. Custom no doubt was used to determine the balance that was struck, almost always to assure the absolute control of masters over their slaves. Even the exceptions to this rule, such as statutes enacted to limit the power of masters to free their slaves, confirmed the general practice of maintaining the master-slave relationship.\textsuperscript{59}

This one-sided relationship further limited the role of legally recognized custom in the law of slavery. Almost by definition, the legal relationship between masters and slaves gave all the power to the masters, and by denying most forms of legal capacity to the slaves, it also limited their ability to act as agents for their masters. Hence, there was no foothold for the customary law implicit in contractual relationships such as that between a master and servant. \textit{The Law of Usages and Customs with Illustrative Cases}, a treatise devoted to this subject, contains extended discussions of custom in the interpretation of contracts and usages in particular trades and businesses.\textsuperscript{60} This treatise cites only one case on custom with regard to the treatment of slaves, and even then the issue is not over the rights of the slave herself but over her owner’s liability

\textsuperscript{56} Friedman, supra note 9, at 85–89; Morris, supra note 7, at 37–57; see also Mark DeWolfe Howe, Federalism and Civil Rights, in Civil Rights, the Constitution, and the Courts 31, 32–37 (Archibald Cox et al. eds., 1967) (discussing the ambivalence of British law towards slavery in the colonies).

\textsuperscript{57} Morris, supra note 7, at 37–38, 48–52.

\textsuperscript{58} Id. at 37–38.

\textsuperscript{59} Id. at 398–99. I am grateful to Risa Goluboff for this point.

\textsuperscript{60} John D. Lawson, \textit{The Law of Usages and Customs with Illustrative Cases} (St. Louis, F.H. Thomas & Co. 1881).
if she gives birth while let out for hire. 61 Another treatise, confined solely to English law, focuses on proof of customs, but almost entirely through parol evidence "to vary, add incidents to, or explain the meaning of written contracts." 62 Slaves, of course, could not take advantage of custom in this form, having been left behind in Henry Maine's general progression of the law from status to contract. 63 Their rights were determined, and invariably denied, by status.

An illuminating contrast can be made with the rights of seamen, which were determined by the customs that governed maritime commerce. 64 These customs were taken up directly into admiralty law and, after ratification of the Thirteenth Amendment, invoked to justify laws that made it a crime for merchant seamen to desert their vessels. In Robertson v. Baldwin, the Supreme Court upheld such laws against the argument that they violated the constitutional prohibition against involuntary servitude, because the services of seaman "have from time immemorial been treated as exceptional." 65 In dissent, Justice Harlan protested that "immemorial usage" could not override the commands of the Constitution. 66 Yet because custom had been accepted as a source of maritime law, it became part of the background against which the Thirteenth Amendment was interpreted and, according to the majority, remained unaffected.

To the extent that custom exercised a similar influence over the law of slavery, it had quite the opposite consequences. Its immediate effect on the law was negated by the abolition of slavery in the

61 Id. at 73. As it turned out, this custom was held to be unenforceable because it was unreasonable. Id.
64 James Lees, Dana's Seamen's Friend: Containing a Treatise on Practical Seamanship 99-134 (London, George Philip & Son 1862) (recounting laws governing the master and other members of the crew and "the customs which long usage has made almost as binding as laws"); see also Alexander Pulling, The Laws, Customs, Usages, and Regulations of the City and Port of London 2-5, 341-52 (London, William Henry Bond 2d ed. 1854) (discussing local customs confirmed by Parliament with regard to harbor seamen).
65 165 U.S. 275, 282 (1897).
66 Id. at 293-94, 301 (Harlan, J., dissenting).
Thirteenth Amendment, but the persistent effects of customs relegating African-Americans to the status of property continued to influence the content and enforcement of state law. These consequences raised the most persistent questions about custom as it affected the rights of the newly freed slaves and the scope of the Reconstruction civil rights acts. Did the newly ratified constitutional amendments authorize Congress only to act against state laws that created the institution of slavery? Or did they authorize Congress to legislate directly against private activity derived from that institution? These questions have been answered differently for different amendments and different civil rights acts, as discussed in the next Part of this Essay, but all of the answers have a common core in the problematic role of custom as a source of state law.

II. CUSTOM AND USAGE IN RECONSTRUCTION

"Custom" and "usage" are most prominently on display in Section 1983, but they entered civil rights law with the predecessor to Section 1981, where "custom" was first used to define the preemptive effect of this statute as well as to make it a crime to deny any of the rights that custom created.6 This latter provision, in fact, provided the model for Section 1983, which was enacted to provide a civil remedy analogous to the remedy by way of criminal prosecution. None of these provisions, insofar as they applied to action under color of custom or usage, received much debate at all. The meaning of these terms instead was taken for granted, and debate focused on other, seemingly broader provisions of the civil rights acts.6 This pattern became even more pronounced later during Reconstruction (and afterwards) when these provisions were applied and interpreted.6 Actions under color of state custom or usage barely caused a ripple in the many controversies over the effect and validity of the Reconstruction civil rights acts.

Section 1983 was enacted as part of the Civil Rights Act of 1871, sometimes known as the Ku Klux Klan Act.70 This Act was passed

6 Act of April 9, 1866, § 1, 14 Stat. 27, 27.
67 See infra text accompanying notes 79–92.
68 See infra text accompanying notes 106–27.
after ratification of the Fourteenth Amendment to enforce the rights granted by Section 1 of the amendment, as well as rights granted by earlier civil rights acts. Among the latter was the Civil Rights Act of 1866, which enacted the provision now codified as Section 1981, a provision that was itself a predecessor of the Fourteenth Amendment. Section 1981 was passed to invalidate the "Black Codes"—legislation in the southern states that imposed various disabilities upon blacks, seeking to return them as closely as possible to the status of slaves from which they had just been liberated by the Thirteenth Amendment. This amendment was interpreted to reach both public and private action, and Section 1981 itself received a similar interpretation, although not until nearly a century after it was enacted. Section 1981 was passed under the power of Congress to enforce that amendment by eliminating the "badges and incidents" of slavery. Section 1981 sought to achieve this goal by granting all persons the same rights as are "enjoyed by white citizens" to participate in various aspects of public life, such as to sue, be parties, give evidence, and to make and enforce contracts. As originally enacted, it also contained a preemption clause, subsequently deleted upon codification, which provided that the rights it granted were valid despite "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Another section of the 1866 Act made it a crime for any person to deny these rights "under color of any law, statute, ordinance, regulation, or custom." This provision is now codified as Section 242 of the Federal Criminal Code.

These two references to custom in the 1866 Act fell squarely within the tradition of treating custom as a source of law, giving it the same status as "law, statute, ordinance, regulation." Moreover, insofar as it appeared in the preemption clause, custom could

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73 See U.S. Const. amend. XIII, § 2.
75 Act of April 9, 1866, § 1, 14 Stat. 27, 27 (emphasis added).
76 Id. § 2 (emphasis added).
78 Act of April 9, 1866 §§ 1–2.
only appear as a source of law, since it would not have been necessary to explicitly override a custom that was not a source of law. Custom, in this latter sense, which we now take to be its ordinary sense, would automatically have been overridden by any valid law. In the preemption clause of Section 1981 as originally enacted, action under color of custom can mean only action under color of custom having the force of law. Since Section 242 was enacted to enforce the rights granted by Section 1981, and indeed appeared in the very next section of the 1866 Act, "custom" must have the same meaning in that provision as well. This conclusion has momentous consequences for Section 1983, since that provision was itself modeled on Section 242. The meaning of "custom" in all three provisions must be "custom having the force of law."

This conclusion still leaves open the question of when custom has "the force of law." As we have seen, in the nineteenth century it did so in the limited circumstances permitted by official sources of law. This sense of custom emerged in the debates over the 1866 Act in two different forms. First, the author of the Act, Senator Trumbull, identified customs with respect to different punishment of white and black citizens in "some communities in the South." This statement is consistent with those of other senators and representatives who equated customs with law, even if those customs were not formulated in official pronouncements. The second reference to custom, also by Senator Trumbull, explicitly concerns the scope of the criminal prohibition in Section 242. In response to criticism that it singled out public officials for punishment, he stated that its intention was "to punish everybody who violates the law." Private individuals, as well as public officials, fell within the prohibition against "any person who, under color of any law, statute, ordinance, regulation, or custom" acted to deny rights granted by the Act.

The congressional debates, however, do not identify precisely which actions by private individuals were covered by the 1866 Act. These actions had to be authorized by law in some form, either

80 Fairman, supra note 51, at 1238–44.
82 Act of April 9, 1866 § 2.
through positive enactments or through custom. It is possible that Senator Trumbull failed to specify these forms of authority for any of several different reasons: He was not aware of all the provisions in the Black Codes that had been enacted or were under consideration in the South; the customs surrounding race relations in the South were unfamiliar to him; private individuals might have acted in complicity with state officials; or in the chaotic conditions of Reconstruction, private individuals often took over the functions of state officials. All of these reasons could have raised suspicions about possible evasion of the Act. After all, the southern states that had passed the Black Codes had already tried to evade the command of the Thirteenth Amendment by reinstating slavery in all but name. Congressional supporters of the 1866 Act would not have wanted this legislation to be threatened with nullification by similar means.

Insofar as Congress legislated against custom in the 1866 Act, it followed the trend of suppressing deviant regional customs that threatened central national power. Slavery, that “peculiar institution” of the South, was eradicated by the Thirteenth Amendment, and its associated laws and customs were invalidated by the 1866 Act. As Mark DeWolfe Howe pointed out several decades ago: “The statutory condemnation of discriminations under color of law or usage, read in the context of the Thirteenth Amendment, seems to outlaw all conduct, public and private, designed to keep alive the degradations that were rooted in the laws and customs of slavery.” By the same token, however, customs associated with more general practices of racial discrimination, particularly in the North, were not affected by the Act. Either these customs, such as racially segregated public schools, were not thought to deny rights to equal treatment, or they were not treated as customs at all, but only as the exercise of individual rights under the common law. The Act

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83 See Casper, supra note 81, at 107–11.
84 See supra text accompanying notes 16–19.
85 Howe, supra note 56, at 49. For a recent version of this argument, see James Boyd White, What’s Wrong with Our Talk About Race? On History, Particularity, and Affirmative Action, 100 Mich. L. Rev. 1927, 1945–47 (2002) (noting Justice Douglas’s argument that when whites “have such a practical monopoly of private and public power that they may simply choose whether to achieve their objectives through the arms of the state or through concerted private action, it ought not matter which form of power they elect to use”).
did not prohibit all forms of public discrimination, nor did it make all forms of private discrimination the equivalent of state action. Only pervasive social practices associated with slavery were prohibited.

Local custom and state law were forced to give way to centralized federal law, but throughout Reconstruction there were intense debates over how far Congress could go in enforcing the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments. These debates led Congress and then the Supreme Court to draw fine distinctions between state action and private action that persist to this day, particularly in decisions interpreting the Fourteenth Amendment. The debates over the Civil Rights Act of 1871 focused on Section 2 of the Act, which is now partly codified in Section 1985(3). In its current form, Section 1985(3) prohibits conspiracies by private individuals to deny equal rights and creates a private action for any damages to persons or property resulting from such conspiracies. It was originally directed against the Ku Klux Klan and other private terrorist organizations opposed to Reconstruction, thus accounting for the Act’s popular name, the “Ku Klux Klan Act.”

The elaborate details of Section 1985(3), which were embedded in the still more elaborate provisions of Section 2 as originally enacted, are less important than the Act’s explicit coverage of actions by private individuals, whether or not they acted under color of state law. This aspect of Section 2 gave rise to prolonged and intense debate over whether it exceeded the powers of Congress under the Fourteenth Amendment, a debate that was soon resolved against its constitutionality. In United States v. Harris, the Supreme Court held unconstitutional a criminal prohibition against private conspiracies enacted in Section 2. The Court reasoned that while the Fourteenth Amendment applied only to state action, the only state law relevant to the conspiracy charged in that case prohibited

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89 106 U.S. 629, 632, 635-44 (1882).
the very same conduct as the federal statute in question. Accordingly, there was no basis for invoking congressional power to enforce the rights granted by the amendment. Only in the twentieth century were the remaining provisions of Section 2 of the Act upheld. In the nineteenth century, these provisions were regarded as a dubious attempt by Congress to displace the general lawmaking authority of the states.

The contrast with the treatment of Section 1983 could not be more dramatic. Enacted as Section 1 of the 1871 Act, Section 1983 elicited no debate over its constitutionality, which was contrasted favorably with the doubtful constitutionality of Section 2. The sponsor of the Act, Representative Shellabarger, introduced Section 1983 as a simple extension of the criminal prohibition in Section 242, enacted in the Civil Rights Act of 1866. Section 1983 expanded upon Section 242 in two different ways: first, by adding a civil remedy to a criminal prohibition; and second, by protecting against the deprivation of all constitutional rights, not just those against racial discrimination. Both provisions protected the rights of citizens against deprivations under color of state law. The constitutionality of Section 242, originally enacted under the Thirteenth Amendment, assured the constitutionality of Section 1983, which was enacted under the additional powers granted to Congress by the Fourteenth Amendment. This analysis of Section 1983, as set forth by Representative Shellabarger in his introductory remarks, was not contradicted by anything else in the debates over the 1871 Act, which referred to the "under color of" clause in Section 1983 mainly as a means of assuring that this section was constitutional, in contrast to the sections of the Act that applied directly to private action.

Despite the general equivalence of Section 1983 with Section 242, the "under color of" clauses in each statute differ in some de-

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90 Id. at 639-40.
91 Id.
94 See id.
tails. The clause in Section 1983 applies only to sources of state law, while Section 242 applies to federal law as well. This change in wording only makes explicit in the later act what was already implicit in the earlier act: that it was aimed at action under color of state authority rather than federal authority. Section 1983 also adds "usage" to the list of sources of state law, following the general tendency to use this word as a synonym for "custom." Again, this change in wording confirms what was already implicit in the earlier act: that it was an appeal to the tradition of unofficial practices, outside of government, as a source of law.

In recent decades most of the attention to the "under color of" clause of Section 1983 has focused on the question whether the clause covers state officials acting in violation of state law. The Warren Court's decision in *Monroe v. Pape* upheld coverage in these circumstances, after an extended examination of the legislative debates both in the majority and dissenting opinions. The scholarly literature also has divided on the question whether Congress intended to create a federal remedy for actions in violation of state law. As the next Part argues in greater detail, the significance of this issue today has less to do with the original intent of the framers of Section 1983 than with the changing conceptions of federalism and pragmatic concerns about providing effective remedies for violations of federal rights. The controversy over this issue, however, does set limits on the possible meaning of "custom" and "usage." In particular, both sides in this debate deny these terms the force of law when a state has acted officially and effectively to disavow and prohibit practices that violate federal rights. This implication of the legislative debates accords completely with the pre-existing understanding of custom as a subordinate source of law that could be overridden by official action.

Both too much and too little state law could eliminate the basis for any exercise of congressional power under the Fourteenth Amendment: too much state law because it could override custom

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and, assuming it was effectively enforced, bring state law into conformity with federal law; too little state law because it could eliminate any basis for finding that the state acquiesced in private customs that would otherwise deny federal rights. As the debates over Section 1985(3) reveal, Congress was deeply concerned over its power to regulate directly private conduct not specifically authorized or condoned by state law. It could not have intended "custom" and "usage" to include simple individual action, which would lack the collective character of accepted practices in the community. Nor could Congress have intended these terms to include customs in the ordinary sense if these actions were not approved or condoned by state law. Action under color of custom or usage falls in the uncertain middle ground between too much and too little state law. Perhaps Congress did not debate the meaning of these terms in the debates over the 1871 Act because it had little to add to the brief discussion of their meaning in the 1866 Act. This conclusion, however, makes the background understanding of these terms, derived from antebellum sources such as Blackstone and Kent, all the more important.

Such neglect certainly carried over into the subsequent history of Section 1983. The wording of the statute was altered when it was codified in the Revised Statutes of 1874, the first comprehensive compilation of federal statutes, but one that still remains authoritative for civil rights laws. These changes are of some significance, but they shed light only indirectly on the meaning of "custom" and "usage." As originally enacted, the "under color of" clause in Section 1983 applied to "any law, statute, ordinance, regulation, custom, or usage of any State." The Revised Statutes deleted "law" from this list. This term, however, reappeared in the form of "laws" in another clause of the statute, in seeming obedience to some principle of conservation of legal terminology. In its original form, Section 1983 protected only rights "secured by the Constitution of the United States." In the Revised Statutes, this clause was changed to "secured by the Constitution and laws." The first of these changes appears to be inadvertent, as the second might be

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100 Act of April 20, 1871 § 1.
also, but it has been held to warrant a significant expansion of the rights protected by Section 1983.\textsuperscript{102}

The inadvertence of the first change can be confirmed by comparing the codified version of Section 1983 with the jurisdictional provisions that were originally enacted with it in the same section of the Civil Rights Act of 1871. The jurisdictional provisions were divided in the Revised Statutes of 1874 into two different sections, one applying to the district courts and one to the circuit courts. Both of these sections provided for federal jurisdiction when the plaintiff alleged a denial of federal rights under color of state law and both retained the original phrasing that covered action under color of "any law" of the state.\textsuperscript{103} The absence of any explanation for the omission of the term "law" in the codified version of Section 1983 implies either that it was left out as a mistake or that it was thought to be redundant with the other sources of law listed in the "under color of" clause.

These alternative explanations are not inconsistent with one another. It is possible that "law" was omitted inadvertently from the codified version of Section 1983 precisely because it is so similar in meaning to the terms that were retained. The only items seemingly missing from the list of "statute, ordinance, regulation, custom, or usage" are state constitutions and state common law. State constitutions could have been included in the list as a term parallel with the remaining sources of law, but probably were omitted because Congress addressed offensive state constitutions by other means. All of the reconstructed southern states had to pass constitutions acceptable to Congress before they could regain their seats in the Senate and the House of Representatives.\textsuperscript{104} Constitutions that defied federal authority would not have been approved. That leaves open the possibility that unreconstructed border states could have retained offensive provisions in their constitutions or that reconstructed states could have amended their constitutions to insert

\textsuperscript{102} See Maine v. Thiboutot, 448 U.S. 1, 4–8 (1980).

\textsuperscript{103} Rev. Stat. §§ 563 (12th), 629 (16th) (1873–74). There are cross-references to these sections in the revisors' notes accompanying the codified version of § 1983. The same wording is retained in the current version of these jurisdictional provisions. See 28 U.S.C. § 1343(a)(3) (2000).

discriminatory provisions. Congress apparently overlooked these means of evading Section 1983, but it did so both when the statute was originally enacted and when it was codified three years later.

The omission of state common law presents a more complicated problem. After *Swift v. Tyson*, an accepted meaning of "laws" excluded the general common law but included local laws, whether statutory or by judicial decision. A mindset that accepted this meaning of the plural "laws" could have treated the singular "law" in similar fashion, not to deny that common law decisions were law, but to imply that they were encompassed in other terms in the list in the "under color of" clause. In particular, decisions of the southern courts based on the local practices of slavery and its aftermath during Reconstruction could have been embraced within the meaning of "custom" or "usage." It was just such local practices that *Swift* excluded from the common law and included within local law. The general common law was not, on this view, the source of discriminatory state action. This position was eventually adopted by the Supreme Court in the *Civil Rights Cases*, finding that private discrimination by innkeepers and other providers of public accommodations violated the common law and, therefore, could not amount to state action, no matter how much it was condoned or permitted by state officials.\(^\text{106}\)

Alternatively, contrary to *Swift*, "custom" and "usage" could have been taken more broadly to refer to the custom and usage of common law courts, another sense of the terms that was also prevalent at the time. On this interpretation, the emphasis in interpreting and applying the "under color of" clause would have fallen on the existence of colorable, but not actual, authority conferred by common law decisions. The ambiguities of "custom" and "usage" are broad enough to support the conclusion that these terms encompassed every indefinite form of colorable authority under state law, including the common law. Yet even the Reconstruction Congresses would have balked at the conclusion that the common law, as applied in the North as well as the South, denied civil rights. Instead, the fundamental premise of virtually every civil rights act passed during Reconstruction was that the newly freed slaves were

\(^{105}\) 16 U.S. (1 Pet.) 1 (1842).

entitled to the same rights that whites already enjoyed under the common law. The common law that still remained common between the North and the South was not the target of Congress in enacting Section 1983.

The little attention paid to "custom" and "usage," both in the enactment and in the codification of Section 1983, strongly suggests that Congress accepted the sense of custom as local practices, the sense that had become dominant in Anglo-American law by the middle of the nineteenth century. A different sense would have required a special definition, which no one took the trouble to provide. It also would have contrasted oddly with the introductory phrase "under color of," which implies the appearance, but not the existence, of actual authority.\textsuperscript{7} A special definition, in a sense unfamiliar in the law that formed the background to Section 1983, would not have conveyed the appearance of authority required to find action "under color of" state law. It would not have been known to the individuals, whether public or private, whose conduct the statute was meant to regulate. How could they assume the appearance of authority from a source not already familiar in American law? Local customs, by contrast, limited the coverage of the statute in a manner commensurate with its immediate aims to eliminate the vestiges of slavery in the South.

A further limitation on the coverage of Section 1983 arises from the rights that it protects. Almost all constitutional rights, with the important exception of the Thirteenth Amendment, protect only against government interference. Going beyond a strict "state action" interpretation of the "under color of" clause does nothing to expand the scope of the underlying rights for which Section 1983 provides a remedy. Even with the addition of "and laws" by the Revised Statutes of 1874, a change which brought statutory rights within the protection of Section 1983, those additional rights still need to be established by some act of Congress. The overall scope of Section 1983 depends just as much on the scope of the plaintiff's underlying rights as it does on the scope of the "under color of" clause. As the next Part discusses in more detail, the application and enforcement of Section 1983 began, after Reconstruction, with a narrow interpretation of those rights.

\textsuperscript{7} See Winter, supra note 97, at 415.
Custom and Usage

III. JUDICIAL DECISIONS

Like most of the civil rights legislation passed during Reconstruction, Section 1983 received only sporadic enforcement while Reconstruction lasted, and it fell into disuse almost immediately thereafter. Decisions of the Supreme Court narrowly interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments also resulted in a narrow interpretation, if not complete invalidation, of almost all the Reconstruction civil rights acts. Section 1983 slowly emerged from the shadow of these decisions in the early twentieth century and, along with other surviving provisions of the civil rights acts, was revived by the Warren Court. In Monroe v. Pape, the Court interpreted the “under color of” clause to reach the actions of state officials, even if these were contrary to state law, and even if they could, in theory, be remedied by actions in state court. This expansion along one dimension did not result in expansion along the dimension of “custom” and “usage” for reasons both internal and external to the statute itself. This Part begins with the decisions during and immediately following Reconstruction.

A. Early Decisions

Like the legislative history of Section 1983, the history of its judicial enforcement and interpretation is largely negative: a history of what did not happen. In the decades immediately following its enactment, Section 1983 was the subject of few claims, and even when it was cited or discussed, its significance was minimized. If it was understood to apply broadly to private action through an expanded sense of “custom” and “usage,” this understanding left no trace in the historical record. On the contrary, coverage of Section 1983 was most often equated with coverage of the Fourteenth Amendment, so much so that the statute barely had an independent existence. Most of the decisions and the accompanying controversies, just like the debates over the Civil Rights Act of 1871, concerned the provisions like Section 1985(3) that applied explicitly to private action.

109 See infra text accompanying notes 110–32.
As with all the Reconstruction civil rights legislation, Section 1983 has waxed and waned in significance with the Fourteenth Amendment. Thus, after the *Slaughterhouse Cases*,\(^\text{10}\) the Supreme Court routinely denied claims (and even federal jurisdiction) in cases alleging violation of constitutional rights unrelated to racial discrimination.\(^\text{11}\) This trend continued into the twentieth century and still ties the interpretation of the statute closely to the amendment. The first of the cases in the line leading to *Monroe* did not discuss Section 1983 at all, but only discussed the question whether state officials engaged in state action when their conduct violated a provision of the state constitution similar to the Fourteenth Amendment. The claim in *Home Telephone & Telegraph Co. v. City of Los Angeles* was that a municipal ordinance imposed rates upon a telephone company in violation of the Due Process Clause.\(^\text{12}\) The company sought to enjoin enforcement of the ordinance, and although this claim would now be brought under Section 1983, the Court simply assumed that there was federal jurisdiction if the complaint properly alleged a violation of the Fourteenth Amendment.\(^\text{13}\) The holding in this case later was used to interpret Section 242,\(^\text{14}\) and because this provision served as the model for Section 1983, it was applied to that statute as well.\(^\text{15}\) The roots of this holding can be traced back to decisions immediately following Reconstruction, but these too are cases concerned solely with state action under the Fourteenth Amendment.\(^\text{16}\)

The neglect of Section 1983 resulted from other factors as well. After the passage of general federal question jurisdiction, claims for denial of constitutional rights could be brought under a combination of common law causes of action and the Constitution it-

\(^{10}\) 83 U.S. (16 Wall.) 36 (1873).


\(^{12}\) 227 U.S. 278, 280-81 (1913).

\(^{13}\) Id. at 295–96.


\(^{15}\) *Monroe*, 365 U.S. at 182–84. Other decisions in this line of cases include *Williams v. United States*, 341 U.S. 97 (1951) and *Screws v. United States*, 325 U.S. 91 (1945).

\(^{16}\) See *Ex parte Virginia*, 100 U.S. 339, 346 (1879); *Virginia v. Rives*, 100 U.S. 313, 318 (1879).
With this alternative available, there was no need to invoke a statute that seemingly was limited to rights directly related to racial discrimination. The expansion of economic rights under the Fourteenth Amendment could be accommodated without expanding the scope of Section 1983 beyond the immediate problems of Reconstruction that led to its passage. Thus, the statute was successfully invoked for claims under the Fifteenth Amendment, which necessarily are limited to racial discrimination, but not for claims of denial of substantive due process under the Fourteenth Amendment. The narrow interpretation of, and apparent hostility toward, civil rights after the end of Reconstruction diminished the scope of Section 1983 further. If the Reconstruction amendments supported only a narrow range of civil rights, then only a few rights could be successfully asserted under this statute.

The familiar history of the abandonment of Reconstruction demonstrates why a broad interpretation of “custom” or “usage” never became a live issue. The fate of the civil rights statutes that applied directly to private action in this period is instructive. Several of these statutes, enacted with Section 1985(3) or as predecessors to it, were declared unconstitutional as beyond congressional power under the Reconstruction amendments. Decisions such as these sought to limit the reach of federal power by imposing categorical limits on the reach of the Reconstruction amendments and, in particular, by limiting the Fourteenth Amendment to actions that could be attributed directly to the states. This approach to constitutional interpretation precluded any significant expansion of Section 1983 to reach a wide range of private action.

Far from receiving broad interpretation, “custom” and “usage” were used to justify practices that we now regard as discriminatory. Thus, to take the most notorious example, *Plessy v. Ferguson* upheld segregation under a Louisiana statute partly on the ground that the legislature was “at liberty to act with reference to the es-

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118 See id. at 1552.

tablished usages, customs and traditions of the people." Whether framed in precisely these terms, reasoning along these lines reveals the inherent limits of custom as a vehicle for legal reform. To be effective, it must be neither too narrowly practiced nor too widely accepted. If a social practice is not sufficiently longstanding or widespread, it does not constitute a custom at all. But if it is universally accepted, it serves as a powerful justification for maintaining the status quo. A custom in these circumstances might well receive sufficient approval from the state to constitute state action, but if so, it is also likely to be found not to have violated any federal rights, precisely because it is so widely accepted. Only by acting between these extremes—by attacking practices that remain widespread but that are falling out of favor—does an expanded sense of "custom" also expand the scope of Section 1983. Regional customs, like those persisting after the abolition of slavery, precisely fit this description.

The effect of custom in expanding the scope of Section 1983 was further limited by the formalist approach characteristic of judicial decisions in the late nineteenth century. Whatever else this movement in legal thought included, it insisted upon the importance of the way in which legal standards were framed. It was the form of federal or state law that determined its validity, rather than the goals it sought to achieve or its actual effects in practice. Hence, state statutes and judicial decisions were sufficient to override custom and discredit it as a source of law, whether or not they actually changed the practices of the community. For instance, the decision in United States v. Harris held unconstitutional the criminal prohibition in the Civil Rights Act of 1871 against conspiracies to deny federal rights, because state law already prohibited the very same conduct. The indictment alleged that a lynch mob had conspired to beat, injure, and kill African-Americans in the custody of a local sheriff. State criminal law prohibited that conduct, and even though it was not effectively enforced to protect the African-Americans in custody, it was sufficient to immunize both the state and the lynch mob from federal regulation under the Fourteenth

\[^{120} 163\text{ U.S.}\ 537,\ 550\ (1896).

\[^{121}\ 106\text{ U.S.}\ 629,\ 632,\ 635–44\ (1882).

\[^{122}\text{Id.}\ at\ 629–32.\]
Amendment. The state itself did not engage in discrimination in violation of the Equal Protection Clause.\(^\text{123}\) If unenforced state law was sufficient to defeat a finding of state action, it was also sufficient to defeat any claim that the practice of lynching and terrorizing African-Americans, no matter how widely tolerated or condoned in the South, was a custom that had the force of state law.

The decision in *Harris*, closely examining the form of both federal and state law, was entirely typical of judicial decisions of this era. These decisions were not, as is often supposed, uniformly hostile to the validity of the Reconstruction civil rights acts,\(^\text{124}\) but they made the way the laws were framed decisive. So, for instance, *Strauder v. West Virginia*\(^\text{125}\) held unconstitutional a state statute that explicitly excluded African-Americans from jury service, but *Virginia v. Rives*\(^\text{126}\) held that a facially neutral law that allowed them to serve on juries, even if applied by state officials in a discriminatory manner, did not support removal of a prosecution from state court to federal court. The jurisdictional provisions of the Civil Rights Act of 1866 did not, in the Court’s view, extend beyond facially discriminatory laws.\(^\text{127}\) Such a fine-grained approach to determining the limits of federal and state law would not look kindly upon custom as the decisive factor in drawing the boundaries between these two spheres of government.

The academic proponents of legal formalism were no more sympathetic to custom as a source of law. The “legal science” advocated by Christopher Columbus Langdell took as its data a selection of reported decisions.\(^\text{128}\) It could not, without a complete change in method, identify customs that were a source of law and then assimilate them into a logically rigorous conceptual theory. Indeed, the whole project of imposing such a deductive structure of legal doctrine on the law—difficult as it was with the heterogene-

\(^{123}\) Id. at 639–40.

\(^{124}\) See Benedict, supra note 86, at 66–69.

\(^{125}\) 100 U.S. 303, 310 (1879).

\(^{126}\) 100 U.S. 313, 323 (1879).

\(^{127}\) Id. at 318–22. But see *Ex parte Virginia*, 100 U.S. 339 (1879) (upholding a criminal prosecution under the Civil Rights Act of 1875 for excluding African-Americans from juries under a neutral state law).

ous decisions of common law courts—would have foundered if it were extended to customs. By definition, customs do not have the canonical form of reported decisions and so cannot be analyzed according to the techniques familiar to lawyers. Customs, more so than any other source of law, resist efforts at systematic restatement in a rigid conceptual scheme.129

In its hostility to custom as a source of law, legal formalism anticipated later movements in American legal thought that more explicitly adopted elements of legal positivism. Implicit in Langdell’s writings—and sometimes explicit as well—was a positivist emphasis on judges as the only sources of the common law.130 This strand of legal formalism provided the only common ground between earlier theories (like Blackstone’s) that allowed a role for natural law and later theories (like legal realism) that did not. Legal realism rejected the rigid doctrinal framework imposed by formalism on the divergent sources of the law, yet it continued to exclude custom as a source of law in its own right. Custom influenced law only indirectly through the acts of public officials in deciding what the law was. This positivist element in legal realism was never as controversial as the separation of law from morals, which came under attack after World War II when the Nazi abuse of the German legal system became widely known.131 By the time the Warren Court undertook to revive and reinterpret the Reconstruction civil rights acts, legal positivism, as a claim about the sources of law, had become the working theory of most American lawyers.132 In doing so, it imposed a new set of limits on custom as a source of law, which are examined in the next Section of this Essay.

B. The Rise of Legal Positivism

Legal positivism arrived in America from England just as legal formalism became a dominant force in American law, both in judicial decisions and in legal scholarship. Formalism in judicial deci-

129 See Grey, supra note 128, at 30.
sions stood for a categorical division between the powers of the states and the federal government and for the protection of liberty of contract from government regulation at all levels. The influence of legal positivism on these decisions was negligible, since the judges who authored and approved of these decisions had been educated under earlier legal theories, like Kent's, derived from Blackstone, with variations appropriate for the American scene. In the academic version of formalism, by contrast, the focus shifted from public law to private law and from adapting previously articulated theories to deriving them from a select body of common law decisions.

The positivist element in American legal thought became explicit in the work of John Chipman Gray, a colleague of Langdell at Harvard and one of several scholars who figured in the transition from legal formalism to legal positivism. He rejected John Austin's theory that all law represented the command of the sovereign, but agreed with him insofar as he asserted "that the Law is at the mercy of the State." With Gray, however, the positivist element in American legal thought began to turn away from Langdell's focus exclusively upon judicial decisions as the constitutive elements of the law. For Gray, the law was what the courts said it was, not in their past decisions, but in their current practice. "Rules of conduct laid down and applied by the courts of a country are co-terminous with the Law of that country, and as the first change, so does the latter along with them." Statutes and precedents were no more than sources of the law, while the law itself was made up only of current judicial decisions. This conclusion might be thought to favor custom as a source of law, since Gray gave it the same status as statutes and precedents insofar as it affected current judicial decisions. Yet in his discussion of custom, Gray traced most instances of custom as a source of law back to judicial deci-

133 Horwitz, supra note 131, at 17–19, 24.
136 Gray, supra note 135, at 87.
137 Id. at 100.
138 Id. at 82–83.
139 Id. at 118–19.
sions that adopted custom as law.\footnote{Id. at 284.} This view reduced custom almost entirely to precedent as a source of law.

Gray's emphasis upon judicial practice, however, became still more pronounced in the critics of legal formalism. Indeed, his views had been anticipated by Oliver Wendell Holmes, Jr., in a characteristically memorable phrase that served as the rallying cry for many of the legal realists: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."\footnote{O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897).} The elements of positivism in this definition are plain enough, emphasizing as it does the actions of public officials in determining what the law is. Where it differs from the legal formalists, such as Langdell, and the classical legal positivists, such as Austin, is in looking at what judges are doing in the present, instead of what they have done in the past. This shift in focus is no doubt of great theoretical significance, but it relegates custom to the subsidiary role of describing the actions of public officials.

Holmes himself was not a legal realist, but rather a remarkably eclectic thinker who cannot easily be categorized as adhering to just one school of thought. Other predecessors or participants in the realist movement took up his call for describing what judges actually do rather than relying on reported decisions of what they have done. Progressive legal theorists, such as Roscoe Pound, called for a "sociological jurisprudence" that examined the actual effects of judicial decisions to distinguish the "law in action" from the "law in books."\footnote{See Duxbury, supra note 134, at 58; Pound, supra note 5, at 22.} These legal theorists saw their views, whether they liked it or not, eventually subsumed into the later currents of legal thought that fell under the heading of "legal realism." The realists devoted their theoretical writings to a comprehensive attack on legal formalism, but like the formalists, they focused their analysis upon judicial decisions. Leading realists, such as Karl Llewellyn and Jerome Frank, sought to develop the predictive theory of law that Holmes had advocated a generation earlier, adding an empirical basis for generalizations that would enable lawyers to determine how courts actually decided cases.\footnote{Duxbury, supra note 134, at 125–35.} This latter ambition was never realized and no generalizations about the actual behav-
ior of courts were ever forthcoming, causing some of the realists to take a skeptical view of all rules formulated on the basis of pre-existing law.

Nevertheless, many of the realists later participated in major legislative reforms, as Llewellyn did in the drafting the Uniform Commercial Code, and as others did in working in the New Deal to create the modern administrative state. In doing so, many abandoned the anti-formalist convictions expressed in their realist writings, but they did not break the thread of positivist influence that was always present in legal realism. In both endeavors, they adopted crucial elements of the program of legal positivism, formulated by the great English legal theorist and utilitarian, Jeremy Bentham: in theory, emphasizing the lawmaking of judges as public officials; in practice, turning to legislation as the principal vehicle of legal reform. Yet legal realism was always a more diffuse movement, with fewer well-defined positions than legal positivism. In fact, it has remained in a mutually exclusive defining relationship with legal formalism: Each is what the other rejected. A more informative description of either movement would have to acknowledge the extent of disagreement within each, the common points of emphasis in both, and the number of scholars who belonged to neither.

Legal positivism, by contrast, has always had its systematic theorists, from its founder, Jeremy Bentham, through his follower, John Austin, to the revisions of H.L.A. Hart and Joseph Raz in the twentieth century. All of these writers, more so than the legal formalists and the legal realists, have self-consciously opposed the amalgam of legal sources, including custom, that Blackstone admitted into his theory of law. Custom as a source of law was confined for the legal positivists (as it was for Holmes) to the actions of public officials. Bentham, in his A Comment on the Commentaries, could hardly contain his contempt for the indiscriminate eclecticism with which Blackstone embraced almost any possible source of law, from the natural law given by God to the inchoate customs of feudal soci-

144 Id. at 149–58. For a different view, emphasizing the continuities between the theoretical and the practical work of the realists, see Horwitz, supra note 131, at 169–92.

145 See Grey, supra note 128, at 2–3 (stating that “classical orthodoxy is the thesis to which modern American legal thought has been the antithesis”).
Hart, although more restrained, was no more sympathetic to custom. In *The Concept of Law*, he devotes an extended argument to the superiority of positive law over customary law in its ability to adapt more quickly and with greater certainty to changed circumstances. Where custom does play a crucial role in his theory—in acceptance of the rule of recognition—it remains limited to the actions of public officials. Their practice of accepting the rule of recognition is a necessary condition of its validity and therefore of all the other rules of a legal system. All valid legal rules must have a pedigree, usually in the form of other actions by public officials, that can be traced back to the rule of recognition accepted by these same officials. Custom is focused only on who these officials are and the extent of their power to make law.

The realists expressed more ambivalence towards custom, especially insofar as the movement was influenced by the "sociological jurisprudence" of legal progressives like Pound. The progressives sought to combine the insights of social science, as it existed at the turn of the twentieth century, with progressive social policies. The scientific aspirations of this program led them to analyze judicial decisions as a form of official custom, but to treat the unofficial customs of private individuals as phenomena outside the legal system, to which it must adapt. To the extent that the content of such customs could be ascertained, they served as the source of progressive legislation and judicial decisions that responded to changes originating outside the legal system. Unlike judicial decisions, the practices of private individuals, far from being a source of law, required recognition through some form of official action. Especially among the legal realists, like Llewellyn (who eventually adopted part of this program) the role of unofficial custom remained dependent on official endorsement. Custom served as a justification

148 Id. at 100–10.
150 Id. at 1023–24.
for adopting a particular rule of law and was thoroughly domesticated as a basis for actions of public officials who made law in the usual manner described by the legal positivists. Thus the Uniform Commercial Code gives a prominent role to custom in the interpretation of contracts, but only through the vehicle of statutory provisions that explicitly endorse this practice. The Code, an enduring achievement of legal realism both drafted and promoted by Llewellyn, now stands as the paradigm of the limited use of custom in a modern legal system: not as a source of law in its own right, but only as a source of rules that become law because they have been adopted by the legislature.

All of these movements in legal thought, whatever their differences, combined to restrict the role of custom in American law. In doing so, they curiously echoed and reinforced the views of the legal formalists. While the latter did not find customs formal enough to fit into their view of state action, the legal realists did not find them progressive enough to be a source of legal reform, at least in the early stages of the movement. In the later stages, the legal realists took the same attitude towards customs as the legal positivists, who recognized them as law only if they received the pedigree of official approval or ratification. During the New Deal, custom was necessarily relegated to a subsidiary role in the creation of the administrative state, as administrative agencies filled many of the gaps in the law that previously had been left to custom. The expanded scope of legislative power recognized by the Supreme Court also diminished any independent role of custom as a source of law. All of these developments had their foundation in the ascendancy of legal positivism as the dominant theory of the origins of law. In this respect, legal positivism had much in common with the predictive theory of law that Holmes had advocated in his scholarly writings and which made its way, through his opinions, into decisions of the Supreme Court.

151 U.C.C. §§ 1-205, 2-202 (2001); see also Horwitz, supra note 131, at 211–12 (stating that Llewellyn “endowed economically dominant commercial practices with undeserved normativity”).
152 See White, supra note 149, at 1024–26 (recounting the differences between realists and progressives).
153 See Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 Ethics 278, 291–93 (2001) (emphasizing the similarities between realists and positivists).
These decisions, mainly on issues of federalism, bear directly on the scope of Section 1983. Interpretation of the statute, like interpretation of the Constitution, has always raised fundamental issues about the distribution of power between the federal government and the states. Thus, as Holmes famously said in a dissent from a decision holding unconstitutional a state worker's compensation statute as applied to a longshore worker, "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."\(^{154}\) This denunciation of natural law applied equally to customary law, which necessarily lacks an official voice. In the line of cases culminating with *Erie Railroad Co. v. Tompkins*,\(^{155}\) Holmes also denied the existence of disembodied sources of law: "[B]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it."\(^{156}\) This passage was eventually quoted in *Erie* itself,\(^{157}\) resulting in the view of that decision as not only overruling a case, but overruling "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."\(^{158}\) The immediate target of these statements was federal general common law, a form of custom in one of its several senses. Tellingly, this was not the sense of custom adopted in *Swift v. Tyson*,\(^{159}\) the decision overruled in *Erie*.\(^{160}\) Perhaps the only common ground between these decisions is the tendency to deny or limit any form of law regarded as customary: in *Erie*, the general federal common law,\(^{161}\) and in *Swift*, state law based on customs that were not limited to local practices.\(^{162}\) Under the new dispensation, all forms of law had to be traced back to the actions of government officials, and federal law, in order to be valid, had to be traced back to official action authorized by the Constitution. Federal power

\(^{154}\) S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

\(^{155}\) 304 U.S. 64 (1938).


\(^{157}\) 304 U.S. at 79.


\(^{159}\) 16 U.S. (1 Pet.) 1, 18–19 (1842).

\(^{160}\) *Erie*, 304 U.S. at 77–78.

\(^{161}\) Id. at 78–80.

\(^{162}\) *Swift*, 16 U.S. (1 Pet.) at 18–19.
could not be expanded by relying on laws without an appropriate positivist pedigree.

Transplanted to Section 1983, this notion of pedigree would allow liability to be imposed only for actions in some way attributable to state officials, such as making law or acting directly themselves. Legal positivism did not allow any other source for action "under color of any statute, ordinance, regulation, custom, or usage of any State." Private individuals might still be held liable under Section 1983, but only if they acted pursuant to state law or in concert with state officials. The custom or usage of private individuals, no matter how widespread or well-established, was not enough; only the custom or usage of state officials counted. This interpretation of the statute became entrenched not long after the *Erie* decision and for precisely the same reason. It limited federal judicial power by limiting the conditions for applying federal substantive law. This understanding of the statute was confirmed, ironically enough, at the same time that modern decisions were expanding liability under Section 1983 in other directions.

C. Modern Decisions

The line of cases preceding *Monroe* has already been mentioned. Like the original enactment of Section 1983, these cases were intertwined with interpretations of the Fourteenth Amendment and the criminal prohibition in Section 242. The doctrinal breakthrough came in *United States v. Classic*, which held that state officials violated federal law even if they also acted in violation of state law. Under this decision, action "under color of" state law need not be action in conformity with state law, but only under authority arguably conferred by the state. This reasoning was soon reaffirmed in other decisions interpreting Section 242, and then, after a delay of almost two decades, it was extended to Section 1983 in *Monroe*. The soundness of this interpretation of Section

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164 See supra Part III.A.
166 313 U.S. 299 (1941).
168 365 U.S. at 183–85.
1983 has been much debated, beginning with Justice Frankfurter's dissent in this case, which sought to limit the statute to cases in which the state provided immunity to its officials for actions that denied federal rights. In his view, the "under color of" clause of Section 1983 was narrower than the state action requirement of the Fourteenth Amendment and restricted private actions under the statute to cases in which there was no remedy under state law.\footnote{Id. at 212-19 (Frankfurter, J., dissenting in part) (criticizing earlier opinions for equating "State action" with "the very different question of the 'under color' clause").}

Paradoxically enough, Justice Frankfurter gave greater scope to the terms "custom" and "usage" than the majority, even though he gave the statute a much more restrictive interpretation in other respects. He allowed these terms to cover cases in which state officials received immunity from liability by state practice rather than by explicit provisions of state law.\footnote{Id. at 237.} The majority did not have to reach this question because it interpreted the "under color of" clause to reach all actions under the purported authority of state law, whether or not they were actually authorized or, indeed, as on the facts of Monroe, prohibited by state law.\footnote{Id. at 235-36, 258-59.} For the majority, the expansion of Section 1983 in one direction eliminated the need to consider expanding it in another. It also reinforced the overall positivist approach to interpreting the statute, tracing the authority under which state officials acted back to some source in officially adopted state law. For the majority, there was no need to embark upon the difficult and fact-intensive inquiry into whether the state officials had created their own customary form of state law; it was enough that they had acted as state officials with some form of authority conferred by state law.

Decisions extending the coverage of Section 1983 in other directions have further diminished the need for a broad interpretation of "custom" and "usage," notably by adding to the underlying federal rights for which the statute provides a remedy. As discussed earlier, the "rights, privileges, or immunities secured by the Constitution" that were initially protected by the statute were expanded, without explanation, in the Revised Statutes of 1874 to include

\footnote{Id. at 235-36, 258-59.}
\footnote{365 U.S. at 183-85.}
those also secured by the "laws" in general.\textsuperscript{173} It was eventually held that any constitutional right could be the subject of a claim under Section 1983, even if it was not related to the rights against racial discrimination that originally motivated the enactment of the statute.\textsuperscript{174} After \textit{Monroe}, the addition of the term "laws" was used as a basis for providing remedies for the violation of federal statutes, at least those that did not contain their own remedial provisions or that did not reveal congressional intent to deny private enforcement altogether.\textsuperscript{175} The expansion of Section 1983 along this dimension has reduced the need to expand it along others, and indeed, increased the risk, often lamented by critics of \textit{Monroe},\textsuperscript{176} that it would be transformed into a general substitute for state tort law. If action under color of custom or usage included private action and applied to any violation of federal statutory rights, Section 1983 would become an all-purpose federal remedy for a wide range of wrongs.

No such innovation could be supported by relying on the original meaning of "custom" or "usage." The practices that fall within these terms have, since the enactment of Section 1983, steadily lost their capacity to generate legal norms by their own force without the endorsement of some source of positive law. Judges could not single-handedly revive the tradition of customary law, which was waning even when Section 1983 was enacted. But wholly apart from this point, originalism itself has played a diminishing role in the interpretation of the statute, which has been overlaid with a variety of doctrinal innovations derived more from pragmatic concerns about enforcing liability against state officials than from original intent. As we have seen, the debate over the Civil Rights Act of 1871 focused not on Section 1, which eventually became

\textsuperscript{173} See supra text accompanying notes 98–102.
\textsuperscript{174} See Collins, supra note 117, at 1533–40.
Section 1983, but on Section 2, whose surviving provisions are now found in Section 1985(3). Thus, there is little original intent to appeal to, beyond the evolving common law understanding of tort law generally. Indeed, the entire law of immunity, which plays such a significant role in litigation against state officials, does not have any basis in the statute or its legislative history, but instead depends upon evolving common law concepts of official responsibility and fault.

None of this is to deny that "custom" and "usage" still have a role, although a limited one, to play under Section 1983. Justice Frankfurter's suggestion in his dissent in Monroe, that only the custom or usage of officials was sufficient for liability, was taken up by the Court in Adickes v. S.H. Kress & Co. Adickes held that the practice of local police in enforcing the discriminatory decisions of restaurant owners to exclude black customers from their property satisfied the "under color of" clause of the statute. It also satisfied the state action requirement of the Fourteenth Amendment, both as a matter of abstract theory and as a matter of practical necessity. The plaintiffs had to establish a violation of the Equal Protection Clause because they alleged no other violation of their federal rights. This understanding of the limited scope of custom, assuring that the "under color of" clause is coextensive with the state action requirement, had already become the standard interpretation of Section 1983.

Only Justice Douglas would have given "custom" the ordinary meaning that it has today—of a social practice established independently of the law. While the majority emphasized the actions of public officials, Douglas emphasized those of private individuals. Both views, however, depart from the historical understanding of

177 See supra text accompanying notes 88–92.
178 E.g., Smith v. Wade, 461 U.S. 30 (1983) (holding that punitive damages are available under § 1983 when conduct is motivated by evil intent or indifference to protected rights).
181 Id. at 166–68.
182 Id. at 169–71.
how custom can have the force of law. It was not the actions of public officials or private individuals alone that supported the transformation of custom into law, but typically the actions of both together. It was the fusion of both pervasive private practices and official acquiescence. Officials changed their own practices independently of positive law, at least when more than their own conduct was at stake, only to conform to customs adopted by the population at large. To take one of Blackstone’s examples, why else would government officials in Kent recognize special rules of inheritance that differed from the common law? Or to take Senator Trumbull’s example, why would southern courts during Reconstruction punish blacks more severely than whites? Without some basis in the regular practice of the community, such official customs would be pointless or perverse, defeating the expectations of those subject to them. Only a legal positivist would focus exclusively on official action as the source of the legal rule, presuming that it was somehow dictated from the top-down rather than from the bottom-up.

Yet this is the only sense of custom that the Supreme Court has been willing to endorse. If Adickes left any doubt about this issue, it was dispelled in Monell v. Department of Social Services of New York. That case imposed liability directly upon units of local government, overruling a contrary holding in Monroe but at the same time limiting liability to actions undertaken according to the policy or custom of the municipality. Units of local government were not liable for the actions of subordinate employees under the doctrine of respondeat superior. Liability for such actions remained personal to the employees themselves, whether or not they were ultimately indemnified by their employer. By contrast, actions undertaken pursuant to local policy or custom resulted in liability imposed directly on the municipality. Because of Monell, custom has regained a significant role in civil rights litigation, but only within the narrow sphere of action admittedly undertaken by government officials.

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185 Blackstone, supra note 13, at *74–75.
186 See supra note 79 and accompanying text.
188 365 U.S. at 183–85.
189 Id. at 690–91.
No greater role for custom or usage under Section 1983 could easily be established after this history of interpretation. Precedents such as *Adickes* and *Monell* stand directly in the way of giving "custom" or "usage" an interpretation that covers private conduct. These decisions significantly expanded the statute's coverage and thus mark the outer limits of the current interpretation of these terms. The common law development of the statute's meaning necessarily gives greater weight to such recent interpretations of its meaning than to an appeal to the original meaning of "custom" or "usage." Moreover, any such expansion of the "under color of" clause would need to be accompanied by a corresponding expansion of the federal rights protected from infringement. If these are mainly constitutional rights subject to the state action requirement, then a reinterpretation of what constitutes action under color of state custom would simply shift litigation back to the issue of what constitutes state action, accomplishing no real change in the statute's effective scope.

Any attempt to revive the lost understanding of custom as a source of law in its own right has only limited potential to expand the scope of Section 1983. Such an attempt, however, has entirely different implications for the scope of congressional power under Section 5 of the Fourteenth Amendment. Congress enacted Section 1983 with no questions at all about whether the coverage of state "custom" or "usage" fell within the powers newly conferred upon it by the Fourteenth Amendment. This silence speaks volumes when compared to the intense debate over the constitutionality of the provisions now codified in Section 1985(3), which directly regulate private action. If Congress had such powers to cover state custom in 1871 under the contemporary understanding of custom as a source of law, it should have similar powers today, which reach beyond the formal terms of state law to custom as we currently understand it. This understanding, freed from the narrow and one-sided influence of legal positivism, recognizes custom as a force that determines both the content of enacted law and, more importantly for present purposes, its effect as actually administered. An examination of how custom might play a role in this constitutional inquiry is taken up in the next Part of this Essay.
IV. CONSEQUENCES FOR EXISTING LAW

In *United States v. Morrison*, the Supreme Court held that the Violence Against Women Act exceeded the powers of Congress under both the Commerce Clause and Section 5 of the Fourteenth Amendment. The first of these holdings was criticized at length in the dissent and in subsequent commentary on the decision. It is the second that bears directly on the role of custom as a source of state law and as a corresponding source of congressional power. The Court supported this second holding by relying directly on the nineteenth-century decisions in the *Civil Rights Cases* and *United States v. Harris*, both of which denied Congress the power under Section 5 to regulate private action that was explicitly prohibited by state law. In both cases, the only state action subject to the general provisions of Section 1 of the Fourteenth Amendment were state judicial decisions or statutes, both of which prohibited the same activity as the federal statutes whose constitutionality was at issue. In the *Civil Rights Cases*, it was the state law of public accommodations, which prohibited the same forms of racial discrimination as the Civil Rights Act of 1875, or, at least, so the Court assumed. In *Harris*, state criminal law prohibited the same forms of violence that Section 2 of the Civil Rights Act of 1871 prohibited as retaliation for the exercise of federal rights.

The continuing force of these precedents might have been questioned before they were so routinely endorsed in *Morrison*. Even if not explicitly overruled, they had been effectively limited by decisions of the Warren Court upholding legislation, such as the Civil Rights Act of 1964, almost identical to that struck down by these decisions. More fundamentally, these decisions rely upon the power of formal enactments or decisions at the state level to re-

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190 529 U.S. 598 (2000).
191 Id. at 628–55 (Souter, J., dissenting); id. at 655–66 (Breyer, J., dissenting); see Judith Resnick, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 Yale L.J. 619, 630–34 (2001).
192 109 U.S. 3 (1883).
193 106 U.S. 629 (1883).
194 See *Morrison*, 529 U.S. at 621–22.
196 *Harris*, 106 U.S. at 639–40.
strict legislative power at the federal level. This understanding of
the limits of legislative capacity to rely on custom should not have
survived the advent of legal realism. As even Justice Frankfurter
recognized, writing in an uncharacteristically realist vein, "Deeply
embedded traditional ways of carrying out state policy, such as
those of which petitioner complains, are often tougher and truer
law than the dead words of the written text." He later invoked
the same reasoning in his dissent in *Monroe v. Pope*, in which he
would have allowed a claim to go forward based on the "custom"
or "usage" of police officials to deny federal rights. His focus only
on the actions of officials has already been criticized, but it is far
more realistic than the reliance of the *Civil Rights Cases* and *Harris*
upon only the formal prohibitions in state law. Even a relatively
conservative understanding of "custom" and "usage" in Section
1983 supports a broader understanding of congressional power un-
der Section 5 to address deficiencies in the enforcement of state
law.

On the modern view, custom influences the content of the law at
two different points: either in determining what the law should be
as it is officially promulgated, or after it has been adopted, in de-
termining how it is enforced. The official sources of law—statutes,
judicial decisions, and regulations—are plainly affected by custom,
and may explicitly refer to it, as in the Uniform Commercial Code.
These forms of positive law, however, supersede the customs on
which they are based; all of the force of law results from the official
decision adopting custom as law. Custom in the administration of
the law operates entirely differently, without the need for any for-
mal endorsement by the state. Its effects on the operation of state
law are less obvious, but just as consequential. No state, for in-
stance, would approve of the practices prohibited by the Violence
Against Women Act (just as no state officially approved of the vio-
ence directed against the newly freed slaves during Reconstruc-
tion). Yet decisions not to enforce state law can result in systematic
discrimination, as would a state law that specifically exempted
these groups from the protection of otherwise general state laws.

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199 *Monroe*, 365 U.S. at 258–59 (Frankfurter, J., dissenting in part).
200 See supra text accompanying notes 166–75.
Courts might well be reluctant to find an equivalence between state enforcement practices and formal expressions of state policy. The pragmatic reasons that lead to a narrow interpretation of "custom" and "usage" in Section 1983 all incline courts to be cautious in extending the statute to reach otherwise private action. Where custom intersects with enforcement policy, we should not expect to find a clear, formally defined relationship between custom and state law. There is little that courts can evaluate to determine whether state action is present.

Congress operates under no such constraints. Indeed, all the civil rights legislation in the latter half of the twentieth century was premised on findings of pervasive patterns of discrimination, both public and private, that had not been cured by state law. The pragmatic reasons that act as a restraint on the interpretation of Section 1983 point in exactly the opposite direction in defining the power of Congress under Section 5: away from a narrow interpretation and toward granting Congress the power to address specific customs, as the need arises, when they are supported by the administration of state law and result in continued discrimination on the grounds prohibited by Section 1.

This conclusion does not transform every state omission into state action under the Fourteenth Amendment, either as a violation of Section 1 or as a basis for the exercise of congressional power under Section 5. Customs necessarily form a far narrower category of state action than the simple refusal of the state to enforce its own laws. Omissions in state law enforcement, even if they would otherwise violate the Equal Protection or Due Process Clauses, might be so isolated or sporadic that they do not rise to the level of systematic activity necessary to constitute a custom. The neglect of a single child by a state social services agency, for instance, as alleged in *DeShaney v. Winnebago County Department of Social Services*, would not count as a state custom, no matter how severe its repercussions in any particular case. Even embracing the most expansive interpretation of Section 1983, the omissions alleged in *DeShaney* would not constitute a custom having the force of law. Nor, of course, did that case concern federal legislation explicitly based on a finding of such a pattern of child abuse.

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and neglect by private individuals and ineffective enforcement of state law by public officials. Only legislation based on such findings would raise issues directly under Section 5.

By the same token, legislation under Section 5 need not be predicated upon evidence that would justify a court in finding a violation of Section 1. If it did, then Section 5 would add nothing to the powers of the federal government beyond those already conferred by Section 1. Congress would be limited to enforcing the Fourteenth Amendment only in circumstances in which the Supreme Court could find unconstitutional state action and impose a judicial remedy without further legislation. The difference is not in the meaning of the prohibitions in Section 1, but in the evidence sufficient to find a violation. To hold the legislature to the same evidence that would be sufficient for a court would invite the same conflict between Congress and the Supreme Court that led to the decision in City of Boerne v. Flores. That decision held unconstitutional legislation enacted under Section 5 which expanded upon the protection of religious freedom under Section 1. Under Boerne, the self-enforcing provisions of the Equal Protection and Due Process Clauses, applied directly by the judiciary, also impose limits on the power of Congress to enact enforcing legislation. These limits, however, are not the same as those under which the judiciary acts in interpreting Section 1. Under Section 5, Congress can prohibit actions that are not themselves constitutional violations if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." In other words, Congress can enact prohibitions broader than those imposed directly by the Constitution, as interpreted by the courts, but it may do so only to protect the same basic rights.

According to the majority in Morrison, the Violence Against Women Act failed this test because it enacted prohibitions directed

\[202\] Cf. Stephen L. Carter, The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions, 53 U. Chi. L. Rev. 819, 857 (1986) ("[U]nder the open-textured clauses, where there is less to guide the Court in its decisions, it is particularly important that the Congress be able to engage the Court in dialogue without being accused of defiance.").


\[204\] Id. at 529–36.

mainly against private individuals, not against state actors. The rights granted by Section 1 are good only against state action, and thus legislation under Section 5 must be similarly limited. An examination of custom as a source of state law, however, would have turned this conclusion on its head. The combination of official inaction in enforcing laws that prohibited violence against women, and the underlying pattern of such violence itself, gave rise to the customs necessary to support a congressional finding of state action. Congress has resources available to it that a court does not when trying to determine whether there has been state action in violation of Section 1. The hearings and extensive documentation of the intertwined patterns of official neglect and private violence, recounted in the dissenting opinions to show an effect on commerce, could not easily have been made by a court.

Nor, of course, would a court have had to overcome the inertia, inherent in the federal lawmaking process, that allows Representatives and Senators to preserve state law simply by obstructing the passage of federal legislation. The committee structure of Congress, and the rules of the Senate in particular, where all the states are equally represented, is famously effective in preventing the enactment of federal statutes. When Congress has found that state law "in action" departs from state law "on the books," there is little reason to doubt that state interests have been adequately consulted. Custom, in other words, can fill the gap between what a court can do in finding a violation of Section 1 and what Congress can do, not in expanding the scope of the constitutional rights protected, but in determining whether they have been violated.

Turning to custom as a source of state action would not give Congress free reign to declare any undesirable pattern of activity illegal. In cases involving discrimination under the Equal Protection Clause, congressional power under Section 5 would be limited to the familiar grounds already subject to heightened scrutiny: race, national origin, religion, sex, alienage, and illegitimacy. Even on

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206 Morrison, 529 U.S. at 625–27.
207 Id. at 629–36 (Souter, J., dissenting); id. at 661–62 (Breyer, J., dissenting).
these grounds, the effects of custom must be comparable to the discrimination practiced explicitly by state law. In cases involving violations of the Due Process Clause, the analysis necessarily would be more complicated because of the variety of rights protected under the headings of procedural and substantive due process. Nevertheless, the basic limitations would be the same: to rights that are in some sense fundamental and whose effective exercise has been denied by customs that operate with the same effectiveness of officially promulgated state law.

All of this assumes, of course, that Congress actually has passed legislation protecting these rights and has overcome the objections on federalism grounds offered by its own members. A wave of new federal statutes, broader and more comprehensive than those enacted under the Commerce Clause, is not to be expected. Nor would legislation enacted on this ground raise issues under the recent decisions expanding state immunity under the Eleventh Amendment. All of those cases concern suits against the states or state officers. Legislation against customs of discrimination, to the extent it is controversial, involves private individuals and organizations, who cannot claim any form of sovereign immunity. Such legislation presents exactly the opposite problem from statutes challenged under the Eleventh Amendment. It would constitute, at most, a modest addition to the powers of Congress under the Commerce Clause, requiring the more difficult showing that a disputed practice is part of a pervasive custom rather than a finding that it has a substantial effect on commerce.

If only such a narrow increase in power was at stake in Morrison, why was the Supreme Court so eager to deny Congress the authority to pass the Violence Against Women Act? The Court accepted the adequacy of the evidence assembled by Congress (with only one qualification, noted below), but questioned the "congruence and proportionality" between this evidence and the remedy adopted by Congress.\footnote{Morrison, 529 U.S. at 625–26.} The Court emphasized the disparity between the evidence of sex discrimination in the administration of justice, most of which derived from investigations by the states themselves, and the remedy against private individuals that Con-
gress adopted in the Act.\textsuperscript{210} The former plainly amounted to state action, but the latter did not, and in the Court's view it evaded the state action doctrine as the principal limitation on federal power under the Fourteenth Amendment.\textsuperscript{211}

This interpretation of the requirement of "congruence and proportionality," whatever its other merits, does not go to the functional effectiveness of the means adopted by Congress to remedy violations of the Fourteenth Amendment. As Justice Breyer pointed out in his dissent, substituting an adequate federal remedy for an inadequate state remedy makes perfectly good sense.\textsuperscript{212} If, as Congress found, the remedies available in state court for violence against women are inadequate, a remedy directly against the private individuals engaged in violence would avoid the circuity of actions, first against state officials, and then by the state officials against the private individuals themselves. If anything, the majority's objection was the opposite: that the Act was too effective in extending federal power to areas of private conduct previously regulated only by the states.

But that objection presupposes that the private conduct covered by the Act can be divorced from the pattern of state action in discriminatory enforcement of the laws protecting women from violence. As noted earlier, the categorical distinction between government action and private action, and the correspondingly limited role of custom as a source of law, might have been appropriate to the era in which \textit{Harris} and the \textit{Civil Rights Cases} were decided. It is inconsistent, however, with the current understanding of how custom, as a fusion of public enforcement practices and patterns of private activity, can determine what the law actually is. The majority only offered a gesture in the direction of approaching this question by concluding that evidence from only twenty-one states could not support a law that applied to all of them.\textsuperscript{213}

\textsuperscript{210} Id. at 619–20, 626. In a provision modeled after § 1983, the Act also applied to action "under color of any statute, ordinance, regulation, custom, or usage of any State." 42 U.S.C. § 13981(c) (2000). This provision apparently was severable from the section authorizing a remedy against private persons in which it was embedded.

\textsuperscript{211} \textit{Morrison}, 529 U.S. at 620–21.

\textsuperscript{212} Id. at 665 (Breyer, J., dissenting).

\textsuperscript{213} Id. at 626–27. The figure of twenty-one states comes from the dissent. Id. at 665–66 (Breyer, J., dissenting).
This conclusion raises the question whether Congress had assembled sufficient evidence of a custom of discrimination against women: a pattern of discriminatory underenforcement by the states in violation of Section 1, which would, in turn, reinforce a pattern of violence by private individuals that could be remedied under Section 5. Yet this question was not pursued, either in the majority opinion or the dissents.\textsuperscript{214} No doubt the majority would have looked at the evidence of custom skeptically, as it did the evidence of an effect on commerce,\textsuperscript{215} but an approach along these lines would at least have had the virtue of asking the right question, instead of studiously avoiding it altogether. If Congress could act to remedy customs of discrimination, as they were understood in 1871, why should it be denied the power to remedy the same customs as they are understood today?

**CONCLUSION**

Recovering the meaning of "custom" and "usage" in Section 1983 has few immediate implications for the interpretation of that statute. It does, however, open a window on what the Reconstruction Congress understood about the scope of its powers under the newly ratified Fourteenth Amendment. That understanding is not the same as ours, especially with regard to the means by which custom becomes law. Even at the time, that understanding was changing, and it has since been replaced by the very different view that we have today of the relationship between custom and law. This is not the positivist view that has come to dominate the interpretation of Section 1983: that official custom alone can have "the force of law." It is the view accepted almost as a commonplace in other ar-

\textsuperscript{214} Justice Souter did not address the argument for congressional power under § 5 at all, and Justice Breyer stopped short of finding a sufficient basis for the act in that provision. Id. at 628 n.1 (Souter, J., dissenting); id. at 666 (Breyer, J., dissenting). The dissenting opinion in the Fourth Circuit also did not address this question. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 911 n.1 (4th Cir. 1999) (Motz, J., dissenting).

eas of law: that official policy combines with private practice to determine how the law actually operates. Having once given custom a role in civil rights law, its continuing significance cannot be ignored through the desperate expedient of embracing an inflexible and anachronistic variation upon legal formalism, one that gives the state the final say through its formal pronouncements of the effect of state law. At least in constitutional law, there is no need to retreat to a view that has been so thoroughly rejected elsewhere in the law.