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Justiciability of Federal Claims in State Court

*Nicole A. Gordon**
*Douglas Gross***

Lawyers representing plaintiffs in cases such as those involving institutional reform[1] have in the past commonly prosecuted federal claims in federal court and appended state claims in reliance upon the federal courts' pendent jurisdiction. These litigants perceived that federal substantive law was more helpful to them than state substantive law and that federal judges were more likely to vindicate the federal rights asserted.[2] Federal courts were also rightly viewed as willing to provide more encompassing relief for an individual's federal rights—and even his state rights—than the state courts.[3]

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1 The conclusions reached in this article apply generally to the justiciability of federal claims in state court. Institutional reform litigation, because it often raises the problems addressed here, is used as an example for discussion purposes. "Institutional reform litigation" means, inter alia, suits brought to improve or modify conditions at prisons, mental hospitals, and schools, and to protect the rights of inmates or other affected individuals, especially the mentally ill and mentally retarded. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227-50 (1977). The kind of systemic relief sought in these cases may require the court to assume ongoing jurisdiction and to supervise the operation of government institutions. *See* text accompanying notes 155-56 *infra*.

2 *See, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-16, 1123 (1977); Rudenstine, *Institutional Injunctions*, 4 CARDOZO L. REV. 611, 611-12 (1983); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1243 (1978).

3 In New York, for example, federal courts have overseen the reform of jail conditions for pre-trial detainees. *See, e.g.*, Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y.), 88 F.R.D. 333 (S.D.N.Y. 1980), 90 F.R.D. 386 (S.D.N.Y.), 528 F. Supp. 925 (S.D.N.Y. 1981), 564 F. Supp. 668 (S.D.N.Y. 1983); Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971), *argued sub nom.* Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y.), 377 F. Supp. 995 (S.D.N.Y.), *aff'd and remanded*, 507 F.2d 333 (2d Cir. 1974), *on remand*, 389 F. Supp. 964 (S.D.N.Y.), 396 F. Supp. 1195 (S.D.N.Y.), *aff'd per curiam*, 527 F.2d 1041 (2d Cir. 1975), *aff'd*, 432 F. Supp. 769 (S.D.N.Y. 1977) (defendants' motion denied). Federal courts in New York have also overseen

These assumptions must now be reconsidered. State substantive law is playing an increasingly important role in protecting the rights of individuals, particularly in institutions, often granting protection beyond that of the federal Constitution or federal statutes.[4] In addition, in *Pennhurst State School & Hospital v. Halderman*,[5] the United States Supreme Court recently held that the eleventh amendment bars the federal courts from granting relief based on pendent state law claims against state officials.[6] The effect of the *Pennhurst* decision

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the reform of conditions for the mentally retarded. *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 958 n.1 (2d Cir.), *cert. denied*, 104 S. Ct. 277 (1983); Society for Good Will to Retarded Children, Inc. v. Cuomo, 572 F. Supp. 1300 (E.D.N.Y. 1983) (institutional relief under both federal and state law). New York state courts, however, have been reluctant to entertain suits seeking institutional reform, *see* note 141 *infra*, although the New York Court of Appeals has held judicial relief for institutionalized individuals to be proper. *See* Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984); Sinhogar v. Parry, 53 N.Y.2d 424, 425 N.E.2d 826, 442 N.Y.S.2d 438 (1981); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973); Ellery C. v. Redlich, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973). These New York cases hold only that institutionalized individuals may seek individual relief; the Court of Appeals in *Klostermann* did not decide whether class relief would be justiciable. Some lower courts have recently provided broad relief to vindicate the rights of the homeless. *See* McCain v. Koch, No. 41023-83 (N.Y. County Sup. Ct. June 22, 1984); *In re* Goodwin, N.Y.L.J., at 12, col. 5 (N.Y. County Sup. Ct. June 6, 1983); Eldredge v. Koch, 118 Misc. 2d 163, 459 N.Y.S.2d 960 (N.Y. County Sup. Ct. 1983) (appeal pending); Callahan v. Carey, N.Y.L.J., at 10, col. 4 (N.Y. County Sup. Ct. Dec. 11, 1979) (order granting preliminary injunction). Courts in some other states have been more willing to grant broad institutional relief. *See, e.g.*, Bustop, Inc. v. Board of Educ., 439 U.S. 1380 (Rehnquist, Circuit Justice 1978) (denying stay of busing as part of school desegregation order by California court under California law); E.H. v. Matin, 284 S.E.2d 232 (W. Va. 1981) (treatment ordered for state mental patients).

4 *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

5 104 S. Ct. 900 (1984).

6 In *Pennhurst*, an inmate at Pennhurst, a state institution for the mentally retarded, brought a class action challenging the conditions at that institution. The action was based on federal constitutional, federal statutory, and state statutory law. The district court found conditions at Pennhurst to be both dangerous and inadequate to habilitate the residents—facts not disputed on appeal. The district court held that these conditions violated plaintiffs' federal constitutional and statutory rights and state statutory rights. The court appointed a special master to oversee the institution and to monitor the placement of the residents of Pennhurst in suitable community living arrangements. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (D.N.J. 1977).

The Third Circuit affirmed most of the district court's order, relying on federal statutory law (the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1982)). 612 F.2d 84 (3d Cir. 1979) (en banc). The Supreme Court reversed. 451 U.S. 1 (1981). On remand, the Third Circuit affirmed the relief granted based on the pendent state statutory claims. 673 F.2d 647 (3d Cir. 1982) (en banc). The Supreme Court again reversed the Third Circuit, holding that the eleventh amendment prevented the federal courts from assuming jurisdiction over the state claims. 104 S. Ct. 900 (1984). *Pennhurst* does not apply

is that these state claims must now be pressed, if at all, in state court.[7] Consequently, litigants seeking relief against state officials must either forego their state claims and bring suit on their federal claims in federal court,[8] or bring both state and federal claims in one state court action. Thus, the number of cases against state officials brought in state court is likely to increase.

State courts, however, may be reluctant to assume the burden of these cases, many of which involve the reform of state institutions under either federal or state law. These institutional reform cases often involve the rights of thousands of individuals[9]—rights that must almost always be asserted against state and local government officials. Fact-finding can be time-consuming, and appropriate relief will often be complicated: a court, for example, may find it necessary to assume on-going jurisdiction and to supervise the operation of an institution in order to ensure effective relief. Effective relief will generally require government defendants to spend significant sums of money to improve services and facilities. Although in recent years federal courts have relied upon their general equitable powers to grant this kind of broad institutional relief,[10] state courts are generally not accustomed to do so, and they may now refuse to intervene

only to pendent state claims. Presumably, suits brought against the state under diversity jurisdiction would also be barred.

7 There would be no federal jurisdiction unless the state legislature waived eleventh amendment immunity for pendent state claims in federal court, which is highly unlikely. Even before *Pennhurst*, institutional litigants with substantial state law claims had reasons to bring suit in state court. A federal court faced with novel issues of state law was likely to abstain from determining those issues. *See, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). On the other hand, although the state court might have initially defined the state right, a federal court, prior to the recent *Pennhurst* decision, may have taken the lead role in enforcing that state right. The Third Circuit, for example, in its second *Pennhurst* decision, 673 F.2d 647 (3d Cir. 1982), *rev'd*, 104 S. Ct. 900 (1984), enforced the state law rights of all individuals in a state institution based on a Pennsylvania state court decision, *In re* Schmidt, 494 Pa. 86, 429 A.2d 631 (1981), concerning the rights of a single mentally retarded individual under state law. *See also* Society for Good Will to Retarded Children, Inc. v. Cuomo, 572 F. Supp. 1300 (E.D.N.Y. 1983).

8 If they do not prevail in federal court, these plaintiffs can sue in state court, assuming they are not barred by the state statute of limitations. They can also commence two suits simultaneously.

9 *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

10 *See, e.g.*, *id.* Commentators have questioned the propriety of having the federal courts order and oversee institutional reform. *See, e.g.*, Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). The obligation of the federal courts to oversee institutional reform, however, arises from the expansion of individual rights in recent decades. *See* Eisenberg & Yeazell, *supra* note 1, at 467. When rights are systematically infringed, relief must be broad in order to provide an adequate remedy.

or to enforce broad relief, holding that claims requesting such relief are not justiciable[11] in state court.[12]

Prospective plaintiffs may thus face a paradox: state standards apparently protect individual rights more broadly than federal standards, but state courts may nonetheless hold that state justiciability doctrines prevent state court enforcement of these state standards, particularly against the executive or legislative branches of state government. In addition, *Pennhurst* will encourage litigants to present their federal claims in state court, and state courts may find the federal claims not to be justiciable under state justiciability standards. Even if the state courts hold the federal claims to be justiciable, the state courts may be reluctant to grant effective remedies for the fed-

11 By lack of justiciability, the authors refer to the "political question" doctrine. The concept of justiciability is elusive. Standing, mootness, ripeness, the prohibition against advisory opinons, and "political questions" are all justiciability concerns. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 56 (1978). This article examines the justiciability concern often inaptly called the "political question" doctrine. *See, e.g.*, Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Courts, although they occasionally employ the term "political question," *see, e.g.*, Powell v. McCormack, 395 U.S. 486, 495 (1969), often appear to refer to this doctrine in terms of justiciability. *See, e.g.*, *id.* at 516; Baker v. Carr, 369 U.S. 186, 208 (1962); Jones v. Beame, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978). Under traditional interpretations, courts may not resolve non-justiciable "political questions," no matter when or by whom brought.

12 *See, e.g.*, Klostermann v. Carey, No. 82-11270 (N.Y. County Sup. Ct., Oct. 14, 1982), *aff'd on opinion below*, 91 A.D.2d 593, 458 N.Y.S.2d 190 (1st Dep't), *rev'd sub nom.* Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984); Joanne S. v. Carey, No. 82-18493 (N.Y. County Sup. Ct., Feb. 1, 1983), *aff'd on opinion in Klostermann*, 94 A.D.2d 691, 462 N.Y.S.2d 808 (1st Dep't), *rev'd sub nom.* Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984). In both *Klostermann* and *Joanne S.*, plaintiffs sought to establish and enforce the obligation of New York state officials to provide appropriate residences to mentally disturbed individuals upon or after their release from state mental institutions. (In *Klostermann* the plaintiffs were former mental patients who were homeless; in *Joanne S.*, the plaintiffs were institutionalized mental patients awaiting release.) Plaintiffs relied primarily on provisions of the New York Mental Hygiene Law and other state law provisions, federal constitutional due process, and federal statutes.

The New York Supreme Court in *Klostermann* dismissed plaintiffs' claims on the ground of lack of justiciability. The court believed that it was bound by the decision in Bowen v. State Bd. of Social Welfare, *decided jointly with* Jones v. Beame, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978), which suggested that the requested relief would interfere unduly with the operations of the other branches of government. The court held that it was not competent to grant that relief. It dismissed the federal law claims on the same state justiciability grounds on which it dismissed the state claims. The claims in *Joanne S.* were dismissed based on the *Klostermann* opinion.

The Court of Appeals, however, reversed in both cases, holding that *Bowen* contemplated that the New York courts could grant declaratory and mandamus relief to individual plaintiffs who asserted that the executive branch had failed to deliver services mandated by the legislative branch. The Court of Appeals left open the question whether a request for class relief would be justiciable.

The authors acted as counsel for plaintiffs in *Klostermann*.

eral claims if those remedies are outside the scope of the state courts' usual remedies. These problems are by no means hypothetical. Recent state cases demonstrate that they are of immediate concern.[13]

If state courts refuse to define or enforce state substantive law protecting the rights of individuals, those state rights will remain entirely unprotected. Plaintiffs who turn instead to the federal courts to force state officials to comply with federal constitutional standards[14] may find that federal standards provide only minimal protection for their rights.[15] The effect of *Pennhurst* in the federal courts could be to encourage the federal courts to fill the vacuum by expanding federal substantive rights. These courts might, for example, expand federal substantive due process rights and, in particular, recognize new causes of action, such as state-based federal substantive due process claims.[16] It will be difficult, however, for federal courts

13 *See* Klostermann v. Carey, No. 82-11270 (N.Y. County Sup. Ct. Oct. 14, 1982), *aff'd on opinion below*, 91 A.D.2d 593, 458 N.Y.S.2d 190 (1st Dep't), *rev'd sub nom.* Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984); Joanne S. v. Carey, No. 82-18493 (N.Y. County Sup. Ct. Feb. 1, 1983), *aff'd on opinion in Klostermann*, 94 A.D.2d 691, 462 N.Y.S.2d 808 (1st Dep't), *rev'd sub nom.* Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984); *In re* S.L., (N.J. Super. Ct. App. Div. Feb. 24, 1982), *aff'd in part, rev'd in part*, 94 N.J. 128, 462 A.2d 1252 (1983).

14 Dicta in *Pennhurst* suggests that the *Ex parte* Young doctrine, 209 U.S. 123 (1908), holding that a federal suit against a state officer was not one against the state, extends only to federal constitutional claims. 104 S. Ct. at 911; *see also id.* at 933 (Stevens, J., dissenting). In the absence of congressional abrogation of the eleventh amendment immunity pursuant to § 5 of the fourteenth amendment or a state waiver, *see* note 25 *infra*, it is unclear whether a federal court can now compel state officials to comply with federal statutory duties.

The Court in *Pennhurst* was aware that its decision would have the peculiar effect of compelling federal courts to decide otherwise avoidable constitutional questions. 104 S. Ct. at 919-20. The Court cautioned, however, that principles of comity and federalism limited the scope of federal relief. *Id.* at 910 n.13.

15 For example, Pennsylvania law as interpreted by the Third Circuit in *Pennhurst* afforded the institutionalized mentally retarded a right to the least restrictive treatment, 673 F.2d 647 (3d Cir. 1982) (en banc), *rev'd*, 104 S. Ct. 900 (1984), a right apparently not provided by the federal Constitution. *See* Youngberg v. Romeo, 457 U.S. 307 (1982) (requiring only that professional discretion in fact be exercised to determine appropriate treatment).

16 Such claims have not been recognized by the Supreme Court. Cases involving state-based procedural due process appear to support claims of state-based substantive due process. State-created liberty or property interests cannot be denied arbitrarily. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government . . . ." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889) (substantive due process)). In procedural due process cases, the arbitrariness consists of failing to use procedures adequate to support the accuracy of the determination to deny the liberty or property interest. Thus a state cannot deny an individual welfare benefits on the ground that he has too high an income without affording the welfare recipient a hearing. Arbitrariness, however, may be unrelated to a defect in procedure. For example, a state agency might deny welfare payments for a month to all recipients, regardless of their established entitlement to payments, even though state substantive law did not permit such a refusal to make payments. This refusal to pay welfare benefits would be an arbitrary denial

to enforce any state-based federal substantive due process claims if state courts refuse, on grounds of non-justiciability, to adjudicate these state-based claims, because the federal courts will be unable to rely upon state court definitions of the underlying property or liberty interests.[17] Indeed, state court refusal to adjudicate might entirely eviscerate federal substantive due process claims based upon state law.[18]

In the future, moreover, federal courts may not afford extensive protection even for the federal rights of individuals as against state and local officials. Principles of comity[19] or a continued expansion of eleventh amendment prohibitions[20] may limit a federal court's ability to oversee state institutions. There is also the continual threat that Congress will restrict the inferior federal courts' jurisdiction, both on substantive and remedial matters, and perhaps the Supreme Court's appellate jurisdiction as well.[21] It is therefore critical that

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of a property interest and would appear to state a substantive due process claim. The remedy would be payment of welfare benefits, not the procedural remedy of affording appropriate hearings to each aggrieved individual. In Youngberg v. Romeo, 457 U.S. 307 (1982), the respondent, confined in a state institution for the mentally retarded, sought damages for violation of his state substantive rights. The respondent argued "that because he was committed for care and treatment under state law he ha[d] a state substantive right to rehabilitation, which is entitled to substantive, not procedural, protection under the Due Process Clause of the Fourteenth Amendment." *Id.* at 316 n.19. The Supreme Court did not reach this issue. Since it had not been raised below, there was no guidance from the lower federal courts, and state law was uncertain. In his concurrence, Justice Blackmun elaborated on this theory, suggesting that if a mentally retarded person was committed for "care and treatment" as defined by state law, due process "might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals." *Id.* at 326 (Blackmun, J., concurring). Chief Justice Burger found this argument frivolous. *Id.* at 330 n.* (Burger, C.J., concurring).

17 *See id.* at 316 n.19.

18 A state court's refusal to adjudicate based on lack of justiciability under state law could be interpreted to mean that there is no underlying property or liberty interest. Alternatively, refusal to adjudicate could be based solely upon a state court's concerns regarding the role of the state judicial branch. Thus, the refusal to adjudicate may not reflect upon the existence vel non of an underlying state property or liberty interest. Indeed, a state court may assume that such an interest exists under state law, but refuse to enforce the state right. *See, e.g.*, note 12 *supra.* A state court refusal to hear the state claims thus would not necessarily mean that federal substantive due process claims could not be premised on unenforceable state liberty and property interests. Of course, the refusal of a state court to enforce rights arising under state law raises procedural due process concerns. *See* note 22 *infra.*

19 *See, e.g.*, *Pennhurst*, 104 S. Ct. 900, 910 n.13 (1984) (citing Rizzo v. Goode, 423 U.S. 362 (1976)).

20 *See, e.g.*, *Pennhurst* and note 6 *supra.*

21 More than two dozen bills are pending in House and Senate Judiciary subcommittees to divest federal courts of jurisdiction in cases concerning issues such as busing, school prayer, and abortion. *See, e.g.*, H.R. 158, 98th Cong., 1st Sess. (1983), H.R. 521, 98th Cong., 1st Sess. (1983), H.R. 798, 98th Cong., 1st Sess. (1983), and S. 139, 98th Cong., 1st Sess. (1983) (school

state courts vindicate both the state and federal rights of individuals.[22]

This article takes the position that the supremacy clause of the United States Constitution requires state courts to vindicate federal rights, even when similar rights under state law are held to be non-justiciable. If this analysis is correct, state courts may not reject suits based on federal law by applying state justiciability standards. Rather, federal standards of justiciability must control. Likewise, based on this reasoning, state courts must grant effective remedies for federal claims and may not refuse to enforce federal remedies solely on the ground that the state court, as a matter of policy, would not employ a similar remedy.

Apart from theoretical objections, it may appear to serve little purpose to force a reluctant state court to address the federal rights of institutionalized individuals when, at least at present, federal courts are available to hear these claims. As a practical matter, however, a constitutional compulsion to hear justiciable federal claims will indirectly help to assure that state courts define relevant state substantive

busing); H.R. 183, 98th Cong., 1st Sess. (1983), and H.R. 525, 98th Cong., 1st Sess. (1983) (school prayer); H.R. 523, 98th Cong., 1st Sess. (1983), S. 26, 98th Cong., 1st Sess. (1983), and S. 210, 98th Cong., 1st Sess. (1983) (abortion). The extent to which Congress can constitutionally withdraw jurisdiction from the federal courts or limit the jurisdiction of the Supreme Court has been the subject of a great deal of scholarly debate. *Compare* Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965) (concluding that Congress has unlimited power to curtail federal court jurisdiction) *with* T. Taylor, Statement on Behalf of the American Civil Liberties Union Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives on Legislative Proposals to Limit the Jurisdiction of the Supreme Court and other Federal Courts (June 3, 1981) (arguing that Congress cannot, consistently with the Constitution, limit federal jurisdiction to vindicate constitutional rights). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 360-65 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

22 As a practical matter, plaintiffs who encounter the defense that the rights asserted are not justiciable in state court will undoubtedly attempt to show that their state claims are justiciable under state law and that their federal claims are justiciable under both state and federal law. But state courts have no clearly identifiable obligation under the federal Constitution to hear state claims, and accordingly there is no federal bar preventing a state court from holding that state claims are not justiciable under state law. The state court may thus hold state claims not to be justiciable and then hold that state grounds of non-justiciability bar the state courts from hearing plaintiffs' related federal claims.

The due process clause requires that state courts or other state tribunals be available to redress claims that state defendants have infringed property (and presumably liberty) rights grounded in state law. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Parratt v. Taylor, 451 U.S. 527 (1981). It would appear that, wholly apart from state court obligations under the supremacy clause, a state court could not hold a property or liberty claim to be non-justiciable under state law when no other forum is available in which to enforce that claim.

law, because a state court which is compelled to resolve federal claims may also reach the merits of similar state claims. As a jurisprudential matter, this interpretation of state obligations under the federal Constitution also assures that a court system is always available to enforce federal rights and remedies.

This article first discusses some basic principles of state court jurisdiction and justiciability. Part II explores state courts' obligation to hear federal claims. In Part III, this article concludes that state courts are almost always obligated to assume jurisdiction over justiciable federal claims. Part IV analyzes the duty of state courts to provide remedies equal or analogous to the remedies which federal law would provide. Recognition of this duty is crucial because state courts are frequently unaccustomed to providing remedies of the breadth required by federal law. State courts, particularly after *Pennhurst*, are the primary protectors of state and federal rights as against many government officials. They thus have an obligation to exercise their full powers to vindicate those rights.

I. Essential Principles of State Court Jurisdiction and Justiciability

Three black-letter principles of state court jurisdiction underlie the justiciability of federal claims in state court. First, the state courts' constitutional obligation to enforce federal law is premised on the supremacy clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.[23]

The supremacy clause obviously requires that, when a state court hears federal claims, it must apply federal substantive law.[24]

Second, state courts have concurrent jurisdiction with federal

23 U.S. CONST. art. VI, cl. 2.

24 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). State courts are free to apply state "procedures" when hearing federal claims, unless these procedures undermine the substantive federal right. *See* Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 363 (1952). The situation is the converse of a federal court sitting in diversity, where the federal court is required to apply state "substantive" law, but adheres to the Federal Rules of Civil Procedure. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965); Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Hill, *Substance and Procedure in State FELA Actions—The Converse of the* Erie *Problem?*, 17 OHIO ST. L.J. 384 (1956).

courts over all federal claims, unless (a) Congress has restricted jurisdiction to federal courts, either explicitly or impliedly; or (b) there is a "disabling incompatibility between the federal claim and state court adjudication."[25] Alexander Hamilton first expressed this principle of general concurrent jurisdiction in *The Federalist*, No. 82, where, construing the supremacy clause, he concluded:

> [I]n every case in which [the state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth . . . . When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent

25 *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981); *see also* Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313-40 (1976). Congress can restrict federal constitutional questions to federal courts, Bowles v. Willingham, 321 U.S. 503, 511-12 (1944), but only if federal courts have the power to provide adequate remedies for constitutional violations. *See generally* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1152-53 (1969). Conceivably there would be instances in which the restriction of federal constitutional claims to federal courts would be unconstitutional. For example, assume a state, in violation of federal law, compelled an individual to pay money into the state treasury, and this individual brought a due process claim to recover this money. *Cf.* Ward v. Love County, 253 U.S. 17 (1920) (action against county, not directly against state). If Congress had restricted due process claims to federal court, but had not overridden the state's eleventh amendment immunity pursuant to its powers under § 5 of the fourteenth amendment, the plaintiff would have no effective remedy because his suit in federal court against the state treasury would be barred by the eleventh amendment. *See* Edelman v. Jordan, 415 U.S. 651 (1974). In that event, Congress' purported restriction of the federal due process claim to federal court would be unconstitutional. The plaintiff would have a right to proceed in state court where there is no eleventh amendment bar. *See* Maine v. Thiboutot, 448 U.S. 1, 9-10 n.7 (1980) (eleventh amendment does not apply to state court proceedings).

The Supreme Court has not held that Congress has power to abrogate a state's eleventh amendment immunity pursuant to Congress' powers under article I of the Constitution, although lower federal courts have so held. *See, e.g.*, County of Monroe v. Florida, 678 F.2d 1124 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 726 (1983); Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979); Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979). If the Supreme Court does not follow the lead of these lower courts, it would mean that the Constitution mandates that constitutional claims for damages against the state treasury must be brought in state court, if those constitutional claims do not arise under the fourteenth amendment. *See* Consolidated Freightways Corp. v. Kassel, 556 F. Supp. 740 (S.D. Iowa 1983) (dormant commerce clause claim not a "right" under 28 U.S.C. § 1343(3) or 42 U.S.C. § 1983); *see also* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) (supremacy clause claim not a right secured by the Constitution under 28 U.S.C. § 1343(3)).

One court has held that 42 U.S.C. § 1983 creates exclusive jurisdiction in the federal courts. Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). This interpretation of § 1983 has been rejected by the Supreme Court. Maine v. Thiboutot, 448 U.S. at 3 n.1; Martinez v. California, 444 U.S. 277, 283 n.7 (1980). The Supreme Court, in these cases, did not decide whether a state court is obligated to hear a § 1983 claim.

> jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.[26]

The Supreme Court adopted this view in 1876 in *Claflin v. Houseman*.[27]

Third, Congress has no obligation under article III to create inferior federal courts and can restrict the jurisdiction of the courts that it does create.[28] Congress' ability to restrict federal jurisdiction implies a state court obligation to assume jurisdiction over federal claims. It is an essential premise of this article, derived from some of the principles described in the famous Dialogue of the late Professor Henry M. Hart, Jr., that an adjudicative forum must always be available to vindicate federal rights.[29] State courts are therefore the ultimate guarantors of federal rights.[30]

A state court is obviously not obligated to hear federal claims which are not justiciable under federal law.[31] The Supreme Court has not yet addressed the federal constitutional question whether a state court, applying state standards, can hold a justiciable federal question to be non-justiciable in state court.[32] This question arises

26 THE FEDERALIST No. 82, at 536 (A. Hamilton) (E. Earle ed. 1941).

27 93 U.S. 130 (1876). For a detailed discussion of the early historical development of enforcement of federal causes of action in state courts, see Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1551-54 (1960).

28 *See, e.g.*, Palmore v. United States, 411 U.S. 389, 400-02 (1973). *But see* note 21 *supra*.

29 *See* Hart, *Further Note on the Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, HART & WECHSLER, *supra* note 21, at 330-60; *see also* Lockerty v. Phillips, 319 U.S. 182 (1943).

30 *Id.* at 330, 359-60; *cf.* Lockerty v. Phillips, 319 U.S. 182 (1943) (Congress could have declined to create inferior federal courts, leaving suitors to the remedies afforded by state courts); Crowell v. Benson, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting) (the jurisdiction of article III courts is subject to the control of Congress, which may commit matters within the federal courts' jurisdiction instead to the state courts); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("[t]he Supremacy of law demands that there shall be opportunity to have some court decide . . . the ultimate question of constitutionality").

31 Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1401 (1978). Professor Sager argues that state courts can, if they so choose, decide cases that would not be heard in federal court because of the federal political question and standing doctrines. *See also* Sager, *supra* note 2. Paradoxically, Professor Sager's view that the existence of a constitutional right does not depend on judicial enforcement would help justify federal court abstention on grounds of non-justiciability. This article focuses only on the obligation of the state courts to hear federal claims that are justiciable under federal law.

32 The Supreme Court has held that the mootness of a federal claim in state court is a question of federal law. Liner v. Jafco, Inc., 375 U.S. 301 (1964); *see also* North Carolina v. Rice, 404 U.S. 244, 246 (1971); Williams v. Shaffer, 385 U.S. 1037, 1038-39 (1967) (Douglas, J., dissenting from denial of certiorari); Concrete Technology Corp. v. Laborers' Int'l Union, 3 Wash. App. 869, 479 P.2d 125 (1970). *Cf.* Comments of P. Freund, SUPREME COURT AND

only when state standards of justiciability, as applied to the federal claim, are more restrictive than federal standards of justiciability. The determination whether a given case is justiciable under state law will generally depend upon the analysis of three factors related to the proper role of the state court and the separation of powers among the branches of state government.[33] First, does the state constitution or a state statute commit the issue to another branch?[34] Second, will a judicial decision and judicial relief improperly interfere with the operations of other branches of government?[35] Third, can the court identify and decide the issues and grant relief consistent with its judicial role?[36]

Unless a constitutional or statutory provision plainly reserves an issue to another branch of state government, a court holding an issue to be non-justiciable is refusing to exercise jurisdictional powers that it possesses.[37] Justiciability is different from jurisdiction, although

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SUPREME LAW 38 (E. Cahn ed. 1954) (standing to raise federal question in state court should be considered federal issue). The essential analysis of the Court in *Liner* was that having once had jurisdiction over federal claims, the state court had to enforce the substance of the federal right and could not dismiss federal claims merely because they had become moot under state law. The Court did not examine whether the state court's mootness doctrine was a valid jurisdictional excuse relieving the state court of the obligation to hear the federal claim. *Cf.* Testa v. Katt, 330 U.S. 386 (1947) (addressing question whether state court has adequate and appropriate jurisdiction to hear the claim). Although the reasoning of *Liner* could be extended to apply to the justiciability concerns discussed here, the Court's failure to address the state court's obligation to assume jurisdiction makes such extension unlikely. Forcing a state court to hear a claim it would otherwise not hear, regardless of when or by whom the claim was brought, imposes a greater burden upon that court than the obligation to continue to adjudicate a federal claim over which the state court has already assumed jurisdiction.

33 *See, e.g.*, Jones v. Beame, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978). The Supreme Court has stated that in federal courts the "nonjusticiability of a political question is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210 (1962). A federal court also cannot interfere unduly in state government. Rizzo v. Goode, 423 U.S. 362, 378-80 (1976) (principles of federalism limit federal court injunctive relief against branches of state government); *cf.* Gilligan v. Morgan, 413 U.S. 1 (1973) (interference with operation of Ohio National Guard). There are restrictions against state court interference in federal affairs. Tarble's Case, 80 U.S. (13 Wall.) 397 (1871); *see also* Davis v. Passman, 442 U.S. 228, 245 n.23 (1979).

34 *See, e.g.*, Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698 (1977). For a discussion of federal non-justiciable "political questions," see *Baker*, 369 U.S. at 217; *Powell*, 395 U.S. at 518; *Gilligan*, 413 U.S. at 6-7. Although Baker v. Carr, 369 U.S. 186 (1962), and other cases have noted the "textual commitment" basis for non-justiciability, this basis was undermined by *Powell*. *See also* HART & WECHSLER, *supra* note 21, at 235.

35 *See, e.g.*, Jones v. Beame, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978); *Baker*, 369 U.S. at 217; *Powell*, 395 U.S. at 548-49, *Gilligan*; 413 U.S. at 7, 10.

36 *See, e.g.*, Jones v. Beame, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978); *Baker*, 369 U.S. at 198, 217; *Powell*, 395 U.S. at 517; *Gilligan*, 413 U.S. at 8, 10.

37 Commentators have extensively debated the freedom of a federal court to refrain from deciding legal issues on grounds of non-justiciability. *See, e.g.*, Bickel, *The Supreme Court 1960*

they involve similar concerns. Justiciability, unlike jurisdiction, is generally a judge-made policy restriction on the power of the court. This article inquires whether state standards of justiciability can ever excuse a state court from hearing a justiciable federal claim when jurisdiction is concurrent with that of the federal courts and whether a state court which holds a federal claim to be non-justiciable under state law is released from its supremacy clause obligation to hear that federal claim.

II. State Court Obligation to Hear Federal Claims Generally

Under the teaching of *Testa v. Katt*[38] and subsequent cases, state courts have a general obligation to hear federal claims. They must exercise their jurisdiction to the fullest extent to vindicate federal rights; they may not discriminate against hearing federal claims when they hear analogous state claims; and, finally, states must maintain courts with jurisdiction adequate to hear claims that state and local officials have violated individuals' federal rights.

A. Testa v. Katt

Testa v. Katt, decided by the Supreme Court nearly forty years ago, remains the seminal case concerning a state court's obligation to hear federal claims. Congress had provided in the Emergency Price Control Act that buyers of goods could recover from the seller, for overcharges, "not more than three times the amount of the overcharge"[39] "in any court of competent jurisdiction."[40] The petitioner,

Term—Forward: The Passive Virtues, 75 HARV. L. REV. 40, 75 (1961); Henkin, *supra* note 11; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8, 9 (1959); *see also* A. BICKEL, THE LEAST DANGEROUS BRANCH 71-72 (1962). Professor Wechsler has asserted that federal courts must decide any issue properly presented unless the Constitution textually commits the issue to another branch of government. Wechsler, *supra*, at 7-8, 9. This concept of justiciability is consistent with the principle of constitutional law that an adjudicative forum always be available to protect properly presented rights. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Hart, *supra* note 29. The late Professor Bickel, on the other hand, would have allowed federal courts substantial discretion to refuse to decide legal issues presented for a variety of political (in the colloquial sense) reasons. A. BICKEL, *supra*, at 172; Bickel, *supra*, at 75. Professor Henkin interprets many "political question" cases as holding only that the equitable relief requested was inappropriate. Henkin, *supra* note 11, at 617-22.

A state court which adopts Professor Wechsler's views will presumably vindicate all rights that are justiciable under federal law, unless a state statutory or constitutional provision plainly bars the state court from hearing these federal claims. The refusal of the state court to vindicate a justiciable federal right will obviously arise most often when a state court takes a restrictive view of justiciability.

38 330 U.S. 386 (1947).

39 Emergency Price Control Act of 1942, ch. 26, § 205(e), 56 Stat. 33-34, *amended by* ch. 325, 58 Stat. 632, 640 (1944).

40 Emergency Price Control Act of 1942, ch. 26, § 205(e). Congress had required that

alleging an overcharge, sued under the Act in Rhode Island District Court. The District Court awarded treble damages, but the Rhode Island Superior Court, conducting a trial de novo, awarded only the amount of the overcharge.[41]

The Rhode Island Supreme Court reversed,[42] holding that the Act was penal, and that consequently Rhode Island courts were not obligated to enforce it.[43] The Rhode Island Supreme Court relied upon its previous decision in *Robinson v. Norato*,[44] a case brought under the previous version of the Emergency Price Control Act. The court in *Robinson* had held that, because Rhode Island courts had no jurisdiction under state law to enforce penal statutes of foreign sovereigns, they had no jurisdiction over claims arising under the Act, which the court viewed as penal.[45] The *Robinson* court held that Rhode Island courts were not unconstitutionally discriminating against federal claims as long as they treated federal claims as favorably as claims from sister states.[46]

The United States Supreme Court reversed in a decision whose meaning has been disputed.[47] The Court first rejected the Rhode Island Supreme Court's assumption that a state court was no more obligated to enforce penal laws of the federal government than those

suit be brought "in the district or county in which the defendant resides or has a place of business." *Id.* § 205(c), 56 Stat. 23, 33. Thus there was no need to determine in which state court a federal suit could be brought, unlike the situation in several Federal Employers' Liability Act cases, *see, e.g.*, McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934); Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 388 (1929).

Curiously, the Supreme Court also referred to § 205(c) of the Emergency Price Control Act in the second sentence of the opinion, *Testa*, 330 U.S. at 387, although this section concerned only criminal jurisdiction under the Act. The Court did not subsequently refer to this provision. Section 205(c) explicitly stated that state and territorial courts had concurrent jurisdiction for criminal proceedings under the Act. Presumably the Court referred to § 205(c) to bolster its assumption that state courts had concurrent jurisdiction of claims under § 205(e). On the other hand, the fact that Congress explicitly mandated concurrent jurisdiction under § 205(c), but not under § 205(e), supports the argument that the legislation itself did not obligate the Rhode Island state courts to hear claims under § 205(e). *See* text accompanying notes 92-93 *infra.*

41 330 U.S. at 388. The Rhode Island District Court awarded costs; the Rhode Island Superior Court awarded attorney's fees.

42 Testa v. Katt, 71 R.I. 472, 47 A.2d 312 (1946).

43 *Id.*

44 71 R.I. 256, 43 A.2d 467 (1945).

45 *Id.* at 265-72, 43 A.2d at 471-75.

46 *Id.* at 270-72, 43 A.2d at 474-75.

47 *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 56 (1978), at 137-38 n.36; Hart, *supra* note 29, at 330; Redish & Muench, *supra* note 25, at 351-59; Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 207-08; Note, *supra* note 27.

of sister states.[48] Such an assumption, the Court held, flew in the face of the supremacy clause.[49] The Court then reviewed historical developments and precedents, emphasizing its decisions in *Claflin v. Houseman*[50] and *Mondou v. New York, New Haven & Hartford Railroad*.[51] According to the Court, *Claflin* taught that the states could not treat federal law as foreign law,[52] and that "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."[53] *Mondou*, the Court stated, held that a state court could not decline to entertain a federal action on the ground that the action was contrary to state policy.[54]

From its reading of *Claflin* and *Mondou*, the Court concluded that Rhode Island's "established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a 'valid excuse.' "[55] It stressed that "the policy

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48 330 U.S. at 389.

49 *Id.*

50 93 U.S. 130 (1876).

51 223 U.S. 1 (1912).

52 330 U.S. at 390-91.

53 *Id.* at 391. The text of the *Claflin* opinion does not appear to support this broad assertion. *Claflin* stated: "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court." 93 U.S. 130, 137 (1876). This language, quoted in *Testa*, 330 U.S. at 391, is the only reference to a "remedy" in the *Claflin* opinion, and it appears to refer to the forum (state or federal) available to a litigant for enforcing his federal rights.

54 330 U.S. at 392.

55 *Id.* The Court took the term "valid excuse" from its decision in Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 388 (1929), to which the Court referred with a "*cf.*" citation. *Douglas* held that the Federal Employers' Liability Act ("FELA") did not require a New York state court to hear a claim when the injuries were inflicted in Connecticut, and the defendant was a Connecticut corporation, although doing business in New York. *See also* Missouri *ex rel.* S. Ry. v. Mayfield, 340 U.S. 1 (1950) (state forum non conveniens doctrine can bar FELA action).

Cases such as *Douglas* and *Mayfield* are only tangentially related to *Testa*. They concern the power of a state court to refuse to adjudicate federal claims when other state courts are available. Obviously there must be a sufficient connection between the federal claim asserted and the location where suit is brought before a state court is obligated to hear the claim. Congress can, as in the Emergency Price Control Act in *Testa*, prescribe the method for determining the appropriate state court to hear the federal claim. *See* note 40 *supra*. *But cf.* Bainbridge v. Merchants & Miners Transp. Co., 287 U.S. 278, 280 (1932) (court reluctant to impute intention of Congress to prescribe state venue for federal claims, leaves open question whether Congress has this power); Hill, *supra* note 24, at 401 (it is far from certain that federal law can confer venue). If Congress does not prescribe such a method, this essentially procedural concern is left to state law, in the absence of state discrimination against the federal claim. McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934). The failure of the state court to hear the federal claim on venue grounds is unrelated to the substance of the claim; the state

of the federal Act is the prevailing policy in every state."[56]

The Court appeared to narrow its decision in the last paragraph of the opinion. There it stated that a Rhode Island court had enforced a double damage claim under the federal Fair Labor Standards Act[57] and that the Rhode Island courts would concededly enforce the same kind of claim at issue in *Testa* if brought under state law.[58] The Court concluded: "Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action."[59] It cited three Rhode Island statutes in support of this statement, two of which vested the Rhode Island courts with general jurisdiction over claims for the amount sought by the plaintiff.[60] The third statute defined jurisdiction over fines, penalties, and forfeitures.[61] In view of these jurisdictional statutes, Rhode Island courts could not refuse enforcement of petitioner's federal claims.[62]

Testa thus involves two distinct approaches: it finds a state court obligation to hear federal claims that overcomes any policy of judicial restraint against hearing those claims, and it forbids discrimina-

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court will hear the identical claim if there is a sufficient nexus to the forum state. This situation must be contrasted with *Testa* and *Mondou* (and cases seeking institutional reform) in which only one state court system is available. *Testa's* reference to *Douglas* with a "*cf.*" citation indicates that the latter case has only limited significance for the obligation addressed here.

56 330 U.S. at 393. The Court then ruled that cases which held that states are not required by the full faith and credit clause to enforce judgments of courts of other states arising out of penal statutes were not relevant. *Id.* at 393-94. According to the Court, the only issue presented was "the right of a state to deny enforcement to claims growing out of a valid federal law." *Id.* at 394.

57 *Id.* (citing Newman v. George A. Fuller Co., 72 R.I. 113, 48 A.2d 345 (1946)). In *Newman*, the Rhode Island Supreme Court distinguished *Robinson v. Norato*, and held that the Fair Labor Standards Act was a remedial, not a penal, statute. The Rhode Island court reasoned that the double damage provision compensated workers for damages too obscure and difficult of proof.

58 The Court cited no instances in which Rhode Island courts had heard similar Rhode Island claims.

59 *Testa*, 330 U.S. at 394.

60 *Testa*, 330 U.S. at 394 n.13. The Court cited R.I. GEN. LAWS ch. 500, § 28; ch. 525, § 7; ch. 631, § 4 (1938). Chapter 500, § 28 provided the Rhode Island District Court with exclusive original jurisdiction for claims seeking less than $1,000 in damages. Chapter 525, § 7 allowed appeal from the district court to the Rhode Island Superior Court, which held a trial de novo.

61 Chapter 631, § 4, provided that fines, penalties, and forfeitures of $500 and less be prosecuted in the Rhode Island District Court and that fines of more than $500 be prosecuted in the Superior Court.

62 *Id.* Professor Wechsler, pointing out the differences in tone between the final paragraph of the *Testa* opinion and the rest of the decision, has speculated that the final paragraph may have been a concession to Justices who thought, as Justice Frankfurter did, that there were limits to federal mandates to state courts. *See, e.g.*, Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring); Letter from Herbert Wechsler to the authors (Jan. 13, 1984) (on file with the *Notre Dame Law Review*).

tion by the states against federal claims when the state courts can hear analogous state claims.

1. Prior Precedents and State Judicial Policy

Although purportedly based upon prior Supreme Court decisions in *Claflin* and *Mondou*, *Testa* endorsed a broader state court obligation to assume jurisdiction over federal claims than did either of those two cases. *Claflin* held only that state courts have concurrent jurisdiction with federal courts over federal questions when federal jurisdiction is not exclusive and when state courts are "competent to decide rights of the like character and class."[63] The obligation of the state court to exercise that jurisdiction was not at issue in *Claflin*,[64] as it was in *Testa*.

Mondou, on the other hand, did concern the state court's duty to take jurisdiction. The Connecticut courts had declined to enforce rights arising under the Federal Employers' Liability Act ("FELA") primarily because the policy of FELA was inconsistent with Connecticut's policy regarding employers' liability to their employees for job-related injuries, and also because it would purportedly be inconvenient and confusing for a court to apply two different standards.[65] The Supreme Court held that the Connecticut Superior Court was required to hear the federal claims because the Connecticut court's jurisdiction, as prescribed by local law, was adequate for the occasion.[66] Jurisdiction was adequate because the Superior Court was a court of general jurisdiction, and it heard personal injury and wrongful death claims when those claims arose under the laws of Connecticut or other states.[67] Connecticut could not decline to enforce FELA merely because Connecticut policy was different; the Connecticut court was to treat the federal policy as if it emanated from the Connecticut legislature. The Court doubted that enforcing FELA would cause much confusion in the Connecticut courts, but even if it did,

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63 93 U.S. 130, 137 (1876); *see also* Note, *supra* note 27, at 1555. The Court in *Claflin* in one passage equated competency to hear federal claims with the ability of the state court under the state constitution to take jurisdiction. 93 U.S. at 136.

64 93 U.S. at 137. The Court did stress that state courts were just as bound to recognize federal law as state law, thereby implying a duty to exercise jurisdiction. *Id.*; *see* 16 C. WRIGHT, A. MILLER, L. COOPER & E. GROSSMAN, FEDERAL PRACTICE AND PROCEDURE § 4024 (1977) [hereinafter cited as WRIGHT & MILLER].

65 223 U.S. at 55-56. The Connecticut court also held that the federal act impliedly limited enforcement to federal courts. *Id.* at 55. The Supreme Court rejected this argument. *Id.* at 56.

66 *Id.* at 57-59.

67 *Id.* at 57.

"[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."[68]

The Supreme Court could have supported its decision in *Testa* merely by clarifying the holding of *Mondou.* The Court could have pointed out the Rhode Island Supreme Court's obvious misinterpretation of *Mondou.* This misinterpretation arose from the Rhode Island court's complete reliance on the *Mondou* Court's passing comment that Connecticut courts heard similar claims from other states.[69] The Rhode Island court thus ignored the central points of *Mondou*—that jurisdiction was appropriate because the state trial court was one of general jurisdiction and that Connecticut courts heard the same kind of claim under Connecticut law.

The Court in *Testa,* however, did not address the Rhode Island court's misinterpretation of *Mondou.* Instead, *Testa* relied on the portion of *Mondou* holding that the Connecticut court could not refuse to enforce FELA on the ground that the underlying substantive policy of that Act conflicted with Connecticut's substantive policy. Yet the state court in *Testa* had considered any conflict between the substantive law of Rhode Island and that of the United States irrelevant to its opinion. The state court had decided as it did because the *jurisdictional* policy of Rhode Island courts was not to hear penal claims based on laws other than Rhode Island's.[70] This policy of judicial restraint, however, conflicted with the state court's duty under the supremacy clause.[71] The Supreme Court interpreted *Mondou* not sim-

68 *Id.* at 58. The Supreme Court also stated that it was not unusual for a court to apply different rules of law to similar factual situations, and that courts may not decline jurisdiction merely because the law they generally applied was different from the law to be applied in the case presented. *Id.* at 58-59.

69 Robinson v. Norato, 71 R.I. 256, 266-72, 43 A.2d 467, 472-75 (1945).

70 One commentator has claimed that the Supreme Court treated the Rhode Island court's refusal to enforce the federal Emergency Price Control Act "as an attempt to interpose that state's own notion of wartime price control policy." *See* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 359 (1963). This view derives little support from the Supreme Court opinion. In *Robinson,* the Rhode Island Supreme Court questioned whether the federal Emergency Price Control Act was a constitutional exercise of Congress' power to wage and declare war, but assumed that the Act was constitutional. 71 R.I. at 257, 43 A.2d at 468. The Rhode Island court never intimated that it disagreed with the substantive policy of the federal Act.

71 *Testa* clearly prohibits state court refusal to hear federal claims because of a policy of judicial restraint (as opposed to a lack of power under state statutes or the state constitution).

When, on the other hand, statutory or state constitutional provisions limit the state courts' jurisdiction (or the state courts have legitimately interpreted these provisions as limiting their jurisdiction), and there has been no discrimination against the federal claims, the decision in *Testa* does not require that the state courts assume jurisdiction. As argued below,

ply to prohibit discrimination against federal claims, but more broadly as holding that a state doctrine of judicial restraint could not justify state court refusal to enforce federal rights.[72]

2. General Jurisdiction

The proposition that a state court may not rely upon state doctrines of judicial restraint to avoid enforcing federal rights is consistent with the last paragraph of the *Testa* opinion. In that paragraph the Court noted that Rhode Island had adequate and appropriate jurisdiction to hear the federal claims,[73] citing the statutory provisions which gave Rhode Island courts general jurisdiction over claims of the amount in question.[74] The Court noted that the Rhode Island courts concededly heard similar claims under Rhode Island law and could hear federal claims for double damages. The Court, however, never suggested that either of these facts was the specific reason why

however, state legislatures have an obligation to create courts with jurisdiction to hear certain federal claims, and all states have courts with general jurisdiction capable of hearing all federal claims. *See* note 76 *infra* and text accompanying notes 100-22 *infra*. *But cf.* note 77 *infra* (statute limiting jurisdiction of New Mexico courts over federal claims).

72 The Connecticut court in *Mondou* alleged that applying the substantively different federal laws would cause confusion in the Connecticut courts. Thus this state court attempted to transform a substantive difference into a concern of judicial administration. *See* text accompanying notes 65-68 *supra*.

The Supreme Court doubted that there would be any confusion or inconvenience if Connecticut courts were to enforce the federal Act. It indicated that Connecticut's purported concern with judicial confusion was merely a subterfuge for a substantive policy difference. Thus, the Supreme Court's primary response to the state court's assertion was that a state court could not evade its responsibility to enforce federal law merely by transforming a substantive policy difference into an issue of state court administration. *Cf., e.g.*, Ward v. Love County, 253 U.S. 17 (1920) (where plaintiffs were clearly coerced into paying illegal tax, state court "finding" that tax was paid voluntarily was not an adequate and independent state ground to bar Supreme Court review).

The Supreme Court did add, however, that even if the state court's exercise of jurisdiction was onerous, there was still an "implication of duty to exercise it." *Mondou*, 223 U.S. at 58. Thus *Mondou* rejected the Connecticut court's reasoning that state judicial policy—in this case a palpably frivolous policy—excused the state court from exercising jurisdiction over a federal claim. This portion of *Mondou* would have provided support for the decision in *Testa*, but the Court in *Testa* referred only to that portion of *Mondou* concerning the irrelevance of substantive differences between state and federal substantive policy, *Testa*, 330 U.S. at 392-93, not to the discussion of the alleged burden on the state courts.

73 330 U.S. at 394.

74 The Rhode Island District Court, in which suit was brought, had general jurisdiction over claims of less than $1,000. The Superior Court had jurisdiction for claims of $1,000 and more. *See* note 60 *supra*. The Court also cited the provision giving the District Court jurisdiction over claims for fines, penalties, and forfeitures of $500 and less. *Id.* at 387 n.1; *see* note 61 *supra*. If no Rhode Island provision had specifically granted jurisdiction over fines, penalties, and forfeitures, undoubtedly the general jurisdictional provisions would have given the Rhode Island courts power to hear the claims in *Testa*.

Rhode Island courts were required to exercise jurisdiction. Rather, the Court appears to have cited these two examples as evidence that Rhode Island courts did have adequate and appropriate jurisdiction. Because Rhode Island courts had general jurisdiction and jurisdiction over fines, penalties, and forfeitures, they were empowered to hear the treble damage Emergency Price Control Act claim. The state court's policy of judicial restraint had to yield to its federal constitutional obligation to enforce federal law. Similarly, the Supreme Court had determined in *Mondou* that state court jurisdiction was adequate and appropriate primarily because that state court had general jurisdiction.

The result would have been the same in *Testa* even if Rhode Island courts never heard "penal" claims under which multiple damages were awarded. The general jurisdiction of the state courts was adequate and appropriate for the courts to hear the statutory overcharge claim, and no state policy against awarding multiple damages could have overridden the policy of the federal Act. The state courts could not decline to exercise the general jurisdiction with which they were vested. In addition, as a practical matter, it would be absurd to suggest that a Rhode Island court was fully competent to identify the legal issues and conduct a trial to determine liability and calculate damages, but incompetent to multiply damages by three.

Indeed, the key to determining the obligation of the state courts to hear federal claims, as some state courts have recognized,[75] is that every state has a court system of general jurisdiction, with common law and equitable powers.[76] Thus, unless a state constitutional or

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75 *See* text accompanying note 89 *infra*.

76 A "court system of general jurisdiction" means, here, a system that includes some court that has original jurisdiction over any claim, including claims for monetary, injunctive, habeas, and mandamus relief. With the exception of four states, each state has one state court with original jurisdiction over most legal and equitable claims. *See* ALA. CONST. amend. 328, § 6.04; ALA. CODE § 12-11-30 (1975); ALASKA CONST. art. IV, § 3, ALASKA STAT. § 22.10.020 (1982); ARIZ. CONST. art. VI, § 14, ARIZ. REV. STAT. ANN. § 12-123 (1956); ARK. CONST. art. 7, § 11 (common law), § 15 (equity), ARK. STAT. ANN. § 22-301 (1962) (common law), § 22-404 (1962) (equity); CAL. CONST. art. 6, § 10; COLO. CONST. art. VI, § 9; CONN. GEN. STAT. ANN. § 51-16-45 (West 1983 Supp.); DEL. CONST. art. IV, § 7 (common law), § 10 (equity), DEL. CODE ANN. tit. 10, § 541 (1953) (common law), § 341 (1953) (equity); D.C. CODE ANN. § 11-921 (1981); FLA. CONST. art. 5, § 20(c)(3), FLA. STAT. ANN. § 6.012 (West 1974); GA. CONST. art. VI, § V, ¶1; GA. CODE ANN. § 24-2613 (1981); HAWAII REV. STAT. § 603 21.5 (1976), § 603-21.8 (1976); IDAHO CONST., art. V, § 20, IDAHO CODE § 1-705 (1979); ILL. CONST. art. VI, § 9, ILL. ANN. STAT. ch. 37, § 72.25 (Smith-Hurd 1972), IND. CODE ANN. § 33-4-4-3 (Burns 1975); IOWA CONST. art. V, § 6, IOWA CODE ANN. § 602.1 (West 1975); KAN. STAT. ANN. § 20-301 (1981); KY. REV. STAT. § 23A.010 (1980); LA. CONST. art. V. § 16; ME. REV. STAT. ANN. tit. 4, § 105 (1983-84 Supp.); MD. CTS. & JUD. PROC. CODE ANN. § 1-501 (1984); MASS. ANN. LAWS. ch. 212, § 4 (MICHIE/LAW. CO-OP

statutory provision limits this general jurisdiction,[77] all states have

1974); MICH. CONST. art. VI, § 13, MICH. COMP. LAWS ANN. §§ 600.601, 600, 605, 600.611 (West 1981); MINN. CONST. art. VI, § 3, MINN. STAT. § 484.01 (1971); MISS. CONST. art. 6, § 156 (vesting original jurisdiction not vested elsewhere in circuit courts), §§ 159-161 (vesting equity and other jurisdiction in chancery court); MISS. CODE ANN. § 9-5-81 (1972); (chancery court jurisdiction), § 9-7-81 (circuit court jurisdiction); MO. CONST. art. V, § 14. MO. ANN. STAT. § 478.070 (Vernon Supp. 1984); MONT. CONST. art. VII, § 4, MONT. CODE ANN. § 3-5-302 (1983); NEB. CONST. art. V, § 9, NEB. REV. STAT. § 24-302 (1979); NEV. CONST. art. 6, § 6, N.H. CONST. Pt. 2d, art. 72-a, N.H. REV. STAT. ANN. §§ 491:7, 498:1 (1983); N.J. CONST. art. VI, § III; N.M. CONST. art. VI, § 13, *but see* N.M. STAT. ANN. § 34-1-8 (1981), providing that no court of the state of New Mexico shall have jurisdiction over any action instituted under a federal statute where the Congress of the United States has curtailed the right of the United States district courts to enforce such statute; *see* note 77 *infra*; N.Y. CONST. art. VI, § 7; N.Y. JUD. LAW § 140-b (McKinney 1983); N.C. CONST. art. IV, § 12, N.C. GEN. STAT. § 7A-240 (1981); N.D. CONST. art. VI, § 8, N.D. CENT. CODE § 27-05-06 (Supp. 1983); OHIO CONST. art IV, § 4, art. 4 § 3; OHIO REV. CODE ANN. § 2305.01 (Baldwin 1981); OKLA. CONST. art. 7, § 4, 7; OKLA. STAT. ANN. tit. 20, § 91.1 (West Supp. 1983); OR. CONST. art. VII, § 9; PA. CONST. art. V, § 5; 42 PA. CONST. STAT. ANN. § 931 (Purdon 1981); R.I. GEN. LAWS § 8-2-13 (1969); S.C. CONST. art. V, § 5, 7; S.D. CONST. art. V, § 5; S.D. CODIFIED LAWS ANN. § 16-6-8, 16-6-9 (1979); TENN. CODE ANN. § 16-11-101 (1980) (vesting equity jurisdiction in chancery court), 16-10-101 (1980) (vesting general jurisdiction in circuit court); TEX. CONST. art. 5, § 8, TEX. STAT. ANN. art. 1906, 1909 (Vernon 1964); UTAH CONST. art. VIII, §§ 5, 7; UTAH CODE ANN. § 78-2-2 (1977), § 78-3-4 (Supp. 1983); VT. STAT. ANN. tit. 4, § 113 (Supp. 1983); VA. CONST. art. VI, § 1, VA. CODE § 17-123 (1982); WASH. CONST. art. IV, § 6; WASH. REV. CODE ANN. § 2.08.010 (1961); W. VA. CONST. art. VIII, § 6, W. VA. CODE § 51-2-2 (1981); WIS. CONST. art. VII, § 8, WIS. STAT. ANN. § 753.03 (West 1981); WYO. CONST. art. 5, § 10.

Original jurisdiction over certain types of cases, such as those involving decedents or monetary claims against the state, and claims involving a small amount of money, is often lodged in a separate court. By court system of general jurisdiction or court of general jurisdiction, this article refers to all the courts of the state.

77 Only one provision of state law has been uncovered that would currently interfere with the power of a state court to hear a federal question. A New Mexico statute provides:

> No court of the state of New Mexico shall have jurisdiction of, or enter any order of decree of any character in any action instituted or attempted to be instituted in the courts of this state, seeking to enforce, directly or indirectly, any federal statute, or rule or regulation described in Section 1 hereof, where the congress of the United States has curtailed, withdrawn or denied the district courts of the United States the right to enforce such statutes, rules or regulations aforesaid.

N.M. STAT. ANN. 34-1-8 (1978).

Section 1, not codified, reads:

> The legislature of the state of New Mexico hereby finds that: (a) the congress of the United States has heretofore authorized, and may hereafter authorize, by congressional act, the courts of the several states to entertain jurisdiction of and enforce causes of action created by or arising from federal statutes, or by rules or regulations of federal regulating bodies or agencies, and
>
> (b) The congress has no power to require the state courts of the several states to take cognizance of such actions, and
>
> (c) The congress has from time to time, and may hereafter, withdraw from the courts of the United States jurisdiction to enforce such statutes or rules or regulations aforesaid or to entertain actions for such purpose or to enter judgments or decrees based thereupon, and
>
> (d) In such event actions to enforce such statutes or rules or regulations afore-

courts with adequate and appropriate jurisdiction to vindicate all federal rights.[78] The obligation to vindicate those rights does not burden the state courts with unfamiliar tasks because state and federal courts are similar institutions with nearly identical functions.

3. Subsequent Interpretations of *Testa*

Subsequent decisions interpreting *Testa* support the proposition that state courts of general jurisdiction must hear all properly-presented federal claims when jurisdiction is concurrent. The only subsequent Supreme Court decision to refer to *Testa* at length is the recent case of *Federal Energy Regulatory Commission v. Mississippi*[79] ("*FERC*"), in which the Court held that the Mississippi Public Service Commission was required to hear claims arising under the Public Utility Regulating Policies Act of 1978.[80] The Court extended *Testa* to govern state commissions and held that the tenth amendment's reservation of powers to the states, revivified in *National League of Cities v. Usery*,[81] did not bar this extension of *Testa*.[82] The *FERC* Court rejected a lower federal court's holding that forcing the Mississippi commission to assume jurisdiction over the federal claims unconstitutionally interfered with state sovereignty.

The Court stated in *FERC* that the Mississippi commission was obligated to hear the federal claims because it heard analogous state claims, but the Court did not analyze the kinds of state claims the commission actually heard. The Court was content that the commis-

> said, or rights or obligations arising therefrom may hereafter be instituted in the courts of this state, burdening and taxing such courts, and placing upon the courts and people of the state the burden and expense of enforcing such federal statutes, rules or regulations, or setting disputes arising therefrom.

The statute was enacted in 1947, the same year *Testa* was decided. The provision would undoubtedly unconstitutionally discriminate against federal laws. The absurd result wrought if this statute were ever applied would be that no court would be available to vindicate a federal right over which Congress had withdrawn federal court jurisdiction. This result is entirely contrary to the states' obligation to uphold the federal Constitution and federal law. *See* notes 29-30 *supra* and accompanying text. Finally, no "burden" or "expense" such as that described in § 1 could possibly justify state court refusal to hear federal claims in the face of the demands of the supremacy clause.

78 Other commentators have also recognized this simple solution to most *Testa* problems. *See* 16 WRIGHT & MILLER, *supra* note 64, at 718; Redish & Muench, *supra* note 25, at 355.

79 456 U.S. 742 (1982).

80 Pub. L. No. 95-617, 92 Stat. 3117 (1978).

81 426 U.S. 833 (1976). In *National League of Cities*, the Supreme Court held that the tenth amendment prohibited Congress from establishing minimum wages and maximum hours for state employees who performed "traditional governmental functions." 426 U.S. at 852. The tenth amendment thus restricted Congress' power to legislate under article I. *Id.*

82 456 U.S. at 760-62.

sion engaged in dispute resolution. Because the commission heard disputes based on state law, it was obligated to hear disputes based on federal law.[83] Hearing these federal claims did not force the commission to undertake an entirely unfamiliar function. In addition, the *FERC* Court emphasized the broad language of *Testa*: federal policy prevails,[84] and "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."[85]

State courts that have recently faced the issues presented in *Testa* have arrived at uniformly consistent results: these state courts have assumed jurisdiction over federal claims.[86] The decisions have

83 *Id.* at 760-61. The Court cited various Mississippi statutory provisions concerning the powers of the Mississippi Public Service Commission. The most relevant provisions, §§ 77-3-13(3) and 77-3-21 (1973), authorized the state commission to hold hearings when determining whether to issue a certificate allowing the operation or construction of an electric facility or when determining whether service was reasonably adequate. The analogy between this function and resolving disputes " 'between qualifying facilities and electric utilities arising under' [the federal act]," 456 U.S. at 760, is not a close one by any standard.

84 456 U.S. at 760; *see also id.* at 762 (state commission obligated to consider federal standards).

85 *Id.* at 769, discussing the obligation of the state court to hear federal claims that the state commission failed to consider the federal standards. Here the Court found a "seemingly precise parallel" between Mississippi judicial review of the state commission and the judicial review called for by the federal Act. *Id.* at 769 n.31.

The Court also held that Congress could provide that federal rights be enforced through state adjudicatory machinery. *Id.* at 761. The Court wrote, relying on *Testa*, that the federal government has "some power to enlist a branch of state government—there the judiciary—to further federal ends." *Id.* at 762.

Other federal decisions have discussed *Testa*, albeit briefly. In Martinez v. California, 444 U.S. 277 (1980), the Court reserved decision on the question whether a state court was obligated to entertain a § 1983 claim, noting that "where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." *Id.* at 283-84 n.7. In Palmore v. United States, 411 U.S. 389, 402 (1973), the Court referred to *Testa* as holding that "Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws . . . ."

Other federal judges have taken a broader view of *Testa*. Justice Marshall, concurring in Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Marshall, J., concurring), stated that the Missouri courts would have had a constitutional obligation to hear the Federal Labor Standards Act claim in issue because these state courts had general jurisdiction, were competent to hear suits of a like character, and were co-equal partners with the federal courts to enforce federal law and the federal Constitution. Some federal courts have assumed that state courts have an obligation to enforce actions under the Civil Rights Act, 42 U.S.C. § 1983 (1982). *See* New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ., 654 F.2d 868 (3d Cir. 1981); International Prisoners' Union v. Rizzo, 356 F. Supp. 806 (E.D. Pa. 1973).

86 Recent state cases discussing *Testa* and assuming jurisdiction over federal claims are: E.A. v. Alaska, 623 P.2d 1210, 1215 n.13 (Alaska 1981); New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 374, 519 P.2d 169, 176 (1974); Williams v. Horvath, 16 Cal. 3d 834, 836, 548 P.2d 1125, 1127, 129 Cal. Rptr. 453 (1976); McCarroll v. Los Angeles County Dist.

all implicitly recognized that state courts of general jurisdiction must vindicate federal rights when jurisdiction is concurrent. The reasoning in these decisions, however, has varied. Some state courts have held that they are obligated to assume jurisdiction over all federal claims when federal jurisdiction has not been made exclusive,[87] while others have held that they must take jurisdiction because they hear similar state claims.[88] Several state courts have explicitly stated that

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Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Perry v. American Fin. Corp., 372 A.2d 224 (Del. Super. Ct. 1977); Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980); United Mo. Bank v. Robinson, 7 Kan. App. 2d 120, 638 P.2d 372 (1981); Concerned Citizens of Rapides Parish v. Hardy, No. 8110, slip op. (La. Ct. App. Mar. 26, 1981); Maryland Comm. For Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962), *aff'd*, 229 Md. 406, 184 A.2d 715, *rev'd and remanded on other grounds*, 377 U.S. 656 (1964); Normand v. Barkei, 385 Mass. 851, 434 N.E.2d 631 (1982); Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962), *cert. denied*, 377 U.S. 990 (1964); Dudley v. Bell, 50 Mich. App. 678, 213 N.W.2d 805 (1973); Lewis v. Delta Loans, Inc., 300 So. 2d 142 (Miss. 1970); State v. Banks, 454 S.W.2d 498 (Mo. 1970); MacNeil v. Klein, 141 N.J. Super. 394, 358 A.2d 488 (1976); Doe v. Bridgeton Hosp. Ass'n, 130 N.J. Super. 416, 327 A.2d 448 (1974), *rev'd on other grounds*, 71 N.J. 478, 366 A.2d 641, *cert. denied*, 433 U.S. 914 (1977); Travel Agents Malpractice Action Corps v. Regal Cultural Soc'y, Inc., 118 N.J. Super. 184, 287 A.2d 4 (1972); Bess v. Toia, 66 A.2d 844 (Conn. 1978); Felder v. Foster, 107 Misc. 2d 782, 436 N.Y.S.2d 675 (Monroe County Sup. Ct. 1981); Brody v. Leamy, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Dutchess County Sup. Ct. 1977); Vickers v. Home Fed. Sav. & Loan Ass'n, 87 Misc. 2d 880, 386 N.Y.S.2d 291 (Monroe County Sup. Ct. 1976); Holt v. City of Troy, 78 Misc. 2d 9, 355 N.Y.S.2d 94 (Rensselaer County Sup. Ct. 1974); Judo, Inc. v. Peet, 68 Misc. 2d 281, 326 N.Y.S.2d 441 (N.Y. County Civ. Ct, 1971); Seamen v. Fedourich, 45 Misc. 2d 940, 258 N.Y.S.2d 152 (Broome County Sup. Ct. 1965); Snuggs v. Stanly County City Dep't of Pub. Health, 63 N.C. App. 86, 303 S.E.2d 646 (1983); Hoffman v. Wagner, 149 Ohio St. 50, 77 N.E.2d 467 (1948); Lakewood Homes, Inc. v. Board of Adjustment, 23 Ohio Misc. 211, 258 N.E.2d 470 (1970), *aff'd in part, rev'd in part on other grounds*, 25 Ohio App. 2d 125, 267 N.E.2d 595 (1971); Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 415 A.2d 689 (1980); Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698 (1977); Commonwealth v. Creamer, 464 Pa. 2, 345 A.2d 702 (1975); Woonsocket Historical Soc'y v. City of Woonsocket, 120 R.I. 259, 387 A.2d 530 (1978); Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977); Vogt v. Nelson, 69 Wis. 2d 125, 230 N.W.2d 123 (1975). *But cf.* Zorick v. Tynes, 372 So. 2d 133 (Fla. Dist. Ct. App. 1979), in which the court first apparently held that it had no duty to assume jurisdiction because federal courts would be better able to hear and enforce the federal claim, but then proceeded to reject the federal claim on the merits.

87 *See* E.A. v. Alaska, 623 P.2d 1210, 1215 n.13 (Alaska 1981); United Mo. Bank v. Robinson, 7 Kan. App. 2d 120, 638 P.2d 372 (1981); Judo, Inc. v. Peet, 68 Misc. 2d 281, 326 N.Y.S.2d 441 (N.Y. County Civ. Ct. 1971); Seamen v. Fedourich, 45 Misc. 2d 940, 258 N.Y.S.2d 152 (Broome County Sup. Ct. 1965); Woonsocket Historical Soc'y v. City of Woonsocket, 120 R.I. 259, 387 A.2d 530 (1978); Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977); Vogt v. Nelson, 69 Wis. 2d 125, 230 N.W.2d 123 (1975).

88 New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 519 P.2d 169, 176 (1974); McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Perry v. American Fin. Corp., 372 A.2d 224 (Del. Super. 1977); Travel Agents Malpractice Action Corps v. Regal Cultural Soc'y, Inc., 118 N.J. Super. 184, 287 A.2d 4 (1972); Snuggs v. Stanly County City Dep't of Pub. Health, 63 N.C. App. 86, 203 S.E.2d 646 (1983); Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 415 A.2d 689 (1980); Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698 (1977).

state courts of general jurisdiction are obligated to hear federal claims when jurisdiction is concurrent.[89]

4. Non-Discrimination

Some commentators have interpreted *Testa* narrowly, relying entirely on language in the last paragraph without regard to the more expansive language in the body of the opinion.[90] These commentators have interpreted *Testa* as a pure non-discrimination case which holds that a state court must hear federal claims if it hears similar state claims. It has even been implied that *Testa* stands only for the proposition that Congress can expressly direct state courts to hear analogous federal claims.[91]

Testa, however, clearly did not rely on an express direction from Congress. Section 205(e) of the federal Emergency Price Control Act had provided only that claims thereunder could be brought "in any court of competent jurisdiction";[92] Congress did not expressly direct state courts to assume jurisdiction. Rather, the state courts' obligation to do so apparently derived purely from the supremacy clause because Congress had not made federal jurisdiction exclusive.[93]

Interpretations of *Testa* that focus on a state court's duty not to

89 *See* Williams v. Horvath, 16 Cal. 3d 834, 548 P.2d 1125, 1127, 129 Cal. Rptr. 453 (1976); Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980); Lewis v. Delta Loans, Inc., 300 So. 2d 142 (Miss. 1974); Brody v. Leamy, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Dutchess County Sup. Ct. 1977).

90 *See, e.g.*, L. TRIBE, *supra* note 47, at 137-38 n.36; *FERC*, 456 U.S. at 784 (1982) (O'Connor, J., dissenting).

91 *See* Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 971 (1947); *FERC*, 456 U.S. at 773-74 n.4 (Powell, J., dissenting). Even a narrow interpretation of *Testa* would place a broader obligation on state courts than that expressed by Justice Frankfurter in his concurring opinion in Brown v. Gerdes, 321 U.S. 178, 188 (1944), an opinion not referred to in *Testa*. In *Gerdes*, Justice Frankfurter wrote:

> Since 1789, rights derived from federal law could be enforced in state courts unless Congress confined their enforcement to the federal courts. This has been so precisely for the same reason that rights created by the British Parliament or by the Legislature of Vermont could be enforced in New York courts. Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the State of New York—enables them to enforce rights no matter what the legislative source of the right may be.

92 *See* note 40 *supra*; *see also* Cullison, *State Courts, State Law, and Concurrent Jurisdiction of Federal Questions*, 48 IOWA L. REV. 230, 239 (1963).

93 Professor Sandalow has suggested that state courts should be obligated to hear federal statutory claims only if Congress has declared that state courts must enforce these federal rights. Sandalow, *supra* note 47, at 207. *But see* Redish & Muench, *supra* note 25, at 346-47. For Professor Sandalow, the fact that it would be "unseemly" for state courts to decline juris-

discriminate against federal claims do find some support in the opinion.[94] The *Testa* Court noted that Rhode Island courts concededly

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diction over federal claims is not an adequate justification for obligating them to assume jurisdiction when jurisdiction is concurrent. Sandalow, *supra* note 47 at 206.

Professor Sandalow's suggestion that the Supreme Court indicated in *Testa* that it would be unseemly for a state court to refuse to adjudicate rights granted by federal statutes is undoubtedly correct. This refusal is not merely unseemly, however; it also ignores the fact that state courts are a part of a federal system, not courts of independent sovereigns. *See* THE FEDERALIST No. 82, *supra* note 26, at 536 (A. Hamilton). State courts are in a "partnership" with federal courts to enforce federal law, Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Marshall, J., concurring); and unless Congress has provided otherwise for exclusive federal jurisdiction, state courts exist to hear all claims, including federal ones. In Robb v. Connolly, 111 U.S. 624, 637 (1884), the Supreme Court stated:

> Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'

The general duty to enforce federal statutory rights does not place a large burden on state courts; the overwhelming majority of such cases are undoubtedly brought in federal court. *See* Brown v. Pitchess, 531 P.2d 772, 775, 119 Cal. Rptr. 204, 207 (1975). *Pennhurst* will most likely lead litigants to bring federal statutory claims against state officials in state court, thus increasing the caseload of state courts. In addition, *Pennhurst* implies that *Ex parte* Young may be limited to federal constitutional claims. *See* note 14 *supra*. Therefore, effective enforcement of some federal statutory rights may be available only in state court. *See* note 25 *supra*. If state courts have no duty to hear federal statutory claims, and Congress has not explicitly overridden the state's eleventh amendment immunity, there may be no forum in which federal statutory claims against state defendants can be redressed. Professor Sandalow might suggest that a congressional mandate that state courts assume jurisdiction should then be inferred. *See* Sandalow, *supra* note 47, at 207, 285. This inference is an obvious fiction and could mean that federal statutory rights would be enforceable against state defendants in state court, but not against municipal defendants. *See* note 112 *infra*. In addition, state court is the only forum, after *Pennhurst*, to which plaintiffs can bring both state and federal claims against the state or state officials acting in their official capacities.

94 The language of other Supreme Court decisions can be read to support the proposition that a state court is obligated to hear only those federal claims analogous to claims it does entertain. In *Mondou*, the Court noted that the state court heard personal injury and death claims, 223 U.S. at 57, claims which fell into the same category as the federal claims over which the state court had refused to take jurisdiction. Similarly, in McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934), the Court wrote that a "state may not discriminate against rights arising under federal law." *Id.* at 234; *see also* the forum non conveniens cases discussed in note 55 *supra*. Both *Mondou* and *McKnett*, however, first emphasized that the state court had general jurisdiction. *Mondou*, 223 U.S. at 57; *McKnett*, 92 U.S. at 233; *see also* Redish & Muench, *supra* note 25, at 350-54 (arguing that case support for analogous right duty is weak). Some commentators continue to treat as open the question whether Congress can require the states to enforce non-analogous federally-created rights. *See, e.g.*, Redish & Muench, *supra* note 25, at 350, n.169; Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, at 507-08 (1954); *see* discussion at note 120 *infra*.

heard similar claims based on Rhode Island law.[95] These interpretations of *Testa*, however, relying as they do entirely on certain language in the last paragraph of opinion, cannot be the controlling interpretations of the opinion. They ignore *Testa's* chief argument that Rhode Island's policy of judicial restraint did not excuse its courts from hearing the federal claims. The duty of a state court not to discriminate against federal claims is only one element of the Court's holding.

As a practical matter, requiring state courts of general jurisdiction to hear all federal claims may not be very different from requiring these courts to hear all analogous federal claims. Although state courts have interpreted *Testa* differently, no state court recently analyzing *Testa* has refused to hear federal claims when jurisdiction was held to be concurrent.[96] *Testa* itself did not require an exact equivalence between the state claims that a state court does enforce and the federal claims that it has a duty to enforce; the *Testa* Court did not even cite similar Rhode Island cases. It referred only to a Rhode Island case enforcing a federal double damages action—an action that under both federal and Rhode Island law was compensatory, not punitive—and to Rhode Island provisions creating jurisdiction. Nor did *Mondou* require any precise equivalence. Although the Connecticut and federal laws were substantively different, the Connecticut courts were obligated to hear the federal claims because the Connecticut courts had jurisdiction to hear personal injury and death actions. Similarly, the Court in *FERC* concluded that the Mississippi commission heard analogous claims merely because the commission engaged in dispute resolution.

The duty not to discriminate does, however, add one element to the earlier conclusion that state courts of general jurisdiction cannot refuse to hear federal claims on the basis of state policies of judicial restraint. Under interpretations of *Testa* which rely entirely on the state courts' general jurisdiction, a state could structure the jurisdiction of its courts to exclude certain kinds of federal claims. This discrimination would clearly be impermissible.[97] The duty not to discriminate thus overcomes any state jurisdictional barrier, constitutional or otherwise.[98] Thus, when jurisdiction is concurrent, a state

95 *Testa*, 330 U.S. at 394.

96 *See* text accompanying notes 86-89 *supra*.

97 *See* note 77 *supra*.

98 Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950). The court, relying on *Testa*, held that the New York legislature's removal of state court jurisdiction to hear federal rent overcharge claims was unconstitutional.

court of general jurisdiction must hear all similar federal claims, and state constitutional or statutory restrictions of state court jurisdiction may not discriminate based on the substance of the federal claim or the remedy which it provides. The parallel between state claims heard and federal claims not heard need not be exact for unconstitutional discrimination to arise. Any state restriction on its courts of general jurisdiction resulting in failure by those state courts to adjudicate a federal claim would be constitutionally suspect. Once a state establishes a court system, only a substantial restriction on the ability of that system to hear and remedy both federal and state claims could justify a refusal to hear and remedy a federal claim.[99]

B. *State Obligation to Establish Courts with Jurisdiction*

Not only must states maintain courts with jurisdiction to hear federal claims analogous to claims heard by the state courts, but the states must also maintain courts with jurisdiction to hear claims that acts of the state violated a plaintiff's federal constitutional rights even if there already exist federal courts available to hear these claims. The Supreme Court implied this obligation in its decision in *General Oil Co. v. Crain.*[100]

In *Crain*, a Tennessee statute provided that the Tennessee courts had no jurisdiction to entertain suits against the state, or against officers acting by authority of the state, if such suits reached state funds or property.[101] Plaintiff sued to enjoin the collection of a state tax on the ground that the tax violated the commerce clause of the federal Constitution. The state court held that it lacked jurisdiction, and the plaintiff appealed to the United States Supreme Court. The defend-

99 Thus, under a non-discrimination analysis, if the state courts heard no claims for an amount more than $10,000, it is not likely that these state courts would be obligated to hear federal claims for more than that amount, assuming a federal forum was available. *Cf.* Herb v. Pitcairn, 324 U.S. 117 (1945) (jurisdictional limit of city court barred suit there for federal claim when other state courts available to hear claim). Under the same analysis, if states had no courts that could grant equitable relief, a suit based on federal law seeking only equitable relief apparently could not be maintained in the courts of that state, as long as a federal forum was available. *See also* Cullison, *supra* note 92, at 239. *But see* text accompanying notes 100-22 *infra.*

In the text of THE FEDERALIST No. 82, Hamilton notes that, with federal jurisdiction, the state courts would still retain their "pre-existing" jurisdiction over state claims. One commentator has argued that Hamilton's reference to a state's "pre-existing" jurisdiction supports the argument that state courts need take jurisdiction only of federal claims "analogous" to state claims enforceable by state courts. Note, *supra* note 27, at 1552 n.6. This is plainly wrong. The context of THE FEDERALIST No. 82 reveals that Hamilton stressed that Congress could not abridge the "pre-existing" authority of the state courts, i.e., in state law matters.

100 209 U.S. 211 (1908); *see* Note, *supra* note 27, at 1556.

101 209 U.S. at 216.

ant state official argued that the Tennessee statute provided an adequate state ground justifying refusal of the Supreme Court to take jurisdiction.[102] The Court rejected this argument but held that the Tennessee tax was constitutional. The Court thus impliedly held that the Tennessee courts had a constitutional obligation[103] to hear the constitutional challenge. To hold otherwise, the Court argued, would in effect nullify much of the operation of constitutional provisions and allow "an easy way" to avoid enforcement of those provisions.[104] As an example, the Court pointed to the eleventh amendment prohibition against suits against a state in federal court.[105] Thus, if the state refused jurisdiction over such federal con-

102 *Id.* at 226-27; *see also* Hill, *supra* note 25, at 1117 n.37; Sandalow, *supra* note 47, at 208-09.

103 The Court did not identify that obligation or cite the supremacy clause.

104 *Crain*, 209 U.S. at 226-28.

105 *Id.* at 226. Professor Sandalow has suggested that *Crain's* reliance on the eleventh amendment was misplaced because under *Ex parte* Young, 209 U.S. 123 (1908), decided the same day, this amendment does not bar "suit in federal court against a state officer acting under an allegedly unconstitutional authority." Sandalow, *supra* note 47, at 209 n.89. This criticism is unwarranted. Although the eleventh amendment would not have barred the suit for injunctive relief in *Crain* in federal court because of the *Ex parte* Young doctrine, it may bar constitutional claims against the state itself in federal court. Thus, under the eleventh amendment as now construed, if the plaintiff had paid the tax in *Crain* and then brought a constitutional claim for a refund, his suit against the state treasury would appear to lie only in state court. *See* note 25 *supra*; Edelman v. Jordan, 451 U.S. 651 (1974); 16 WRIGHT & MILLER, *supra* note 64, § 4024; HART & WECHSLER, *supra* note 21, at 232 (1981 Supp.).

The Supreme Court has held that 42 U.S.C. § 1983 did not abrogate the states' eleventh amendment immunity, finding no explicit intent to abrogate this immunity in the legislative history of this Civil Rights statute. Quern v. Jordan, 440 U.S. 352 (1979); *Pennhurst*, 104 S. Ct. at 907. Constitutional claims that reach a state's treasury at the present time thus cannot be brought in federal court. In his *Quern* dissent, Justice Brennan argued that the majority had held, sub silentio, that a state was not a "person" under § 1983. If a state had been a "person," Justice Brennan reasoned, § 1983 would have overridden the states' eleventh amendment immunity. The Supreme Court, subsequent to its holding in Monell v. Dep't of Social Serv., 436 U.S. 658 (1978), that a municipality is a "person" under § 1983, has yet to decide the issue whether a state is a "person" under § 1983. State courts and lower federal courts are divided. *Compare, e.g.*, State v. Green, 633 P.2d 1381 (Alaska 1981); Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979) (en banc), *cert. denied*, 444 U.S. 1077 (1980); De Bleecker v. Montgomery Co., 292 Md. 498, 438 A.2d 1348 (1982); Boldt v. State, 101 Wis. 2d 566, 303 N.W.2d 133 (1981), *cert. denied*, 454 U.S. 973 (1981) (state not a "person") *with* Irvin v. Calhoun, 522 F. Supp. 576 (D. Mass. 1981); Marrapese v. Rhode Island, 500 F. Supp 1207 (D.R.I. 1980); Stanton v. Godfrey, 415 N.E.2d 103 (Ind. App. 1981); Thiboutot v. State, 405 A.2d 230 (Me. 1979), *aff'd sub nom.* Maine v. Thiboutot, 448 U.S. 1 (1980); Smith v. State, 122 Mich. App. 340, 333 N.W.2d 50 (1983) (all allowing § 1983 suits against state).

State courts that have explicitly or implicitly held that a state is a "person" under § 1983 have allowed federal damage claims against the state treasury which could not be brought in federal court, because of the eleventh amendment, to be brought in state court. In *Thiboutot*, the Court held that plaintiffs had stated a § 1983 claim against the state for damages in state court, but did not examine the issue discussed here. Justice Powell, dissenting from the Court's holding that a violation of a social security statute stated a claim under § 1983, noted

stitutional challenges, complainants would be left without a forum in which to bring their claims. The Court stated: "It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law . . . ."[106]

The *Crain* approach is persuasive because it ensures that a state forum is always available to redress federal constitutional claims asserted against the state, even if the eleventh amendment bars an action in federal court. States, as responsible governmental bodies in a federal system, may not refuse to allow their courts to hear claims that acts of the state and state officials violated the federal Constitution. At the very least, then, the supremacy clause obligates states to provide a judicial forum to vindicate federal constitutional claims arising from these acts.[107]

Crain supports an even greater obligation of the states. It is possible that state immunity under the eleventh amendment requires that various federal statutory claims be enforced against the state only in state court. It is not clear at present whether the *Ex parte Young* doctrine (which holds that a federal suit against state officers in

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that § 1983 actions could be brought against the states. 448 U.S. at 22, n.10 (Powell, J., dissenting).

Even if § 1983 does not encompass claims against the state, such claims could perhaps be directly implied under the fourteenth amendment. T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497, 393 A.2d 613 (Law Div. 1978). There is no reason to believe that the substantive rights granted by the fourteenth amendment are limited by the sovereign immunity doctrine of the eleventh amendment.

106 209 U.S. at 228. Professors Hart and Wechsler have suggested that *Crain* was overruled, sub silentio, by the Supreme Court's per curiam dismissal of the appeal in Musgrove v. Georgia R.R. & Banking Co., 335 U.S. 900 (1949). *See* HART & WECHSLER, *supra* note 21, at 935-36. In *Musgrove* the Georgia Supreme Court dismissed a claim premised on the contract clause of the federal Constitution, art. I, § 10, because the state had failed to consent to the suit. 204 Ga. 139, 49 S.E.2d 26 (1948), *appeal dismissed*, 335 U.S. 900 (1949). The Supreme Court held that this non-federal ground was adequate to support the Georgia court's decision. *See also* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952). To the extent *Crain* was overruled by this per curiam dismissal, it has been resuscitated by recent Supreme Court assertions that sovereign immunity defenses to federal claims are issues of federal, not state, law. Owen v. City of Independence, 445 U.S. 622, 647 n.30 (1980); Martinez v. California, 444 U.S. 277, 284 n.8 (1980). *Martinez* is particularly on point because in that case state sovereign immunity was stated to be no defense to federal claims brought in state court. *See also* T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497, 503, 393 A.2d 613, 618 (Law Div. 1978).

107 *See also* Normand v. Barkei, 385 Mass. 851, 851 n.1, 434 N.E.2d 631, 633 n.1 (1982). As stated, *see* note 25 *supra*, it would appear that Congress could limit federal constitutional claims to federal court, if these courts had authority to provide adequate remedies for the constitutional violations. The *Crain* Court did not consider this issue.

their individual capacities is not a suit against the state)[108] extends to federal statutory actions.[109] Moreover, federal courts cannot award damages against a state treasury without that state's consent, unless Congress has overridden the state's eleventh amendment immunity.[110] Thus, states should be required to maintain courts which can hear federal claims challenging acts of states and state officers to ensure that there is always a forum in which to vindicate federal rights.[111] It would further appear that states must provide courts to review constitutional claims arising from the acts of local, county, and municipal officials.[112]

Indeed, *Crain's* concern that there always be a judicial forum to enforce federal rights and its suggestion that constitutional analysis must take account of "the possibility of extremes"[113] argues for a state court obligation to hear all federal claims when jurisdiction is concurrent.[114] Congress' ability to limit the jurisdiction of the infer-

108 *Ex parte* Young, 209 U.S. 123 (1908).

109 *See* note 14 *supra.*

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

111 Professor Hill suggests that it was significant that the jurisdictional provision in *Crain* removed jurisdiction that the state court otherwise had, and thus the invalidation of the application of this provision restores general jurisdiction as vested by other provisions. Hill, *supra* note 25, at 1117 n.37. He quotes Kenney v. Supreme Lodge, 252 U.S. 411, 415 (1920), in which Justice Holmes wrote that *Crain* "foreshadowed the rule that 'a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.' "

Because all states have court systems of general jurisdiction, *see* note 76 *supra*, it is perhaps unnecessary to decide whether the obligations which *Crain* appears to impose depend upon the existence of general jurisdiction in the state courts. The *Crain* Court never inquired whether the Tennessee courts had general jurisdiction. More important, the existence vel non of general jurisdictional statutes was not relevant to the *Crain* Court's central concern that a forum be available to vindicate federal constitutional rights. *Crain* requires the states to provide judicial forums for these claims without regard to the pre-existing jurisdiction of the state courts, or indeed the existence of any courts. *But see Kenney*, 252 U.S. at 414 ("[T]here is truth in the proposition that the Constitution does not require the State to furnish a court.") (full faith and credit case).

112 Although the Supreme Court has held that the eleventh amendment does not generally apply to counties and similar municipal corporations, Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977), to the extent these units of local government act in conjunction with the state, they may effectively share the state's eleventh amendment immunity. *Pennhurst*, 104 S. Ct. at 920-21. In addition, for the reasons stated in the text, it is proper to obligate states to maintain courts to hear all federal constitutional challenges to state action.

113 *Crain*, 209 U.S. at 226-27.

114 This obligation includes the obligation to hear federal claims brought against federal officers or agencies. Of course, federal officers or agencies can remove lawsuits brought against them in state court to federal court. 28 U.S.C. §§ 1441-1442. In Tarble's Case, 80 U.S. (13 Wall.) 397 (1871), the Supreme Court held that a state court did not have the power to issue a writ of habeas corpus for the discharge of a person in federal custody allegedly in violation of federal law, or even to determine whether the federal tribunal which tried the

ior federal courts would, under the *Crain* analysis, also support this obligation.[115]

Testa can also be interpreted broadly to require states to redress all federal rights when jurisdiction is concurrent. The *Testa* Court suggested as much when it stated that "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."[116] This statement suggests that the states are responsible for enforcing federal law regardless of the jurisdiction of their courts. In addition, the broad language of *Testa* stating that federal policy is the prevailing policy of every state suggests that states must have courts to enforce that federal policy.[117]

A state court obligation to address federal claims guarantees a judicial forum for the presentation of federal rights even if Congress abolishes the inferior federal courts altogether or restricts their jurisdiction.[118] Some might argue that this obligation need arise only if

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underlying lawsuit had jurisdiction to do so. Tarble's Case should be read to rest upon an implied congressional intent that habeas actions to release enlisted soldiers from the military be restricted to federal court. Tarble's Case, under this interpretation, is no more than an instance in which Congress has vested exclusive jurisdiction in the federal courts. Tarble's Case might also be an example of a "disabling incompatibility between the federal claim and state court adjudication." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981); *see also* text accompanying note 25 *supra.*

115 Professor Sandalow suggests that Congress' power to restrict federal court jurisdiction is a more plausible basis for *Crain* than the eleventh amendment, but he then questions whether it is appropriate to fashion state court constitutional obligations upon the remote possibility that Congress will restrict federal court jurisdiction. Sandalow, *supra* note 47, at 209. He would have any failure of Congress to confer jurisdiction upon the federal courts for federal constitutional claims be interpreted as a direction by Congress that state courts must assume jurisdiction. *Id.* As has already been established, Sandalow's argument suffers because it fails to take into account that the eleventh amendment may require that certain constitutional claims be brought in state court. *See* note 105 *supra.* There are several other objections to his proposal. First, the possibility that Congress will restrict the federal constitutional jurisdiction of the federal courts no longer seems "remote," as it may have appeared in 1965. *See* note 21 *supra.* The statement in *Crain* that constitutional analysis must take account of the possibility of extremes is thus well heeded. Second, state courts have an equal responsibility with federal courts to enforce federal rights, *see* note 93 *supra*, and it is particularly appropriate for states to maintain courts to test the propriety of state action under the federal Constitution as well as under other laws. *See* text accompanying notes 14-19 *supra.* Third, any implied congressional intent that state courts must assume jurisdiction could be overcome by explicit congressional intent that state courts and federal courts be deprived of jurisdiction. The congressional restrictions on state jurisdiction in these circumstances would be unconstitutional, and state courts would be obligated to hear the federal constitutional claims, but there would be no implicit congressional intent that the state courts assume jurisdiction. *See* note 25 *supra*; *see also* Hart, *supra* note 29, at 360.

116 *Testa*, 330 U.S. at 341.

117 *Id.* at 393.

118 Professor Tribe in his treatise interprets the Hart Dialogue to speak only to the re-

Congress actually abolishes the inferior federal courts;[119] but as stated in *Crain*, constitutional obligations are based on the possibility (not the existence) of extremes.[120] The obligation to vindicate all federal rights is also supported by the fact that there was no general federal question jurisdiction at all in federal court before 1875.[121] Congress only recently struck the requirement of a minimum amount in controversy from 28 U.S.C. § 1331, the statute which provides for federal question jurisdiction.[122] Certainly, the broad language of the supremacy clause, which specifically binds state judges without regard to provisions of state law, supports a requirement that states maintain courts to hear all federal questions.

In any event, the Supreme Court has not clearly established that states must provide courts to hear all federal claims when jurisdiction is concurrent. Although *Testa* may hint at this requirement, its holding is far more limited. Thus, for purposes of the analysis below, this article assumes that states are not obligated to hear federal claims if a federal court is available to provide a complete remedy, the state constitution and statutes do not empower the state courts to hear the

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quirement of a state court to enforce federal rights when it enforces similar state rights. L. TRIBE, *supra* note 47, at 38. This interpretation ignores the reading of *Testa* suggested by Professor Hart, *see* Hart, *supra* note 29, at 330, and his central concern that there always be an adjudicative forum to vindicate federal rights.

119 Hart, *supra* note 94, at 507.

If the broad reading of *Crain* is correct, and state courts have an independent responsibility to enforce federal law because of the "possibility of extremes," then *Crain* goes further than this analysis advanced by Professor Hart. *Cf.* Crowell v. Benson, 285 U.S. 22 (1932) (due process does not allow Congress to withdraw review by article III courts of constitutionality of administrative findings).

120 209 U.S. at 226-27. If the analysis suggested in this article is correct, *see* text accompanying notes 29-30 *supra*, it follows that were Congress in fact to abolish the inferior federal courts, states would be required to have courts to vindicate all federal rights. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981). Similarly, if Congress restricted the jurisdiction of the inferior federal courts, state courts would be obligated to have courts to vindicate all federal rights that could not be asserted in federal court. In either instance, the existence of state court jurisdiction over similar claims would be irrelevant. Accordingly, the ability of Congress to eliminate or restrict the jurisdiction of federal courts under article III, and the obligation which the supremacy clause places on the states, state officials, and particularly state judges, demonstrates that Congress has the power to obligate states to have courts to adjudicate all federal claims. There is no reason that this power of Congress should be contingent upon Congress actually limiting federal court jurisdiction. If Congress has the authority to obligate state courts to adjudicate unfamiliar claims when no federal court is available, it would appear to have the same authority even if a federal court were available. Congress need not strip federal courts of jurisdiction in order to force state courts to undertake unfamiliar functions. *See also* Hart, *supra* note 94, at 507.

121 Palmore v. United States, 411 U.S. 389, 401-02 (1973); HART & WECHSLER, *supra* note 21, at 39.

122 The minimum amount in controversy requirement was removed from § 1331 in 1980. Pub. L. No. 96-486, 94 Stat. 2369 (1980).

federal claim or any similar claim, and the federal claim does not challenge the propriety of state action.

Analysis of a state court's obligation to hear justiciable federal claims depends on three principles drawn from *Testa* and related cases. First, a state court of general jurisdiction can not refuse to hear a federal claim on the basis of a state doctrine of judicial restraint. Second, states cannot structure the jurisdiction of their courts to discriminate against federal claims. Discrimination may exist even where the analogy between state claims heard and federal claims not heard is not exact. Third, a state must maintain courts to hear claims that actions of the state and state officials violated the federal Constitution, and perhaps to hear claims that any state action violated federal law.

III. State Court Obligation to Hear Justiciable Federal Claims

Even if a state establishes courts with jurisdiction to hear federal claims, those state courts may declare federal claims which are justiciable under federal law to be non-justiciable in state court and thus decline to hear the federal claims. As stated above,[123] state courts hold claims to be non-justiciable for three major reasons: (1) the issue is textually committed to another branch; (2) judicial inquiry will unduly interfere with the operation of the other branches; and (3) the court is not equipped to determine the issue or to provide remedies. These elements of justiciability are considered separately in analyzing state courts' obligation to hear federal claims which are justiciable under federal law. It is rare, however, that only one element will be at issue in any given case.

A. *Textual Commitment*

Although all states have court systems with general jurisdiction, state constitutional or statutory provisions may commit particular issues to other branches of state government. If such a provision unequivocally reserves the issue to another branch, the state court is stripped of its jurisdiction over that issue. Assuming that the federal claim does not challenge state action, the state court is absolved from deciding the federal question, unless the jurisdiction-stripping provision discriminates against the federal claim. It should be noted, however, that textual provisions of constitutions and statutes are seldom unequivocal, and the history of their passage may offer no decisive

123 *See* text accompanying notes 34-36 *supra*.

guidance. A state court interpreting a provision possibly reserving an issue to another branch must take into account that federal policy is paramount: under *Testa*, the federal policy of redressing federal rights overcomes a state judicial policy of not hearing the claims.

The Pennsylvania Supreme Court considered this issue of justiciability in *Sweeney v. Tucker.*[124] The Pennsylvania House of Representatives had expelled the appellant from membership, and he sought reinstatement and back pay,[125] asserting that the House had deprived him of his federal constitutional rights. After rejecting appellees' argument that the speech or debate clause of the Pennsylvania Constitution barred the suit,[126] the court considered whether the Pennsylvania Constitution exclusively committed matters concerning expulsion of a member to the Pennsylvania House of Representatives. The court noted that it could infer that the matter was committed to the House,[127] but chose not to do so for three reasons. The court had the institutional competence to determine the procedural due process issues raised;[128] the court had heard similar challenges to legislative procedures;[129] and the court recognized the crucial role state courts play in enforcing federal constitutional rights.[130] It stated that the Pennsylvania Constitution should be construed, when possible, to permit state court review of federal claims arising from actions of the political branches of state government when those claims are cognizable in federal court.[131]

The Pennsylvania Supreme Court ruled, in effect, that there was a "false conflict" between federal and state standards of justiciability and thus avoided the question whether the state constitutional provision could bar the justiciable federal constitutional claim. The court gave persuasive reasons for taking jurisdiction of justiciable federal

124 473 Pa. 493, 375 A.2d 698 (1977).

125 Appellant sought both to enjoin the special election called to fill his seat and to obtain a declaratory judgment declaring the proposed election void. *Id.* at 493-94, 375 A.2d at 698.

126 *Id.* at 504-07, 375 A.2d at 703-04. The court, although it sought guidance from federal cases, treated this issue purely as one of state law. It did not consider the implications if the clause did bar the federal constitutional claims which were certainly justiciable under federal law. *See* Bond v. Floyd, 385 U.S. 116 (1966). The existence of a state legislative immunity defense to a federal claim is an issue of federal law. *See* note 106 *supra.*

127 473 Pa. at 517-18, 375 A.2d at 709-10.

128 *Id.* at 517-18, 375 A.2d at 709-10. The court also wrote that the political question doctrine was disfavored when individual rights were at stake.

129 *Id.* at 518, 375 A.2d at 710.

130 *Id.* at 519-22, 375 A.2d at 710-12.

131 *Id.* at 522, 375 A.2d at 712; *cf.* Vickers v. Home Fed. Sav. & Loan Ass'n, 87 Misc. 2d 880, 386 N.Y.S.2d 291 (Monroe County Sup. Ct. 1976) (when remedying federal claims, state court interprets state statute providing for class actions to allow class action that the court held was required by federal law).

claims whenever possible. It noted that state court resolution of questions concerning the functioning of state government is preferable, that state court expertise in state law might enhance the quality of constitutional adjudication, and that federal court intervention in state affairs might be more intrusive than state court intervention.[132]

Although it referred to the state courts' "parallel responsibility to enforce federal constitutional rights,"[133] *Sweeney* also suggested that the Pennsylvania Constitution could preclude all state court review of issues—including federal constitutional issues—arising from the legislative expulsion without offending the federal Constitution.[134] This view fails to take into account the state courts' duty under *Crain* to hear justiciable federal constitutional claims challenging state action. Indeed, the *Sweeney* court failed to cite *Crain*.[135]

In addition, the *Sweeney* court did not recognize that it would be unconstitutionally discriminating against the federal claims raised if it refused to hear those claims. The court acknowledged that it heard federal due process claims and similar challenges to legislative procedure. Because it heard these analogous claims, the court was obligated to adjudicate appellant's federal due process claim on the merits.[136]

132 473 Pa. at 521-22, 375 A.2d at 711-12.

133 *Id.* at 522, 375 A.2d at 712.

134 *Id.* at 520 n.28, 375 A.2d at 711. *But see* State v. Banks, 454 S.W.2d 498 (Mo. 1970), *cert. denied*, 400 U.S. 991 (1971).

135 If the appellant in *Sweeney* had a constitutional right to back pay, he could recover that money against the state only in state court. The eleventh amendment would have barred the award of damages for back pay in federal court. The Missouri Supreme Court, in State v. Banks, 454 S.W.2d 498, 501 (Mo. 1970), *cert. denied*, 400 U.S. 991 (1971), faced a similar issue concerning a state court's obligation to address federal constitutional issues regarding the ouster of a state legislator. The court held, with little explanation, that the Missouri Constitution barred plaintiffs' claims based on state law, but that, notwithstanding, it had an obligation to hear the parallel federal claims. *Banks* does demonstrate that the main practical goal proposed by this article—that if a state court is obligated to hear justiciable federal claims, it will also hear similar state claims—will not always be achieved. But this practical objective is more likely to be achieved when a state constitutional provision does not commit the issue to another branch.

136 Similar issues arose in state court cases after Baker v. Carr, 369 U.S. 186 (1962), in which the apportionment of state legislative districts was alleged to violate the federal Constitution. A badly divided Michigan Supreme Court held that a "one-man, one-vote" challenge to the districting of the Michigan legislature was not justiciable, apparently relying on federal law. Scholle v. Hare, 360 Mich. 1, 104 N.W.2d 63 (1960), *vacated and remanded*, 369 U.S. 429 (1962). The Supreme Court vacated this decision in light of *Baker*, and on remand all members of the still extremely divided Michigan Supreme Court assumed that the challenge was justiciable. Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962), *cert. denied*, 377 U.S. 990 (1964); *see also* 367 Mich. at 196, 116 N.W.2d at 359 (Carr, C.J., dissenting) (vacatur by the Supreme Court means only that the challenge is justiciable). In Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962), *aff'd*, 229 Md. 406, 184 A.2d 715,

B. *Interference with Another Branch*

A state court may refuse to adjudicate a claim because to do so would interfere with the operation of other branches of state government.[137] The court may have the power to hear the claim under the state constitution, but may nonetheless choose to abstain because of a judge-made policy against undue interference. Such a judicial policy cannot justify a state court's refusal to hear justiciable federal claims. The paramount federal policy that certain state legislative or executive action be subject to review supplants any contrary state judicial policy under which such action may not be reviewed. The justiciable federal claims themselves mandate this "interference."[138]

A state court's refusal to hear federal claims which are justiciable under federal law does not, of course, bar federal court review, which, as stated in *Sweeney*, is likely to be more intrusive than state court review.[139] A state court's refusual to hear federal claims, then, amounts to a de facto abdication to the federal courts to address the claims. The result of this refusal is therefore not that the activities of other branches are immune from judicial review, but that a state court, as distinguished from a federal court, does not undertake this review.

C. *State Court Competence*

The strongest argument for state court abstention from hearing a justiciable federal claim is that constitutional or statutory provisions do not empower the court to hear the claim. But all states have court systems of general jurisdiction, and rarely do state constitutions and statutes explicitly or implicitly bar state courts from hearing particular claims.[140] Claims are more commonly barred by state court precedent precluding the state court from addressing the federal claims and from granting appropriate remedies because of the narrower role of state courts in state government. Requiring the state

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rev'd and remanded on other grounds, 377 U.S. 656 (1964) (applauding the willingness of the state court to assume jurisdiction), the court stated that *Baker* seemed to require it to hold an apportionment claim to be justiciable, particularly in light of the Supreme Court's vacatur in *Scholle*. *Tawes*, 228 Md. at 427, 180 A.2d at 664. Because Maryland had courts of general jurisdiction and because there was no jurisdictional barrier preventing these courts from hearing the apportionment challenge, the court held that the Maryland courts were obligated to hear this challenge.

137 Jones v. Beame, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978).

138 New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ., 654 F.2d 868, 883 (3d Cir. 1981).

139 *Sweeney*, 473 Pa. at 521-22, 375 A.2d at 711-12.

140 *See* note 76 *supra*. *But see* notes 77 and 126-27 *supra*.

court to address the federal claims would thus impose functions on that court in contravention of policies of judicial restraint.[141]

The argument that state court precedents concerning justiciability can excuse a state court from redressing a federal claim has some superficial appeal. A state court's definition of its judicial role should arguably be given the same respect as state jurisdiction-granting provisions. Under this view, state court jurisdiction is not adequate and appropriate when state policies of judicial restraint would bar the federal claim.

This argument invites two major objections. First, a policy of judicial restraint—that is, one not mandated by a state constitutional or statutory provision—results in a court's failure to use the full powers available under its jurisdictional provisions. It does not evidence a lack of power or competence to hear these federal claims. As *Testa* makes clear, however, state judicial policy must bow before the federal policy that state courts vindicate federal rights. Under *Testa*, adequate and appropriate state jurisdiction depends upon jurisdictional provisions, not judicially-created policies. The supremacy clause requires that state courts use all their available jurisdiction to hear federal claims.

Second, hearing justiciable federal claims is unlikely as a practical matter to require the state courts to take on a wholly unfamiliar role, even when those state courts subscribe to a restrictive view of justiciability. State courts are not very different from federal courts, and federal standards should adequately protect the state courts from assuming an improper judicial role. A justiciable federal claim must be a "case or controversy" under the Constitution, as well as justiciable under federal law. State courts can identify the issues and determine liability under federal law with the guidance of federal standards.[142] A state court of general jurisdiction is as competent as a federal court to interpret federal law and to conduct a trial.[143]

At most, a state court can argue that it is not equipped to remedy the federal rights—for instance, that it cannot oversee the operation of a jail, a school system, or an institution for the mentally ill. A

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141 At the Appellate Division argument in Joanne S. v. Carey, 94 A.D.2d 691, 462 N.Y.S.2d 808 (1st Dep't 1983), discussed in note 12 *supra*, one of the justices remarked that federal courts might well grant the kind of relief requested against the defendant state officials, but that New York courts would not. This remark indicated a limited view of the role of New York courts, not that the operations of the other two branches of state government, challenged in *Joanne S.*, should be entirely free from judicial review.

142 *Sweeney*, 473 Pa. at 519, 375 A.2d at 710.

143 *But see* Zorick v. Tynes, 372 So. 2d 133 (Fla. Dist. Ct. App. 1979).

state court might contend that the federal courts have assumed a non-traditional judicial role in reforming institutions, a role which state courts will not assume. But state courts with common law and equitable powers invariably have the power to grant effective relief and cannot ignore the federal policy that substantive federal rights be vindicated. The supremacy clause does not allow state courts to close their doors to federal claims because of a distaste for federal policy. The difficulty of providing a remedy for justiciable federal claims cannot of itself excuse a state court from refusing even to hear those claims.

IV. State Court Obligation to Apply Federal Remedies

As discussed above, state courts must exercise their jurisdiction to the fullest extent in order to hear federal claims. Similarly, they must exercise their full statutory and constitutional powers to grant effective remedies for these claims. *Testa* teaches that, if federal law requires that a precise remedy be provided, a state court must provide that same remedy (if the court has the statutory and constitutional power under state law to provide that or an analogous remedy.)[144] Moreover, for constitutional claims brought against the state and state officials—and probably all claims challenging state action—state courts must grant the remedy which federal law requires, without regard to the court's power under the state constitution or statutes.

A. *The Necessity of Providing an Effective Remedy*

All states have court systems of general jurisdiction and wide

144 Cases following Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), have addressed the extent to which federal courts are required to enforce state remedies in diversity cases. Under these cases, the federal courts are generally required to follow state law, but they are not required to grant relief inconsistent with federal law. *See, e.g.*, Butner v. United States, 440 U.S. 48 (1979); American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965) (injunctive relief denied on basis of Norris-LaGuardia Act restraints on federal courts despite state court availability of such relief in labor dispute). Federal courts can also adopt some federal remedial procedures even when those procedures would not be available in state court. *See, e.g.*, American Brands v. Playgirl, 498 F.2d 947 (2d Cir. 1974) (standard for injunctive relief determined by federal law). The general rule that courts should apply state remedies in diversity cases discourages forum shopping and minimizes discrimination between state-court and federal-court litigants. *See generally* 19 C. WRIGHT, A. MILLER & L. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4513 (1982). The duty of state courts to enforce federal remedies arises, of course, from the supremacy clause. Considerations such as forum shopping and uniform treatment of state and federal litigants would be additional support for the application of federal remedies to vindicate federal rights in converse-*Erie* situations. *See* note 157 *infra*.

remedial powers. These courts are therefore generally equipped to provide most remedies that federal courts would employ to vindicate federal rights.[145] It has long been clear that state courts must employ effective remedies within their general remedial powers to vindicate federal rights. In *Iowa-Des Moines National Bank v. Bennett*,[146] petitioners sought a refund, claiming that the state had imposed a tax on them in a discriminatory manner, in violation of the due process and equal protection clauses of the federal Constitution. The state court held that petitioners' remedy was to bring an action to compel tax collection from the favored class of taxpayers or to await such action by state authorities. The Supreme Court reversed, holding that petitioners were entitled to the refund and could not be required to assume the burden of seeking an increase in taxes for the favored class or await action by state officials to do so.[147] The remedy proposed by the state court was not adequate to protect the federal right at stake, and the state court had the jurisdiction to afford the effective remedy.

In *Ward v. Board of County Commissioners*,[148] plaintiffs, Choctaw Indians, sought to recover taxes they claimed had been coercively collected. Plaintiffs asserted they were not obligated to pay the taxes in question because of an exemption under federal law. They maintained that the tax exemption was a vested property right which the county had abrogated in violation "of a right arising out of a law of

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145 The issue of what constitutes a proper remedy for a federal claim is an issue of federal law. *See* Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 361 (1952) (validity of releases under FELA is federal question to be determined by federal, not state, law); *see also, e.g.*, Miller v. Apartments & Homes of New Jersey, Inc., 646 F.2d 101 (3d Cir. 1981) (federal law determines contribution under civil rights laws); Carter v. Romines, 560 F.2d 395 (8th Cir. 1977), *cert. denied*, 436 U.S. 948 (1978) (standing to sue under civil rights law determined under federal law); Boscarino v. Nelson, 518 F.2d 879, 882 n.3 (7th Cir. 1975) (state law not controlling on question of good faith defense in a § 1983 action); Felder v. Foster, 107 Misc. 2d 782, 784, 436 N.Y.S.2d 675, 677 (Monroe County Sup. Ct. 1981) (holding that court had jurisdiction over § 1983 claim and that "where . . . an action is based solely upon Federal statute, it must be determined in accordance with Federal law. . .").

146 284 U.S. 239 (1931).

147 *Id.* at 247. Before the decision in *Bennett*, inadequacy of a legal remedy in state court was described by then Professor Frankfurter to serve as "the basis of equitable intervention by the federal courts." *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 517 (1928), stating that the federal courts were "compelled to entertain jurisdiction in these suits because the states do not provide adequate legal remedies through their own courts," (citing, inter alia, Proctor & Gamble Distrib. Co. v. Sherman, 2 F.2d 165 (2d Cir. 1924) (failure of state law to provide for recovery of interest on taxes unconstitutionally levied); Chicago Great W. Ry. v. Kendall, 266 U.S. 94 (1924) (burden of possibility of multiple lawsuits under questionable statute); *Ex parte* Young, 209 U.S. 123 (1908) (threat of oppressive penalties for disobedience of challenged order of a state commission)).

148 253 U.S. 17 (1920).

Congress and protected by the Constitution of the United States and that the county was accordingly bound to repay the moneys thus collected."[149] The Supreme Court of Oklahoma held, first, that the taxes could not be recovered because they had been paid voluntarily and, second, that the county could not be liable for taxes it had in turn paid over to the state.[150]

The United States Supreme Court rejected the county's argument that independent non-federal grounds were broad enough to sustain the judgment of the Oklahoma Court to deprive the United States Supreme Court of jurisdiction. The Court held, first, that there was no fair and substantial support for the state court holding that plaintiffs had paid the tax voluntarily.[151] More pertinent here, the Court rejected the county's argument that its payment of the collected taxes over to the state could justify the county's refusal to reimburse plaintiffs. An effective remedy to protect plaintiffs' federal statutory and constitutional rights required that the county be liable for any taxes coercively collected. Otherwise, the Court stated, the county "could take or appropriate the property of these Indian allottees arbitrarily and without due process of law."[152]

Bennett and *Ward* demonstrate that state judicial policies that leave plaintiffs without effective remedies in state court must yield to the federal policy that effective remedies be granted to protect federal rights.[153] The resulting state court obligation to grant an effective remedy does not generally cause any jurisdictional problems for state courts, because the general jurisdiction of state courts of jurisdiction will be, in almost all instances, "adequate and appropriate under local law"[154] to grant an effective remedy.

149 *Id.* at 20.

150 *Id.* at 21.

151 *Id.* at 22-24.

152 *Id.* at 24.

153 Hill, *supra* note 25, at 1115 n.29; *see also* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930), involving a state court's denial of injunctive relief to a plaintiff who challenged the constitutionality of a certain tax imposed by the county of Henry in Missouri. The state court based its refusal to grant relief on the ground that the plaintiff was guilty of laches in not pursuing an administrative remedy which a previous state court decision had ruled was not available. *Id.* at 675-76. Citing Mondou v. New York, 223 U.S. 1, 55-57 (1912), the Supreme Court held that injunctive relief was appropriate—and, impliedly, mandated—and that the state court decision had violated plaintiff's due process rights by failing to grant a remedy to plaintiff based upon the exclusivity of an administrative remedy which the state court had previously declared to be unavailable. 281 U.S. at 678.

Justice Brandeis, writing for the Court, held that "a State may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

154 *Testa*, 330 U.S. at 394.

B. *State Court Discretion to Choose the Appropriate Remedy*

State courts applying federal remedies clearly have the same freedom to exercise discretion in the application of those remedies as federal courts have. For example, federal law may not require a particular remedy for federal violations in institutional reform cases. Instead, the case law will reveal a multitude of discretionary federal remedies, ranging from the least intrusive remedy of a declaratory judgment to the most intrusive remedy of administration of the state institution by a federal master.[155] Although a federal court may be inclined to appoint a master, federal law will probably not require such an appointment. A state court is then free to choose a less intrusive remedy for enforcing the federal rights, as long as the remedy it chooses is effective. If the less intrusive remedy proves ineffective to correct the federal wrongs, then the state must choose a more intrusive remedy.[156]

If federal law provides a precise remedy for a federal claim, a state court must provide the same remedy to the extent that it has the power to do so.[157] Thus, in *Testa*, the state court was required to award a treble damage remedy even when it might not otherwise have done so.[158] There had been no showing that Rhode Island provided treble damages in any state cases, but this did not seem of particular importance to the Court. What was important was that the state court had adequate and appropriate jurisdiction to hear the federal claims. The federal policy that state courts enforce those actions overcame the state policy against awarding the treble damages.

It is likewise well settled that state courts must enforce certain

155 *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1247-50 (1977).

156 *Cf., e.g.*, Halderman v. Pennhurst State School & Hosp., 673 F.2d 647 (3d Cir. 1982), *rev'd*, 104 S. Ct. 900 (1984), in which Judge Garth, in dissent, suggested that before a master was appointed to oversee an institution for the mentally retarded, the state should be given the opportunity "to propose a plan for achieving compliance." 673 F.2d at 665. Judge Garth suggested that, if injunctive relief proved inadequate, plaintiffs could return to the courts for further relief. *Id.* at 671.

157 Congress would always have the power, of course, to mandate specifically that the state courts enforce a particular remedy. *See* note 120 *supra*. This requirement that state courts grant the precise remedy prescribed by federal law promotes uniformity of result in federal actions brought in state court. *See, e.g.*, Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 361 (1952) ("[O]nly if federal law controls can the [FELA] be given that uniform application throughout the country essential to effectuate its purposes."); Liner v. Jafco, Inc., 375 U.S. 301, 307 (1964). *But cf.* McCarroll v. Los Angeles County Dist. Council of Carpenters, 315 P.2d 322, 332 (Cal. 1957) ("uniformity in the determination of the substantive federal right . . . is not threatened because a state court . . . give[s] a more complete and effective remedy").

158 *See* 330 U.S. at 391.

constitutionally-mandated remedies even in the face of contrary state policy. One such remedy is the exclusionary rule. About half the states in the Union did not apply an exclusionary rule at the time the Supreme Court mandated its application by the states in *Mapp v. Ohio.*[159] The Court in *Mapp* required the state courts to enforce the exclusionary rule because it was the only effective remedy for the harm caused by illegally obtained evidence.[160] The *Mapp* rule, of course, intrudes on what had formerly been a state's prerogative to enforce its own rules of evidence.[161]

Remedies demanded by federal law may be more burdensome for a state court to enforce than the exclusion of evidence. Nevertheless, a state court must grant these remedies if it has the power to do so or to grant analogous remedies. For example, the Supreme Court has held that busing is an appropriate remedy to correct racial imbalance in the schools caused by segregation[162] and that federal

159 367 U.S. 643, 651 (1961). The Supreme Court had previously ruled the exclusionary rule applicable to the federal courts as a "judicially created rule of evidence" and not a constitutional "command." *See* Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring); McNabb v. United States, 318 U.S. 332, 340-41 (1943). *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 182-85 (1969).

160 367 U.S. at 652-53. *Mapp* rejected the finding of Wolf v. Colorado, 338 U.S. 25 (1949), that states that had not adopted the exclusionary rule were no less successful in enforcing the rule against unreasonable searches and seizures than the federal system, which relied on the exclusionary rule.

161 This intrusion, even if unwelcome in the state courts, nonetheless requires no unusual exercise of powers. Every state has rules of evidence; *Mapp* merely requires the states to apply a particular rule of evidence in certain situations. Similarly, when the Supreme Court held in Gideon v. Wainwright, 372 U.S. 335 (1963), that the federal Constitution requires reversal of a criminal conviction in state court where the defendant was not represented by counsel, no unusual exercise of state judicial power was required. In the absence of the Supreme Court's decision, of course, a state would not necessarily reverse the convictions covered by *Gideon*, but reversal of a conviction is well within the everyday arsenal of state court remedies.

162 Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

Federal habeas actions also present a difficult problem for the state courts. Under article I, § 9, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended." Although this provision may be read simply to prohibit Congress from interfering with state habeas corpus proceedings, *see generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1267 (1970), it has been read to provide for a federal constitutional right of habeas corpus. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 405-09 (1963) (discussing historical basis for federal habeas). In any event, federal habeas has a statutory basis, now codified at 28 U.S.C. § 2254 (1982). And it would appear that this federal remedy, like other "effective remedies," must be available to litigants in some court if the federal forum is unavailable. *Cf. Developments in the Law—Federal Habeas Corpus*, *supra*, at 1267, 1271-73 (suggesting that Congress must provide a federal forum to serve the purposes of "modern habeas"). Were Congress to abolish federal courts, or to repeal 28 U.S.C. § 2254, the question would arise whether state courts must grant relief equivalent to federal habeas in the absence of the federal forum. It would seem that state courts must enforce federal habeas rights (or provide analogous relief) in the absence of a federal forum to vindicate those rights. The Supreme Court has intimated that

courts have authority, through their equitable powers, to grant this kind of relief.[163] Although the Court has not explicitly held busing to be a constitutionally-mandated remedy, it has stated that "it is unlikely that a truly effective remedy [for unconstitutional school segregation] could be developed without continued reliance upon it."[164] Indeed, the Court has held that state anti-busing laws contravene the Court's direction that "all reasonable methods be available to formulate an effective remedy."[165]

Thus, in some instances the fourteenth amendment appears to require busing to remedy school segregation. Obviously, a state court which uses busing as a remedy for violations of state law must use busing to remedy school segregation under federal law.[166] In addition, if federal law mandates a specific remedy, like busing, a court must interpret its jurisdictional powers expansively to provide that remedy.[167] Finally, a state court with general equitable powers is ob-

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state courts must be available to entertain federal habeas claims if the state affords no post-conviction remedies under its own law. *See, e.g.*, Case v. Nebraska, 381 U.S. 336 (1965); Young v. Ragen, 337 U.S. 235, 238 (1949). *But cf.* Woods v. Nierstheimer, 328 U.S. 211, 217 (1946); Hart, *supra* note 94, at 507 n.59 (both suggesting that if the state courts are unavailable to vindicate post-conviction constitutional rights, the federal courts would be available to correct such wrongs). *See* Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221, 1236 (1973); *cf.* Sandalow, *supra* note 47, at 213 (unresolved question whether states have obligation to provide post-conviction relief for protection of fourteenth amendment rights if Congress limits availability of federal habeas). Of course, Congress can require that federal habeas be granted exclusively by the federal courts. *See* note 114 *supra.*

163 433 U.S. 406, 410 (1976); *id.* at 421 (Brennan, J., concurring); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

164 North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

165 *Id.* at 46 (citing Green v. County School Bd., 391 U.S. 430 (1968)).

166 California has employed busing as a remedy for state constitutional violations in circumstances in which it was questionable whether the federal Constitution would have required busing. *See, e.g.*, Bustop, Inc. v. Board of Educ., 439 U.S. 1380, 1384 (1978) (Rehnquist, J., Circuit Justice).

167 In Vickers v. Home Fed. Sav. & Loan Ass'n, 87 Misc. 2d 880, 386 N.Y.S.2d 291 (Monroe County Sup. Ct. 1976), the court permitted a class action to proceed under the federal Truth-in-Lending Act, 15 U.S.C. §§ 1601-1650, by interpreting the New York class action provisions to allow such suits in these instances. The court apparently believed that class relief was part of the substantive right, and that to hold that state statutory provisions "barr[ed] such actions in the courts of this state because of a failure to find specific authority under [the Truth-in-Lending Act] would appear to be unconstitutional." *Id.* at 885-86, 386 N.Y.S.2d at 296.

It might appear that state courts, which are not required to follow federal procedures, need not adhere to federal class action standards when enforcing federal rights. A class action, however, may be essential to enforce federal rights. Judge Wisdom explained in Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), a case concerning the care of mental patients in a state institution, that:

[T]here are special reasons why reliance upon individual suits by mental patients

ligated to use busing as a remedy if no other remedy is effective, even if the court had never ordered busing as a remedy in the past. Any state policy of judicial restraint against granting that remedy must yield to the paramount federal policy that federal violations be effectively remedied. Moreover, state legislative action specifically restricting the jurisdiction of the state courts to disallow the remedy of busing would unconstitutionally discriminate against the federal remedy.

C. *Obligation of States to Provide A Particular Federal Remedy in the Absence of State Statutory or Constitutional Provisions Giving Power to Grant the Remedy*

A state court may lack state statutory or constitutional power to grant a specific federal remedy or even to grant an effective remedy for a federal claim. The state court must, of course, grant the appropriate federal remedy to the extent that it grants analogous relief under state law. For example, assume federal statutory law required that widespread violations of patients' rights at mental institutions be remedied by the appointment of a special master to oversee the implementation of corrective measures. A state court which had no state statutory or constitutional power to appoint a special master might contend that the power to appoint a special master falls outside the arsenal of the state court's equitable remedies. If, however, the state court has the power to grant a similar remedy, such as to appoint a receiver to oversee property, the state court should be obligated to appoint a special master (assuming the receiver's responsibilities under state law were comparable to those of a special master). Under *Testa*, a state court is obligated to provide the federal remedy even if no state remedy is precisely analogous.

There is a limit, however, to what state remedies can be viewed as analogous to the federal remedy required. Analysis here mirrors the previous discussion concerning the exercise of jurisdiction. The possibility that Congress can restrict the jurisdiction of the inferior

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> would be especially inappropriate. Mental patients are particularly unlikely to be aware of their legal rights. They are likely to have especially limited access to legal assistance. Individual suits may be protracted and expensive, and individual mental patients may therefore be deterred from bringing them.

Id. at 1316. Class actions are more than a form of procedure. They may be a necessary part of an effective remedy. If class actions are necessary to vindicate federal rights, and if a state court has the power to provide class relief, any state policy not to provide this relief (such as the policy of New York not to permit class actions against state and local government, *see, e.g.*, Jones v. Berman, 37 N.Y.2d 42, 333 N.E.2d 303, 371 N.Y.S.2d 422 (1975)), must succumb to the federal policy that an effective remedy be provided.

federal courts or eliminate them entirely argues not only that states must create courts that can hear all federal claims, but also that those courts must have the power to give the precise remedy required by federal law. It is not necessary, however, to reach this ultimate issue. As long as federal courts have concurrent jurisdiction, state courts which have no analogous power under the state constitution or statutes generally need not enforce the precise remedy required by federal law.[168] If, however, Congress were to restrict inferior federal court jurisdiction so that federal claims had to be brought in state court, then state courts would have to provide the exact remedy required by federal law.[169]

In any event, even without restriction of access to the federal courts, the requirement of *Crain* that state courts hear all federal constitutional claims concerning acts of state officials, and perhaps all claims that state action violates federal law, strongly suggests that state courts must also grant the requisite effective federal remedies, whether or not they have existing remedial power to do so. Protecting federal rights requires not only that state courts assume jurisdiction, but also that they provide effective remedies.

Conclusion

It may seem ironic that the magnitude of a social ill should ever serve as an excuse for courts to refuse to intervene to correct injustices created by failures in the administration of government institutions.[170] Nonetheless, the Supreme Court in *Pennhurst* cited the widespread, grievous wrongs inflicted on state mental patients in support

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168 Perhaps the demands of the supremacy clause need not intrude so greatly on the state courts because a federal forum exists to provide the appropriate effective remedies. Of course, this conclusion would be contrary to the "possibility of extremes" analysis of *Crain* discussed in text accompanying note 113 *supra.*

169 *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981); *see also* Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 54 (1968).

If Congress were to withdraw jurisdiction from the federal courts over certain causes of action or certain remedies, it might seek to do the same with state courts. Were it to attempt this, Congress would clearly have the power to withdraw jurisdiction from state courts over federal statutory claims and remedies, but not over federal constitutional claims, because the state courts have an independent duty to enforce the Constitution. *See* note 93 *supra.*

170 The magnitude of a social ill, one might argue, is the very reason why the doctrine of the separation of powers gives the legislature and the executive, not the judiciary, the primary responsibility, with great discretion, to carry out policy in the administration of social programs. But, when the legislative and executive branches do not provide the very services they are obligated to provide to institutionalized individuals, it is appropriate for the courts to correct a failed political process. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

of its argument that the Constitution bars federal judicial intervention on state grounds against state officials.[171] State courts may similarly be reluctant to intrude on state executive and legislative functions, as some have been in the past, even when plaintiffs present compelling arguments grounded in state and federal law. Referring plaintiffs back to the political process which failed to provide the appropriate care and the necessary facilities does not solve the problem. State courts, then, are faced with a choice: they can vindicate rights in a way which may require them to assume an unaccustomed role, or they can ignore the pleas of plaintiffs, thus effectively rendering state law rights a nullity.

As a matter of state law, these issues must be addressed separately in each of the fifty judicial systems; as a matter of federal law, however, the supremacy clause obligates the state courts to use their full powers to enforce federal claims and to grant precise, effective remedies, even when to do so is to override state policies against intervention, and even when the state courts would not have heard similar state claims under state justiciability standards. State courts are indeed, especially after *Pennhurst*, the primary protectors of individual rights against violations of those rights by state officials.

171 *Pennhurst*, 104 S. Ct. at 912 n.16 (arguing that responsibility for the plight of mental patients is on the state itself, not on the individual and institutional defendants, and thus the failure of these defendants to provide proper treatment for these mental patients cannot be characterized as ultra vires).