Restrictions on Access to the Federal Courts in Civil Rights Actions: The Role of Abstention and Res Judicata

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COMMENTS

RESTRICTIONS ON ACCESS TO THE FEDERAL COURTS IN CIVIL RIGHTS ACTIONS: THE ROLE OF ABSTENTION AND RES JUDICATA

I. Introduction

During the last decade the United States Supreme Court has limited the access of civil rights litigants to the federal courts through expanded use of res judicata and broadened application of the doctrine of abstention. These recent restrictions are contrary to a history of expanding access which began about one hundred years ago and climaxed during the 1960s.

Res judicata is a common-law doctrine incorporated into our Constitution by the “full faith and credit” clause. Abstention is a much newer creation of the judicial branch of government. This Comment will describe how these doctrines limit the availability of the federal forum to civil rights claimants who commence actions under

1. Res judicata is a common law doctrine which provides that a final judgment by a court of competent jurisdiction is conclusive of the rights of the parties in all later suits on matters determined in the former suit. It is invoked when the cause of action and the parties are identical. See BLACK'S LAW DICTIONARY 1470 (4th ed. rev. 1968).

2. The original doctrine of abstention simply required a federal court to hold an action in abeyance, if the meaning of a challenged state statute was ambiguous, giving the state court an opportunity to interpret the meaning of its own laws before the litigation was resumed in federal court. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Abstention has evolved into a doctrine which may require a federal court to dismiss an action in favor of the state court. See text accompanying notes 20-60 infra.

3. The civil rights laws enacted to support the fourteenth amendment after the Civil War began the expansion. See, e.g., notes 6 & 7 infra. In 1961, the Supreme Court decided Monroe v. Pape, 365 U.S. 167 (1961). That decision supported the policy of making federal courts the forums for litigation of civil rights claims. The Court held that federal remedies in civil rights actions are available to litigants regardless of whether state remedies are also sought or obtained.

4. U.S. CONST. art. IV, § 1 provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Congress prescribed in 28 U.S.C. § 1738 (1970) that state judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . .”

sections 1981⁶ and 1983⁷ of Title 42 of the United States Code and Title VII of the Civil Rights Act of 1964.⁸

II. Origin and Development of the Abstention Doctrine—Denial of Injunctive Relief

Historically, federal courts have refrained from enjoining pending state criminal prosecutions because of federalism⁹ and adherence to the maxim that equity will not enjoin a criminal prosecution.¹⁰ The Anti-Injunction Statute of 1793¹¹ codified this principle of non-interference with state criminal proceedings and forbade such intervention. The Supreme Court eventually introduced some flexibility into the doctrine in Ex Parte Young.¹² That decision permitted a federal court to enjoin enforcement of an unconstitutional state statute when the litigant faced immediate and irreparable harm from its operation.¹³


All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.


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

Id.

8. 42 U.S.C. § 2000e-2 (1970) (pertinent section of Title VII of the Civil Rights Act of 1964 [hereinafter Title VII]) provides that it is an unlawful employment practice to refuse to hire or to discharge or otherwise discriminate because of race, color, religion, sex or national origin, or to limit, segregate, or classify employees or applicants in any way which would deprive them of employment opportunities or affect employee status because of race, color, religion, sex or national origin. Id.

9. The essence of federalism in this context is non-interference with the rights of the separate states. See, e.g., Oklahoma Packing Co. v. Oklahoma Gas Co., 309 U.S. 4 (1939). Federal courts avoid enjoining state court proceedings to avoid "needless friction between state and federal courts." Id. at 9.

10. See Younger v. Harris, 401 U.S. 37, 43 (1971) for the history of this doctrine of equitable restraint.

11. 1 Stat. 335 (1793). "[N]or shall such writ of injunction be granted to stay proceedings in any court of a state . . . ." Id. at 335.


13. Id.
The Court carved out additional exceptions to the anti-injunction doctrine through the years, as Congress enacted legislation which required or allowed an injunction to issue.\(^{14}\) The modern general rule, which Congress codified in 1948,\(^{15}\) prescribes specific exceptions to the prohibition against federal injunctive relief.\(^{16}\) One of these exceptions permits injunctions when they are "expressly authorized by Act of Congress."\(^{17}\) Section 1983 specifically permits those deprived of their constitutional rights under color of state law to bring an "action at law, suit in equity, or other proper proceeding for redress."\(^{18}\) In 1972 the Supreme Court held that these words had "expressly authorized" injunctions in actions arising under section 1983.\(^{19}\)

The abstention doctrine developed as a result of the tension between the principle of federal non-intervention in state proceedings and the need of civil rights litigants for such interference when a state infringed upon their constitutional rights.

The doctrine emerged in 1941 with the Supreme Court's holding in *Railroad Commission v. Pullman Co.*\(^{20}\) A Texas Railroad Commission order required sleeping cars to be supervised by Pullman conductors, all of whom were white, rather than Pullman porters,

\(^{14}\) See Mitchum v. Foster, 407 U.S. 225, 234-38 (1972) for development of these exceptions.


\(^{16}\) 28 U.S.C. § 2283 (1970) provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

\(^{17}\) Id.

\(^{18}\) See note 7 supra.

\(^{19}\) Mitchum v. Foster, 407 U.S. 225 (1972). A three-judge district court in *Mitchum* refused injunctive relief to a bookshop owner, whose shop was ordered closed under a Florida nuisance statute, holding that the relief sought in the section 1983 action did "not come under any of the exceptions" to the anti-injunction statute. *Id.* at 228. The Supreme Court reversed, holding only that the district court was "in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a proceeding pending in a state court. . . ." *Id.* at 243.

The *Mitchum* holding was totally consistent with the purpose of section 1983 (to afford a citizen relief against state deprivations) and the era which spawned the legislation. During the Congressional debate on section 1983, Representative Lowe stated: "[R]ecords of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . What less than this [Civil Rights Act of 1871] will afford an adequate remedy?" *Cong. Globe*, 42d Cong., 1st Sess., 374-76, cited in Mitchum v. Foster, 407 U.S. at 240 (1972).

\(^{20}\) 312 U.S. 496 (1941).
all of whom were black. The railroad sought to enjoin enforcement of the order, claiming denial of due process, since the conductors were paid more than the porters. The porters intervened, alleging denial of equal protection. A three-judge federal district court granted the injunction, but the Supreme Court, on direct appeal, reversed.

The Court believed it was accommodating both state and federal interests with this decision. *Pullman* held that the state court must be given an opportunity to give a preliminary ruling on questions of ambiguous state law, a ruling which might extinguish the federal issue if the railroad commission order were overturned by the state courts. The federal court would retain jurisdiction as fact-finder if the federal issues remained viable.

More recent cases, decided on the basis of "comity," have virtually eliminated the federal courts as fact-finders in many types of civil rights actions. These later decisions have closed the doors of the federal courthouses to many section 1983 claimants who seek injunctive relief against pending state proceedings. In *Younger v. Harris* the Burger Court overturned a Warren Court holding that abstention was not appropriate when the challenged state statute was overbroad and restricted first amendment rights. The respondent in *Younger* had been indicted in a California state court for violating a state statute which imposed criminal sanctions for the spoken or written advocacy of change through violence or terrorism. He sued in federal district court to enjoin the state prosecution,

21. Until August 12, 1976, when it was repealed by 90 Stat. 1119, 28 U.S.C. § 2281 (1970) required that "[a]n . . . injunction restraining the enforcement, operation or execution of any State statute . . . shall not be granted by any district court . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges . . . ."
22. 312 U.S. at 498.
25. "Comity" is defined as "a proper respect [by federal courts] for state functions." *Younger v. Harris*, 401 U.S. at 44.
26. See note 24 supra.
28. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The Court held that the federal district court should have enjoined pending prosecutions under Louisiana's "anti-subversion" laws, where the laws were overbroad and prosecutions were maintained solely for harassment of Negroes, causing them irreparable injury. *Id.*
claiming that the state law inhibited his freedom of speech and was thus unconstitutional. A three-judge district court found the Act void for vagueness and enjoined the prosecution. The Supreme Court reversed on two grounds: the principle of non-intervention by courts of equity in criminal prosecutions; and the principle of comity, or deference to the state's interests.

Such powerful state concerns, the Court held, should take precedence over federal intervention unless the contemplated injury was irreparable, great and immediate. The Court found no such irreparable and immediate injury present in this action, because a defense in state court would allow the defendant to raise his constitutional claims, the prosecution was brought in good faith, and the injury the defendant faced was merely "that incidental to every criminal proceeding."31

In Huffman v. Pursue, Ltd.32 the Supreme Court extended the Younger principle to an Ohio civil nuisance proceeding. State officials, pursuant to a public nuisance statute, brought a state action to close for one year a theatre which had exhibited obscene films. The defendant theatre owner's successor, who obtained ownership prior to the judgment, did not appeal through the state courts, but rather filed a section 1983 action in federal district court, seeking an injunction against enforcement of the allegedly unconstitutional statute. The district court declared the statute unconstitutional as a prior restraint on free speech and enjoined execution of the state court's judgment.33 The Supreme Court reversed, holding that the nuisance proceeding was so closely "akin"34 to a criminal proceeding that the Younger doctrine should be extended to this type of civil proceeding. The Court further held that a claimant must exhaust a

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29. 401 U.S. at 40.
30. "A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face... or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement..." 401 U.S. at 56 (Stewart, J., concurring). For a discussion of federal restraint in subsequent criminal cases see Steffel v. Thompson, 415 U.S. 452 (1974); Hicks v. Miranda, 422 U.S. 332 (1975). See also, Maraist, Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski, 48 Texas L. Rev. 535 (1970); Note, Federal Jurisdiction—Younger v. Harris: A Current Appraisal of the Policy Against Federal Court Interference With State Court Proceedings, 21 De Paul L. Rev. 519 (1971).
33. Id. at 599.
34. Id. at 604.
state’s appellate remedies before resorting to the federal courts. The Court refused to extend its holding to apply to other types of civil litigation, but a more recent decision, Juidice v. Vail, has accomplished that result.

In Vail appellees were fined and imprisoned under a New York contempt statute after repeatedly failing to pay private creditor judgments levied against them. They brought a section 1983 action in federal court to enjoin enforcement of the statutory contempt procedures “on the ground that the procedures leading to imprisonment for contempt of court violated the Fourteenth Amendment. . . .” The three-judge district court held the challenged sections of New York’s Judiciary Law unconstitutional on their face and enjoined their operation. On appeal, the Supreme Court did not reach the constitutional question, holding that the district court should have abstained on Younger grounds. Thus the Court extended the Younger principle of non-interference in state criminal proceedings to this purely civil action, justifying its decision on the importance of the state interests involved.

Vail is significant as a further restriction upon access to federal courts, not only because it extends Younger to strictly civil proceedings, but also because, as Justice Stevens pointed out, it was the contempt proceedings themselves which were challenged. “[S]ince the federal remedy that appellees seek is protection against being required to participate in an unconstitutional judicial proceeding. . . [e]ven ultimate success in such a proceeding would not protect them from the harm they seek to avoid. The challenged state procedures. . . . cannot themselves provide an adequate remedy for the alleged federal wrong.”

Pullman was the first judicial recognition of abstention. At that time the doctrine merely required state interpretation of state law prior to federal adjudication of federal issues. But the doctrine has

35. Id. at 609-10.
36. Id. at 607.
38. Id. at 330.
39. Id. at 331.
40. Id. at 338-39.
41. Id. at 340-41 (Stevens, J., concurring) (footnote omitted).
42. Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941).
taken a turn different from what the Pullman Court may have envisaged.

The Younger Court held, in its eight to one decision, that a criminal defendant's "constitutional contentions may be adequately adjudicated in the state criminal proceeding,"[43] but the Court declined to "express [a] . . . view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."[44] Presumably, Younger would permit a relitigation in a section 1983 federal action after state appeals have been exhausted, even though the defendant would not be allowed to bring a 1983 action during the course of the state proceedings.

Huffman reiterated the Younger reasoning, extending abstention, by its six to three majority, to apply to civil nuisance proceedings, and asserting that "entitlement [to a federal forum] is most appropriately asserted by a state litigant when he seeks to relitigate a federal issue adversely determined in completed state court proceedings."[45] But the Court added: "We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. § 1983 of federal issues arising in state court proceedings."[46] Here, in addition to extending abstention to a civil proceeding allegedly "akin"[47] to a criminal proceeding, the Court cast doubt on the permissibility of a litigant's raising his constitutional claim in federal court, even after abstention has forced him to exhaust state remedies.

Neither Younger nor Huffman challenged the permissibility of federal litigation of federal claims which had not been raised in state court. But the five to four majority in Vail appears to have done just that, in addition to extending abstention to a purely civil proceeding. In Vail, the constitutional claims were never raised in the state courts. Indeed, the civil defendants did not even appear in state court, as it was the state court proceedings themselves that they

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43. 401 U.S. 37, 56-57 (Brennan, J., concurring).
44. Id. at 41.
46. Id. at 606 n.18.
47. See note 34 supra.
were attempting to challenge in federal court. The Supreme Court nevertheless held that the federal district court could not entertain a section 1983 action when the constitutional issues "could have been raised . . . in the state courts, as a defense to the ongoing proceedings."48 "Here . . . appellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke Younger abstention."49

Thus, through Younger and its progeny, an approach far different from Pullman abstention has developed. It is really a new doctrine and might be termed abdication rather than abstention. The Younger line of decisions promotes, and may even require, elimination of the federal fact-finding role in civil rights cases, rather than the mere delay required by Pullman abstention.

Once state courts have decided factual issues, the convicted criminal defendant may still resort to federal habeas corpus relief, 50 but the civil defendant who has a federal claim may be deprived totally of a federal fact-finding forum.51 Upon issuance of a plaintiff's summons, the civil defendant becomes a party to the state action and must defend in the state court system, federal claims notwithstanding. A defendant may not remove a state action to federal court for adjudication of the federal question because the federal court will abstain.

A civil plaintiff is in a better position, since he may institute his action in federal court. Nonetheless, abstention can create problems for him. In England v. Louisiana State Board of Medical Examiners52 plaintiff chiropractors challenged in federal court a Louisiana statute, alleging that its requirements barred them from practicing within the state. They sought an injunction against en-

48. 430 U.S. at 330 (emphasis in original).
49. Id. at 337 (footnote omitted) (emphasis in original).
50. The habeas corpus statute, 28 U.S.C. § 2254 (1970), provides that a federal court may grant the writ to a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or federal statutes or treaties, and only after he shall have exhausted state remedies. Id. § 2254(a). The Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976), discussed in the text accompanying notes 111-12 infra, has narrowed the availability of habeas corpus.
51. Justice Brennan disagreed with this turn of events. "It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum because of the pendency of state civil proceedings where Congress intended that the district court should entertain his suit without regard to the pendency of the state suit." Judice v. Vail, 430 U.S. 327, 343 (1977) (Brennan, J., dissenting) (emphasis in original).
52. 375 U.S. 411 (1964).
forcement of the statute as violative of the fourteenth amendment. The three-judge district court abstained and ruled that plaintiffs must first seek a state court determination as to whether the Act applied to chiropractors.

Plaintiffs then misconstrued a previous Supreme Court holding, Government Employees v. Windsor, which required only that plaintiffs inform a state court what their constitutional challenges were. Plaintiffs erroneously thought that, following abstention, they were required to litigate fully both their state and federal claims in state court. After all their claims were rejected in state court, the plaintiffs returned to the federal court. The federal court, however, dismissed the action and held that because the federal question had been submitted and ruled upon by the state court, the proper remedy was by appeal through the state courts to the Supreme Court.

Because of the misunderstanding as to the prior Windsor holding, the Supreme Court remanded the case to the district court for a determination of the constitutional claim. In addition, it clarified the earlier holding, stating that, following abstention, a party must inform a state court what his federal claims are, but he need not litigate them in state court; he may reserve his right to return to federal court either by express reservation or by clear indication that he did not voluntarily and fully litigate his federal claims in the state proceeding.

A reservation of rights enables a plaintiff to return to federal court, but difficulties remain. First, he must be aware of these technicalities; and second, he must have a "deep pocket." "Many [litigants] . . . can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. . . . There are no foundations to finance the resolution of nice state law questions involved in federal court litigation." 57

53. Id. at 413.
54. 353 U.S. 364 (1957). Windsor held that a party had to inform a state court what his federal claims were so that the state court might interpret the state statute with consideration of any constitutional objections. It was interpreted by some to require that a party actually litigate his federal claims in the state court proceeding. See discussion of Windsor in England, 375 U.S. at 419-20.
55. 375 U.S. at 414.
56. Id. at 420.
Even the financially stable civil plaintiff could face further difficulties if he is later named a defendant under a state criminal statute. According to *Hicks v. Miranda*, a civil rights plaintiff, who has already filed an action in federal court challenging the constitutionality of a state criminal statute, may be forced to defend against state criminal proceedings which are commenced after the federal claim, as long as proceedings on the merits have not yet begun in federal court. Thus the Supreme Court, by further extension of *Younger*, has sanctioned the conversion of a federal civil plaintiff into a state criminal defendant. The only requirement is that state officials reach the state courthouse before litigation on the merits commences in the federal district court. Justice Stewart, dissenting from the five to four majority in *Hicks*, declared: "Today's opinion virtually instructs state officials to answer federal complaints with state indictments. Today, the State must file a criminal charge to secure dismissal of the federal litigation; . . . and the day may not be far off when any state civil action will do."

**III. Uses and Misuses of the Doctrine of *Res Judicata***

*Res judicata* derives from article IV, section 1 of the United States Constitution and 28 U.S.C. § 1738. Section 1738 requires that the judicial proceedings of any court in the United States be accorded full faith and credit in any other court. Problems arise for the civil rights litigant when a state court adjudicates a federal claim which he would prefer to litigate in federal court. "Full faith" may preclude relitigation in the federal forum.

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58. 422 U.S. 332 (1975).
59. *Id.* Miranda owned a theatre which was exhibiting the film "Deep Throat." Copies of the film were confiscated under a state obscenity statute and misdemeanor charges were filed against two employees. Miranda filed an action in district court to enjoin enforcement of the statute. One day after service of the federal complaint was completed, a criminal complaint pending in state court was amended to include the federal plaintiffs as defendants. The three-judge district court found the state statute unconstitutional and refused to abstain since the federal court had jurisdiction before the state court. The Supreme Court reversed and extended *Younger* on principles of comity.
60. 422 U.S. at 357 (Stewart, J., dissenting).
61. See definition in note 1 *supra*.
62. See note 4 *supra*.
63. *Id.*
64. See Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9
A recent Second Circuit case, *Mitchell v. National Broadcasting Co.*, \(^{66}\) illustrates some of the problems that emerge when *res judicata* is invoked. After N.B.C. discharged Blanche Mitchell from her employment, she filed a complaint with the New York State Division of Human Rights,\(^{66}\) alleging racial discrimination. After investigation, the state authority dismissed the complaint for lack of probable cause. Plaintiff appealed to the State Human Rights Appeal Board\(^{67}\) and shortly thereafter filed a complaint with the federal Equal Employment Opportunity Commission (EEOC), following the rules prescribed under Title VII.\(^{68}\) The State Appeal Board split two to two, automatically affirming dismissal of the state complaint, and the Appellate Division\(^{69}\) of the New York State Supreme Court unanimously affirmed. Plaintiff did not appeal to New York's highest court. Sometime later the EEOC found no probable cause for the federal complaint and issued a right-to-sue letter,\(^{70}\) entitling the plaintiff to bring an action in federal court under Title VII. Instead, she commenced an action under another civil rights statute, 42 U.S.C. § 1981,\(^{71}\) which guarantees to all persons the same rights to make and enforce contracts as those "enjoyed by white citizens."\(^{72}\) The federal district court held that the claim was *res judicata* and dismissed the suit.\(^{73}\) The Court of Appeals for the Second Circuit affirmed, reasoning that the parties and the rights adjudicated in the state proceeding were identical to those of the section 1981 action. Therefore, said the court, the federal claims had

\(^{65}\) 553 F.2d 265 (2d Cir. 1977).

\(^{66}\) New York State law provides that any person aggrieved by an alleged discriminatory practice may file a complaint with the State Division of Human Rights, which will make a prompt investigation of the matter. N.Y. EXEC. LAW § 297(1) (McKinney 1972).

\(^{67}\) The Appeal Board hears appeals by any party from all orders of the commission. N.Y. EXEC. LAW § 297-a(6)(c) (McKinney 1972).

\(^{68}\) Title VII of the Civil Rights Act of 1964, which created the EEOC, requires that when an unlawful employment practice occurs within a state which has its own laws prohibiting the practice, proceedings must first be commenced under the state or local law, and a claim be made to the EEOC sixty days after such commencement. The intent is to allow the state the first opportunity to resolve the dispute under its own laws. See 42 U.S.C. § 2000e-5(c) -5(d) (1970).

\(^{69}\) N.Y. EXEC. LAW § 298 (McKinney 1972) directs that appeals from the Appeal Board be heard by the Appellate Division of the Supreme Court.


\(^{72}\) Id.

\(^{73}\) 553 F.2d at 268.
a fair adjudication under the analogous New York State law, and the state court’s determination was binding upon the federal court.

The Mitchell decision raises grave problems. Title VII’s deferral provision required complainant Mitchell to seek state administrative remedies before the EEOC could consider her claim. After administrative rejection, plaintiff invoked the normal channels of state judicial review for a claim begun under Title VII. The Second Circuit, however, interpreted the deferral provision to mean that only state administrative action, and not state judicial review, might be sought if a complainant intended to revert to a federal remedy. Since plaintiff Mitchell received a judicial decision (dismissal by the appellate division) in state court, the federal court held it res judicata. In declining jurisdiction on these grounds, the court actually held a state court decision rendered under a state statute to bar a federal claim under a federal statute, a result which Congress did not intend.

This presents an anomalous situation: a plaintiff is forced by the provisions of Title VII to seek state remedies first; but if he appeals a hearing officer’s determination in the state’s prescribed statutory manner (i.e., state courts), he has lost his right to sue in the federal forum.

Congress intended federal civil rights remedies to be separate and distinct from any state remedy. Although Title VII requires that a litigant first employ available state machinery, Congress did not intend to deprive a civil rights litigant of his federal remedies if a state agency or court rendered a decision against him. Numerous federal courts of appeals, including the Second Circuit, have held that the doctrine of res judicata does not apply in such cases.

74. N.Y. Exec. Law § 296(1)(a) (McKinney Supp. 1976-77) provides:
   It shall be an unlawful discriminatory practice . . . [f]or an employer . . ., because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

75. Id. See note 68 supra.


77. See Monroe v. Pape, 365 U.S. 167, 183 (1961). “The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.” Id. See also text accompanying notes 78-80 infra.

78. Id. See note 77 supra.

79. Id. See note 80 and accompanying text infra.

federal remedy is independent and cumulative . . . , and its facilitates comprehensive relief.”81

Even if res judicata were technically applicable, Judge Feinberg points out in his Mitchell dissent that “strong federal policies can override the mandate of 28 U.S.C. § 1738 [full faith and credit] . . . . Such a strong, countervailing federal policy is involved in this case. With respect to employment discrimination, Congress has shown a clear intent to provide injured plaintiffs with a federal fact-finding forum. . . .”82 and this intent supersedes any requirements of section 1738.83

The second difficulty in the Mitchell decision is that its rationale effectively eliminates the use of Title VII, under which plaintiff Mitchell initiated her complaint. This is unfortunate, since Title VII promotes conciliation rather than litigation.84 An informed plaintiff, faced with both the deferral provisions of Title VII and a Mitchell application of res judicata, would probably utilize section 1981, since it does not require prior state proceedings. He would thereby forego any possibility of Title VII conciliation and frustrate the Congressional intent that civil rights remedies be complementary rather than exclusive.85

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82. Mitchell v. NBC, 553 F.2d 265, 277 (Feinberg, J., dissenting).
83. Id. Accord, American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040 (1972).
85. “[R]emeds available to the individual under Title VII are co-extensive with the individual’s right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981 . . . the two procedures augment each other and are not mutually exclusive.” H.R. Rep. No. 92-238, at 19 (1971), cited in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975). At least two recent Supreme Court decisions have upheld the supplementary nature of federal remedies in civil rights actions. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), held that an arbitration hearing held under a nondiscrimination clause of a collective bargaining agreement, which ruled that the petitioner was fired for just cause, did not foreclose a judicial remedy under Title VII because “[t]he clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.” Id. at 48-49. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), held that filing under Title VII did not toll the running of the statute of limita-
Title VII and section 1981 are different actions and indeed provide different remedies. A minority of courts have held that a Title VII action must be pursued before institution of a section 1981 action, but the majority agree that "Title VII and 1981 afford different tactical advantages and handicaps to aggrieved parties," so that either one may be sought before the other or they may proceed concurrently, and one civil rights action could not then be res judicata of another.

Another decision of the Second Circuit Court of Appeals, Winters v. Lavine, illustrates the tightrope upon which a civil rights litigant may be placed by application of res judicata principles to state court determinations of federal issues.

After the appropriate New York City and State administrative departments refused Miriam Winters' claim for Medicaid reimbursement for payments to a Christian Science nurse, she appealed in the Appellate Division of the New York Supreme Court on two grounds: (1) violation of the statutes governing such reimbursement; and (2) deprivation of her constitutional right to free exercise of religion. The appellate division ruled against the plaintiff without any mention of the constitutional issue or any indication of whether it had considered that claim. The New York Court of

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86. For instance, Title VII claimants may be awarded back pay, but not for more than two years prior to filing with the EEOC, while section 1981 claimants are not bound by the two year limitation; section 1981 applies to all employers, while Title VII excludes some; Title VII offers investigation, conciliation, even attorneys' fees, while section 1981 does not. See Johnson v. Railway Express Agency, Inc., 421 U.S. at 459-60.


88. Long v. Ford Motor Co., 496 F.2d 500, 504, n. 7 (6th Cir. 1974).


90. 574 F.2d 46 (2d Cir. 1978).

91. The appellate division stated:

Aside from the fact that a Christian Science nurse is not classified as a registered nurse (Education Law § 6901 et seq.), petitioner has not demonstrated that she is entitled to payments pursuant to Social Services Law § 365-a, since there is insufficient [evidence] in the record to indicate either the nature of her illness or the treatment which she received.

Appeals dismissed an appeal as of right, holding there was "no substantial constitutional question directly involved."92

In a later section 1981 action brought in federal court,93 the Second Circuit Court of Appeals held94 that the New York Court of Appeals decision was res judicata as to the constitutional question presented, despite the fact that no express inquiry into the merits of that question had been made in either the intermediate or the highest state court.

The federal court came to its decision through its application of what it called the "New York rule" of collateral estoppel95 (a corollary to res judicata) which "bars the relitigation of any issue . . . which was litigated and decided against the litigant in the earlier action, provided that the resolution of the issue . . . [was] necessary to the [earlier] judgment . . . ."96 Contrary to the appellant's claim that there had been no decision on the merits upon which to apply any exclusionary principle, the Second Circuit held that, (1) since the appellate division's rejection of the constitutional claim was necessary to its judgment,97 its silence on the matter must be deemed a rejection sub silentio98 and was therefore a ruling on the merits, and (2) although dismissal by the highest state court was a failure to rule on the merits of the constitutional question, the dis-

92. 574 F.2d at 51.
93. The action named as defendants the commissioners of the state and city Departments of Social Services. Plaintiff's principal claim was that the New York Medicaid statute was unconstitutional because it denied plaintiff her free exercise of religion. Judge Bartels determined that the constitutional question required the convening of a three-judge court, but the three-judge court held her claim for payment barred by res judicata, because of its rejection by the New York Court of Appeals. See note 92 supra. Plaintiff Winters appealed directly to the United States Supreme Court, which ordered the vacating of the district court's judgment and rendering of a fresh decree, so that an appeal might be taken to the federal court of appeals. Winters v. Lavine, 429 U.S. 1012 (1976). The district court complied with a fresh decree adhering to its original decision, and plaintiff appellant appealed to the Second Circuit Court of Appeals on February 18, 1977.
94. 574 F.2d 46 (2d Cir. 1978).
95. Id. at 58.
96. Id. at 56. The federal law of res judicata, according to the court's opinion, is harmonious with the "New York rule" of collateral estoppel, id. at 58; that is, an issue may be barred in later litigation only if it was raised and litigated in the earlier action. The so-called "New York rule" of res judicata bars relitigation of any issue that could have been litigated in the prior action. The court consciously chose to apply collateral estoppel, which it called the "conservative position," id. at 56-57, rather than res judicata.
97. Id. at 60-61.
98. Id. at 61.
missal was justified because appellant had no right of appeal, and therefore, the appellate division's decision was a final one. Thus the court of appeals collaterally estopped a "relitigation" in federal court of a constitutional claim that had never actually been considered by the state courts. The disharmony between the legal principles set out by the federal court and the matters which had been considered by the state courts illustrates one of the most severe dangers facing a civil rights plaintiff, the danger of having no forum consider the merits of the constitutional issue.

IV. Effect of Abstention and Res Judicata upon Litigants

Clearly, a civil rights claimant will not always gain access to federal court. Thus, it might be helpful to explore in depth the problems he may face in attempting to litigate his federal claims.

A. The Criminal Defendant

Since a federal court will not interfere in a pending state criminal prosecution, where can the defendant seek adjudication of a section 1983 claim alleging that the statute under which he is being prosecuted is unconstitutional?

He can, of course, allege immediate and irreparable harm, in order to obtain injunctive relief, on the basis of that exception to the Anti-Injunction Statute. Even though the Supreme Court has held that section 1983 expressly authorizes injunctive relief, the Court's narrow construction of that provision gives the defendant little hope for such relief.

99. Id. at 62. "If the decision [of the appellate division] has or may have been based on some other ground, the appeal will not lie." Id. The other ground, the court believed, was the insufficiency of plaintiff's evidence that she was entitled to Medicaid payments. Id. at 63. See note 91 supra.

This contradicts the court's first holding that consideration of the constitutional claim had been necessary to the appellate division's decision. Clearly it was not necessary if its decision was based on evidentiary grounds.

100. Id. at 62.

101. See parts II & III supra and cases cited therein.

102. See text accompanying notes 9 and 10 supra.

103. Section 1983 is used only as a hypothetical. The problem attaches to all such civil rights actions.

104. See text accompanying notes 12 and 13 supra.


106. The Court has used the restrictive Younger doctrine to justify abstention, despite the Mitchum holding.
The criminal defendant has two other choices. He may raise the constitutional claim as a defense in his criminal prosecution, and risk that he will be collaterally estopped from relitigating that issue in a federal forum; or he may withhold his constitutional claim, reserving it for a possible federal court action, but thereby take a greater risk of conviction on the original charges in state court.

If the defendant unsuccessfully litigates his constitutional claim in the state courts, he may seek redress through federal habeas corpus, in order to have the claim adjudicated de novo in federal court. But even this last resort to the long-established writ may be denied the defendant. In 1976 the Supreme Court refused habeas corpus relief to two criminal defendants, convicted by allegedly unlawfully seized evidence, holding that habeas corpus was not available in fourth amendment cases where the state had "provided an opportunity for full and fair litigation" of the federal claim in the state courts.

The implications for a criminal defendant with a civil rights claim are troublesome. If this 1976 holding is extended to other constitutional guarantees, the defendant's last opportunity for a federal forum may fade away. Since a convicted criminal defendant has been deprived of his liberty, he most deserves preservation of his right to a federal forum.

This new limitation on habeas corpus may have a reverse effect upon some federal court judges who have collaterally estopped section 1983 actions, knowing that the defendant could always seek his federal forum via habeas corpus. As district court Judge Merhige stated in Moran v. Mitchell, "This Court has some doubt as to the propriety of collateral estoppel in this context (section 1983 action), at least in those instances where the criminal defendant is unable to secure consideration of his constitutional claims through

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107. Principles of res judicata will be invoked to estop any collateral relitigation of his claim in another court.
109. See note 50 supra.
110. The authority of federal courts in this country to issue the writ of habeas corpus dates back to the Judiciary Act of 1789.
112. Id. at 494.
federal habeas corpus. . . . [I]n the majority of criminal convictions [however], federal habeas corpus is available to the defendant to assert his federal claims free of res judicata or collateral estoppel defenses." Only time will tell whether such feelings will serve to reopen the federal courthouse doors.

B. The Civil Defendant

Finding a federal forum for a defendant in a state civil action is also difficult. By the mere issuance of a summons, he is made party to an action in state court. If the summons is issued under an unconstitutional state statute, his civil rights are infringed at the same moment that he becomes a defendant, and he is thereby a captive of the state court system.

The defendant may want to assert the unconstitutionality of the statute. If he tries to file in federal court or remove there on a counterclaim, he faces abstention in the Younger sense, which may really be dismissal in favor of the state court. He may not be able to obtain federal injunctive relief unless his injury is irreparable, great and immediate, even though he is a civil defendant. He is in a worse procedural straitjacket than the criminal defendant, since the civil defendant does not even have a right to seek habeas corpus relief. He may be totally without access to a federal forum.

C. The Civil Plaintiff

The civil rights plaintiff is in the best position initially to secure a federal forum since he has the right to choose one under sections 1981 and 1983. If the court feels that there are issues requiring state interpretation and adjudication, it will abstain, but the plaintiff may reserve his federal claims via the England procedure and return to federal court for their litigation. He must be careful, however, not to appear to have litigated his federal claims in state court, because that will bar his return to federal court.

If a plaintiff in a section 1983 action believes that a criminal statute, which may ultimately affect him, is unconstitutional and seeks injunctive or declaratory relief in federal court, he too may

114.  Id. at 88-89.
115.  See text accompanying notes 43-49 supra.
116.  See text accompanying note 30 supra.
117.  Title VII requires exhaustion of state remedies first. See note 68 supra.
118.  See text accompanying note 56 supra.
become locked into the state system. The state could bring a crimi-
nal proceeding under the questioned statute, and if the state did so
before federal proceedings on the merits had commenced, the fed-
eral court would yield to the state court, even though the federal
action was instituted first. Thus, the claimant would have lost his
federal fact-finding forum.\footnote{119}

V. Why a Federal Forum?

Proponents of keeping federal claims in state courts cite judicial
economy, comity and termination of litigation as their rationale.
But the reasons supporting the litigation of federal claims in federal
courts are far more compelling.

A. Congressional Intent

Congress has given federal courts jurisdiction to hear claims aris-
ing under federal law.\footnote{120} Congress also has enacted legislation giving
the federal courts original jurisdiction over civil rights actions.\footnote{121}
Moreover, certain federal civil rights statutes specifically provide
for federal court jurisdiction.\footnote{122} Legislative history evinces a Con-
gressional intent to make federal remedies available in civil rights
cases.\footnote{123} While repealing the requirement that three federal judges

\footnote{119} See Hicks v. Miranda, 422 U.S. 332 (1975); see also notes 59 & 60 and accompanying
text supra.
\footnote{120} 28 U.S.C. § 1331(a) (Supp. 1977) in pertinent part provides: "The district courts
shall have original jurisdiction of all civil actions . . . (which arise) under the Constitution,
laws, or treaties of the United States."
\footnote{121} 28 U.S.C. § 1343 (1970) provides:
The district courts shall have original jurisdiction of any civil action authorized by law
to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the
deprivation of any right or privilege of a citizen of the United States, by any act done
in furtherance of any conspiracy mentioned in section 1985 of Title 42;
(2) To recover damages from any person who fails to prevent or to aid in preventing
any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about
to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance,
regulation, custom or usage, of any right, privilege or immunity secured by the Constit-
tution of the United States or by any Act of Congress providing for equal rights of
citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of
Congress providing for the protection of civil rights, including the right to vote.
\footnote{122} For Instance, Title VII provides for the right to sue in federal court. See, e.g., 42
\footnote{123} See notes 77-86 and accompanying text supra.
decide the constitutionality of state statutes, Congress left intact both the power and the duty of the federal district court to make such determinations. All of these actions indicate that Congress intends civil rights litigants to have their day in federal court.

B. Availability of Habeas Corpus Review

For those deprived of their liberty, the opportunity to litigate constitutional claims in federal court has always been available. The Supreme Court's decision in Stone v. Powell gives finality to state court determinations as to violations of the fourth amendment rights of criminal defendants, and precludes habeas corpus review when there has been "full and fair litigation" of such claims in the state courts.

Yet, in the very cases leading to this landmark decision, habeas corpus had been granted, and both the Eighth and Ninth Circuits had found that the state courts had denied the defendants their fourth amendment rights.

While neither state nor federal courts are infallible, their lack of agreement illustrates how important a second look at the facts might be for a person facing long-term confinement, or even death.

C. Political Considerations

There are still some occasions when the impartiality of the federal court system, its removal from local government and local politics, gives it power that the state courts are unable to wield.

In Rizzo v. Goode a federal district court ordered injunctive relief and development of a remedial program to end an unconstitutionally pervasive pattern of police brutality against minority citizens of Philadelphia. The Third Circuit affirmed, but the Supreme Court reversed, basing its decision in part on the inappro-

126. See note 110 supra.
128. See note 112 supra.
129. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975); Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).
130. Id.
priateness of federal intervention into local state activities. 134 Plaintiffs were left to their state remedies, and the same abusive pattern of police activity continued. 135

In this type of civil rights action federal intervention can be a strong tool in restoring rights to the aggrieved parties.

D. State Interest

It may be in the state's best interests to have civil rights claims processed in federal court, particularly when a section 1983 claim arises in a civil action between private parties. 136

If the State may not be heard in the state civil case, defense of the constitutionality of its statute would be solely in the hands of a party having neither the State's resources, expertise, nor governmental interest in sustaining the validity of the statute . . . . [T]he state must choose whether to intervene in countless private lawsuits brought all over the State . . . or . . . risk adverse decisions having effects far beyond the interests of the particular private parties. By contrast, a 1983 suit in federal court necessarily names the State or its officials as defendants, and the litigation focuses squarely on the issue of the validity of the statute, with the State defending its own interest directly. 137

E. Expense

It is expensive for a civil rights litigant, civil or criminal, to pursue his claim through tiers of state courts, when a federal court refuses to enjoin, or abstains. The convening of a district court, which now requires only a single judge, 138 and the issuance of an injunction or declaratory judgment, could end the proceedings early. Equitable restraint by federal courts may result in two or three extra rounds of appeals and consequent financial hardship to the litigant. Many who are deprived of their rights in the first instance are also deprived of justice in the second instance because of economic inability to sustain multiple litigation. 139

134. 423 U.S. at 379-80.
135. See Philadelphia is Resistant in Police Brutality Inquiry, N.Y. Times, Sept. 22, 1977, at A-13, col. 3. In July, 1977 a group of Philadelphia clergy wrote to President Carter concerning the continuing policy brutality and failure of local officials to do anything about it. Id. at col. 5.
137. Id. at 345-46 (Brennan, J., dissenting).
138. 28 U.S.C. § 2281, requiring three judges, was repealed on August 12, 1976.
VI. Conclusion

The federal court system bears a large and increasing case load. The Supreme Court and other federal courts undoubtedly feel that some of this burden should shift to the states. Effects of the burdensome case load upon civil rights litigants were reflected in responses to a survey on the Supreme Court conducted by U.S. News & World Report. As one unnamed attorney commented, "Where the Court has been required to balance the interests of litigants seeking to vindicate constitutional and other federally protected rights against the legitimate concern over increasing case loads in the federal courts, the Court has regularly favored the latter interest by denying litigants access to the federal forums."

Diversity cases now comprise 26% of civil filings in district courts. In order to diminish the case load, a shift of diversity cases from federal to state courts, long endorsed by Chief Justice Burger, would be a far lighter blow to basic rights than non-uniform and often arbitrary denial of the federal forum when important federal questions are at issue, and particularly questions of civil rights. It is up to Congress, however, to institute such a change.

Until Congress does act, the simplest and perhaps most just solution the federal courts can provide to the civil rights litigants would be judicial refusal to apply res judicata to federal claims adjudicated in state courts. In other words, the numerous statutes granting federal forums for federal issues should predominate over the statute granting full faith and credit. While this would not ease the economic hardship of multiple litigation, it would eliminate the sometimes incongruous and unjust results of the combination of


142. Id. at 63.

143. 28 U.S.C. § 1332(a) (Supp. 1977) provides federal court jurisdiction for controversies between citizens of different states (i.e. diversity jurisdiction).


145. See note 140 supra.
abstention and *res judicata*, the race to the courthouse to make a federal court plaintiff into a state court defendant, and the loss of the federal forum on technicality or misinterpretation.

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