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FEDERAL RIGHTS, FEDERAL FORUM: SECTION 1983 CHALLENGES TO STATE CONVICTIONS IN FEDERAL COURT

INTRODUCTION

The protection of individual rights requires more than the mere enumeration of such rights in constitutions and bills of rights. When rights are violated, a remedy is needed.¹ To illustrate this point, consider the following hypothetical. A, a law student, takes part in a campus protest against American military intervention in some far-away land. The police quickly arrive on the scene of the protest and begin to clear the main street on campus. The protest is non-violent, but there is palpable tension between the police and the student protesters. Having just read *Hess v. Indiana*² for class, A is well aware of her First Amendment rights. Thus, as she and the other students are being directed to leave the area, A says, "We'll take the fucking street later." At that point, she is arrested and later charged with disorderly conduct through use of obscene language.³ At her trial, A raises the defense that her speech was protected by the First Amendment under *Hess*, but she is convicted anyway. The state appellate court affirms the conviction, and the state high court and the Supreme Court decline to hear the case. A's state conviction thus stands, despite the precedents in her favor,⁴ and she has exhausted her state appeals. In this hypothetical, A has the right of free speech in theory, but without a remedy, she is denied that right in practice.

¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). See also Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 (1987) ("[A] right without a remedy is not a legal right; it is merely a hope or a wish.").

² 414 U.S. 105 (1973). *Hess* involved a student protester convicted of disorderly conduct for saying, during a Vietnam protest rally and within earshot of a police officer, "We'll take the fucking street later," or "We'll take the fucking street again." *Id.* at 107.

³ This part of the hypothetical draws on *Pringle v. Court of Common Pleas*, 778 F.2d 998, 999-1000 (3d Cir. 1985), in which a young woman challenged her conviction for disorderly conduct through use of obscene language. Pringle's arrest and conviction stemmed from her directing language similar to Hess's at police officers.

⁴ In addition to *Hess*, A could point to *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that the word "fuck" printed on the back of a jacket was not obscene because it was not erotic).

At this point, A's remedy—i.e., her means of challenging her state conviction in federal court—will depend on the nature of the sanction imposed by the state. If A is sentenced to jail or prison, even for a relatively short time, she will have recourse to a federal district court by means of the federal habeas corpus statute.⁵ If A is merely fined, however, she will not have a federal remedy under the habeas statute because the federal habeas statute requires that the habeas applicant be "in custody."⁶ The habeas statute may not be A's only recourse, however—perhaps she can challenge her state conviction in federal court under 42 U.S.C. § 1983.⁷

Section 1983, as it is commonly called, provides a federal remedy for the violation of federally protected rights when the violation occurs under the color of state law.⁸ Originally passed as the first section of the Civil Rights Act of 1871, § 1983 was part of the "profound revolution in federalism" following the Civil War.⁹ In passing the Act, the Forty-Second Congress addressed the unwillingness of state governments to protect the rights of newly freed African-American citizens from violence.¹⁰ Section 1983 creates a remedy for violations of federally protected rights under color of state law by empowering the federal courts to intervene in matters originally left to the states. This power was needed during Reconstruction to provide a remedy in federal court for the violation of rights secured under the recently ratified Fourteenth Amendment.¹¹ Given the broad language of the statute, A seems to have a strong case under § 1983, claiming that her federal rights have been violated by her state conviction under color of state law.

⁵ 28 U.S.C. § 2254 (1994 & Supp. 1998). This was the case in *Pringle*, 778 F.2d at 1000, in which the Third Circuit reversed the district court's denial of Pringle's habeas petition. Pringle had been sentenced to 10-30 days in prison. See *id.*

⁶ See *infra* Part I.B (discussing habeas corpus and the custody requirement).

⁷ 42 U.S.C. § 1983 (1994).

⁸ The relevant part of the statute reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Id.*

⁹ Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 3 (1985).

¹⁰ See 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.3 (2d ed. 1991) ("The 42d Congress . . . found that a federal remedy was essential to correct deprivations of federal rights, because state authorities were either unable or unwilling to control the widespread violence of the Ku Klux Klan against blacks and their supporters.").

¹¹ See *id.* § 1.4 (discussing the "vital function" played by § 1983 in providing a remedy for violations of rights protected by the Fourteenth Amendment). Section 1983 "neither creates rights nor establishes jurisdiction." *Id.* The rights protected by § 1983 are not found in § 1983 itself, but in the Constitution or in federal laws.

This Note addresses the issue raised by this hypothetical: whether the validity of state convictions can be challenged in the federal courts using § 1983. Although the Supreme Court has held that individuals in state custody may not use § 1983 to circumvent the more exacting requirements of habeas corpus review,¹² the answer for those individuals (like A) who are not in custody, and thus do not have access to the federal courts through habeas corpus, is not clear. Supreme Court Justices have recently addressed this issue, however, in *Heck v. Humphrey*¹³ and *Spencer v. Kemna*.¹⁴ Although neither of these cases dealt with the issue directly, Justice Souter argued in concurring opinions in both cases that § 1983 provides a federal forum to challenge the validity of state convictions when habeas corpus relief is not available. In *Spencer*, a majority of the Court agreed with Justice Souter on this point. In doing so, a majority of the present Court appears to have accepted a broad reading of both § 1983 and the powers of the federal courts to intervene in matters traditionally left to the state courts. Interestingly, this interpretation of § 1983 runs counter to much of the Rehnquist Court's recent federalism jurisprudence.¹⁵ A number of other recent cases illuminate the contemporary Court's concern with limiting the power of the federal courts when state governments and important state functions are at issue.¹⁶

¹² The writ of habeas corpus is "[a] writ directed to the person detaining another, and commanding him to produce the . . . person detained. . . . the purpose of which is to test the legality of the detention or imprisonment." BLACK'S LAW DICTIONARY 709 (6th ed. 1990). For a discussion of habeas corpus, see *infra* Part I.B.

¹³ 512 U.S. 477 (1994).

¹⁴ 523 U.S. 1 (1998).

¹⁵ In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Court struck down a federal law passed under the Commerce Clause for the first time since the 1930s, holding that the Gun-Free School Zones Act of 1990 exceeded the scope of Congress's legislative power. In 1997, the Court held in *Printz v. United States*, 521 U.S. 898 (1997), that provisions of the Brady Handgun Violence Prevention Act violated the residual sovereignty of the states by requiring state executives to carry out a federal regulatory program. In that same term the Court held in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that states' Eleventh Amendment immunity from suit in federal court cannot be abrogated by a federal statute in the absence of an express constitutional provision granting Congress that power. *Seminole Tribe* has been called "an unprecedented limit on the ability to hold state governments accountable in federal court." Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997). The Rehnquist Court seems serious about protecting the immunity of state governments from suit, having held in the 1998 Term that state governments cannot be sued in federal court for violations of the Fair Labor Standards Act or patent law. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999) (involving the Fair Labor Standards Act); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (involving the Trademark Remedy Clarification Act). One prominent scholar has commented that, "[c]umulatively, these federalism rulings are the Rehnquist Court's most dramatic change in constitutional law." Erwin Chemerinsky, *Permission to Litigate*, A.B.A. J., Aug. 1999, at 42, 43.

¹⁶ *See Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting) (criticizing the Court's decision as "prevent[ing] Congress from providing a federal forum for a broad range of actions against States").

State governments' autonomy should yield, however, where federally protected rights are concerned. Because of the need for a remedy when rights are violated, this Note argues that the Court should adopt Justice Souter's position on § 1983 challenges to state convictions in federal court. Part I provides some historical and legal background on § 1983 and the federal habeas corpus statute. The habeas corpus statute is discussed because of the similarities between § 1983 challenges to state convictions and habeas corpus review. Part II analyzes the statutory overlap of § 1983 and habeas corpus in more detail, discussing the cases in which the Supreme Court has addressed the complex relationship between the two statutes. Part II concludes by discussing Justice Souter's concurrences in *Heck* and *Spencer* as well as the response of the lower federal courts to his position. Part III builds on Justice Souter's argument that individuals claiming violations of their federally protected rights should have access to a federal forum under § 1983. A major premise of this argument is that the federal courts are better suited to protect the federal rights of individuals than the state courts. In short, Justice Souter appears to reject parity between the state and federal courts, an assumption central to a number of important § 1983 cases in recent decades. Part III argues that this rejection of parity is more persuasive than the alternative conclusion that there is parity between the state and federal courts, given both empirical and historical considerations as well as the legislative purpose in enacting § 1983. Part IV discusses the application of the issue preclusion doctrine in § 1983 actions, under which one cannot relitigate in federal court issues that have been previously decided in state court. Because a federal forum is necessary to protect federal rights, Part IV argues that this doctrine must be reconsidered and rejected in this particular context. Finally, Part V discusses concerns with judicial economy and finality in allowing § 1983 challenges to state convictions in federal court.

I. SECTION 1983 AND HABEAS CORPUS

A. Section 1983

Section 1983 has been called the most important provision in contemporary federal law.¹⁷ Although this may be something of an overstatement, § 1983 is significant both in terms of its historical effects and the sheer volume of actions brought under it every year. Historically, many landmark cases in constitutional law have been brought under § 1983,¹⁸ including *Brown v. Board of Education*,¹⁹

¹⁷ See 1 SCHWARTZ & KIRKLIN, *supra* note 10, § 1.1 ("No federal statute is more important in contemporary American law than 42 U.S.C. § 1983.").

¹⁸ See *id.* (listing important constitutional cases brought under § 1983).

Reynolds v. Sims,²⁰ *Roe v. Wade*,²¹ and, more recently, *City of Richmond v. J. A. Croson Co.*²² In terms of sheer volume, § 1983 is certainly an important statute, with more than 30,000 § 1983 actions filed every year.²³ This litigation explosion under § 1983 is remarkable given that the statute was little used before it was revived by the seminal case of *Monroe v. Pape*.²⁴ In the year *Monroe* was decided, 1961, only 270 § 1983 actions had been filed.²⁵

The typical § 1983 action involves plaintiffs bringing state officials into federal court as defendants; thus, § 1983 raises a number of federalism concerns. Proponents of a broad reading of § 1983 emphasize that the intended purpose of the statute when originally enacted in 1871 was to provide a federal forum for alleged violations of federally protected rights by state officials acting under color of state law. Justice Blackmun, for example, argued that "Reconstruction . . . established a new legal order that contemplated direct federal intervention in what had been considered to be state affairs, a system in which federal courts were to enforce newly created federal constitutional rights against state officials through civil remedies."²⁶ In this new legal order, § 1983 would provide those civil remedies.²⁷ Under this view, complaints that § 1983 litigation is "inconsistent with the thesis that federal courts not interfere with state affairs unless absolutely necessary"²⁸ simply misunderstand the legislative purpose behind § 1983.²⁹ As the Supreme Court has held:

¹⁹ 347 U.S. 483 (1954).

²⁰ 377 U.S. 533 (1964).

²¹ 410 U.S. 113 (1973).

²² 488 U.S. 469 (1989).

²³ See 1 SCHWARTZ & KIRKLIN, *supra* note 10, § 1.1. Most of these actions are filed in federal courts, but § 1983 actions can be filed in state courts as well.

²⁴ 365 U.S. 167 (1961), *overruled in part by* *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Monroe* held that the phrase "under color of law" in § 1983 applied to actions that were not authorized by state law but were instead illegal, such as the unreasonable search and seizure at issue in that case. See *id.* at 172-174. Previous to *Monroe*, § 1983 was thus limited to challenging unconstitutional state laws; after *Monroe*, § 1983 offered access to a federal forum to anyone claiming a violation of his or her federally protected rights. See generally 1 SCHWARTZ & KIRKLIN, *supra* note 10, § 1.1 ("Monroe established that the federal § 1983 remedy is independent of and 'supplementary to' any available state law remedies.").

²⁵ See 1 SCHWARTZ & KIRKLIN, *supra* note 10, § 1.1.

²⁶ Blackmun, *supra* note 9, at 7-8.

²⁷ In this way, § 1983 plays a vital role, as the Fourteenth Amendment does not authorize or create remedies for the rights extended against the state governments. See 1 SCHWARTZ & KIRKLIN, *supra* note 10, § 1.4 ("Although the Fourteenth Amendment establishes binding standards of conduct for state and local governments, it does not authorize remedies when its provisions are breached. Section 1983 fills this void.").

²⁸ Blackmun, *supra* note 9, at 2.

²⁹ See Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHL.-KENT L. REV. 695, 697 (1997) [hereinafter Beermann, *Common Law Elements*] ("[T]he statute[] [has] not been allowed to reach [its] full textual potential, largely because the Court has constructed numerous limiting doctrines . . ."); Jack M. Beermann, *A Critical Approach to Section 1983 With Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 52 (1989) ("Commenta-

Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, “whether that action be executive, legislative, or judicial.”³⁰

For the federal courts to properly play this role of “guardians of the people's federal rights,” they must directly intervene in affairs that, under more restrictive understandings of federalism, are none of their business.

Whatever the merits of this broad reading of § 1983, it has not generally been adopted by the federal courts. Instead, the federal courts have relied on a number of doctrines to limit the scope of federal review of alleged violations of federally protected rights under color of state law.³¹ As one leading treatise notes, § 1983 defendants have “a storehouse of defenses to choose from,” and that § 1983 is, as a result, “a comprehensive, intricate, and, in many respects, complex body of law.”³² Perhaps the most important of these defenses is the application of collateral estoppel, or issue preclusion, to § 1983 actions.³³ In *Allen v. McCurry*,³⁴ the Supreme Court held that the closely related preclusion doctrines of res judicata and collateral estoppel apply to § 1983 actions. The § 1983 plaintiff in *Allen* had been tried and convicted of drug offenses and assault in state court, and, while in custody, filed a § 1983 action claiming that the police had

tors have long attacked the Court's method of construing § 1983, charging the Court with ignoring congressional intent . . .”).

³⁰ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

³¹ In addition to res judicata and collateral estoppel, other doctrines limiting federal review of state action under § 1983 include various forms of abstention and the absolute and qualified immunity doctrines. For discussions of these doctrines, see generally KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION, chs. 6-9 (1998).

³² 1 SCHWARTZ & KIRKLIN, *supra* note 10, § 1.2. These multiple defenses, according to Schwartz and Kirklin, “involve the reconciliation of important competing interests” raised by § 1983, including the federal interest in providing a remedy and the states' interests in their basic functions and autonomy. *Id.* See also Zeigler, *supra* note 1, at 665 (“[T]he chief legacy of the Burger Court may be the creation of impediments to the enforcement of rights.”).

³³ A prior judgment may preclude a future action in one of two closely related ways. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.1 (2d ed. 1993). First, res judicata, often called claim preclusion, “prevents a plaintiff from suing on a claim that already has been decided.” *Id.* at 610. Second, estoppel by judgment, or issue preclusion, “precludes relitigation of any issue . . . if that particular issue actually was contested and decided in the first action.” *Id.* Estoppel by judgment is called collateral estoppel, its more common name, when the second lawsuit is collateral to the first, i.e., not the same claim as the first lawsuit. Collateral estoppel is much more common than the other form of estoppel by judgment, direct estoppel. See *id.* at 610-11. Because § 1983 challenges to state convictions involve a civil action brought to challenge a criminal conviction, the relevant doctrine is collateral estoppel or issue preclusion.

³⁴ 449 U.S. 90 (1980).

violated his Fourth Amendment rights in an illegal search. Because of the Court's holding in *Stone v. Powell*,³⁵ this Fourth Amendment claim could not be brought under habeas corpus, and thus the *Allen* plaintiff's only hope for federal review of his state conviction was § 1983. The Court, however, refused to accept "a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court."³⁶ Such a principle, the Court held, could not be found in the Constitution, which does not grant that jurisdiction to the federal courts.³⁷ More surprisingly, the *Allen* Court also held that this principle could not be found in § 1983 itself.³⁸

In addition to the traditional preclusion doctrines, the Court's reasoning in *Allen* was also based on the Full Faith and Credit Act.³⁹ Passed by the First Congress in 1790,⁴⁰ the Full Faith and Credit statute reads, in part: "[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State"⁴¹ In *Allen*, the Court held that § 1983 did not repeal the Full Faith and Credit Act by implication.⁴² Thus, the common-law doctrine of issue preclusion and the Full Faith and Credit Act, taken together, limit the ability of individuals convicted in state courts to relitigate issues in federal court, despite the broad language of § 1983. In two limited situations, however, *Allen* does permit an individual convicted in a state court to litigate issues related to that conviction in federal court. First, issues may be relitigated in federal court "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court."⁴³ Second, under the terms of the Full Faith and Credit Act, a party may relitigate an issue in federal court if the earlier adjudication would not

³⁵ 428 U.S. 465 (1976). *Stone* held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 481-82. The effect of *Stone* was that the *Allen* plaintiff's Fourth Amendment claim could not be reviewed by a federal court sitting in habeas.

³⁶ *Allen*, 449 U.S. at 103.

³⁷ *See id.*

³⁸ *See id.*

³⁹ 28 U.S.C. § 1738 (1994).

⁴⁰ *See Allen*, 449 U.S. at 96 n.8 (noting that the act has remained essentially unchanged since 1790).

⁴¹ *Id.* at 96 (alterations in original) (quoting § 1738).

⁴² *See id.* at 97-98 ("[N]othing in the language of § 1983 remotely expresses any congressional intent to . . . repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.") (citation and footnote omitted).

⁴³ *Id.* at 101.

be given preclusive effect in the courts of that state.⁴⁴ If an individual raises constitutional defenses in the state court, however, it is generally safe to say that *Allen* bars the relitigation of those issues in federal court.⁴⁵

Importantly, the *Allen* Court explicitly rejected the idea that § 1983 embodies "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues."⁴⁶ Such a general distrust of state courts' capacity to respect constitutional rights, however, is one of the basic tenets of the broad reading of § 1983. If the federal courts were to adopt a broader reading of § 1983, then *Allen* would require reconsideration. For § 1983 to provide a meaningful federal forum for the vindication of federal rights in cases involving state convictions not resulting in incarceration, some revision of the preclusive effects of state-court judgments is essential.⁴⁷

In contrast to § 1983 actions, the review of state convictions by a federal court sitting in habeas is not limited by the prior adjudication of issues in state court.⁴⁸ But many individuals do not have access to a federal forum using habeas corpus, primarily because federal habeas corpus review is limited to petitions from individuals in state custody. This is discussed in the next section.

B. Habeas Corpus

The Habeas Corpus Act of 1867 extended the right to a federal writ of habeas corpus to state prisoners.⁴⁹ In the terms of the statute, however, habeas relief is limited to those individuals who are "in custody."⁵⁰ This limitation follows from the traditional role of habeas corpus: "Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his imme-

⁴⁴ See *id.*

⁴⁵ See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4471.2 (West Supp. 2000) (explaining that federal courts will rarely find that state defendants did not have a full and fair opportunity to litigate in state court).

⁴⁶ *Allen*, 449 U.S. at 105.

⁴⁷ See *infra* Part IV.

⁴⁸ See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 356 (5th ed. 1994) ("[R]es judicata does not bar habeas corpus, and the mere fact that the contention has been presented to, and rejected by, the state courts does not prevent the federal court from giving relief.").

⁴⁹ Codified at 28 U.S.C. § 2254 (1994 & Supp. 1998). On the long history of habeas as a protection of individual rights, see generally 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 108-25 (1926) (discussing the historical development of the writ of habeas corpus from the reign of Edward I).

⁵⁰ Section 2254(a) reads, in part: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody"

diate release.”⁵¹ Thus, the custody requirement “preserve[s] the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas . . . is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency.”⁵² The custody requirement is jurisdictional, i.e., if a habeas petitioner is not in custody at the time the habeas petition is filed, then the federal court does not have jurisdiction to consider the petition.⁵³ In cases in which individual freedom is not at stake, the habeas statute does not grant federal jurisdiction to intervene in matters of state concern.⁵⁴ In short, the federal habeas corpus statute grants state prisoners a federal forum because of the important interests at stake.

In the 1960s and 1970s, the Supreme Court expanded the definition of custody to include individuals not in actual physical custody, but who were subject to conditions that “significantly restrain [the] petitioner’s liberty to do those things which in this country free men are entitled to do.”⁵⁵ Thus, individuals released on parole⁵⁶ or even on personal recognizance⁵⁷ have been held to be “in custody,” despite the lack of physical restraint. In addition, at least one court has held that community service constitutes custody for habeas purposes.⁵⁸ But there are still limits to what constitutes custody: “[T]here must be some significant restraint by the state on the petitioner’s liberty in order for the action to lie.”⁵⁹ Fines, for example, have not been held to be a sufficiently important restraint to give rise to federal jurisdiction under the habeas statute.⁶⁰

However, one need not be “in custody” when the federal court actually decides on the merits of the habeas petition. Once federal jurisdiction has attached, a habeas petition is not rendered moot by

⁵¹ *Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled in part by* *Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁵² *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

⁵³ *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (“[O]nce the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on [habeas] application[s].”).

⁵⁴ *See, e.g., Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (“Habeas jurisprudence has traditionally been concerned with liberty rather than property, with freedom more than economics.”).

⁵⁵ *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

⁵⁶ *See id.*

⁵⁷ *See Hensley*, 411 U.S. at 351.

⁵⁸ *See Barry v. Bergen County Probation Dep’t*, 128 F.3d 152, 160-61 (3d Cir. 1997).

⁵⁹ *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984).

⁶⁰ *See, e.g., Hanson v. Circuit Court*, 591 F.2d 404, 407 (7th Cir. 1979) (“[W]e hold that the ordinary collateral consequences or civil disabilities flowing from a fine-only conviction, although they may be restraints on liberty, are not severe enough to put the convicted person in custody . . .”).

the petitioner's release in most cases.⁶¹ The general rule is that a criminal conviction carries sufficient collateral consequences to present a live case and controversy, despite the petitioner's release from custody.⁶² The collateral consequences of a criminal conviction, which may constitute great enough restraints on individual liberty to prevent a habeas petition from being rendered moot by release, however, are generally not great enough to alone constitute custody and give rise to federal jurisdiction: "The existence of collateral consequences of his conviction may enable a prisoner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the 'in custody' jurisdictional prerequisite unless . . . federal jurisdiction has already attached."⁶³ In other words, the federal courts have developed two threshold levels for considering habeas petitions, a custody threshold and a collateral-consequences threshold. The custody threshold involves the restraint on individual liberty necessary to give rise to federal jurisdiction. The collateral-consequences threshold is the level to which collateral consequences of a conviction must rise to prevent a habeas petition from being rendered moot by release from custody. Importantly, this second threshold is set at a much lower level than the first, because a criminal conviction is generally enough to prevent a habeas petition from being rendered moot, but never enough, without custody, to establish federal jurisdiction by itself.⁶⁴

These different threshold levels for jurisdiction and mootness are, to a great extent, arbitrary. If habeas corpus were just about release from custody, then release would always render a habeas petition moot. Instead, the courts have interpreted the federal habeas corpus statute as providing a federal forum to ensure that federally protected rights have not been violated and that the need for this forum

⁶¹ See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) ("[O]nce the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.").

⁶² The *Carafas* Court illustrated the rule in the following manner:

It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."

Id. (alteration in original) (citations omitted) (quoting *Fiswick v. United States*, 329 U.S. 211, 212 (1946)). The required degree of specificity of the disabilities following upon a challenged conviction is not clear. Cf. *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143, 1148 (7th Cir. 1991) ("Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid.") (quoting *Lane v. Williams*, 455 U.S. 624, 632 n.13 (1982)).

⁶³ *Ward*, 738 F.2d at 138-39.

⁶⁴ See *Carafas*, 391 U.S. at 237-38 (discussing these mootness and jurisdictional issues).

exists even after release.⁶⁵ But the courts have not allowed access to federal habeas review in all cases, despite the important interests at stake. Courts faced with this issue have generally not commented on this inconsistency. In *Hanson v. Circuit Court*, however, the Seventh Circuit squarely addressed this issue:

Admittedly, once the notion that custody means only confinement within the four walls of a prison is abandoned, finding a principled basis upon which to draw lines is difficult. We must, however, attach some meaning to the Congressional limitation on habeas corpus jurisdiction; Congress did not authorize the federal courts to be roving commissions to correct all constitutional errors in state criminal proceedings. . . . The Supreme Court has declared the purpose of the custody requirement to be "to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." We hold that a fine-only conviction is not a restraint on individual liberty. Moreover, we hold that the ordinary collateral consequences or civil disabilities flowing from a fine-only conviction . . . are not severe enough to put the person in custody within the meaning of the habeas corpus statute.⁶⁶

In this passage, the *Hanson* court identifies two closely related problems with extending the habeas jurisdiction of the federal courts. First, the habeas statute does include the phrase "in custody," and, as the *Hanson* court asserts, "some meaning" must be given to those words.⁶⁷ But as the *Hanson* court itself appears to concede, no "principled basis" has been put forward for the meaning the courts have

⁶⁵ Cf. Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1009-10 (1985). Professor Yackle argues:

In sum, it was the nature of litigants' federal claims, rather than their interest in raising them, that motivated the Justices' decisions making postconviction habeas generally available. The writ's association with personal liberty made it an entirely appropriate vehicle for the Court's strategy to protect individuals from recalcitrant state authorities. Yet the "custody" requirement was merely a traditional component of habeas. It quickly gave ground whenever it threatened to interfere with the development of an effective system of federal postconviction review. When habeas was recruited to new service for the protection of fourteenth amendment rights, "custody" offered an expedient and facially acceptable justification for federal judicial action notwithstanding previous litigation in state court. It would have been nonsense, however, to take 'custody' seriously [Instead,] [t]he Court . . . blithely departed from the historical doctrine that habeas applicants must be physically confined. Today, "custody" serves a symbolic function. It would be a serious mistake to believe that it offers a sound basis for determining the availability of federal adjudication.

Id. (footnotes omitted).

⁶⁶ *Hanson v. Circuit Court*, 591 F.2d 404, 407 (7th Cir. 1979) (citation and footnote omitted) (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1978)).

⁶⁷ *Id.*

chosen.⁶⁸ Second, the *Hanson* court asserts that "Congress did not authorize the federal courts to be roving commissions to correct all constitutional errors in state criminal proceedings."⁶⁹ This merely begs the question, however. The issue is not whether Congress has authorized the federal courts, under the habeas statute, to correct all constitutional errors made in the state courts. The current rules of habeas corpus, including the requirement of exhaustion of state remedies and the doctrine of state procedural default, make this perfectly clear.⁷⁰ The real question is: which constitutional violations has Congress authorized federal courts to correct in habeas proceedings, and how can the courts distinguish between those constitutional violations federal courts can correct and those they cannot?

Given the requirement that a habeas petitioner be in custody, and the courts' definition of "custody," those convicted of state crimes, but not sentenced to incarceration, probation, or even community service, have no access to a federal forum to challenge their conviction under the habeas statute. This is true despite the collateral consequences that often follow from the mere fact of a criminal conviction. In addition to the collateral consequences of the conviction itself, other forms of punishment may be implicated, such as a fine or a revocation of a license. Moreover, individuals who have never been in custody have also been denied access to a federal forum under § 1983 because the federal courts have generally interpreted habeas corpus as the exclusive means of challenging a state conviction in federal court.⁷¹ This interpretation of habeas corpus is based in large part on two important Supreme Court precedents. Part II analyzes these precedents and the more recent developments indicating that § 1983 may be a viable option for those individuals denied access to a federal forum under the habeas statute.

II. WHEN HABEAS AND § 1983 COLLIDE: *PREISER*, *HECK*, AND THE UNSETTLED STATE OF THE LAW

A. *Preiser v. Rodriguez*

The Supreme Court first addressed the relationship between § 1983 and the federal habeas corpus statute in 1973 in *Preiser v. Rod-*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See 2 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 22.1 (2d ed. 1998) (discussing the "elaborate procedural obstacles" to habeas relief today, including "procedural default"). See also Jeffrey C. Metzcar, Note, *Raising the Defense of Procedural Default Sua Sponte: Who Will Enforce the Great Writ of Liberty?*, 50 CASE W. RES. L. REV. 869, 871 (2000) (criticizing recent Supreme Court decisions limiting access to habeas corpus).

⁷¹ See, e.g., *Cavett v. Ellis*, 578 F.2d 567, 569 (5th Cir. 1978) (holding that § 1983 cannot be used when an individual does not have access to habeas because he is no longer in custody).

riguez.⁷² *Preiser* was a consolidated appeal involving challenges by three New York state prisoners to the revocation of their good-conduct-time credits for disciplinary reasons.⁷³ Instead of proceeding under habeas corpus, however, the prisoners chose to proceed under § 1983, alleging that the New York Department of Correctional Services had acted unconstitutionally when it revoked their credits. The prisoners sought an injunction to restore the credits and thus, in effect, to reduce the length of their confinement.⁷⁴ These state prisoners attempted to bring their action under § 1983 rather than under habeas corpus because they wished to evade the requirement, under the habeas corpus statute, that they first exhaust their state remedies before seeking federal review.⁷⁵ Given the broad language of § 1983, the *Preiser* prisoners appeared to have a good case. The prison officials who revoked the credits were certainly acting under color of state law, and thus the allegation that the prisoners' federally protected rights had been violated brought the case under the "literal terms of that statute."⁷⁶ The issue before the Court in *Preiser*, then, was whether the specific language of the habeas corpus statute, 28 U.S.C. § 2254, or the more general statute, § 1983, applied in this instance.⁷⁷ The Court held that the specific habeas statute did in fact take precedence over the more general § 1983.⁷⁸

The *Preiser* holding was motivated, to a large extent, by the Court's unwillingness to allow state prisoners to evade the exhaustion requirements of the habeas statute.⁷⁹ The *Preiser* Court reasoned that, in adding the exhaustion requirements to the habeas statute in 1948, Congress expressed concern for "federal-state comity," defined as "'a proper respect for state functions.'" ⁸⁰ Comity was more than a matter of federal courts not interfering with the state courts; it extended to state administrative bodies, as well.⁸¹ The Court stressed the importance of the state interest involved: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons."⁸² Given Congress's intent that the fed-

⁷² 411 U.S. 475 (1973).

⁷³ *See id.*

⁷⁴ *See id.* at 476-77.

⁷⁵ *See id.* at 477.

⁷⁶ *Id.* at 488.

⁷⁷ *See id.* at 482.

⁷⁸ *See id.* at 500 ("Upon that question, we hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment . . . his sole federal remedy is a writ of habeas corpus.").

⁷⁹ *See id.* at 503-04 (Brennan, J., dissenting) ("At bottom, the Court's holding today rests on an understandable apprehension that the no-exhaustion rule of § 1983 might, in the absence of some limitation, devour the exhaustion rule of the habeas corpus statute.").

⁸⁰ *Id.* at 491 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

⁸¹ *See id.* at 490-91.

⁸² *Id.* at 491-92.

eral courts show a proper respect for important state functions such as prison administration, the *Preiser* Court held that prisoners should not be allowed to frustrate that intent by using the broad language of § 1983 to evade the exhaustion requirement of habeas corpus.

Preiser left three important questions unanswered. First, because *Preiser* dealt with prisoners' access to a federal forum using habeas corpus, the Court did not address the use of § 1983 by those without access to habeas corpus relief. The Court's broad holding that habeas corpus is "the exclusive federal remedy for a state prisoner attacking his confinement"⁸³ was interpreted by some federal courts to mean that habeas corpus is the exclusive federal remedy for individuals attacking their state convictions.⁸⁴ This conclusion, based on the questionable extension of a rule from the context of custody to that of non-custodial convictions, has not been reached by all federal courts considering the issue, however.⁸⁵

Second, under *Preiser's* interpretation of § 1983 and the habeas statute, some prisoner suits could still proceed under § 1983. The *Preiser* Court reasoned that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."⁸⁶ This rule applies when the prisoners' challenge would lead to immediate release, if successful, or, as in *Preiser*, to a speedier release.⁸⁷ Thus, "when a state prisoner is challenging the very fact or

⁸³ *Id.* at 493 (emphasis added).

⁸⁴ See, e.g., *Waste Management, Inc. v. Fokakis*, 614 F.2d 138, 140-41 (7th Cir. 1980) (rejecting a corporation's § 1983 action challenging a state conviction); *Hanson v. Circuit Court*, 591 F.2d 404, 409-410 (7th Cir. 1979) ("We think that Congress intended that habeas corpus provide . . . the exclusive federal remedy for all who seek to attack state court judgments of convictions."); *Cavett v. Ellis*, 578 F.2d 567, 569-70 (5th Cir. 1978) (affirming the dismissal of a § 1983 action challenging convictions for which the sentences had already been served).

⁸⁵ For an excellent comparison of the two positions on *Preiser's* effects on § 1983 actions by those not in custody, see *Pueschel v. Leuba*, 383 F. Supp. 576, 581 (D. Conn. 1974). The *Pueschel* court explained:

It might be contended that Congress, in enacting the habeas corpus remedy, not only intended it to be the exclusive vehicle for district court collateral inquiry into the validity of state convictions but also intended that those convictions not subject to a habeas remedy, i.e., without custody consequences, should be immune from district court collateral inquiry. In the absence of helpful legislative history, it seems at least as plausible to argue that the unavailability of habeas corpus to attack a sentence involving only a fine is a sufficient reason for permitting collateral inquiry via § 1983.

Id. The *Pueschel* court avoided granting the § 1983 plaintiff relief by holding that his action was barred by issue preclusion, as the issues in his action had already been decided against him in state court. See *id.* at 583 ("[C]ollateral estoppel should bar the suit."). As argued *infra* Part IV, however, such a result is inconsistent with the legislative purposes in enacting § 1983 and thus, fundamentally flawed.

⁸⁶ *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). It should be noted that Justice Brennan, in dissent, strongly objected to this premise: "The Court's conclusion . . . is assertedly justified by invocation of a concept, newly invented by the Court today, variously termed the 'core of habeas corpus,' the 'heart of habeas corpus,' and the 'essence of habeas corpus.'" *Id.* at 503 (Brennan, J., dissenting).

⁸⁷ See *id.* at 489.

duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."⁸⁸ When a prisoner is "attacking something other than the fact or length of his confinement," or is seeking "something other than immediate or more speedy release," however, habeas corpus is not his exclusive remedy, and the prisoner may proceed under § 1983.⁸⁹ Since *Preiser*, then, the federal courts have wrestled with the difficult task of determining whether a claim challenges the fact or duration of a prisoner's imprisonment (cognizable only under habeas), or merely the conditions of that confinement (cognizable under § 1983).⁹⁰

Third, because the *Preiser* prisoners sought only an injunction restoring their credits and not monetary damages, the Court did not squarely address the issue of whether state prisoners could attack their imprisonment indirectly by seeking damages under § 1983. The *Preiser* Court appeared to suggest, however, that a suit for damages could be brought under § 1983: "If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus."⁹¹ Moreover, the Court stressed that a damages claim could not be brought under the habeas corpus statute, and thus that a state prisoner seeking damages would have to proceed under § 1983.⁹² The Court addressed this issue in *Heck v. Humphrey*.⁹³

B. Heck v. Humphrey

Preiser suggested that a state prisoner might be able to challenge his or her state conviction by bringing a § 1983 action for damages, as opposed to an action seeking injunctive or declaratory relief. In *Heck v. Humphrey*, the Court returned to the "intersection of the two most fertile sources of federal-court prisoner litigation,"⁹⁴ § 1983 and habeas corpus. Roy Heck, the petitioner in *Heck*, had been convicted of manslaughter in Indiana state court and was appealing that conviction

⁸⁸ *Id.* at 500.

⁸⁹ *Id.* at 494.

⁹⁰ Sorting out which claims implicate the fact or duration of confinement is not always a simple matter. See Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85 (1988) (discussing the difficulties federal courts experience determining whether a particular prisoner action challenges the fact or duration of confinement).

⁹¹ *Preiser*, 411 U.S. at 494.

⁹² See *id.* ("In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy.")

⁹³ 512 U.S. 477 (1994).

⁹⁴ *Id.* at 480.

in the Indiana courts.⁹⁵ While that appeal was still pending, Heck filed a § 1983 action in federal court, naming two state prosecutors and a police investigator as defendants. Heck alleged that these individuals had violated his federally protected rights by, among other things, destroying exculpatory evidence.⁹⁶ In his § 1983 action, Heck did not request an injunction ordering his release but instead sought only monetary damages for his allegedly illegal conviction.⁹⁷

Heck's § 1983 action presented a *Preiser* problem in that "the issues it raised 'directly implicate[d] the legality of [petitioner's] confinement'"⁹⁸ despite the absence of a request for injunctive relief ordering his release. In short, Heck was attempting to use § 1983 to avoid federal habeas requirements and to secure his release from prison. A successful § 1983 action would have called into question the validity of Heck's continuing incarceration and would have compelled the state to release him.⁹⁹ Accordingly, the Seventh Circuit held that Heck's claim was not cognizable under § 1983.¹⁰⁰ Heck had based his claim, however, on *Preiser's* suggestion that a prisoner seeking damages was not seeking immediate or speedier release, and thus the Supreme Court granted certiorari because of the "unreliable, if not unintelligible" implications of *Preiser* on this issue.¹⁰¹

Following the rationale of *Preiser*, the *Heck* Court held that a state prisoner's claims were not cognizable under § 1983 where suc-

⁹⁵ See *id.* at 478-79. Eventually, Heck's state conviction was upheld by the Indiana Supreme Court. See *id.* at 479.

⁹⁶ See *id.* at 478-79 (describing the facts of the case).

⁹⁷ See *id.* at 479 ("The complaint sought, among other things, compensatory and punitive monetary damages. It did not ask for injunctive relief, and petitioner has not sought release from custody in this action.").

⁹⁸ *Id.* (quoting the district court's dismissal of the complaint).

⁹⁹ At least that is what the *Heck* Court concluded would result from a successful § 1983 action for damages in the case. The *Heck* Court was not altogether clear on just how the federal court's judgment would affect later state court proceedings if Heck succeeded in his § 1983 action. In the simplest case, of course, the federal court judgment would have preclusive effect in subsequent state court proceedings. Writing for the Court, however, Justice Scalia stated that "it is at least plain that preclusion will not necessarily be an automatic, or even a permissible, effect" of the federal court's judgment. *Id.* at 488. Thus, even if Heck prevailed in federal court and was awarded damages, the state would not automatically be legally compelled to release him. Because *Heck* did not present such an issue to the Court, however, Justice Scalia did not elaborate on this point, unfortunately, see *id.* at 488 ("[W]e have no occasion to rule on the matter at this time . . ."), but only stated, in a footnote, that federal preclusion rules are judge-made. See *id.* at 488 n.9 (citing various treatises on the nature of federal preclusion law). In his concurring opinion, Justice Souter noted that a federal court judgment would compel Heck's release either because of its preclusive effect or because "mounting damages against the defendant-officials for unlawful confinement (damages almost certainly to be paid by state indemnification) would, practically, compel the State to release the prisoner." *Id.* at 498 (Souter, J., concurring). In any case, *Heck* is clearly premised on the assumption that the state (or its officials) could not just pay Heck damages and keep him in prison, despite the fact that the Court did not rule on this matter directly.

¹⁰⁰ See *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993)).

¹⁰¹ *Heck*, 512 U.S. at 482 ("In the last analysis, we think the dicta of *Preiser* to be an unreliable, if not an unintelligible, guide . . .").

cess on those claims would compel the prisoner's immediate or speedier release.¹⁰² But the *Heck* Court went further than merely extending *Preiser* to bar § 1983 actions seeking only monetary damages in such circumstances. Specifically, *Heck* held that

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.¹⁰³

In short, the *Heck* Court held that § 1983 claims by state prisoners for damages resulting from an illegal conviction or illegal imprisonment must satisfy a favorable-termination requirement, demonstrating that their convictions have been invalidated in some other forum prior to the bringing of damages claims. Favorable termination of prior judicial proceedings in a prisoner's favor is thus an element of a prisoner's § 1983 action for damages from an illegal conviction. The result is a sweeping rule that § 1983 cannot be used, either directly (request for injunctive relief ordering release) or indirectly (request for monetary damages only), to call into question the validity of a state conviction. Instead, after *Heck* a state conviction can only be challenged in state appellate courts or in a federal court sitting in habeas. Only after the conviction has been invalidated in one of these alternative fora may a former prisoner bring a § 1983 action.¹⁰⁴

The *Heck* Court based this favorable-termination requirement on the common law of torts in 1871, the year Congress enacted § 1983. Justice Scalia, writing for the Court, analogized *Heck*'s lawsuit to a suit for malicious prosecution "because . . . it permits damages for

¹⁰² See *id.* at 483.

¹⁰³ *Id.* at 486-87 (citations omitted).

¹⁰⁴ It should be noted that *Heck* does "not engraft an exhaustion requirement upon § 1983, but rather den[ies] the existence of a cause of action." *Id.* at 489. The favorable-termination requirement differs from exhaustion because even a state prisoner who has fully exhausted the available remedies—including state appeals, federal habeas corpus, and perhaps even an appeal for an executive pardon—would still not have a cognizable § 1983 action for damages if he had not succeeded in having his conviction invalidated in some other forum. See *id.* ("Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.").

confinement imposed pursuant to legal process.”¹⁰⁵ Because favorable termination is an element of a suit for malicious prosecution, Justice Scalia reasoned that it should also be an element of a prisoner’s § 1983 claim for damages for illegal conviction and imprisonment.¹⁰⁶ The primary effect of importing this requirement from nineteenth-century torts law into a contemporary civil rights action is to limit the availability of § 1983 in such cases. Justice Scalia emphasized this effect in the *Heck* opinion, stressing that “[t]his Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack.”¹⁰⁷ The term “collateral attack” describes an action seeking to deprive a conviction or prior judgment of its normal force and effect in a later proceeding with a purpose other than overturning or reversing the prior conviction or judgment.¹⁰⁸ Heck’s § 1983 action for damages was a classic example of a collateral attack: although his suit was brought for damages, if successful it would have also called into question the validity of his state conviction and compelled his release. In support of his rejection of collateral attacks on state convictions, Justice Scalia pointed to “the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.”¹⁰⁹ As discussed below, however, Justice Souter and other members of the Court have proven more willing than Justice Scalia to ignore this “hoary principle” in § 1983 actions.

C. Justice Souter’s *Heck* Concurrence

Despite his criticisms of Justice Scalia’s common-law analysis in *Heck*,¹¹⁰ Justice Souter concurred in the Court’s basic holding in

¹⁰⁵ *Id.* at 484.

¹⁰⁶ *See id.* at 483-84. Justice Scalia began by observing that “[w]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.” *Id.* at 483 (alteration in original) (quoting *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986)). He then asserts that “[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here” *Id.* at 484. It should be noted, however, that more recently Justice Scalia has vociferously criticized the Court’s § 1983 jurisprudence for its resemblance to tort law:

The § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier. . . . *Monroe* changed a statute . . . into one that pours into the federal courts tens of thousands of suits each year, and engages this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law.

Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

¹⁰⁷ *Heck v. Humphrey*, 512 U.S. 477, 484-85 (1994) (citing a number of authorities on this point).

¹⁰⁸ *See Parke v. Raley*, 506 U.S. 20, 30 (1992) (citing BLACK’S LAW DICTIONARY 261 (6th ed. 1990)).

¹⁰⁹ *Heck*, 512 U.S. at 486.

¹¹⁰ Justice Souter criticized *Heck*’s argument for the favorable-termination requirement on two levels. First, Justice Souter argued that Justice Scalia had used “common-law analogies to displace statutory analysis.” *Id.* at 492 (Souter, J., concurring). Justice Scalia’s use of the

Heck. Justice Souter suggested, however, that the Court could have reached essentially the same result by merely applying *Preiser's* analysis to § 1983 claims for damages for illegal conviction.¹¹¹ Following *Preiser's* central holding that habeas corpus is the exclusive means for a state prisoner to challenge a state conviction in federal court, Justice Souter would have limited *Heck* to hold that state prisoners cannot evade the requirements of habeas corpus by pursuing a § 1983 action for monetary damages; state prisoners would thus have to secure habeas relief before filing a claim for damages under § 1983.¹¹² Such a rule, Justice Souter argued, would be consistent with the purpose of § 1983,¹¹³ because habeas corpus relief would still provide the state prisoner with a federal forum to hear his federal claims.¹¹⁴

Justice Souter did not stop there, however. His *Heck* concurrence went on to address the situation of those individuals who do not have access to federal habeas corpus review of their state convictions. His concern with the Court's opinion was that it "would needlessly

common law to supplant statutory analysis in *Heck* has also been criticized in the scholarly literature. See Beermann, *Common Law Elements*, *supra* note 29, at 713-14 (noting that the *Heck* opinion fundamentally alters analysis of § 1983 without arguing for its new method).

Second, Justice Souter argued that there were serious problems with analogizing *Heck's* § 1983 action for damages to an action for malicious prosecution because of the traditional elements of the malicious-prosecution claim. Unlike the favorable-termination element adopted by the Court in *Heck*, Justice Souter pointed out that "other elements of the tort . . . cannot coherently be transplanted" to a § 1983 action. *Heck*, 512 U.S. at 493. In a malicious-prosecution action, the plaintiff must also "prove the absence of probable cause for the proceeding as well as 'malice,' or a primary purpose other than that of bringing an offender to justice." *Id.* at 494 (internal quotation marks omitted). If these elements were applied to *Heck's* § 1983 claim, he would have to show that the police did not have probable cause to arrest and charge him and that they were motivated by malice in doing so. However, under the common law of 1871, a criminal conviction would create an "irrebuttable" presumption "that the prosecution never lacked probable cause." *Id.* at 496. This would mean, as a matter of logic, "that conviction of a crime wipes out a person's § 1983 claim for damages," *id.* at 496, even if that individual were able to comply with the favorable-termination requirement imposed under *Heck*. Justice Souter also noted that *Heck's* action for damages resembled a claim for abuse of process as well as for malicious prosecution, and thus that if "the common law were the master of statutory analysis . . . we would find ourselves with two masters to contend with." *Id.* at 494.

¹¹¹ See *id.* at 499-500 ("It may be that the Court's analysis takes it no further than I would thus go, and that any objection I may have to the Court's opinion is to style, not substance.").

¹¹² See *id.* at 500 ("[A]fter enactment of the habeas statute and because of it, prison inmates seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a requirement analogous to the malicious-prosecution tort's favorable-termination requirement.").

¹¹³ Justice Souter explained:

Harmonizing § 1983 and the habeas statute by requiring a state prisoner seeking damages for unconstitutional conviction to establish the previous invalidation of his conviction does not run afoul of what we have called, repeatedly, "[t]he very purpose of" § 1983: "to interpose the federal courts between the States and the people, as guardians of the people's federal rights."

Id. at 501 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

¹¹⁴ See *id.* ("A prisoner caught at the intersection of § 1983 and the habeas statute can still have his attack on the lawfulness of his conviction or confinement heard in federal court . . . and, . . . he may be able to obtain § 1983 damages.").

place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes."¹¹⁵ If *Heck* were applied to individuals without access to a federal court sitting in habeas, such individuals would be denied "any federal forum for claiming a deprivation of federal rights" if they could not "first obtain a favorable state ruling."¹¹⁶ Justice Souter argued that such a result would be contrary to the purpose of § 1983, providing a federal forum for those claiming an official violation of federally protected rights:

It would be an entirely different matter . . . to shut off federal courts altogether to claims that fall within the plain language of § 1983. "[I]rrespective of the common law support" for a general rule disfavoring collateral attacks, the Court lacks the authority to do any such thing absent unambiguous congressional direction where, as here, reading § 1983 to exclude claims from federal court would run counter to "§ 1983's history" and defeat the statute's "purpose."¹¹⁷

In Justice Souter's view, then, "the plain language of § 1983" mandates access to the federal courts for those claiming that their federally protected rights have been violated under color of state law, irrespective of any common-law doctrine "disfavoring collateral attacks." Importantly, Justice Souter's position is clearly based on a broad reading of Congress's purpose in enacting § 1983, namely, "'to interpose the federal courts between the States and the people, as guardians of the people's federal rights.'"¹¹⁸ Given the purpose and the broad language of the statute, Justice Souter argued that old common-law doctrines or principles, by themselves, could not empower the Court to limit the reach of § 1983.¹¹⁹ Justice Souter then emphasized the breadth of § 1983's language, pointing out that the statute "speaks of deprivations of 'any' constitutional rights . . . by '[e]very' person acting under color of state law,"¹²⁰ and which, the Court has held, "'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'"¹²¹

¹¹⁵ *Id.* at 500. Justice Souter provided the following list of such individuals: "people who were merely fined, . . . or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences . . ." *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 501 (quoting *Wyatt v. Cole*, 504 U.S. 158, 158 (1992)).

¹¹⁸ *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

¹¹⁹ *See id.* at 502. Justice Souter's exact words: "[S]urely the common law can give us no authority to narrow the 'broad language' of § 1983." *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (quoting *Dennis v. Higgins*, 498 U.S. 439, 445 (1991)).

On the question of § 1983 challenges to state convictions in the federal courts, then, Justice Souter drew a clear line in *Heck* between those in custody, who have access to the federal courts using habeas corpus, and those not in custody, who would only have access using § 1983.¹²² This distinction between those limited, under the *Preiser-Heck* line of cases, to habeas corpus as their exclusive federal remedy and those with access to the federal courts under § 1983 reflects the differences between federal interference with custodial and non-custodial convictions. The habeas statute, with its “explicit policy of exhaustion,”¹²³ recognizes one set of policy concerns, § 1983 a different set of concerns. Justice Souter suggested that a § 1983 action for damages in federal court is “a significantly less disruptive remedy than an order compelling release from custody.”¹²⁴ In other words, habeas corpus relief affects state functions in ways that raise more serious federalism concerns than § 1983 challenges to state convictions by individuals not in custody. The Court’s holding in *Preiser* was largely based on the important interest of the states in administering their prisons.¹²⁵ A federal court order compelling the release of a prisoner from state custody is a substantial intervention in the state’s functions. In requiring exhaustion of state remedies in the habeas corpus statute, Congress explicitly recognized states’ interests and thus limited federal review of state convictions under habeas corpus. But, in Justice Souter’s view, federal courts can also review a state conviction when the plaintiff is “unaffected by the habeas statute”¹²⁶ and thus comes under the broad scope of § 1983. In this interpretation, neither federalism concerns nor Scalia’s “hoary principle” disfavoring collateral attacks can override the congressional policy underlying § 1983.

Justice Souter was unable to muster a majority of the Court, however, and thus *Heck* does not draw a distinction between those in custody and those not in custody. In a footnote to the opinion of the Court, Justice Scalia rejected Justice Souter’s argument in the following terms: “We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.”¹²⁷ *Heck*’s favorable-termination requirement, then, would apply both to state prison-

¹²² See *id.* at 503 (“I would not cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983.”).

¹²³ *Id.* at 503.

¹²⁴ *Id.* at 502.

¹²⁵ See *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1978) (“It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.”).

¹²⁶ *Heck*, 512 U.S. at 503 (Souter, J., concurring).

¹²⁷ *Id.* at 490 n.10.

ers in custody and those no longer (or never) in custody.¹²⁸ The fact that the latter group does not have access to a federal forum through habeas corpus—and thus may not have access to a federal forum at all—is largely irrelevant under *Heck*.¹²⁹ The reason for this is that *Heck* interprets habeas corpus as a limited exception to general common-law principle disfavoring collateral attack. Without the explicit authorization of the habeas corpus statute, *Heck* does not permit challenges to the validity of state convictions in federal court.

D. *Spencer v. Kemna*

In a more recent case, *Spencer v. Kemna*,¹³⁰ a majority of the current Court adopted Justice Souter's position on allowing § 1983 challenges to state convictions. Justice Souter did not write the opinion of the Court, however, and thus the legal effect of this unorthodox majority is unclear.¹³¹ *Spencer* involved a habeas petition that had been dismissed for mootness by the district court.¹³² *Spencer*, the habeas petitioner, was released on parole, but his parole was subsequently revoked and he was re-incarcerated. While in prison, he filed a habeas petition challenging the revocation of his parole. Before the district court reached the merits of his petition, however, *Spencer's* sentence expired and he was released.¹³³ The Supreme Court held that, because a revocation of parole rarely has any collateral consequences by itself, *Spencer's* habeas application had been rendered moot by the expiration of his term and his inability to show any continuing injuries as a result of the revocation of his parole.¹³⁴

¹²⁸ See, e.g., *Anderson v. County of Montgomery*, 111 F.3d 494, 499 (7th Cir. 1997) ("The fact that a plaintiff is no longer incarcerated has no bearing on the applicability of *Heck*."), *overruled by DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995) ("*Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated."); *White v. Phillips*, 34 F. Supp. 2d 1038, 1040 (W.D. La. 1998) ("If the favorable termination requirement is an element of the prima facie case . . . as Justice Scalia's common law analysis would have it, then the status of the petitioner, whether free or detained, matters not at all.").

¹²⁹ See *Anderson*, 111 F.3d at 499 ("That it may be difficult (perhaps in some cases—mostly due to a lapse of time—even impossible) to get a conviction reversed or expunged does not constitute a reason for bypassing the holding in *Heck*.").

¹³⁰ 523 U.S. 1 (1998).

¹³¹ Justice Souter concurred in *Spencer*. Three other Justices signed on to this concurrence—Justices O'Connor, Ginsburg, and Breyer—making four votes for his position on this issue. Justice Ginsburg filed a separate concurrence, in which she explained the reasons for the change in her position between *Heck* and *Spencer* on this issue. See *id.* at 21 (Ginsburg, J., concurring) (agreeing with Justice Souter's reasoning that § 1983 applies to those not in custody). The fifth Justice for Justice Souter's "majority" was Justice Stevens, who actually dissented from the Court's holding in *Spencer*. See *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as [Justice Souter] explains, that he may bring an action under 42 U.S.C. § 1983.").

¹³² See *id.* at 3-6 (describing the factual and procedural history of the case).

¹³³ See *id.*

¹³⁴ See *id.* at 18 (Souter, J., concurring) ("But mootness, however it may have come about, simply deprives us of our power to act . . .").

Justice Souter wrote separately to provide an added reason for the Court's holding in *Spencer*.¹³⁵ One of Spencer's arguments was that he would be deprived of a federal forum for demonstrating the illegality of his parole revocation if his habeas petition was declared moot because, under *Heck*, a person not in custody has no access to the federal courts.¹³⁶ In short, Spencer argued that he would be unable to satisfy the favorable-termination of *Heck* if his habeas petition were declared moot. Justice Souter argued in response: "*Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim For all that appears here, then, Spencer is free to bring a § 1983 action, and his corresponding argument for continuing habeas standing falls accordingly."¹³⁷

After explaining his reasons for concurring in the *Spencer* judgment, Justice Souter restated the position he had expressed in *Heck* on the relationship between the habeas statute and § 1983. Although *Heck* was "a simple way to avoid collisions at the intersection of habeas and § 1983,"¹³⁸ Justice Souter argued that the federal courts are "bound to recognize the apparent scope of § 1983 when no limitation [is] required for the sake of honoring some other statute or weighty policy, as in the instance of habeas."¹³⁹ Thus, a prisoner no longer in custody, like Spencer, or an individual who was never in custody for purposes of the habeas statute, should have access to the federal courts through a § 1983 action.¹⁴⁰ Or, as Justice Ginsburg stated succinctly in her concurrence: "Individuals without recourse to the habeas statute because they are not 'in custody' . . . fit within § 1983's 'broad reach.'"¹⁴¹

Justice Souter's concurrences in *Heck* and *Spencer*, then, would permit § 1983 actions challenging state convictions in federal court as long as the person bringing the action is not currently in custody and thus required to pursue habeas corpus as his or her exclusive federal remedy. Given that a majority of the current Court has expressed

¹³⁵ See *id.* ("I join the Court's opinion as well as the judgment, though I do so for an added reason that the Court does not reach, but which I spoke to while concurring in a prior case.").

¹³⁶ See *id.* at 19 (describing Spencer's argument that, under *Heck*, "holding his habeas claim moot would leave him without any present access to a federal forum to show the unconstitutionality of his parole revocation").

¹³⁷ *Id.* However, Justice Souter also adds that "[t]o be sure, the majority opinion in *Heck* can be read" in such a way as to require favorable termination of habeas proceedings before allowing Spencer to continue: "[T]he [*Heck*] majority acknowledged the possibility that even a released prisoner might not be permitted to bring a § 1983 action implying the invalidity of a conviction or confinement without first satisfying the favorable-termination requirement." *Id.* at 19-20. Apparently, on this issue Justice Souter would have limited the holding in *Heck* to the facts presented. See *id.* at 19 ("*Heck* did not present such facts . . .").

¹³⁸ *Id.* at 20 (internal quotation marks omitted).

¹³⁹ *Id.*

¹⁴⁰ See *id.* at 21 n.* ("The convict given a fine alone, however onerous, . . . would always be ineligible for § 1983 relief [under the alternative view].").

¹⁴¹ *Id.* (Ginsburg, J., concurring).

their agreement with this position, most of the federal courts that have addressed this issue since *Spencer* have held that an individual for whom habeas corpus relief is unavailable can bring a § 1983 action in federal court to challenge a state conviction.¹⁴² One federal court has even read Justice Souter's position to mean "that some federal remedy—either habeas corpus or § 1983—must be available."¹⁴³

Parts III through V of this Note further develop the argument for Justice Souter's position in *Heck* and *Spencer*. Part III argues that Justice Souter's position assumes a lack of parity between state and federal courts as defenders of federal rights. Justice Souter appears to take the position that a federal forum is preferable to a state forum where federal rights are concerned, and thus he can be understood as siding with a long line of case law and commentary on this important question. Part III argues that Justice Souter's position on this issue is well-supported by the empirical evidence on parity as well as historical, constitutional, and statutory considerations. Accepting this premise—that access to a federal forum is necessary for the protection of federal rights—requires the reconsideration of the preclusive effects of a prior state judgment, discussed in Part IV. Under the current law, individuals using § 1983 to challenge a state criminal conviction in federal court generally cannot relitigate issues decided against them in state court. If the Court is serious about providing access to a federal forum in such cases, however, it cannot grant such a sweeping preclusive effect to state-court judgments. Finally, Part V argues that concerns of judicial economy and finality do not outweigh the necessity of a federal forum. The fear of a flood of § 1983 actions is based on a flawed analogy to the large numbers of habeas petitions filed in the federal courts. Similarly, state governments have much less significant finality interests in cases involving non-custodial convictions than in convictions resulting in custody. In the final analysis, such concerns do not outweigh the important legislative purpose of § 1983, providing a federal forum for the protection of federal rights.

¹⁴² See, e.g., *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) ("A majority of the Justices of the Supreme Court have said that a prisoner who cannot challenge the validity of his conviction . . . by either appeal or postconviction procedure can do so by bringing a civil rights suit for damages under 42 U.S.C. § 1983."); *White v. Phillips*, 34 F. Supp. 2d 1038, 1038 (W.D. La. 1998) ("In light of the Supreme Court's disposition in the recent case of *Spencer v. Kemna*, . . . *Heck* . . . does not bar White's petition, and he may proceed with his case."); *Zupan v. Brown*, 5 F. Supp. 2d 792, 797 (N.D. Cal. 1998) ("The Court is persuaded by Justice Souter's reasoning in *Spencer* and *Heck*. It is unfair to require a person who is legally precluded from challenging his or her conviction or sentence on habeas grounds to demonstrate that the conviction or sentence has been overturned or invalidated."). But cf. *Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (rejecting the idea that dicta can overturn a clear precedent).

¹⁴³ *Jenkins v. Haubert*, 179 F.3d 19, 27 (2d Cir. 1999).

III. PARITY BETWEEN STATE AND FEDERAL COURTS

Justice Souter criticized the rule announced in *Heck* because it “would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not ‘in custody’ for habeas purposes.”¹⁴⁴ To apply *Heck* to these individuals would deny them “any federal forum for claiming a deprivation of federal rights.”¹⁴⁵ Justice Souter argues instead that the purpose of § 1983 is to provide a federal forum for claimed deprivations of federal rights:

It would be an entirely different matter . . . to shut off federal courts altogether to claims that fall within the plain language of § 1983. “[I]rrespective of the common law support” for a general rule disfavoring collateral attacks, the Court lacks the authority to do any such thing absent unambiguous congressional direction where, as here, reading § 1983 to exclude claims from federal court would run counter to “§ 1983’s history” and defeat the statute’s “purpose.”¹⁴⁶

Importantly, Justice Souter’s argument is premised on a broad reading of the purpose of § 1983—“to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.”¹⁴⁷ In other words, Justice Souter argues that the role of the federal courts under § 1983 is to guard the people of the states against violations of their federally protected rights by the state governments themselves. In arguing that a federal forum is necessary to protect federal rights, Justice Souter implicitly calls into question the fitness of the state courts as guardians of those rights. If Justice Souter started from the premise that the state courts would adequately protect the federal rights of state criminal defendants, then it would make little sense for him to write separately to insist on access to a federal forum merely to confirm the conclusions of the state courts.

The first question that must be addressed, then, is the relative fitness of state courts for this important task. If state courts are inferior to federal courts in protecting federal rights, then it makes sense to argue that § 1983 should be interpreted expansively to provide individuals claiming official deprivation of those rights access to a federal forum. If, however, there is no significant difference between the state and federal courts in their ability or willingness to protect federal rights, then access to a federal forum is not essential or even desirable, given concerns of federal-state comity and judicial economy.

¹⁴⁴ *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring). For a list of such individuals, see *supra* note 115.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 501 (quoting *Wyatt v. Cole*, 504 U.S. 158, 158 (1992)).

¹⁴⁷ *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

There has been a long debate in the scholarly literature on whether there is parity between state and federal courts in protecting federal rights.¹⁴⁸ Commentators have long noted the inconsistent nature of the Court's discussions of parity.¹⁴⁹ In many cases, the Court has emphasized "the importance of federal tribunals as the primary guardians of federal rights."¹⁵⁰ But there is "an equally long, equally well respected list of cases maintaining the contradictory position: state courts have the same responsibility toward federal claims that federal courts have and state courts cannot be presumed to do a less competent job."¹⁵¹ When the Court has adopted the view that there is parity between state and federal courts, it has at the same time rejected the necessity of a federal forum, holding that state courts adequately protect federal rights.¹⁵² In doing so, the Court has often stressed other values, especially federal-state comity.¹⁵³ The role of comity in this debate, however, cannot be separated from the issue of parity.¹⁵⁴ The reason for this is straightforward: if there is not parity between federal and state courts, then the federal courts' responsibility to enforce constitutional protections must outweigh concerns about comity.¹⁵⁵ One will be concerned with comity, or conclude that comity outweighs the necessity of a federal forum, then, only if one already believes that there is parity between the state and federal courts.

¹⁴⁸ See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (2d. ed. 1990) (examining the struggle among courts in the federal system); Paul H. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (analyzing the role of state courts in federal constitutional law); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (arguing that litigants be allowed to choose their forum for constitutional claims); Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981) (describing areas of complexity in federal jurisdictional issues); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (comparing state and federal courts to demonstrate the preference for federal courts in constitutional matters); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988) (agreeing with Chemerinsky's conclusion, but criticizing his analysis); Michal E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts*, 10 HASTINGS CONST. L.Q. 213 (1983) (discussing the results of a study supporting the existence of parity).

¹⁴⁹ See Chemerinsky, *supra* note 148, at 246 ("What is most striking about the Supreme Court's statements about parity is their inconsistency. There are as many declarations that state courts are equal to federal courts as there are statements that federal courts are superior to state courts in protecting federal rights."); Field, *supra* note 148, at 688 (noting the "peculiar schizophrenia in the case discussions of the policies favoring state or federal forums").

¹⁵⁰ Field, *supra* note 148, at 684.

¹⁵¹ *Id.* at 685-86.

¹⁵² See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980).

¹⁵³ See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

¹⁵⁴ See Chemerinsky, *supra* note 148, at 288 (arguing that "comity cannot operate as a principle . . . independent of parity").

¹⁵⁵ See *id.* ("If there is not parity, then federal jurisdiction is justified regardless of the insult or friction.").

A. Arguments Against Parity

In *Heck* and *Spencer*, Justice Souter's argument falls within the "lack of parity" line of cases. Although the Supreme Court has not consistently adhered to this position, it has been the dominant position in the scholarly literature on the subject. Many arguments have been advanced against the parity of state and federal courts, including the relative technical expertise of state and federal judges, the judicial independence of federal judges, historical experience with state courts, and the political motivations of those seeking to limit access to a federal forum.

The first argument against parity is that federal judges are more competent to deal with such cases than state judges because of both the relative capacities of the judges themselves and various institutional characteristics of the federal courts.¹⁵⁶ By comparison to the number of state judges, the federal bench is relatively small and drawn from an elite pool of candidates.¹⁵⁷ In addition, the more exclusive nature of the federal bench increases its prestige and thus, all else being equal, the quality of those appointed to it.¹⁵⁸ Other factors weighing against parity include the greater compensation provided for federal judges, the relatively lighter caseload of the federal courts, and the higher quality of federal law clerks.¹⁵⁹ In sum, federal courts are to be preferred to state courts because federal judges will have, on average, more knowledge about federal issues, more expertise in dealing with them,¹⁶⁰ and more time and support in carefully considering them.

In addition, the technical competence of federal judges is also related to the manner of their selection, which is more likely to focus on the professional competence of the appointee than the selection processes for state judges.¹⁶¹ As one scholar has argued, "because of

¹⁵⁶ See Neuborne, *supra* note 148, at 1121.

¹⁵⁷ See *id.* ("Because it is relatively small, the federal trial bench maintains a level of competence in its pool of potential appointees which dwarfs the competence of the vastly larger pool from which state trial judges are selected.")

¹⁵⁸ See Chemerinsky, *supra* note 148, at 276 ("The smaller number of federal judges enhances the prestige of serving on that bench and thus attracts the most qualified individuals to federal judgeships.")

¹⁵⁹ See *id.* at 276-77 (analyzing the relationship between the quality of judges and institutional factors); Neuborne, *supra* note 148, at 1121-22 (citing the quality of federal law clerks and the lighter caseload of federal judges as contributing to the competency of federal judges).

¹⁶⁰ See REDISH, *supra* note 148, at 2 ("[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law.")

¹⁶¹ See Chemerinsky, *supra* note 148, at 276 ("The federal selection process, which generally includes bar association review, evaluation by Senators, and scrutiny by the incumbent administration, is thought to yield more uniformly qualified judges than the state processes."); Neuborne, *supra* note 148, at 1122 ("While the federal selection process is not without flaws, it does focus substantially on the professional competence of the nominee."). But cf. Solimine & Walker, *supra* note 148, at 228 (making the point that "the selection process for federal judges has always been, and continues to be 'political' in nature").

the process of presidential selection and Senate confirmation, we can usually be assured of a floor of competence in the federal judiciary."¹⁶² The implication is that such a "floor of competence" is missing in some state courts. Some commentators have even argued that the selection processes for state judges, which generally involve judicial elections at some point, may actually deter qualified candidates from seeking judicial appointments: "[A]ny electoral process will discourage a very large number of well qualified persons from seeking judicial office."¹⁶³ Given the weight of these considerations, even those scholars opposed to providing a federal forum in many cases,¹⁶⁴ or who argue that the lack of parity does not necessarily translate into different case outcomes,¹⁶⁵ have generally conceded that federal judges are of higher quality, on average, than state judges.¹⁶⁶ The higher quality of the federal bench counsels in favor of granting individuals access to a federal forum for the adjudication of their federal rights.

The judicial independence of the federal judiciary is a second reason for the superiority of federal judges to state judges.¹⁶⁷ Federal judges serve during good behavior,¹⁶⁸ and thus enjoy significant insulation from majoritarian pressures.¹⁶⁹ State judges, on the other hand, are subject to greater majoritarian pressures because they must generally seek re-election. Because enforcing the federally protected rights of individuals who have been convicted of state crimes will typically be politically unpopular, the responsibility for protecting

¹⁶² REDISH, *supra* note 148, at 2.

¹⁶³ RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 46 (1985); *see also* Chemerinsky, *supra* note 148, at 276 ("[T]he existence in almost all states of electoral selection or review of judges is thought to deter some highly qualified individuals who do not want to participate in such a political process.").

¹⁶⁴ *See* Bator, *supra* note 148, at 608 (conceding that "once it is established that the federal courts may, on balance, do a better job, the argument that a plaintiff should be free to choose the federal forum seems especially powerful").

¹⁶⁵ *See* Solimine & Walker, *supra* note 148, at 228 (conceding that "the quality of federal judges . . . is clearly higher").

¹⁶⁶ In an attempt to avoid this problem, Professors Solimine and Walker argue that the proper comparison is not between individual federal and state judges, but "between federal judges and the entire state court system, including appellate courts." *Id.* at 226. *See also* Bator, *supra* note 148, at 630 (arguing, similar to Solimine & Walker, that the relevant comparison is "between the federal courts and the entire hierarchy of state courts, including the highest state appellate courts").

¹⁶⁷ *See, e.g.,* REDISH, *supra* note 148, at 2 ("[B]ecause federal judges are guaranteed the independence protections of Article III, while many state judges are forced to stand for election, we can generally be assured of a greater degree of independence of the federal judiciary from external political forces."); Neuborne, *supra* note 148, at 1127-28 (arguing that federal judges serving during good behavior are "as insulated from majoritarian pressures as is functionally possible," while state judges elected for a fixed term are more vulnerable to such pressures).

¹⁶⁸ *See* U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour.").

¹⁶⁹ This argument dates back to *THE FEDERALIST* No. 78 (Alexander Hamilton).

such rights should be placed in judges less subject to majoritarian pressures.

A third argument against parity is that state courts have historically failed to protect federal rights, most notably during Reconstruction in the nineteenth century and the civil-rights era in the twentieth.¹⁷⁰ This historical argument assumes, to some extent, that the state courts' past failures to protect federal rights are evidence of a continuing inadequacy in that regard, an assumption that some scholars have questioned.¹⁷¹ There is empirical evidence, however, that state courts have not complied with Supreme Court precedents regarding important federal rights in recent decades. One of the leading works on the impact of Supreme Court decisions, for example, concludes that the due process revolution of the 1960s was "The Revolution That Wasn't."¹⁷² The Warren Court was unable to achieve its goals in this area "because political support was often lacking and seldom were the conditions necessary for change present. What was overlooked was that organizations, be they prison systems, police departments, or lower courts, are often unwilling to change."¹⁷³ There are reasons to think, then, that the lessons of history on the inadequacy of state courts in protecting federal rights are still relevant today.¹⁷⁴

Finally, it could be argued that the effort of conservatives in recent decades to shift the adjudication of controversial issues from federal courts to the state courts provides some evidence that state courts are less sympathetic fora for the protection of federal rights, at least if one accepts the broad definition of those rights established by the Supreme Court in the last forty years.¹⁷⁵ Professor Neuborne compares contemporary arguments claiming that parity exists to the pretextual "outcome-neutral" arguments used in the past to justify

¹⁷⁰ See Chemerinsky, *supra* note 148, at 243 ("[S]tate resistance to civil rights, especially in the South, renewed distrust of the state courts.").

¹⁷¹ See Solimine & Walker, *supra* note 148, at 225 ("In short, it can be argued that whatever the historical scorecard of state courts in enforcing federal rights, such a record has only tangential relevance to the modern debate over parity.").

¹⁷² GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 334 (1991).

¹⁷³ *Id.*

¹⁷⁴ See *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1137 (1977) [hereinafter *Developments*] ("[M]any of the concerns which prompted the enactment of the Civil Rights Act of 1871 have contemporary analogues . . .").

¹⁷⁵ For a discussion of the effect of the expansion of federally protected rights in the post-war era, see Chemerinsky, *supra* note 148, at 242-43. Professor Chemerinsky points to the effects of both "the application of the Bill of Rights to the states through the incorporation process," which "greatly expanded the opportunity for state violations of constitutional liberties," and "the Supreme Court's expansion of individual liberties," which "created more opportunities for claims that states had violated constitutional rights," as reasons for the increased importance of the issue of parity since the 1950s. *Id.*

outcome-determining forum allocations.¹⁷⁶ He argues that, in more recent decades, "[l]awyers seeking to enforce the Bill of Rights against the states have sought to use the lower federal courts as the primary implementing forum," while lawyers representing local and state governments have attempted to litigate such matters in state court.¹⁷⁷ Similarly, some conservative members of Congress have sought to reverse controversial Supreme Court precedents by depriving the federal courts of jurisdiction over those issues, assuming that the state courts will be a more friendly forum for the outcomes they prefer.¹⁷⁸ In short, lack of parity appears to be the working assumption of a number of legal and political actors. To the extent that this working assumption is supported by experience, it weighs heavily against the conclusion that there is parity between state and federal courts in protecting federal rights.

Overall, the weight of the evidence points toward a lack of parity between state and federal courts in terms of their ability and willingness to protect federal rights from violation. From this conclusion, it is only a small step to argue, as Justice Souter does in his *Heck* and *Spencer* concurrences, that § 1983 challenges to state convictions in federal court should be permitted: individuals claiming a violation of their federal rights should have access to a federal forum because that forum will be more likely to protect their rights than the state forum. In this way, Justice Souter's broad reading of § 1983 provides added protection for individual rights by making available a federal remedy for their violation by state officials.

The greater protection afforded to federal rights in federal courts, however, may be the result, in large part, of historical contingencies rather than actual characteristics of federal courts or judges. As Chemerinsky has pointed out, "there is no reason that better judges are necessarily more disposed toward safeguarding individual liberties."¹⁷⁹ The "psychological set"¹⁸⁰ or ideological dispositions of federal judges toward their role as guardians of federal rights changes over time. There may be times in history when federal courts may

¹⁷⁶ See Neuborne, *supra* note 148, at 1106-08.

¹⁷⁷ *Id.* at 1108. In this context, Professor Neuborne was drawing on his personal experience as a practicing civil-liberties lawyer. In this capacity, he assumed that "persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court." *Id.* at 1115-1116.

¹⁷⁸ See Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129-31 (1981) (discussing congressional efforts to restrict the jurisdiction of the federal courts in an effort to affect case outcomes); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 617 (1991) ("[E]ach [side in the parity debate] pursues the litigating edge it can obtain by having the issues heard in a forum sympathetic to its ends.").

¹⁷⁹ Chemerinsky, *supra* note 148, at 278.

¹⁸⁰ This term is used by Neuborne, *supra* note 148, at 1124-26.

not actually protect federal rights any better than their state counterparts, and it may be possible that in some historical contexts, state courts may be more protective than federal courts.¹⁸¹ This suggests that the parity (or lack thereof) of the state and federal courts at any given point in time cannot be dispositive, despite the attention scholars have paid to it.¹⁸² The next subsection presents an argument for the superiority of federal courts in protecting federal rights that is not dependent on an empirical assessment of the parity of the state and federal courts.

B. Does the Court's Assessment of Parity Matter?

Alternatively, it can be argued that concerns about the parity of state and federal courts are irrelevant for determining whether a federal forum should be available for the adjudication of federal rights. On this view, what matters is the theory of parity embodied in the Constitution and federal law; the Court's assessment of parity would then have to give way to the determination of the Constitution or Congress (or both). If the Constitution or Congress has determined that state courts are equally suited to the adjudication of federal rights, then the courts should not override that assessment with their own determination of the issue.

Justice Scalia has argued that "the theory . . . that a federal forum must be afforded for every federal claim of a state criminal defendant"¹⁸³ "misperceives the basic structure of our national system."¹⁸⁴ Justice Scalia's argument is premised in part on his interpretation of the Madisonian Compromise, which left the creation of lower federal courts to Congress's discretion.¹⁸⁵ By not creating lower federal

¹⁸¹ See Chemerinsky, *supra* note 148, at 274 (pointing to "changes in the composition of the federal judiciary" in the 1980s as a reason to expect the federal bench to be less sympathetic to claims that federally protected rights have been violated). Even earlier, however, changes in Supreme Court membership led to decisions making access to federal fora more difficult, and these decisions prompted some jurists to suggest that civil libertarians might turn to state courts and even state constitutions for the protection of civil liberties. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) ("[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach."); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 261, 263 (David M. O'Brien ed., 1997) (arguing that "a state court . . . put things in their logical sequence and . . . examine its state law first, before reaching a federal issue").

¹⁸² To a great extent, this is the conclusion that the scholarly debate has reached in recent years. In 1991, leading scholars on parity participated in a symposium on the issue, and the general conclusion was that "[n]ow is the time to lay the parity debate to rest." Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593 (1991). As an alternative, Professor Chemerinsky suggested that the parity of the state and federal courts was a "question[] for Congress" rather than the courts to decide. *Id.* at 601. This argument is addressed *infra* Part III.B.

¹⁸³ *Withrow v. Williams*, 507 U.S. 680, 721 (1992) (Scalia, J., concurring in part and dissenting in part).

¹⁸⁴ *Id.* at 722-23.

¹⁸⁵ Professor Farrand summarizes the Madisonian Compromise in the following terms:

courts, the Constitution implies that the state courts are proper fora for the adjudication of federal rights; according to Justice Scalia: "It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not)."¹⁸⁶ In other words, parity is constitutionally mandated: the Constitution posits that state courts are not "second-rate instruments" for the protection of federal rights, and thus it is erroneous to extend a federal forum to an individual who has access to an equally competent state forum.¹⁸⁷

Justice Scalia's assessment of the Constitution's view of parity, however, fails to take into account the "vast transformation [of] the concepts of federalism" following the Civil War.¹⁸⁸ Although it is true that "[i]n the early days of the Republic, federalism was viewed as a means of protecting individual rights from the tyranny of a unified central government,"¹⁸⁹ events following the Civil War revealed that state courts were unwilling to protect the federal rights of freedmen and their white supporters.¹⁹⁰ Thus, the transformation of

That there should be a national judiciary was readily accepted by all. . . . The difficulty lay in the fact that they were regarded as an encroachment upon the rights of the individual states. It was claimed that the state courts were perfectly competent for the work required, and that it would be quite sufficient to grant an appeal from them to the national supreme court. The decision that was reached was characteristic of much of the later work [T]he matter was compromised: inferior courts were not required, but the national legislature was *permitted* to establish them.

MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79-80 (1913).

¹⁸⁶ *Withrow*, 507 U.S. at 723.

¹⁸⁷ *But cf.* Akhil Reed Amar, *Comment: Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 646 (1991) ("The Constitution itself . . . presumes . . . disparity between federal and state courts—at least where the question is which court may be given the last word on issues of federal law."). Professor Amar also notes that the Constitution vests the judicial power in a federal judiciary, which does not appear to include state courts. *Id.* at 649. *See* U.S. CONST. art. III, § 1 ("The 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.").

¹⁸⁸ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

¹⁸⁹ *Developments*, *supra* note 174, at 1135.

¹⁹⁰ *See, e.g.,* *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled in part by* *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). In *Monroe*, the Court stated: It is abundantly clear that one reason the [1871 act] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. There can be little doubt that "the state agencies" in question included the state courts. One supporter of the 1871 act was quoted in *Monroe* to the effect that

[I]t is a fact . . . that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples.

Id. at 178 (quotation marks omitted).

American law and federalism occurring after the Civil War amounts to a second understanding of parity, one found in both the Constitution, in the form of the post-Civil War amendments,¹⁹¹ and in federal statutes, including § 1983.¹⁹² This transformation was summarized in *Mitchum v. Foster*: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"¹⁹³ This statement of legislative purpose in enacting § 1983 is often cited in opinions defending the necessity of a federal forum.¹⁹⁴ In sum, what Justice Scalia misunderstands about the basic structure of our national system is that the Constitution of the late-eighteenth century was radically transformed in the 1860s and 1870s, and that the Reconstruction Congresses effected this transformation by using their constitutional powers to create and extend federal-court jurisdiction in order to protect federal rights, even against violation by the state governments themselves.¹⁹⁵

Not surprisingly, Justice Souter advances this theory of § 1983's legislative purpose in his *Heck* concurrence.¹⁹⁶ Justice Souter argues in *Heck* that the Court should not use the common law to thwart Congress's purpose in enacting § 1983. After pointing to the legislative intent behind § 1983, Justice Souter argues that there must either be a

¹⁹¹ See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 82 (1991) (arguing that the post-Civil War amendments were a "quantum leap . . . in nationalizing the protection of individual rights").

¹⁹² Dissenting in *Preiser v. Rodriguez*, 411 U.S. 475, 513-514 (1973), Justice Brennan argued:

By enactment of the Ku Klux Klan Act in 1871, and again by the grant in 1875 of original federal-question jurisdiction to the federal courts, Congress recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under federal law. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, ' . . . to guard, enforce and protect every right granted or secured by the Constitution of the United States'"

Id. (alteration in original) (citations omitted) (quoting *Zwicker v. Koota*, 389 U.S. 241, 248 (1967)).

¹⁹³ 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

¹⁹⁴ See, e.g., *Preiser*, 411 U.S. at 516 (Brennan, J., dissenting) (citing *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

¹⁹⁵ See *Developments*, *supra* note 174, at 1142 ("[T]he lower federal courts emerged from the Reconstruction period with significantly greater importance, supplanting the state courts as the principal forum for enforcing federal law.").

¹⁹⁶ See *Heck v. Humphrey*, 512 U.S. 477, 501 (1994) (Souter, J., concurring) (stating that "the very purpose of" § 1983 [is] "to interpose the federal courts between the States and the people, as guardians of the people's federal rights") (quoting *Mitchum*, 407 U.S. at 242).

statute limiting the reach of § 1983¹⁹⁷ or a "policy reflected in a congressional enactment that would justify" denying an individual access to a federal forum.¹⁹⁸ Unable to find any statute or underlying congressional policy that would deny a federal forum to individuals claiming official violations of their federal rights, Justice Souter concludes that the Court cannot deny such access based on its own understanding of the common law:

[A]bsent such a statutory policy, surely the common law can give us no authority to narrow the "broad language" of § 1983, which speaks of deprivations of "any" constitutional rights, privileges, or immunities, by "[e]very" person acting under color of state law, and to which "we have given full effect [by] recognizing that § 1983 'provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'"¹⁹⁹

Justice Souter's position is relatively straightforward. Congress has determined that, when it comes to protecting federal rights, federal courts are superior to state courts, and the Court should not override Congress's determination that access to a federal forum is therefore necessary to vindicate federal rights.

Subsequently, Justice Souter repeated this argument in *Spencer v. Kemna*, and a majority of the Court apparently agreed with him.²⁰⁰ This is significant because it may signal that the Court is changing direction on the issue of the necessity of a federal forum to protect federal rights. Over the past few decades, the Court has significantly narrowed access to federal fora when challenges to state functions have been at issue. This has been true in habeas corpus cases, in cases involving other federal laws and constitutional provisions, and in other § 1983 cases.²⁰¹ In all these areas, federalism concerns—

¹⁹⁷ See *Heck*, 512 U.S. at 502 (arguing that such "a result [would be] unjustified by the habeas statute or any other post-§ 1983 enactment."). This was essentially the argument of *Preiser*. See *supra* notes 72-82 and accompanying text.

¹⁹⁸ *Heck*, 512 U.S. at 502.

¹⁹⁹ *Id.* (alterations in original) (quoting *Dennis v. Higgins*, 498 U.S. 439, 443, 445 (1991)).

²⁰⁰ See *supra* notes 130-41 and accompanying text.

²⁰¹ See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (involving Fair Labor Standards Act allegations brought by state probation officers); *College Sav. Bank v. Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 119 (1999) (involving Lanham Act claim against state-administered tuition pre-payment program); *Allen v. McCurry*, 449 U.S. 90 (1980) (holding that a criminal defendant's inability to obtain federal habeas review of his Fourth Amendment claim did not render the collateral estoppel doctrine inapplicable to his § 1983 suit); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."); *Younger v. Harris*, 401 U.S. 37, 53-54 (1971) (holding that a federal court cannot enjoin a state prosecutor's enforcement of a state statute solely on the basis of the possible unconstitutionality of a statute on its face).

comity between the federal and state courts, respect for state functions, or the residual sovereignty maintained by the states under the Constitution—have trumped other concerns, including, in many cases, providing a federal forum for the adjudication of federally protected rights. Justice Souter's argument for a federal forum for individuals who have no access to habeas review implicitly rejects the parity of state and federal courts as fora for the protection of federal rights. Whether this position is based on an empirical assessment of the state and federal courts, or on an historical understanding of Congress's purposes in passing § 1983, it indicates that Justice Souter and other members of the current Court are rethinking an issue long thought settled in the law of federal courts—the assumption of parity between the state and federal courts. If this assumption, which forms the basis for a number of important legal doctrines, is reconsidered and rejected, then a number of related doctrines must be reconsidered and rejected, as well.²⁰²

IV. ISSUE PRECLUSION

One of the most important of these related doctrines is the application of issue preclusion to § 1983 cases.²⁰³ Under the holding in *Allen v. McCurry*,²⁰⁴ a § 1983 plaintiff in federal court seeking to relitigate an issue already decided in a state criminal trial will be precluded by the state court's holding on that issue. Thus, *Allen* blocks such § 1983 actions as surely as would *Heck*'s favorable-termination requirement. In one sense, the *Allen* and *Heck* rules cover much the same ground, because, under *Heck*, a § 1983 plaintiff must first secure a favorable termination in another forum, most likely a favorable state ruling. In both *Allen* and *Heck*, then, the Court deferred to state courts, assuming that they would adequately protect the federal rights of potential § 1983 plaintiffs. But if *Heck* should not apply to those without access to habeas corpus, as Justice Souter argues, then *Allen*'s issue preclusion rule should not apply either, as it would have much

²⁰² At this point, it is unclear whether the fact that a majority of the current Court has determined that a federal forum is necessary under § 1983 in cases such as those discussed here points toward a change of direction on federalism issues or whether *Spencer* is an anomaly.

²⁰³ In fact, one Justice suggested, in dissent, that § 1983 challenges to state convictions would depend on the Court's treatment of the res judicata or issue preclusion issue:

The Court has never expressly decided whether and in what circumstances § 1983 can be invoked to attack collaterally state criminal convictions. *The resolution of this general problem depends on the extent to which, in a § 1983 action, principles of res judicata bar relitigation in federal court of constitutional issues decided in state judicial proceedings to which the federal plaintiff was a party.*

Ellis v. Dyson, 421 U.S. 426, 440 (1975) (Powell, J., dissenting) (emphasis added).

²⁰⁴ 449 U.S. 90 (1980). Before the Court decided *Allen*, a scholarly literature on the propriety of applying res judicata principles to § 1983 cases had developed. See, e.g., William H. Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U. L. REV. 859 (1976) (arguing that res judicata should not be applied in § 1983 cases).

the same effect. *Allen*'s application of issue preclusion in such cases must be rejected if the Court accepts the premise that access to federal court is necessary to protect federal rights.

The *Allen* Court explicitly rejected the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court."²⁰⁵ The Court based this rejection, in large part, on its interpretation of § 1983: "[N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims."²⁰⁶ The Court concluded that the idea that a federal forum is necessary was "hardly a legal basis at all, but rather [based in] a general distrust of the capacity of the state courts to render correct decisions on constitutional issues."²⁰⁷ The Court rejected this premise, pointing to its recent decisions expressing confidence in the parity of state courts as fora for the protection of federal rights.²⁰⁸ The Court also noted in *Allen* that federal-state preclusion "promote[s] the comity between state and federal courts,"²⁰⁹ further evidence that the decision was firmly based in the assumption of parity between state and federal courts.

The *Allen* Court's analysis, however, is flawed by its anachronistic reading of the legislative intent behind § 1983. These flaws stem from the *Allen* Court's view that § 1983 conflicts with the Full Faith and Credit Act, which requires federal courts to give the same preclusive effect to state judgments as would the courts of the state in question.²¹⁰ Under this view, a broad reading of § 1983, allowing relitigation in federal court of issues already decided in state court, would partially repeal the Full Faith and Credit Act.²¹¹ Citing the interpretive principle that "repeals by implication are disfavored,"²¹² the Court held that the legislative history of § 1983 "lends only the most equivocal support" to the argument that § 1983 was intended to over-

²⁰⁵ *Allen*, 449 U.S. at 103.

²⁰⁶ *Id.* at 103-04.

²⁰⁷ *Id.* at 105.

²⁰⁸ See *id.* (citing *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1975), and other cases). The Court noted that *Stone* presented "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Id.*

²⁰⁹ *Allen*, 449 U.S. at 96.

²¹⁰ 28 U.S.C. § 1738 (1994). The statute reads, in part: "[J]udicial proceedings [of any court of any state] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State" *Id.*

²¹¹ See *Allen*, 449 U.S. at 97-99 (discussing the conflict between a broad reading of § 1983 and the Full Faith and Credit Act).

²¹² *Id.* at 99.

ride the dictates of the Full Faith and Credit Act.²¹³ The problem with this reading of § 1983 as conflicting with the Full Faith and Credit Act is that the drafters of § 1983 could not have thought, in 1871, that the two laws were in conflict with each other. As Justice Blackmun pointed out in his *Allen* dissent, “at the time § 1983 was passed, a nonparty’s ability, as a practical matter, to invoke collateral estoppel was nonexistent.”²¹⁴

Allen largely ignores the traditional requirement of “mutuality of estoppel,” which the authors of § 1983 would have taken for granted.²¹⁵ Mutuality of estoppel is the traditional common-law rule that “a judgment was binding only on parties and persons in privity with them, and [that] a judgment could be invoked only by parties and their privies.”²¹⁶ Thus, under the common law of 1871, state officials sued in a subsequent § 1983 action would have been unable to defend themselves by invoking a state-court judgment that they had not violated the § 1983 plaintiff’s rights, unless they were “in privity” with the state. Although state officials might have been able to raise this argument in federal court in the 1880s or 1890s, it is unlikely that such an argument would have prevailed.²¹⁷ The better conclusion is that of Justice Blackmun, who dissented in *Allen*: “no preclusive effect could arise out of a criminal proceeding that would affect subsequent *civil* litigation.”²¹⁸ Thus, the drafters of § 1983 “could not have anticipated” the preclusive effects of state criminal proceedings,²¹⁹ and there is no difficulty in reading § 1983 as consistent with the Full Faith and Credit Act. The fact that the statutes appeared to be in conflict in 1980 indicates nothing about the intentions of the drafters of § 1983 in 1871.

Once the apparent conflict between § 1983 and the Full Faith and Credit Act is resolved in this way, § 1983’s legislative purpose

²¹³ *Id.*

²¹⁴ *Id.* at 114 (Blackmun, J., dissenting). See also Theis, *supra* note 204, at 866 (“Not surprisingly, the [legislative] debates [in 1871] make no mention of res judicata questions. . . . However, the remarks in support of the legislation suggest that the debaters would not have approved of the application of an expansive notion of res judicata in actions brought under the legislation eventually adopted.”).

²¹⁵ The *Allen* Court largely ignores this difficulty, but does note that “the requirement of mutuality of estoppel was still alive in the federal courts until well into this century, . . . [and thus] the drafters of the 1871 Civil Rights Act . . . may have had less reason to concern themselves with rules of preclusion than a modern Congress would.” *Allen*, 449 U.S. at 97. See also Theis, *supra* note 204, at 866 n.38 (“Identity of the parties was a requirement of collateral estoppel at that time [1871].”).

²¹⁶ WRIGHT ET AL., *supra* note 45, § 4463.

²¹⁷ See *id.* (discussing the traditional “narrow” exception to the mutuality of estoppel requirement).

²¹⁸ *Allen*, 449 U.S. at 114 (Blackmun, J., dissenting).

²¹⁹ See *id.* at 114-15 (“Thus, the 42d Congress could not have anticipated or approved that a criminal defendant, tried and convicted in state court, would be precluded from raising against police officers a constitutional claim arising out of his arrest.”).

must dominate the analysis. Justice Blackmun argued in his *Allen* dissent that "Congress consciously acted in the broadest possible manner"²²⁰ in passing § 1983 because "justice was not being done in the States then dominated by the Klan."²²¹ In that context "it seems senseless to suppose that"²²² Congress intended state court proceedings to preclude access to a federal forum for the adjudication of federal rights, given the inability or unwillingness of the state courts to protect federal rights at that time.²²³ This version of the legislative history leads to the conclusion that "§ 1983 embodies a strong congressional policy in favor of federal courts acting as the primary and final arbiters of constitutional rights,"²²⁴ regardless of the availability of a state forum.²²⁵ Such a holding is the only one that makes sense if, in the much-quoted language of *Mitchum v. Foster*, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights."²²⁶ Justice Blackmun's *Allen* dissent, then, appears to be based on the same understanding of § 1983 as Justice Souter's position in his *Heck* and *Spencer* concurrences.

Justice Souter did not directly address the effect of *Allen* on his position in *Heck*, but there is some indirect support for the reading offered here. After stressing the importance of Congress's intent that a federal forum be available, Justice Souter offered the following hypothetical:

Consider the case of a former slave framed by Ku Klux Klan-controlled law-enforcement officers and convicted by a Klan-controlled state court of, for example, raping a white woman; and suppose that the unjustly convicted defendant did not (and could not) discover the proof of unconstitutionality until after his release from custody. If it were correct to say that § 1983 independently requires a person not in custody to establish the prior invalidation of his conviction, it would have been equally right to tell the former slave that he could not seek federal relief even against the law-enforcement officers who framed him unless he first managed to convince the state courts that his conviction was unlawful. That would be a result hard indeed to reconcile either with the purpose of §

²²⁰ *Id.* at 109.

²²¹ *Id.* at 109-10.

²²² *Id.* at 110.

²²³ *See id.* ("[I]t seems senseless to suppose that [Congress] would have intended the federal courts to give full preclusive effect to prior state adjudications. That supposition would contradict their obvious aim to right the wrongs perpetuated in [the state] courts.").

²²⁴ *Id.*

²²⁵ *See id.* ("Congress passed the legislation in order to substitute a federal forum for the ineffective, although plainly available, state remedies . . .") (citation omitted).

²²⁶ *Allen*, 449 U.S. at 111 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

1983 or with the origins of what was “popularly known as the Ku Klux Klan Act,” the statute having been enacted in part out of concern that many state courts were “in league with those who were bent upon abrogation of federally protected rights.”²²⁷

Although Justice Souter’s immediate concern in this passage is to reject *Heck*’s favorable-termination requirement in favor of opening up access to a federal forum, this hypothetical—involving someone convicted of a state crime but subsequently released, prior to obtaining the information needed to file a habeas petition—appears to require relitigation of issues previously decided in the state courts. Like *Heck*’s favorable-termination requirement, *Allen*’s application of modern issue-preclusion rules to § 1983 actions limits the access to a federal forum of those, like the individual in the hypothetical, whose federally protected rights have been violated. Given that Justice Souter’s reading of the purposes of § 1983 cannot be squared with a favorable-termination requirement, it cannot be squared with the application of issue preclusion that would have effectively the same result.

Interestingly, following this hypothetical, Justice Souter cites the legislative history of § 1983 to the effect “that, under the Civil Rights Act of 1871, ‘the Federal Government has a right to set aside . . . action of the State authorities’ that deprives a person of his Fourteenth Amendment rights.”²²⁸ Under this broad reading of the statute’s purposes, then, the Forty-Second Congress actually intended for the federal courts to use § 1983 to set aside state convictions if those convictions violated the federal rights of criminal defendants. This reading of § 1983 is premised on exactly the same “general distrust of the capacity of the state courts to render correct decisions on constitutional issues” that the *Allen* Court rejected.²²⁹ Thus, as the Second Circuit has recently interpreted Justice Souter’s position, it makes sense to argue that “some federal remedy—either habeas corpus or § 1983—must be available.”²³⁰

Following this logic, then, issue preclusion, like the favorable-termination requirement, must give way before Congress’s purpose in ensuring access to a federal forum for those claiming an official vio-

²²⁷ *Heck v. Humphrey*, 512 U.S. 477, 501-02 (1994) (Souter, J., concurring) (quoting *Collins v. Hardyman*, 341 U.S. 651, 657 (1951); *Mitchum*, 407 U.S. at 240).

²²⁸ *Id.* at 502 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 577 (1871) (statement of Sen. Trumbull)).

²²⁹ *Allen*, 449 U.S. at 105.

²³⁰ *Jenkins v. Haubert*, 179 F.3d 19, 27 (2d Cir. 1999) (holding that a § 1983 suit by a prisoner challenging the validity of a disciplinary or administrative sanction that does not affect the overall length of the prisoner’s confinement is not barred by the *Heck* rule).

lation of their federal rights.²³¹ In the case of both issue preclusion and favorable termination, Congress's determination that a federal forum is necessary for the protection of federal rights greatly outweighs federalism concerns, such as federal-state comity. As discussed above, comity concerns cannot be separated from the issue of parity. If there is not parity between the state and federal courts, then concerns with maintaining friendly relations between the two must give way to the protection of federal rights in a federal forum.²³²

In fact, if the Court grants that challenges to state convictions are cognizable under § 1983 because of the necessity of a federal forum, it would be inconsistent for it to hold that the prior state adjudication precludes relitigation of federal claims. This would in effect give with one hand what is taken away by the other, because those who have not already had a full and fair opportunity to litigate an issue in a state criminal trial have access to a federal forum through § 1983, even under *Allen*.²³³ Such a paradoxical result might be justified, however, if the Court determined that the costs of opening the federal courts to such actions, in terms of judicial resources and the finality of decisions, outweighed the legislative goals behind the Civil Rights Act of 1871.²³⁴ Unlike comity, these important concerns can be weighed independently of assessments of parity. Issue preclusion advances the important policies of conserving judicial resources²³⁵ and the finality of decisions.²³⁶ Finality is particularly important in criminal cases, where punishment must be meted out in a sure manner to provide for deterrence.²³⁷ Thus, it could reasonably be argued that concerns about finality, coupled with already-overloaded federal dockets, outweigh the necessity of a federal forum, especially in cases not involving state custody. Part V addresses these issues.

²³¹ *Allen*, 449 U.S. at 109 (Blackmun, J., dissenting) ("Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights.").

²³² See Chemerinsky, *supra* note 148, at 288 (arguing that "comity cannot operate as a principle . . . independent of parity").

²³³ See, e.g., *Haring v. Prosise*, 462 U.S. 306 (1983) (holding that a § 1983 plaintiff who plead guilty in state court has not had an opportunity to fully and fairly litigate an issue that was not actually litigated in state court).

²³⁴ For an example of the view that concerns for judicial economy could outweigh the need for a federal forum, see Neuborne, *supra* note 148, at 1117 ("[B]y uncritically assuming parity, the Supreme Court has avoided the difficult, but critical, issue of whether concerns for federalism, efficiency, and caseload outweigh the importance of having constitutional claims heard by the more sympathetic and competent forum.").

²³⁵ See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (indicating that "res judicata and collateral estoppel . . . conserve judicial resources").

²³⁶ See *id.* (touching on the importance of finality in "preventing inconsistent decisions," thereby "encourag[ing] reliance on adjudication").

²³⁷ See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441 (1963) (noting that in criminal cases, "our instinct is that we must be sure before we proceed to the end [of the case], that we will not write an irrevocable finis on the page until we are somehow truly satisfied that justice has been done").

V. JUDICIAL ECONOMY AND FINALITY

As stated above, concerns with both judicial economy (i.e., the federal courts' caseload) and the finality of criminal convictions weigh against allowing § 1983 challenges to state convictions in federal courts. The nature of § 1983 challenges to state convictions not involving custody, however, suggests that such concerns can be easily overstated. In terms of judicial resources, it is unclear just how many cases would be brought under § 1983 challenging state convictions resulting in fines or other forms of non-custodial punishment. The worst-case scenario, of course, is that the federal courts would quickly be awash in frivolous cases involving small fines imposed by states for misdemeanor convictions and other minor offenses, just as the federal courts found themselves flooded with habeas petitions in years past. But it is certainly not appropriate to compare the potential effects of the availability of a federal forum under § 1983 to the large number of habeas corpus petitions filed in the federal courts. With a few exceptions, habeas petitions are filed by state prisoners, individuals with little to occupy their time and nothing to lose by filing a pro se petition in federal court. As one commentator has noted: "[C]ollateral attack may have become so much a way of prison life as to have created its own self-generating force: it may now be considered merely something done as a matter of course during long incarceration."²³⁸ It is unlikely that small fines would motivate many individuals to seek a federal forum, even if they believed that their federal rights had been violated in some way, because, unlike state prisoners, such individuals are free to go on with their lives. Moreover, unlike prisoners, who have much to gain—physical freedom—in filing habeas petitions, individuals not in custody will often have little to gain from pursuing in the federal courts a matter already resolved in state court.²³⁹

This does not mean, however, that there are never significant and important interests involved in non-custodial convictions. Large fines imposed as part of a state criminal conviction, for example, would implicate important individual interests. Suppose that a state criminal defendant were fined \$85,000 for illegally dispensing prescription drugs, and that the state courts rejected his defense that he had not received a fair trial because of the jury's exposure to biased media coverage about the case.²⁴⁰ Because physical restraint is not involved,

²³⁸ Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970).

²³⁹ Friendly points out that most habeas petitions fail. Thus, the number of habeas petitions filed can be traced at least in part to the lack of anything else better to do. See *id.* (noting "the minute percentage" of habeas petitions granted).

²⁴⁰ These were the facts in *Barry v. Bergen County Probation Dep't*, 128 F.3d 152 (3d Cir. 1997). However, because the state criminal defendant was also sentenced to community serv-

the habeas corpus statute would not offer such an individual access to a federal forum, despite the important interests involved. In addition to protecting procedural rights, such as that to a fair trial, § 1983 actions could also be pursued to vindicate substantive federal rights. Suppose that an individual was fined for violating a state statute that infringes upon his or her freedom of speech, but that the state courts upheld the conviction despite clear Supreme Court precedent to the contrary.²⁴¹ Without access to a federal forum, such an individual would have no recourse to vindicate his or her most important constitutional rights, despite clear precedent in his or her favor.²⁴² Moreover, important federal rights might be at stake in cases involving corporations and nonprofit organizations, but these entities do not have access to a federal forum through habeas corpus because they cannot be placed "in custody."²⁴³ This does not mean, however, that they should never have access to a federal forum to vindicate their federally protected rights.²⁴⁴ In cases like these, the individuals or corporations involved will have a real stake in the outcome of the case and thus an incentive to bring a § 1983 action. At the same time, it would be very difficult to argue that hearing such cases would be a waste of valuable judicial resources, given the importance of the interests involved. In short, judicial economy should not justify closing the federal courts to § 1983 actions involving important interests, and

ice, in addition to the massive fine, the Third Circuit held that he was "in custody" and thus had access to a federal forum by means of habeas corpus. If Barry had not been sentenced to community service, under *Heck* and *Allen*, he would have been unable to pursue his claim in federal court despite the significant interests involved and the possible merit of his claim. (His habeas petition was granted in the district court.) See *id.* at 154.

²⁴¹ These were essentially the facts in *Pringle v. Court of Common Pleas*, 778 F.2d 998 (3d Cir. 1985). Pringle was convicted of disorderly conduct for the use of obscene language; despite the Supreme Court's holding in *Hess v. Indiana*, 414 U.S. 105 (1973), that the language she had used was protected by the First Amendment, the state courts affirmed her conviction. See *Pringle*, 778 F.2d at 1000-03. However, because Pringle was sentenced to a short jail sentence, she had access to federal court through habeas corpus. See *id.* at 1000.

²⁴² Here, it is important to note that the Supreme Court's certiorari review is not adequate as a federal forum for policing the constitutional decisions of the state courts. See Bator, *supra* note 237, at 513-14, for a discussion of the purposes of Supreme Court review. The argument can be summarized in the following way:

As the Court has so often pointed out, it will not grant certiorari in a case merely because it thinks the case was erroneously decided: the purpose of the jurisdiction is to have the Court resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If [the Court] took every case in which . . . [its] *prima facie* impression is that the decision below is erroneous, [it] could not fulfill the Constitutional and statutory responsibilities placed upon [it].

Id. at 513 (internal quotation marks omitted).

²⁴³ See *Waste Management, Inc. v. Fokakis*, 614 F.2d 138, 141-42 (7th Cir. 1980) (holding that a corporation cannot be "in custody" and thus cannot seek federal relief under the habeas statute).

²⁴⁴ See SCHWARTZ & KIRKLIN, *supra* note 10, § 2.3 ("Both businesses and nonprofit organizations are other persons authorized to assert claims under § 1983.").

it is unlikely that many § 1983 actions involving unimportant interests will be brought.

It could also be argued that the number of § 1983 actions that would be filed by former state prisoners under these proposed changes in the law would put a severe strain on the resources of the federal courts. Under the approach advocated in this Note, state prisoners would be able to use § 1983 as a means of challenging their convictions after their release from prison. After a prisoner's release, a federal district court would no longer have jurisdiction to consider the habeas petition of a former prisoner,²⁴⁵ and thus, under this reading—and following the logic of Justice Souter's *Heck* concurrence—such an individual would have access to a federal forum using § 1983.²⁴⁶ Such prisoners might then defeat the exhaustion requirement of the federal habeas corpus statute by sitting out their prison sentence, waiting for their opportunity to bring a § 1983 action.²⁴⁷ This argument, however, fails to take into account the relatively short statute of limitations in § 1983 actions. The limitations period for a § 1983 action is the period applied in the courts of the state in which the action arose for a personal injuries claim.²⁴⁸ Because states have generally imposed short limitations periods on such torts claims,²⁴⁹ a prisoner seeking to evade the requirements of habeas corpus must be certain that his or her release will occur before the statute has run. Thus, any prisoner facing a sentence longer than the limitations period would have to pursue habeas corpus relief. A prisoner serving a sentence that is shorter than the state's limitations period, on the other hand, would have the option of waiting to file a § 1983 action, but it seems unlikely that there are many prisoners willing to give up their first opportunity for collateral review of their convictions. In addition, given that such individuals would have access to a federal forum under the habeas statute before release, judicial resources would not be conserved by restricting them to habeas corpus.

Similarly, finality concerns cannot justify closing the federal courts to § 1983 actions challenging state convictions not involving custody, because finality is a relatively minor concern in such cases. The finality of judicial decisions plays an important role in encour-

²⁴⁵ See *supra* Part I.B (discussing the jurisdictional element of "custody" under the federal habeas statute).

²⁴⁶ See *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring) (discussing the situation of those "who discover . . . a constitutional violation after full expiration of their sentences"); *id.* at 501 (discussing the hypothetical of the freed slave convicted by a Klan-controlled state court).

²⁴⁷ See *supra* Part II.A (discussing the strategic choices of the *Preiser* plaintiffs).

²⁴⁸ See SCHWARTZ & KIRKLIN, *supra* note 10, § 12.8 (discussing *Wilson v. Garcia*, 471 U.S. 261 (1985), and related authority).

²⁴⁹ For a list of statute of limitations for personal injury claims in most American jurisdictions, see *id.* § 12.9. The average limitations period for these jurisdictions is 2.6 years, with nearly half of the jurisdictions listed having a limitations period of only two years. See *id.*

aging reliance on judicial decisions,²⁵⁰ but it is unclear what sort of "reliance" concerns are at issue with fine-only sanctions or other forms of non-custodial punishment. As Justice Souter pointed out in his *Heck* concurrence, a successful § 1983 action involves "a significantly less disruptive remedy than an order compelling release from custody."²⁵¹ After the state imposes the fine, or other non-custodial punishment, the § 1983 plaintiff would bring an action challenging the conviction and, if he or she prevailed, may receive relief, including damages and reimbursement of the fine imposed.²⁵² Such a result would have little effect on the state government because the state government will have placed little reliance on the prior judgment at all. In this respect, non-custodial punishments raise much less of a finality concern than do custodial punishments, which involve continuous state action in the form of incarceration and thus greater reliance on the conviction. The state's reliance on a criminal conviction resulting in a prison sentence is much greater, given the ongoing nature of the punishment involved.²⁵³

To illustrate this point, take the case of an individual who serves a short sentence, does not pursue habeas corpus relief, and is released after his or sentence expires. The state's concerns with finality have actually been satisfied, as the punishment has been fully meted out. The same holds true for fine-only convictions and other non-custodial sentences. In short, while finality and the state's reliance on the conviction are important considerations, they cannot outweigh the necessity of a federal forum in cases not involving custody.

CONCLUSION

This Note has argued that § 1983 should be interpreted broadly to allow individuals without access to a federal forum under the federal habeas corpus statute to challenge their state convictions in federal court. Such a result is consistent with the legislative purpose of § 1983 and the primary role of the federal courts as the guardians of the federally protected rights of individuals. Despite a number of precedents in recent decades limiting access to a federal forum to challenge state actions, several members of the current Supreme Court have shown a renewed interest in providing a federal forum for those claiming that their federal rights have been violated. There are good reasons to think that the federal courts are better suited to protect fed-

²⁵⁰ See FRIEDENTHAL ET AL., *supra* note 33, § 14.3 (discussing reliance and finality).

²⁵¹ *Heck*, 512 U.S. at 502 (Souter, J., concurring).

²⁵² In *Waste Management, Inc. v. Fokakis*, 614 F.2d 138, 139 (7th Cir. 1980), for example, the § 1983 corporate-plaintiff requested relief including the expungement of the record of its conviction, reimbursement of the fine paid, and an injunction restraining state officials from taking any action based on the record of the conviction.

²⁵³ See Bator, *supra* note 237, at 441.

eral rights than the state courts—reasons stemming from the quality and characteristics of the federal bench, the insulation of federal judges from political or majoritarian pressures, and historical experience. Section 1983 reflects the Forty-Second Congress's determination that the state courts could not be trusted to protect federal rights and thus that access to a federal forum was necessary. Once this important role of the federal courts is recognized, however, it becomes necessary to reconsider and ultimately reject *Allen v. McCurry*. This Note has argued that *Allen*'s application of issue preclusion to § 1983 actions is inconsistent with both the legislative history and purposes of § 1983. In addition, *Allen* is difficult to reconcile with the majority position in *Spencer*. Thus, an action challenging a state criminal conviction should be cognizable under § 1983, even though the state courts had provided an opportunity for the litigation of the matter in the first instance, unless the § 1983 plaintiff has access to the federal courts by means of the habeas corpus statute. Neither finality nor judicial economy should override the important legislative purpose behind § 1983, providing a federal forum for the protection of federal rights.

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