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How Far Is Too Far: Analyzing the Collateral Law Applicable in State Court Section 1983 Litigation

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HOW FAR IS TOO FAR: ANALYZING THE COLLATERAL LAW APPLICABLE IN STATE COURT SECTION 1983 LITIGATION

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The recent influx of cases brought in state courts under 42 U.S.C. § 1983[1] is certainly ironic considering that Congressional distrust in the ability or willingness of state courts to protect the constitutional rights of freed slaves necessitated the original enactment of the statute.[2] Nonetheless, state courts are hearing § 1983 cases on a more frequent basis,[3] raising issues that the enactors likely did not foresee but which judges and lawyers alike must inevitably confront.

One such issue is the collateral law[4] applicable in state court § 1983 litigation. Sometimes referred to as a "converse-*Erie*" prob-

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1. Section 1983 of title 42 of the United States Code ("§ 1983") states:

> 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 in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C § 1983 (1994).

2. In a review of the legislative history of section 1 of the Civil Rights Act of 1871, the precursor to § 1983, the Supreme Court concluded that "[a] major factor motivating the expansion of federal jurisdiction . . . was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." Patsy v. Board of Regents, 457 U.S. 496, 505 (1982).

3. The number of § 1983 cases reported in state court appellate reporters increased from a total of seven during the four years from 1969 and 1972, to 105 in 1983. *See* Stephen H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 435 (1984). This is just a fraction of the § 1983 cases that are heard at the state trial court level.

4. Herman defines collateral law as "state or federal rules, statutes, or practices extrinsic to section 1983 itself, and therefore possibly not 'substantive' federal law." Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1062 n.23 (1989). Neuborne employs a more specific definition:

> By "collateral rules" I mean a host of issues which must be faced whenever a legal rule is judicially enforced, including the nature and availability of defenses or immunities, the identity of potential plaintiffs, the survivorship of the cause of action, the applicable limitations period, rules governing the assessment and computation of damages, rules governing the availability and scope of equitable relief, rules governing the form, timing, and sufficiency of pleadings, rules governing the burden of proof, rules governing the availability and administration of jury trials, rules governing the allocation of functions between judge, jury and alternative methods of fact-finding, rules governing discovery, rules governing the admissibility of evidence, rules governing the geographical

lem,[5] this issue is of particular interest because of the tension it creates between competing state and federal interests. On one hand, the states have an obvious interest in promulgating and following their own collateral law schemes.[6] At the same time, there is a strong federal interest in ensuring that the remedial and deterrence policies of § 1983 are carried out.[7] A ubiquitous federalism concern lurks in the background: it would serve both the state and federal interests to keep § 1983 cases involving intrastate parties in the state courts.[8]

In states with collateral law that parallels federal collateral law, there is no converse-*Erie* problem since the same collateral law would be applied wherever the § 1983 claim is heard.[9] Nor does a problem materialize when state collateral law conflicts with the substantive law of § 1983: the Supremacy Clause[10] dictates that substantive federal law preempts conflicting state law, whether that state law is characterized as substantive or collateral. However, a converse-*Erie* problem

setting of the trial, and rules governing the form and consequences of service of process.

Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 767 n.173 (1981).

5. This term was first used over 40 years ago. *See* Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the* Erie *Problem?*, 17 OHIO ST. L.J. 384 (1956). It refers to the seminal case of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), in which the Supreme Court held that in cases arising under diversity jurisdiction, a federal court enforcing state law must apply the substantive law of the forum state but may apply federal procedural law. In state court § 1983 cases, the question is not whether the state court must apply federal substantive law—the Supremacy Clause mandates that it do so—but rather whether it should apply its own collateral law or that of the federal courts.

In using the term "converse-*Erie*" throughout this Note, I do not mean to imply that the converse of the *Erie* approach governs state court § 1983 litigation; that is, I do not mean to advocate that the answer is as simple as federal substantive law and state procedure. Rather, I employ the phrase as a convenient means of referring to the procedural dilemma that arises when § 1983 claims are heard in state court.

6. *See* Herman, *supra* note 4, at 1096-1098; *infra* text accompanying notes 139-40.

7. *See generally* Felder v. Casey, 487 U.S. 131 (1988).

8. There are a number of reasons why state, federal, and federalism interests would be served by increased litigation of § 1983 claims in state courts: (1) the general concern that federal jurisdiction over matters involving intrastate parties is an intrusion on state power would be eased; (2) state court § 1983 litigation would relieve the federal courts of a significant portion of their burdensome caseload; (3) combining § 1983 claims with other state claims would lead to more efficient litigation; (4) state court § 1983 litigation would provide more harmonious resolution of civil rights abuses since an "outsider" federal judge is not making often controversial decisions; and (5) state courts have more flexibility to deal with § 1983 cases because they are less constrained by Article III case or controversy requirements. *See* Herman, *supra* note 4, at 1073-76; Neuborne, *supra* note 4, at 731-32.

9. This is not an infrequent occurrence given that, as of 1979, 23 states have adopted the Federal Rules of Civil Procedure. *See* Walter Cox & David Newbern, *The New Civil Procedure: The Court that Came in from the Code*, 33 ARK. L. REV. 1, 2 n.6 (1979).

10. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

does arise when a state collateral law neither parallels a federal collateral rule nor directly conflicts with the substantive law of § 1983, yet is less generous to § 1983 plaintiffs—or, conversely, more generous to § 1983 defendants—than the collateral law applicable had the case been brought in federal court. In such a scenario, it is unclear whether the state law should be applied because it is the rule of the host state forum, or preempted in favor of the remedial and deterrence policies of § 1983. For instance, what result if the collateral law applicable in a state court § 1983 action requires "beyond a reasonable doubt" proof of the state of mind requirement for the imposition of punitive damages, when a "preponderance of the evidence" standard would have governed in federal court?[11] Surely the higher standard makes it more difficult for § 1983 plaintiffs to recover punitive damages, but recovery is not altogether precluded. Should the state rule be preempted or applied?[12]

The Supreme Court has provided scant guidance as to how such § 1983 converse-*Erie* questions should be answered. In *Felder v. Casey*, the Court held that whether a statute is inconsistent with the policies of § 1983 and outcome-determinative are factors that should be considered.[13] However, *Felder* left as an open question the standard that governs when preemption is required because a state collateral rule hinders the policies of § 1983, but is not outcome-determinative. Any answer will depend on line-drawing; determining a point where tolerable disparity between state and federal collateral law becomes intolerable conflict with the policies of § 1983.[14]

11. This was the issue raised in a recent Colorado Supreme Court case, *Boulder Valley School District R-2 v. Price*, 805 P.2d 1085 (Colo. 1991), which is discussed *infra* Part IV.

12. This problem arises in a number of different settings. For instance, the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), ruled that defendants denied summary judgment on qualified immunity grounds had the right to an interlocutory appeal in federal § 1983 litigation. Should the same right to interlocutory appeal be given to state court § 1983 defendants, even if as a matter of state practice interlocutory appeals are not normally allowed? The Minnesota Supreme Court answered in the affirmative in *Anderson v. City of Iopkins*, 393 N.W.2d 363 (Minn. 1986), while North Dakota answered in the negative in *Klindtworth v. Burkett*, 477 N.W.2d 176 (N.D. 1991).

13. 487 U.S. 131 (1988). In *Felder*, the Court ruled that a Wisconsin notice-of-claim statute that it found to be both inconsistent with the policies of § 1983 and outcome-determinative necessitated preemption when § 1983 litigation takes place in Wisconsin courts. *See infra* Part II.A.

14. I assume throughout this Note that the compensation and deterrence policies of § 1983 are carried out pursuant to the will of Congress via the collateral rules applicable in federal court § 1983 litigation. This seems to be a rather safe assumption, given that if Congress was unhappy with the procedure being applied in § 1983 litigation, it could simply amend § 1983 to include specific collateral rules it finds appropriate to carry out the policies of § 1983. Reading Congress' silence as implicit approval, the collateral law applicable in federal § 1983 litigation thus can be seen as facilitating the fair federal forum envisioned with the enactment of § 1983.

This Note analyzes the different approaches that could be used to determine when, in state court § 1983 litigation, state collateral law must be preempted because of inconsistency with the policies of § 1983.[15] Part I consists of a brief overview of § 1983 and a discussion of the relatively recent history of § 1983 proceedings in state courts. Part II examines *Felder v. Casey*, and further defines the nature of the § 1983 converse-*Erie* problem. In Part III, different approaches to solving the § 1983 converse-*Erie* problem are discussed and analyzed. Finally, in Part IV, a recent Colorado Supreme Court case that raises the line-drawing issue is considered in light of the various approaches.

I. AN OVERVIEW OF SECTION 1983 ACTIONS IN STATE COURTS

A. *Section 1983's History and Purposes*

The history and purposes of § 1983 have been exhaustively analyzed by courts[16] and commentators[17] alike. Essentially, § 1983 originated in the Civil Rights Act of 1871,[18] which was enacted to give

State collateral law that is applicable in a § 1983 setting can then be measured against this baseline of federal collateral law. Any differences between state and federal collateral law applicable in the § 1983 context indicates that the state rule is either more or less supportive of the § 1983 cause of action as compared to the federal collateral law norm.

However, it is illogical to conclude that *all* differences between state and federal collateral law produce inconsistencies that necessitate preemption. Such a position would dictate that state courts surrender all independence and adopt the entirety of federal collateral law when hearing § 1983 cases. Rather, the issue addressed in this Note is how far state collateral rules can stray from the federal collateral law norm before preemption is mandated in § 1983 state court litigation.

For further development of this concept, see *infra* Part II.C.

15. Although this Note speaks in terms of "preemption"—referring to situations in which state laws conflict with federal law and thus must be preempted under the Supremacy Clause—the same analysis can be employed in regard to the application of 42 U.S.C. § 1988 (1994), when state collateral rules are needed to fill gaps in the federal collateral law scheme. In both the converse-*Erie* and § 1988 contexts, absent a conflict with the substantive law of § 1983, both analyses are reduced to looking for intolerable inconsistency between state collateral law and the policies of § 1983. *See* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN THE STATE COURTS, § 10.5 at 10-15 to 10-16 (1988); *see also infra* note 208 and accompanying text.

16. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 502-07 (1982); Mitchum v. Foster, 407 U.S. 225, 238-42 (1972). *See generally* Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (overruling *Monroe's* holding that cities were not persons subject to § 1983 liability

17. *See, e.g.*, Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 3-20 (1985); Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 673-85 (1986); Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1497-506 (1989); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1137-75 (1977) [hereinafter *Developments—Section 1983*].

18. Act of April 20, 1871, ch. 22, 17 Stat. 13.

life to the provisions of the Fourteenth Amendment.[19] Although it did not contain explicit substantive rights, § 1983 significantly expanded federal judicial power by creating a federal forum for all claims of deprivations of federally secured rights.[20]

The Supreme Court in *Monroe v. Pape* concluded that the Forty-second Congress had three main purposes in enacting § 1983: (1) to override state laws that deprived citizens of the vindication of their civil right;[21] (2) to provide a remedy where state law was inadequate;[22] and (3) to make available a federal remedy where a state remedy was adequate in theory but not available in practice.[23] The Court has characterized the third aim as the most important: "The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[24]

At a more pragmatic level, the Court has identified the contemporary purposes of § 1983 as compensation and deterrence,[25] with the remedial function considered paramount.[26] Moreover, the Court has held that the § 1983 remedy "is to be accorded 'a sweep as broad as its language.'"[27]

B. History of Section 1983 in State Courts

It was by no means a given that § 1983 was intended to confer concurrent jurisdiction on federal and state courts. In fact, it is doubtful that the Forty-second Congress contemplated state court jurisdiction at all since it was the inability or unwillingness of state courts to protect civil rights that necessitated the creation of an alternative federal forum in the first place.[28] However, the Supreme Court declared

19. "[Section 1983's] purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Monroe*, 365 U.S. at 171.

20. *See Developments—Section 1983, supra* note 17, at 1137-90.

21. *Monroe*, 365 U.S. at 173.

22. *Id.* at 173-74.

23. *Id.* at 174-80.

24. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting Ex parte Virginia, 100 U.S. 339, 346 (1880)).

25. *See* Carey v. Phiphus, 435 U.S. 247 (1978); 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES: THE LAW OF SECTION 1983 5 (3d ed. 1991).

26. "As we have repeatedly emphasized, 'the central objective of the Reconstruction Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.'" Felder v. Casey, 487 U.S. 131, 139 (1988) (quoting Burnett v. Grattan, 468 U.S. 42, 55 (1984)).

27. *Id.* (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

28. *See* Patsy v. Board of Regents, 457 U.S. 496, 505-06 (1982).

unequivocally in *Martinez v. California*[29] and *Maine v. Thiboutot*[30] that § 1983 jurisdiction is not limited to federal courts.[31] The tension between competing state and federal interests regarding the collateral law to be applied when § 1983 cases are heard in state court was an inevitable by-product of this concurrent jurisdiction.

The Supreme Court has provided little guidance as to how this tension should be resolved.[32] It has decided only four cases directly involving § 1983 actions in state courts, and three of these have featured a direct conflict between state law—whether it is labeled as collateral or substantive—and the Court's interpretation of the substance of § 1983. In *Martinez v. California*, the Court ruled that the law of immunities is intrinsic to § 1983, and therefore a California statute immunizing parole officers from liability for parole-release determinations was in direct conflict with the substantive law of § 1983 and must be preempted in § 1983 cases heard in California courts.[33] In *Maine v. Thiboutot*, the Court held that the attorney's fees provision[34] is part of the substantive law of § 1983 and thus travels with § 1983 claims into state court.[35] In 1990, the Court concluded in *Howlett v. Rose* that a state court could not use common law sovereign immunity to refuse to hear a § 1983 claim when it could have entertained state claims arising from the same set of facts.[36] *Martinez*, *Thiboutot*, and *Howlett* are relatively easy cases since each features a direct clash between the substantive law of § 1983 and state collateral law. Consequently, the Supremacy Clause expressly mandates that the state law be preempted; no converse-*Erie* problem arises because the Constitu-

29. 444 U.S. 277, 283-84 n.7 (1980).

30. 448 U.S. 1, 3 n.1 (1980).

31. The Supreme Court has yet to address whether state courts *must* hear § 1983 claims. *See* NAHMOD, *supra* note 25, at 50.

32. The Supreme Court recently heard argument in another case that involves the converse-*Erie* question in the § 1983 context. In *Johnson v. Finkel*, the trial court denied the four individual defendants' qualified immunity defense in a § 1983 action filed in Idaho. *See* Brief for Petitioner, Johnson v. Finkel, 1996 WL 699671, at *6-7. Defendant's filed a timely notice of appeal to the Idaho Supreme Court on the qualified immunity issue. The Idaho Supreme Court dismissed the appeal sua sponte because it was not an appeal from a "final order or judgment." *See id.* at *7. On a petition for rehearing, defendants argued that the Idaho courts, when hearing § 1983 claims, must abide by (1) the federal definition of "final judgment" with regard to denials of qualified immunity; and, more generally, (2) the federal rule that the denial of qualified immunity is immediately appealable. *See id.* Those arguments were rejected by the Idaho Supreme Court. The Supreme Court then granted certiorari. 117 S. Ct. 356 (Oct. 21, 1996). Petitioners raised these same arguments when the case was argued before the Supreme Court on February 26, 1997. *See* Transcript of Oral Argument, 1997 WL 92111 (Feb. 26, 1997.)

33. *Martinez*, 444 U.S. at 284 & n.8.

34. *See* 42 U.S.C. § 1988(b) (1994).

35. *Maine*, 448 U.S. at 11.

36. 496 U.S. 356, 375 (1990).

tion dictates the result. In the fourth case, *Felder v. Casey*, the Court squarely confronted the converse-*Erie* problem, although the answer it provided is less than conclusive.

II. ANSWERS AND QUESTIONS IN *FELDER V. CASEY*

A. *The Decision*

In *Felder v. Casey*, the plaintiff brought a § 1983 action against the city of Milwaukee and certain of its police officers for an allegedly racially motivated arrest and beating.[37] The defendants moved to dismiss the § 1983 claim on grounds that the plaintiff had failed to meet the requirements of a Wisconsin notice-of-claim statute that provided that no suit could be brought against any state or local government entity or officer unless the plaintiff provided written notice of the claim to the defendant within 120 days of the alleged injury, waited 120 days after the notification to file suit, and then brought suit within six months after being notified that the defendant would not settle the claim.[38] The trial court denied the motion on grounds that the notice-

37. 408 N.W.2d 19 (Wis. 1987). The plaintiff, a black man, was stopped for questioning by several white police officers who were searching for an armed suspect. *See id.* at 21. When the interrogation grew loud, several of the plaintiff's friends and family members came to the scene and convinced the officers that the plaintiff was not the man for whom they were looking. *See id.* According to the police, the plaintiff continued to argue with the police officers and allegedly pushed one of them, which led the police to arrest plaintiff for disorderly conduct. *See id.* According to the plaintiff, during the course of the arrest the officers beat him about the head and face with batons, dragged him across the ground, and threw him into the police car in a partially unconscious state. *See id.* The disorderly conduct charge against the plaintiff was later dropped. *See id.* Plaintiff did not file the § 1983 claim until nine months after the incident occurred. *See id.*

38. *See id.* The statute reads, in pertinent part:

> (1) Except as provided in sub.[ ] (1m),[ ] no action may be brought or maintained against any . . . governmental subdivision or agency thereof nor against any officer, official, agent or employee of the . . . subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision or agency and on the officer, official, agent or employee. . . . Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . . subdivision or agency or to the defendant officer, official, agent, or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision or agency and the claim is disallowed.
>
> (g) . . . Failure of the appropriate body to disallow a claim within 120 days after the presentation . . . is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against

of-claim statute was inapplicable when § 1983 litigation takes place in Wisconsin courts, and the Wisconsin Court of Appeals subsequently affirmed.[39]

The Wisconsin Supreme Court reversed. It held that while the federal government could prescribe the collateral scheme under which federal claims were litigated in federal courts, states were free to determine the procedures under which § 1983 claims are litigated in state courts.[40] According to the court, the Wisconsin legislature was within the scope of its power when enacting the notice-of-claim provision, and the provision is thus applicable to all claims—including claims arising under federal law—brought against state or local governments or actors in Wisconsin courts.[41] The Wisconsin Supreme Court supported its conclusion by noting that the notice-of-claim statute pursued legitimate state interests, including the prompt settlement of claims and protection against stale or fraudulent claims.[42]

The Supreme Court, on a 7-2 vote, reversed the Wisconsin Supreme Court and held that the Wisconsin notice-of-claim statute must be preempted when § 1983 actions are heard in Wisconsin courts.[43] The Court, with Justice Brennan writing, based its decision on two general considerations.[44] First, it reasoned that the notice-of-

> any defendant . . . subdivision or agency nor against any defendant officer, official, agent or employee may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

WIS. STAT. ANN. § 893.80(1) (West 1997).

39. *See Felder*, 408 N.W.2d at 20. The decisions of the trial court and the Wisconsin Court of Appeals were unpublished.

40. The court concluded that "[w]hile the Constitution vests in Congress 'the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,' . . . it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court." *Id.* at 25 (citing Kramer v. Horton, 383 N.W.2d 54 (1986)).

41. *See id.*

42. *See id.* at 22-24.

43. *See* Felder v. Casey, 487 U.S. 131 (1988). Justice White, who joined Justice Brennan's majority opinion, added a concurrence in which he argued that the Wisconsion provision must be preempted because it provided for an inappropriately short statute of limitations for a § 1983 claim. *See id.* at 153-56 (White, J., concurring). In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Court had ruled that as a matter of substantive law § 1983 suits were governed by the state statute of limitations applicable to personal injury suits. White reasoned that the notice-of-claim statute clashed with *Wilson v. Garcia* because it was significantly shorter than the otherwise applicable Wisconsin statute of limitations, and thus should be preempted. *See Felder*, 487 U.S. at 155-56 (White, J., concurring).

44. In analyzing *Felder v. Casey*, Herman found nine rationales, both explicit and implicit, imbedded in the Court's opinion. These included: (1) "the statute conflicts in purpose and effect with the remedial objectives of § 1983"; (2) application of the notice-of-claim statute will produce different outcomes based on whether the claim was brought in state or federal court; (3) "the notice-of-claim statute discriminates against federal claims"; (4) the statute is outcome-determinative, and states cannot apply outcome-determinative law when entertaining a federal right to recovery; (5) the statute conditions a federal right to recovery; (6) the statute is not a

claim statute was inconsistent with the remedial purpose of § 1983 because it conditioned a federally created right of recovery,[45] discriminated against a federal right of recovery,[46] and effectively served as an exhaustion requirement.[47] Second, the Court held that the federal interest in interstate uniformity necessitated the preemption of state collateral laws that would "frequently and predictably produce different outcomes . . . based solely on whether the claim is asserted in state or federal court."[48] In reaching this second conclusion, the Court—relying on Federal Employer Liability Act and diversity cases—explicitly rejected the notion that equitable federalism considerations dictate that § 1983 state court plaintiffs abide by the rules of the state court in which they seek redress, even if those rules are outcome-determinative.[49]

Justice O'Connor, joined by Chief Justice Rehnquist, dissented, and in doing so embraced the equitable federalism argument that plaintiffs who choose to bring their § 1983 cases in state court must abide by the rules set forth by that court.[50] Justice O'Connor argued that the inconsistencies between the Wisconsin provision and the purposes and policies of § 1983 existed only in the majority's incorrect and overly expansive interpretation of § 1983, its legislative history,

neutral and uniformly applicable rule; (7) the statute is in effect an exhaustion requirement; (8) the states may not impose unnecessary burdens on rights to recovery; and (9) the states should show the same deference to the federal courts under § 1983 as the federal courts would show the states in a diversity action. Herman, *supra* note 4, at 1066-67.

45. *See Felder*, 487 U.S. at 142-145. The Court emphasized that both in purpose and in effect the Wisconsin notice-of-claim statute directly benefitted governmental defendants in § 1983 actions, and as such burdened a federal right to recovery. *See id.* at 142. The statute, according to the Court, mirrored in both purpose and effect the governmental immunity statutes it had previously ruled inapplicable in state court § 1983 actions. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980). The Court also specifically pointed out that it did not see this burdening of a federal right as a "natural or permissible consequence of an otherwise neutral, uniformly applicable state rule" because the Wisconsin statute only applies to a specific class of plaintiffs, those who sue governmental defendants. *Felder*, 487 U.S. at 144.

46. *See Felder*, 487 U.S. at 145-46. The Court reasoned that since plaintiffs who sued governmental defendants were subject to the notice-of-claim statute while all other plaintiffs were not, the statute discriminated against the federal right of recovery created by § 1983. *See id.* at 146.

47. *See id.* at 146-50. The Court viewed the notice-of-claim statute as an exhaustion requirement in that it required that the plaintiff meet certain administrative obligations before a suit against a governmental defendant could be filed. *See id.* at 146. Relying on *Patsy v. Board of Regents*, 457 U.S. 496 (1982), in which the Court had ruled that plaintiffs did not have to exhaust state administrative remedies before filing a § 1983 suit in federal court, the Court concluded that "[g]iven the evil at which the federal civil rights legislation was aimed, there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." *Felder*, 487 U.S. at 147.

48. *See Felder*, 487 U.S. at 138; *see also id.* at 150-53.

49. *See id.* at 150-53.

50. *See id.* at 156-63 (O'Connor, J., dissenting).

and § 1983 case law.[51] She concluded that the notice-of-claim statute should have been applied because Wisconsin had legitimate reasons for enacting it, while the majority's argument lacked valid grounds for preemption.[52]

B. *The Precedential Value of* Felder v. Casey

While *Felder* is a clear statement that Wisconsin's notice-of-claim statute must be preempted when § 1983 claims are brought in Wisconsin courts, it is unclear what effect the decision should have on § 1983 state court litigation generally. At the very least, *Felder* requires that in addition to being consistent with the substantive law of § 1983, collateral rules governing state court § 1983 proceedings cannot be both inconsistent with the policies of § 1983 and outcome-determinative. However, *Felder* leaves unanswered some crucial questions about where the preemption threshold lies, and how—if at all—inconsistency and outcome-determination relate to each other.

Felder suggests that a state collateral law that is *either* inconsistent with the policies of § 1983 *or* outcome-determinative should be preempted:

> "[E]nforcement of the notice-of-claim statute in § 1983 actions brought in state court so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest. *This interference, however, is not the only consequence of the statute that renders its application in § 1983 cases invalid.* In a State that demands compliance with such a statute before a § 1983 action may be brought or maintained in its courts, the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in state or federal court. . . . [F]ederalism . . . dictate[s] that the State's outcome-determinative law must give way when a party asserts a federal right in state court.[53]

Although *Felder* intimates that either of the conditions might suffice as grounds for preemption, a closer analysis calls into doubt whether this is actually true.

51. *See id.* Herman echoes Justice O'Connor's sentiments about the Court's reading of Congressional intent: "Congress has been so silent on most of the key questions concerning the state courts' role in section 1983 litigation that the Supreme Court's divining of congressional intent in this area verges on the psychic." Herman, *supra* note 4, at 1091.

52. *See Felder*, 487 U.S. at 157-58 (O'Connor, J., dissenting).

53. *Id.* at 151 (emphasis added) (Brennan, J.). I hesitate to declare that *Felder* unequivocally holds that inconsistency alone triggers preemption because of the inclusion of the word "so." That qualifier insinuates a degree inconsistency and as such could mean that a state collateral rule that does not interfere with the policies of § 1983 as much as Wisconsin' notice-of-claim statute—that is, a statute that is not as inconsistent as the Wisconsin statute—might not require preemption. *See infra* text accompanying notes 156-184.

If inconsistency and outcome-determination are treated as independent grounds for preempting a state collateral rule,[54] the two grounds can be combined to create four categories into which any state collateral law can be placed: inconsistent and outcome-determinative; inconsistent but not outcome-determinative; consistent and outcome-determinative; and consistent but not outcome-determinative. According to the implication of the *Felder* Court's decision that inconsistency or outcome-determination independently could mandate preemption, only the state collateral rules in the consistent/not outcome-determinative category could survive converse-*Erie* analysis. This seems like an improper result, however, for state collateral rules that are so generous to § 1983 plaintiffs that they are, in effect, outcome-determinative.[55] Such rules are indeed consistent with the remedial and deterrence policies of § 1983, but they are also outcome-determinative because they frequently and predictably would allow a § 1983 plaintiff who would have lost in federal court to win in state court.[56] Aside from a monomaniacal interest in uniformity of result, there is no plausible reason to preempt outcome-determinative state collateral laws that are nonetheless consistent with the policies of § 1983.[57]

Perhaps, then, it is necessary to reevaluate the relationship of the two grounds the Court gives for preempting the Wisconsin notice-of-claim provision. Whatever effect they have independently, the *Felder* Court did not hesitate to strike down the Wisconsin statute that was both inconsistent with the policies of § 1983 and outcome-determinative.[58] Other state collateral rules that are both inconsistent and outcome-determinative would likely meet the same fate. Rules in the consistent/not outcome-determinative category obviously should be

54. By independent, I mean that each of the factors involves a separate inquiry: (1) Is the state law inconsistent with the policies of § 1983, and; (2) Is the state law outcome-determinative?

55. One hypothetical example is a state collateral law that grants standing to a plaintiff who lacks Article III standing in the federal courts. *See* Herman, *supra* note 4, at 1120-23.

56. For instance, returning to the hypothetical state rule proposed *supra* note 55, the compensatory purpose of § 1983 would be served by allowing a plaintiff the opportunity to be compensated for an alleged civil rights violation, but the state collateral law would nonetheless be outcome-determinative because the plaintiff would always lose—by being deprived by Article III considerations of having any opportunity of winning—in federal court.

57. *See* Herman, *supra* note 4, at 1115-18, 1130-31. However, this argument cannot be made when a state collateral law is more generous than the substantive law of § 1983 (as opposed to the policies of § 1983). *See id.* at 1118-20; *see also* Moor v. County of Alameda, 411 U.S. 693 (1973) (allowing a vicarious liability theory in a state court § 1983 claim conflict with the substantive law of § 1983).

58. Felder v. Casey, 487 U.S. 131, 138 (1988).

applied.[59] As discussed previously, one can also make a strong case for applying state collateral laws that are consistent with the policies of § 1983 yet outcome-determinative because they are substantially more beneficial to § 1983 plaintiffs than federal collateral law.[60] That leaves only the inconsistent/not outcome-determinative category. Although *Felder* could be read as holding that a provision that is inconsistent with the policies of § 1983 but not outcome-determinative triggers preemption,[61] at this point it can be safely said that at the very least *Felder* holds that inconsistency between a state collateral law and the policies of § 1983 triggers the *possibility* of preemption, whether or not the rule is outcome-determinative.

Under this reading of *Felder*, inconsistency with the policies of § 1983 becomes the threshold issue in the converse-*Erie* context. If a state collateral law is consistent with the policies of § 1983, it should be applied regardless of whether it is outcome-determinative. But if a state collateral law is inconsistent with the policies of § 1983, there is at least a possibility of preemption. Whether a state collateral law is outcome-determinative thus becomes a secondary inquiry; standing alone it tells us nothing about whether a state collateral law should be preempted or applied.

C. *Reconceptualizing the Issue: The Continuum Approach*

While *Felder* treats inconsistency with the policies of § 1983 and outcome-determination as separate grounds for preemption, it seems conceptually more attractive to treat them as different degrees of the same inquiry, that being how far a state collateral rule deviates from the collateral law applicable in § 1983 litigation in federal court. It is helpful to conceptualize the problem as existing on a continuum on which the midpoint is the collateral law applicable in federal court § 1983 litigation.[62] A collateral rule applicable in state court § 1983 litigation can be plotted on this continuum according to whether it is more or less supportive than the federal collateral rules of the compensation and deterrence policies of § 1983, and the degree to which it

59. Considering there are relatively few areas in which the converse-*Erie* problem arises, suffice it to say that the consistent and not outcome-determinative category encompasses the bulk of state collateral law.

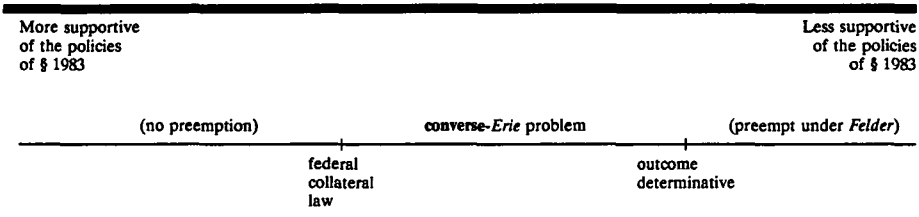
60. *See supra* notes 55-57 and accompanying text.

61. *See supra* note 53 and accompanying text.

62. Again, this makes the assumption, previously discussed at *supra* note 14, that the collateral scheme applicable in federal § 1983 litigation adequately carries out the compensation and deterrence functions of § 1983. Thus, the collateral law applicable in federal § 1983 can be considered the baseline against which state collateral law is compared.

differs from the federal collateral law in this respect.[63] The less (or more[64]) supportive the state collateral rule is of the remedial and deterrence policies of § 1983, the further away from the center of the continuum the collateral law is plotted.

As the state collateral law moves further from the federal collateral law midpoint, there will come a point at which the state law can no longer be termed merely a deviation of the federal law that is less supportive of the policies of § 1983, but instead becomes inconsistent with those policies. Yet even further away from the midpoint, the state collateral law reaches a point where the outcome of the state court § 1983 litigation will "frequently and predictably" be different from the outcome in federal court solely because of the state collateral rule; at that point the law can be said to be outcome-determinative.



The post-*Felder* continuum

This continuum analysis serves two important functions.[65] First, it more accurately reflects the complexity of the converse-*Erie* problem than does *Felder*. The continuum approach points out that the converse-*Erie* world cannot be neatly divided into two categories, one where the state collateral rule in question is consistent with the policies of § 1983, and one where it is not. Rather, it recognizes that there is a range of state collateral rules that must be considered in the converse-*Erie* analysis: rules that are slightly less supportive of the poli-

63. If there is no federal collateral rule that corresponds to the state collateral rule, as was the case in *Felder v. Casey*, then the state rule must be plotted according to how much it deviates from there being no rule at all. In doing this, one would ask how much it disadvantages the § 1983 plaintiff to have this rule instead of no rule at all.

64. This Note does not directly deal with the "more supportive" side of the midpoint since it seems fairly clear that such laws should be applied so long as they do not infringe on the substantive law of § 1983. *See* Herman, *supra* note 4, at 1115-18, 1130-31.

65. The continuum analysis is similar to how the Supreme Court approaches the statute of limitations issue in federal § 1983 litigation. Because there is no statute of limitations applicable to § 1983, the personal injury statute of limitations of the state in which the alleged violation occurred governs § 1983 claims. *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985), *aff'g*, 731 F.2d 640 (10th Cir. 1984) (en banc). However, it is likely that should a state statute of limitations be unreasonably short, the Court would preempt it as inconsistent with the policies of § 1983. *See* NAHMOD, *supra* note 25, at 52-54. The Court would allow state statutes of limitations to deviate within a certain range so long as they did not deviate so far as to be inconsistent with § 1983.

cies of § 1983 than federal collateral law but still consistent with those policies; rules that are clearly inconsistent with the policies of § 1983 but do not altogether preclude plaintiffs from vindicating their civil rights; and rules that are so hostile to § 1983 plaintiffs that they effectively negate any possibility of recovery. By recognizing the complexity of the converse-*Erie* problem from the outset, the continuum approach encourages the creation of a solution that is sufficiently flexible to handle the intricacies of the problem.

Second, the continuum approach allows the decision-maker to focus on the core of the converse-*Erie* problem: How far can state collateral rules disadvantageous to § 1983 plaintiffs deviate from the federal collateral law baseline without necessitating preemption? *Felder* clearly tells us that preemption is mandatory when a state collateral law deviates so far from federal collateral law norm that it is outcome-determinative.[66] But because the Wisconsin notice-of-claim statute was outcome-determinative, the *Felder* Court did not articulate what level of disparity less than outcome-determination mandates preemption. One possible interpretation of *Felder*—that state collateral laws even mildly less supportive of the remedial and deterrence purposes of § 1983 are inconsistent and trigger preemption—suggests drawing the line very close to the center point.[67] The narrowest reading of *Felder* suggests that the line be drawn at the point at which the state collateral law becomes outcome-determinative.[68] Of course, there are also a number of choices in between.[69] We now turn to an analysis of where that line should be drawn.

III. Approaches for Solving the Line-Drawing Problem

Though *Felder v. Casey* focuses the spotlight on the interplay of state and federal collateral law in the § 1983 context, the converse-*Erie* problem did not originate in this area.[70] Consequently, courts

66. Felder v. Casey, 487 U.S. 131, 150-53 (1987).

67. This is Neuborne's individual rights position. *See infra* Part III.B.

68. This is essentially Hart's plaintiff's choice approach. *See infra* Part III.A.

69. This would encompass both Herman's balancing-of-interests approach, *see supra* Part III.C, and the *Felder*-based approach, *see infra* Part III.D.

70. The converse-*Erie* problem can arise whenever state courts enforce federal rights. Prior to the reemergence of § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). The problem most frequently appeared in cases arising under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. §§ 51-60 (1994). The term "converse-*Erie*" was in fact coined in an article discussing the application of state collateral law in FELA cases. *See* Hill, *supra* note 5.

FELA created concurrent federal jurisdiction in cases involving negligent injury to employees of railroads engaged in interstate commerce. While early FELA cases heard in state courts employed state procedural law, *see, e.g.*, Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211

and commentators have grappled for some time with this problem, both in the context of § 1983 and otherwise. The following approaches to solving the converse-*Erie* problem have emerged.

A. The Plaintiff's Choice Approach

One approach to the § 1983 converse-*Erie* problem is to not envision it as a problem at all, but rather as a peripheral effect of concurrent jurisdiction under § 1983. This is the approach set forth by Professor Henry Hart, whose premise regarding the relationship between federal law and the state courts is quite simple: "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."[71] So long as there is a fair federal forum available, Hart sees the state courts as a supplemental forum where the plaintiff can either abide by the state court rules or instead choose the federal forum.[72] With a fair federal forum available, a plaintiff would not choose to litigate her claim in state court with hostile collateral law unless that state court also had some advantage—procedural or otherwise—over the federal courts.[73] Hart therefore would not allow the plaintiff to have the advantages of both the state court and the federal court when it was the plaintiff's choice as to where to litigate in the first place; she must weigh the relative advantages and disadvantages of the state court collateral law vis-à-vis the collateral law available in federal court, and choose the forum in which she wishes to proceed. Once that decision is made, the plaintiff must live with the rules of the forum she has chosen.[74] However, Hart points out that two minimum

(1916) (state law allowing a non-unanimous jury could be used in a state court FELA action), later cases required state courts to use federal procedures that would advantage plaintiffs. *See, e.g.*, Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949) (state cannot use strict pleading rules in a FELA case because it unnecessarily burdens the federal right to recovery).

71. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

72. *See id.*

73. For example, a plaintiff may choose to bring a § 1983 action in a state court despite a disadvantageous collateral rule because the state court has already favorably ruled on a right in question. *See* Neuborne, *supra* note 4, at 731.

74. This very approach was urged by Justice O'Connor in her *Felder* dissent:

> A plaintiff who chooses to bring a § 1983 action in state court necessarily rejects the federal courts that Congress has provided. Virtually the only conceivable reason for doing so is to benefit from procedural advantages available exclusively in state court. Having voted with their feet for state procedural systems, such plaintiffs would hardly be in a position to ask Congress for a new type of forum that combines the advantages that Congress gave them in the federal system with those that Congress did *not* give them, and which are only available in state courts.

Felder v. Casey, 487 U.S. 131, 163 (1988) (O'Connor, J., dissenting) (emphasis in original).

requirements must be met: the plaintiff must have access to a fair federal forum in which to pursue the federally-created remedy, and the state collateral rules cannot be "so rigorous as, in effect, to nullify the asserted rights."[75]

Hart's "plaintiff's choice approach" has a strong common sense appeal. It is the free market applied to the judicial process: the plaintiff has a choice of two "products," each with advantages and disadvantages, and she must purchase one or the other. And just as in the free market where a consumer has no right to force one seller to add a feature to its product because the feature would make the product more attractive to the consumer, Hart's argument is that a § 1983 plaintiff should not be able to force state courts to adopt "better" procedures from the federal court system just because those procedures would be beneficial to the plaintiff.

Hart's plaintiff's choice approach is also appealing because it embraces one of the central tenets of federalism: encouraging experimentation by state governments.[76] Most notably, allowing state courts to define and apply their own collateral law enables the state courts to act as small-scale laboratories for experimenting with alternative judicial procedure. This is desirable in our system of federalism because experimentation at the state level could foreseeably create a superior system of collateral law that could be adopted by the federal courts.[77]

At an even more general level, federalism interests are served by the plaintiff's choice approach because it maintains—or at least prevents the further erosion of—the balance of power between the federal and state governments.[78] Unlike other branches of state government, state courts remain relatively independent from federal oversight in their day-to-day functioning, and as such are one of the

75. Hart, *supra* note 71, at 508.

76. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 134 (2d ed. 1991). The importance of experimentation by state governments is expressed well by Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

77. This argument is weakened somewhat by the option of a more moderate regime which allows the application of a state collateral rule which is outcome-determinative because it is more generous to plaintiffs than federal collateral law, but not a state collateral rule that is outcome-determinative in the other direction. *See supra* notes 62-69 and accompanying text. In such a regime, "good" experimentation would be allowed and "bad" experimentation would not be allowed, meaning the nation at large could still reap the benefits of the "good" state experimentation.

78. *See* Margaret G. Stewart, *Federalism and Supremacy: A Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431, 444 (1992).

last refuges into which federal power has not crept.[79] Moreover, states have a difficult-to-articulate but nonetheless real interest in controlling the "housekeeping functions" of their own state courts.[80] By applying state collateral law, even if at the expense of the § 1983 cause of action, the plaintiff's choice approach reaffirms the autonomy of the state judiciary.[81]

Hart's approach does, however, have some significant drawbacks. Most importantly, it undervalues the federal right of recovery established by § 1983 by assuming that the state interest in following its own collateral law is superior to the federal interest in remedying and deterring civil rights violations through § 1983. The plaintiff's choice approach conceptualizes state judicial autonomy as the framework into which the policies of § 1983 must be accommodated; the § 1983 claim must fit into the existing state collateral scheme, or it must be brought in federal court. However, the history of § 1983 indicates that it would be more appropriate to consider the § 1983 right of recovery as paramount compared to state judicial autonomy, and that the proper solution of the converse-*Erie* problem would be to make the state courts accommodate § 1983.

Section 1983 was enacted primarily to make available a federal remedy for civil rights violations where a state remedy was available in theory but not in practice.[82] The problem which § 1983 was supposed to solve was not that state laws explicitly prevented the vindication of civil rights,[83] but rather that states were unwilling or unable to protect individuals' constitutional rights because of the prejudices of juries and judges.[84] The only readily available solution was to create

79. *See id.*

80. *See* Herman, *supra* note 4, at 1097. Herman argues that states have an interest in following their own rules because the rules are familiar, because doing so encourages efficiency by ensuring that all claims within a case are subject to the same rules, and because the rules may be well-suited to a state or court. *See id.* Lastly, but perhaps most importantly, states arguably have a dignitary interest in creating and following their own collateral law.

81. Stewart also raises the argument that while Congress undeniably has power under the Supremacy Clause to force states to enforce federally created rights, it may act unconstitutionally when it forces state courts to apply rules that are outside the substantive content of § 1983. *See* Stewart, *supra* note 78, at 438-40.

82. *See* Monroe v. Pape, 365 U.S. 167, 174 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

83. Although overriding state laws that prevented the vindication of civil rights was cited as one of three major reasons for the enactment of § 1983, *see id.* at 173-74, at least one senator argued that this was irrelevant because no such laws existed. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. 268-69 (1871) (statement of Rep. Sloss).

84. *See Monroe*, 365 U.S. at 176-77.

an alternative federal forum.[85] Not surprisingly, this proposed solution was met with strong protests that it infringed on the powers reserved to the states.[86] Despite the protests, the enactors saw the ability of plaintiffs to vindicate their civil rights as more important than exclusive state judicial control over intrastate civil rights claims, and created an alternative federal forum via § 1983 so civil rights claims could be fairly heard.[87]

In the converse-*Erie* context, a different but related question arises: As between state control over state collateral law and the ability of plaintiffs to effectively vindicate their civil rights, which is paramount? Given that the Forty-second Congress made the decision in 1871 that citizens must have the ability to vindicate their civil rights even at the sacrifice of state judicial control over claims that could be brought in state court, the § 1983 right of recovery is, all the more so, paramount vis-à-vis state control over collateral law applicable in § 1983 state court litigation. Otherwise stated, if something has to give, it should be state control over the collateral law applicable in state court § 1983 actions rather than the § 1983 right of recovery.

Another fundamental criticism of the plaintiff's choice approach is that it would allow the states to have too much control over federally created rights. It is undeniable that as between federal law and state law, the Supremacy Clause mandates that federal law is supreme.[88] It is also quite clear that states may establish their own

85. Indeed the solution would have been easy if it was state law that was preventing individuals from vindicating their civil rights: the problem could have been solved by preempting the state law Supremacy Clause as conflicting with the Fourteenth Amendment.

86. The remarks of Representative Arthur are, indeed, representative:

> [Section 1 of the Civil Rights Act of 1871 (which later became § 1983)] overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States and the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals and functions, it leaves them the shadow of what they once were.

CONG. GLOBE, 42d Cong., 1st Sess. 365 (1871); *see also id.* at 352 (remarks of Rep. Beck); *id.* at app. 86-87 (remarks of Rep. Storm); *id.* at app. 50 (remarks of Rep. Kerr); *id.* at 365-66 (remarks of Rep. Arthur); *id.* at 373 (remarks of Rep. Archer); *id.* at 385 (remarks of Rep. Lewis); *id.* at 396 (remarks of Sen. Rice); *id.* at app. 91 (remarks of Rep. Duke); *id.* at app. 112 (remarks of Rep. Moore); *id.* at app. 117-18 (remarks of Sen. Blair); *id.* at app. 148 (remarks of Rep. Lamison); *id.* at app. 179 (remarks of Rep. Voorhees); *id.* at app. 304 (remarks of Rep. Slater). *See generally* Blackmun, *supra* note 17, at 6-7.

87. One can only speculate what the Forty-second Congress would have done if it could have solved its problem by simply ordering that state courts follow certain federal collateral rules when hearing civil rights claims, but it does seem likely that usurping state procedure in certain cases would have been a more moderate solution than effectively taking control of intrastate civil rights disputes away from the state courts altogether.

88. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

collateral law schemes to govern litigation in their state courts.[89] However, when state courts are called upon to enforce federal rights, the validity of the latter statement becomes less clear because state procedure can affect the enforcement of the federal right. When federal claims are adjudicated in state court, the state collateral rules that legitimately apply to all state court litigation can so erode the federal right that the federal right must trump the state collateral rules under the Supremacy Clause.

This is precisely how the Supreme Court has handled cases brought in state courts under the Federal Employers' Liability Act.[90] Of particular interest is *Brown v. Western Railway of Alabama*,[91] a 1949 case in which the Supreme Court preempted Georgia's strict pleading rules because they deprived the plaintiff the opportunity to recover under FELA.[92] As Justice Black explained:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."[93]

Other Supreme Court FELA cases have reached similar results.[94]

The plaintiff's choice approach, on the other hand, would allow state collateral law to control the federal right of recovery so long as the federal right is not nullified.[95] Hart intimates that the *Brown* decision was wrong, and that Georgia's strict pleading rules should have governed even if that meant a different result than the one likely had the *Brown* litigation taken place in federal court.[96] Hart would have allowed Georgia's local rules to erode the federal right, so long as it

89. *See* Felder v. Casey, 487 U.S. 131, 138 (1988).

90. 45 U.S.C. §§ 51-60 (1994). For an explanation of the substance of the Federal Employers' Liability Act, see *supra* note 70.

91. 338 U.S. 294 (1949).

92. In *Brown*, the plaintiff alleged that he was injured in the performance of his duties as a railroad employee when he stepped on an object negligently left by his employer alongside a track in the railroad yard. *Id.* at 295. The Georgia courts, relying on Georgia's strict pleading requirements, held that the plaintiff had failed to state a claim because his complaint neither alleged the absence of plaintiff's contributory negligence nor specifically alleged that the object over which the plaintiff stumbled was left where it was because of the railroad company's negligence. *See id.*

93. *See id.* at 298-99 (quoting Davis v. Wechsler, 263 U.S. 22, 24 (1923)).

94. *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (FELA plaintiffs are entitled to a jury trial notwithstanding a local rule to the contrary); Bailey v. Central Vt. Ry., 319 U.S. 350 (1943) (notwithstanding local rules, state courts are disallowed from granting a directed verdict for employers in FELA cases).

95. *See* Hart, *supra* note 71, at 508.

96. *See id.* at 508 n.60 and accompanying text.

did not destroy that right completely. His approach there, as well as to the § 1983 converse-*Erie* problem, can be criticized for failing to consider the importance of federal rights vis-à-vis state collateral rules that undoubtedly affect the ability of plaintiffs to recover under that federal right.

The *Felder* Court expressly rejected the plaintiff's choice approach in its pure form.[97] Hart's approach was the foundation on which the Wisconsin Supreme Court built its decision that the notice-of-claim statute was applicable in the § 1983 context.[98] This argument was, however, expressly rejected on appeal as the United States Supreme Court concluded that the states' right to define and apply its own collateral law was not absolute:

> However equitable [the Wisconsin Supreme Court's] bitter-with-the-sweet argument may appear in the abstract, it has no place under our Supremacy Clause analysis. Federal law takes state courts as it finds them only insofar as those courts employ rules that do not "impose unnecessary burdens upon rights of recovery authorized by federal laws."[99]

While the plaintiff's choice in its purest form may be dead so far as the majority of the Supreme Court is concerned, it nonetheless lives on for purposes of the converse-*Erie* analysis by providing the theoretical underpinning for drawing the preemption line at a maximum distance from the federal collateral law midpoint. The point of outcome-determination would mean nothing to Hart, who would allow state collateral law to deviate from the federal collateral law so long as it did not nullify the federal right. However, given the Supreme Court's holding in *Felder*, the plaintiff's choice approach would be positioned on the post-*Felder* continuum so as to not preempt a state collateral rule *unless* it was outcome-determinative.

B. The Individual Rights Approach

At the other end of the continuum is the "individual rights approach" promoted by Professor Burt Neuborne.[100] Neuborne's pri-

97. The *Felder* majority opinion actually summarized the Wisconsin position by quoting Hart, then explicitly rejected the argument. Felder v. Casey, 487 U.S. 131, 150 (1988).

98. "The point we wish to reiterate is simply that litigants who choose to press their claims in state court cannot 'elect' to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. [The notice-of-claim statute] is an example of just such a procedure." Felder v. Casey, 408 N.W.2d 19, 25 (Wis. 1987).

99. *Felder*, 487 U.S. at 150 (quoting Brown v. Western Ry. of Ala., 338 U.S. 294, 298-99 (1949)).

100. *See generally* Neuborne, *supra* note 4.

mary focus is the protection of the rights of the individual against the will of the collective.[101] Although he has previously argued that federal courts are institutionally superior to state courts in adjudicating civil rights claims,[102] Neuborne nonetheless places a high value on concurrent jurisdiction because of its potential value as a "self-correcting constitutional compass, guiding litigation into the forum most likely to enunciate an expansive definition of the rights of the individual."[103] Neuborne's ideal scenario, then, is one in which federal and state courts are equally competent in adjudicating civil rights claims, with the two forums "competing" for civil rights plaintiffs via the substantive law available in each.[104]

However, even assuming substantive parity, Neuborne argues that three collateral law considerations still force § 1983 plaintiffs into federal court.[105] First, federal collateral law is uniform throughout the United States and thus allows a relatively small and centralized civil rights bar to apply one set of rules wherever they litigate.[106] To litigate § 1983 claims in state court, on the other hand, this small group of civil rights attorneys would have to expend valuable resources on learning the diverse collateral law schemes of the states in which they wish to litigate. Secondly, because federal collateral law is applicable in all federal litigation, civil rights litigators quickly become familiar with it and learn to apply it masterfully.[107] The same cannot be said of

101. This is manifest in Neuborne's definition of the "better" forum for adjudicating civil rights claims "as the one more likely to assign a very high value to the protection of the individual, even the unreasonable or dangerous individual, against the collective, so that the definition of the individual right in question will receive its most expansive reading and its most energetic enforcement." *Id.* at 727.

102. Neuborne lays out this theory in his seminal article, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Neuborne argues that federal courts are institutionally superior to state courts for three reasons: federal judges are more technically competent than judges in the state courts; the "psychological set" of federal judges is more amenable, compared to the psychological set of state court judges, to the liberal values protected by civil rights litigation; and federal judges are more apt than state judges to make difficult and unpopular civil rights decisions because federal judges are insulated from majoritarian pressures. *See id.* at 1118-28.

103. Neuborne, *supra* note 4, at 731. In this sense, Neuborne's approach—like Hart's—is analogous to a free market, with the federal and state courts "competing" for plaintiffs by offering ease of recovery. However, the free market analogy is eroded by the fact that even if a plaintiff chooses to file a § 1983 in state court the defendant can remove to federal court.

104. *See id.* By substantive law, Neuborne does not mean the substantive law of § 1983, which is interpreted by the federal courts and binding on the state courts. Rather, Neuborne argues that a state court may have previously ruled favorably on a certain substantive right (whether on state or federal constitutional grounds, or because the federal courts may appear to be hostile to a certain right).

105. *See id.* at 733-47.

106. *See id.* at 733-34.

107. *See id.* at 734-35. Neuborne points out that one contributing factor is that law schools generally require students to take a course in federal civil procedure, but not state procedure.

the diverse collateral law schemes of different states. Finally, and perhaps most importantly, Neuborne argues that federal collateral law is generally more hospitable to plaintiffs than is state collateral law.[108] This encourages § 1983 plaintiffs to opt to litigate their civil rights claims in the federal courts, where they are less likely to lose because of a particular collateral law.[109] To keep plaintiffs from avoiding state courts because of a disadvantageous collateral rule, Neuborne suggests that the collateral law applicable in all § 1983 litigation, whether in federal or state court, should be uniform and hospitable.[110] In other words, Neuborne envisions procedural parity as a prerequisite to making a system of concurrent jurisdiction work effectively.

In addition to seeing procedural parity as normatively attractive, Neuborne argues that it is the proper result based on an analysis of the collateral law applicable when other federal rights are enforced in state courts,[111] in diversity cases,[112] and when 42 U.S.C. § 1988 is used

108. *See id.* at 735.

109. Neuborne cites six specific areas in which the collateral laws of most states are hostile to civil rights plaintiffs: (1) pleadings; (2) statute of limitations; (3) class actions; (4) official immunity; (5) discovery; and (6) attorney's fees. *See id.* at 735-47. Since Neuborne wrote his article in 1981, Supreme Court decisions have absorbed some of these areas into the substantive law of § 1983, and thus precluded states from applying their own rules in state court § 1983 actions. These areas include statute of limitations, *see* Wilson v. Garcia, 471 U.S. 261 (1985); official immunity, *see* Howlett v. Rose, 496 U.S. 356 (1990); Martinez v. California, 444 U.S. 227 (1980); and attorney's fees. *See* Maine v. Thiboutot, 448 U.S. 1 (1980).

110. Aside from the argument that "competing" federal and state forums will be good for § 1983 plaintiffs, Neuborne also asserts that there are good reasons why plaintiffs and the community as a whole would be better served if civil rights cases could be effectively litigated in state rather than federal courts. These include time and monetary savings (Neuborne points out that in his experience 25 % of federal court civil rights litigation is devoted to federalism issues which would not be relevant in state court); that state court judges could more harmoniously check local majorities than could "outsider" federal judges; and that state court judges have more remedies available to them than do federal judges, who are restricted by Article III requirements. *See* Neuborne, *supra* note 4, at 731-32.

111. *See id.* at 770-75. Herman argues that these cases, particularly the ones brought under the Federal Employer's Liability Act, are not analogous to the § 1983 converse-*Erie* problem. *See* Herman, *supra* note 4, at 1107. First, she argues that nationwide uniformity was a central aim of the FELA legislation, so it was logical to apply the same procedure wherever the case was heard. *See id.* Uniformity, on the other hand, has never been an articulated aim of § 1983. Second, Herman argues that the statutory scheme of FELA differs from § 1983 in two ways. Because the FELA statutory scheme gave plaintiffs an absolute choice of forum which § 1983 did not give civil rights plaintiffs, Herman argues that unlike FELA where a defendant was trapped in state court, it makes no sense to force federal procedures on state courts where a defendant can "escape" to federal court if he wishes. *See id.* at 1108. Moreover, Herman sees § 1988 as showing Congressional intent to rely at least on occasion on state law in the § 1983 setting, whereas there was no similar provision in FELA. *See id.*

112. *See* Neuborne, *supra* note 4, at 776-77. Herman disputes Neuborne's claim that the diversity cases are analogous to § 1983 claims being heard in state court. *See* Herman, *supra* note 4, at 1109-13. First, Herman argues that Congress' power to force federal procedure on state courts in the converse-*Erie* analysis is more questionable than Congress' power to subject state law claims to federal procedure when those claims are being heard in federal court. *See id.* at 1111. She also argues that the comity concerns that troubled the federal courts in the *Erie*

to fill gaps in federal court § 1983 litigation.[113] Neuborne concludes that the cross-forum applicability of collateral law in each of these three areas converges into one rule:

> [W]henever the generative jurisdiction enjoys constitutional primacy in a given area of lawmaking, the forum jurisdiction must apply the collateral rule of the generative jurisdiction if it is likely to exert a substantial impact on the preincident behavior of the targets of the cause of action or if it is likely to affect the ability of the beneficiaries of the cause of action to enjoy its full benefit.[114]

Neuborne then proposes that this general rule be applied to the § 1983 converse-*Erie* problem as follows:

> [I]f the application of a collateral rule of the state forum would be *likely to permit* behavior which the section 1983 cause of action was designed to deter . . . the collateral rule of the state forum [must] give way to the collateral rule of the generative jurisdiction. Similarly, if the collateral rule of the state forum is *likely to inhibit* the class of persons who are the intended beneficiaries of section 1983 from enjoying its protection, the forum's rule should be displaced by the more hospitable rule of the generative jurisdiction.[115]

The result of this approach, according to Neuborne, would be "the emergence of a uniform and hospitable body of collateral rules governing the litigation of federal constitutional claims in both state and federal courts."[116]

From the perspective of the § 1983 plaintiff, Neuborne's individual rights approach has much to offer. The individual rights approach would maximize the remedial and deterrence functions of § 1983 by preempting any state collateral laws that would be likely to stand between a § 1983 plaintiff and the vindication of her civil rights. In theory, more plaintiffs would be able to recover under § 1983 because plaintiffs could reap the benefits of state substantive law without being forced to abide by disadvantageous state collateral law.[117] Addition-

cases cut the other way when a federal cause of action is being forced on state courts, that unlike diversity cases the state forum is not disinterested in the § 1983 converse-*Erie* context, and that forcing federal procedure on state courts would have a more drastic effect on state court dockets than the *Erie* rule has had on the federal dockets. *See id.* Finally, Herman argues that the diversity cases are inconsistent with the FELA cases in that while the diversity cases respect the host forum, the FELA cases show a willingness to override host forum rules. *See id.* at 1112. For Herman, this latter point indicates that converse-*Erie* and diversity cases, while "interesting and instructive experiences with similar problems, do not provide any simple answers." *Id.* at 1113.

113. *See* Neuborne, *supra* note 4, at 778-79.

114. *Id.* at 779-80.

115. *Id.* at 780 (emphasis added).

116. *Id.*

117. This may be true, however, in theory only. Since § 1983 defendants have the right to remove cases to federal courts, it is unlikely that a defendant would allow litigation to remain in a state forum that is so plaintiff-friendly.

ally, assuming the validity of Neuborne's observations about the tendency of civil rights lawyers to migrate to a forum with uniform and familiar collateral law, federalism interests would also be served by Neuborne's approach because more civil rights litigation between intrastate parties could take place without resorting to the "outsider" federal courts.[118] A peripheral advantage of each of these considerations is that as more § 1983 cases are litigated in state courts, the burden § 1983 places on overcrowded federal dockets would be eased.

From the states' rights perspective, the individual rights approach is not nearly so preferable. Under Neuborne's approach, state collateral law must give way at the first indication that it would likely affect the ability of § 1983 to compensate or deter. Consequently, it would preclude states from experimenting with their collateral law schemes, shift the balance of power even more toward the federal government compared to the states, and discount the interests—dignitary and otherwise—that states have in controlling their own housekeeping functions.[119]

A more glaring problem with the individual rights approach is the incompatibility between the test Neuborne articulates and the goals he sets out. Consider the case of a state collateral rule that is more generous to a § 1983 plaintiff than the collateral law that would have been applicable in federal court § 1983 litigation. Under Neuborne's test, the law would not be preempted because it would not be likely to permit behavior which § 1983 was designed to deter, and it would not be likely to inhibit plaintiffs from benefitting from the protection of § 1983. However, such a result is at odds with Neuborne's concern that § 1983 litigation is kept out of state court because of uniformity and familiarity principles; civil rights litigators would still have to navigate the collateral law nuances of each state in which they wish to bring § 1983 claims.[120]

It seems, then, that Neuborne's prediction that his test would lead to "the emergence of a uniform and hospitable body of collateral rules

118. According to Neuborne, this would be true even if state substantive law was only equivalent to federal substantive law because attorneys would rather litigate in a forum with which they are most familiar, and most attorneys are more familiar with state than federal forums. *See* Neuborne, *supra* note 4, at 732.

119. *See supra* notes 76-81 and accompanying text.

120. One could argue that this is of little consequence since civil rights litigators accustomed to a uniform set of collateral rules would in all likelihood be able to meet the requirements of a more generous state collateral rule simply by meeting the requirements of the rules to which they are accustomed. While this may be true, unless civil rights litigators became familiar with the nuances of the collateral law of each state, they would be precluded from using generous state collateral law to the advantage of their clients.

governing the litigation of federal constitutional claims in both state and federal courts"[121] is flatly wrong. Neuborne presupposes that federal collateral law is superior to state collateral law,[122] and he thus designs his test to preempt state collateral rules which would inhibit recovery under § 1983. But when it comes to state collateral laws that are more generous to § 1983 plaintiffs than federal collateral law, Neuborne's test, as it stands, cannot provide for both uniformity and maximum hospitality—one or the other must give way. If it is uniformity that is deemed paramount, then Neuborne's approach would lead, at best, to federal collateral law being applicable in all § 1983 litigation, regardless of whether a state collateral rule would be more beneficial to the plaintiff.[123] Ironically, despite Neuborne's dedication to the protection of individual rights, if the uniformity and familiarity principles are to be taken seriously the individual rights approach would put a ceiling on the hospitality available to persons bringing § 1983 claims in state court. If, on the other hand, it is maximum hospitality that is paramount, then the uniformity and familiarity concerns must be sacrificed.[124]

Another criticism of Neuborne's individual rights approach is that while it promotes interstate uniformity of procedure and result, it could at the same time cause a uniformity problem for state courts.[125] For example, if a § 1983 claim was being heard in state court in conjunction with other state claims, and a state had a collateral rule that failed Neuborne's test and thus necessitated preemption, federal collateral law would have to be used for the § 1983 claim but not the state claims. This would leave different collateral law applicable to

121. Neuborne, *supra* note 4, at 780.

122. *See id.* at 735-37.

123. In 1981, when he proposed the individual rights approach, such a result would have pleased Neuborne, who sweepingly observed that federal collateral law is more generous to § 1983 plaintiffs than is state collateral law. *See id.* at 735-47.

124. This would seem to be the better approach because the number of state collateral laws that are more generous to § 1983 plaintiffs—those specific rules that civil rights attorneys accustomed to federal law would have to learn and master—would likely be few in number. Moreover, it is hard to imagine federal civil rights advocates unwilling to learn collateral rules that are favorable to their clients. On the other hand, if uniformity is considered paramount, state court civil rights plaintiffs would be limited to the generosity of the federal collateral rules, even if the state rules were more beneficial to § 1983 plaintiffs.

125. It is important to note that uniformity of procedure and uniformity of result are distinct concerns. This distinction is important in that the *Felder* Court's emphasis on uniformity of result could be accomplished without mandating uniformity of procedure. This could be done by allowing the application of state collateral rules less supportive of the policies of § 1983 than federal rules, so long as those state rules are not outcome-determinative. Neuborne, on the other hand, argues that disparity of procedure should not be allowed because it drives civil rights cases into federal court. *See* Neuborne, *supra* note 4, at 733-37.

different counts within the same case,[126] and could cause confusion by exposing all parties to potentially contradictory legal commands.[127]

While it is doubtful that such a plaintiff-friendly approach would be adopted by the current Supreme Court, Neuborne's individual rights approach nonetheless informs the converse-*Erie* analysis by providing the rationale for drawing the line of preemption very near the federal collateral law midpoint. Because of his concern for the ability of plaintiffs to recover under § 1983, Neuborne would allow a state collateral rule that is disadvantageous to § 1983 plaintiffs to deviate very little before preempting that rule in favor of the federal collateral rule.

C. *The Balancing-of-Interests Approach*

While Hart and Neuborne approach the § 1983 converse-*Erie* problem from diametrically opposite perspectives—Hart focusing exclusively on state autonomy and Neuborne focusing solely on the § 1983 right of recovery—Professor Susan Herman has proposed an approach that purports to steer a path between the Hart and Neuborne positions.[128] Rather than abide by one rule of general applicability, Herman's "balancing-of-interests" approach would weigh the pertinent federal and state interests on a case-by-case basis to decide whether a specific state collateral law should be preempted or applied in § 1983 state court litigation.

A discussion of this balancing-of-interests approach must begin by identifying the interests to be balanced. For Herman, the only federal interest at stake in the § 1983 converse-*Erie* context is preventing the states from applying collateral law that would defeat the § 1983 right to recovery.[129] She chooses this narrower formulation over a more broadly defined federal interest in compelling state courts to apply federal collateral law that would enhance the ability to recover

126. Herman describes the problem as follows: "Borrowing federal procedure on one out of two or three claims in a case might lead to a situation in which the federal claim is entitled to class action treatment, or a jury trial, and the state claims are not. Must there be two trials, or might the plaintiff get a jury trial on a state law issue simply because section 1983 was invoked in the complaint?" Herman, *supra* note 4, at 1099. For one way the Supreme Court might handle this issue, see *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), which held that where a federal and state law claim are being heard in a state court, the statute of limitations applicable to the federal claim should also govern the state claim so as to maximize the federal right.

127. A comment by Hart is relevant here: "People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions . . . could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown." Hart, *supra* note 71, at 489.

128. *See generally* Herman, *supra* note 4.

129. *See id.* at 1094-95. This narrow formulation also reflects Herman's belief that deterrence—not compensation—is the paramount goal of § 1983. *See id.* at 1095.

under § 1983.[130] Herman chooses the more modest formulation because of Congressional silence regarding § 1983 state court litigation,[131] and because the modest definition of the federal interest allows for accommodation of state interests and the basic tenets of federalism.[132]

Also significant is Herman's conclusion that uniformity of result between federal and state § 1983 litigation need not be weighed on the federal side of the scale. Herman argues that disparate outcomes resulting from a neutral state collateral law that happens to disadvantage § 1983 plaintiffs should be of no concern in the § 1983 converse-*Erie* context.[133] While Herman would preempt state justiciability doctrines that tend to keep plaintiffs out of court,[134] Herman lists several reasons why a single-minded reverence for federal-state uniformity is unwarranted. First, preempting state collateral law to promote uniformity in a state court § 1983 claim could result in disparity of procedure between the § 1983 claim and other claims at issue in the same suit.[135] Second, uniformity would not lead to enhanced deterrence because no matter how antiplaintiff state collateral law is, § 1983 plaintiffs always have the prerogative to file suit in federal court.[136] Next, Herman takes issue with the *Felder* court's argument that collateral law unfavorable to plaintiffs will disserve federalism interests by keeping plaintiffs out of state courts. She counters that since state collateral law favorable to plaintiffs may tempt plaintiffs as well as repel them, forced uniformity could disserve federalism interests by disallowing state legislatures from attracting § 1983 plaintiffs with plaintiff-friendly collateral law.[137] Finally, Herman argues that fear of forum-shopping is no reason to force uniformity since forums "competing" to attract § 1983 plaintiffs may enable plaintiffs a better opportunity to vindicate their civil rights.[138]

130. *See id.*

131. Herman is unabashedly critical of the Supreme Court's "psychic divining" of Congressional intent regarding § 1983 state court litigation. *See id.* at 1091.

132. *See id.* at 1094-95.

133. *See generally id.* at 1098-1104.

134. *See id.* at 1098, 1114, 1123-24. Thus, even for Herman, *Felder v. Casey* is an easy case if one sees the Wisconsin notice-of-claim statute as tending to keep plaintiffs of court.

135. *See id.* at 1099.

136. *See id.*

137. *See id.* at 1100. This argument loses weight, however, if only state collateral laws that disadvantage plaintiffs are preempted while collateral laws that advantage plaintiffs are applicable.

138. *See id.* at 1100-02. Herman adds that forum-shopping cannot be completely eliminated in any concurrent jurisdiction scheme. *See id.* at 1101.

As for the state interests to be weighed, Herman argues that states have a number of legitimate and cognizable interests in following their own procedural schemes.

> These interests include the state court's interest in following its own rules because those rules are familiar, because they are the rules possibly being applied to other claims in the same case and, therefore, will promote efficient litigation, because the rules may be well adapted to that particular state or court, and because of the dignitary interest the states have in making their own procedural decisions.[139]

Herman does not, however, include among the legitimate state interests the protection of state actors from § 1983 liability.[140]

For the purpose of illustrating how the balance-of-interests approach might come out in specific cases, Herman then divides potential § 1983 converse-*Erie* problems into four categories:[141] (1) state justiciability doctrine less restrictive than federal justiciability doctrine; (2) state justiciability doctrine more restrictive than federal justiciability doctrine; (3) state procedure more favorable to plaintiffs than federal procedure; and (4) state procedure less favorable to plaintiffs than federal procedure.[142] Categories one and three would be relatively easy cases for Herman since both federal and state interests would be served by applying the state collateral law.[143] Category two cases are also easy for Herman: these restrictive state justiciability doctrines must be preempted because they are invariably outcome-determinative and thus are inconsistent with § 1983.[144]

As for category four,[145] Herman argues the balancing-of-interests approach would dictate that

> [i]f a procedure cannot be characterized as advantaging or disadvantaging plaintiffs, outside the context of a particular case, the state should not be prohibited from using its own neutral rules. If a

139. *Id.* at 1097.

140. *See id.* at 1096-98.

141. Herman also discusses state collateral law that is more favorable to § 1983 plaintiffs than the substantive law of § 1983. *See id.* at 1118-20. Though she predicts that the Supreme Court would likely preempt such laws under the Supremacy Clause, she proposes two ways that these laws could be allowed to stand: (1) the Supreme Court could cut back on the substantive law of § 1983 it creates, and thus leave room for the states to be more generous with their collateral law; or (2) the Court could adopt the admittedly radical approach of allowing states to use collateral law more favorable to plaintiffs even if that law conflicts with the settled substantive law of § 1983. *See id.* at 1119-20.

142. *See id.* at 1063.

143. *See id.* at 1116, 1130-31.

144. *See id.* at 1124.

145. The § 1983 converse-*Erie* problems Herman places in category four are those at issue in this Note, specifically state collateral law that is less favorable to plaintiffs than that available in federal court, but is not so disadvantageous as to be characterized as outcome-determinative.

> rule might be thought to be disadvantageous to plaintiffs, that does not end the inquiry into whether the state may be permitted to use its own procedure, but is the beginning of a process of analysis and balancing.
>
> My balance of the relevant interests maintains a presumption in favor of state court procedures . . . that is overcome only if the procedure is inherently hostile to section 1983 plaintiffs.[146]

Herman does not specifically define "inherently hostile," although she points out that "a procedure that is generally and predictably adverse to plaintiffs might be impermissible."[147] Additional guidance is provided by Herman's analysis of strict state pleading rules, which she concludes are not inherently inconsistent with the policies of § 1983 because they can be overcome by competent counsel.[148] Apparently, Herman's "inherently hostile" standard would preempt more state collateral law than Hart's "nullification of the federal right" standard, but judging from her discussion of strict pleading rules she would draw the line in the same vicinity.[149] Herman envisions this deference to the state collateral law as a quid pro quo for state generosity in categories one and three:

> [I]f a state procedure is neutral, not inconsistent with the goals of section 1983 and serves a strong enough legitimate state interest that the state courts wish to insist on its application, allowing the state courts to apply a procedure plaintiffs might dislike may be simply the other side of the coin of allowing state court generosity.[150]

Because Herman's balancing-of-interests approach admittedly would lead to results similar to Hart's plaintiff's choice approach, it shares many of the same strengths and criticisms that were made about that approach in Part III.A. One significant achievement of the balancing-of-interesting approach is that it, unlike Hart or Neuborne's approaches, considers both the valid federal and state interests at stake. As such, it more accurately reflects the complexity of the converse-*Erie* issue, which cannot—and should not—be a "winner-take-all" approach where either the state or federal interest wins out without first considering the interests of the other. Rather, as Herman suggests, competing considerations must be taken into account.

146. Herman, *supra* note 4, at 1133.

147. *Id.* at 1131.

148. *See id.* at 1132-33. Herman also concludes that pleading rules regarding relation back of amendments and the commencement of a suit are not inherently hostile to § 1983 plaintiffs because both plaintiffs and defendants could be disadvantaged by the rules. *See id.* at 1131-32.

149. *See id.* at 1131-34.

150. *Id.* at 1114. Herman's use of the phrase "not inconsistent" is perplexing in that elsewhere in the article she seemingly would apply state collateral rules that are somewhat inconsistent with the policies of § 1983 so long as it is not "inherently hostile."

But while Herman purports to balance federal and state interests, her narrow conceptualization of the federal interest at stake predetermines the outcome of the "balancing" in favor of the application of the state collateral law. By defining the federal interest as preventing states from applying collateral rules that defeat the § 1983 right to recovery, and then asserting that the state interest in applying its own collateral scheme is legitimate, Herman rigs the scale so that the state interest in applying its own collateral rules will, except when the state rule will defeat the § 1983 right, outweigh the federal interest. This is so because she defines the federal interest in the negative; it only has weight when another condition, here a state collateral law that threatens to defeat the § 1983 right, exists.[151] Consequently, Herman's approach is akin to categorical balancing, not balancing on a case-by-case basis as she claims, because the determinative inquiry is whether a state collateral law will defeat the § 1983 right of recovery.[152] If the answer is no, the state collateral law is applicable. If the answer is yes, the state collateral rule is preempted. As such, the balancing-of-interests approach is little more than Hart's plaintiff's choice approach dressed up as a balancing test—the outcome depends only on whether the federal right will be defeated.[153]

151. For Herman, a law that will defeat the federal right of recovery is one that is "inherently hostile" to § 1983. *See id.* at 1133.

152. An analogy may be helpful. Suppose a parent must decide whether a particular item of food should be fed to her child. The decision will depend on how the parent defines the interests involved. At the most basic level, a parent might believe it is appropriate to feed the food to the child unless it will somehow cause the child harm, irrespective of whether the food is nutritionally good for the child, etc. Thus, the parent's decision depends on a determination of whether the food will cause harm to the child. The same result could be expressed as a categorical balancing test in which the parent weighs the child's interest in gratifying an immediate craving to eat against the parent's interest in not having the child eat food that will harm the child. In any given case, the outcome depends on the parent's determination whether or not the food will harm the child. If it will, the child does not eat the food.

Suppose another parent defines the parental interest as ensuring that the child gets the proper amount of carbohydrates, calcium, calories, fat, etc. In such a case, the balancing must be done on a case-by-case basis, analyzing the particular food in question. The existence of a single condition does not control because the nutritional value of the food must be weighed against the child's immediate craving for it.

The difference between the two hypotheticals is that in the first the parental interest is defined in the negative, and thus depends on the existence of the condition that the parent does not want to happen. In the second, the parental interest is defined positively, and so in any given case there will be some parental interest to weigh.

Herman's balancing-of-interests approach, which defines the government interest as preventing states from applying collateral rules that defeat the policies of § 1983, is thus categorical because the outcome depends not on weighing on a case-by-case basis, but rather on the existence of a condition, specifically the existence of a state collateral rule that defeats the § 1983 right.

153. To Herman's credit she seems to be willing to use a more liberal standard of the definition of "defeating" a federal right—"inherently hostile"—compared to Hart's virtually unreachable "nullification of the right" standard.

Another weakness of the balancing-of-interests approach is the vagueness and subjectivity of the "inherently hostile" standard. Unlike Hart or Neuborne, who are quite clear about where lines should be drawn, Herman's "inherently hostile" standard does not provide meaningful guidance to state court judges faced with a § 1983 converse-*Erie* question.[154] Judges would still face the difficult decision of whether a particular law is "inherently hostile" to the policies of § 1983. While Herman's balancing-of-interests approach is arguably sound in the abstract—even if it is underconsiderate of the federal interest—it would not provide judges sitting in a courtroom with an easy-to-use tool for making difficult collateral law decisions.[155]

Unlike either Hart or Neuborne, it is difficult to abstractly place Herman's balancing-of-interests approach on the post-*Felder* continuum because of her vague "inherently hostile" standard. Nonetheless, given Herman's disregard of uniformity of result, Herman would likely place the line of preemption somewhere further away from the collateral law midpoint than "outcome-determinative," yet not as far as Hart's "nullification of the federal right" point.

D. An Alternative Approach Based on Felder v. Casey

Although *Felder* did not explicitly articulate a standard for handling the core of the converse-*Erie* problem—state collateral rules that are less supportive of § 1983 plaintiffs than federal collateral law, yet are not outcome-determinative—the Court's reasoning provides the basis for an alternative approach to those suggested by Hart, Neuborne, and Herman. This approach starts with the presumption that the state collateral law should be applicable in state court § 1983 actions, absent some reason for preemption.[156] The threshold factor in this approach is whether the state collateral law in question is more or less supportive of the remedial and deterrence policies of § 1983

154. Herman realizes this as well: "I have no easy answers, for these are not easy issues. In fact, many of my conclusions render these choice of law decisions more difficult than they might otherwise be." Herman, *supra* note 4, at 1063.

155. Consider Herman's conclusion that "states should be permitted to use their own neutral procedures so long as those procedures are not so inconsistent with the purposes of section 1983 as to warrant judicial exercise of the supremacy clause, regardless of whether those procedures are more or less generous to plaintiffs than federal procedure would have been," *id.* at 1094, which is more a restatement of the problem being discussed than it is a tool for making decisions.

156. "No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own Courts. By the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" Felder v. Casey, 487 U.S. 131, 138 (1988) (quoting Brown v. Western Ry. of Ala., 338 U.S. 294, 296 (1949)).

than federal collateral law. If the state collateral law is more generous to § 1983 plaintiffs, the state law should be applied.[157] Herman's reasoning in this area is persuasive: uniformity aside, there is no reason *not* to allow states courts that are willing to make it easier for plaintiffs to litigate their § 1983 claims to apply their own favorable collateral laws.[158] This is a point on which Hart, Neuborne, and Herman would likely agree, albeit for different reasons.[159]

If, however, a state collateral law differs from the federal collateral law in a way that is less supportive of the compensation and deterrence policies of § 1983—that is, it makes it more difficult for § 1983 plaintiffs to recover—the next inquiry is whether the state collateral law alone frequently and predictably would cause a plaintiff to lose in state court when that plaintiff would have been successful in federal court.[160] If so, the law should be preempted because state courts, who are prevented by the Supremacy Clause from directly defeating federal rights, should not be able to use collateral rules to indirectly defeat the same federal rights.[161] Herman's conclusion that some disparity of result must be tolerated out of respect for neutral[162] state collateral rules misplaces the focus of the analysis on what the state did or did not do rather than on the right of recovery guaranteed under § 1983. Section 1983 was enacted because "neutral" state courts were able to vindicate citizens' civil rights in theory but not in

157. The *Felder* Court had no occasion to reach this issue because the Wisconsin notice-of-claim statute was clearly disadvantageous to § 1983 plaintiffs.

158. *See* Herman, *supra* note 4, at 1115-18, 1130-31. In fact, there is much to the argument that states should be encouraged to provide a more favorable forum for § 1983 litigation than that available in the federal courts. This is true both from the standpoint of federalism and the compensation and deterrence policies of § 1983: states would take care of internal problems internally, and the remedial and deterrence policies of § 1983 would be carried out to their fullest.

159. Hart and Herman would agree because the state interest in following its own collateral law is being served. Neuborne would also agree, but because individual rights are being protected. It should be noted, however, that the application of a state collateral law more favorable to plaintiffs would wreak havoc on Neuborne's uniformity and familiarity principles. *See supra* notes 105-127 and accompanying text.

160. Stated in terms of the continuum, does the state collateral rule deviate so far from the federal collateral rule that it will cause the litigation to come out differently?

161. Underlying the *Felder* decision and the FELA decisions is a valid concern that if cases turn out differently in different fora, it should be solely because of the merits of the cases, not because of the intricacies of the forum. As such, it does not matter whether the different outcome is the secondary effect of an otherwise neutral state rule, or the actual purpose of the collateral rule. If one accepts the argument that the federal court result is the "correct" result, *see supra* notes 14, 62 and accompanying text, then there is *no* reason to allow a state collateral rule to frequently and predictably reach a different result.

162. Herman would presumably preempt nonneutral state collateral rules that directly discriminate against the § 1983 cause of action. *See* Herman, *supra* note 4, at 1114.

practice.[163] Congress thus created a fair federal forum in which citizens could bring civil rights claims without fear of explicit or implicit bias, and where the "correct" result thus could be reached. It must be assumed, then, that the result reached in § 1983 litigation in federal courts is the "correct" result.[164] For state courts to frequently and predictably reach a different result because of a state collateral rule—even an ostensibly neutral rule—harkens the days when vindication of civil rights was available in state courts in theory but not in practice. Just as this necessitated the creation of a federal forum in 1871, today it necessitates the preemption of any state collateral law that frequently and predictably causes a different result from that which would have been reached in federal § 1983 litigation.

Felder went even further, though, and suggested that inconsistency with the remedial and deterrence policies of § 1983 that does not reach the level of outcome-determination may also mandate preemption.[165] Three factors guided the *Felder* Court in its analysis: the Wisconsin legislature's purpose in enacting the notice-of-claim provision,[166] the provision's facial discrimination against § 1983 plaintiffs,[167] and the provision's functioning as an improper exhaustion requirement.[168]

The *Felder* Court found that the Wisconsin legislature's purpose in enacting the notice-of-claim provision was to control the § 1983 liability of its actors.[169] This was evident, the Court concluded, because the very design of the provision primarily benefitted governmental defendants by facilitating early investigation of claims, the preparation of a stronger case, and early settlement.[170] Although Congress had elected to expose state actors for liability for civil rights violations, the Court found that the notice-of-claim provision was an attempt by the Wisconsin legislature to override Congressional intent.[171] However, the *Felder* Court did not preempt the Wisconsin provision solely because it burdened a federal right of recovery, but instead because the Wisconsin legislature's purpose was to burden the federal right in or-

163. *See* Monroe v. Pape, 365 U.S. 167, 174-80 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).
164. *See supra* note 14.
165. Felder v. Casey, 487 U.S. 131, 141-42 (1988).
166. *Id.* at 142-45.
167. *Id.* at 145-46.
168. *Id.* at 146-50.
169. *Id.* at 142.
170. *See id.*
171. *See id.* at 143. It is noteworthy that the Court inquired into actual, rather than stated, purpose.

der to reduce the liability of state and local governments.[172] The Court hinted that had the additional burden placed on § 1983 plaintiffs bringing suit in Wisconsin courts been the peripheral result of a legitimate procedural scheme, the burden may not have triggered preemption.[173] The standard being applied in *Felder* seems to be that if the actual purpose of a state collateral law is to eviscerate the remedial and deterrence policies of § 1983, then the law must be preempted.

The *Felder* majority also relied on its conclusion that the Wisconsin notice-of-claim provision facially discriminated against § 1983 plaintiffs. The Wisconsin statute was only applicable to plaintiffs wishing to sue state governmental defendants, the very group that § 1983 was designed to protect. On its face, the Wisconsin provision treats § 1983 claims against state and local government officials differently from other claims. Furthermore, the notice-of-claim provision, on its face, discriminates against § 1983 plaintiffs by conferring a benefit on § 1983 defendants (i.e., early notice to aid in the preparation of a case and, potentially, prompt settlement) and placing a burden on § 1983 plaintiffs (i.e., a relatively short period in which to begin the litigation process, and the effort required to comply with the statute). This facial discrimination alone would have triggered preemption, even if the Wisconsin legislature had a permissible motive in enacting the rule.[174] The standard that can be extracted from *Felder* in this regard is that if a state collateral rule on its faces discriminates against § 1983 plaintiffs,[175] it is impermissibly inconsistent with the policies of § 1983 and must be preempted.[176]

Lastly, the *Felder* Court based its preemption on the fact that, when applied, the Wisconsin notice-of-claim statute served as an exhaustion requirement that was inconsistent with the remedial and deterrence purposes of § 1983.[177] Setting aside the fact that the

172. *Id.* at 144-45.

173. "This burdening of a federal right[ ] is not the natural or permissible consequence of an otherwise neutral, uniformly applicable rule." *Id.* at 144.

174. It is unlikely, however, that any statute that on its face specifically discriminates against § 1983 plaintiffs could have a permissible purpose.

175. A statute that on its face confers a benefit to § 1983 plaintiffs should be applied as usual. *See supra* note 55-57 and accompanying text. Rather, only state rules that on their face adversely affect § 1983 plaintiffs should be preempted.

176. For analytical purposes, the facial discrimination inquiry will generally inform the purpose inquiry. That is, if the statute on its face adversely affects § 1983 plaintiffs, then in most cases an impermissible purpose will also be present.

177. *Id.* at 146-47. Because the Court envisioned the notice-of-claim statute as an exhaustion requirement, and because the Court in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), had ruled that § 1983 plaintiffs need not exhaust state administrative remedies before bringing a § 1983

Wisconsin provision failed the first two prongs of the inconsistency analysis, *Felder* seems to indicate that even if a state has a legitimate purpose for enacting a collateral rule, and even if that rule does not facially discriminate against § 1983 plaintiffs, the rule could be preempted as inconsistent with the remedial and deterrence policies of § 1983.[178] The Court does not explicitly articulate how it reached its decision that notice-of-claim provision was inconsistent with the policies of § 1983.[179] However, underlying its decision may have been a balancing of interests in which the Court considered what the state hoped to achieve from applying the collateral rule against the burden that rule placed on the § 1983 right of recovery. This balancing was easy—and perhaps even unnecessary[180]—in regard to the Wisconsin statute, which the Court concluded had an impermissible purpose and therefore could not hope to achieve any permissible benefits. In other cases, however, a balancing test will weigh the state interests against the collateral rule's effect on the policies of § 1983 in making the decision whether to apply or preempt the state collateral rule. On the state side, the factors to be considered are what legitimate ends the provision will serve, and what effect preempting the state rule and applying a federal rule will serve.[181] Against these state interests, courts must weigh the effect the rule will have on the remedial and deterrence policies of § 1983. For example, if a state collateral rule exists only because it is the rule that the state courts are familiar with, yet that rule will substantially hinder a § 1983 plaintiff, the rule should be preempted. On the other hand, if the state has a legitimate purpose for enacting a rule, and the rule only tangentially and marginally affects the § 1983 cause of action, it should be applied.

The *Felder* approach to the converse-*Erie* problem has some significant advantages over the other approaches advanced by Hart,

claim in federal court, it was easy for the *Felder* Court to find that an exhaustion rule was inconsistent with the policies of § 1983. One could even argue that *Felder* could have been decided on the basis that the *Patsy* prohibition against exhaustion of administrative remedies was part of the substantive law of § 1983 and thus applicable in state court § 1983 litigation. This approach would have avoided the converse-*Erie* problem entirely. Regardless, after *Felder* it seems clear that the *Patsy* exhaustion rule controls in both federal and state court.

178. Of course, one could also read *Felder* more narrowly as holding that the effect of the Wisconsin statute naturally flowed from its impermissible purpose and facial discrimination, rendering the "in effect" analysis dicta.

179. This is likely so because the exhaustion function of the provision had previously been found to be inconsistent with the substantive law of § 1983.

180. If the provision fails the purpose analysis, then there is no need to go on to the balancing test because the benefits the state hopes to achieve are impermissible and the federal interest will always weighs more.

181. The former consideration reflects the state's policy-making and dignitary interests, while the latter administrative consideration reflects the state's housekeeping interests.

Neuborne, and Herman. First, it is the only approach that truly takes into consideration the federal and state interests. Unlike Neuborne, the *Felder* approach considers that the states do indeed have a legitimate interest in enacting and pursuing their own collateral laws. But unlike Hart and Herman, it also takes into account the weighty federal interest in ensuring that the remedial and deterrence policies of § 1983 are carried out without being negated—directly or indirectly—by state collateral rules. Although the ultimate decision to apply or preempt will serve either the state or federal interest more than the other, the process through which the decision was made fully considers all the interests involved.

Second, the *Felder* approach's systematic analysis of the converse-*Erie* problem is both easy to administer and flexible. Hart's plaintiff's choice approach and Neuborne's individual rights approach are both undeniably easy to administer, but they are so only because they draw extreme, all-or-nothing lines. Conversely, Herman sacrifices ease of administration with the flexibility of the "inherently hostile" standard, with judges given so little guidance that the test becomes difficult to administer.[182] The *Felder* approach, on the other hand, provides both guidance and flexibility. It systematically removes the state collateral rules that should per se be applied[183] or preempted[184] to focus on the state collateral rules that are less generous to the policies of § 1983 than the federal collateral rules yet do not deviate so far as to be outcome-determinative. It then enables the court to balance the relevant interests involved to determine which of these rules necessitate preemption.

The *Felder* approach puts the preemption line on the converse-*Erie* continuum somewhere between the federal collateral law midpoint and the point of outcome-determination, with the precise location of the line dependent on a balance of the state and federal interests involved. It allows a state to employ collateral rules that deviate so long as it has a legitimate reason for doing so and the state's reason is not outweighed by the effect the rule will have on the policies of § 1983.

182. *See infra* note 212 and accompanying text.

183. This includes any state rule that is more generous to the policies of § 1983 than federal collateral law.

184. This includes all state collateral rules that are outcome-determinative on the side of frequently and predictably causing the § 1983 plaintiff to lose in state court when she would have won in federal court.

IV. APPLYING THE CONVERSE-*ERIE* APPROACHES TO REAL-WORLD PROBLEMS

While it is worthwhile to discuss the various approaches to the converse-*Erie* problem in the abstract, it is also important to analyze how these approaches would function in the courtroom. This Part discusses how each of the approaches discussed in Part III would be applied to a recent Colorado Supreme Court case which raised the converse-*Erie* question in the § 1983 context.[185]

A. Boulder Valley School District v. Price

In *Boulder Valley School District R-2 v. Price*,[186] the Colorado Supreme Court grappled with Colorado's standard of proof requirement for punitive damages in § 1983 litigation. The plaintiff in *Boulder Valley*, Gary Price, was a tenured teacher in the defendant school district, who, after eight years of performing satisfactorily as a teacher, encountered personal problems that affected his work.[187] Price eventually had a conference with his principal, during which the two discussed the requirements of Price's job and the possibility of disciplinary action if Price's work performance did not improve.[188] The principal summarized the conference in a memo to Price, to which Price responded with a letter in which he expressed thoughts about leaving teaching.[189] A week later, the principal entered Price's classroom on two occasions, placed a typewritten letter of resignation on Price's desk, discussed with Price the possibility of Price's resignation, and told Price that if he did not sign the letter, there would be a disciplinary hearing.[190] Price ultimately signed the letter of resignation, and the defendant district accepted it.[191]

Price subsequently brought a § 1983 action against the principal and the school district, alleging that he had been constructively discharged without a hearing in violation of his due process rights.[192]

185. For purposes of this Note, I assume that the Colorado statute at issue does not conflict with the substantive law of § 1983, and is thus not automatically preempted. This is a point as to which the Boulder Valley majority and the dissenting Justice Lohr differ. At least one commentator has concluded that *Boulder Valley* was wrongly decided because there is a direct conflict between the Colorado statute and the substantive law of § 1983. *See* NAHMOD, *supra* note 25, at 54.

186. 805 P.2d 1085 (Colo. 1991).

187. *Id.* at 1087.

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.*

The case was tried before a jury, which was instructed that it could award punitive damages against the principal if it found "beyond a reasonable doubt" that the principal had acted in reckless disregard of Price's rights.[193] The jury returned verdicts against the school district in the amount of $60,000, and against the principal but without any monetary damages.[194] No punitive damages were awarded.[195] The trial court then entered a judgement notwithstanding the verdict ("JNOV") for the district and the principal.[196] The appeals court reversed the trial court's JNOV, and ordered a new trial on the issue of punitive damages, with a "preponderance of the evidence" standard to be used at the new trial.[197]

The Colorado Supreme Court affirmed the appellate court on the JNOV issue, but reversed as to the standard of proof for punitive damages.[198] The court first held that *Smith v. Wade*,[199] a Supreme Court § 1983 punitive damages case, was not controlling.[200] It concluded that *Smith v. Wade* merely stood for the proposition that a finding of reckless disregard merited the award of punitive damages in a § 1983 action. Since *Smith* did not address the burden of proof required, it did not foreclose the possibility that states could require a higher standard of proof for a finding of reckless disregard than the "preponderance of the evidence" standard that governs federal civil litigation.[201]

Consequently, the Colorado Supreme Court turned to § 1988's three-step process for determining whether Colorado state law should be used to fill the deficiency in the federal law.[202] The Court found no federal statute or federal common law governing the burden of proof

193. *See id.*
194. *See id.*
195. *See id.*
196. *See id.*
197. *See* Price v. Boulder Valley Sch. Dist., 782 P.2d 821 (Colo. Ct. App. 1989).
198. *See Boulder Valley*, 805 P.2d at 1094.
199. 461 U.S. 30 (1983).
200. *See Boulder Valley*, 805 P.2d at 1089.
201. *See id.*
202. This process was outlined in *Wilson v. Garcia* and was quoted by the Colorado Supreme Court in *Boulder Valley*, *id.* at 1089:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." [42 U.S. § 1988] If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. *Id.* A third step assets the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." *Id.*

Wilson v. Garcia, 471 U.S. 261, 267 (1985) (quoting Burnett v. Grattan, 468 U.S. 42, 47-48 (1984)).

for punitive damages,[203] so it then looked at its state law and found a Colorado statute[204] mandating that the burden of proof for a finding of punitive damages in civil actions is "beyond a reasonable doubt."[205] The Court then reasoned that the statute was not inconsistent with the deterrence purpose of § 1983 because state actors run the risk of facing a § 1983 action in federal court and always have the removal option at their disposal, so they act the with federal "preponderance of the evidence" standard in mind regardless of whether a state standard of proof is higher or lower.[206] Thus, the court concluded that a "beyond a reasonable doubt" standard of proof in the state court would not lower the deterrent effect of § 1983, and therefore was not inconsistent with the policies of § 1983.[207] The majority opinion did not cite *Felder v. Casey*, presumably because it saw the issue not as one of preemption but rather as one of deficiency where the application of § 1988 was necessary.[208]

A dissent by Justice Lohr argued that the a "preponderance of the evidence" standard should be used in all state court § 1983 determinations of punitive damages because of the need for uniformity among the states, and because the standard of proof for punitive damages is embodied in federal common law.[209] Alternatively, Justice Lohr argued that even if the federal law is deficient as to the standard

203. *See Boulder Valley*, 805 P.2d at 1089-90. At least one commentator has argued that *Smith v. Wade* established the burden of proof for punitive damages as preponderance of the evidence. *See* NAHMOD, *supra* note 25, at 54.

204. *See* COLO. REV. STAT. § 13-25-127(2) (1987).

205. *See Boulder Valley*, 805 P.2d at 1090-91.

206. *See id.* at 1091.

207. *See id.*

208. The analysis is the same whether the issue is preemption or deficiency. *See* STEINGLASS, *supra* note 15, § 10.5 at 10-14 to 10-16. Preemption under the Supremacy Clause is required when state law—whether substantive or collateral—conflicts with the substantive law of § 1983 or is inconsistent with the purposes or policies of § 1983. When federal substantive law is deficient, a § 1988 analysis ultimately rests on whether the state gap-filling law is consistent with the purposes of § 1983. Thus, in either case, inconsistency with the purposes of § 1983 is the focus of the analysis.

Since § 1988 is directed at filling gaps in federal law, it would seem more appropriate to see the issue here as preemption rather than § 1988 gap-filling.

209. *See Boulder Valley*, 805 P.2d at 1094-96 (Lohr, J., concurring in part and dissenting in part). Justice Lohr makes a compelling argument that a uniform rule is necessary in the punitive damages context. He reasons that because some states do not generally allow punitive damages, but must allow punitive damages under § 1983, a uniform rule must be established for use in those states. *See id.* at 1095. That uniform "preponderance of the evidence" standard should then be used by all state courts in § 1983 actions. *See id.* at 1099.

of proof for punitive damages, a "beyond a reasonable doubt" standard is incompatible with the purposes and policies of § 1983.[210]

B. Boulder Valley *in Light of the Proposed Approaches*

Boulder Valley puts the converse-*Erie* issue squarely on the table. On one hand, Colorado's stringent "beyond a reasonable doubt" standard of proof for punitive damages undeniably makes it more difficult for a § 1983 plaintiff to recover punitive damages than it would be if he had brought the case in federal court, where a preponderance of the evidence standard governs. At the same time, Colorado has an interest in applying the "beyond a reasonable doubt" standard that its legislature has decided should govern all punitive damages claims brought in Colorado courts. *Boulder Valley* thus provides a vehicle for considering how well each of the approaches to the converse-*Erie* problem would function in addressing an actual fact pattern.[211] In addition to the various factors previously discussed, this analysis also considers the ease a state court judge would have in applying the suggested test, both at a practical and at a philosophical level.[212]

1. The Plaintiff's Choice Approach

Hart would have an easy time with the § 1983 converse-*Erie* issue that arises in *Boulder Valley*. His two preconditions are clearly met: Price could have elected to bring his § 1983 claim in a fair, federal forum and the Colorado statute does not nullify the § 1983 right to recovery, but merely makes it more difficult to recover punitive damages. Therefore, Hart would look to the general rule that "federal law takes state courts as it finds them," and apply the heightened standard

210. *See id.* at 1096-98. Justice Lohr argues that the purpose of the Colorado statute was to limit purely punitive damage awards in civil cases, and this purpose is in direct conflict with § 1983's deterrence policy. *See id.* at 1097-98.

211. The Colorado punitive damages rule poses a significantly more difficult converse-*Erie* problem than the Wisconsin notice-of-claim provision. While the notice-of-claim provision was outcome-determinative and could keep plaintiffs out of court without an opportunity to recover at all, the Colorado rule only affects the ability of § 1983 plaintiffs to recover punitive damages; compensatory damages are not affected. Moreover, the Wisconsin rule on its face discriminated against § 1983 plaintiffs by only being applicable in suits against state and local government officials. The Colorado rule, on the other hand, is applicable to all civil plaintiffs.

212. Analysis at the "practical level" means the ease or difficulty a state court judge would have in making a decision based on the various approaches. Analysis at the "philosophical level" means how accepting a state court judge would be in reaching the decision suggested by the approaches. While one could argue that how receptive a judge is to a particular decision is not relevant, it is relevant in that a test that is philosophically disdained by a judge is not likely to be administered fairly or accurately.

of proof. The negative ramifications for Price[213] would not matter to Hart, who would reason that because Price chose to litigate his § 1983 claim in the Colorado courts, there must be some advantage Price hoped to derive from bringing his claim there rather than federal court. According to Hart, it therefore would defy both common sense and the federal system to allow Price to have the advantages of both fora.

From the perspective of the state court judge, it would not be difficult, either practically or philosophically, to apply the plaintiff's choice approach to the *Boulder Valley* fact pattern. At the practical level, the decision would be easy because Hart's lines are unmistakably clear: given that the federal courts are always there for § 1983 plaintiffs, the state rule applies unless it nullifies the right of recovery completely. At the philosophical level, it seems intuitive that a state court judge would prefer to apply a rule that expresses the will of the people of the state rather than reaching the countermajoritarian conclusion that the state rule must be preempted in favor of the policies of § 1983.[214]

Of course, this decision would—and the Colorado Supreme Court's decision likely does—disserve the policies of § 1983. If punitive damages have a deterrent effect not only because of their applicability in a specific situation but also because they exist generally,[215] denying Price punitive damages because he failed to meet the beyond the reasonable doubt standard would erode, at least to some degree, the deterrent effects of § 1983.[216]

2. The Individual Rights Approach

Boulder Valley would be as easy a case for Neuborne as it would be for Hart, but Neuborne would reach the opposite result. Even assuming that the Colorado statute would not be likely to inhibit § 1983's remedial function, a strong argument can be made that the Colorado statute "would be likely to permit behavior which the § 1983

213. The result under the plaintiff's choice approach would be the same as that reached by the Colorado Supreme Court: the "beyond a reasonable doubt" standard would apply, the jury's finding that Price did not meet that standard would stand, and Price would not recover punitive damages.

214. This is not an unimportant consideration, especially when one considers that state court judges are typically elected, and thus must answer to the voters on a periodic basis.

215. *See infra* note 218.

216. Of course, it may not have been the higher standard of proof that kept the jury from awarding punitive damages. For instance, the jury may not have found that the Price proved that the principal acted in reckless disregard of his due process rights even if the standard of proof was preponderance of the evidence.

cause of action was designed to deter"[217] because plaintiffs would have more difficulty meeting the "beyond a reasonable doubt" requirement for punitive damages and would consequently be awarded punitive damages in fewer cases.[218] Under Neuborne's test, the more hospitable "preponderance of the evidence" standard of the federal generative jurisdiction would then be applicable in § 1983 litigation in Colorado courts. For Price, this would mean another opportunity to prove to a jury that punitive damages are warranted under a preponderance of the evidence standard.

While this might lead to a result more favorable to the protection of individual rights, it would certainly serve Neuborne's other goals of providing a uniform and familiar set of collateral rules to govern all § 1983 litigation.[219] According to Neuborne, this would also serve federalism interests because Colorado § 1983 plaintiffs would have no reason based on collateral law not to "stay at home" to litigate their civil rights claims. However, the state's dignitary interest in applying the collateral scheme enacted by its legislature would be disserved by such a result, as would the state interest in expedient litigation through familiar collateral rules.[220]

217. Neuborne, *supra* note 4, at 780.

218. The Colorado Supreme Court argued that deterrence was not affected by the Colorado statute because state actors would still have to base their conduct on the federal standard of proof since plaintiffs always have the ability to bring a § 1983 action in federal court. *See supra* text accompanying notes 202-208. While the Colorado Supreme Court's reasoning is sound in the abstract, one could call into question whether it is sound in the real world. First, it is fanciful to assume that state actor X's decision whether to violate citizen Y's civil rights would turn on the obscure fact that even though Colorado law requires "beyond a reasonable doubt" proof of the reckless disregard that can trigger the imposition of punitive damages, X must take into consideration that he could face charges in federal court, where the standard of proof for the reckless disregard that could trigger punitive damages is merely "preponderance of the evidence." It seems implausible that, except for the rare, preplanned "what can we get away with and how" kind of civil rights violation, the different standards of proof would affect the actions of potential § 1983 defendants.

Second, deterrence arguably flows not from a lesson learned about a particular sort of conduct in a particular situation governed by particular legal rules, but rather from the publicity surrounding any award of punitive damages, no matter what the infraction. One can argue that deterrence comes about because state actors know punitive damages are possible if they act inappropriately, above and beyond any consideration of the applicable legal rules. If this is true, it means that more awards of punitive damages mean more deterrence. It would therefore follow that because the Colorado statute makes punitive damages less frequent because of the higher standard of proof, the Colorado statute would be likely to permit behavior which § 1983 was designed to deter.

219. Note that the concern raised about Neuborne's test in Part III.B does not arise here because the state collateral law is less generous than federal collateral law.

220. This is not such a significant argument in this case because the "preponderance of the evidence" standard is not a foreign concept to Colorado judges. And because all the claims brought by Price arose under § 1983, the problem with different standards of proof applying to different claims in the same case does not materialize in the *Boulder Valley* fact pattern.

As far as the practical effects of the individual rights approach, a state court judge would likely have mixed feelings about applying Neuborne's individual right's approach. Neuborne's approach would be relatively easy for judges to apply: the only inquiry is whether the application of the state collateral law is likely to permit the violation of civil rights or likely to inhibit recovery under § 1983. However, at the philosophical level, state court judges familiar with state collateral rules and partial to those rules because they reflect the will of the people might resist making the countermajoritarian decisions that the individual rights approach would often require.[221] Moreover, state court judges would likely resist the inflexibility of the individual rights approach because it takes discretion entirely out of their hands.

3. The Balancing-of-Interests Approach

Herman would also likely affirm the trial court's finding that Colorado's "beyond a reasonable doubt" standard is applicable in the § 1983 context, although her conclusion would not be as straightforward as that of Hart. The determinative factor for Herman is whether the Colorado rule is "inherently hostile" to the § 1983 cause of action.[222] Herman would likely consider first that the Colorado provision is applicable to all punitive damages claims, not just those arising under § 1983, and is therefore neutral. Second, she would likely reason that because § 1983 plaintiffs would not be hindered in attempting to recover compensatory damages, and they would merely face a more difficult task in recovering punitive damages, the Colorado statute is not inherently hostile to the compensation and deterrence policies of

221. This may not be as evident in a case like *Boulder Valley* where the judge—and probably the public at large—could empathize with the plaintiff. But when the plaintiff is seen as "less deserving"—for example a plaintiff who alleges he was beaten by police officers in the course of an arrest, and is later convicted on the charge for which he was arrested—it may be difficult for a popularly elected judge to preempt a state rule in order to make it easier for the plaintiff to recover large punitive damages awards.

222. Herman would ostensibly be performing a balancing test to reach this decision, although I have argued previously that the "balancing-of-interest approach" does not actually balance but instead bases its outcome on whether the state collateral rule in question is inherently hostile to § 1983. *See supra* notes 151-53 and accompanying text. This holds true when Herman's approach is applied to the *Boulder Valley* fact pattern. On one side of her balancing test, Herman would consider the federal interest in preventing state courts from defeating the rights created by § 1983. In regard to the Colorado statute, the federal interest would have no weight because the statute does not threaten to defeat the § 1983 right of recovery—that is, it is not inherently hostile to § 1983—but instead merely makes it more difficult for plaintiffs to recover punitive damages. On the state side, Herman would weigh the state interest in controlling punitive damages in all civil litigation, as well as the intangible but arguably noteworthy dignitary interest in promulgating and applying its own procedural rules. Clearly the state interest "outweighs" the federal interest, because there is no federal interest to weigh.

§ 1983.[223] Under Herman's balancing-of-interests approach, then, the Colorado statute would likely be applied, with the same result obtaining that was reached in *Boulder Valley*.

Although this result would not likely be philosophically unpalatable for state court judges to swallow, the balancing-of-interests approach would be more difficult to apply than either Hart or Neuborne's approaches. While it is plausible that the inherently hostile analysis would turn out the way suggested above, it is not improbable that a judge could find the higher punitive damages standard of proof inherently hostile to the policies of § 1983 because it disproportionately affects plaintiffs—including § 1983 plaintiffs—as compared to defendants. But this play in the application of the inherently hostile standard has a concomitant value for state court judges: it leaves some amount of discretion in their hands.

4. The *Felder v. Casey* Approach

The threshold issue under the *Felder* approach is whether the state collateral law is more or less generous than the federal collateral rules to § 1983 plaintiffs. Because the Colorado statute makes it more difficult for plaintiffs to recover punitive damages and is thus less generous than federal collateral law, the next point of analysis is whether the Colorado law will frequently and predictably provide for different outcomes than would have been reached in federal court § 1983 litigation. At a general level, the Colorado statute has no effect on whether § 1983 plaintiffs are able to prevail on their § 1983 claims because it only goes to the issue of punitive damages. Since plaintiffs are not hindered either in proving their claim or in recovering compensatory damages, the Colorado statute would likely survive the outcome-determinative analysis.[224]

Next, the analysis turns to whether the provision serves an impermissible purpose, facially discriminates against the § 1983 cause of action, or cannot be justified in comparing the purpose it serves against

223. However, one could also envision Herman preempting the higher standard of proof because it disproportionately affects plaintiffs outside the context of a specific case, and is thus "inherently hostile." *See* Herman, *supra* note 4, at 1133. This inability to predict how a court would rule on the Colorado punitive damages standard using the balancing-of-interests approaches highlights the vagueness and subjectivety of the "inherently hostile" standard. *See supra* notes 154-55 and accompanying text.

224. This conclusion is dependent, however, on the level of generality at which the analysis is done. For instance, if one looks at whether the awarding of punitive damages will frequently and predictably be different because of the Colorado statute, the result of the outcome-determinative analysis might be different.

the burden it places on the policies of § 1983.[225] The beyond a reasonable doubt standard of proof for punitive damages would likely fail both the impermissible purpose and balancing portions of this analysis, and thus would necessitate preemption under the *Felder* approach.

One could reasonably conclude that regardless of what the Colorado legislature sets forth as the purpose of the higher standard of proof for punitive damages, the actual purpose was to limit the frequency of punitive damage awards in civil litigation.[226] Such a purpose directly conflicts with the remedial and deterrence policies of § 1983, which the Supreme Court has said should be "accorded 'a sweep as broad as its language.'"[227] It should thus be preempted when § 1983 litigation is heard in Colorado courts.

The Colorado provision also fails the *Felder* approach's balancing test. As stated above, the benefit Colorado gains from the provision is fewer awards of punitive damages.[228] Against this, one must consider that the higher standard of proof would significantly eviscerate the deterrent effect of § 1983.[229] Moreover, the effects of preempting the state rule and applying the federal standard would be minimal since Colorado judges are already familiar with applying the preponderance of the evidence standard, and a jury would not be unduly confused by conflicting instructions.[230] When one considers all these factors, it is quite clear that under the *Felder* approach the Colorado statute should be preempted when § 1983 claims are heard in its state courts.

While Colorado may not be particularly pleased with this result, it could not be said that the state interests were not considered when

225. The Colorado provision does not facially discriminate against the § 1983 cause of action because it applies to all punitive damages claims irrespective of how they arise. Nor does it have a disproportionate effect on § 1983 plaintiffs; it effects all civil plaintiffs equally.

226. "A major legislative purpose underlying section 13-21-102 as it existed at the time of the trial was to avoid purely punitive civil damages awards." Boulder Valley School Dist. v. Price, 805 P.2d 1085, 1097 (Colo. 1991) (Lohr, J., concurring in part and dissenting in part).

227. Felder v. Casey, 487 U.S. 131, 139 (1988) (quoting United States v. Price, 383 U.S. 787, 801 (1966)). This argument was made by Justice Lohr in his dissent. *See Boulder Valley*, 805 P.2d at 1097 (Lohr, J., concurring in part and dissenting in part).

228. For purposes of the balancing analysis, we must assume that these benefits are legitimate. In actuality, the balancing test would not be necessary here since the analysis would end when we ascertain that the state legislature's actual purposes for enacting the statute conflict with the policies of § 1983.

229. *See supra* note 218.

230. This is obviously true in this case, where only § 1983 claims are at stake. But even if there were state punitive damages claims that would be subject to the beyond a reasonable doubt standard, the effect of varying standards would be minimal. A jury would be no more confused by different standards of proof between the federal and Colorado punitive damages claims than it would be if only a Colorado claim was at issue and the jury had to apply a preponderance standard in regard to compensatory damages and a beyond a reasonable doubt standard for punitives.

applying the *Felder* approach. The same, of course, cannot be said of Neuborne's individual rights approach, which would reach the same result but without considering the state interests at all. The *Felder* approach also pays the respect due the remedial and deterrence policies of § 1983, which cannot be said of either Hart or Herman's approaches. In other words, the *Felder* approach fairly and systematically considers all the interests involved and reaches an appropriate result.

Furthermore, state court judges would not be troubled by the *Felder* approach, even it reaches a countermajoritarian result. The *Felder* approach is not difficult to apply, yet it leaves some discretion in the hands of the state judges. And because it does take the state interests into consideration, judges would be less likely to be hostile to the counter-majoritarian result than they would have had the same result been reached under Neuborne's approach.

CONCLUSION

If the trend toward increased state court litigation of § 1983 claims continues, the converse-*Erie* problem likely will arise more often and pose difficult questions for judges, plaintiffs, and defendants alike. The Supreme Court in *Felder v. Casey* began the process of formulating the approach to be taken in analyzing converse-*Erie* problems, but it did not have occasion to reach the issue of how to handle state collateral laws that are less generous to § 1983 plaintiffs but are not outcome-determinative.

This Note has analyzed in some detail four potential approaches for solving the converse-*Erie* questions. Although each of the approaches have relative strengths and weaknesses, the approaches suggested by Hart, Neuborne, and Herman are significantly disadvantaged by their one-sidedness. Both Hart's plaintiff's choice approach and Herman's balancing-of-interest approach tend to overvalue state interests at the expense of the policies of § 1983. Neuborne's individual rights approach, on the other hand, neglects the state interests while focusing solely on the § 1983 right of recovery.

The approach based on *Felder v. Casey*, on the other hand, respects both the federal and state interests in formulating a systematic approach to solving the converse-*Erie* problem. Although the conclusion it reaches with regard to a particular state collateral rule will inevitably displease either the states or § 1983 plaintiffs, the *Felder* approach takes a middle ground in analyzing the converse-*Erie* prob-

lem. In doing so, it provides a solution with which the federal and state interests could both abide.