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I. INTRODUCTION

Soon after the ratification of the fourteenth amendment, a Reconstruction Congress passed the 1871 Civil Rights Act,¹ which created a statutory right of action to redress constitutional deprivations effected under color of state law.² Included in the Act was a jurisdictional provision that allowed access to federal court without regard to the amount in controversy.³ The statute’s modern descendant, known as § 1983,⁴ has become so popular with litigants that critics routinely complain of the flood of federal court litigation that it has produced.⁵ Predictably, there also has been a flood of calls to limit the scope of the statute.⁶ Although the Supreme Court itself was largely respon-

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2. Id. § 1, 17 Stat. at 13 (current version of cause of action provision at 42 U.S.C. § 1983 (1982)).
3. Id. (current version of jurisdictional provision at 28 U.S.C. § 1343(a)(3) (1982)).

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

   Id.


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sible for the statute's resurrection in the 1960s, many of its recent opinions reflect a similar concern with the breadth of the § 1983 remedy.7

Despite this criticism, and despite the occasional signs of disaffection by the Supreme Court, no one questions § 1983's role as the primary vehicle for challenging unconstitutional state action. That premier role resulted in large part from the Warren Court's expansion of constitutional guarantees against state action, particularly under the equal protection and due process clauses of the fourteenth amendment, and from its strengthening of the 1871 statute.8 The statute's success as a remedy against state actors even had a spillover effect in the area of federal officer liability—an area not covered by § 1983. There, the Court has fashioned an implied cause of action for damages that litigants can bring "directly" under the Constitution and the federal question jurisdiction statute, 28 U.S.C. § 1331.9 The implied action theory provides for symmetry in the availability of monetary (as well as injunctive) relief against federal and state officials for their constitutional wrongs.

The modern development of § 1983 has obscured the fact that the federal question statute was once the preferred vehicle for enforcing constitutional limits on state and local governmental action. In the latter part of the nineteenth century and the first third of the twentieth century—the so-called Lochner10 era—the Court expansively interpreted the fourteenth amendment's due process clause. During this period federal courts actively enforced substantive due process limits on state economic and social regulation without assistance from § 1983 or any other congressionally created right of action.11 Instead, lawyers and courts unhesitatingly looked to the federal question statute, originally enacted in 1875, to redress injuries from the en-


10. See Lochner v. New York, 198 U.S. 45, 64 (1905) (New York statute limiting bakery employees' work week to 60 hours invalid interference with liberty to contract).

forcement of unconstitutional state statutes.\textsuperscript{12} Section 1983 and its jurisdictional counterpart, on the other hand, were used only rarely during the \textit{Lochner} era.\textsuperscript{13}

Scholars have advanced various explanations for why § 1983 actions were so infrequent prior to the 1960s,\textsuperscript{14} but none has suggested why the tradition of constitutional actions brought directly under the federal question statute was so vigorous during this same period. Nor do most treatments of § 1983 suggest what role, if any, should remain for actions under the federal question statute in contemporary constitutional litigation against state action. This question is of particular concern in light of the resurgence of litigation to enforce what may loosely be called “economic” rights under the commerce, contract, takings, supremacy, and interstate privileges and immunities clauses.\textsuperscript{15} It is at least arguable that § 1983 was not intended to cover these rights, despite its express reference to “any rights, privileges, or immunities secured by the Constitution.”\textsuperscript{16} Before the modern revival of § 1983, and in the absence of diversity, many such “economic” rights would have been actionable in federal court under section 1331 only.\textsuperscript{17}

The modern growth of § 1983 also has obscured the fact that the relief available in actions brought directly under the federal question statute against state or local actors historically was not limited to equitable remedies. Although the Court freely has acknowledged a history of implied actions for equitable or injunctive relief under the Constitution and the federal question statute,\textsuperscript{18} it implicitly has presumed a lack of comparable develop-

\textsuperscript{12} See infra text accompanying notes 88-91 (noting former advantages of federal question statute over § 1983).
\textsuperscript{15} See infra text accompanying notes 237-42 (citing examples of recent litigation under these clauses).
\textsuperscript{17} See infra text accompanying notes 282, 283, 297, 301 (illustrating perception that non-fourteenth amendment constitutional violations not actionable under § 1983).
\textsuperscript{18} See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 & n.5 (1971) (Harlan, J., concurring) (discussing “presumed availability” of federal equitable relief against threatened invasions of constitutional interests, based on “distinctive historical traditions” of equity); Bell v. Hood, 327 U.S. 678, 684 & n.4 (1946) (citing Court’s established practice sustaining jurisdiction of federal courts to issue injunctions to protect rights safeguarded by Constitution); see also Carlson v. Green, 446 U.S. 14, 32 (1980) (Rehnquist, J., dissenting) (conceding
ment of a damages remedy. The historical record, however, reveals a tradition of federal question damage actions, long antedating modern implied rights of action. In those cases, litigants recovered damages in federal court for constitutional injuries suffered at the hands of both federal and state officers by suing directly under the federal question jurisdiction statute. Not surprisingly, modern lawyers have been misled by the Court’s amnesia into supposing that, in the absence of an express congressional remedy, a damages remedy for constitutional violations is only a by-product of the Court’s invention of implied constitutional rights of action against federal officers.

This Article explains why the tradition of federal question suits against state officers for their unconstitutional acts, a tradition that included monetary as well as equitable relief, was once so dominant. In part, courts and litigants perceived that Congress, in enacting the federal question statute, had provided a complete and ready mechanism for redressing any and all constitutionally based injuries as long as litigants could allege a harm familiar to the common law or equity. The Article also explains why these suits disappeared from the legal landscape, only gradually to be replaced by § 1983. The disappearance of these federal question actions—early versions of modern “implied” rights of action under the Constitution—and their displacement by § 1983 in this century reflect radical shifts in thinking about the sources of law, the remedial powers of the federal courts, and the respective roles of the common law and the Constitution in remedying the wrongs of governmental actors.

The Article also suggests that, despite the current hegemony of § 1983, a role still may remain in modern constitutional litigation for direct federal question actions against state and local officers, to the exclusion of suits under § 1983. Considerable stakes may ride on whether a particular constitutional injury can be redressed by a suit under § 1983 rather than solely through an implied action. Suits under the civil rights statute promise damages for proven injury and attorneys’ fees for the prevailing plaintiff. Concededly, the older tradition of direct actions for damages under section 1331, especially when read in tandem with modern implied right of action analysis,
may somewhat alleviate the remedial advantages associated with § 1983 suits. As this Article shows, however, it will not eliminate them.\textsuperscript{24}

Any division of constitutional litigation against state and local actors between § 1983 and the general federal question statute would, to be sure, sound a partial retreat from the Court's current approach to § 1983—an approach that emphasizes its plain meaning and its apparent inclusion of constitutional rights of all kinds. Such a division also would revive implied actions at a time when the Court has indicated its general skepticism of them. Nevertheless, a division may be more consistent with the congressional intent behind the 1871 Civil Rights Act and the 1875 federal question statute. More importantly, a division, if workable, could preserve a central and more active federal court role for § 1983 with respect to certain core interests protected by the Civil War amendments to the Constitution.\textsuperscript{25}

II. SECTION 1983'S "UNHAPPY HISTORY" REVISITED

A. THE CIVIL WAR AMENDMENTS AND SECTION 1983

In 1875 Congress conferred on the lower federal courts general federal question jurisdiction over "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States."\textsuperscript{26} This marked the culmination of a larger revolution in jurisdiction and substantive law spawned by the Civil War and Reconstruction.\textsuperscript{27} Only four years earlier Congress enacted the ancestor statute of § 1983 that expressly provided a private cause of action "at law . . . [or] in equity" for the deprivation under color of state law "of any rights, privileges, or immunities secured by the Constitution."\textsuperscript{28} In 1874 Congress amended the 1871 Act to add a comparable right of action for violations of federal statutes.\textsuperscript{29} Section 1983 was the last in a series of major Reconstruction era civil rights acts and the first explicitly to provide a private enforcement mechanism for vindicating many of the rights recently guaranteed in the other civil rights acts.\textsuperscript{30}

Facially, § 1983 and its accompanying jurisdictional provision overlapped

\begin{itemize}
\item \textsuperscript{24} See infra Part IV (suggesting that proposed reforms will result in more effective enforcement of civil rights).
\item \textsuperscript{26} Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.
\item \textsuperscript{27} See generally F. Frankfurter & J. Landis, The Business of the Supreme Court 64-69 (1928) (discussing relationship between 1875 Act and expansion of federal jurisdiction in contemporary civil rights legislation).
\item \textsuperscript{28} Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13.
\item \textsuperscript{29} Rev. Stat. § 1979 (1874).
\end{itemize}
with the federal question statute, at least where constitutional litigation was concerned. Because it is hard to imagine a suit to enforce a right "secured by" the Constitution that did not also "arise under" it, the federal question statute apparently was the more inclusive of the two statutes. However, unlike the federal question statute, the jurisdictional provisions that accompanied the 1871 Act and tracked its language, lacked an amount-in-controversy requirement. Thus, litigants who claimed injuries arising from unconstitutional state action might have been expected to prefer filing suit under § 1983 because of its more liberal jurisdictional counterpart and its express cause of action to redress constitutional wrongs. Despite these advantages, most constitutional litigation before the last thirty years was not conducted under § 1983. Instead, litigants brought what modern lawyers would call implied rights of action directly under the Constitution, and they used the general federal question statute as their jurisdictional hook. Given the straightforward language and hospitable jurisdictional provisions of § 1983, the obvious questions become how and why that happened.

It is no secret that § 1983 was almost dead on arrival. It served as the litigational vehicle for only a smattering of constitutional cases in its first fifty years. Most accounts of § 1983's limited use during the nineteenth and early twentieth century have focused on the narrow substantive scope given to the Civil War amendments with which § 1983 was connected. Shortly after Congress enacted § 1983, the Supreme Court in the Slaughter-House Cases, all but read the privileges or immunities clause out of the fourteenth amendment. Then, in a series of decisions culminating with the Civil Rights Cases, the Court made it almost impossible for Congress to reach private action under its fourteenth amendment enforcement powers. By


32. See Comment, supra note 13, at 363-66 (discussing low volume of § 1983 litigation from 1871 to 1921).

33. See Gressman, supra note 14, at 1336-37 (analyzing Supreme Court's interpretation of amendments in Reconstruction period cases).

34. 83 U.S. (16 Wall.) 36 (1873).


36. 109 U.S. 3 (1883).

37. Id. at 10-11. The Civil Rights Cases held that under the fourteenth amendment "[i]t is State action" that is prohibited, not "[i]ndividual invasion of individual rights." Id. at 11. Three criminal civil rights cases paved the way for the state action ruling in the Civil Rights Cases: United States v.
narrowing the category of "badges and incidents" of slavery that could be legislatively proscribed, that decision also limited Congress' ability to reach private action under the thirteenth amendment.\^38 Even the due process clause got off to a slow start.\^39 In addition, the Court soon read the equal protection clause in such a way as to sanction racial segregation.\^40 As one member of the Court recently put it, "it was our Dark Age of Civil Rights."\^41

But this familiar account does not tell the full story. It offers no explanation, for example, of why litigants did not use § 1983 to enforce the many constitutional limitations that were recognized against state action during the period from Reconstruction through the end of the Lochner era. The language of the 1871 Act is sufficiently broad to encompass a host of federal rights today. Yet constitutional litigants did not use the civil rights statute for a number of reasons that are only indirectly connected to the Court's early reading of the Civil War amendments.

B. STATUTORY LIMITS AND SECTION 1983

Perhaps the most familiar contributing factor to § 1983's unhappy history was the narrow reading of its "under color of" state law requirement. There seems to have been a perception that officers engaged in activity not affirmatively sanctioned by statute, policy, or custom did not act "under color of" state law for purposes of § 1983; they did so only when acting pursuant to state law.\^42 This narrow construction of the statutory language of § 1983

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\footnotesize{Harris, 106 U.S. 629, 643 (1882) (narrowly construing Congress' power under Civil War amendments to criminalize private interference with voting rights); United States v. Cruikshank, 92 U.S. 542, 555 (1876) (same); United States v. Reese, 92 U.S. 214, 221 (1875) (same).

38. Civil Rights Cases, 109 U.S. at 24-25.


40. See Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (upholding Louisiana statute requiring racially segregated railway accommodations as within state's police power and not in violation of fourteenth amendment). Political realignments in Congress after Reconstruction also meant that criminal civil rights enforcement was all but nonexistent during most of the first 50 years following enactment of § 1983. See generally R. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 101-05 (1985) (noting decline in enforcement efforts as Reconstruction drew to a close).

41. Blackmun, supra note 14, at 11.

42. See Brawner v. Irvin, 169 F. 964, 965, 968 (C.C.N.D. Ga. 1909) (police chief arrested and whipped petitioner for striking chief's relative; case dismissed because it alleged, at most, private tort); cf. United States v. Jackson, 26 F. Cas. 563, 563-64 (C.C.D. Cal. 1874) (No. 15,459) (tax collector illegally extorted money; indictment under criminal analog to § 1983 held insufficient because action not within provisions of state law and thus not "under color of law"). Monroe v. Pape,
paralleled the initial reluctance of the post-Reconstruction Supreme Court to find state action under the fourteenth amendment except when parties acted pursuant to the authoritative command of the state.\textsuperscript{43} The justification for this view was the debatable notion that the fourteenth amendment was intended to reach only unconstitutional state policies—typically those embodied in statute or sanctioned by custom having the force of law.\textsuperscript{44} Although the Court held long ago that the constitutional scope of state action included acts that violated state law,\textsuperscript{45} it did not similarly construe § 1983’s “under color of” state law requirement until the 1960s.\textsuperscript{46}

Other, less familiar, problems surrounding the construction of § 1983’s language had an even greater effect on its utility. For example, the Court narrowly construed the “rights, privileges, or immunities” covered by the statute. After Reconstruction, the Court for many years refused to extend § 1983 beyond what it once described as “civil rights.”\textsuperscript{47} The Court never was precise about what these civil rights were. They were often, but not

\textsuperscript{43} See The Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding that under fourteenth amendment “[i]t is State action” that is prohibited, not “[i]ndividual invasion of individual rights”); Virginia v. Rives, 100 U.S. 313, 317-18 (1880) (discussing requirement under fourteenth amendment of “state action” as opposed to “any action of private individuals”). \textit{But cf.} \textit{Ex parte} Virginia, 100 U.S. 339, 347 (1880) (holding that state judge's exclusion of blacks from juries was state action even though exclusion not commanded by state statute).

\textsuperscript{44} See Raymond v. Chicago Union Traction Co., 207 U.S. 20, 40-41 (1907) (Holmes, J., dissenting) (arguing that fourteenth amendment challenge to decision of state board of equalization should not be heard until that decision “has been sanctioned directly” by state supreme court); Barney v. City of New York, 193 U.S. 430, 438-39 (1904) (holding that fourteenth amendment protects only against deprivations or denials of rights by the state, not actions undertaken by subordinate officers of the state in violation of state law); \textit{see also} Screws v. United States, 325 U.S. 91, 147-48 (1945) (Roberts, J., joined by Frankfurter and Jackson, JJ., dissenting) (asserting that “[i]t has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State”).

\textsuperscript{45} See Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 286-89 (1913) (fourteenth amendment extends to actions by state actors that violate state law).

\textsuperscript{46} See Monroe v. Pape, 365 U.S. 167, 184 (1961) (§ 1983’s “under color of” state law requirement extends to actions by state actors that violate state law).

exclusively, associated with the rights that Congress had delineated in the Civil Rights Act of 1866, a measure passed pursuant to the thirteenth amendment. In that Act, Congress mandated racial equality respecting a citizen's ability to sue and be a party in state court, to testify, to make contracts, and to buy, sell, and inherit property. Doubts about the constitutionality of the 1866 Act had led to the enactment of section one of the fourteenth amendment, which generally is supposed to have "constitutionalized" the 1866 Act; the 1871 Act, in turn, ostensibly was designed to enforce section 1 of the fourteenth amendment. The language of the 1871 Act was lifted almost verbatim from the criminal remedy that Congress had provided for violations of the 1866 Act. Although scholars and the Court continue to debate the impact and scope of the 1866 Act, they agree that the rights, privileges, and immunities covered by § 1983 included at least those already set out in that earlier statute.

Sometimes the Court defined civil rights negatively, indicating what they were not rather than what they were. For example, the Court distinguished "civil" rights from "political" rights. Political rights were rights to participate in government, the most notable of which were rights to hold state office

10,336) (pre-Slaughter-House; jurisdiction under 1871 Act over corporation's constitutional challenge to city's efforts to shut down fertilizing plant).

49. Id. § 1, 14 Stat. at 27.
50. Constitutional doubts surrounded the 1866 Act's attempt to create and define "citizenship" on the basis of the thirteenth amendment alone, because the thirteenth amendment did not provide a constitutional definition of citizenship. Section 1 of the fourteenth amendment resolved those doubts by defining citizenship. See H. Hyman & W. Wieck, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 405-06 (1982) (fourteenth amendment was intended to "constitutionalize" civil rights protections in face of earlier presidential veto of civil rights law); J. James, THE FRAMING OF THE FOURTEENTH AMENDMENT 161 (1956) ("no doubt" that § 1 of fourteenth amendment incorporated into Constitution what Congress had sought to guarantee in civil rights legislation).

51. The Civil Rights Act of 1866 provided that "any person who, under color of any law, . . . shall subject, or cause to be subjected, any inhabitant of any State . . . to the deprivation of any right secured or protected by this act" would be guilty of a misdemeanor. Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27, 27; see supra note 4 (text of § 1983).

52. See Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 896, 925 (1986) (finding connection between § 1 of fourteenth amendment and broadly defined goals of 1866 Act); cf. R. Berger, Government by Judiciary 18, 20 (1977) (section 1 of fourteenth amendment designed to "embody and protect" the "limited" objectives of 1866 Act). The underlying rights in the 1866 Act hark back to the rights protected from interstate discrimination under the comity clause. U.S. Const. art. IV, § 2, cl. 1; see Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (comity clause protected those rights "which are, in their nature, fundamental[...][p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety").

53. See generally H. Hyman & W. Wieck, supra note 50, at 394-97 (1982) ("civil" rights seen as including contract and property rights; "political" rights as including right to vote and hold office); R. Berger, supra note 52, at 29-30 (framers saw fourteenth amendment as protecting only
and to vote.\textsuperscript{54} Unlike civil rights, which were "absolute and personal" and judicially enforceable, political rights were "conditional" and "dependent on the discretion of the elective or appointing power."\textsuperscript{55} Hence many thought that the thirteenth and fourteenth amendments were designed to ensure civil rights, while the fifteenth amendment was added to combat racial discrimination with respect to a specific political right that the other two amendments did not reach: voting.\textsuperscript{56} The rigidity of this particular distinction seemed to give way early on, however, as even \textit{Lochner} era litigants were able to bring § 1983 damage actions to challenge violations of the fifteenth amendment's right to vote free of racial discrimination in state elections.\textsuperscript{57} In addition, the Court regularly adhered to an even more inscrutable distinction between civil rights and "social" rights, a category of entitlements that included equal access to public accommodations and that eventually led the Court to sanction the doctrine of separate-but-equal.\textsuperscript{58} The Court gave a final and more permanent twist to § 1983 by a restrictive

\textit{"civil" rights; "political" rights, including right to vote, expressly excluded in congressional debates).}

\textsuperscript{54} See Baldwin v. Franks, 120 U.S. 678, 691 (1886) (voting was "political right"); see also Giles v. Harris, 189 U.S. 475, 497 (1902) (Harlan, J., dissenting) (political rights, such as right to vote, are not civil rights within meaning of 1871 statute); \textit{Ex parte Virginia}, 100 U.S. 339, 367-68 (1880) (Field, J., dissenting) (political rights, such as jury service, are distinct from civil rights); United States v. Mosley, 238 U.S. 383, 390 (1914) (Lamar, J., dissenting) (arguing that criminal conspiracy parallel of § 1983 did not reach voting rights because political in nature).

\textsuperscript{55} \textit{Ex parte Virginia}, 100 U.S. at 368 (Field, J., dissenting); cf. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (voting and holding office not among "fundamental" rights protected from interstate discrimination by article IV's privileges and immunities clause).

\textsuperscript{56} See Kaczorowski, supra note 52, at 882 & n.70 (exclusion of voting from framers' definition of civil rights dictated by prevailing legal opinion; voting is "political privilege," not "natural right of free men"); cf. Minor v. Happersett, 88 U.S. 162, 171, 175 (1874) (none of Civil War amendments confers right to vote in state elections; fifteenth amendment protects only racial nondiscrimination in voting). Of course, § 2 of the fourteenth amendment addresses the denial of voting rights by the states, but it only provides for the extraordinary remedy of reduction of a state's representation in the House of Representatives for a violation. U.S. CONST. amend. XIV, § 2.


\textsuperscript{58} See, e.g., Plessy v. Ferguson, 163 U.S. 537, 551-52 (1895) (although civil and political rights are guaranteed by the Constitution, "[i]f one race be inferior to the other socially," no constitutional remedy); The Civil Rights Cases, 109 U.S. 3, 24-25 (1883) (asserting that to enforce "social" right of equal accommodation under fourteenth amendment "would be running the slavery argument into the ground"); see also Buchanan v. Warley, 245 U.S. 60, 79 (1917) (distinguishing between "social" and "property" rights); see generally H. HYMAN & W. WIECEK, supra note 50, at 395-98 (discussing distinction between civil and social rights).
reading of the statute’s reference to rights “secured by” the Constitution and laws. According to the old Court, the phrase excluded rights that did not, in some often hard-to-define sense, take their origin in or derive “directly” from the Constitution or federal law. For example, property rights, even though protected against deprivation by the due process clause, were defined and created by the common law; they pre-dated the Constitution and thus took their origin outside of it.59 Because the old Court viewed the due process clause as providing constitutional protection for those rights that had previously been created or secured by the common law, litigants could not use § 1983 to vindicate such rights.60

For similar reasons, courts did not consider the rights protected by the equal protection clause to be rights “secured by” the Constitution within the meaning of § 1983. Because the underlying interests that the clause protected typically were created by state law, they were only “indirectly” secured by the Constitution.61 By analogy, even a plain textual limit on state action such as the contracts clause did not implicate a right secured by the Constitution, because that clause also protected merely state-created or common law contractual rights from state infringement.62 In short, state violations of common law or other “preconstitutional” rights protected by the due

59. See infra note 60; see also Marcus Brown Holding Co. v. Pollak, 272 F. 137, 141 (C.C.S.D.N.Y. 1920) (three-judge court) (Hand, J.) (asserting that “the general right of property does not have its origin in the Constitution[,] and . . . the Fourteenth Amendment is not constitutive of [it]”).

60. The Court worked out this distinction in other, mostly criminal, cases involving Reconstruction civil rights statutes containing similar “secured by” language. See, e.g., Logan v. United States, 144 U.S. 263, 287 (1892) (distinguishing “fundamental rights of life and liberty,” which are “natural and inalienable rights of man” guaranteed by due process clause, from rights “created by or dependent on” Constitution); Strader v. West Virginia, 100 U.S. 303, 310 (1879) (noting distinction between rights “created by” Constitution and those “only guaranteed by it”); United States v. Cruikshank, 92 U.S. 542, 553-54 (1876) (noting that life, liberty, and property are protected by due process clause but not “granted” by Constitution); see also Simpson v. Geary, 204 F. 507, 511-12 (D. Ariz. 1913) (“right to contract for and retain employment in a given occupation or calling” not secured by Constitution); Brawner v. Irvin, 169 F. 964, 966 (C.C.N.D. Ga. 1909) (right to life, liberty, and property is right of citizen of state, not right secured by Constitution). But see Smith v. United States, 157 F. 721, 724-25 (8th Cir. 1907) (right “secured by” Constitution need not originate in or be created or granted by it).

61. This was true at least when there was no allegation of invidious, class-based animus. Compare Holt v. Indiana Mfg. Co., 176 U.S. 68, 72 (1900) (1871 Act unavailable for equal protection challenge to state tax) and Farson v. City of Chicago, 138 F. 184, 185 (C.C.N.D. Ill. 1905) (1871 Act provided no federal jurisdiction for equal protection challenge to automobile licensing ordinance) with Davenport v. Cloverport, 72 F. 689, 693 (D. Ky. 1896) (1871 Act provided federal jurisdiction for suit against racially discriminatory school tax) and Ho Ah Kow v. Nunan, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,546) (1871 Act cited by court in striking down pigtail-cutting rule that discriminated against Chinese); cf. Truax v. Raich, 239 U.S. 33, 39 (1915) (right of aliens to obtain job free of discrimination was right secured by equal protection clause).

process clause or contracts clause could be remedied in federal court, but not under § 1983.

This nice distinction between common law rights and rights “directly” secured by federal law and the Constitution was characteristic of the *Lochner* era.63 Ordinary common law rights, especially property rights, comprised a distinct and sacrosanct category in the old Court’s doctrine. Its peculiar reading of § 1983’s “secured by” language paralleled its approach to the fourteenth amendment’s privileges or immunities clause. In the *Slaughter-House Cases*,64 the Court refused to incorporate into the fourteenth amendment’s privileges or immunities clause all of the so-called fundamental rights of citizens that article IV’s privileges and immunities clause protected from interstate discrimination.65 The civil rights that article IV protected antedated the Constitution because they took their origin in the common law or state law. By refusing to incorporate them into the fourteenth amendment, *Slaughter-House* confined the class of rights that owed their existence directly to the Constitution to a short list of rights of national citizenship. This reading also narrowly circumscribed the areas in which Congress could affirmatively legislate to enforce the Civil War amendments, by leaving the great bulk of ordinary private rights and relationships to state definition and protection.66

Civil rights directly secured by the Constitution or federal laws consequently were in short supply in the nineteenth century. They included the meager handful of privileges and immunities of national citizenship that remained protected by the fourteenth amendment after *Slaughter-House*: the rights to vote in federal elections (whether or not denial is based on race), to petition the national government, to assert claims against it, to seek its protection, to participate in it, and to pass freely over the whole country.67 Interestingly, the privileges or immunities of national citizenship also included

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63. See Sunstein, supra note 11, at 884-86 (*Lochner* reflected distinction between rights created by common law and other rights at least partly attributable to congressional action).
64. 83 U.S. (16 Wall.) 36 (1873).
65. Id. at 75-78.
66. See L. Tribe, supra note 8, at 552 (observing that *Slaughter-House* preserved mutually exclusive spheres of rights on which state and federal governments could legislate); cf. Logan v. United States, 144 U.S. 263, 293 (1892) (rights merely “recognized and declared” but not “granted or created” by Constitution “cannot . . . be affirmatively enforced by Congress against unlawful acts of individuals”); United States v. Cruikshank, 92 U.S. 542, 554-55 (1876) (fourteenth amendment did not displace states as primary guardians of rights between private persons).
67. See *Slaughter-House*, 83 U.S. (16 Wall.) at 79-80 (federal privileges include right to assert claims against federal government, to seek its protection, and to participate in it); see also Twining v. New Jersey, 211 U.S. 78, 97 (1908) (providing examples of privileges and immunities of national citizenship). The supremacy clause, U.S. Const. art. VI, probably protected these rights from state action already. See Crandall v. Nevada, 73 U.S. (6 Wall.) 36, 49 (1867) (pre-fourteenth amendment; state cannot impair ability to pass from state to state); see also Logan v. United States, 144 U.S. 263, 285 (1892) (right to protection from mob violence while in custody of federal marshal
the fifteenth amendment's protection against discrimination in voting, as well as the thirteenth amendment's prohibition on involuntary servitude. Also included were the rights conferred by congressional statutes passed pursuant to other constitutional grants of federal authority. Well into this century, § 1983, whose "rights, privileges or immunities" language suggestively echoed the fourteenth amendment's "privileges or immunities" clause, retained a strong tie to that particular clause—a clause that never fully recovered from the blow dealt by Slaughter-House.

Of course, the express guarantees in the Bill of Rights today would seem to have established a group of rights with an independent origin in the Constitution, which § 1983 therefore might have reached even under the old Court's approach. Some academics still make a respectable argument that the framers intended the fourteenth amendment's privileges or immunities clause to incorporate the first eight amendments to the Constitution as prohibitions on the states. But the narrow interpretation of the privileges or immunities clause in Slaughter-House and its progeny made such a reading virtually
impossible. Instead of viewing the Bill of Rights as a set of independent guarantees "secured by" the Constitution, the Court seemed to identify its protections with the vast array of older common law rights that were neither originally granted by the Constitution nor dependent upon it for their existence. The Bill of Rights, therefore, continued as a limitation on the power of the federal government alone. The gradual process of incorporation and elevation to fundamental status of many of those same Bill of Rights guarantees through the due process clause took place after Lochner. Thus, the limitation on § 1983 was two-fold: the statute could apply only to those rights that were "secured by" the Constitution or laws, and only to such of those that could be tagged "civil rights."

C. SECOND-GUESSING THE COURT

The post-Reconstruction Court's reading of § 1983, although tortuous by modern standards, is perhaps understandable given the old Court's frame of reference. In Slaughter-House the Court had given short shrift to the most potentially radical clause of the fourteenth amendment even before Reconstruction had run its course. External pressures and the politics of compromise may have also played some part in persuading the Court to chart a less radical course than some members of the Reconstruction Congresses had likely envisioned.

Section 1983, moreover, was only the first and least controversial part of a much larger statutory scheme ostensibly aimed at the Ku Klux Klan. The Court's narrow reading was reinforced by the statute's strong connection with the earlier Civil Rights Act of 1866—an Act that, despite recent histori-

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74. See, e.g., Twining v. New Jersey, 211 U.S. 78, 96 (1908) ("There can be no doubt, so far as the decision in the Slaughter-House Cases has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by . . . the Fourteenth Amendment."); Maxwell v. Dow, 176 U.S. 581, 595 (1900) (sixth amendment guarantees surrounding criminal jury trials "secured" against congressional action only); Cruikshank, 92 U.S. at 551, 552-53 (rights of life and personal liberty are natural rights of man, protected only by states).

75. See generally L. Tribe, supra note 8, at 772-74 (discussing modern incorporation controversy). Only the prohibition against takings of property for public use without just compensation was incorporated by the fourteenth amendment's due process clause at an early date. See Smyth v. Ames, 169 U.S. 466, 525-26 (1898) (state rate-making for railroad transportation depriving carrier of just compensation was taking in violation of fourteenth amendment); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 236, 241 (1897) (judgment, authorized by state statute, condemning private land without compensation was taking in violation of fourteenth amendment).

76. See Benedict, Preserving Federalism and the Waite Court, 1978 Sup. Ct. Rev. 39, 53-63 (concern for states' rights and unwillingness to act as perpetual censor of state legislation motivated justices to interpret fourteenth amendment's privileges or immunities clause narrowly).

77. See Developments, supra note 14, at 1153-54 (1871 Act passed by Congress in response to request from President Grant for emergency legislation to deal with widespread Klan violence).
cal evidence to the contrary, never lost its tie to race and to racial equality.\textsuperscript{78} By 1874, \$ 1983’s main jurisdictional statute referred to constitutional deprivations and violations of laws pertaining to “equal rights.”\textsuperscript{79} Although this limitation apparently had reference only to a state actor’s violation of rights secured by federal statutes, it tended to cement the connection between \$ 1983 and other Reconstruction efforts to protect the recently freed slaves and their champions against state interference and, in some cases, from private violence. A race-centered view of \$ 1983 may not have been the view of its framers, but it quickly became the dominant one.

Thus, although the open-ended constitutional language of the fourteenth amendment eventually enabled the Court to give it meaning outside of the context of race relations, the parallel language of \$ 1983 long remained keyed to the problems of race and race-related violence. A Court that later was willing to subordinate Reconstruction’s promise of racial equality to protect national industry and private property from state regulation might understandably have looked to something other than \$ 1983 and its jurisdictional statute to enforce the preferred constitutional rights of the time.

\section*{III. CONSTITUTIONAL LITIGATION IN THE \textit{LOCHNER} ERA AND THE GENERAL FEDERAL QUESTION STATUTE}

Although \$ 1983 saw very little action until late in the game, constitutional litigation was not on hold in the latter part of the nineteenth and first third of the twentieth centuries. On the contrary, the era marked the slow but relentless growth of substantive due process. The fourteenth amendment’s due process provision became the clause of choice for resourceful litigants who continued to raise challenges to state action after the privileges or immunities clause was laid to rest.\textsuperscript{80} The demise of the privileges or immunities clause turned out to be a lucky break for corporate plaintiffs because that clause reached “citizens” only—a limitation that the Court had held to exclude corporations in the analogous article IV privileges and immunities con-

\textsuperscript{78} See, e.g., St. Francis College v. Al-Khazraji, 481 U.S. 604, 609-13 (1987) (discussing modern descendant of 1866 Act, 42 U.S.C. \$ 1981 (1982), which allows parties to sue for racial discrimination by private actors in contractual relationships); cf. Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1420 (1988) (ordering reargument on question whether 1866 Act should apply to private actors). For the historical argument that the 1866 Act was not simply a racial equality statute, see Kaczorowski, supra note 52, at 898-99.

\textsuperscript{79} Rev. Stat. \$ 629(16) (1874) (current version at 28 U.S.C. \$ 1343(3) (1982)). The Revised Statutes actually contained two jurisdictional provisions—one for the district courts, \$ 563(12), and one for the old Circuit Courts, \$ 629(16). Only the latter provision, like the modern one, contained the equal-rights-only language. The complicated story is told in Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). See infra text accompanying notes 284-89 (explaining Court’s interpretation of \$ 1343(3)).

\textsuperscript{80} See generally D. Currie, supra note 39, at 369-78 (discussing Supreme Court opinions from 1874 to 1888 that addressed substantive reach of due process).
text. Although parties who raised due process claims were turned away by the Court at first, their persistence bore lasting results. Indeed, the clash in federal courts between private enterprise and state regulation was a pervasive judicial theme in the years prior to comprehensive federal regulation of commerce that began in earnest only with the New Deal.

Then, as now, constitutional issues arose in litigation in a variety of ways. Many constitutional challenges to state regulation arose as defenses to state court criminal enforcement actions, reviewable in the Supreme Court (as in *Lochner* itself) or on postconviction collateral attack. Jurisdiction also was available in suits brought against officers charged with the enforcement of state statutes when the parties had diversity of citizenship. A corporation was particularly able to secure a diversity forum because, although it might do business in many states, it was diverse from everyone who was not a citizen of its state of incorporation. In addition, from 1875 to 1894, civil enforcement actions brought by state or local governments against regulated parties under unconstitutional statutes were removable on the basis of a fed-

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81. See Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181-82 (1868) (holding that although corporation can act as individual for certain purposes, it is not citizen within meaning of article IV privileges and immunities clause); see also W. Guthrie, Lectures on the Fourteenth Amendment to the Constitution of the United States 54 (1898) (advising corporations that they cannot claim fourteenth amendment privileges or immunities clause protection); cf. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (holding corporations as "persons" under fourteenth amendment's due process clause).

82. For the classic treatment, see generally B. Twiss, Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court (1942).

83. See *Lochner*, 198 U.S. at 52 (defendant challenging statute's 60-hour limit on employees' work week as due process violation); see also Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (defendant challenging state insurance restrictions as violating due process); cf. Chicago, Minn. & St. P. Ry. v. Minnesota, 134 U.S. 418, 458-59 (1890) (direct review of civil enforcement action).

84. See *Ex Parte* Royall, 117 U.S. 241, 251-53 (1886) (contract clause challenge to custody through federal habeas corpus should await outcome of state court process).


eral defense alone. Finally, a standard vehicle for the enforcement of constitutional limits on the states in federal courts was a coercive action under the general federal question statute against the state or local officers charged with enforcement of the unconstitutional regulation.

Following the enactment of the 1875 federal question statute, there was a fairly consistent tradition of suits in federal courts to enjoin officials from enforcing unconstitutional laws. The barriers of sovereign immunity and the eleventh amendment failed to exclude the vast majority of these anticipatory suits. The federal question statute permitted litigation over the entire range of constitutional prohibitions on state actions injuring property, unlike § 1983, which was limited in the number and kind of rights that it could reach. The only extra hurdle was the amount-in-controversy requirement, but Lochner-era economic-rights plaintiffs rarely had trouble clearing it. Such federal question suits were a prime reason why most constitutional litigants seldom needed to turn to § 1983. Indeed, the availability of the federal question statute to redress unconstitutional state action once led the Court at the turn of the century to wonder whether § 1983 and its jurisdictional statute were “still in force.”


88. See, e.g., Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 81-82 (1902) (plaintiff seeking injunction restraining city from abrogating franchises and contract rights and from attempting to coerce plaintiff to sell its works to city pursuant to allegedly unconstitutional city ordinance); Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 2-3 (1898) (plaintiff seeking to enjoin city from creating system of water works pursuant to city ordinance that allegedly unconstitutionally impaired city's contractual obligations); Scott v. Donald, 165 U.S. 107, 112 (1896) (plaintiff seeking injunction preventing state officials from seizing liquor pursuant to unconstitutional state law); Allen v. Baltimore & Ohio R.R., 114 U.S. 311, 313 (1885) (plaintiff seeking injunction to restrain seizure of property pursuant to unconstitutional state law forbidding payment of taxes with coupons); see also infra text accompanying notes 100, 104-09 (discussing Ex parte Young, 209 U.S. 123 (1908)).


90. Equity did not traditionally protect deprivations of liberty. See infra text accompanying note 201 (equity protected property, not liberty, interests).

A. THE TRADITION OF IMPLIED CONSTITUTIONAL RIGHTS OF ACTION IN EQUITY

Implied actions under the Constitution and under the federal question statute for equitable relief against state or federal officers have never generated much controversy during this century, and the Court frequently has acknowledged their lengthy tradition.92 Today, courts usually treat these suits as creatures of federal common law, fashioned by the federal courts acting pursuant to their jurisdictional grant to hear cases arising under federal law.93 When a federal court infers a right of action from the Constitution, injured parties can bring coercive actions to secure the Constitution's guarantees rather than having to wait to raise those guarantees as a shield in defense to state-initiated enforcement proceedings.94 These actions arise under federal law within the meaning of the federal question statute because federal law—the Constitution—has created the right of action, albeit by implication. This modern process of implying a right of action to enforce the Constitution, however, is not how courts once perceived their task when allowing recovery for constitutionally based injuries.

1. The Private Law Model: Suits Against Officers and the Role of the Constitution

Although courts today customarily see the source of the right to sue to enforce the Constitution as federal, it was not always so. Traditionally, governmental actors were liable at common law for injuries inflicted in the course of their employment.95 The constitutional nature of the harm seemed to have mattered only tangentially at first. If, for example, an officer injured someone or seized his property, the injury might have formed the basis for an action for damages against the officer personally or for recovery of the property under an action familiar to equity or the common law. Once the injured party pleaded his action, the defending official would raise a defense of statu-
tory or other governmental authorization in order to avoid personal liability. If, however, the statute or authority pursuant to which the official acted was unconstitutional, it would negate the defense of official justification. The idea was that an unconstitutional statute was void and of no effect; consequently, it could not confer any immunity on the officer in the nature of official justification. Unable to take advantage of that immunity, the officer could be held personally liable, just as an individual wrongdoer would be, under traditional common law principles. In such a case, the officer was not liable because he had violated the Constitution; he was liable because he had committed a common law harm.

Although these officer suits did litigate federal questions, the right of action in the earliest constitutional cases was clearly nonfederal. Constitutional questions entered only through the back door to test the officer's authority or his defense of statutory justification. Moreover, prior to the enactment of the 1875 federal question statute (and § 1983 four years before), original jurisdiction over constitutional litigation against state officers ordinarily would have been confined to state courts in the absence of diversity. The federal judicial power generally exerted itself in such cases only through direct review in the Supreme Court after a final state court judgment.

The arrival of federal question jurisdiction coincided with the enlargement, as a result of the Civil War amendments, of constitutional limitations on state action. This coincidence created the possibility that suits against state officers for their unconstitutional acts might come to federal court without regard to diversity. Nevertheless, the federal courts that initially heard suits under the federal question statute for constitutionally based injuries inflicted by state or local officers did not treat them as cases in which the Constitution created the right to relief. Just as before the Civil War, litigants pleaded causes of action—such as trespass, detinue, ejectment, or conversion—that were familiar to the common law and for which federal law was not the source.

96. See Hill, supra note 95, at 1122-23 (governmental officer acting under void statute or outside bounds of valid statute may be regarded as stripped of official character).
97. Id. at 1123 & n.56 (quoting In re Ayers, 123 U.S. 443, 500-02 (1887)); see Currie, Sovereign Immunity and Suits Against Government Officers, 1984 Sup. Ct. Rev. 149, 155-56 (discussing apparent inconsistencies in Court's theory of stripping officials of state immunity).
98. The same was true for suits against federal officers, but various removal statutes meant that those cases could be litigated in federal court even if diversity was lacking. See generally HART & WECHSLER, supra note 5, at 422-23, 1335-38 (charting history of federal officer removal provisions).
100. See, e.g., Scott v. Donald, 165 U.S. 107, 111-12 (1896) (action to enjoin continuing trespasses resulting from enforcement of unconstitutional law arose under federal law); Hans v. Louisiana, 134 U.S. 1, 9 (1890) (jurisdiction for action to recover on bonds based on unconstitutionality of state statute); Virginia Coupon Cases, 114 U.S. 269, 308, 326 (1885) (actions for trespass and spe-
The overlay of constitutional elements on the traditional common law model was not without its problems. Scholars who have tried to picture the litigational landscape that existed before the advent of modern implied constitutional rights of action have assumed that the source of law in these early officer suits was state rather than federal law. Henry Hart noted that even after the advent of the federal question statute, constitutional issues in suits against a state officer continued to be raised only in an indirect manner: in response to the officer's anticipated defense to the state law cause of action that his actions were authorized by state statute, plaintiffs would urge the unconstitutionality of that statute.\textsuperscript{101}

If that is how federal constitutional questions arose in such cases, however, it is not immediately clear how they could be filed in federal court as an original matter under the federal question statute alone. Under the "well-pleaded complaint" rule,\textsuperscript{102} nondiverse plaintiffs could not get into federal court under the federal question statute by anticipating in their complaint a defendant's expected federal defense to a suit alleging a traditional state-law-based injury. Nor did pleading a constitutional reply to an anticipated defense of authorization under state law suffice. If constitutional issues entered the case against a state officer only because of the plaintiff's constitutionally-based reply to a defense based on state law, then the well-pleaded complaint rule should have prevented the case from arising under federal law for the purposes of the federal question statute.\textsuperscript{103}

Nevertheless, federal question suits against state officers to enjoin enforcement of unconstitutional state laws were a reality, at least around the turn of the century. The classic example is \textit{Ex parte Young}.\textsuperscript{104} That decision is best known for its ruling that a federal court suit to enjoin state officers from enforcing unconstitutional statutes in their own courts is not a suit against the state in violation of the eleventh amendment; instead, it is a suit against the officer only.\textsuperscript{105} Of equal and related importance, however, was the


\textsuperscript{102} See Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908) (non-diverse plaintiff's statement of cause of action must itself present federal issues and not merely anticipate federal defenses); Metcalf v. Watertown, 128 U.S. 586, 589 (1888) (same). According to this rule, federal jurisdiction had to appear on the face of the plaintiff's complaint, without reference to possible defenses or replies.


\textsuperscript{104} 209 U.S. 123 (1908).

\textsuperscript{105} Id. at 159-60.
Court's conclusion that for the purposes of the general federal question statute, *Young* arose under federal law.\(^{106}\) At the time *Young* was decided, the well-pleaded complaint rule undoubtedly was fully in force; *Louisville & Nashville Railroad v. Mottley*,\(^ {107}\) the case most closely associated with the pleading rule, was decided that same year. *Young*, therefore, somehow must have satisfied the well-pleaded complaint rule.\(^ {108}\) If the constitutional question in suits against state officers previously was thought to arise only by way of reply to an anticipated defense to a claim based on nonfederal law (and thus in violation of the well-pleaded complaint rule), *Young* suggests that the constitutional question now was considered part of the plaintiff's original pleading.

The coincidence of jurisdictional holdings in *Young* and *Mottley* led Henry Hart and others to conclude that by the time *Young* was decided, courts had come to view the Constitution itself as forming the basis of the plaintiff's right to sue in such officer suits.\(^ {109}\) If federal rather than state law created the right to sue, that would easily explain why such suits satisfied the well-pleaded complaint rule. Hart suggested that in *Young* the Court effectively had created the modern implied right of action for equitable relief under the Constitution. Somehow, he concluded, through "almost imperceptible steps,"\(^ {110}\) a shift in thinking about the source of law of the plaintiff's suit—from state law to federal—had taken place in actions against officers who acted under unconstitutional statutes.

2. Searching for the Imperceptible Steps

To be sure, *Young* suggests that the Court was starting to conceive of the right to relief in these officer actions as flowing less from the proof of a familiar common law injury than from the Constitution itself. Allowing an injunction against the particular state activity in *Young* (the filing of lawsuits

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106. *Id.* at 143-45. The Court held that the federal court had jurisdiction to inquire whether railroad rates imposed by acts of the state legislature were too low and therefore confiscatory, and, if so, permanently to enjoin the railroad company and state officials from putting in force those rates. *Id.* at 148, 159-60.

107. 211 U.S. 149 (1908).

108. This point also bears upon a well-known conundrum: how can the act of an officer in a suit such as *Ex parte Young* be state action for purposes of the fourteenth amendment and not be the state for the purposes of the eleventh? *See* Currie, *supra* note 97, at 155-56 & n.42 (noting the apparent contradiction). If the officer were liable because his acts were trespassory rather than because they were in violation of the fourteenth amendment, there is no conflict; he acted as an individual for purposes of both amendments. But that perspective in turn makes it hard to see how the case arose under federal law within *Mottley*’s well-pleaded complaint rule.

109. *See* Hart, *supra* note 101, at 523-24 (remedy of injunction for abuse of state authority came to be viewed as conferred directly by federal law, as courts ceased to inquire whether acts complained of were breach of duty under state law); *Hart & Wechsler, supra* note 5, at 1181 (drawing similar conclusion).

by the state attorney general under an unconstitutional statute) seems to have been a relatively novel idea under the common law as it then stood. However, the exercise of federal jurisdiction against state officers to enjoin their unconstitutional actions in other contexts was commonplace when Young was decided. For years after the enactment of the 1875 federal question statute, plaintiffs successfully had brought nondiversity suits against state and local officers in federal court without running afoul of the well-pleaded complaint rule. In addition, although a common law cause of action in Young was not immediately apparent, the Court considered the enforcement of confiscatory rate schedules in state court to be akin to trespass. If Young represented a shift in thinking about the source of the right to sue state officers, it is not clear how that shift occurred or how dramatic it was in Young. Nor is it clear how other efforts to enjoin state and local officials from enforcing unconstitutional statutes managed to arise under federal law even before Young.

During the period between the enactment of the federal question statute and the decision in Young, federal courts conceivably may already have considered the Constitution to be the source of the plaintiff’s right to sue. However, Supreme Court and lower federal court opinions under the 1875 Act belie any such suggestion. Federal question suits against state officers during this period typically alleged a cause of action familiar to common law or equity, and federal courts treated these cases just as they would treat any action against an individual wrongdoer. The cases give little hint that courts considered the Constitution as providing the right to sue in these cases.

If federal law was not identifiable as the source of the right to sue in pre-Young suits brought under the federal question statute, what enabled those suits to arise under federal law? A partial explanation may be that the well-pleaded complaint rule was not fully in force prior to Mottley. The rule did not take permanent root for the determination of original jurisdiction until 1888 when the Court decided Metcalf v. Watertown. Moreover, the Court did not eliminate removal based on a federal defense or reply until its 1894

111. See Collins, supra note 87, at 768 & n.230 (Young departed from apparent teaching of In re Ayres, 123 U.S. 443 (1887), by ruling that eleventh amendment did not bar suit against state official to enjoin initiation of judicial proceedings).

112. See supra note 88 (citing cases in federal court seeking to enjoin state officials from enforcing unconstitutional laws).

113. See 209 U.S. at 153 (rate cases raise question whether state’s commencement of suit seeking unconstitutional judgment is equivalent to trespass).

114. See supra note 100 (citing cases based on common law causes of action). Of course, once the Court began to proscribe conduct that would not have been actionable at common law, as it may have done in Young, it gradually became harder to view the source of the action as nonfederal, despite the courts’ invocation of the older forms of action.

115. 128 U.S. 586, 589 (1888).
decision in *Tennessee v. Union & Planters' Bank*.\textsuperscript{116} Prior to 1894, the well-pleaded complaint rule thus served merely to postpone and not to preclude federal trial court jurisdiction.\textsuperscript{117} Since either party could remove to federal court a suit in which the constitutional issues arose by defense or reply, a federal trial court easily might have concluded that it had jurisdiction over similar suits when a plaintiff filed there originally. To the federal trial court, it was simply a question of jurisdiction now, or later, after the officer filed his answer. Only after *Metcalf* and *Union & Planters’ Bank* did lawyers have to worry about whether the federal element entered by way of the complaint (which would be enough for jurisdiction), or only in a later pleading (which would not).\textsuperscript{118} Understandably, some of the decisions immediately following *Union & Planters’ Bank* and prior to *Mottley* show that courts often were not quite sure what to do with constitutional suits against state officers which, before 1894, had easily gotten into federal court.\textsuperscript{119} Now these suits could only get in as an original matter if the constitutional issue were conceptualized as part of the plaintiff’s pleading.

In addition to the diminished impact of the well-pleaded complaint rule prior to *Mottley*, a distinction between actions at law and actions in equity suggests another possible explanation for the persistent presence of federal question suits against state officers, before courts considered federal law to provide the cause of action. Some evidence indicates that incorporating the federal constitutional element as a proper part of the plaintiff’s complaint was easier in an equity action against state officers than in a damages case, even under the well-pleaded complaint rule. Alfred Hill has concluded that in actions at law the traditional model applied: the constitutional element would enter only in reply to an anticipated defense to the state law claim.\textsuperscript{120} Under the well-pleaded complaint rule, the officer suits thus would not arise under federal law. This accounted for the customary absence of damage actions brought against state officials directly under the federal question statute.\textsuperscript{121}

In contrast, equity actions, which were not governed by any particular

\textsuperscript{116} 152 U.S. 454, 464 (1894). Although *Union & Planters’ Bank* interpreted an 1887 revision of the 1875 federal question statute, see Act of Mar. 3, 1887, ch. 373, § 6, 24 Stat. 552, 555, amended by Act of Aug. 3, 1888, ch. 866, § 1, 25 Stat. 433, 433, it was the first decision to read the statute as eliminating removal based on a federal defense.

\textsuperscript{117} See Collins, supra note 87, at 718 (plaintiff seeking federal jurisdiction had to wait until answer showed that defense raised issue of federal law).


\textsuperscript{119} See infra notes 126, 159 (citing and discussing some of the decisions following *Union Planter’s Bank* and prior to *Mottley*).

\textsuperscript{120} Hill, supra note 95, at 1128.

\textsuperscript{121} Id. at 1129-36.
state's law, required the plaintiff to tell a "fuller story," that necessarily included within it the requisite federal ingredient. For example, to secure federal equity jurisdiction, a plaintiff had to show the probable illegality of the threatened invasion of property rights and the inadequacy of any available legal remedies. According to Hill, the equity plaintiff therefore had to describe in the complaint the hypothetical action at law, including the anticipated defense of authorization under state law and the plaintiff's reply that the statute was unconstitutional. In a number of equity suits both prior to and after Mottley, federal courts frankly noted that the plaintiff properly had alleged, as part of his initial pleading, both the statute on which the defendant officer would rely and its unconstitutionality. Thus, although federal law did not create the right to sue in these equity cases, the allegation that defendant officials had acted under color of an unconstitutional state law may have been part of the equity plaintiff's own pleading and proof. In addition, the clear dominance of the legal landscape by equity actions in federal question suits against state officers during this period, plus an occasional lower federal court decision expressly concluding that it was possible to anticipate a defense in equity but not in law, support Hill's distinction as the

122. See id. at 1129 (equity pleading had to tell entire story to justify extraordinary intervention of equity).

123. See id. (equity plaintiff required to allege special circumstances, which often included extensive claims concerning unconstitutionality of state statute).

124. See, e.g., Cuyahoga Power Co. v. Akron, 240 U.S. 462, 463-64 (1916) (federal jurisdiction premised on reliance of defendant city on unconstitutional ordinance appropriating water rights); Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 7 (1898) (federal jurisdiction premised on unconstitutionality of city ordinance that impaired contractual obligations of city to plaintiff); Nolen v. Riechman, 225 F. 812, 817 (W.D. Tenn. 1915) (federal equity jurisdiction based on plaintiff's challenge to constitutionality of statute establishing licensing and indemnity system for jitneys); Kimball v. City of Cedar Rapids, 99 F. 130, 130-31 (C.C.N.D. Iowa 1900) (plaintiff's challenge to constitutionality of city ordinance establishing rates for water supplied by waterworks company to city residents); cf. Barney v. City of New York, 193 U.S. 430, 441 (1904) (due process suit dismissed when plaintiff's complaint showed defendants acted contrary to state law only). The Supreme Court indicated how equity pleadings worked in its discussion of sovereign immunity in McNeill v. Southern Ry., 202 U.S. 543 (1906), a diversity case:

We think the real object of the bill may be properly said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of the rights of the company protected by the Constitution of the United States.

Id. at 559.

125. See Woolhandler, supra note 95, at 450-53 (noting comparative dearth of damage actions as opposed to suits in equity against state and local officers).

126. See Fergus Falls v. Fergus Falls Water Co., 72 F. 873, 875 (8th Cir. 1896) (in action at law, plaintiff should not anticipate adversary's defense because latter may never make defense sought to be guarded against). Fergus Falls was a suit to recover for water delivered to a city under contract, the breach of which was pursuant to legislation alleged to impair the obligation of contracts. Relying on Union & Planters' Bank, the court concluded that the plaintiff could anticipate a federal
key to this jurisdictional puzzle.

Nonetheless, this explanation has some difficulties. The first is the suggestion that an equity plaintiff always could anticipate defenses based on statutory authorization. Some of the best examples of the well-pleaded complaint rule, including Mottley itself, were equity cases in which the plaintiff unsuccessfully tried to jump the gun and raise a constitutional challenge to an anticipated statutory defense. If equity was different, why did these equity cases fail to arise under federal law?

A second problem with this explanation is its underlying assumption that in actions at law, federal courts, in defining the elements of a plaintiff’s right to recover, had to follow state law, whereas in actions in equity they did not. A straightforward reading of the Rules of Decision Act might suggest such a distinction, because the Act expressly covered only suits at law. Under the then prevailing regime of Swift v. Tyson, however, in neither legal nor equitable actions would federal courts ordinarily look to state law to define the right to recover. Rather, unless the plaintiff’s claim rested on a state statute or involved peculiarly local issues, litigants framed their actions by looking to “general law” principles. Until Swift’s reversal in Erie Railroad v. Tompkins, the right to relief existed independently of any particular sovereign’s laws. That had always been true in diversity cases, and seems also to have been true in early federal question cases in which the common law formed the basis of the plaintiff’s action.

B. The Forgotten Tradition of Implied Constitutional Actions for Damages

A more significant problem with relying too heavily on the distinction be-

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127. See Mottley, 211 U.S. at 152 (dismissing case for lack of jurisdiction because plaintiff failed to state federal question in cause of action; insufficient to allege that federal law invalidates defendant’s anticipated defenses). Mottley, of course, was a suit against a private party, not a state or federal officer; see also Tennessee v. Union & Planters’ Bank, 152 U.S. 454, 464 (1894) (two equity actions to recover taxes did not arise under federal law).


129. Id. § 34, 1 Stat. at 92. The Act provided as follows:

[T]he laws of the several states, except where the [C]onstitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Id. (emphasis added).

130. 41 U.S. (16 Pet.) 1 (1842).

131. See id. at 18 (in matters of “general law,” federal courts need not apply state common law); Hill, The Erie Doctrine in Bankruptcy, 66 HARV. L. REV. 1013, 1027-31 (1953) (Swift had same implications for law and equity sides of federal courts).

132. Swift, 4 U.S. at 18.

133. 304 U.S. 64 (1938).
between law and equity is its underlying premise that courts never entertained federal question jurisdiction over damage claims—actions at law—against state or local officers for their constitutional harms. Although that is the received view, it is not altogether accurate. The Supreme Court, in fact, had approved federal question damage actions against state officers for their constitutional torts shortly after the enactment of the federal question statute.

In the 1885 *Virginia Coupon Cases*, for example, local taxpayers sued state officers to redress seizures of their property for nonpayment of state taxes. The taxpayers alleged that the State of Virginia, in violation of the contracts clause, had reneged on its promise to accept payments in interest coupons from state-issued bonds in lieu of cash. Interestingly, the Court allowed a damages action against the tax collector directly under the federal question statute, but disallowed a similar suit under § 1983's predecessor. In the § 1983 suit, *Carter v. Greenhow*, the Court agreed that the state statute pursuant to which the official had acted violated the contracts clause. However, because the state's obligation not to impair contracts was not one of the "rights, privileges or immunities secured by the Constitution" within the meaning of § 1983, the Court dismissed the suit.

The Court reached this seemingly odd conclusion in *Carter* because it determined that the only "individual right" that was "secure[d]" by the contracts clause was a right to a "judicial determination" in a suit at common law that would decide the constitutionality of any impairment:

[The] constitutional provision [i.e., the contracts clause], so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are nevertheless passed by the legislature of the State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, . . . the individual has a right to a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived.


135. 114 U.S. 269 (1885).
136. Id. at 273-75.
137. 114 U.S. 317 (1885).
138. Id. at 322.
139. Id. at 322-23.
140. Id. at 322.
141. Id.
The Court went on to consider the means that Congress had given to enforce the rights under the contracts clause:

The mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, [is] . . . by providing for a review on writ of error [in the Supreme Court] to the judgments of the [s]tate courts . . . and by conferring jurisdiction upon the [lower federal] [c]ourts by the act of March 3, 1875, . . . of all cases arising under the Constitution and laws of the United States, where the sum or value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right.142

By so concluding, the Carter Court unanimously had determined that the federal question statute, not § 1983, was the proper vehicle through which a party could enforce the contracts clause against state officers in a lower federal court, even when damages were sought.

The Court adhered to this determination in a companion case, White v. Greenhow,143 in which the plaintiffs alleged nearly identical facts to show a trespass by the state tax collector.144 This time, however, they based their claim for damages solely on the general federal question statute rather than on the Civil Rights Act. The Court upheld jurisdiction, concluding that "[t]he present action, as shown on the face of the declaration, was a case arising under the Constitution."145 The White Court thereby had found not only that a damage action to recover for trespassory harms resulting from enforcement of an unconstitutional statute could arise under federal law within the meaning of the general federal question statute rather than on the Civil Rights Act. The Court upheld jurisdiction, concluding that "[t]he present action, as shown on the face of the declaration, was a case arising under the Constitution."145 The White Court thereby had found not only that a damage action to recover for trespassory harms resulting from enforcement of an unconstitutional statute could arise under federal law within the meaning of the general federal question statute, but also that a case could "aris[e] under" the Constitution and still not involve a right "secured by" the Constitution under § 1983. In effect, the federal question statute picked up where § 1983 left off.

The Court drew a similar distinction in applying statutes regulating its appellate jurisdiction. One provision, which Congress originally enacted as part of the 1871 Civil Rights Act, allowed an appeal from a lower federal court to the Supreme Court of any suit implicating a right "secured by the Constitution" without regard to the amount in dispute.146 However, appeals

142. Id. at 322-23.
143. 114 U.S. 307 (1885).
144. Id. at 307-08. Plaintiff complained that the treasurer of the City of Richmond "forcibly and unlawfully" entered his premises "and seized and carried away property" while acting pursuant to an unconstitutional statute. Id. There was no diversity of citizenship in either White or Carter. See id. at 307 (both plaintiff and defendant citizens of Virginia); Carter, 114 U.S. at 318 (same).
145. White, 114 U.S. at 308; see Barry v. Edmunds, 116 U.S. 550, 558-59 (1886) (suit to recover damages against state official who seized property under unconstitutional state statute arose under federal law); cf. Pleasants v. Greenhow, 114 U.S. 323, 323-24 (1885) (equity action to restrain collection of tax of $32.25, challenged as unconstitutional under contracts clause, disallowed under § 1983 after Carter, and disallowed directly under § 1331 because of insufficient amount in controversy).
146. Rev. Stat. § 699 (1874). The statute provided for appellate jurisdiction "without regard to
from the lower federal courts to the Supreme Court in most other cases, including those that arose under the Constitution, then required a minimum amount-in-controversy.\footnote{See Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 316, 316 (requiring that matter in dispute exceed $5,000 for appeal to Supreme Court from circuit court); see also HART \& WECHSLER, supra note 5, at 37 \& nn.38-39 (charting history of congressional limits on appeals from federal courts).} Pursuant to those statutes, the Court in one case dismissed the appeal of an action at law involving the constitutionality of a state statute purported to interfere with interstate commerce, because the jurisdictional amount was not met.\footnote{See Bowman v. Chicago \& N.W. Ry., 115 U.S. 611, 614 (1885) (two counts, each charging only $1,200 in damages).} The Court concluded that the case "may be one arising under the Constitution, within the meaning of that term, as used in other statutes, but it is not one brought on account of the deprivation of a right, privilege or immunity secured by the Constitution."\footnote{Id. at 615-16.} This distinction mirrored the Court's disparate interpretations of the language in the general federal question statute and in § 1983 (and its jurisdictional provision).

It is possible to object that the decision in \textit{White} was rendered before the Court clearly embraced the well-pleaded complaint rule a few years later. \textit{White}, however, seemed to have anticipated such a rule by noting that the action arose under federal law "on the face of" the complaint.\footnote{White, 114 U.S. at 308.} Moreover, even after the well-pleaded complaint rule became a settled requirement of both original and removal jurisdiction, the Court upheld jurisdiction over constitutionally-based damage actions against state officers directly under the federal question statute. In \textit{Scott v. Donald},\footnote{165 U.S. 58 (1897).} for example, the plaintiff brought suits at law against state officers seeking damages for the seizure of packages of liquor and wine that he had imported into the state.\footnote{Id. at 59.} The plaintiff claimed that the seizures were undertaken pursuant to statutes that violated the commerce clause, and the defendant officers specifically raised the jurisdictional question in the lower court.\footnote{See Donald v. Scott, 67 F. 854, 855-56 (C.C.D.S.C. 1895) (plaintiff claimed interference with importation of alcohol violated commerce clause; defendants argued federal courts lacked jurisdiction because suit was against state, claim did not arise under Constitution or laws of United States, and showed no grounds for equity jurisdiction). The plaintiff and defendants were nondiverse. Id. at 855.} Nevertheless, the Supreme Court upheld federal question jurisdiction and affirmed the award of dam-

\begin{quotation}
the sum or value in dispute" for review from lower federal courts of "[a] final judgment at law or final decree in equity . . . in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States." \textit{Id.}
\end{quotation}

\begin{quotation}
147. See Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 316, 316 (requiring that matter in dispute exceed $5,000 for appeal to Supreme Court from circuit court); see also HART \& WECHSLER, supra note 5, at 37 \& nn.38-39 (charting history of congressional limits on appeals from federal courts).
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148. \textit{Id.}
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149. \textit{Id.} at 615-16.
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150. \textit{White}, 114 U.S. at 308.
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151. 165 U.S. 58 (1897).
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152. \textit{Id.} at 59.
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153. \textit{See Donald v. Scott}, 67 F. 854, 855-56 (C.C.D.S.C. 1895) (plaintiff claimed interference with importation of alcohol violated commerce clause; defendants argued federal courts lacked jurisdiction because suit was against state, claim did not arise under Constitution or laws of United States, and showed no grounds for equity jurisdiction). The plaintiff and defendants were nondiverse. \textit{Id.} at 855.
\end{quotation}
In a separate action, filed on the equity side of the lower federal court, the same plaintiff obtained injunctive relief against the same defendants for ongoing and threatened seizures of his property.\textsuperscript{155} The two \textit{Scott} decisions provide a clear example of the Court's willingness to find that both legal and equitable challenges to action taken pursuant to unconstitutional statutes arose under federal law within the meaning of the 1875 Act.

Not surprisingly, federal courts continued to rely on cases such as \textit{White} and \textit{Scott} to uphold federal question jurisdiction over constitutionally tinged tort actions for damages against nondiverse state officers.\textsuperscript{156} The most notable of these decisions were federal question damage actions against state and local officers to recover for the denial of the right to vote in congressional elections.\textsuperscript{157} Actions to redress interference with voting had an ancient pedigree at common law.\textsuperscript{158} The voting cases,\textsuperscript{159} as well as the ordinary trespass

\textsuperscript{154} Scott v. Donald, 165 U.S. 58, 72-73, 101 (1897).
\textsuperscript{155} Scott v. Donald, 165 U.S. 107, 115-17 (1897).
\textsuperscript{156} The jurisdictional problem in actions at law was specifically addressed in the otherwise insignificant case of Cox v. Gilmer, 88 F. 343 (C.C.W.D. Va. 1898), a trespass action to recover damages for false and malicious imprisonment by state officials. The plaintiff claimed that the statute under which the defendant officers had seized and imprisoned him violated due process. \textit{Id.} at 346. The defendant argued that the plaintiff had not shown federal question jurisdiction on the face of the complaint because the constitutional issue could form no part of the tort action:

\begin{quote}
The first ground of demurrer urged by the defendants is that the plaintiff, after stating his cause of action, goes further, and anticipates the defense that will be relied on by the defendant[s]—that is, that they were proceeding under the act of [the legislature] . . . ; that the plaintiff thus attempts to confer jurisdiction on this court by alleging that the defense which will be relied on involves a federal question.
\end{quote}

\textit{Id.} Relying on \textit{White} v. Greenhow, 114 U.S. 307 (1885), the Court expressly rejected the defendants' argument. Cox, 88 F. at 347-48. \textit{But cf.} City of Fergus Falls v. Fergus Falls Water Works Co., 72 F. 873, 876 (8th Cir. 1896) (allegation that city resolution annulled city's contract with water company did not make action one arising under Constitution or within jurisdiction of federal courts).

\textsuperscript{157} See, e.g., Swafford v. Templeton, 185 U.S. 487, 494 (1902) (federal jurisdiction existed when duly qualified voter in federal election denied right to vote by state officials); Wiley v. Sinkler, 179 U.S. 58, 62, 65 (1900) (since right of South Carolina resident to vote for congressman derives from Constitution, federal jurisdiction exists for nondiverse parties); Brickhouse v. Brooks, 165 F. 534, 543 (C.C.E.D. Va. 1908) (action against state election officer for wrongful rejection of plaintiff's right to vote for member of Congress is within federal jurisdiction); Knight v. Shelton, 134 F. 423, 426 (C.C.E.D. Ark. 1905) (same). Litigants brought these cases under the general federal question statute, not § 1893. Even though the denial of the right to vote in a congressional election was a privilege or immunity secured by the fourteenth amendment, see \textit{supra} text accompanying notes 67-68 (listing protected privileges or immunities), the Court at one time did not consider voting cases to involve "civil rights." See \textit{supra} notes 53-55 and accompanying text (distinguishing between "political rights," including right to vote, and "civil rights"). Once that limitation dissolved, litigants could use § 1893 when the vote denial was based on race, even if the election was local rather than congressional, because of the fifteenth amendment.

\textsuperscript{158} See Nixon v. Herndon, 273 U.S. 536, 540 (1927) (noting that damages had been recoverable in suits at law for vote denials "for over two hundred years" (citing Ashby v. White, 92 Eng. Rep. 126 (1703))); see also Memphis Community School Dist. v. Stachura, 477 U.S. 299, 311-12 n.14 (1986) (noting "long line of cases" in which damages could be had for deprivation of right to vote).
actions in *White* and *Scott*, seemed to fit comfortably within the boundaries of the well-pleaded complaint rule. Even in the federal officer context, plaintiffs successfully brought federal question damage actions against individuals for harm arising from the enforcement of unconstitutional federal statutes.160

Pigeonholing all of these suits as cases in which the Constitution itself had created the right to sue would be difficult. Indeed, the courts treated them as ordinary common law actions against individual officers, but also noted that they arose under federal law, as did the equity cases. This treatment suggests that a constitutional ingredient had found its way into the plaintiff's complaint, when, for example, the plaintiff affirmatively alleged the wrongfulness of a particular trespass. The explanation seems to be that in trespass, and trespass-like contexts, the legality of the defendant's acts, even at common law, depended upon the constitutionality of the authority on which he premised his action.161

Admittedly, the allegation that an officer acted under color of an unconstitutional state law at one time had arisen only as a reply to a defense based on state authorization. But courts now apparently viewed the claim of absence of official authority as a part of the plaintiff's case, even though they did not yet see the right to sue as federally created.162 Ironically, the underutilized 1871 Civil Rights Act itself may have heralded this shift in thinking when it made the allegation of unconstitutional action "under color of" state law part of the plaintiff's own pleading and proof in both equity and damage

159. See *Swafford v. Templeton*, 185 U.S. at 493 (right to vote which complainant claimed had been unlawfully invaded was one "in the very nature of things arising under the Constitution and laws of the United States, and...this inhered in the very substance of the claim"); *Wiley v. Sinkler*, 179 U.S. 58, 64-65 (1900) ("The complaint, by alleging that the plaintiff was...under the constitution and laws of the State of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the State, shows that the action is brought under the Constitution and laws of the United States.").

160. See *Patton v. Brady*, 184 U.S. 608, 611-12 (1902) (court had federal question jurisdiction over assumpsit action against agent enforcing unconstitutional federal tobacco tax); *Iron Gate Bank v. Brady*, 184 U.S. 665, 667 (1902) (federal question jurisdiction over tort action against revenue agent enforcing unconstitutional federal tax). If sued in state court for injuries arising out of the enforcement of unconstitutional statutes, federal officials might still have been able in some (but not all) cases to remove because of federal officer removal statutes. See *Collins*, *supra* note 87, at 767 & nn.225-27 (providing examples of specific officer removal statutes).

161. See *Note*, *Railroad Rate Regulation and Suit Against the State*, 21 HARV. L. REV. 527, 529 (1908) (ultimate issue in enjoining official from enforcing state statute—whether defendant's acts have "legal sanction"—depends on whether official's action is attributable to state, which in turn depends on whether act in question is constitutional); see also *supra* note 124 (citing equity cases in which plaintiff alleged unconstitutionality of state statute or ordinance pursuant to which official had acted).

162. See *Hill*, *supra* note 95, at 1140-41 & n.137 (discussing "federal equity" and its similarities to rights deemed given by Constitution). *But see* *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (assuming that federal elements arose solely by way of defense to claim based on local law in such cases).
Despite the tradition of legal as well as equitable actions against officers, not all common law or general law causes of action consisted of elements that allowed plaintiffs to incorporate or absorb the Constitution as part of their pleading, any more than did all actions in equity. The trespass model could readily assimilate in the complaint a “deprivation” of liberty or property in violation of the due process clause. But suits attacking legislative impairments of the obligation of contract often presented difficulties. As a substantive matter, the contracts clause required that the state or locality do something more than “merely” breach its contract; the impairment of existing contractual rights had to result from legislative action. As a practical matter, pleading such a legislative impairment and staying in federal

163. See Woolhandler, supra note 95, at 460 (Congress must have contemplated that statutory and constitutional violations would be part of plaintiff’s case-in-chief when it passed 1871 Civil Rights Act); see also California Oil & Gas Co. v. Miller, 96 F. 12, 22 (C.C.S.D. Cal. 1899) (noting that § 1833’s predecessor allowed plaintiff to plead defendant’s reliance on a statute whose constitutionality plaintiff attacked). A similar fate befell the common law writ of habeas corpus once it became available for persons in custody in violation of the Constitution. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385-86 (current version at 28 U.S.C. § 2241(c)(3) (1982)) (extending writ to prisoners held in violation of Constitution). Although historically the writ could only be used to challenge the jurisdiction of the sentencing court, a challenge to the constitutionality of the statute pursuant to which the prisoner was being held would satisfy the jurisdictional allegation required of the petitioner by the writ. See Ex parte Royall, 117 U.S. 241, 247 (1886) (federal courts may grant writ to any person who alleges liberty restrained in violation of Constitution).

164. The classic nonconstitutional illustrations (in both law and equity) involved litigation over land in which parties claimed title from a federal grant. Federal courts drew fine distinctions between actions to remove a cloud on the plaintiff’s title (which required plaintiff to plead the existence and invalidity of the defendant’s adverse federal title and which thus arose under federal law) and suits to quiet title (which did not). Compare Hopkins v. Walker, 244 U.S. 486, 487 (1917) (action to remove cloud from title) with Devine v. Los Angeles, 202 U.S. 313, 333 (1905) (quiet title claim under state statute; not necessary to allege nature of defendant’s title even though defendant claimed under federal treaty). For similar pleading reasons, ejectment actions failed to arise under federal law, even where the plaintiff claimed under a federal grant. See Taylor v. Anderson, 234 U.S. 74, 75 (1914) (“However essential or appropriate the allegation [that defendant’s title is void under congressional legislation] might have been in a bill in equity to cancel or annul the deed, they were neither essential nor appropriate in a petition in ejectment.”); Joy v. St. Louis, 201 U.S. 332 (1902) (whether patentee is entitled to accretion of, or ejectment from, newly formed land between old boundary of federal grant and course-changing river is state, not federal, question); see also Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900) (possessory action based on local law in which both parties claimed land from federal government did not arise under federal law); cf. White v. Sparkhill Realty Corp., 280 U.S. 500 (1930) (federal question jurisdiction to enjoin state officer from turning property into state park in violation of due process clause, but not over ejectment claim).

165. See Hill, supra note 95, at 1139 (observing that when the legality of a novel or less traditional common law injury turned on a constitutional norm, it became almost impossible to discern, and perhaps futile to discuss, whether the action was given by the Constitution itself or by the general law that had absorbed its standard).

166. See Shawnee Sewerage & Drainage Co. v. Stearns, 220 U.S. 462, 471 (1912) (while subsequent contract between city and company to build sewage lateral lines is breach of contract with original company, it is not legislative action impairing obligation of contract); City of Dawson v.
court were not easy. Apart from sovereign immunity problems, the Court sometimes intimated that in the absence of diversity, litigants could not repress such constitutional injuries in federal court through an ordinary breach of contract claim, or in an equity suit for specific performance. The Court reasoned that no element of these actions could absorb the constitutional norm in the same way that a suit for a trespassory harm could. To allege that the breach violated the contract clause added nothing to the plaintiff's complaint because this allegation would have formed no part of a breach of contract or specific performance action. But sometimes, as in the Virginia Coupon Cases, plaintiffs were able to shoehorn even a claim based on the contracts clause into an ordinary trespass action. In that event, plaintiffs

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Columbia Trust Co., 197 U.S. 178, 181 (1905) (mere contractual repudiation by municipality lacks "character of a law impairing the obligation of contracts").

167. The eleventh amendment would have barred a suit against the state or its officers to enforce its contracts. See U.S. Const. amend. XI (prohibiting federal courts from hearing cases brought against state by citizens of another state); Hans v. Louisiana, 134 U.S. 1, 20 (1890) (state cannot be sued in circuit court by one of its own citizens without consent of that state); see also Currie, supra note 97, at 153-54 (state officials could not be sued on contracts of state).


169. See Fergus Falls v. Fergus Falls Water Co., 72 F. 873, 875-76 (8th Cir. 1896) (allegation that city resolution violated contracts clause mere surplusage). On the other hand, in a series of utility cases, the Court regularly took federal question jurisdiction over claims involving breach of an exclusive franchise when the plaintiff sought to enjoin acts (such as the construction of competing waterworks) pursuant to legislation that would infringe property rights protected under the contract. See, e.g., Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 81-82 (1902) (noting that legislative acts in question "do not present the mere case of a breach of a private contract" but "disclose an intention and attempt . . . to deprive the complainant of its rights under an existing contract"); Knoxville Water Co. v. Knoxville, 200 U.S. 122, 32 (1906) (bill charging that municipal construction of waterworks will impair contract granting company exclusive rights to build and operate such a facility arises under Constitution); Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 9 (1898) (water company's bill to enjoin city's construction of water works raises questions of constitutional power). Actions to enforce an exclusive franchise were familiar to equity. See generally J. High, High on Injunctions 568-89 (2d ed. 1880) (describing the law of injunctions to protect franchises). Although these cases involved impairments of the obligation of contracts, they closely resembled the trespass tradition.

170. 114 U.S. 269 (1885).

171. See supra text accompanying notes 135-36, 143-45 (discussing enforcement under federal question statute of rights based on contract clause in White, one of Virginia Coupon Cases); see also Ashland Elec. Power & Light Co. v. City of Ashland, 217 F. 158, 159-60 (D. Ore. 1914) (federal question jurisdiction over challenge to city ordinance that breached contract rights in violation of due process clause); Green v. Oemler, 151 F. 936, 937-38 (C.C.E.D. Ga. 1907) (federal question jurisdiction over injunction suit demanding that defendant stop picking oysters in violation of plaintiff's prior contract with state).
could avoid any lurking sovereign immunity problems and guarantee that the suit would arise under federal law.

The intersection of pleading and jurisdiction in these constitutional cases was neatly paralleled in the area of so-called implied rights of action under federal statutes. In that context litigants did not originally assert that a federal statute itself implicitly created the right to sue; rather, recent scholarship suggests that they pleaded a cause of action drawn from the common law and borrowed the relevant legal standard from the federal norm set up in the statute. Thus, a federal statute could supply the standard of liability that the general common law could then incorporate in the same way that a common law judge might adopt a criminal standard as the relevant standard of care in a negligence case. Suits to enforce that statutory norm arose under federal law because plaintiffs had to plead and prove the incorporated federal law ingredient in order to prevail on their common law claim. That was essentially what constitutional litigants were doing in their own arena, at least in the context of trespassory harms.


173. See Macon Grocery Co. v. Atlantic Coast Line R.R., 215 U.S. 501, 507-08 (1910) (suit arose under federal law, despite absence of express private right to sue for equitable relief, when shippers sought to enjoin interstate carriers from exacting rates made unlawful by interstate commerce statutes); Toledo, A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 730, 732, 739-34 (C.C.N.D. Ohio 1893) (Taft, J.) (federal question jurisdiction granted for injunctive relief—and damages (dictum)—against union for inducing carrier's violation of interstate commerce statutes through work stoppage, on basis of statutes' criminal and civil sanctions against carriers; claims likened to third-party breach of contract claims); see also Paine Lumber Co. v. Neal, 244 U.S. 459, 474-75 (1917) (Pinney, J., dissenting) (private right of action for injunctive relief against defendants in boycotting combination implied under federal antitrust statutes (citing Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916))). But see Noyes, supra note 172, at 158 & n.58, 173 (arguing that Rigsby-style cases came into federal court only through diversity, or when a federally chartered corporation was involved).

The tradition of general law actions in which some element of the plaintiff's pleading absorbed a federal standard probably also helps explain the curious cases of civil enforcement suits brought by the United States or its officers to enjoin labor strikes even though no specific federal statutory cause of action was involved in those cases. [In re Debs, 158 U.S. 564, 599-600 (1895) (defendants enjoined from conducting illegal boycott that prevented railroad from discharging duties, including delivery of mail, in interstate commerce); see also F. Frankfurter & N. Green, The Labor Injunction 6-7 (1930) (interference with interstate commerce gave rise to use of Interstate Commerce Act to assert federal jurisdiction in labor disputes); Hovenvamp, Labor Conspiracies in American Law, 1880-1930, 66 Tex. L. Rev. 919, 962-63 (1988) (courts enjoined violent or coercive labor activities under Sherman and Interstate Commerce Acts).
C. RE Thinking the Intended Role of the General Federal Question Statute in Constitutional Litigation

Scholars frequently have attempted to provide a workable definition of when a case arises under federal law.\textsuperscript{174} The debate, however, rarely focuses on suits in which federal law itself creates the right of action; such cases nearly always "arise under" federal law.\textsuperscript{175} Rather, the debate centers on cases in which state law creates the right of action, which somehow incorporates a federal element. These cases can also arise under federal law,\textsuperscript{176} but as the Supreme Court recently reiterated, they are clearly second-class citizens for jurisdictional purposes.\textsuperscript{177}

Curiously, the early constitutional and statutory cases under the federal question statute, whether in law or equity, seem to fit more into that second category—in which federal law did not create the cause of action—than into the first. In the most famous decision of this genre, \textit{Smith v. Kansas City Title & Trust Co.},\textsuperscript{178} a shareholder sued the company in which he held stock to enjoin its unauthorized investment in federally issued securities that he alleged were unconstitutional. The Court concluded that the case arose under federal law because the legality of the company's investment turned on the constitutionality of Congress' action in issuing the securities.\textsuperscript{179} Today, \textit{Smith} is considered to have been a "path-breaking" decision.\textsuperscript{180} As the


\textsuperscript{175} \textit{See} Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9 (1983) (Justice Holmes provided most familiar definition of "arising under" limitation that "suit arises under the law that creates the cause of action" (quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916))).

\textsuperscript{176} \textit{See} Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 201-02 (1921) (federal jurisdiction granted because shareholder's state law action against corporation implicated constitutional validity of federal banking laws).


\textsuperscript{178} 255 U.S. 180 (1921).

\textsuperscript{179} \textit{Id.} at 201-02.

\textsuperscript{180} T.B. Harms Co. v. Elissee, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.). Judge Friendly considered \textit{Smith} a "path-breaking" decision in determining that federal jurisdiction can be granted to a claim created by state law if the plaintiff's pleadings raise a need to determine or apply federal law. \textit{Id.}
above discussion has shown, however, Smith is hardly the first example of a nonfederal cause of action in which the plaintiff properly alleged a constitutional question, but merely one that came at the end of a long line of similar decisions.\footnote{81} True, most pre-Erie decisions such as Smith did not seem to have focused on state law as creating the right to sue; but since the relief sought by plaintiffs was dependent upon the pleading and proof of the constitutional matter in their nonfederal, general law actions, the suits arose under federal law.\footnote{82} Such constitutional litigation did not arise under federal law in the modern sense, however, until the courts gradually came to see the source of the right to sue as genuinely federal—as impliedly created by federal law.\footnote{83}

It is not surprising that the federal courts first used the federal question statute to grant jurisdiction in general law actions that incorporated a federal element. The prevailing assumption in 1875 was that federal courts would act as general common law and equity courts.\footnote{84} In diversity, the jurisdictional grant over cases at law and in equity was read as authorizing federal courts to adopt the general law as the substantive point of departure in the absence of a state statute.\footnote{85} In admiralty, the jurisdictional grant invited the federal courts, as it still does, to tap the "common law" of admiralty as the source of substantive law.\footnote{86} Thus, the Reconstruction Congress reasonably might have understood its grant of jurisdiction over suits "at common law or in equity" as delegating to the federal courts a similar power to draw their actions and remedies in accordance with general law principles.\footnote{87} More-
over, such a delegation of power in an area of clear congressional competence—federal question litigation—would not have run into the same constitutional problems that the diversity grant later did.\textsuperscript{188}

Although the legislative history is sparse,\textsuperscript{189} the context in which the federal question statute was enacted gives rise to a few inferences about the role that Congress may have envisioned for it. When Congress created an express cause of action to enforce a statute, the general federal question statute probably was unnecessary as a jurisdictional hook. On the few occasions before the Civil War when it passed such statutes, Congress customarily added a specialized jurisdictional provision to allow federal trial court access.\textsuperscript{190} Indeed, before the 1875 federal question statute, Congress had to do so if it wanted jurisdiction in federal court without regard to diversity. Therefore, if the 1875 statute had been designed to bring into federal court suits involving federal laws for which Congress already had created or expressly authorized the right to sue, it would have been superfluous. Yet, providing jurisdiction over cases in which federal law expressly created the cause of action typically is considered the primary (and to some, the exclusive) reason for enactment of the federal question statute.\textsuperscript{191}

states. \textit{See} Hinderlider \textit{v.} La Plata River \& Cherry Creek Ditch Co., 304 U.S. 92, 110-11 (1938) (Court may develop federal common law in resolution of water rights controversy between states).

\textsuperscript{188.} \textit{Cf} Textile Workers Union \textit{v.} Lincoln Mills, 353 U.S. 448, 455-57 (1957) (bare grant of jurisdiction read as delegation to courts to formulate rules of decision in area of congressional competence). Prior to \textit{Erie}, federal courts sitting in diversity often displaced state law in areas where Congress arguably could not legislate. Under the general federal question grant, the federal courts might also displace state law when they used general law rules, but it would have been in an area where Congress itself would have had legislative authority. \textit{See} Field, \textit{supra} note 93, at 923-24, 941-42 (\textit{Erie} Court concern was that courts not make rules that would exceed Congress' delegation of power). \textit{But cf.} Note, \textit{supra} note 183, at 31-33 (Reconstruction-era civil rights statutes' jurisdictional provisions may have been intended to give federal courts power to develop federal law even beyond what Congress might have been able to do legislatively).

\textsuperscript{189.} \textit{See generally} Forrester, \textit{The Nature of a "Federal Question,"} 16 TUL. L. REV. 362, 374-77 (1942) (discussing few provisions of legislative history available and comments in contemporary literature, and finding no indication that Congress intended statutory phrase "arising under" to have different interpretation from constitutional clause).

\textsuperscript{190.} \textit{See}, e.g., Act of Apr. 10, 1790, ch. 7, § 5, 1 Stat. 109, 111 (patents); Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-03 (fugitive slave law); Act of Mar. 30, 1802, ch. 13, § 15, 2 Stat. 139, 144 (trade with Indian tribes); Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 266, 269 (suits involving Bank of United States); Act of Mar. 3, 1845, ch. 43, § 20, 5 Stat. 732, 739 (postal laws).

\textsuperscript{191.} \textit{See} Merrell Dow Pharmaceuticals, Inc. \textit{v.} Thompson, 478 U.S. 804, 808 (1986) ("vast majority" of federal question cases involve federal statutes which expressly create cause of action). For Justice Holmes, the cause-of-action test defined the outer reach of the federal question statute. \textit{See}, e.g., Smith \textit{v.} Kansas City Title \& Trust Co., 255 U.S 180, 214-15 (1921) (Holmes, J., dissenting) (cause of action in shareholder suit created by state law; "suit cannot be said to arise under any other law than that which creates the cause of action"); American Well-Works Co. \textit{v.} Lane \& Bowler Co., 241 U.S. 257, 259-60 (1916) (Holmes, J.) (plaintiff's complaint alleged state cause of action for libel and slander relating to defendant's alleged statement that plaintiff was patent infringer; federal jurisdiction denied since issue of validity of federal patent arises only in defendant's defense).
On the other hand, when Congress had not expressly created the cause of action, the federal question statute was indispensable in 1875. In 1871 Congress had written a civil rights act that, for whatever reason, courts and litigants alike soon perceived as fairly limited. Moreover, the Court had just given short shrift to the privileges or immunities clause of the fourteenth amendment, whose language the 1871 Act tracked and with whose fortunes it was linked. Vindication in federal court of ordinary common law interests against unconstitutional state action required a different statute that would not be so closely tied to the privileges or immunities clause which did not protect common law rights. The 1875 statute, given its promise of original jurisdiction and federal defense removal, ensured that all constitutional issues, whether raised in a coercive or defensive posture, could be litigated in federal court even when diversity was absent, and even when the violation did not involve “civil rights” or a right directly “secured by” the Constitution.

Thus, the general federal question statute, not § 1983, made the federal courts “the primary and powerful reliances” for the enforcement of constitutional limits on state and local government.

D. THE DISAPPEARANCE OF THE CONSTITUTIONAL DAMAGE REMEDY

The received tradition embraces federal question jurisdiction over equitable, but not monetary, actions against officers for their unconstitutional acts. And yet, although less common, the damage cases appear at one time to have

192. See supra text accompanying notes 42-62 (discussing narrow reading given “under color of,” “rights, privileges, or immunities,” and “secured by” language of 1871 Act).
193. See supra text accompanying notes 64-66, 70 (discussing Court's narrow interpretation of privileges or immunities clause of fourteenth amendment in Slaughter-House and effect of this interpretation on § 1983). Interestingly, the author of the 1875 Act, Senator Matthew Carpenter, was well aware of the Court's 1873 decision in Slaughter-House, having successfully argued the case for the monopoly on direct review from the Louisiana state courts. See F. Frankfurter & J. Landis, supra note 27, at 68 (Senator Carpenter's proposed substitute for House bill became Act of 1875 after minor changes). The equal protection basis of the ill-fated Civil Rights Act of 1875, Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (held unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883)), also shows that the Congress which enacted the federal question statute knew that it could no longer rely on the fourteenth amendment's privileges or immunities clause after Slaughter-House.
194. F. Frankfurter & J. Landis, supra note 27, at 65; cf. Brennan, The Bill of Rights and the States: The Revival of State Institutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 538 (1986) (noting that 1875 Act "revealed Congress's intention to leave the definition and enforcement of the protections and prohibitions of the Fourteenth Amendment to the federal judiciary"). However, while federal law provided the norm to be enforced, the common law provided the right to sue. Hence the Court concluded that state courts also were competent to hear most cases arising under federal law as long as Congress had not provided exclusive jurisdiction in federal court. See Clafin v. Houseman, 93 U.S. 130, 136-37 (1876) (assignee in bankruptcy action permitted to sue in state court since Congress did not give federal courts exclusive jurisdiction).
195. See supra text accompanying notes 143-45, 151-54 (discussing implied constitutional actions for damages based on federal question jurisdiction).

196. 403 U.S. 388 (1971). Bivens held that a violation of the fourth amendment's proscription of unreasonable searches and seizures by a federal agent acting under color of authority gives rise to a cause of action for damages. Id. at 389.

197. 209 U.S. 123 (1908); see supra text accompanying notes 104-08 (discussing availability under federal jurisdiction statute of injunctive suit in Young, based on constitutional response to anticipated defense).

198. See W. Guthrie, supra note 81, at 174-77 (advocating suit in equity, with remedy of injunction as most prompt and satisfactory relief when property rights at stake); Woolhandler, supra note 95, at 444-47 (discussing decline of constitutionally-based damage actions in favor of anticipatory equitable remedies in wake of Young).
from a postdeprivation damage action, even if one were possible. Also, to the extent that state regulatory legislation could cause compensable harm, no individual officer, and perhaps not even local governments, could afford to pay the potential award.

In addition, corporations had a special affinity to equity. At that time equity protected only property, as opposed to liberty, interests, and corporations had only property interests to protect. By itself, this would not explain why corporations would not also seek damages when injury to their property occurred. But regulated businesses apparently preferred to litigate their constitutionally based property claims and the facts surrounding them without a jury. Equity guaranteed that the fate of free enterprise would be in the good hands of article III judges. Because constitutional damage remedies served the needs of business less well than other remedies did, these plaintiffs rarely sought them.

Yet another reason that constitutional damage actions under the federal question statute disappeared was that plaintiffs seldom had to rely solely on federal question jurisdiction to obtain relief in federal court for constitutionally based injuries. As noted above, when the wrongdoing official was diverse, litigants could remedy harms caused by the enforcement of unconstitutional statutes by bringing equity as well as damage actions in fed-

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199. See Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418, 460 (1890) (Miller, J., concurring) (intimating that because of ruinous rates, injunction was only viable remedy); Ex parte Young, 209 U.S. 123, 165-66 (1908) (citing Chicago, M. & St. P. Ry. for proposition that to await proceedings against railroad company for violation of rate act in order to obtain review of act would imperil company with crippling loss).


201. See Giles v. Harris, 189 U.S. 475, 486-88 (1902) (equity would not remedy denial of right to vote; relief from political wrong must come from people of state as body); Green v. Mills, 69 F. 852, 858 (4th Cir. 1895) (courts lack jurisdiction in matters of political nature, unless necessary to protect property rights).

202. See Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906) (fourteenth amendment refers to liberty of natural, not artificial persons); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) (citing Northwestern Nat'l Life for similar proposition); cf. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (suggesting that although corporations may have liberty interests under due process and equal protection clauses, "purely personal" guarantees—such as the privilege against self-incrimination—are unavailable to corporations).

203. Ex parte Young itself observed that the plaintiff's legal remedy was inadequate partly because jurors would not be able to fathom the difficult questions of constitutional fact associated with substantive due process challenges to complex regulatory legislation. Ex parte Young, 209 U.S. at 164-65.

204. See supra text accompanying note 85.
eral court. Given the familiar role of general law actions in diversity, the pleadings in these suits may not have been appreciably different from the pleadings in federal question actions in which litigants alleged constitutionally based injuries.205 These suits, however, would not have been remembered as owing their existence to § 1331 even though that statute might have provided a basis for jurisdiction in addition to diversity.

The most debilitating reason for the decline of constitutional damage actions under the federal question statute was the growing positivist assault in the first third of the twentieth century on the idea of general common law. The "transcendental"206 source of general law principles that previously fueled the creation of many federal question and diversity suits was a creature of neither state nor federal law. Once Erie compelled parties to conceive of the source of law that supplied the right to sue strictly in terms of state or federal law, constitutional damage actions became problematic. If state law were the source, then plaintiffs could incorporate the constitutional ingredient into their pleadings only when state law permitted.207 State tort law, however, did not always reach the constitutional harm and was not as malleable in the hands of the federal courts as the general common law it replaced. Federal courts, therefore, could only sustain damage actions against state officers for their unconstitutional acts if they recognized the source of the action as truly federal.

Consequently, around the time of Erie, when the Court began to abandon the general law as its base of operations, it began to fashion an explicitly federal cause of action for damages for constitutional deprivations. Simultaneously, it loosened its stranglehold on § 1983 in actions involving state of-

205. See McNeill v. Southern Ry., 202 U.S. 543, 546 (1906) (diversity action to permanently enjoin enforcement of commission rule, on ground that statute imposing damages for noncompliance with rule violated commerce clause); Smyth v. Ames, 169 U.S. 466, 517 (1898) (equity action by stockholders of railway corporation to enjoin enforcement of certain transportation rates, on ground that statute prescribing them was unconstitutional); cf. Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362, 397-99 (1894) (diversity challenge to constitutionality of federal income tax).

206. See Black & White Taxi Cab & Transfer Co. v. Brown & Yellow Taxi Cab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (arguing that there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute").

207. See Moore v. Chesapeake & O. Ry., 291 U.S. 205, 217 (1934) (no federal question jurisdiction when cause of action arises under state tort statute, even though state statute incorporated federal statutory safety standard to negate defense of contributory negligence or assumption of risk); cf. Hopkins v. Walker, 244 U.S. 486, 489-90 (1917) (in suit to remove cloud on title between competing federal title holders, court found federal question jurisdiction when plaintiff's complaint disclosed dispute respecting validity, construction and effect of federal mining laws on which defendant's claim relied). Even if state law incorporated a federal constitutional standard, the genuineness of federal law in such a suit would still be in question. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214-15 (1921) (Holmes, J., dissenting) (adoption by state law of federal law does not mean federal law operates of its own force).
ficers\textsuperscript{208} and started down the road that eventually led to federal officer liability in \textit{Bivens}.\textsuperscript{209} These shifts may well account for the disappearance of constitutional damage actions under the federal question statute early in this century and for the eventual reconceptualization and thorough federalization of constitutionally based damage actions against state and federal officers.

IV. RETHINKING THE SCOPE OF SECTION 1983

A. SECTION 1983 AND THE END OF THE LOCHNER ERA

\textit{Erie}'s revolution in locating the sources of law coincided with the Court's dismantling of economic due process. As it withdrew from its searching scrutiny of most social and economic legislation in the late 1930s, the Court started to infuse meaning into other substantive constitutional limits on state action—especially the Bill of Rights and the equal protection clause. As this trend developed, § 1983 easily came to fill the void that had been left by the waning tradition of federal question damage suits against state officers. In the process, though, the Court had to make some basic alterations in its approach to the statute.

1. Due Process

One major alteration occurred in Justice Stone's influential opinion in \textit{Hague v. CIO},\textsuperscript{210} which read the 1871 statute's jurisdictional provision to encompass "personal," but not "property," rights in the Constitution.\textsuperscript{211} Stone's justification was that because § 1983's jurisdictional provision could pick up constitutional cases without regard to the amount in controversy, limiting its reach to personal rights—rights on which placing a price tag was

\textsuperscript{208} See \textit{Hague v. CIO}, 307 U.S. 496, 530-32 (1939) (Stone, J., plurality opinion) (Bill of Rights guarantee of free speech enforceable under 1871 Act).

\textsuperscript{209} 403 U.S. at 397; \textit{see} \textit{Bell v. Hood}, 327 U.S. 678, 687 (1946) (federal court has jurisdiction to entertain suit against FBI agent for damages alleged to have been sustained as result of violations of plaintiff's rights under fourth and fifth amendments). Equity actions underwent a reformation in justification too, but more gradually, and in a way that did not seriously disrupt the continuity of that tradition. By the time of \textit{Erie}, the federal question damages action tradition had disappeared, whereas the tradition of equity actions had taken firm root. When equity actions had to be rejustified as an expression of genuine federal common law, their tradition, unlike the damage tradition, was well entrenched. \textit{Cf. Bivens}, 403 U.S. at 400 (Harlan, J., concurring in judgment) (it became clear "at least after \textit{Erie} . . . that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law") (citation omitted).

\textsuperscript{210} 307 U.S. 496 (1939) (Stone, J., plurality opinion).

\textsuperscript{211} \textit{id.} at 531-32. Justice Stone's view was shared by a plurality only. \textit{See id.} at 518 (Stone, J., joined by Reed, J., concurring in judgment); \textit{id.} at 532 (Hughes, C.J., concurring in judgment). Two other Justices concluded that the right of union members to assemble and discuss national issues was a right of national citizenship under the fourteenth amendment's privileges or immunities clause and hence was actionable under the 1871 Civil Rights Act under older precedents. \textit{See id.} at 500 (Roberts, J., joined by Black, J).
often harder—made sense.212 The federal question statute could reach cases litigating property rights, in which valuation would seldom present a problem. Because Bill of Rights guarantees such as freedom of speech (at issue in Hague) previously had been completely off limits to § 1983 litigants,213 Stone's distinction between personal rights and property rights actually broadened the scope of the statute. His distinction had the virtue of ensuring easy access to federal court when persons challenged state action as violating one of the first eight amendments, which the Court gradually was applying to the states by incorporating the amendments into the due process clause of the fourteenth amendment.214

Justice Stone's formula was in many ways faithful to earlier constructions of § 1983 itself. His distinction adhered to tradition in that it preserved separate spheres of competence for suits based on § 1983 (and its jurisdictional provision) and for constitutional actions brought directly under section 1331. The exclusion of property rights also was justifiable in terms of precedent because § 1983 had never encompassed the deprivation of such common law interests under the due process clause; they were not rights "secured" by the Constitution.215 In addition, the legal imagination had linked § 1983 with the fourteenth amendment's privileges or immunities clause. Thus, Stone's distinction was faithful to tradition in another way: the interests that the 1871 statute could protect were "personal" in the sense that they belonged to natural persons only,216 despite the obviously broader language of the statute itself.217 This was true even though Stone eschewed reliance on the fourteenth amendment's privileges or immunities clause, which refers only to "citizens," to protect freedom of speech, and squarely grounded his result in the due process clause, which refers to "persons."218 Stone's personal rights limitation therefore was at least vaguely reminiscent of the older limitation of § 1983 to "civil rights."219

Nevertheless, Justice Stone's opinion broke with tradition in other ways. The Court had never before used § 1983 to reach deprivations of personal liberty under the due process clause, even when the action implicated a Bill of Rights guarantee such as free speech. Before Hague, the Court had not
considered the Bill of Rights guarantees as "secured by" the Constitution within the meaning of the statute, even when the due process clause had incorporated them. But Stone changed that when he concluded that § 1983 covered rights that the Court previously would have viewed as merely "protected" rather than "secured" by the Constitution.

Justice Stone might have chosen the route taken in Hague by Justices Roberts and Black, who found room for some aspects of the Bill of Rights guarantees in the fourteenth amendment's privileges or immunities clause—rights of national citizenship that the Court had always regarded as "secured" within the meaning of § 1983. But opting to expand the privileges or immunities clause to include the Bill of Rights would eventually have run squarely up against Slaughter-House. Stone's preference for the more malleable due process clause thus required him to redefine the scope of § 1983. Of course, to the extent that the Court was beginning to view the Bill of Rights itself as a positive grant of fundamental rights against state action, Stone's approach was perhaps not too greatly at odds with the older notion that § 1983 protected only rights that took their origin in federal law. Nevertheless, the opinion marked a significant shift in the Court's approach to the 1871 Act.

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220. See supra text accompanying notes 59-60, 71-75 (rights protected by due process clause and Bill of Rights predated Constitution, hence not secured by it).

221. See Hague, 307 U.S. at 527. Stone discounted the strict distinction between rights secured by the Constitution and those merely protected by it, by a strained reading of Carter v. Greenhow, 114 U.S. 317 (1883). In Carter, the Court had concluded that the contracts clause did not "secure" any rights within the meaning of § 1983, and thus plaintiff's claim of a right to pay taxes in coupons and to be immune from further proceedings could not be brought under that statute. Id. at 322-23. In a companion case, White v. Greenhow, 114 U.S. 307 (1883), however, the Court made clear that a similar suit alleging an impairment of the obligation of contracts would be permitted directly under the federal question statute. Id. at 308; see supra text accompanying notes 135-44. Surprisingly, Stone concluded that the plaintiff in Carter had chosen not to resort to the contracts clause at all, but that if he had, the plaintiff would have been invoking a right secured by the Constitution. Hague, 307 U.S. at 527. Stone thus was able to use Carter for the dubious proposition that there never had been any meaningful distinction between rights "secured" and rights merely "protected" by the Constitution.

222. Id. at 511-14. Hague was decided during a short-lived revival of the fourteenth amendment's privileges or immunities clause. See Colgate v. Harvey, 296 U.S. 404, 433 (1935) (statute taxing income from out-of-state loans but not from in-state loans abridges privileges of citizen of United States to loan money and make contracts in any part of United States), overruled in Madden v. Kentucky, 309 U.S. 83, 90-93 (1939) (no privilege of national citizenship to carry business beyond state lines; state statute imposing higher ad valorem tax on deposits in banks outside state than inside state upheld). Justices Roberts and Black viewed the right of a labor union such as the Committee for Industrial Organization to speak out on issues of national concern as a right of national citizenship. See Hague, 307 U.S. at 511-14.

223. 83 U.S. (16 Wall.) 36 (1873); see supra text accompanying notes 71-74 (discussing exclusion of Bill of Rights from privileges or immunities clause as a result of Slaughter-House).
2. Equal Protection

The judicial treatment of equal protection underwent a similar evolution. Ever since the New Deal, the Court has applied a less exacting scrutiny under the equal protection clause to most so-called social or economic legislation than it has to legislation that discriminates against suspect classes or impinges upon the exercise of fundamental rights. This judicial role in constitutional litigation has numerous justifications, but Justice Stone usually is credited as the architect of this two-tiered perspective in his famous *Carolene Products* footnote.224 Interestingly, Stone's christening of § 1983's liberty-property distinction in *Hague* took place a scant nine months earlier. Both opinions reflect an effort to preserve scarce federal judicial capital for special cases at a time when judicial activism had acquired a bad name.

For a long time, litigants invoked the old equal protection clause, like the old due process clause, simply to protect property rights and other common law interests. Taxes, rate regulation, business entry, and licensing schemes were the standard targets.225 Not surprisingly, the Court usually held those equal protection claims to be outside the purview of § 1983, because state or local law, not the Constitution or federal law, secured the relevant underlying interests. However, in the slow assault on race discrimination during the 1930s and 1940s, a few equal protection cases made their debut under § 1983.226 The Court rarely articulated the reason that the civil rights statute worked in those contexts. Perhaps the most logical explanation was the historical link between the statute, race relations, and Reconstruction.227 In addition, however, the new equal protection plaintiffs alleged more than mere inequality regarding the exercise of an underlying common law right: they also alleged a particular impermissible basis for the legislative line drawing regarding the underlying right. The Court's focus thus gradually moved away from characterization of the underlying right protected by the equal protection clause toward application of a substantive, nondiscrimination principle secured by the fourteenth amendment.228 As a result of these parallel developments in the areas of due process and equal protection, § 1983 and

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224. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting narrower scope for operation of presumption of constitutionality when legislation, on its face, appears to be within specific prohibition of Constitution, such as Bill of Rights).

225. See A. Bickel & B. Schmidt, supra note 57, at 294-300, 640-43 (describing Supreme Court's equal protection docket from 1910 to 1921); Currie, supra note 103, at 382 n.343 (noting infrequent success of equal protection arguments, even in economic rights areas).

226. See Comment, supra note 12, at 371 & n.51 (discussing cases where "flagrant instances of outright discrimination" were redressed using § 1983).

227. See supra text accompanying notes 77-79 (discussing historical basis for race-centered view of § 1983).

228. Cf: A. Bickel & B. Schmidt, supra note 57, at 789-819 (finding equal protection overtones in Buchanan v. Warley, 245 U.S. 60, 82 (1917), in which Court found that racial restrictions in purchase of property were deprivation of property rights in violation of due process).
its jurisdictional statute became linked with the post-War constitutional and civil rights revolution surrounding fundamental liberty interests and suspect classifications.

B. SECTION 1983 AND THE MODERN ERA

Under the Warren Court, § 1983 made its greatest strides. In Monroe v. Pape,229 the Court rejected a narrow reading of “under color of” state law and held that misuse of power possessed by virtue of state law is action taken “under color of” state law.230 The Court proceeded to hold that a constitutional damage action would lie against individual officers even though they violated state law.231 A decade later, in Lynch v. Household Finance Corp.,232 the Court jettisoned Justice Stone’s distinction between personal rights and property rights in an effort to accommodate the 1871 Civil Rights Act to the procedural due process revolution.233 By thus expanding its jurisdictional provision—234—and with it, it appeared, the substantive scope of § 1983—Lynch permitted litigants to use the civil rights act to redress minor property losses that would not have been remediable in federal court under section 1331 because of its substantial amount-in-controversy requirement. The effect of Lynch is hard to overestimate: the decision essentially converted § 1983 into an all-purpose constitutional litigation statute—something that it had never been before.

The honeymoon between the Court and § 1983, however, did not last long. As the Court’s composition shifted in the 1970s, so did its attitude toward the statute and the individual rights it safeguarded. Doctrines of equitable restraint, abstention, preclusion, and personal and sovereign immunity all made resort to federal trial court more difficult in § 1983 actions.235 In addition, the Court showed its restlessness with Monroe’s state action holding that permitted litigants to attack exercises of power that state or local law had not affirmatively authorized.236

230. Id. at 184-85, 187.
231. Id.
233. Id. at 542.
234. 28 U.S.C. § 1343(3).
236. See Monell v. New York City Dep’t of Soc. Servs., 436 U.S. 658 (1978). First, the Court concluded that cities do not “cause” constitutional deprivations within the meaning of § 1983 unless their agents act pursuant to established custom or policy. Id. at 700. Although not couched as
At the same time the Court started to express doubts about § 1983 and the expansion of individual rights, however, it once again was reminding litigants that the Constitution had not wholly abandoned economic interests. Over the last ten years, for example, the Court has given added force to prohibitions on the states outside of the fourteenth amendment: it strengthened the contracts clause by raising the level of judicial scrutiny when states breach their own promises; it resuscitated article IV’s privileges and immunities clause by striking down barriers to out-of-state citizens’ rights to ply their trade; and it has vigorously enforced the dormant commerce clause against state regulations that interfere with interstate commerce. Moreover, the Court has strengthened economic rights under the fourteenth amendment by refurbishing the takings clause against state action, and by a state action holding, that decision is not much different from a conclusion that a locality does not always “act” (for purposes of § 1983) when its agents violate state or local law. Id. at 691. Second, the Court channeled some § 1983 claims attacking random and unauthorized deprivations of nonfundamental property and liberty interests to state court on the theory that no deprivation in violation of due process occurs until post-deprivation state court process has first been tried. See Daniels v. Williams, 474 U.S. 327, 335-36 (1986) (while there may be state law remedy in tort, no remedy under § 1983 for injury incurred when petitioner slipped on pillow prison official negligently left on stairs); Parratt v. Taylor, 451 U.S. 527, 543-44 (1981) (since state law remedies available that satisfy requirements of due process, no remedy under § 1983 for loss of property due to negligence of prison officials). That conclusion fits poorly with the notion that the state “acts” under the fourteenth amendment (and “under color of” state law) even when its officers contravene state law and would be subject to state tort remedies. See Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 COLUM. L. REV. 979, 996 (1986) (viewing Parratt and Daniels as grounded in theory of state action that is incompatible with Monroe and Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278 (1913)).

237. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978) (dictum) (“particular scrutiny” used in evaluating contract modification when state is party to contract); United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23, 32 (1977) (higher level of scrutiny when state impairs obligation of its own contract; New Jersey failed to show “reasonable conditions” and “public purpose” to justify repeal of covenant with New York).

238. See, e.g., Supreme Court of Virginia v. Friedman, 108 S. Ct. 2260, 2267 (1988) (striking state residency requirement for admission without examination to state bar as violation of privileges and immunities clause); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 288 (1985) (striking state statute that limited bar admission to state residents); United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 214-18 (1984) (city ordinance requiring 40% of workers on city construction contracts to be residents of city was subject to strictures of privileges and immunities clause); Hicklin v. Orbeck, 437 U.S. 518, 534 (1978) (striking Alaska statute that required all oil and gas agreements to contain preference for resident over nonresident workers).


240. See Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (Commission’s condition of
giving added bite to equal protection in the context of business regulation.\footnote{Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (Alabama statute imposing substantially lower tax rate on domestic insurance corporations than on foreign corporations violated equal protection clause).} A few scholars, cheering from the sidelines, are openly delighted at the prospect of a revival of the old economic liberties.\footnote{See, e.g., B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318 (1980) (recounting history of economic liberties and interpretations of due process); R. POSNER, supra note 5, at 209 n.25 (discussing revival among scholars of due process notions); Phillips, Another Look at Economic Substantive Due Process, 1987 Wis. L. Rev. 265, 266-67 & n.7 (describing movement for new “activist jurisprudence” in area of due process).}

In most of these so-called economic rights decisions, however, the Court has not clarified the underlying basis for suit—whether they were § 1983 actions or simply implied constitutional actions against state and local officers. The suggestion that § 1983 might not supply a remedy for such claims may seem startling at first. The breakdown of Stone’s liberty-property distinction in \textit{Lynch} and the Court’s current plain-meaning approach to § 1983 both suggest that the civil rights statute should reach all constitutional deprivations. The Court’s tendency to divorce § 1983 from its jurisdictional companion, section 1343(3), reinforces that argument.\footnote{See supra text at notes 327-32 (courts have greater flexibility in fashioning monetary remedies in implied actions because injunction may be sufficient or damages may be unnecessary).} But the question whether § 1983 can or should supply a remedy for violations of all constitutional limits on state action, particularly in light of the tradition of federal question suits against state officers, is, as discussed below, more difficult than it seems.

Moreover, the packaging of constitutional cases matters. If they cannot be maintained under § 1983 and are simply implied rights of action, the available remedies could be vastly different. First, damages for proven injury might be less certain in an implied action than in a § 1983 action.\footnote{See Maine v. Thiboutot, 448 U.S. 1, 8 n.6 (1980) (§ 1983 may be more broadly interpreted than § 1343(3)).} With the notable exception of takings cases, damages typically have not been at issue in modern economic rights actions. Although the discarded tradition of federal question damage suits might argue for damage awards in some types of direct action suits, the question today would be framed differently: should a \textit{Bivens}-style damages remedy be extended to these other constitutional guarantees?\footnote{See id. (noting that extension of \textit{Bivens}' rationale to nondiscrete, broad-scale economic or social regulation may be inappropriate).} Second, successful plaintiffs in § 1983 actions can obtain attorneys’ fees from the defendant.\footnote{See Civil Rights Attorneys’ Fees Awards Act of 1976, 90 Stat. 2641 (codified as amended at 42 U.S.C § 1988 (1982)) (“the court . . . may allow the prevailing party . . . a reasonable attorneys’}
substantial incentive to attack unconstitutional state action under § 1983 rather than only as a direct action under the federal question statute.\(^\text{247}\) The remainder of this Article explores the difficulties associated with the question whether § 1983 should be available for all constitutional violations, and offers some suggestions as to how the Court might handle those difficulties.

C. PLAIN MEANING, CONGRESSIONAL POWER, AND THE SCOPE OF SECTION 1983

1. Section 1983 as an Express Substitute for Actions Directly Under the Constitution

The current Court has never been totally at ease with implied rights of action in either the statutory or constitutional context, and it is usually alert to evidence of congressional displacement of such actions.\(^\text{248}\) At the outset, therefore, the question that arises is whether implied rights of action against state officers should exist at all in light of an expressly created federal remedy under § 1983. That question, however, seems misplaced in this context. If, for example, the issue were whether a party could avoid § 1983’s statutory restriction against imposing vicarious liability on cities for their agents’ constitutional torts by suing under the general federal question statute and the fourteenth amendment, the Court plausibly might view § 1983 as the exclusive enforcement mechanism and disallow the suit.\(^\text{249}\) In those circumstances, the express statutory remedy that provides limited municipal liability arguably has displaced any preexisting remedy involving suits directly under the Constitution.


\(^\text{248}\) See Bush v. Lucas, 462 U.S. 367, 388-90 (1983) (concluding in Bivens context that congressional statute could substitute for direct action under Constitution); Nichol, supra note 7, at 989 (noting difficulties with relying on implied rights of action to enforce constitutional limits on state and local governments).

\(^\text{249}\) See Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 924-25 (1976) (discussion of municipal liability in direct federal question actions under fourteenth amendment at time when cities were not "persons" subject to suit under § 1983).
But the issue here is whether § 1983 covers, or ought to cover, certain kinds of constitutional violations at all, and whether some violations should be actionable in federal court under the federal question statute only. Section 1983 can hardly be an express congressional substitute for implied actions to redress violations of constitutional provisions that it does not purport to reach. Moreover, since Congress passed § 1983 four years before the general federal question statute, it could scarcely have intended to displace any pre-existing federal remedy. The question therefore comes down to: What is the proper scope of § 1983, and what constitutional interests does it cover?

2. Cracks in the Plain Meaning

From a distance of more than a century, the language of the Civil Rights Act seems clear: an aggrieved party may sue for the "deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States]." Recently, in Maine v. Thiboutot,250 the Court addressed the scope of the "and laws" provision and read it literally. Whenever a person acting under color of state law violates a federal statute, whether or not the statute relates to civil rights or to equal rights, § 1983 may be triggered.251 The Court's current plain-meaning approach to § 1983's coverage of "all" federal laws suggests that the statute also should reach "all" constitutional violations.252 This reading reinforces Lynch's elimination of any useful distinction between liberty and property rights.

Nevertheless, the words chosen in the 1871 statute had a specialized meaning to which its earliest interpreters all seemed to have adhered: the rights "secured by" the Constitution did not refer to each and every limitation on state action spelled out in the Constitution.253 Whatever the original intent underlying the statutes, the historically limited coverage of § 1983 and its jurisdictional companion largely was due to the perceived need to reconcile their role in constitutional litigation with the role of the more broadly worded general federal question statute. There was and still is disagreement over what rights the Constitution meant directly to secure in the limited fashion suggested by § 1983 and its early interpreters. But until recently, no

250. 448 U.S. 1 (1980).
251. See id. at 7-8 (if Congress had intended to limit the language of § 1983 to equality of rights, it would have done so expressly in the statute); Nichol, supra note 7, at 988-89 (finding argument from plain meaning "insurmountable barrier" to any dramatic limit on § 1983).
252. Indeed, the Court once casually suggested as much. See Lynch v. Household Finance Corp., 405 U.S. 538, 549 n.16 (1972) (the phrase "rights, privileges, or immunities secured . . . by the Constitution or laws of the United States" embraces not just rights under fourteenth amendment, but "all of the Constitution and laws of the United States" (quoting United States v. Price, 383 U.S. 787, 797 (1966)) (dictum) (emphasis in original)).
253. See supra notes 59-75 (distinguishing rights created by Constitution from rights preexisting it).
one has questioned the basic idea that § 1983 covered only some, rather than all, constitutional limitations on the states. The modern Court should at least pause before it gives a current common-sense reading to a hundred-year-old statute, particularly when no one until recently seems to have shared that common-sense understanding.254

In addition, numerous other arguments raise questions regarding the 1871 Act's applicability to all unconstitutional state action, despite its seemingly all-inclusive wording. Militating against § 1983's coverage of all constitutional limits on the states are considerations of: (1) congressional power and legislative intent surrounding § 1983; (2) long judicial practice and legislative intent surrounding the federal question statute as a mechanism to combat unconstitutional state action; and (3) diminished need on the part of many litigants who claim injury from economic and regulatory legislation for the incentives provided by § 1983's remedial scheme. These three considerations are considered in turn.

D. COUNTERWEIGHTS TO A "PLAIN MEANING" APPROACH TO SECTION 1983

1. Congressional Power, Legislative Intent, and Limits on the States in the Original Body of the Constitution

In Thiboutot, the Court not only took a plain-meaning approach to § 1983, but it also seemed to conclude that Congress had acted pursuant to powers other than the Civil War amendments when it passed the 1871 statute. Despite an ambiguous historical record, the Court held that the jurisdictional limitation of section 1343(3) to violations of federal statutes relating to "equal rights" was not a qualification on the reach of § 1983, which contained no such explicit limitation.255 As a consequence, a state's violation of federal (but non-equal rights related) social security statutes was actionable under § 1983. Because the social security statutes had been passed pursuant

254. If anything, the so-called plain meaning of "rights, privileges, or immunities" in the statute would seem to be more directly tied to the similarly phrased but long-neglected privileges or immunities clause of the fourteenth amendment, as it nearly always was before Monroe v. Pape, 365 U.S. 167, 180 (1961) (legislative purpose of § 1979 (precursor to § 1983) was to prevent denial of all rights, privileges, or immunities guaranteed by fourteenth amendment). See Eisenberg, supra note 25, at 506 (no explanation given by Monroe Court for rejecting restrictive § 1983 precedents). Of course, inclusion of the word "rights" (in addition to "privileges or immunities") arguably makes § 1983 broader than that particular constitutional provision. See id. It is interesting to note that Congress used a similar phrase: "[w]henever is claimed] any title, right, privilege or immunity . . . under the Constitution" when, in 1867, it redefined Supreme Court review of state court judgments. See Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-87 (amending § 25 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85-86 ("[w]here is drawn in question] the construction of any clause of the constitution").

255. Thiboutot, 448 U.S. at 6-7; see Sunstein, supra note 30, at 396-411 (discussing historical record, but approving Thiboutot's reading of it).
to Congress's spending powers, the *Thiboutot* Court implicitly suggested that § 1983 could be used to enforce constitutional provisions unrelated to the Civil War amendments.256 Also, because federal court jurisdiction under section 1343(3) would not have been available in *Thiboutot* itself,257 the Court had, for the first time, consciously severed § 1983 from its jurisdictional statute.

Despite the decision in *Thiboutot*, the question whether Congress has the power to enact remedial legislation to enforce every constitutional limit on the states is not as easy as it might appear. For example, nowhere does the Constitution give Congress the power to enforce the prohibition on state impairments of the obligation of contracts.258 That clause, like the ex post facto and bill of attainder provisions, is simply a limit on what the states can do.259 The limits on state action in the Civil War amendments, on the other hand, all provide a specific grant of power to Congress to enforce them by appropriate legislation.260 The necessary and proper clause261 supplies an additional and potentially dramatic source of power to Congress, and, at first blush, looks like a good way for Congress to enforce any other constitutional limit on the states. The necessary and proper clause, however, only gives Congress the ability to pass laws appropriate for the enforcement of "foregoing" and other "Powers"—powers elsewhere granted in the Constitution to the federal government.262 Neither the contracts clause nor the other limits on state action in article I, section 10, contain such a grant of power, as distinguished from a limitation.263 Arguably, therefore, Congress could not

256. The only other possibility is that the Court was interpreting the privileges or immunities clause of the fourteenth amendment (which § 1983 clearly could enforce) to include rights granted under any federal statute. Although such a reading of *Thiboutot* might be a sensible way to conclude that § 1983 is limited to the enforcement of the fourteenth amendment, nothing in the opinion suggests that that is what the Court thought it was doing. See *Thiboutot*, 448 U.S. at 4-8 (holding that Court precedent "explicitly or implicitly" suggests that § 1983 remedy encompasses violations of federal statutory, as well as constitutional, law).

257. In addition, jurisdiction could not then be founded under the general federal question statute because the plaintiff's claim was for a small amount of money. See supra note 31 (more-than-$10,000 requirement before 1980). Thus, the Court had questionably created a species of § 1983 claims enforceable only in state court.

258. See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts").

259. See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law"); id. ("No State shall . . . pass any Bill of Attainder").

260. See U.S. CONST. amend. XIII, § 2 ("Congress shall have the power to enforce this article by appropriate legislation."); id. amend. XIV, § 5 (same); id. amend. XV, § 2 (same).

261. U.S. CONST. art. I, § 8, cl. 18. The clause provides: "[Congress shall have the Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

262. Id.

263. Congress' inability to enforce such guarantees by remedial legislation, other than by the indirect method of providing a purely jurisdictional statute, may have prompted the Court to ex-
have enacted § 1983 to enforce such naked constitutional prohibitions on the states because it lacked the power to do so.\textsuperscript{264}

The Court, however, has gotten around similar problems in the past. Before the Civil War, the Court concluded in \textit{Prigg v. Pennsylvania}\textsuperscript{265} that Congress had the power to enforce article IV’s fugitive slave clause\textsuperscript{266} by remedial legislation, despite the absence of any express grant of power in that clause.\textsuperscript{267} In contrast to the contracts clause, which contained a simple prohibition on state action, the fugitive slave provision gave an affirmatively worded right, expressly requiring that the fugitive slave be “delivered up”\textsuperscript{268} on demand, notwithstanding any state law to the contrary. The \textit{Prigg} Court thought this positive grant justified Congress’ power to create a judicial remedy to enforce the right.\textsuperscript{269} Thus, although the \textit{Prigg} Court found an en-

\begin{itemize}
  \item \textsuperscript{264} See \textit{Employees v. Missouri Dep’t of Public Welfare}, 411 U.S. 279, 320 n.7 (1973) (Brennan, J., dissenting) (“The Contract Clause . . . is not an enumerated power. . . . It is simply a prohibition self-imposed by the States upon themselves and it granted Congress no powers of enforcement.”); see also \textit{The Civil Rights Cases}, 109 U.S. 3, 12 (1883) (contracts clause gives Congress no legislative enforcement power); \textit{Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction}, 65 B.U.L. REV. 205, 223 n.68 (1985) (drawing similar conclusion with respect to pre-fourteenth amendment Constitution). In the context of a discussion of state sovereign immunity from suit in federal court, Martha Field has suggested that the contracts clause may not even create an implied cause of action. \textit{See Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines, Congressional Imposition of Suit Upon the States}, 126 U. PA. L. REV. 1203, 1265-68 (1978) (history and legislative intent both support theory that contracts clause claims may only be raised defensively and thus no private right of action exists). To be sure, the early contracts clause cases such as \textit{Hans v. Louisiana}, 134 U.S. 1 (1890), and \textit{White v. Greenhow}, 114 U.S. 307 (1885) (discussed above at notes 143-45), are more properly viewed as common law causes of action that nevertheless arose under federal law; the modern idea of a truly federal implied constitutional action had yet to materialize. But to suggest that the contracts clause cannot now be enforced by an implied right of action would deny its enforcement in a coercive action against cities and counties and would suggest that cases such as \textit{Hans} and \textit{White} could not arise under federal law. \textit{See Hart \& Wechsler, supra} note 5, at 1181 n.6 (questioning whether cases previously brought as common law actions could be filed in federal court today).
  \item \textsuperscript{265} 41 U.S. (16 Pet.) 539 (1842).
  \item \textsuperscript{266} U.S. CONST. art. IV, § 2, cl. 3. The clause provides: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”
  \item \textsuperscript{267} \textit{Prigg}, 41 U.S. (16 Pet.) at 616.
  \item \textsuperscript{268} U.S. CONST. art. IV, § 2, cl. 3. Only recently, the Court appeared to assume that Congress could enforce the extradition clause, U.S. CONST. art. IV, § 2, cl. 2, a companion of the fugitive slave clause, with a similar “deliver up” command. \textit{See Puerto Rico v. Branstad}, 483 U.S. 219 (1987) (no justification for distinguishing duty to deliver fugitives from any other species of constitutional duty enforceable in federal courts).
  \item \textsuperscript{269} \textit{Prigg}, 41 U.S. (16 Pet.) at 612-16. In what was perhaps not its finest hour, the Court reasoned that the positively worded constitutional right to the return of a fugitive slave implied a
\end{itemize}
forcement power in a constitutional provision that lacked an affirmative
grant to Congress, inferring a grant from the positively phrased, rights-crea-
ting language of the fugitive slave clause was easier.

In an analogous and even more remarkable fashion, the Court once suc-
cceeded in fashioning congressional power in the area of admiralty and mar-
time law purely out of article III’s jurisdictional grant. Congress could
conceivably claim a similar substantive legislative power to enforce the con-
tracts clause (or any other limit on the states) under its necessary and proper
power to effectuate the federal judiciary’s power to hear cases arising under
the Constitution, at least when Congress has exercised its article III power to
let the lower federal courts hear such cases.

The argument, however, is something of a bootstrap, just as it was in the
admiralty context. It suggests that Congress obtains legislative power to en-
act substantive rules of decision in cases simply because it has the power to
provide jurisdiction over them. In admiralty, moreover, this result was ac-
complished when the Court’s restrictive interpretation of the commerce
clause would have prevented Congress from legislating in broad areas where
the Court had assumed congressional power to formulate rules of decision.
Thus, neither the fugitive slave nor the admiralty cases serve as a convincing
precedent that Congress has the power to enforce the naked limitations on
government found in the original body of the Constitution by remedial legis-
lation such as § 1983. At best, the proposition is problematic.

remedy; that Congress had the constitutional power under article III to confer federal court jurisdic-
tion over suits involving constitutional questions; and that the necessary and proper clause gave
Congress the power to enforce that article III power by creating a remedial enforcement scheme.
Id. at 615-19. The Court’s analysis on this point has been roundly criticized. See D. Currie, supra
note 39, at 243-45 (asserting that none of these arguments will bear close scrutiny because Court’s
presumption that Congress has power to regulate with respect to fugitive slaves is not at all clear).
But cf. Strauder v. West Virginia, 100 U.S. 303, 310-11 (1879) (noting that right or immunity,
whether created or guaranteed by Constitution, may be protected by Congress “even without ex-
press delegation of power”); Kaczorowski, supra note 52, at 913 (noting that many Reconstruction
Congressmen believed that Prigg meant Congress had power to enforce rights recognized by Consti-
tution against states even without express grant of power).

270. See Ex Parte Garnett, 141 U.S. 1, 4 (1891) (since Constitution grants federal judiciary ex-
clusive jurisdiction over all admiralty and maritime cases, legislative power of same subject neces-
sarily must be in national legislature); see generally D. Robertson, Admiralty and Federalism 142-45 (1970) (describing interrelationship between commerce power and admiralty);
Note, From Judicial Grant to Legislative Power, 67 Harv. L. Rev. 1214 (1954) (discussing develop-
ment of legislative power from jurisdictional grant).

271. But cf. Dellinger, supra note 94, at 1546-47 (concluding that Congress would have power to
enforce Bill of Rights against federal officers under similar argument, even apart from Congress’
powers to legislate respecting its employees).

272. See Employees v. Missouri Dep’t of Public Health & Welfare, 411 U.S. 279, 320-21 n.7
(1973) (Brennan, J., dissenting) (arguing that Constitution grants Congress powers of enforcement
against states only regarding enumerated powers); see also supra note 261 (necessary and proper
clause permits Congress to legislate to enforce powers listed in Constitution). At the time of the
framing of the fourteenth amendment, which was couched in negative terms, there was disagree-
Possible Responses to the Problem of Lack of Congressional Power.

Maybe the simplest response to the lack-of-congressional-power argument would be to convert claims to enforce prohibitions on state action into fourteenth amendment claims, making them easily actionable under § 1983. For example, interstate discrimination claims under article IV (which, like the fugitive slave clause of that same article, arguably is not a “mere prohibition” at all) might be recast in equal protection terms; contracts clause claims could be recast in due process terms. But the somewhat heightened standards of scrutiny that now attend article IV and contracts clause claims, particularly against a state’s impairment of its own contracts, might not survive the repackaging process.

Alternatively, some or all of these original limits on the states arguably are themselves substantive components of due process that can be incorporated directly through that clause. This argument seems particularly applicable to criminal procedure limits such as the ex post facto clause. Nonetheless, trying to incorporate—as a prohibition against state action under the fourteenth amendment—a limitation that the Constitution already imposes on the states elsewhere is somewhat peculiar. In the past, incorporation usually has involved applying constitutional limits on federal power to the states. The only purpose of incorporating preexisting state constitutional limits into the fourteenth amendment and applying them against the states a second time would be to give Congress an enforcement power (under section 5 of the fourteenth amendment) that it otherwise might lack.

273. Neither a fundamental right nor a suspect class would be involved in the typical article IV case so as to trigger more than minimal equal protection scrutiny. Although the right to ply one’s trade is fundamental for article IV purposes, it is not for the purposes of equal protection. See United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 219 (1984) (no fundamental right to government employment under equal protection clause). Nor are noncitizen visitors (as opposed to new residents) in a state a suspect class for equal protection purposes. See McCarthy v. Philadelphia Civil Serv. Comm’n, 424 U.S. 645, 647 (1976) (per curiam) (residence requirement for public employee not violative of equal protection clause). Article IV, however, seems to call for a somewhat higher standard of scrutiny for discrimination against out-of-staters than would the equal protection clause. See Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985) (fashioning intermediate scrutiny test).


275. See U.S. CONST. amend. XIV, § 5 (granting Congress “power to enforce, by appropriate
As odd as that sounds, such reincorporation may have been one of the very purposes of the derelict privileges or immunities clause of the fourteenth amendment. As noted above, legal historians forcefully argue that this clause was really the fourteenth amendment’s most powerful provision, and the most common criticism of Slaughter-House is that it rendered the privileges or immunities clause superfluous. But incorporating preexisting limits on state action in the original body of the Constitution into the clause as incidents of national citizenship would counter that very criticism. By reiterating these limits, the framers and ratifiers of the fourteenth amendment would have added to the pre-Civil War Constitution a means to enforce those state limits through appropriate congressional legislation. Thus, even assuming that the privileges or immunities clause had a limited scope—as Slaughter-House concluded—some of the older express limits on state action in the original body of the Constitution might be included among the rights of national or federal citizenship. Consequently, litigants conceivably could use § 1983 to enforce those older limits.

The powerful and practical argument against this suggestion is that the fourteenth amendment’s privileges or immunities clause has lain dormant since Slaughter-House. Whether the Court would turn to it now, even if an original intent argument might once have pointed in the other direction, is questionable. In any event, incorporation would not help corporate plaintiffs, since (in contrast to the equal protection and due process clauses), the privileges or immunities clause is limited to “citizens,” i.e., natural persons. In addition, even if the Court were to conclude that some or all of the original prohibitions on state action are among the incidents of national citizenship, whether Congress meant to enforce these limits when it passed legislation, the provisions of this article“); cf. Maltz, supra note 272, at 239, 252-55, 269 (noting widespread belief that lack of enforcement provision in article IV’s privileges and immunities clause prevented Congress from enforcing rights that the clause guaranteed against state encroachment).

276. They differ, however, over the scope of the privileges or immunities clause itself. See supra note 52.

277. See L. Tribe, supra-note 8, at 556 (principle of federal supremacy already shields preexisting federal rights from state infringement).

278. There is even some nineteenth-century support for the idea. See Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 651-52 (C.C.D. La. 1870) (No. 8,408) (Bradley, J.) (asserting that privileges or immunities clause of fourteenth amendment embraces more than privileges and immunities guaranteed in original Constitution and demands that these privileges as to all citizens be absolutely unabridged); see also Palmer, supra note 35, at 744-45 (arguing that even Miller’s opinion in Slaughter-House can be read as admitting of such an interpretation); Maltz, supra note 272, at 269-70 (framers of fourteenth amendment may have desired to make article IV’s comity clause congressionally enforceable).

279. But see generally M. Curtis, supra note 72 (arguing for broad construction of privileges or immunities clause); Kurland, The Privileges or Immunities Clause: “Its Hour Come Around at Last?”, 1972 Wash. U.L.Q. 405 (1973) (predicting its possible renaissance).

280. U.S. Const. amend. XIV, § 1. The clause provides: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Id.
§ 1983 would still be unclear. Nineteenth century courts seem to have rejected that assumption, and the Supreme Court once expressly held that contract clause claims were excluded from § 1983. Moreover, litigants traditionally have brought suits enforcing those older constitutional limits on the states as direct actions under section 1331. If the Court wanted to make these limitations on the states enforceable under § 1983, it would have to reverse course explicitly or somehow incorporate those older limits into the fourteenth amendment.

b. Private Enforcement of Federalism Limitations—Claims Under the Supremacy and “Dormant” Commerce Clauses. Despite the Court’s current plain-meaning approach to § 1983, at least one category of claims, those alleging constitutional preemption based on the supremacy clause, seems to have been carved out from the statute’s scope. In Chapman v. Houston Welfare Rights Organization, the Court concluded that “an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim ‘secured by the Constitution’ within the meaning of § 1343(3).”

This interpretation of the rights “secured by the Constitution” in section 1343(3) is important in interpreting parallel language in § 1983. Admittedly, Thiboutot concluded only a year after Chapman that § 1983’s scope was not coextensive with its jurisdictional provision, section 1343(3). That curious result was possible only because the § 1983 reference to violations of federal “laws” was not qualified by the equal-rights-only language of section 1343(3). On the other hand, the constitutional language of section

281. See supra text accompanying notes 137-42 (discussing Carter v. Greenhow, 114 U.S. 317 (1885)).
282. Id. Some modern federal courts, however, have entertained contract clause claims under § 1983, without much discussion of the question. See McGuire v. Sadler, 337 F.2d 902, 905 (5th Cir. 1964) (affirming district court jurisdiction over contract claims under § 1331 and § 1983); cf. Pirolo v. City of Clearwater, 711 F.2d 1006, 1014 (11th Cir. 1983) (suggesting that contract clause claim would be viable under § 1983). But see Poirier v. Hodges, 445 F. Supp. 838, 842 (M.D. Fla. 1978) (concluding bar against states enacting laws that impair contractual obligations never incorporated into fourteenth amendment, thus not actionable under § 1983).
283. The article IV interstate privileges and immunities clause would be a likely candidate for incorporation, because of its Prigg-like affirmative language, and because its interstate antidiscrimination principle can easily be viewed as an incident of national citizenship under the fourteenth amendment’s privileges or immunities clause. See Friedman v. Supreme Court of Virginia, 822 F.2d 423, 424 (4th Cir.) (article IV claim brought under § 1983), aff’d, 108 S. Ct. 2260 (1988) (no mention of basis of suit); W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 490 (7th Cir. 1984) (Posner, J.) (article IV claim brought under § 1983); cf. Anglo-American Provision Co. v. Davis Provision Co., 105 F. 536 (C.C.S.D.N.Y. 1900) (state court denial of full faith and credit could be raised in action under 1871 Act).
285. Id. at 615.
286. In addition, post-Thiboutot cases have substantially blunted its force. See Pennhurst State
1343(3)—"any right, privilege or immunity secured by the Constitution"—which the Chapman Court interpreted as excluding supremacy clause claims, is identical to the language of § 1983.287 Thus, even though sections 1983 and 1343(3) are not coextensive, they may very well be coextensive in their coverage of constitutional, as opposed to statutory, violations.

In any event, there is a good argument for excluding supremacy clause claims from § 1983’s constitutional coverage. As the Chapman Court reasoned about the jurisdictional statute, a supremacy clause claim lurks behind every violation of a federal law by a state actor. If federal statutory violations were actionable under § 1983 as a “right secured by the Constitution,” the “and laws” language that Congress added in 1874 would in many cases be superfluous. And, although Thiboutot demonstrates that litigants can reconstitute some supremacy clause claims as state officer violations of federal statutes—claims within the reach of § 1983—that approach is not possible for all supremacy clause claims.288 In fact, the Court recently has stated that supremacy clause challenges to state action should be brought directly under the general federal question statute.289 If nothing else, Chapman shows that the Court is interpreting the “secured by” language in the civil rights statutes as less than all-inclusive, despite its plain-meaning rhetoric in Thiboutot and elsewhere.

For similar reasons, although the question is not free from difficulty, claims under the “dormant” or “negative” commerce clause arguably are not

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287. See Gould, Inc. v. Wisconsin Dep’t of Indus. & Human Relations, 750 F.2d 608, 616 & n.16 (7th Cir. 1984) (noting identity of language and concluding that § 1983 does not cover supremacy clause claims), aff’d on other grounds, 474 U.S. 434 (1986); Pirolo v. City of Clearwater, 711 F.2d 1006, 1010, 1014 (11th Cir. 1983) (holding § 1983 does not cover supremacy clause claims).


289. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987) (claims of preemption should be regarded as arising under laws of United States and will be treated as federal questions for purpose of federal court jurisdiction); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983) (claims that state regulation is preempted by federal statute present federal question over which federal courts have jurisdiction under § 1331).
actionable under § 1983.\textsuperscript{290} The commerce clause not only gives Congress the power to regulate interstate commerce, but imposes, by negative implication, constitutional limits on state action even when Congress has not exercised that power. By permitting litigants in the face of congressional silence to challenge state regulations that impede or discriminate against interstate commerce, the Court can enforce federalism concerns and the supremacy clause. Although states may regulate commerce, they may not step into an area in which regulation, if any, must come from Congress.\textsuperscript{291}

Nonetheless, the Court sometimes has referred to a "right" to engage in interstate commerce free of state impediments.\textsuperscript{292} In addition, modern dormant commerce clause analysis focuses primarily on the antiprotectionist and nondiscrimination principles that the clause embraces.\textsuperscript{293} But judicial enforcement of such constitutional limits on state government at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause,\textsuperscript{294} or other provisions that allocate power between the states and federal government.\textsuperscript{295} And although it is true that federalism limitations protect individual freedoms, the right here is not one to be free of discriminatory legislation, but to be free of it in the absence of a congressional mandate.\textsuperscript{296} Consequently, even

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\textsuperscript{291} See L. Tribe, supra note 8, at 403-04 (noting that controversy turns on whether, as general rule or in specific instance, nature of power vested in Congress requires exclusive exercise by that body).

\textsuperscript{292} See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) (state cannot regulate or restrain right to engage in interstate commerce); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) (Kentucky statute restricting interstate commerce held unconstitutional because participation in interstate commerce not privilege granted by state, but rather right which every citizen entitled to exercise).


\textsuperscript{294} See Chapman, 441 U.S. at 613 (although concluding supremacy clause does not secure rights within meaning of § 1343(3), Court observed that "even though that [c]lause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law").


\textsuperscript{296} But compare Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985) (equal protection
though Congress clearly would have the ability under the necessary and proper clause to pass remedial legislation to enforce its commerce powers with a statute such as § 1983, these variants of constitutionally based supremacy clause claims may, after Chapman, very well fall outside § 1983's reach. Moreover, until recently, federal courts, including, on one occasion, the Supreme Court, historically have treated dormant commerce clause claims as suits that arise under federal law, but not as involving rights secured by the Constitution.297

2. Congressional Intent and Court Practice

a. The Civil War Amendments as a Limiting Principle. Section 1983 might not extend to all limitations on the states in the original body of the Constitution for still other reasons. As a historical matter, the statute's connection with Reconstruction is hard to escape. To begin with, when Congress enacted § 1983, it expressly acted pursuant to its power to enforce the newly enacted fourteenth amendment. The title of the Act says as much.298

challenge to protectionist legislation favoring domestic insurance companies in Alabama successful despite fact that Congress had authorized discrimination in insurance industry pursuant to its power to regulate commerce) with Cohen, Federalism in Equality Clothing: A Comment on Metropolitan Life Ins. Co. v. Ward, 38 STAN. L. REV. 1, 10 (1985) (criticizing Ward for invalidating discriminatory tax on equal protection grounds).

297. See Scott v. Donald, 165 U.S. 58, 72-73, 101 (1897) (plaintiff's claim that liquor imported into state was seized pursuant to statute that violated dormant commerce clause upheld under federal question statute); Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139, 1143, 1146-47 (8th Cir.) (plaintiff who prevailed on dormant commerce clause claim not entitled to attorneys' fees because § 1983 does not provide remedy for such claim), cert. denied, 469 U.S. 834 (1984); cf. Bowman v. Chicago & Northwestern Ry., 115 U.S. 611, 615-16 (1885) (dormant commerce clause claim arose under Constitution for purposes of appeals statute, but did not involve right secured by Constitution). For additional discussion of Bowman, see supra text accompanying notes 148-49. But see M. Schandler Bottling Co. v. Welch, 42 F. 561, 566 (C.C.D. Kan. 1890) (dormant commerce clause claim upheld and preliminary injunction granted allowing sale by nonresident importer of intoxicating liquor under predecessor of § 1983); Tuchman v. Welch, 42 F. 548, 558 (C.C.D. Kan. 1890) (same). Both Schandler Bottling and Tuchman were reversed on other grounds in Helmsley v. Myers, 45 F. 283 (C.C.D. Kan. 1891) (adequate remedy at law). Some have urged abandonment of the dormant commerce clause analysis. See generally Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425 (1982) (calling for radically diminished role for dormant commerce clause and arguing that national commercial interests would be better served by preserving democratic processes embedded in privileges and immunities clause). Even if the dormant commerce clause is abandoned, the reincarnation of such claims as article IV actions will not guarantee § 1983 treatment. See supra text accompanying notes 275-83 (discussing problems of incorporating older limits on state action in original body of Constitution into fourteenth amendment); see also Redish & Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 605-12 (arguing that article IV, not commerce clause, should be source of constitutional antidiscrimination principle and urging its application to corporations).

298. The statute was entitled: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13. The remainder of the 1871 Act was also directed at violations of the fourteenth amendment. Id. at §§ 2-7.
The historical connection between § 1983 and the 1866 Civil Rights Act that the fourteenth amendment constitutionalized, together with the parallel "rights, privileges, or immunities" language of the 1871 Act, strongly tie § 1983 to section one of the fourteenth amendment. Congress, of course, did not explicitly limit the statute to any particular constitutional provision. But this open-endedness simply may have been in recognition that the privileges or immunities clause of the fourteenth amendment itself might incorporate one or more of the limitations on government mentioned elsewhere in the Constitution.

In addition, the Court has long since concluded that § 1983 is the appropriate vehicle to remedy deprivations under the fifteenth amendment. That the Court should associate § 1983 with the trio of Civil War amendments immediately preceding it is not startling, especially since each of those amendments gave Congress the express right to enforce them by appropriate legislation. Finally, almost none of the parties invoking § 1983 during its first fifty years ever strayed beyond the confines of the Civil War amendments in framing their claims. That, too, is hardly surprising given that the statute's legislative history bears few indications of applying to constitutional rights apart from those amendments.

Adherence to an historical or originalist approach limiting § 1983 to the enforcement of the Civil War amendments would not necessarily mean that the statute would remain keyed to the particular rights that its drafters or the Court happened to think that the Civil War amendments secured back in 1871. The statute's language is broad enough to tie it definitionally to other constitutional variables, including the development under the Civil War amendments of rights that the Court might one day conclude are secured by the Constitution or federal laws. That the statute would keep pace in this century, as the Court has defined the fundamental rights that the Civil War amendments safeguard, therefore makes sense. The dynamic conformity that Congress built into the statute gives it an ability to expand or contract with subsequent constitutional developments.


300. Even in Slaughter-House the Court considered the rights secured by the thirteenth and fifteenth amendments among the few privileges and immunities of national citizenship that the fourteenth amendment embraced. Slaughter-House, 83 U.S. (16 Wall.) at 80.

301. But see supra note 297 (discussing two commerce clause cases brought under § 1983's ancestor).

302. Of course, to the extent that a provision such as the privileges or immunities clause of the fourteenth amendment might have incorporated other constitutional limitations, § 1983 might have enforced additional, non-Civil War amendment, constitutional rights.
At the same time, however, that flexibility need not mean that if Congress never intended, and the courts never perceived, the statute to reach certain general categories of constitutional injuries—even under the Civil War amendments—such additional statutory limitations should be ignored. The old Court, like most litigants, did not view § 1983 as covering all actionable constitutionally based injuries even under these amendments. Thus, as a matter of history, long-standing practice, and probable legislative intent, a violation of a Civil War amendment seems to have been a necessary but not sufficient condition to bringing a constitutional claim under § 1983.

b. The Limiting Force of the Federal Question Statute. Congress' intent and Court practice respecting the general federal question grant may shed light on the proper scope of § 1983. The 1875 statute ensured a federal trial forum for enforcing most constitutional protections against invasions of common law liberty and property rights. These rights eventually were covered by the due process and equal protection clauses, the two clauses in section one of the fourteenth amendment that Slaughter-House left standing. This is not to say that the subsequently passed jurisdictional statute somehow limited or impliedly repealed the original scope of § 1983, or that subsequent legislative history can control the meaning of earlier statutes, but only to suggest that the two rounds of related Reconstruction legislation should be construed in light of each other.

Moreover, in the absence of some kind of limit on the scope of the constitutional guarantees actionable under § 1983, the 1871 and 1875 statutes necessarily would give rise to either of two unlikely assumptions. On the one hand, if § 1983 and its jurisdictional provision already covered all constitutional deprivations, Congress must have intended the 1875 general federal question statute to have no role in enforcing constitutional limits on state action; section 1331 would have been unnecessary for that purpose. However, not a shred of evidence supports this conclusion about the federal question statute; courts, litigants, and commentators alike understandably have assumed the contrary. On the other hand, if the federal question statute did cover original constitutional actions involving state and local officials, then, as the Court itself once ominously hinted, all claims against unconstitutional state action arguably should have had to satisfy the 1875 Act's jurisdictional amount requirement. That too seems unlikely. Congress clearly

303. See supra text accompanying notes 43-70 (discussing Court's narrow reading of "under color of," "rights," and "secured by" language of § 1983).

304. See supra text accompanying notes 63-75 (discussing exclusion of common law rights from § 1983 protection and general incorporation of such fundamental rights through due process clause).

did not mean to stymie civil rights jurisdiction by placing a new minimum amount requirement on all § 1983 cases.\textsuperscript{306} Unless, therefore, § 1983 suits represented a special subset of claims against state action arising under the Constitution that could come into federal court "for free" under section 1343(3), constitutional claims would have been actionable only under section 1331. The existence of the federal question statute, therefore, suggests that § 1983 should not be seen as good for all constitutional deprivations.

In \textit{Lynch}, the Court indicated that reading section 1343(3) (and by implication, § 1983) as all-inclusive would not render section 1331 superfluous, because the federal question statute still could reach cases that did not allege action under color of state law.\textsuperscript{307} That, of course, is true. But, if § 1983 and its jurisdictional statute acquired a monopoly on cases that arose under color of state law, section 1331 would be rendered superfluous for purposes of challenging the constitutionality of state and local officials' acts, because of the state action limitation of the fourteenth amendment. Moreover, the recent deletion of the jurisdictional amount requirement for federal question suits does not obviate the question of what limits might be placed on § 1983's constitutional coverage. By dropping that requirement and expanding section 1331, Congress certainly was not extending the scope of § 1983. In fact, Congress seems to have eliminated the jurisdictional amount requirement for federal question cases in part precisely because of doubts concerning whether section 1343(3) (whose language is identical with § 1983's in this regard) would reach nonfourteenth amendment claims, such as dormant commerce clause actions.\textsuperscript{308}

Limiting § 1983 to violations of the Civil War amendments would provide respective areas of competence for the two rounds of legislation—the 1871 and 1875 Acts—in the context of constitutional litigation. Prior to \textit{Lynch}, lower courts once considered such a limit,\textsuperscript{309} and it holds some intuitive appeal. The main drawback of having no further limit, however, is that § 1983 still would encompass some nominal economic concerns such as equal protection and due process attacks on state regulatory legislation—fourteenth amendment claims that, under an earlier regime, traditionally found their

\textsuperscript{306.} Cf. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, \textit{amended by} Act of Aug. 13, 1888, ch. 866, § 5, 25 Stat. 433, 436 (revision of federal question statute noting that "nothing in this act shall be held . . . to repeal or affect any jurisdiction or right mentioned either in [the civil rights jurisdictional provisions] or in title twenty four ['Civil Rights'] of the Revised Statutes")

\textsuperscript{307.} \textit{Lynch}, 405 U.S. at 546-47 & n.13.

\textsuperscript{308.} See S. Rep. No. 827, 96th Cong., 2d Sess. 14 (Exhibit A, Letter from Charles Alan Wright to Rep. Kastenmeier) (unclear whether challenge to state action based on commerce clause or some other constitutional provision than the fourteenth amendment can be brought under 1343(3)).

\textsuperscript{309.} See \textit{Eisen} v. \textit{Eastman}, 421 F.2d 560, 566 & n.9 (2d Cir. 1969) (in denying jurisdiction under § 1983 to landlord challenging constitutionality of city rent control law, Second Circuit noted that jurisdiction could be limited to rights secured by post-Civil War amendments).
home as direct federal question actions under the Constitution.\textsuperscript{310} For any number of reasons, more rigorous judicial scrutiny of economic legislation may not be an altogether bad idea.\textsuperscript{311} But the question raised here is whether § 1983, and by implication, its fee statute, should be available to serve that goal.\textsuperscript{312}

c. Possible Limits on Section 1983 Beyond a Civil-War-Amendments-Only Rule. If there should be an additional limit on § 1983 beyond that Civil-War-amendments-only requirement, what it should look like and whether it would even be workable are not clear. Despite its questionable historical basis, Justice Stone's much maligned distinction between personal rights and property rights had a lot going for it.\textsuperscript{313} It kept faith with the earlier limitation to "civil rights"—although that too was a vague limitation that enabled the Justices to take an "I know it when I see it" approach to § 1983.\textsuperscript{314} As noted above, finding a place for the distinction also gave meaning to the "secured by" limitation inasmuch as courts could more easily, if somewhat imprecisely, view personal liberties, such as those in the Bill of Rights, as taking their origin in the Constitution than the common law rights championed in

\textsuperscript{310} Today some types of fourteenth amendment claims, such as those challenging rates and taxes, have to await the outcome of state process anyway. See 28 U.S.C. §§ 1341, 1342 (1982) (directing federal courts not to interfere with state tax collection or rate regulation of public utilities when certain conditions, including plain, speedy, and efficient remedy in state courts, are met). But that certainly could not have been the reason that the old Court excluded such cases from § 1983's ambit long before the passage of the anti-tax and anti-rate injunction acts.

\textsuperscript{311} See Easterbrook, Implicit and Explicit Rights of Association, 10 Harv. J.L. & Pub. Pol'y 91, 98 (1987) (arguing that economic rights may be more important than associational rights, since those who lack control over resources are not in control of their destinies); Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 49-53, 56-59 (1985) (advocating heightened scrutiny for distribution of resources to those exercising raw power to obtain governmental assistance and for instances when legislative process not deliberative).

\textsuperscript{312} If economic equal protection and due process suits could qualify for § 1983 treatment, courts would be able to award attorneys' fees under 42 U.S.C. § 1988, even when the plaintiff prevailed on only a pendent, non-section 1983 constitutional claim. See Gould, Inc. v. Wisconsin Dep't of Industry, 750 F.2d 608, 616-17 (7th Cir. 1984) (court noted that fee recovery might be possible on non-section 1983 supremacy clause claims when appended to colorable equal protection claim, but denied fees because plaintiff had not met this standard), aff'd on other grounds, 473 U.S. 933 (1985); cf. Maher v. Gagne, 448 U.S. 122, 127, 132-33 & n.15 (1980) (Court found fee recovery proper on wholly statutory, non-civil rights claim pendent to substantial constitutional claim or case in which both statutory and constitutional claim settled favorably to plaintiff without litigation).

\textsuperscript{313} See H. Friendly, Federal Jurisdiction: A General View 91 (1973) (concluding, despite Lynch, that Stone's distinction "came closer to capturing the spirit of the [1871] Civil Rights Act").

the *Lochner* era. 315

Resurrecting the particular distinction seized upon by Justice Stone would, of course, present considerable problems. The most obvious is that it would require reconsideration of *Lynch*, in which the Court rejected this distinction. As *Lynch* and its champions rightly noted, Stone’s line-drawing was not altogether satisfactory because personal interests often could be conceptualized as property interests and vice versa. 316 The Court, for example, has sometimes characterized constitutional issues implicating jobs or employment as personal and at other times as proprietary. 317 Moreover, as the due process revolution showed, depriva
tions of even relatively ordinary property interests can easily shade into questions of personal liberty. 319

315. Takings of “property” for public use without just compensation would have presented a problem for § 1983 treatment under Stone’s approach. Takings cases do come to the Supreme Court as § 1983 suits. However, they do not fully operate like ordinary § 1983 suits. First, plaintiffs must initially resort to state remedies on the theory that the takings violation is not “ripe” until just compensation has been denied. See Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 182, 193-94 (1985) (recognition of developer’s § 1983 takings claim that rezoning had denied it economically viable use of its property in violation of fifth amendment overturned because final decision regarding state regulations and just compensation not obtained and thus claim not ripe). The reasoning is reminiscent of the pre-Monroe approach to state action. Cf. Daniels v. Williams, 474 U.S. 327, 336, 339-40 (Stevens, J., concurring) (1986) (random and unauthorized destruction of nonfundamental property interests does not amount to deprivation without due process until state courts have acted). Also, parties denied recovery after exhausting state process may not necessarily reenter a federal trial court. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) (final decisions from state court reviewable in Supreme Court only); cf. Allen v. McCurry, 449 U.S. 90, 103-04 (1980) (defendant’s § 1983 action collaterally estopped after failure to obtain federal habeas corpus relief because state court acting within proper jurisdiction provided parties full and fair opportunity to litigate federal claims). Nor is it likely that the Court would bother to police particular compensation awards in individual cases. See *Powe, Economic Make-Believe in the Supreme Court*, 3 CONST. COMM. 385, 392 (1986) (noting improbability of Court policing compensation awards in thousands of eminent domain proceedings).

316. *Lynch*, 405 U.S. at 552 (“[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.”); see B. SIEGAN, supra note 242, at 248-64 (belittling liberty/property distinction); Levy, *Property as a Human Right*, 5 CONST. COMM. 169, 184 (1988) (praising *Lynch* and arguing that property be accorded same constitutional respect that courts give to other civil or human rights); Comment, *The “Property Rights” Exception to Civil Rights Jurisdiction—Confusion Compounded*, 43 N.Y.U. L. REV. 1208, 1211 (1968) (ridiculing distinction).


318. See Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (triumph of society over private property has necessitated new debate over concepts of “public interest” and private property); see also Johnson v. Harder, 438 F.2d 7, 12 (2d Cir. 1971) (“Since welfare cases by their very nature involve people at a bare subsistence level,” disputes over payments “are treated not merely as involving property rights, but . . . a personal right under the Stone formula.”); cf. Michelman, *The Supreme Court 1968 Term-Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9-19 (1969) (judicial explosion of economic equality fueled by reawakening of “minimum welfare” value system mandating state’s duty to protect persons against hazards endemic in unequal society).

319. The much discussed “dignitary” component of procedural due process is likewise personal.
Nevertheless, the Court has long engaged in an analogous and no less inexact exercise to ascertain the rights in the constitutional pantheon that are deserving of so-called "fundamental" status—an inquiry for which the distinction between personal and property rights in many ways was once a shorthand. Perhaps that is all that Justice Stone really meant to do for § 1983: to make it applicable to the sorts of plaintiffs he envisioned would be able to take advantage of his Carolene Products footnote. It might not be too great a leap to restructure his fifty-year-old insight and conclude that the 1871 statute should be available whenever fundamental rights or suspect classifications are involved, without regard to the nature of the underlying liberty or property interest. That way, § 1983 would reinforce the Court's selective use of more than minimal rationality scrutiny in the Civil War amendments context. Nor would this reformulation be incompatible with other approaches to the Constitution that posit a unified concern behind both rationality-based and heightened-scrutiny challenges to governmental action.320 By providing ease of access to federal court through its broad remedial promises, the 1871 statute could make it easier for plaintiffs to bring to the federal courts those Civil War amendment cases especially warranting a close judicial look.

This focus on fundamentality also has some plausible historical justification. The debate over whether the framers and ratifiers of the fourteenth amendment meant to incorporate some or all of the Bill of Rights is an endless one.321 But whatever might have been the intended scope of the fourteenth amendment, the evidence is persuasive that when the 1871 Congress enacted § 1983 three years after the 1868 ratification of the amendment, it thought that victims of Bill of Rights deprivations by state and local actors could use the 1871 Act.322 Of course, those who thought so probably perceived the privileges or immunities clause as the hook for such incorporation—an oddity explainable in part because in 1871 (two years before

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320. See Rubin, Due Process and the Administrative State, 72 CALIF. L. REV. 1044, 1047 (1984) (clause should focus on "fairness," not the liberty or property interest at issue).

321. See M. CURTIS, supra note 72, at 1-6 (describing incorporation debate).

322. See id. at 157-70 (Congressmen argued that Bill of Rights limited the states and that fourteenth amendment was designed to effectuate true meaning of Constitution).
Slaughter-House) the privileges or immunities clause still was viable in the lower federal courts. The framers of the statute, perhaps more clearly than the framers of the amendments it helped to enforce, saw a specific place for vindication of the Bill of Rights against the states, as well as other rights that they conceived of as fundamental. Obviously, the Court could not now interpret § 1983 more broadly than the very amendments it was designed to enforce. Yet, despite the eventual demise of the privileges or immunities clause, to continue to let litigants use § 1983 to redress violations of fundamental interests, at least to the extent that the Court has otherwise incorporated them against state action under the due process clause, would not be wholly inconsistent with that rough idea of statutory intent. Thus, a possible limit on § 1983 would be to confine it to cases arising under the Civil War amendments, and then, only to such of those as implicated interests sufficiently fundamental to trigger some form of heightened scrutiny.

Of course, if procedural due process victims like Ms. Lynch could not take advantage of this reformulated version of Stone's inquiry, that might be argument enough against it. Yet deprivations of nonfundamental liberty or property interests would not go unremedied in federal court. The federal question statute could easily reach the few procedural due process cases that still manage to stay in federal court these days. The reason Lynch interred

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323. See, e.g., United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (in criminal prosecution charging defendants with conspiracy and intent to injure, threaten, and oppress, court held that privileges or immunities of citizens, including freedom of speech, were undoubtedly those that may be denominated fundamental); United States v. Mall, 26 F. Cas. 1147, 1147 (C.C.S.D. Ala. 1871) (No. 15,712) (court refused to dismiss criminal indictment holding that privileges or immunities of citizens included rights of peaceable assembly and free speech); United States v. Canter, 25 F. Cas. 281, 281 (C.C.S.D. Ohio 1870) (No. 14,719) (in criminal case, charging defendants with using threats, violence, and intimidation to prevent black citizen from exercising right to vote, court held that guarantee of privileges or immunities of citizenship implied the right of suffrage and obviously included black citizens); Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 651 (C.C.D. La. 1870) (No. 8,408) (in suit to restrain enforcement of state-sanctioned slaughtering monopoly, court struck down monopoly holding that privileges or immunities of citizenship embraced fundamental right to pursue any lawful industrial pursuit in lawful manner and to be protected in possession and enjoyment of property so long as not injurious to the community).

324. In the procedural due process context, the relevant liberty or property interests are frequently defined by state or local law—not by the Constitution. See Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 229-30 (1985) (Powell, J., concurring) (respondent's asserted interest in continued enrollment is essentially state-law contract right and bears little resemblance to fundamental interests considered protected by Constitution). The protection of the “new” property arising from federal entitlements would seem to be “secured” by federal law from state interference after Maine v. Thiboutot, 448 U.S. 1, 3-8 (1980) (section 1983 remedy encompasses violations of federal statutory as well as constitutional law).

325. Practically speaking, many procedural due process claims never see the inside of a federal trial court. Some fail because an enforcement proceeding in which the constitutional question can also be raised is ongoing in state court. See, e.g., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (Younger abstention doctrine requires district court to abstain from hearing constitutional claims directed at state's post-judgment attachment rules when opportunity exists to raise challenge in
the distinction between personal and property rights in actions under section 1343(3) was because suits for losses of small amounts of property could not satisfy the jurisdictional amount requirement then in place for ordinary federal question cases. Unless the civil rights statutes were available, no federal trial forum would have existed in such cases. However, the pressure that made the Court bend the 1871 civil rights statute to get around the distasteful dollars-and-cents requirement for procedural due process litigation under the federal question statute has vanished. It therefore might be time to think again about the full implications of Lynch for modern constitutional litigation and whether § 1983 should remain an all-inclusive statute.

3. Who Needs Section 1983, Anyway?

The Court must consider a final, and more overtly policy-based set of issues if it wanted to make § 1983 applicable to all constitutional deprivations: who will benefit from, and will be burdened by, an all-inclusive § 1983? In their constructions of the 1871 statute, both Justice Stone in Hague and Justice Stewart for the Court in Lynch explicitly took account of the remedial advantages offered to litigants. The most obvious remedial advantages associated with § 1983 today are damages and attorneys’ fees.

One argument for restricting the scope of § 1983 to fundamental interests protected by the Civil War amendments is that many nonfundamental rights protected by the Constitution frequently can pay their way into federal court whereas other constitutional rights often cannot. The incentive of damages in every case of proven injury and the almost automatic availability of attorneys’ fees for successful constitutional plaintiffs is arguably less needed in cases challenging broad-scale social welfare or economic legislation. Many pending state court proceedings); Juiced v. Vail, 430 U.S. 327, 338-39 (1977) (procedural due process challenge to state judiciary’s contempt proceedings must be raised in contempt proceeding itself, if possible). Others fail for want of state action when a private party effects the deprivation without the aid of judicial process. See Flagg Bros. v. Brooks, 436 U.S. 149, 157-60 (1978) (warehouseman’s proposed sale of goods entrusted to him for storage is not action properly attributable to state). In addition, the Court surprisingly has concluded that some deprivations are not protectable by the due process clause because they involve merely common law interests adequately protected by state process. See, e.g., Paul v. Davis, 424 U.S. 693, 701 (1976) (defamation by police does not deprive plaintiff of fourteenth amendment liberty or property interest); Baker v. McCollan, 443 U.S. 137, 143 (1979) (false arrest claim will not always impair liberty or property interest); cf Daniels v. Williams, 474 U.S. 327, 330-34 (loss of nonfundamental property interest pursuant to random and unauthorized negligence of state officers is not a “deprivation” within meaning of due process clause). Finally, the Court has made it difficult to obtain damages awards for interim losses occasioned by a procedurally inadequate deprivation when the same deprivation would have occurred even if the proper procedural safeguards had been observed. See Carey v. Piphus, 435 U.S. 247, 263 (1978) (public school students who were found to have been suspended without procedural due process were entitled to recover only nominal damages absent proof of actual injury).

326. See Lynch, 405 U.S. at 547. Ms. Lynch would not have received attorneys’ fees in a direct action under the general federal question statute, but she also would not have been able to get them under § 1983 in those pre-attorneys’ fee days.
cases challenging such legislation can be effectively remedied by an injunction alone. Plaintiffs in these cases may suffer interim economic losses, but a damages award need not be the presumption. In the absence of a clear constitutional command for monetary compensation, as in takings cases, courts in implied action cases against state officers should have the flexibility to award damages or not, even in cases of proven economic injury, depending upon the necessity for monetary relief in the individual case. In contrast, the great benefit of a decision such as Monroe v. Pape is that isolated acts of unconstitutional behavior affecting fundamental interests could be remedied immediately in a federal trial court. Isolated acts are less easily remediable by injunction and in many instances require a damage award to vindicate the violation of a right after the fact.

The flexibility to award or not to award damages would appear to be greater in an implied action under section 1331 than in a suit under an express congressional provision such as § 1983. Bivens, like Monroe, involved a plaintiff who suffered a one-shot, noncontinuing Bill of Rights violation. In Bivens it was “damages or nothing” because injunctive relief would not have been effective. To permit a federal court to award damages in an implied action case only when the constitutional provision would be a dead letter in their absence may be too restrictive an approach. Yet to apply § 1983’s near automatic promise of monetary relief whenever injury is proved in all implied action cases seems equally unnecessary. The Court has easily extended Bivens’ rationale from the fourth amendment to other Bill of Rights violations by federal officers. But those cases are fundamentally different from constitutional challenges to nondiscrete, broad-scale economic or social regulation. Also, damage awards in those Bivens actions are not far removed

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328. See Bivens, 403 U.S. at 409 n.9 (Harlan, J., concurring) (noting that “the appropriateness of money damages may well vary with the nature of the personal interest asserted”).

329. See Rizzo v. Goode, 423 U.S. 362, 375-77 (1976) (district court’s entry of injunctive decree in class action alleging police mistreatment improper because it rested on finding of “unacceptably high” number of unconstitutional incidents, but only 20 of 3 million citizens were concerned in class action); O’Shea v. Littleton, 414 U.S. 488, 502 (1974) (injunctive relief in civil rights class action against judicial officers for allegedly engaging in illegal bond-setting, sentencing, and jury fee practices denied because of plaintiffs’ inability to demonstrate they would again be subject to challenged practices).

330. The Bivens Court rejected such an approach, although the United States had urged it. See 403 U.S. at 406-07 (Harlan, J., concurring) (responding to arguments for stringent test by observing that “the judiciary has a particular responsibility to assure the vindication of constitutional interests”).

331. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (assuming Bivens would cover first amendment violations); Carlson v. Green, 446 U.S. 14, 19-20 (1980) (Bivens remedy available for violation of eighth amendment rights when prisoner was not given proper medical attention); Davis v. Passman, 442 U.S. 228, 233-49 (1979) (cause of action for damages remedy can be implied directly when due process clause of fifth amendment is violated).
from the older common law trespass tradition that easily assimilated damage actions for constitutionally based torts under the general federal question statute.\(^3\)

In addition, rigid application of §1983's rule of automatic damages for proven economic injury in regulatory challenges would enormously heighten federalism tensions. The sheer scale of interim damages to regulated business arising from such legislation would dwarf individual §1983 damage awards. Although states might be immune from damages because of the eleventh amendment,\(^3\) local governments would be strictly liable insofar as regulatory schemes are by nature "custom or policy," even when their officers acted in good faith.\(^3\) In contrast, one of the arguments made in \textit{Bivens} and progeny in favor of implied damage awards was the absence of any impact on the government.\(^3\) Nor is it likely that state or local officers would be able personally to absorb the kinds of damages typically associated with interim economic injury arising from unconstitutional regulatory statutes, even if they acted in bad faith. Probably for many of these same reasons the damage action under section 1331 dried up during the \textit{Lochner} era. It would be quite anomalous if business could fare better in federal court now under §1983 than it ever did during its glory days under \textit{Lochner}.

Similarly, the attorneys' fee incentive is less needed for most cases involving ordinary regulatory legislation. In that context, the economic incentives associated with enjoining enforcement of unconstitutional regulation itself often provides sufficient impetus to bring suit. That is not always the case in more traditional civil rights contexts (such as school desegregation litigation), in which injunctive relief may generate no easily measurable economic benefit. Moreover, a main purpose of the fee awards statute was to make such injunctive relief cases as desirable for an attorney to undertake as any

\(^{332}\) Of course, \textit{Bivens'} achievement was to provide federal court redress when the Constitution proscribed action that the common law did not. Common law claims against federal officers were already litigable in federal court under federal officer removal statutes, and federal law already supplied the measure of the officer's defense. \textit{See Bivens}, 403 U.S. at 391 & n.4 (noting present policy to remove to federal court all suits in state court against federal officers for trespass or imprisonment). \textit{Bivens} thus went beyond the common law and federalized the entire action.

\(^{333}\) \textit{See U.S. Const.} amend. XI (prohibiting federal courts from adjudicating cases brought against state by citizens of another state or foreign state); \textit{see also} Hans \textit{v.} Louisiana, 134 U.S. 1, 7-8 (1890) (barring federal question suit against state by its own citizen for impairment of obligation of contract).

\(^{334}\) \textit{See Owen v. City of Independence}, 445 U.S. 622, 635-36 (1980) (city acting pursuant to custom or policy under Monell \textit{v.} New York City Dep't of Soc. Servs., 436 U.S. 658 (1978), may not claim good faith immunity); \textit{see also} Monell, 436 U.S. at 690 n.54 (municipality not arm of the state for eleventh amendment purposes).

\(^{335}\) \textit{See Bivens}, 403 U.S. at 408 (Harlan, J., concurring) (court should not deny relief simply because deterrence of future lawless conduct cannot be shown).
other fee-producing case. Fee-shifting often is necessary to procure competent counsel in many traditional civil rights cases, but a large pool of competent counsel frequently will be ready and willing to litigate for clients who attack broad-scale social and economic regulation. The availability of an automatic fee award to prevailing economic-rights plaintiffs is neither needed as an incentive to them, nor is it desirable in terms of its added burden on the public fisc as a consequence of good faith efforts at economic regulation.

Nevertheless, neither a liberty-versus-property nor a nonfundamental-versus-fundamental-rights dichotomy would be completely in harmony with the incentive structures created by the fee statute for § 1983 plaintiffs. Some very traditional-looking civil rights plaintiffs may wish to bring federal constitutional claims to which, for one reason or another, the Court does not give fundamental rights treatment. Strict adherence to a fundamental/nonfundamental rights dichotomy, therefore, might mean that parties who are victims of unconstitutional state action because of their age, poverty, or handicap could not take advantage of § 1983 or its fee statute. Stone's original (personal-rights versus property-rights) formulation of the dichotomy would rescue many such actions for § 1983, but they would very likely be lost if fundamentality alone were the touchstone. It is hard to argue that such cases be relegated to the status of implied rights of action only. Such cases can also be won in § 1983 cases, thus offering some incentive for representation even in the ordinary civil rights case. Yet Congress was quick to note that typical damage awards in such cases were often subject to individual or governmental immunities, see H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976) ("in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damages remedy"), and were often less spectacular than damages in most personal injury cases. See 122 Cong. Rec. 31,472, 33,314 (1976) (statements of Sen. Kennedy) ("civil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer"). Since the usual incentives provided by the contingent fee system will not operate in many individual small claimant civil rights damage suits, these cases trigger the need for fee-shifting. See Rowe, Predicting the Effects of Attorney Fee Shifting, 47 Law & Contemp. Probs. 139, 148-49 & n.39 (1984) (small claimants have special need for fee-shifting statutes).

Some constitutional interests that would have been classified as personal under Stone's scheme may currently lack "fundamental" status, and yet they clearly could not pay their way into court. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (discrimination based on mental retardation held unconstitutional, although Court applied minimal level of scrutiny "normally accorded economic and social legislation"). To exclude such suits from § 1983's coverage, or to carve them out of the fee statute seems harsh. Perhaps it should be enough that the federal plaintiff could make a substantial claim to some form of heightened scrutiny, even if his challenge is upheld by the application of a weaker scrutiny.

A similar problem would be faced by parties that seek to vindicate against state and local officials civil rights granted by treaties. See, e.g., Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974) (petitioners asserted right to possession of Indian property conferred by federal law wholly independent of state law). If viewed from the nineteenth-century perspective that § 1983 applied only to rights that took their "origin" in federal law, treaty violations by state actors arguably should come under the civil rights statute. Nevertheless, under a Thiboutot plain-meaning
litigants might need the fee incentive every bit as much as do fundamental rights claimants for vindicating what are often nonpecuniary rights. This lack of coverage raises serious doubts about the viability of any limit to § 1983 apart from a limit to the Civil War amendments.

To be sure, another way to solve the attorneys' fee questions raised here would be by approaching them from the direction of the fee statute rather than by redefining § 1983's scope. For example, it might be possible to develop exceptions under the attorneys' fee statute for individual plaintiffs who did not actually need a fee incentive to litigate. But that approach is not trouble-free either. First, most courts have found that the client's financial status or ability to pay is not a reason to deny an award of attorneys' fees to a prevailing plaintiff in a § 1983 suit.\footnote{340} Those decisions accurately reflect Congress' intent to make the fee award to prevailing plaintiffs almost a matter of course in such suits, despite the more ambiguous statutory language. When Congress legislated in 1976 to provide fees in § 1983 cases, however, it could hardly have foreseen the latest boom in economic rights litigation begun by some very untraditional civil rights plaintiffs. Second, an ability-to-pay defense to fee awards could threaten fee recovery by well-to-do plaintiffs who prevail on traditional Bill of Rights or basic equal protection claims.\footnote{341} If federal courts were given the discretion to deny fees in successful § 1983 cases when they conclude—after the fact—that the fee incentive was unnecessary, then attorneys in traditional civil rights cases may be marginally more reluctant to take on even sure winners, out of fear that their reliance on the fee statute may be second guessed.

In addition, the Court should consider the judicial cost savings of a categorical rule excluding classes of cases from § 1983's coverage at the definitional stage rather than requiring an ad hoc and often unpredictable analysis of ability to pay attorneys' fees after the fact.\footnote{342} The satellite litigation general approach to § 1983, they may not. The word "treaties"—which is among the trio of case-categories that make up the federal question jurisdiction for the purposes of article III and § 1331 ("arising under the Constitution, laws, or treaties")—is conspicuously missing in § 1983 ("rights, privileges, or immunities secured by the Constitution and laws"). Treaty violations by state or local actors may simply be supremacy clause violations that arguably are not apt for § 1983 treatment. \textit{But see Note, Section 1983 Remedies for the Violation of Supremacy Clause Rights, 97 YALE L.J. 1827 (1988) (by A. Siegel) (arguing for § 1983 treatment of supremacy clause claims).}

\footnote{340. See, e.g., DiFilippo v. Morizio, 759 F.2d 231, 233-34 n.1 (2d Cir. 1985) (plaintiff entitled to attorneys' fees irrespective of ability to pay); Kirchberg v. Feenstra, 708 F.2d 991, 999 n.7 (5th Cir. 1983) (plaintiff's ability to pay is not special circumstance sufficient to justify denial of attorneys' fees); Metcalf v. Borba, 681 F.2d 1183, 1189 (9th Cir. 1982) (district court correctly allowed recovery of attorneys' fees that plaintiff could afford to pay).}


\footnote{342. \textit{Cf} Rowe, \textit{The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics},.
ated by requests for and opposition to statutorily awarded attorneys' fees already takes up considerable judicial resources; requiring a context-specific review of the needed incentive for fee shifting in the particular case would consume additional federal court energies at trial and appellate levels.\textsuperscript{343} Focusing the inquiry at the outset on the applicability of § 1983 would reduce the danger that plaintiffs will proceed to trial only to be informed later that their constitutional actions are not really § 1983 suits after all, and thus are not eligible for a fee award.\textsuperscript{344}

Similar arguments operate in the area of damage awards. For example, it might be possible to give § 1983 an all-inclusive constitutional scope, but to give district judges the discretion to deny damages when, as was not the case in \textit{Bivens}, the injunctive remedy is adequate. Given the Court's current wide-open approach to § 1983, that would obviously be the path of least resistance and therefore one that the Court might predictably take. Such a choice would effectively pass the buck to the lower courts to work out the propriety of monetary relief on a case-by-case basis. Although that task might be what the \textit{Bivens} Court had in mind for lower courts when deciding the appropriateness of damage awards in direct actions under the federal question statute, it is harder to square with § 1983.\textsuperscript{345} The discretionary ability to deny damages even in cases of proven injury could, by its very unpredictability, prove to be a powerful disincentive to current users of § 1983, for many of whom the promise of damages now makes up the constitutionally most meaningful portion of their relief.

\textbf{V. Conclusion}

Section 1983 has come a long way, from a statute that constitutional litigants hardly ever invoked to one that they seldom forget to invoke. Users now include corporate takeover artists\textsuperscript{346} and commercial real estate devel-

\textsuperscript{343} See \textit{Hensley v. Eckerhart}, 461 U.S. 424, 437 (1983) ("A request for attorneys' fees should not result in a second major litigation.").

\textsuperscript{344} See, e.g., \textit{Consolidated Motor Freightways Corp. v. Kassel}, 730 F.2d 1139, 1144 (8th Cir.) (although plaintiff was successful in invalidating Iowa's statutory ban on 65-foot trailers under commerce clause, § 1983 was not appropriate basis for relief), \textit{cert. denied}, 469 U.S. 834 (1984); \textit{Private Truck Council of America, Inc. v. Secretary of State}, 503 A.2d 214, 221 (Me.) (in class action by drivers of foreign registered trucks challenging reciprocal truck taxes, plaintiffs failed to state claim for relief cognizable under § 1983, because Congress never intended violations of commerce clause to be actionable under that section of Civil Rights Act), \textit{cert. denied}, 476 U.S. 1129 (1986); see also 476 U.S. at 1129-30 (White, J., joined by Brennan, J., and O'Connor, J., dissenting from denial of \textit{certiorari}).

\textsuperscript{345} See, e.g., \textit{Carey v. Piphus}, 435 U.S. 247, 253-54 (1978) (noting compensatory purposes of § 1983 and indicating that damages should be awarded in cases of proven injury).

\textsuperscript{346} See \textit{Icahn v. Blunt}, 612 F. Supp. 1400, 1402-03 (W.D. Mo. 1985) (section 1983 used as basis
opers 347—parties who can significantly raise the economic stakes of their disputes by the invocation of § 1983. The statute's early unpopularity was not, however, for want of savvy constitutional lawyers, nor was it for want of an activist judicial construction of the fourteenth amendment. It was instead the consequence of a shared understanding of its limited scope; the old Court's preference for vindicating common law rights from state interference; and the predominant role of the general federal question statute in enforcing those rights. Although the 1871 Act fell into virtual desuetude following Reconstruction, it has resurfaced and now serves as the main vehicle for redressing most constitutional deprivations. Because of the forgotten purposes and uses to which the general federal question statute was once put, "direct" actions are now brought mainly to vindicate constitutional rights in the federal officer context. As a consequence, the 1875 jurisdictional statute is rapidly attaining a vestigial status for the purposes of enforcing constitutional limitations on state action.

The federal courts, of course, no longer employ general law or state law actions as the basis for vindicating the Constitution, even though those were the original sorts of actions on which the federal question statute operated. Instead, the Court has thoroughly federalized the constitutional right of action against governmental officers. That process of federalization, taken together with the express remedy of § 1983, may be sufficient justification for shelving the general federal question statute in the context of suits against state and local officers altogether, despite its original and traditional role in that area. But apparently some limits on state action, such as those commanded by the supremacy clause, must still be litigated exclusively under section 1331 rather than under § 1983 (and its jurisdictional provision). And other limits on the states, especially among the naked prohibitions in the original body of the Constitution, also may be candidates for vindication under the federal question statute alone.

Developing a coherent limiting principle for § 1983 will be anything but easy. 348 Each possible limitation has drawbacks. The civil-rights and personal-rights-only limitations have problems in uncertainty of application. A limitation of § 1983 to the Civil War amendments would have some historical support and the virtue of easy application. But it would let in the usual run of economic litigation attacking rates, taxes, and other good faith social and regulatory legislation—litigation that the Court never allowed under

347. See Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 182 (1985) (section 1983 used as basis for takings claim); see also supra note 290 (discussing § 1983 as basis for dormant commerce clause challenges).
348. See Eisenberg, supra note 25, at 483, 504-12 (discussing tensions between a limited "historical" versus a more all-inclusive "functional" approach to § 1983); Nichol, supra note 7, at 991-93 (same).
§ 1983, even before Justice Stone's re-christening of the statute. A race-only limit would probably also be workable, but it would reduce the statute's usefulness even beyond what the old Court made of it. Having no limitation at all would be the easiest way out, but that option may be foreclosed for other reasons discussed above. Any workable and justifiable limit on § 1983 therefore has to take account not only of considerations that argue for something less than an all-inclusive statute, but also of the problems that beset any such attempt at limitation.

The problem of developing a limit to § 1983, moreover, is one of more than merely historical interest. If § 1983 is made available for some of the economic rights that the Court is beginning to dust off, litigation over damages from regulatory injuries and fee awards threatens to quickly become tomorrow's cottage industry for a new class of constitutional litigants. The availability of those remedial devices would be a powerful weapon in the hands of regulated industry and business. The obvious response by local governments would be to steer well clear of even good faith efforts at economic regulation whenever there was a colorable chance that their legislation was unconstitutional. Admittedly, the Court probably would prefer to emphasize the 1871 statute as the vehicle for all modern constitutional litigation, given its dislike of implied rights of action reasoning at a more general level. But as this Article has tried to show, bringing all litigation under § 1983 is likely to create unnecessary and unanticipated windfalls to regulated parties and to spell disaster, by the infusion of new discretionary judicial controls, for those whom it has traditionally protected.