University of Dayton Law Review

Volume 9 | Number 1 Article 3

10-1-1983

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INTRODUCTION

It is a well-settled canon of jurisdictional doctrine that state tribunals are courts of "general" jurisdiction, while federal courts are limited, under article III of the United States Constitution, to hearing those categories of cases defined by Congress.[1] Meshing with the broader jurisdiction of state courts is the notion of "concurrent jurisdiction" of causes of action brought under federal statutes. That is, state courts are generally presumed to have jurisdiction to hear federal causes of action.[2] This canon of jurisdiction is also well-settled, and under it Ohio courts have adjudicated cases brought under federal statutes such as the Labor-Management Relations Act,[3] the Truth-in-

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1. *See* Palmore v. United States, 411 U.S. 389, 400-02 (1973); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262 n.8 (1977); *see also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359-60 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER]; C. WRIGHT, LAW OF FEDERAL COURTS 22-26 (4th ed. 1983); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 628 (1981).

2. Hathorn v. Lovorn, 457 U.S. 255, 266 (1982); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981). *See generally* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976); Comment, *State Court Jurisdiction over Claims Arising under Federal Law*, 7 U. DAYTON L. REV. 403 (1982). The doctrine of concurrent jurisdiction is discussed *infra* text accompanying notes 28-32.

This article will use the phrase "cause of action" to denote claims arising under federal statutes. The terms "cause of action" and "claims" are not susceptible of precise definition. Davis v. Passman, 442 U.S. 228, 237-39 (1979). However, the title of the Comment, *supra*, is a bit misleading. Assuming federal "law" includes interpretations of the United States Constitution, claims arising under such law are adjudicated every day in state courts, particularly in criminal proceedings. *See* Michigan v. Long, 103 S. Ct. 3469, 3477 n.8 (1983); *see also* Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821, 824-25 (1981); Bator, *supra* note 1, at 611, 625. State courts are of course presumed competent to hear and decide federal issues and claims in the context of a lawsuit otherwise brought under state law. District of Columbia Court of Appeals v. Feldman, 103 S. Ct. 1303, 1315 n.16 (1983). I recently conducted an empirical examination of how such claims are treated in published state court decisions. Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. ___ (1983). In contrast, the present article addresses not mere federal issues or "claims" which are part of a state court proceeding, but causes of action predicated on liability created by a federal statute.

3. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.). *See, e.g.*, Neal v. Reliance Elec. & Eng'g Co., 12 Ohio App. 2d 183, 231 N.E.2d 882 (1967).

Lending Act,[4] and the Wage and Hour Act.[5]

Recently, however, several Ohio courts have rendered disturbing rulings which deny litigants the opportunity to pursue federal causes of action in state court. The most prominent of these decisions is *Fox v. Eaton Corp.*[6] In *Fox*, the Ohio Supreme Court held that an action under Title VII of the Civil Rights Act of 1964[7] could not be brought in Ohio courts. Several lower Ohio courts[8] have since seized upon the *Fox* decision to hold that actions brought under federal civil rights statutes, principally section 1983,[9] cannot be pursued in state court. These cases portend a retraction of the previously settled option of Ohio litigants to pursue federal causes of action in either federal or state courts. These cases are particularly disturbing since they curtail jurisdiction over the most widely utilized federal civil rights statutes.

This article examines the grounds on which these Ohio decisions retracted jurisdiction. Part I summarizes the purported reasoning of

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4. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of tits. 15 & 18 U.S.C.). *See, e.g.*, Sealey v. Boulevard Constr. Co., 70 Ohio App. 2d 277, 437 N.E.2d 305 (1980); *see also* Domestic Credit Corp. v. Vazquez, 69 Ohio St. 2d 527, 433 N.E.2d 190 (1981); Stone v. Davis, 66 Ohio St. 2d 74, 419 N.E.2d 190, *cert. denied*, 454 U.S. 1081 (1981).

5. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended in scattered sections of 29 U.S.C.). *See, e.g.*, Tag v. Linder, 87 Ohio App. 302, 94 N.E.2d 383 (1949). Another example would be an action under the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1976). *See, e.g.*, Reed v. Pennsylvania R.R. Co., 171 Ohio St. 433, 171 N.E.2d 718 (1961).

6. 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976). The Ohio Supreme Court's decision led to an unfortunate result for Ms. Fox. Her later Title VII suit in federal court was dismissed for untimely filing, despite the fact that the untimeliness was due to her futile effort to sue in state court. *See* Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981), *on later appeal*, 689 F.2d 91 (6th Cir. 1982) (per curiam).

7. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

8. These cases are discussed in Part I.

9. 42 U.S.C. § 1983 (1976 & Supp. V 1981). Section 1983 states as follows:

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

Id.

Excellent overviews of recent procedural and substantive developments in § 1983 litigation in federal courts are found in Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Manley, *The Next Thirty Years of Civil Rights Litigation*, 13 URB. LAW. 541 (1981); Comment, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). *See also* Begg v. Moffitt, 555 F. Supp. 1344 (N.D. Ill. 1983).

The term "civil rights actions" is used in this article generically, and is meant to cover § 1983, Title VII, and other statutes found in title 42 of the United States Code.

these cases. Part II develops three rationales for calling into question the validity of these decisions: namely, they conflict with the presumption of concurrent jurisdiction, violate the rule prohibiting discrimination between federal and state causes of action, and, ultimately, are incompatible with the *obligations* of state courts to hear federal actions. Once jurisdiction of such actions is accepted in a state court, however, certain problems regarding the choice of federal or state substantive and procedural law can arise. These problems are briefly addressed in Part III. Finally, having established (1) that Ohio courts can and should entertain federal causes of action, and (2) that any choice of law questions can be easily resolved, I conclude that *Fox* and its progeny were incorrectly decided. Both legal theory and public policy support the availability of Ohio courts to entertain federal civil rights actions.

I. ABDICATING RESPONSIBILITY FOR ENFORCING FEDERAL CIVIL RIGHTS ACTIONS: SOME RECENT CASES

Title VII and section 1983 are the two most utilized federal civil rights statutes. In the early 1980's, they accounted for almost one-third of the filings in civil cases in federal district courts.[10] Given the overburdened caseloads of the federal courts,[11] it is not surprising that some litigants have attempted to pursue remedies under these statutes in an alternate forum—that is, the state courts.

Title VII prohibits certain discriminatory employment practices based on race, color, religion, sex, or national origin.[12] The statute sets out a complex scheme of overlapping federal and state enforcement procedures which a litigant must follow[13] before suit is permitted in a federal district court.[14] State court jurisdiction is not mentioned in the

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10. ADMINISTRATIVE OFFICE U.S. COURTS, 1982 ANNUAL REPORT OF THE DIRECTOR 98-108. The data is further collected and discussed in HART & WECHSLER, *supra* note 1, at 950; Eisenberg, *supra* note 9, at 523-36; Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring). The large number of such cases gives some indication of their importance to plaintiffs. Whether such figures suggest that civil rights actions overburden federal courts is another question. *See infra* notes 106-07.

11. ADMINISTRATIVE OFFICE U.S. COURTS, 1982 ANNUAL REPORT OF THE DIRECTOR 99, 103, 111 (this report documents the rise in filings over time). Disproportionately rising caseloads have been evident in the Northern and Southern Districts of Ohio. *Id.* at 215.

12. 42 U.S.C. § 2000e-3(b) (1976).

13. In Ohio, Title VII plaintiffs must first bring charges of discrimination before the Equal Employment Opportunity Commission (EEOC), a federal agency, and the Ohio Civil Rights Commission (OCRC). If proceedings before these agencies do not yield satisfactory relief, plaintiffs may then bring suit in state or federal court. For further discussion of this procedure, see *infra* text accompanying notes 37-51.

14. "Each United States district court . . . shall have jurisdiction of actions brought under this [title]." 42 U.S.C. § 2000e-5(f)(3) (1976). Under the legislation establishing the OCRC, both the OCRC and, in some cases, private individuals, may bring enforcement proceedings in state

statute.

In *Fox v. Eaton Corp.*,[15] the plaintiff brought a Title VII suit in an Ohio trial court. The trial court found for the plaintiff on the merits, a judgment subsequently affirmed by the court of appeals. On further appeal, the Ohio Supreme Court held, in a brief opinion, that Title VII vested exclusive jurisdiction in the federal courts. Having raised the issue on its own as a matter of subject matter jurisdiction, the court directed that the suit be dismissed.[16]

Section 1983 permits suits to remedy "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[17] Unlike Title VII, section 1983 covers a broader range of unlawful conduct (though it is limited to acts of government officials), and presents a streamlined procedural scheme. Jurisdiction itself is not mentioned in section 1983; federal courts hear section 1983 actions under the aegis of the general jurisdictional provisions permitting suit for deprivation of rights secured by the Constitution or the laws of the United States.[18]

In the wake of *Fox*, several Ohio courts of appeals declined to hear causes of action brought under the federal civil rights laws. Plaintiffs in *Wheeler v. General Motors Corp.*[19] brought suit under Ohio tort law and section 1985(3),[20] a companion provision to section 1983. The

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court. OHIO REV. CODE ANN. §§ 4112.01 to .99 (Page 1980 & Supp. 1982).

15. 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976).

16. *Id.* at 238, 358 N.E.2d at 537.

17. 42 U.S.C. § 1983 (1976 & Supp. V 1981).

18. 28 U.S.C. § 1343(a)(3) (Supp. V 1981). *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

19. No. 79-5889 (Ct. App. Montgomery Co., Ohio Jan. 12, 1979).

20. 42 U.S.C. § 1985(3) (Supp. V 1981). Section 1985(3) states as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. Congress enacted this conspiracy provision at approximately the same time it passed § 1983. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 103 S. Ct. 3352 (1983). The jurisdictional counterpart of § 1985(3) is 28 U.S.C. § 1343

trial court dismissed the federal claim on the merits. That decision was affirmed on appeal, but the court of appeals added, purporting to follow the lead of *Fox*, that state courts had no jurisdiction over section 1985 actions.[21] While acknowledging that the Ohio Constitution[22] and Revised Code[23] grant trial courts "original jurisdiction" in all civil cases, the *Wheeler* court nevertheless held that

> [w]hether such subject matter jurisdiction in civil cases include [sic] subject-matter jurisdiction in actions created by Congress and imposed upon federal district courts raises a question of federal power to add to the assignment of jurisdiction to state courts. Every logical reason and impediment against such exercise by Congress of state's [sic] rights must be explored and exhausted before accepting imposition of jurisdictional changes in state courts.[24]

The court of appeals therefore concluded that no jurisdiction could be exercised over section 1985 actions.[25] Several other courts of appeals, citing *Wheeler*, have refused to exercise jurisdiction over section 1983 actions as well.[26]

The *Fox* and *Wheeler* decisions and their progeny deserve critical examination. In *Fox*, the Ohio Supreme Court did not establish a per se rule against adjudicating federal causes of action. Indeed, by invok-

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(1976 & Supp. V 1981).

21. *Wheeler*, slip op. at 6-7.

22. OHIO CONST. art. IV, § 4(B).

23. OHIO REV. CODE ANN. § 2305.01 (Page 1981). Both the Ohio Constitution and the Ohio Revised Code refer to vesting jurisdiction in the "courts of common pleas." For convenience, however, this article will refer to such tribunals as simply the trial courts of Ohio.

24. *Wheeler*, slip op. at 6-7. The *Wheeler* court went on to hold that the trial court was correct in dismissing the § 1985(3) claim on the merits. *Id.* at 8-11. The court was compelled to reach the merits since an assignment of error was made on that point. *Id.* at 7. *See* OHIO R. APP. P. 12(A).

25. *Wheeler*, slip op. at 7.

26. Ehler v. Montgomery County Joint Vocational School, No. 82-7509 (Ct. App. Montgomery Co., Ohio Aug. 9, 1982); Johnson v. City of Dayton, No. 81-7184 (Ct. App. Montgomery Co., Ohio Oct. 7, 1981); Shapiro v. City of Dayton, No. 81-7183 (Ct. App. Montgomery Co., Ohio Oct. 6, 1981).

These cases, of course, represent a narrow sample of Ohio case law. Surprisingly, none are published, although Ohio is notorious for the erratic manner in which decisions of *lower* Ohio courts are printed in the official reporters. *See* Black, *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477 (1981); Richert, *Update on Ohio Judicial Reporting*, 41 OHIO ST. L.J. 675 (1980). The Ohio Supreme Court decides, by law, which lower court opinions will be published. OHIO REV. CODE ANN. § 2505.20 (Page 1981). However, recent rules promulgated by the court may forecast a more consistent treatment in this area. 3 Ohio St. 3d xxi, 444 N.E.2d (Ohio cases) LXIX (1983).

Unfortunately, LEXIS does not catalog unreported Ohio cases. Black, *supra*, at 481 n.20. Only reported Ohio decisions, aside from those unreported decisions discussed in this article, can be analyzed. Thus, this article is only a partial response to Professor Eisenberg's suggestion that a study be made of § 1983 actions in state courts. Eisenberg, *supra* note 9, at 524 n.179. This writer doubts, however, that many § 1983 cases would surface in such a study.

ing the doctrine of *exclusive* jurisdiction, the court apparently assumed that *concurrent* jurisdiction could lie in Ohio courts only under what it viewed as a properly drafted statute. For reasons to be developed shortly, the *Fox* court distorted the doctrine of concurrent jurisdiction and misconstrued the language and legislative history of Title VII.

Moreover, the *Wheeler* result does not inexorably flow from the *Fox* decision. As outlined above, sections 1983 and 1985 have no jurisdictional statements which might be construed to interdict the presumption of concurrent jurisdiction. Yet the court in *Wheeler* framed the issue as whether Congress could "impose" jurisdictional "changes" upon state trial courts. Answering the question in the negative, the *Wheeler* court cited no authority aside from *Fox*.[27] This holding is dubious. It ignores both conventional jurisdictional doctrines and authority from other Ohio tribunals and the courts of sister states. Sound legal and public policy rationales compel the rejection of the *Fox* and *Wheeler* decisions. These rationales are explored in the following section.

II. THE BASIS FOR AN ALTERNATIVE APPROACH: CONCURRENT JURISDICTION, ANTIDISCRIMINATION, AND AFFIRMATIVE DUTY

A reading of the *Fox* and *Wheeler* opinions alone might suggest that Ohio courts are writing on a clean slate in determining whether to hear federal causes of action. In fact, the opposite is true. A well-developed jurisprudence supports the ability and duty of state courts to hear most causes of action under federal statutes. The basic presumption is one of concurrent jurisdiction. Moreover, two corollary doctrines hold that state courts *must* hear federal causes of action when they hear analogous state causes of action, and that, in any event, state courts are under an *obligation* to adjudicate federal actions. All three of these doctrines are at variance with the *Fox* and *Wheeler* decisions.

A. The Presumption of Concurrent Jurisdiction

In permitting, but not mandating, the creation of lower federal courts, the drafters of article III of the United States Constitution contemplated that state courts could entertain federal causes of action.[28]

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27. The *Wheeler* decision did not cite or discuss the doctrine of concurrent jurisdiction, or the antidiscrimination/analogous right doctrine derived from Testa v. Katt, 330 U.S. 386 (1947), both of which are addressed in Part II, *infra*. Ironically, had the *Wheeler* court discussed these doctrines, it may have found *some* support for its holding in the "valid excuse" doctrine emanating from Testa v. Katt, 330 U.S. 386 (1947). *See infra* notes 102-04 and accompanying text. I conclude, nevertheless, that no "valid excuse" supports the *Wheeler* court's rejection of concurrent jurisdiction. The disturbing point is that the *Wheeler* court did not even discuss these issues.

28. HART & WECHSLER, *supra* note 1, at 11-12; Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124

While states can control the formation and jurisdiction of their own courts, the supremacy clause[29] of the Constitution mandates that such courts recognize federal law as paramount.[30] Relying on this historical background, the United States Supreme Court has frequently restated the general rule that state courts may assume jurisdiction over federal causes of action, absent either congressional directives to the contrary or an incompatibility between the federal claim and state court jurisdiction.[31] This presumption of concurrent jurisdiction may only be rebutted by "an explicit [federal] statutory directive, [a]n unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests."[32]

In *Fox*, the Ohio Supreme Court relied on the jurisdictional provisions for Title VII which only referred to federal district courts. The court, with no analysis, converted the *silence* on state court jurisdiction into a presumption that state courts had no jurisdiction at all to entertain Title VII suits.[33] However, the court erred in assuming that an explicit congressional directive was necessary to vest state courts with Title VII jurisdiction. The opposite is true. Given congressional silence on the matter, the *Fox* court should have presumed that there was state court jurisdiction.[34] Numerous other state and federal courts have rejected the *Fox* holding and concluded that Title VII suits could be litigated in either federal or state forums.[35]

U. PA. L. REV. 45, 52-53 (1975); THE FEDERALIST No. 82 (A. Hamilton) (C. Rossiter ed. 1961).

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

30. *See* Hathorn v. Lovorn, 457 U.S. 255, 269 (1982); Tibbs v. Florida, 457 U.S. 31, 45 (1982); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981).

31. *Hathorn*, 457 U.S. at 266; *Gulf Offshore Co.*, 453 U.S. at 477-78; Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962); Claflin v. Houseman, 93 U.S. 130 (1876).

32. *Hathorn*, 457 U.S. at 266 (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)).

Professor Redish has argued that this presumption should be reversed. In the face of congressional silence, he contends that we should initially assume that state courts *cannot* adjudicate federal causes of action. Given the present realities of federal court expertise in relation to state court expertise, as well as the complexity of many federal cases, Redish argues that the current presumption is unjustified. Redish & Muench, *supra* note 2, at 325-30. I have elsewhere argued that Redish's own assumptions are overbroad. Solimine & Walker, *supra* note 2, at ____ (calling into question Redish's shifting of the burden of proof on the jurisdictional presumption). Ironically, the *Fox* and *Wheeler* decisions appear to have adopted the Redish position.

33. 48 Ohio St. 2d at 237, 358 N.E.2d at 537.

34. *See, e.g.*, California v. Arizona, 440 U.S. 59, 66-68 (1979). Another commentator has concluded, on similar grounds, that *Fox* was decided incorrectly. *See* Comment, *supra* note 2, at 418-19.

35. Only one federal court and one state court have reached the same conclusion as *Fox*. Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978); Lucas v. Tanner Bros. Contracting Co., 10 Fair Empl. Prac. Cas. (BNA) 1104 (Ariz. Super. Ct. 1974). At least several federal courts and two state courts have held that state courts can hear Title VII cases. Salem v. [illegible], 31, Fair Empl. Prac. Cas. (BNA) 10 (C.D. Cal. 1983); Green v. County

A consideration of the factors which might rebut the presumption of concurrent jurisdiction does not compel a different result. The legislation establishing Title VII does not contain an "explicit statutory directive" forbidding state court jurisdiction. It is settled that the mere failure to mention state courts does not preclude their taking jurisdiction.[36] Moreover, neither the legislative history nor the statutory scheme of Title VII suggests that state courts should be divested of jurisdiction.

A Title VII plaintiff must proceed before both a federal agency, the Equal Employment Opportunity Commission (EEOC), and state administrative and adjudicatory bodies. In a "deferral" state such as Ohio,[37] a complainant must first file a charge of discrimination with the EEOC *and* the Ohio Civil Rights Commission (OCRC).[38] The OCRC can undertake investigatory review and hold evidentiary hearings, similar to the work done by the EEOC.[39] Review of the OCRC's findings may then be sought in Ohio courts.[40] The EEOC may not act for sixty days, or until state proceedings have terminated.[41] If unsatisfied with the outcome before the state bodies, the Title VII complainant may press his charge before the EEOC. If the EEOC declines to initiate a suit on the charging party's behalf, a civil action may be brought by the plaintiff in federal court.[42]

The legislative history of Title VII emphasizes the importance of state antidiscrimination laws in the statute's enforcement scheme.[43]

School Bd., 524 F. Supp. 43 (E.D. Va. 1981); Peterson v. Eastern Airlines, 20 Fair Empl. Prac. Cas. (BNA) 1322 (W.D. Tex. 1979); Bennum v. Board of Governors, 413 F. Supp. 1274 (D. N.J. 1976); Peper v. Princeton Univ., 77 N.J. 55, 389 A.2d 465 (1978); Vason v. Carrano, 31 Conn. Supp. 338, 330 A.2d 98 (Conn. Super. Ct. 1974). *See generally* Fox v. Eaton Corp., 615 F.2d 716, 719 n.7, 719-20 (6th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981), *on later appeal*, 689 F.2d 91 (6th Cir. 1982).

36. *See supra* text accompanying notes 28-32.

37. Section 706(c) of the 1964 Civil Rights Act provides that a complainant must first initiate proceedings with the state agency (if any) which has authority to grant relief from unlawful employment practices. 42 U.S.C. § 2000e-5(c) (1976). The EEOC has recognized the OCRC as a "deferral" agency, 29 C.F.R. § 1601.74 (1982), so-called since the EEOC must "defer" to the state agency before initiating its own proceedings. *Id. See also infra* note 38.

38. If a charge of discrimination is filed with the EEOC, the federal agency must "defer" to state agency action for at least sixty days. 42 U.S.C. § 2000e-5(d) (1976). Typically, the EEOC and state agencies have "work-sharing" agreements, where the EEOC refers paperwork to the state agency. *See* 29 C.F.R. § 1601.13 (1982); Love v. Pullman, 404 U.S. 522 (1972). The EEOC and the OCRC have such an agreement (on file with University of Dayton Law Review).

39. OHIO REV. CODE ANN. § 4112.05 (Page 1980).

40. *Id.* § 4112.06.

41. 42 U.S.C. § 2000e-5(c)-(d) (1976).

42. *Id.* § 2000e-5(f)(1), (3). *See supra* note 14.

43. The legislative history of the drafting of Title VII procedures was extensively reviewed in Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), and in Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L.

The United States Supreme court recently took pains to reiterate the states' role in *Kremer v. Chemical Construction Corp.*[44] In *Kremer*, the Court held that the federal courts, in Title VII suits, must give res judicata or collateral estoppel effect to a state court decision upholding a deferral state agency's rejection of an employment discrimination claim. This result is supported, the Court emphasized, by the intent of the drafters of Title VII who desired to accommodate state antidiscrimination programs[45] and did not "envision full litigation of a single claim in both state and federal forums."[46] Preclusion is thus proper, the Court concluded, when a party has had a "full and fair opportunity" to litigate the employment discrimination claim in state courts.[47]

Some courts and commentators have concluded differently, arguing that state court adjudication of Title VII cases would be anomalous because the Title VII legislative scheme vests "final enforcement" of Title VII actions in federal courts.[48] To be sure, the Title VII scheme vests *primary* responsibility for litigation in federal courts. However, it does not vest *exclusive* responsibility in the federal forum. The *Kremer* Court acknowledged the "final responsibility" of the federal courts to enforce Title VII.[49] This rule was originally meant to emphasize, the Court explained, that the *EEOC* must turn to federal courts to adjudicate claims or impose sanctions against employers.[50] Permitting a complainant to sue in either federal or state court, after the EEOC declines to further litigate, does not disrupt the Title VII enforcement scheme.

REV. 1485 (1981).

44. 456 U.S. 461 (1982). The Court held that Title VII was not an exception to the preclusive effect to be given state court judgments in federal court, as mandated by 28 U.S.C. § 1738 (1976). 456 U.S. at 476.

45. 456 U.S. at 472-74. *See also* Jackson, Matheson & Piskorski, *supra* note 43, at 1492-1510; Shaw v. Delta Air Lines, Inc., 103 S. Ct. 2890 (1983).

46. 456 U.S. at 474 (citation omitted).

47. *Id.* at 480. The Court went on to state that, to be given preclusive effect, the state procedures must satisfy the due process clause. *Id.* The Court concluded that the "panoply of [New York procedures in question], complemented by administrative as well as judicial review," was sufficient under the due process clause. *Id.* at 481.

48. Dickinson v. Chrysler Corp., 456 F. Supp. 43, 45-48 (E.D. Mich. 1978) (construing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)). *See also* Jackson, Matheson & Piskorski, *supra* note 43, at 1514 n.164. The latter authors argue that permitting concurrent jurisdiction will prevent federal courts, under traditional issue or claim preclusion principles, from passing on the fairness and adequacy of state substantive antidiscrimination law, since a Title VII suit *could* have been brought in the state court system. *Id.* This assumption appears to be true, but it by no means proves fatal to the ability of Title VII claimants, in Ohio or other deferral states, to bring suit in federal court. Only those plaintiffs who seek state court review of OCRC findings, or actually bring a Title VII suit in state court, will suffer preclusion of any sort in federal court. If a Title VII plaintiff elects only to seek remedies before the state *agency*, as opposed to the state *courts*, no preclusion principles are applicable. *Kremer*, 456 U.S. at 470 n.7.

49. *Kremer*, 456 U.S. at 447.

50. *Id.* at 477-78 (distinguishing Alexander v. Gardner-Denver Co., 415 U.S. at 36 (1974)).

Under the supremacy clause, the state court would in any event be bound to apply principles of federal law for the purposes of determining liability and enforcing remedies developed under Title VII.[51] Likewise, state courts should insist, as federal courts must, that a Title VII plaintiff follow the procedural prerequisites in the Title VII scheme before instituting suit.[52]

The problems that some have anticipated with state court adjudication of Title VII actions should be eased by these procedures. Absent "clear incompatibility" between the federal statutory scheme and state court jurisdiction, there seems to be little to be gained by denying state adjudication of Title VII actions. In short, the presumption of concurrent jurisdiction should hold in Title VII actions.

A similar analysis is applicable to section 1983 actions. As previously suggested, section 1983 is in one sense narrower than Title VII, since it only reaches unlawful acts performed under color of state law.[53] However, it is far broader in the *types* of conduct which it makes actionable, namely, any conduct violative of the rights secured by the Constitution and laws of the United States.[54] Unlike Title VII, section 1983 is not burdened by an onerous jurisdictional scheme. Indeed, in *Patsy v. Board of Regents*,[55] the Supreme Court recently reiterated the

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51. *See supra* text accompanying notes 29-30. One court has argued that concurrent jurisdiction was inconsistent with the reference in Title VII to certain procedures being governed by the Federal Rules of Civil Procedure. Dickinson v. Chrysler Corp., 456 F. Supp. at 47 n.7. However, such procedures might be available under parallel provisions of state rules of civil procedure. Any federal procedures which are not available under, or inconsistent with, state law can be borrowed for state court actions. *See generally infra* Part III.

52. The New Jersey Supreme Court followed this procedure in Peper v. Princeton Univ., 77 N.J. 55, 75-76, 389 A.2d 465, 475 (1978). Arguably, these procedural prerequisites, so integral to the Title VII enforcement process, *must* be followed by litigants in state court. *See generally infra* Part III.

53. Section 1983 reaches actions performed "under color of state law." The fourteenth amendment to the United States Constitution prohibits certain action by the "state." If a public official or agency is sued in a § 1983 action for violations of the fourteenth amendment, the inquiries as to the § 1983 and fourteenth amendment violations are identical and collapse into one. *See* Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2754 (1982). The inquiries may be more intricate if a private actor, who allegedly acted "under color of state law," is sued. *Id.* at 2749-53, 2756. "State action" is *not* required to be shown under 42 U.S.C. §§ 1981, 1985 (1976 & Supp. V 1981).

54. *See generally* 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS chs. 4-9 (2d ed. 1980) (discussing conduct actionable under § 1983); Maine v. Thiboutot, 448 U.S. 1 (1980) (expansive construction of the word "law" in § 1983); Eisenberg, *supra* note 9, at 504-15. *But see* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (both cases restricting construction of "law" in § 1983). *See also* Manley, *supra* note 9; Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

55. 457 U.S. 496 (1982). Interestingly, one state court, which found concurrent jurisdiction for § 1983 actions, also applied the "no exhaustion" rule reaffirmed in *Patsy*. *See* Silverman v. University of Colorado, 36 Colo. App. 269, 279, 541 P.2d 93, 98-100 (1975). This holding appears

generally accepted rule that state administrative remedies need not be exhausted as a prerequisite to bringing a section 1983 action in federal court.

Given the streamlined nature of section 1983 jurisdiction, the Supreme Court in *Martinez v. California*,[56] had little difficulty in deciding that the presumption of concurrent jurisdiction was satisfied:

> We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where
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> " '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.' " *Testa v. Katt*, 330 U.S. 386, 391, quoting *Claflin v. Houseman*, 93 U.S. 130, 137.
>
> See also *Aldinger v. Howard*, 427 U.S. 1, 36, n. 17 (BRENNAN, J., dissenting); *Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 476. We have never considered, however, the question whether a State *must* entertain a claim under § 1983. We note 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. *Testa v. Katt, supra*, at 394. But see *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W. 2d 248 (1969).[57]

A large number of state courts have assumed concurrent jurisdiction over section 1983 actions.[58] A recent Ohio appellate decision, *Jackson*

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to be consistent with the legislative history of § 1983. *See infra* text accompanying notes 62-65. *See generally* Note, *Exhaustion of State Administrative Remedies in Section 1983 Actions*, 50 U. CIN. L. REV. 594 (1981).

56. 444 U.S. 277, 283-84 n.7 (1980). For other cases and authorities which stand for the proposition that in an action brought pursuant to § 1983, state courts and federal courts have concurrent jurisdiction, see Smith v. Wade, 103 S. Ct. 1625, 1640 n.23 (1983); Maine v. Thiboutot, 448 U.S. at 3 n.1, 11 (1980); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 748-52 (1981); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1497-98 n.62 (1969).

57. *Martinez*, 444 U.S. at 283 n.7.

58. Courts in at least seventeen states have held that they have concurrent jurisdiction over § 1983 claims. *E.g.*, Santana v. Registrars of Voters, 81 Mass. Adv. Sh. 2061, 425 N.E.2d 745 (1981); Royer v. Adams, 121 N.H. 1024, 437 A.2d 316 (1981) (per curiam); Bleecker v. Montgomery County, 48 Md. App. 455, 427 A.2d 1075 (Md. Ct. Spec. App.), *rev'd on other grounds*, 292 Md. 121, 433 A.2d 1348 (1981); Durango School Dist. v. Thorpe, 200 Colo. 268, 614 P.2d 880 (1980); Colvin v. Bowen, ___ Ind. App. ___, 399 N.E.2d 835 (1980); Ingram v. Moody, 382 So. 2d 522 (Ala. 1980); Thiboutot v. Maine, 405 A.2d 230 (Me. 1979), *aff'd*, 448 U.S. 1 (1980); Ramirez v. County of Hudson, 169 N.J. Super. 455, 404 A.2d 1271 (Super. Ct. Ch. Div. 1979); Young v. Toia, 66 A.D.2d 377, 413 N.Y.S.2d 530 (N.Y. App. Div. 1979); Lange v. Nature Conservancy, Inc., 24 Wash. App. 416, 601 P.2d 963 (1979), *cert. denied*, 449 U.S. 831 (1980); Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978); Bohaes v. Reid, 63 Ill. App. 3d 477, 379 N.E.2d 1372 (1978); Terry v. Kolski, 78

v. Kurtz,[59] followed the lead of these cases and explicitly held that it had jurisdiction over section 1983 cases. Moreover, numerous other reported Ohio decisions have assumed jurisdiction under section 1983 and reached the merits of cases.[60] Against this background, the recent Ohio decisions disclaiming jurisdiction over these actions seem to have little precedential value.

One state court, however, has held that the legislative history of section 1983 effectively rebuts the presumption of concurrent jurisdiction.[61] Section 1983 and the Reconstruction constitutional amendments[62] were the products of the enhancement of the power of the federal government after the Civil War. The drafters of section 1983 were

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Wis. 2d 475, 254 N.W.2d 704 (1977); Saunders v. Creamer, 464 Pa. 2, 345 A.2d 702 (1975); Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); New Times Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 519 P.2d 169 (1974). *Accord* Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972); Young v. Board of Educ., 416 F. Supp. 1139 (D. Colo. 1976). *See also* Aldisert, *supra* note 2, at 825 n.13; Neuborne, *supra* note 56, at 752 n.114.

59. 65 Ohio App. 2d 152, 416 N.E.2d 1064 (1974). The *Jackson* court distinguished *Fox*, as does this article, by noting that the court in *Fox* was confronted with a statute which, unlike § 1983, expressly vested exclusive jurisdiction in the federal courts. *See id.* at 156, 416 N.E.2d at 1067.

60. At least three Ohio Supreme Court decisions and five reported lower court decisions have assumed jurisdiction over causes of action brought under § 1983, without expressly discussing the jurisdictional issue. *See* Kilburn v. Guard, 5 Ohio St. 3d 21, 448 N.E.2d 1153 (1983) (per curiam); Jenkins v. Krieger, 67 Ohio St. 2d 314, 423 N.E.2d 856 (per curiam), *cert. denied*, 454 U.S. 1124 (1981); Wholesale Elec. & Supply, Inc. v. Robusky, 22 Ohio St. 2d 181, 258 N.E.2d 432 (1970); White v. Columbus Bd. of Educ., 2 Ohio App. 3d 178, 441 N.E.2d 303 (1982); Swigert v. Miller, 39 Ohio App. 2d 107, 315 N.E.2d 818 (1973), *cert. denied*, 429 U.S. 805 (1976) (mem.); Schneider v. Ohio Youth Comm'n, 31 Ohio App. 2d 225, 287 N.E.2d 633 (1972); Lakewood Homes, Inc. v. Board of Adjustment, 25 Ohio App. 2d 125, 267 N.E.2d 595 (1971); Gilmore v. General Motors Corp., 35 Ohio Misc. 36, 300 N.E.2d 259 (C.P. Ct. 1973).

61. Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). The Georgia Supreme Court has refused to assert § 1983 jurisdiction over certain classes of cases. *See* Baranan v. Fulton County, 250 Ga. 531, 299 S.E.2d 722, *cert. denied*, 103 S. Ct. 2092 (1983) (mem.) (nuisance action); Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976) (tax assessments). It is unclear if Georgia would be unwilling to adjudicate *any* § 1983 action.

62. U.S. CONST. amend. XIII (ratified 1865); amend. XIV (ratified 1868); amend. XV (ratified 1870). *See generally* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW (1983); H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973).

Of course, the extent to which the intent of the framers of the fourteenth amendment can or should be relevant to the interpretation of the amendment is the subject of the current debate between advocates of the various modes of "interpretivist" and "noninterpretivist" judicial review. *See generally* Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745 (1983). On the other hand, there seems to be much less controversey in divining the intent of the framers to determine if exclusive jurisdiction of a certain statute lies in federal courts. *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 908-12 (1982). Critics of parity, in particular, have been willing to rely on the intentions of the Reconstruction Congress. *See generally* Solimine & Walker, *supra* note 2, at ____. *But cf. id.* at ____ & ____ n.113 (questioning the relevance of the 19th century view of state courts to conditions today); Eisenberg, *supra* note 9 (arguing that current interpretations of § 1983 should not be bound by patterns of tort law when § 1983 was enacted).

concerned in large part with what they perceived as antipathy or apathy of state authorities toward the protection of federal constitutional rights.[63] A separate statute to protect these rights was thought necessary. It would be inconsistent, the court argued, to permit state courts to enforce a statute which was enacted because state authorities themselves were reluctant to protect federal rights.[64]

This argument fails for two reasons. Section 1983 did owe its existence to congressmen who felt state courts would not or could not protect federal rights. It does not follow, however, that exclusive jurisdiction is thereby vested in federal courts. As the *Patsy* decision recently emphasized, section 1983 was viewed by its drafters as providing "dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief."[65] It is difficult to imagine more explicit legislative history endorsing the presumption of concurrent jurisdiction.

Second, to retreat behind the historical concerns of over one hundred years ago only confirms the worst fears of the Reconstruction legislators.[66] Even in recent years, academic critics have challenged the competence of state courts to fully and fairly adjudicate federal constitutional rights.[67] A refusal to adjudicate section 1983 actions lends sup-

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63. *See* Haring v. Prosise, 103 S. Ct. 2368, 2378 (1983); *Patsy*, 457 U.S. at 506-07; Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). *See also* Eisenberg, *supra* note 9, at 484-85; Solimine & Walker, *supra* note 2, at ____.

64. Chamberlain v. Brown, 223 Tenn. at 35, 442 S.W.2d at 252. *See also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 23-24 (1980); Terry v. Kolski, 78 Wis. 2d 475, 498-509, 254 N.W.2d 704, 713-18 (1977) (Hansen, J., dissenting).

65. *Patsy*, 457 U.S. at 506. The drafters of § 1983 were perhaps influenced by the fact that, until 1875, most federal questions were litigated in state courts. In that year, the jurisdiction of federal courts was expanded to include federal question jurisdiction. Judiciary Act of 1875, ch. 137, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331 (Supp. V 1981)). *See* HART & WECHSLER, *supra* note 1, at 39.

Admittedly, the above-quoted language from *Patsy* might be read narrowly, to infer that the drafters of § 1983 meant to grant plaintiffs a choice between a common-law tort action in state court *or* a § 1983 action in federal court. Such a reading, of course, would conflict with the generally accepted doctrine of concurrent jurisdiction. The leading case on that doctrine, Claflin v. Houseman, 93 U.S. 130 (1876), was decided only five years after the passage of § 1983, and purported to *restate* the accepted rule of concurrent jurisdiction. *Id.* at 136-37. *See* C. WRIGHT, *supra* note 1, at 36, 268.

66. The point is forcefully expressed in Terry v. Kolski, 78 Wis. 2d 475, 489 n.2, 254 N.W.2d 704, 709 n.2 (1977) (disclaiming jurisdiction over § 1983 actions "would ratify adherence to the very evil the civil rights acts were designed to obviate").

67. *E.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Redish & Woods, *supra* note 28, at 100-02. I have elsewhere argued that the available empirical data, in fact, undercuts the assumptions of Neuborne and Redish. *See* Solimine & Walker, *supra* note 2. *Cf.* Whitman, *supra* note 64, at 24 n.114 (arguing that "state court competence and bias may be less important in most § 1983 *damage* actions than they are in other contexts") (emphasis added). In such actions, courts often will not decide whether certain conduct was constitutional or not, but only decide whether the state acted in good faith in enforcing procedures which are later deter-

port to the historical and modern critics of state courts. Only by acknowledging the duty to enforce federal rights *and* federal causes of action will state courts merit their characterization as tribunals with responsibility equal to that of federal courts in enforcing and protecting federal rights.[68] Moreover, caseload burdens and immunity barriers such as the eleventh amendment[69] may prevent litigants, as a practical or legal matter, from effectively reaching federal courts. State courts should welcome the opportunity to challenge the critics of "parity" by providing a forum for such litigants. The incremental cost of adjudicating a small number of additional causes of action surely is outweighed by the benefits of granting relief to litigants and familiarizing state judges with the expanding substantive scope of federal law.

B. The Analogous Right/Antidiscrimination Principle

Despite the apparent acceptance of concurrent jurisdiction, a number of state courts in the first half of this century characterized federal causes of action as "foreign" or "penal" laws and refused to adjudicate them. The United States Supreme Court soon overturned these refusals, holding that state courts had to adjudicate federal causes of action without discrimination between "state" and "federal" plaintiffs. While this antidiscrimination principle has long thwarted most state court attempts to deny jurisdiction over federal causes of action, it is still useful to examine the principle because it sheds light upon the ultimate jurisdictional obligation imposed upon state courts.

The antidiscrimination principle was first fully articulated in *Mondou v. New York, New Haven & Hartford Railroad*,[70] when the Supreme Court held that Connecticut courts could not refuse to adjudicate a claim under the Federal Employer's Liability Act (FELA)[71]

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mined to be unlawful. *Id.* Such "good-faith" immunity is addressed in Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

68. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982); Rose v. Lundy, 455 U.S. 509, 518 (1982); Stone v. Powell, 428 U.S. 465, 494 n.35 (1976); Younger v. Harris, 401 U.S. 37 (1971). Most, but not all, academic observers would disagree with this characterization. *Compare* Neuborne, *supra* note 56, *with* Bator, *supra* note 1.

69. U.S. CONST. amend. XI. *See generally* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981). In general, the eleventh amendment prohibits federal courts from awarding retrospective monetary relief against a state for violations of federal law. *See* Quern v. Jordan, 440 U.S. 332 (1979). Thoughtful summaries and criticisms of the Supreme Court's eleventh amendment jurisprudence appear in Eisenberg, *supra* note 9, at 487-90; Lichtenstein, *Retroactive Relief in the Federal Courts since Edelman v. Jordan: A Trip Through the Twilight Zone*, 32 CASE W. RES. L. REV. 364 (1982).

70. 223 U.S. 1 (1912). *Mondou* and related Supreme Court cases are discussed in C. WRIGHT, *supra* note 1, at 268-73; HART & WECHSLER, *supra* note 1, at 434-38; Neuborne, *supra* note 56, at 753-59.

71. 45 U.S.C. §§ 51-60 (1976).

when those courts were vested with jurisdiction over analogous state tort claims. In *Floyd v. Dubois Soap Co.*,[72] the Supreme Court summarily reversed a decision by the Ohio Supreme Court which had refused to adjudicate, as a "penal" law, an action under the Fair Labor Standards Act.[73] Shortly thereafter, the Supreme Court rendered the leading decision, *Testa v. Katt*.[74] In *Testa*, the Court rejected an effort by Rhode Island courts to deny jurisdiction of claims under the Emergency Price Control Act.[75] Invoking the principle of concurrent jurisdiction, the Court held that Rhode Island courts could not discriminate against federal plaintiffs when the courts adjudicated similar, but not identical, claims under state law.[76] More recently, the Supreme Court reiterated these principles in *Federal Energy Regulatory Commission (FERC) v. Mississippi*,[77] where the Court upheld the constitutionality of certain provisions of the Public Utility Regulatory Policies Act (PURPA).[78] In the course of its decision, the *FERC* Court, reiterating *Testa*, upheld a provision of the Act requiring state regulatory agencies to implement certain rules.[79] *Testa* was controlling, the Court held, since the state agency had statutory authority to consider analogous disputes under state law.[80]

Based on this authority, the Supreme Court in *Martinez v. California*[81] held that a state court could not refuse to enforce a section 1983 action when the same type of claim was actionable under state law.[82] This reasoning alone suggests the unsoundness of *Wheeler*[83] and

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72. 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam*, 317 U.S. 596 (1942).

73. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended in scattered sections of 29 U.S.C.).

74. 330 U.S. 386 (1947).

75. Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (codified in scattered sections of 50 U.S.C.) (repealed 1947).

76. 330 U.S. at 394. *See* Neuborne, *supra* note 56, at 756-57.

77. 456 U.S. 742 (1982).

78. Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended in scattered sections of tits. 15, 16, 30, 42 & 43 U.S.C.).

79. *FERC*, 456 U.S. at 760-61. The provision in question, § 210(f) of title II of the Act, 16 U.S.C. § 824a-3(f) (Supp. V 1981), requires state utility authorities to implement certain rules promulgated by the Federal Energy Regulatory Commission. *See FERC*, 456 U.S. at 750-51, 759.

80. 456 U.S. at 760. The partial dissents in *FERC* were less sanguine about applying *Testa* to state agencies, as opposed to state courts. *Id.* at 773-74 n.4 (Powell, J., concurring and dissenting); *id.* at 784-85 (O'Connor, J., concurring and dissenting). The dissenters' concerns are echoed in Guida, *Commandeering State Government: Renewed Confusion Over Federal Power under the Clean Air Act*, 10 ECOLOGY L.Q. 579, 606-07 (1983); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 186, 193 (1982). For present purposes, it need only be stated that *FERC* forcefully reiterated, and arguably went beyond, the antidiscrimination principles found in *Testa*.

81. 444 U.S. 277 (1980).

82. *See supra* text accompanying notes 56-57.

83. No. 79-5889 (Ct. App. Montgomery Co., Ohio Jan. 12, 1979).

its progeny. State officials in Ohio are liable for tortious acts,[84] and the state itself may be sued in the Ohio Court of Claims.[85] While such actions in tort are not *identical* to a typical section 1983 action,[86] they surely are sufficiently similar to trigger the antidiscrimination rule. Applying this doctrine to the Title VII situation is more problematic. A court enforcement action under the OCRC differs in some respects from a typical Title VII court action.[87] But the differences are not of a quantum nature; the very fact that adjudication under the state agency exists at all suggests the presence of an analogous cause of action. The existence of such state-level enforcement schemes belies the holdings of the *Wheeler* court and its progeny; in refusing to adjudicate Title VII and section 1983 actions, Ohio courts run afoul of the antidiscrimination principle.

C. *The Obligation to Enforce Federal Causes of Action*

The *Wheeler* court[88] and its progeny did not attempt to distinguish the presumption of concurrent jurisdiction in general, or the antidiscrimination principle in particular. Instead, the courts avoided these doctrines and reached the more difficult question of whether Congress could "impose" an obligation upon state courts to hear federal actions. Having reached the precipice, the courts backed away, dubiously applying the doctrine of exclusive jurisdiction to federal civil rights

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84. OHIO REV. CODE ANN. § 2743.02 (Page 1981). *See also* 15 OHIO JUR. 3d *Civil Servants and Other Public Officers and Employees* §§ 240-46 (1979); Note, *Official Immunity in Ohio: How To Sue the King's Men*, 43 U. CIN. L. REV. 557 (1974).

85. OHIO REV. CODE ANN. § 2743.02 (Page 1981). In addition, the Ohio Supreme Court recently abrogated the venerable rule of sovereign immunity. *See* Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982) (opening Ohio courts to tort suits against state and local agencies and officials).

86. Schorle v. City of Greenhills, 524 F. Supp. 821, 825 (S.D. Ohio 1981), sets out possible substantive differences between a typical tort action under Ohio law and a § 1983 action. However, the United States Supreme Court has emphasized that § 1983 liability must be formulated against the general background, historical or otherwise, of common-law torts. *See* Smith v. Wade, 103 S. Ct. 1625, 1628-29 n.2 (1983); Briscoe v. Lahue, 103 S. Ct. 1108, 1113 (1983); Monroe v. Pape, 365 U.S. 167, 187 (1961); *see also* Eisenberg, *supra* note 9, at 495, 501 n.84. This suggests that the chasm between § 1983 actions and typical common-law torts, covering similar types of official conduct, may not be as wide as the *Schorle* court indicated.

87. Procedures under Title VII and the OCRC are compared and contrasted in 1A FED. REG. OF EMPL. SERV. 342-54 (1983 ed.). However, the Ohio Supreme Court has held that actions brought in court under OHIO REV. CODE ANN. ch. 4112 (Page 1980 & Supp. 1982), will be governed by the substantive liability guidelines for Title VII actions developed in federal court. *See* Barker v. Scovill, Inc., 6 Ohio St. 3d 146, 451 N.E.2d 807 (1983); Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm'n, 66 Ohio St. 2d 192, 421 N.E.2d 128 (1981). Most state courts have followed this course in actions brought under their own civil rights laws. *See* Jackson, Matheson & Piskorski, *supra* note 43, at 1515-16. Ohio's use of Title VII guidelines in such cases provides a potent example of an "analogous" action to a Title VII suit brought in federal court.

88. No. 78-3689 (Ct. App. Montgomery Co., Ohio Jan. 12, 1979).

actions.

In raising the issue of federally imposed obligations, the courts did suggest some puzzling concerns. Indeed, the Supreme Court in *Martinez* expressly reserved this issue in the context of a section 1983 action.[89] The difficulty or confusion stems in part from the language in *Testa v. Katt*.[90] Justice Black, writing for the Court, set out the principle that state courts could not refuse to adjudicate federal actions when they enforced similar claims arising under state law.[91] Earlier in the opinion, however, the Court spoke in terms of a broader principle of federal supremacy, apparently condemning the right of a state court to deny enforcement of claims growing out of a valid federal law.[92] Similar ambiguity is apparent in the *FERC* decision. There the Court upheld a provision of PURPA[93] mandating that state agencies consider certain standards in fixing utility rates.[94] While the Court had earlier invoked the antidiscrimination principle,[95] the Court also characterized *Testa* as permitting the federal government "some power to enlist a branch of state government—there the judiciary—to further federal ends."[96] The latter language seems to eschew any reliance on the need to find an analogous claim which can be raised in state agencies (or courts) under state law. This reading of *Testa* and *FERC* apparently compels the conclusion that state courts must enforce certain federal actions, given the mandate of the supremacy clause.

While not fully explicated in the case law, such a result is consistent with the intent of the framers of article III of the Constitution. The framers at the Constitutional Convention of 1789 agreed that there should be one federal Supreme Court, but debated the necessity of creating *lower* federal courts.[97] The debate culminated in the "Madisonian Compromise," which permitted but did not obligate Congress to create lower federal courts.[98] Critical to this resolution was the

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89. *See supra* text accompanying note 57.

90. 330 U.S. 386 (1947).

91. *Id.* at 389, 391, 394.

92. *Id.* at 391. *See generally* C. WRIGHT, *supra* note 1, at 270-71; 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4024, at 718 (1977); Redish & Muench, *supra* note 2, at 350-52.

93. Titles I and III of PURPA. 16 U.S.C. §§ 2621-24 (Supp. V 1981).

94. 456 U.S. at 771.

95. *See supra* text accompanying notes 78-79.

96. 456 U.S. at 762 (footnote omitted). *See also id.* at 762 n.27, 769 (also invoking the "obligation" language of *Testa*).

97. THE FEDERALIST NO. 82, at 492 (A. Hamilton) (C. Rossiter ed. 1961).

98. This is reflected in the language of U.S. CONST., art. III, § 1, which provides in part that "[t]he Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." *See generally* Solimine & Walker, *supra* note 2, at ____; Redish & Woods, *supra* note 28, at 52-53.

assumption that *state* courts would always entertain federal actions, subject to ultimate review by the United States Supreme Court.[99] This assumption would seem equally true today, particularly given the many federal issues already litigated in state courts on a daily basis. Indeed, the recent attempts by Congress to strip federal courts of jurisdiction over actions dealing with controversial "social" issues[100] underscores the wisdom of following the framers' intent. In short, once the *ability* of state courts to adjudicate federal causes of action is established, the history and structure of our federal system suggests that state courts are under an *obligation* to leave their courts open to such actions.[101]

Yet even this broad principle is subject to qualification. In *Testa*, the Court intimated that state courts could refuse to adjudicate federal actions where a "valid excuse" existed.[102] This formulation was apparently intended to exempt state courts of *limited* jurisdiction from any obligation to entertain federal actions.[103] However, an examination of the fundamental sovereignty of the states in the federal system gives content to the "valid excuse" doctrine.[104] A "valid excuse" might ar-

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99. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

100. The court-stripping bills in the 97th Congress, none of which were enacted, are critically examined in Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). Most writers consider Congress' power to regulate the jurisdiction of the Supreme Court much narrower than its authority to alter lower federal court jurisdiction. *Id.* at 30-36, 37-60; *see also* Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982).

101. *See* Neuborne, *supra* note 56, at 759-66; Redish & Muench, *supra* note 2, at 347. State judges should view such an obligation as an opportunity not as a burden. *See supra* text accompanying notes 65-68.

102. 330 U.S. at 392. Interestingly, none of the opinions in *FERC* mentioned this doctrine.

103. *See* Redish & Muench, *supra* note 2, at 349-52. The *Testa* Court indicated that it did not insist that adjudication of a federal action be taken in Herb v. Pitcairn, 324 U.S. 117 (1945), which involved an Illinois court of limited jurisdiction. *See also FERC*, 456 U.S. at 773-74 n.4 (Powell, J., concurring and dissenting).

104. As Professor Redish has suggested, one could look to the Supreme Court's recent interpretation of the tenth amendment in National League of Cities v. Usery, 426 U.S. 833 (1976). See Redish & Muench, *supra* note 2, at 343-45 for suitable criteria. As developed by the Court, a federal statute may be invalid under the tenth amendment if it regulates "States as States," addresses "matters that are indisputably attributes of state sovereignty," and impairs the states' "ability to structure integral operations in areas of traditional functions." *Usery*, 426 U.S. at 845, 852, 854; *see also* EEOC v. Wyoming, 103 S. Ct. 1054, 1061 (1983); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981). Even if the three-part test is met, the federal interest involved may still outweigh the state interests, so as not to invalidate the statute. *FERC*, 456 U.S. at 764 n.28; *Hodel*, 452 U.S. at 288.

Technically, the tenth amendment limitation only applies to acts of Congress done pursuant to the commerce power. *See* EEOC v. Wyoming, 103 S. Ct. at 1064 n.18; Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976). Thus, it would apply to Title VII, 42 U.S.C. § 2000e-1(g) (1976), but not to § 1983, passed pursuant to the fourteenth amendment. Milliken v. Bradley, 433 U.S. 267, 291 (1977). Even if not directly applicable, the tenth amendment limitations are relevant to

guably exist when a state, while entertaining federal actions, is faced with a burgeoning caseload or the necessity of creating additional courts.

This parade of horribles[105] clearly does not reflect the result of sending a typical federal civil rights action through a state court. The administrative burden involved in civil rights actions in federal courts has been overstated.[106] It seems quite unlikely that similar burdens, to the extent that they exist, would affect similarly situated state courts. For reasons of convenience and familiarity alone, far fewer plaintiffs would seek the state forum in a typical case. These few cases could hardly be characterized as a "burden."[107] Moreover, even if an individual federal action or series of actions unduly burden a state court, the valid excuse doctrine remains a last resort. Only the most serious circumstances merit a state court's avoidance of its obligation to enforce federal causes of action, however.

III. CROSS-FORUM APPLICABILITY OF SUBSTANTIVE AND PROCEDURAL RULES

Having established that state courts can and should entertain federal causes of action, there remains the question of which federal substantive and procedural rules the state tribunal must apply in order to properly adjudicate that action. Indisputably, the state court must utilize the "substantive" rules found in the applicable federal statute or federal case law—that is, standards concerning the liability of the defendants involved.[108] This result flows from the application of the

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explicating the "valid excuse" doctrine.

105. Redish & Muench, *supra* note 2, at 358-59.

106. The large number of civil rights cases is discussed at *supra* notes 10-11. Such litigation has become increasingly complex in recent years, especially with regard to class actions, discovery, and supervision of relief. *See, e.g.*, Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); 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). In extreme cases, such factors may justify invocation of the "valid excuse" doctrine by state courts. Redish & Muench, *supra* note 2, at 358 n.200.

Yet Professor Eisenberg has demonstrated, in his statistical study of the Central District of California, that few civil rights cases will be unduly complex or burdensome. Most such cases, he found, do not place unbearable burdens on courts, and are often dismissed at an early stage. Eisenberg, *supra* note 9, at 524-56. In any event, complex, "institutional" litigation is not totally foreign to state courts. Wolcher, *supra* note 69, at 193 n.14 (citing examples).

107. A recent study by the National Center for State courts found that Ohio courts have had a slower rate of growth for civil cases than the national average. Stewart, *Bucking Trend: National Growth in Court Filings Unmatched in Ohio*, Dayton Daily News, Mar. 6, 1983, at 3, col. 2. Therefore, having some federal civil rights cases tried in Ohio courts would not be unduly burdensome, and might help alleviate the large caseloads in Ohio federal courts. *See supra* note 11.

108. *See supra* text accompanying note 30.

supremacy clause.[109] A more difficult question for the state court to address is which, if any, "procedural" rules it must adopt from the federal forum, assuming a conflict exists between a state and a federal rule. Such "procedural" rules typically govern the conduct of the lawsuit, including defenses, immunities, statutes of limitation, burdens of proof, discovery, and the scope of relief available.[110]

Federal courts have of course struggled with similar issues in the wake of *Erie Railroad Co. v. Tompkins*,[111] which mandated that federal courts sitting in diversity jurisdiction[112] apply the substantive law of the state. The long-evolved interpretation of *Erie*[113] appears to be that state substantive law will apply, but that a Federal Rule of Civil Procedure, if in conflict with a relevant state rule, will apply if "procedural," as that term is used in the Rules Enabling Act.[114] Any other

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

110. For a lengthier catalog of examples, see Neuborne, *supra* note 56, at 767 n.173. The problem, of course, is to distinguish "substantive" from "procedural" rules. Those terms are crusted with so many intellectual barnacles from the *Erie* doctrine, discussed below, that Professor Neuborne has suggested that the more neutral term, "collateral rules," be utilized. *Id.*

111. 304 U.S. 64 (1938). *Erie* overruled Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which had interpreted the Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1652 (1976)), which required federal courts in diversity cases to follow only state statutes, not state case law. In the absence of a statute, federal courts could develop and apply their own "common law." Under *Erie*, state case law must be applied in such cases as well.

There is considerable controversy whether *Erie* was simply a reinterpretation of the Rules of Decision Act, or also rested on constitutional underpinnings. *See* 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4505 (1982); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702-04 (1974); Neuborne, *supra* note 56, at 769 n.184; Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). This inquiry has some relevance to this article: that is, how the Constitution might mandate the application of federal procedural rules in state courts adjudicating federal causes of action. *See infra* note 116.

112. The federal district courts are vested with diversity jurisdiction under U.S. CONST., art. III, § 2, cl. 1 and 28 U.S.C. § 1332 (1976).

113. Since 1938, three leading Supreme Court decisions have attempted to explain the meaning of *Erie*. In Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the Court appeared to require the application of state law whenever application of federal law would be "outcome determinative," that is, lead to a different result in the lawsuit. In Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), the Court appeared to require that the state's interests in applying a rule be "balanced" against the federal interests in applying a federal rule. Finally, in Hanna v. Plumer, 380 U.S. 460 (1965), the Court indicated that application of a federal or state rule would depend on the requirements of the United States Constitution, and the standards of either the Rules of Decision Act, 28 U.S.C. § 1652 (1976), or the Rules Enabling Act, 28 U.S.C. § 2072 (1976). The Court's most recent pronouncement, Walker v. Armco Steel Corp., 446 U.S. 740 (1980), broke no new ground and appeared to be a cautious affirmance of *Hanna*. *See generally* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 111, at § 4504.

114. The Enabling Act provides in part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeal of the United States in civil actions . . . . [Such] rules shall not abridge, enlarge or modify any substantive right . . . .

28 U.S.C. § 2072 (1976).

procedure or rule, formulated by the sitting federal judge or developed in federal case law, can be used in a diversity case under the Rules of Decision Act,[115] so long as application of the federal rule will not likely affect the outcome of the case. Federal rules which are outcome-determinative are held inapplicable because they are thought to increase the dangers of forum-shopping.[116] However, such elegant formulations can often mask problems in differentiating "substantive" and "procedural" state or federal rules.

Similar, though not identical, difficulties are found in what have been described as "converse-*Erie*"[117] situations, such as those discussed in this article. "Converse-*Erie*" situations present the question of which forum's procedural rules should be applied when a federal cause of action is litigated *in a state court*. The Supreme Court's addressing of these issues predates *Erie*, with virtually all of the relevant cases involving FELA actions brought in state courts.[118] The leading cases appear to require that state procedural rules, which might substantially hinder or defeat the plaintiff's ability to recover, be rejected in favor of more liberal federal rules.[119] The interests of federal statutory policies

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115. The Rules of Decision Act provides that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1976).

116. The tests represent the generally accepted academic interpretation of Hanna v. Plumer, 380 U.S. 460 (1965). *See, e.g.*, 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 111, at § 4504; Ely, *supra* note 111; Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

A more eclectic approach, rejecting much of the above analysis and positing that Professor Ely and others have misread the applicable statutes and case law, is found in Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980). Generally, the authors argue that, in federal courts, any "valid" and "pertinent" federal rule should be applied under the supremacy clause. *Id.* at 314. Professor Westen's approach has been sharply criticized. *See* Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980). However, Westen applied his analysis to problems of concurrent jurisdiction that are relevant to this article, which Professor Redish did not attack. *See* Westen, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971, 976 (1980).

117. As coined by Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384 (1956).

118. Overviews of these cases can be found in Neuborne, *supra* note 56, at 770-75; Hill, *supra* note 117, at 387-88.

119. The leading cases are Brown v. Western Ry. of Ala., 338 U.S. 294 (1949) and Dice v. Akron, C. & Y. R.R. Co., 342 U.S. 359 (1952). In *Brown*, the Court held that a state court could not apply a rule that allegations in a complaint must be construed *against* the pleader, since strict "local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." 338 U.S. at 298. In *Dice*, the Court held that a state court must forego local practices and submit the question of the validity of a release to the jury. The Court felt that a jury trial was "too substantial a part of the rights accorded" by the FELA to be denied by a "mere 'local rule of procedure.'" 342 U.S. at 363. However, the Court suggested that the result might be different had the state chosen to do away entirely with jury trials in negligence cases. *Id.* (distinguishing Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916)). Thus, *Dice* appears to recognize that a sufficiently strong state interest, such as not equipping courts for

seem to be of major importance in these decisions.[120]

This latter line of decisions is most relevant to this article. But some have argued that the *Erie* doctrine's delineation of "substance" and "procedure" can inform the choice-of-rule decision in converse-*Erie* cases.[121] Others have suggested that *Erie* concerns, such as the prevention of forum-shopping,[122] have little relevance to the adjudication of federal actions in state courts.[123] Those authorities which find

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juries, might overcome federal policies derived from the statute. *See* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 92, § 4023 at 708; C. WRIGHT, *supra* note 1, at 272. Taken together, *Brown, Dice*, and related cases support the "substantial hindrance or burden" test set out in the text. *See* Neuborne, *supra* note 56, at 779-80; Note, *Procedural Protection for Federal Rights in State Courts*, 30 U. CIN. L. REV. 184, 185-87 (1961) [hereinafter cited as Note, *Procedural Protection*]; Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1561-64 (1960) [hereinafter cited as Note, *State Enforcement*]. *See also The Supreme Court, 1981 Term*, 96 HARV. L. REV. 186, 194-95 (1982) (asserting that the *FERC* decision, discussed *supra* note 94, implicitly reaffirms the *Brown* and *Dice* holdings, leaving virtually no exceptions).

Most recently, in Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980), the Court held that a state court must admit evidence of the effect on income taxes of a FELA plaintiff's estimated future earnings, and, upon request, instruct the jury that the damage award was not subject to federal income taxes. The majority curtly assumed that such issues were "federal in character." *Id.* at 493. In dissent, Justice Blackmun briefly discussed *Brown* and *Dice* and concluded "that state rules that interfere with federal policy are to be rejected, even if they might be characterized as 'procedural.'" *Id.* at 504 (Blackmun, J., dissenting).

120. *Brown, Dice*, and related cases were predicated, in large part, on the Supreme Court's recognition that Congress, through the FELA, sought to ameliorate the obstacles certain potential plaintiffs faced in tort suits under state law. *See* HART & WECHSLER, *supra* note 1, at 568-69; Hill, *supra* note 117, at 397. Yet there seems no logical reason to limit the import of those decisions to FELA cases. C. WRIGHT, *supra* note 1, at 270; Note, *The Securities Exchange Act and the Rule of Exclusive Federal Jurisdiction*, 89 YALE L.J. 95, 116 nn.84-85 (1979). Such a conclusion seems particularly appropriate when considering the adjudication of a § 1983 action in state court; Congress specifically enacted § 1983 to enable persons to protect their federal constitutional and statutory rights. *See supra* notes 62-65 and accompanying text.

121. Brown v. Western Ry. of Ala., 338 U.S. 294, 300-02 (1949) (Frankfurter, J., dissenting); Note, *State Enforcement, supra* note 119, at 1560-62. *Cf.* HART & WECHSLER, *supra* note 1, at 571-72. Professor Hill also found that *Erie* applied, given his understanding that the *Erie* doctrine was governed by the "outcome-determinative" test. Hill, *supra* note 117, at 387, 414. *See supra* note 113. He might have come to a different conclusion had he been appreciative of the current understanding of the *Erie* "tests." *See supra* notes 113, 116.

122. Walker v. Armco Steel Corp., 446 U.S. 740, 747 (1980) (citing Hanna v. Plumer, 380 U.S. 460, 468 (1965)). *See also* Redish & Phillips, *supra* note 116, at 378-84.

123. Note, *Procedural Protection, supra* note 119, at 192.

The difference between *Erie* and "converse-*Erie*" analysis is underscored by recognizing that, in the latter situations, the supremacy clause is the ultimate authority for controlling procedural rules in state courts. *See* Maine v. Thiboutot, 448 U.S. 1, 11 (1980); Note, *Procedural Protection, supra* note 119, at 190.

Professor Westen reached this conclusion, in analyzing the question of concurrent jurisdiction, using the example of a § 1983 action brought in state court. He felt that in such actions, "the statute vesting concurrent jurisdiction in state courts contains an implicit policy against the adoption of judge-made rules of procedure that are so outcome-determinative that they would effectively prevent civil rights suits from being heard in state court." Westen & Lehman, *supra* note 116, at 382.

Erie to be an interesting but inapplicable analogue appear to have the better of the argument. In diversity cases, no substantive federal law is applied; in converse-*Erie* cases, substantive law derived from a federal statute is applied. The existence of federal substantive interests, derived from the statute upon which liability is predicated, argues for a strict cabining of state procedural rules. Moreover, the rather complicated nature of modern *Erie* analysis has little practical applicability to a straightforward conflict between state rules and federal rules in state court. When a direct conflict exists, the relevant federal rule or procedure should be followed if the state rule or procedure would substantially burden a plaintiff's chance of recovery under a federal statutory claim. Absent such circumstances, the state court adjudicating a federal cause of action can utilize ordinary state procedural rules.[124]

This test, like the *Erie* tests, glosses over potentially difficult questions, such as defining a "substantial burden" to a plaintiff. Fortunately, the potential conflicts between federal and state rules of procedure are diminishing. Ohio, for example, in promulgating its Rules of Civil Procedure and Rules of Evidence,[125] has largely replicated the federal counterparts. Issues which are not governed by these rules (such as the application of a statute of limitations or the calculation of damages) should be decided only after an *initial* look to the federal statute or case law for guidance. In some instances, such as with Title VII, most if not all of the answers will be found in the statute itself.[126] In other instances, such as with section 1983, the statute will not provide answers. In such cases, the state court can *then* look to state law, as a federal court would in adjudicating a section 1983 action.[127] In

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124. Even if the state rule might "substantially burden" the plaintiff, the state court could arguably still apply the rule if it applied to *all* lawsuits in court. *See supra* note 119. *See also supra* notes 102-05 and accompanying text (discussing "valid excuse" doctrine).

125. On the former, see Harper, *Introduction, Ohio Rules of Civil Procedure: A Symposium*, 39 U. CIN. L. REV. 465 (1970). On the latter, see 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE T-2 (Supp. 1982); Blakey, *A Short Introduction to the Ohio Rules of Evidence*, 10 CAP. U.L. REV. 237 (1980).

126. Various pre-court suit filing requirements and the availability of remedies are set out in Title VII. 42 U.S.C. §§ 2000e-5(b), (f)(procedures), (g)(remedies), (k)(attorney's fees) (1976 & Supp. V 1981).

127. A state court's search for the appropriate "federal" procedural rule in a § 1983 action should be particularly manageable. Federal courts apply a companion provision to § 1983, 42 U.S.C. § 1988 (1976), which permits courts to look to state law to fill gaps in federal law, as long as the former is not "inconsistent" with policies of the latter. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478 (1980). *See generally* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980). Cognizant of the language in § 1988, a state court in such cases can usually refer to state law.

Section 1988 also contains a provision allowing the awarding of attorney's fees to the "prevailing party." The Supreme Court has held that this provision should be applied by a state court in a § 1983 action. Maine v. Thiboutot, 448 U.S. 1, 11 (1980). For a listing of state decisions

short, the convergence of federal and state procedures, as well as an initial resort to federal practice, should considerably diminish any chance of potentially disruptive and confusing conflicts between federal and state rules. This course can obviate the need for the state court to determine if a state rule, in conflict with a federal rule, "substantially burdens" the plaintiff in pursuing a federal cause of action.[128]

IV. CONCLUSION

The fear of saddling Ohio courts with the adjudication of federal civil rights actions may have implicitly motivated the decisions in *Fox v. Eaton Corp.*[129] and *Wheeler v. General Motors Corp.*[130] Such a fear may stem from a presumption that state judges would be unfamiliar with federal law or burdened with increased caseloads. In so deciding, however, these courts failed to address some rather settled doctrines—the presumption of concurrent jurisdiction, the antidiscrimination principle, and the ultimate obligation of state courts to adjudicate such actions. These doctrinal deficiencies render the *Fox* and *Wheeler* decisions and their progeny doubtful as precedent.[131]

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applying § 1988, see *id.* at 10-11 n.11.

128. A discussion of the applicability of various federal or state procedural rules in § 1983 actions is presented in Neuborne, *supra* note 56, at 780-86.

129. 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976).

130. No. 79-5889 (Ct. App. Montgomery Co., Ohio Jan. 12, 1979).

131. The significance of the apparent disagreement among Ohio decisions as to whether federal civil rights actions can be brought in Ohio courts is underscored by a case to be decided in the October 1983 term of the United States Supreme Court. In Migra v. Warren City School Dist. Bd. of Educ., Nos. 79-CV-271, 571 (C.P. Ct. Trumbull County, Ohio 1979), a discharged schoolteacher sued her school board in an Ohio trial court for breach of contract and tortious interference with contract. After holding for the plaintiff on the contract claim, the Ohio judge dismissed, without prejudice, the remaining tort action. Plaintiff thereafter filed suit in the Federal District Court for the Northern District of Ohio, under 42 U.S.C. §§ 1983 & 1985, charging violations of her first, fifth, and fourteenth amendment rights. In an unreported decision, the district judge dismissed the action on res judicata grounds, holding that plaintiff could have raised the civil rights claims in the state contract action. No. C80-1183-y (N.D. Ohio Feb. 17, 1981). The Court of Appeals for the Sixth Circuit affirmed. 703 F.2d 564 (6th Cir. 1982) (mem.). The Supreme Court has granted certiorari. 103 S. Ct. 722 (1983) (No. 82-738). On appeal, plaintiff argues that res judicata should not apply because her federal claims sound in tort (severed from the contract claim in state court) and, alternatively, 28 U.S.C. § 1738 and 42 U.S.C. §§ 1983 & 1985 should not be construed to permit full preclusion of her federal claims. *See generally* Brief for the American Civil Liberties Union and the Greater Cleveland Chapter of the ACLU as Amici Curiae, Migra v. Warren City School Dist. Bd. of Educ., *cert. granted*, 103 S. Ct. 722 (1983) (No. 82-738).

While not directly on point, this article has some relevance to both issues raised in *Migra*. To the extent that there is confusion whether § 1983 actions can be brought in Ohio courts, the res judicata effect of Ms. Migra's state court judgment should be construed narrowly. *See* Haring v. Prosise, 103 S. Ct. 2368, 2373 n.7 (1983); Montana v. United States, 440 U.S. 147, 163 (1979). On the other hand, to the extent that most Ohio courts have explicitly or implicitly accepted jurisdiction of § 1983 cases, *see supra* text accompanying notes 56-60, Ms. Migra's efforts to relitigate claims in federal court [assuming that to be a proper characterization of her federal

Even the policy speculations that may have underlain these decisions are unfounded. Most potential plaintiffs will likely continue to seek out the more familiar forum of the federal court. Any increase in state court caseloads should be miniscule. More importantly, the courts' refusal to open their doors to such actions only lends credence to the self-fulfilling prophecy, often repeated by academics, that state courts are institutionally unable or philosophically unwilling to properly adjudicate and protect federal rights. Such criticisms may have been valid a century ago; they certainly should not be fostered in this century—much less by state courts themselves. As partners with the national courts in a federal system, the time is at hand for Ohio courts to fully accept the presumption of concurrent jurisdiction over federal civil rights actions.

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lawsuit) should be viewed less charitably. The latter result is suggested by the spirit and holding of Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982). *See supra* text accompanying notes 44-50.