The Enforceability and Proper Implementation of § 1983 and the Attorney's Fees Awards Act in State Courts

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Under the Constitution of the United States, Congress is given considerable latitude in defining the role of federal courts in protecting the civil rights of citizens.[1] In providing Congress with this power, the framers of the Constitution intended the creation of a dual court system—made up of state courts and federal courts—to provide checks on the potential abuse of power by the other branch of this system.[2] Because federal law is the "supreme Law of the Land,"[3] the federal courts can nullify actions taken by state legislatures and other state officials that are contrary to federal policy.[4] Federal judicial review of actions

1. "The Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 9.

"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." U.S. CONST. art. III, § 1.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. (Similar language is found in several other amendments to the Constitution.) The amount of literature devoted to the interpretation of these clauses and the scope of congressional control over federal court jurisdiction is voluminous. *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S, THE FEDERAL COURT'S AND THE FEDERAL SYSTEM 309-418 (2d ed. 1973) [hereinafter cited as HART & WESCHSLER]; Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Van Alstyne, *A Critical Guide To Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). This power has been seen as almost plenary. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting); Yakus v. United States, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting); *see* Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869). However, this power is subject to some limitations. *See* Van Alstyne, *supra*, at 260-67.

2. THE FEDERALIST No. 15, at 89-91 (A. Hamilton); THE FEDERALIST No. 46, at 294-96 (J. Madison); THE FEDERALIST No. 78, at 487-89 (A. Hamilton); Note, *Theories of Federalism and Civil Rights*, 75 YALE L. J. 1007, 1022-23 (1966).

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

4. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). It is a fairly common occurrence that the decisions of state officials will be guided by local prejudices and interests, rather than furthering policies beneficial to the nation. THE FEDERALIST No. 46, at 294-95 (J. Madison). Therefore, if the nation is to exist as a unified whole, federal law must prevail in the event of conflict with state law or state action. This, of course, assumes that the subject matter of the state-federal conflict is of such a nature so as to demand uniformity. In some areas, states may regulate beyond the federal law as long as minimum standards set forth by the federal government are complied with. An example is air pollution prevention and control. *See* 42 U.S.C.A. § 7416

taken by state officials is instrumental in effectuating basic political values where local abuses occur,[5] and in recognition of this, Congress has provided specific statutory relief. One such statute is 42 U.S.C. § 1983.[6]

Congress created what is now embodied in section 1983 over a century ago,[7] and entrusted the federal judicial system with the responsibility for the vindication and enforcement of federally secured rights against abuses "under color of state law."[8] The congressional intent of the original legislation was to provide a federal remedy for state encroachment into these important federal rights.[9] The United States Supreme Court interpreted the primary aims of section 1983 as: (1) overriding certain kinds of state law; (2) providing a remedy for a deprivation of civil rights when state law is inadequate; and (3) providing a remedy when state recourse is adequate in theory, but not in practice.[10]

The development of section 1983 has led to a great deal of confusion over the jurisdictional grant of the statute.[11] The majority of courts and legal commentators have argued that section 1983, in its present form, provides for concurrent jurisdiction between state and federal courts,[12] while a minority of courts have proceeded under the

(Supp. 1977) (granting states the power to adopt standards more stringent than the federal standards).

5. *See* Monroe v. Pape, 365 U.S. 167, 180 (1961). Monroe v. Pape was recently overruled in Monell v. Department of Social Servs., 436 U.S. 658, 663 (1978). However, the Supreme Court in *Monell* merely abolished a municipality's immunity against § 1983 actions—an immunity established in *Monroe v. Pape*. The Court in *Monell* did not dispute other aspects of the analysis of § 1983 contained in *Monroe v. Pape*, therefore, it continues as authority for the propositions connected with § 1983 discussed herein.

6. 42 U.S.C. § 1983 (1976) reads:

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

7. The Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

8. The Supreme Court first defined the phrase "under color of state law" as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." United States v. Classic, 313 U.S. 299, 326 (1941). The Supreme Court restated its conclusion that this is the correct meaning of "under color of state law," and applied this meaning to the terms as used in § 1983 in Monroe v. Pape, 365 U.S. 167, 184-87 (1961). The Court in *Monroe* added that actions taken under color of state law shall give rise to tort liability in the same manner as any person is responsible for the natural consequences of his actions. *Id.* at 187. In other words, a tortfeasor is not entitled to any immunity merely because he was acting under authority conferred upon him by the state.

9. Juidice v. Vail, 430 U.S. 327, 342 (1977) (Brennan, J., dissenting); Mitchum v. Foster, 407 U.S. 225, 239 (1972).

10. Monroe v. Pape, 365 U.S. 167, 173-75 (1961); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1489 (1969).

11. *See* text & notes 67-78 *infra*.

12. *See, e.g.*, Young v. Board of Educ., 416 F. Supp. 1139, 1141 (D. Colo. 1978); Freeman & Bass v. New Jersey Comm'n of Investigation, 359 F. Supp. 1053, 1055 (D.N.J. 1973); Williams v. Horvath, 16 Cal. 2d 834, 837, 548 P.2d 1125, 1127, 129 Cal. Rptr. 453, 455 (1976); C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS CIVIL PRACTICE 29, 49 (1971).

assumption that the federal courts have exclusive jurisdiction.[13]

Congress has attached great significance to section 1983. This is evidenced by the statute having remained an integral part of the federal civil rights laws for over 100 years. This perceived importance has not diminished in recent years. The most recent indication that section 1983 is necessary to the vindication of important congressional policies is the Attorney's Fees Awards Act of 1976.[14] The legislative history of this Act reveals that the availability of reasonable counsel fees to the prevailing party in actions brought pursuant to section 1983 is considered by Congress to be essential to the proper enforcement of the statute.[15] The importance of the Attorney's Fees Awards Act raises several questions about the adequacy of state courts for the enforcement of section 1983 actions. Most of these questions stem from the enforceability of the attorney's fees amendment in state court.[16] Thus, the effective implementation of important federal policies and goals by state courts depends, to a large degree, on the determination of this issue.

This Note will trace the historical development of section 1983 and the changes in the jurisdictional language associated with this provision in an attempt to resolve the confusion present in the courts today.[17] Proceeding on the conclusion that Congress has provided for concurrent jurisdiction for claims brought under section 1983, the discussion will move to an examination of the applicability of the Attorney's Fees Awards Act of 1976[18] to the enforcement of section 1983 in state courts.

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13. *See* Beaureguard v. Wingard, 230 F. Supp. 167, 185 (S.D. Cal. 1964); Chamberlain v. Brown, 223 Tenn. 25, 31, 442 S.W.2d 248, 250-51 (1969). *See also* Hague v. Committee for Indust. Organization, 307 U.S. 497, 530 (1939) (concurring opinion of Justice Stone implies that there is exclusive jurisdiction in his argument that if a minimum jurisdictional amount were required in these actions brought in federal court, then the statute would be meaningless because a large proportion of suits authorized by the Civil Rights Act could not be maintained in *any court*); Terry v. Kolski, 78 Wis. 2d 475, 505, 254 N.W.2d 704, 716 (1977) (Hansen, J., dissenting).

An understandable source of this confusion is the apparent contradiction between the policy behind the statute and a legislative allowance of state court jurisdiction. The statute was originally designed to provide a remedy to redress abuses of power by state officials. *See* text & notes 41-46 *infra*. It, therefore, seems antithetical to grant the states authority to review these actions. This does not prove, however, that exclusive jurisdiction is vested in federal courts. Several goverental and nongovernmental bodies police themselves. *See, e.g.*, U.S. CONST. art. I, § 5 (the Senate and the House of Representatives are empowered to punish and expel members); ARIZ. SUP. CT. R. 27(a) (State Bar of Arizona is empowered to regulate and discipline persons engaged in the practice of law).

14. 42 U.S.C. § 1988 (1976), *as amended by* Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641. See note 87 *infra*.

15. See text & notes 89-92 *infra*.

16. See text & notes 112-116 *infra*.

17. In the dissenting opinion in Terry v. Kolski, 78 Wis. 2d 475, 509, 254 N.W.2d 704, 718 (1977), a request was made for the United States Supreme Court to consider this problem and provide a definitive answer to whether state courts could properly entertain § 1983 actions. A careful reading of all pertinent statutes will yield the definitive answer sought by the dissenters on the Wisconsin court. However, this case illustrates the widespread lack of judicial discernment regarding the source of authority for concurrent jurisdiction between federal and state courts.

18. 42 U.S.C. § 1988 (1976), *as amended by* Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641.

The Note will focus on the extent to which this congressional mandate must be obeyed by state courts and the proper interpretation given to this statute by state courts. These issues will be analyzed within a framework patterned after the doctrine of *Erie Railroad Co. v. Tompkins*[19] and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[20]

HISTORICAL DEVELOPMENT OF SECTION 1983

Prior to the Civil War, the prevailing view was that the state courts were the proper forum for the enforcement of rights secured by the Constitution and federal laws.[21] The basis for this view was a sensitivity to state rights, a fear that a rivalry would arise between federal and state courts, and a respect for state sentiment.[22] However, throughout the Reconstruction period following the Civil War, state judicial systems in the South appeared unable or unwilling to withstand local pressures, and federally protected rights suffered as a result of the primary reliance placed on the state courts for their enforcement.[23]

An increase in the application of federal judicial power was necessary if federal civil rights laws were to be adequately enforced in the South. To accomplish this end, Congress first enacted the Civil Rights Act of 1866.[24] The legislative history behind the Civil Rights Act of 1866 and its progeny[25] indicates that Congress intended to change the relationship between the states and the federal government with respect to protection of federally created rights.[26] This expansion of federal judicial power reflected the belief that many state officials were unsympathetic to the protection of civil rights and that these views were shared by state courts.[27] Congress conceived civil rights to be inherent ingredients of national citizenship and, as such, to be entitled to federal

19. 304 U.S. 64 (1938).

20. 356 U.S. 525 (1958).

21. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928); HART & WECHSLER, *supra* note 1, at 844-45; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1150 (1977) [hereinafter cited as *Developments*].

22. F. FRANKFURTER & J. LANDIS, *supra* note 21, at 64.

23. *Developments, supra* note 21, at 1152-53. A voluminous report was presented to Congress to evidence the extent of lawlessness in the South and the individual states' inability to rectify the situation. S. REP. NO. 1, 42d Cong., 1st Sess. (1871). The manner in which rights suffered was demonstrated by Representative Beatty of Ohio when he said:

> Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.

CONG. GLOBE, 42d Cong., 1st Sess. app. 428 (1871).

24. Ch. 31, 14 Stat. 27 (1866).

25. Included in the group of federal laws that are progeny of the Civil Rights Act of 1866 are: the Act of 1870, ch. 114, 16 Stat. 140; Act of 1871, ch. 22, 17 Stat. 13; Act of 1874, Rev. Stat. § 1979, title 24 (1874); Act of 1875, ch. 114, 18 Stat. 335.

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

27. *Id.*; *Developments, supra* note 21, at 1150.

protection.[28] The most recent of the civil rights acts that stems from the Act of 1866, 42 U.S.C. § 1983, allows a private citizen access to federal courts and offers a federal remedy against deprivation (under the claimed authority of state law) of rights secured by the Constitution and laws of the Nation.[29]

The Civil Rights Act of 1866 unequivocally granted exclusive jurisdiction to the federal district and circuit courts.[30] This Act provided that citizens of the United States could not lawfully be denied any right secured by the Act.[31] Any person who under color of state law violated the mandates of the Act of 1866 was subject to fine and/or imprisonment.[32] However, injustices not reached by the Act of 1866 continued to run rampant in the South.[33] In an effort to remedy this condition, Congress passed the Civil Rights Act of 1871, commonly referred to as the Ku Klux Klan Act.[34] The language of the Act of 1871 encompassed a much wider range of protected interests, made the party violating the Act directly answerable to the injured party, and removed the remedial limitations found in the Act of 1866.[35] With the Civil Rights Act of

28. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336 (1952). The attorney's fees amendment to 42 U.S.C. § 1988 demonstrates continuing congressional concern for civil rights and the need to afford an economical remedy for the vindication of these rights. See text & notes 79-88 *infra*.

29. Mitchum v. Foster, 407 U.S. 225, 239 (1972). The Supreme Court has devoted some attention to the proper spectrum of rights protected by § 1983 in recent years. The Court refused to allow § 1983 to be used as a device for the creation of a body of general federal tort law to be imposed upon the states. Paul v. Davis, 424 U.S. 693, 701 (1976). Specifically, the Court held that a person's interest in his reputation is not a "liberty" or "property" interest as used in the fourteenth amendment. *Id.* at 712. Therefore, defamation by a public official is not within the realm of "rights, privileges, or immunities" protected by § 1983. *See id.* at 706. As a general proposition, however, "[s]ection 1983 focuses on 'misuse of power, possessed by virtue of state law and *made possible only because the wrongdoer is clothed with the authority of state law.*' " *Id.* at 717 (Brennan, J. dissenting) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

30. The 1866 Act stated "[t]hat the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act . . . ." Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

31. *Id.* § 2. The rights secured by the Act are that all citizens

> shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . .

Id. § 1.

32. *Id.* § 2. The punishment was a fine not to exceed $1000, or maximum imprisonment of one year, or both, in the discretion of the court. *Id.*

33. See text & notes 41-44 *infra*.

34. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976)).

35. The Civil Rights Act of 1871 reads:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district courts or circuit courts of the United States . . . .

Ch. 22, § 1, 17 Stat. 13 (1871). *Compare* above language *with* notes 30-32 *supra*. The Act of 1871

1871, Congress created—in almost the exact wording—what is now embodied in 42 U.S.C. § 1983.[36] The jurisdictional language contained in the 1871 Act was less explicit than that contained in the Act of 1866.[37] However, Congress still manifested its intent to interpose the federal courts between the states and the people, as guardians of the people's federal rights.[38]

The Supreme Court has relied heavily on the legislative history surrounding the 1871 Act when interpreting section 1983.[39] For example, statements made by individual legislators during the floor debates are given great weight in determining what problems and evils the legislature was undertaking to remedy.[40] Therefore, a brief review of the congressional debates over the passage of the Civil Rights Act of 1871 is helpful in understanding the intended purpose and scope of the statute.

The creation of the 1871 Act was initiated by a message to Congress from President Grant:

> A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . That the power to correct these evils is beyond the control of State authorities I do not doubt . . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.[41]

The testimony of several witnesses brought before Congress led to the conclusion that there was an urgent need for federal legislation so that order might be restored in the South.[42]

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did not limit an injured party's recovery to $1000 nor did it limit the maximum term of imprisonment to one year, as did the Act of 1866.

36. *Compare* statutory language note 6 *supra with* statutory language note 35 *supra*. Although the language contained in these statutes is similar, it is not identical. For example, § 1983 protects rights, privileges, and immunities secured by the Constitution and laws, whereas the Act of 1871 protected only those interests secured by the Constitution.

37. The language was changed from the unambiguous statement in the Act of 1866 "[t]hat the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act" to the language found in the Act of 1871 that a person causing a deprivation of a constitutionally secured right, privilege, or immunity shall be liable in a "proceeding to be prosecuted in the several district courts or circuit courts of the United States." The language of the 1871 Act does not explicitly state that jurisdiction is exclusive to the federal courts.

38. Preiser v. Rodriguez, 411 U.S. 475, 516 (1973) (Brennan, J., dissenting); Mitchum v. Foster, 407 U.S. 225, 242 (1972).

39. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 665-89 (1978) Mitchum v. Foster, 407 U.S. 225, 238-42 (1972); Monroe v. Pape, 365 U.S. 167, 171, 173-83, 185, 188-91 (1961); *Developments, supra* note 21, at 1170.

40. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 240-41 (1972); C. SANDS, 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.13, at 217 (4th ed. 1972) [hereinafter cited as SUTHERLAND].

41. CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

42. *See id.* at 320-21; 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS 600-05 (1970). Among the witnesses brought before the congressional comittees were members of the Ku Klux Klan who attended meetings at which raids were planned, judges who

One of the major goals of the Act was to stop violent attacks and atrocities committed against citizens.[43] It was also designed to provide a federal forum as an alternative to the state courts, since the latter were viewed as permeated with corruption and prejudice.[44] In order to achieve this goal, Congress felt it was necessary to make claims based on the Act of 1871 cognizable solely in the federal courts.[45] Thus, Congress included language in the statute that was interpreted to limit actions brought under the Act to the federal courts.[46]

In 1874, Congress attempted, with the creation of the Revised Statutes, to consolidate various federal statutes that were scattered throughout the Statutes at Large. In section 1979 of the Revised Statutes, the jurisdictional language granting exclusive jurisdiction to the federal courts was deleted, and the statute was left silent as to the proper jurisdictional grant.[47] Thus, the substantive provisions of the Act of 1871 were lacking a jurisdictional counterpart.[48]

A second edition of the Revised Statutes, necessitated by the detection of a number of errors in the first edition,[49] was enacted by Congress and was intended to replace the original codification.[50] Congress provided that this edition of the Revised Statutes was merely to serve as

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testified to the widespread corruption and terror, and victims who bore the brunt of the Klan's raids and terrorism.

43. The following quote gives an indication of the state of affairs that existed in the South at that time: "The whole South . . . is rapidly drifting into a state of anarchy and bloodshed . . . . There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals." CONG. GLOBE, 42d Cong., 1st Sess. 321 (1871).

44. *See id. See also id.* at 505:

> But it is a fact . . . that of the hundreds of outrages committed upon loyal people through the agency of the 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.

45. CONG. GLOBE, 42 Cong., 1st Sess. app. 50 (1871); 1 B. SCHWARTZ, *supra* note 42, at 615.

46. *See* language of Act note 35 *supra* .

47. Rev. Stat. § 1979 (1874). In deciding the extent of jurisdiction in a given statute, the United States Supreme Court has held that there is an initial premise in favor of a finding of concurrent jurisdiction. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); Clafin v. Houseman, 93 U.S. 130, 136 (1876). That is, jurisdiction under a federal statute is not exclusive in the federal courts unless Congress chooses to make it so, either expressly or by fair implication. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876); 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3527, at 120-21 (1975).

48. Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972). Changes in phraseology and deletions will not necessarily imply a change in meaning. 2 SUTHERLAND, *supra* note 40, § 36.19, at 80 n.3. In transferring the language from the Statutes at Large to the Revised Statutes, it is presumed that Congress intended to transfer the sense of the original enactments. Pott v. Arthur, 104 U.S. 735, 736 (1881). Therefore, even though Congress deleted the jurisdictional language in the Revised Statutes, the proper interpretation is that there was still exclusive jurisdiction vested in the federal courts. Terry v. Kolski, 78 Wis. 2d 475, 505, 254 N.W.2d 704, 716 (1977) (Hansen, J., dissenting).

49. 2 SUTHERLAND, *supra* note 40, § 36.19, at 80.

50. Act of Mar. 2, 1877, ch. 82, 19 Stat. 268.

prima facie evidence of the laws of the United States,[51] and in cases involving a discrepancy between the Revised Statutes and the original enactment as found in the Statutes at Large, the original enactment was controlling.[52] At this point, the controlling statute was the Civil Rights Act of 1871.[53] Consequently, the federal courts still retained exclusive jurisdiction.

The jurisdictional language associated with the substantive rights that have developed under section 1983 was significantly altered by the Judiciary Act of 1911.[54] Where the federal circuit and district courts previously had exclusive jurisdiction,[55] the Act of 1911 provided that federal district courts have "original jurisdiction."[56] The phrase "original jurisdiction" has been uniformly interpreted as the power to hear cases in the first instance; such power does not entail sole or exclusive jurisdiction.[57] In other words, a grant of mere original jurisdiction is construed as giving concurrent jurisdiction to federal and state courts.[58]

51. Act of Mar. 9, 1878, ch. 26, 20 Stat. 27. This enactment stated that the Revised Statutes, "shall not preclude reference to, nor control, in case of any discrepency, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three." *Id.*

52. *Id.*; 2 SUTHERLAND, *supra* note 40, § 36.19, at 80. Congress included this provision out of a sense of caution counseled by the frequent errors found in the previous edition of the Revised Statutes. *Id.*

53. Since there was no jurisdictional language contained in the Revised Statutes, *see* text & note 47 *supra*, the 1871 Act was the only definitive statement of jurisdiction made by Congress. If the Revised Statutes had contained jurisdictional language contradicting the language contained in the 1871 Act, it is unclear which language would have been controlling. The Revised Statutes were not to control in the case of a discrepancy with an original act passed after December 1, 1873. *See* note 51 *supra*. The Act of 1871 was passed prior to this date, and it is uncertain whether the Revised Statutes were intended to displace acts passed prior to December 1, 1873, in the case of a conflict. However, since there were no inconsistencies between the 1871 Act and the Revised Statutes, the question of which would preempt the other was not directly presented, and the jurisdictional language contained in the 1871 Act remained in effect.

54. Judiciary Act of 1911, ch. 231, 36 Stat. 1087. "That the laws relating to the judiciary be, and hereby are, codified, revised, and amended . . . to read as follows . . . ." *Id.*

55. See text & notes 38-53 *supra*.

56. Judiciary Act of 1911, ch. 231, § 24, 36 Stat. 1087, reads:

> The district courts shall have original jurisdiction as follows:
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> . . . .
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> Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

57. Bors v. Preston, 111 U.S. 252, 256-57 (1884); United States v. California, 328 F.2d 729, 733 (9th Cir. 1964), *cert. denied*, 379 U.S. 817 (1965); New Times, Inc. v. Arizona Bd. of Regents, 20 Ariz. App. 422, 426, 513 P.2d 960, 964 (1973), *vacated*, 110 Ariz. 367, 519 P.2d 169 (1974). *New Times, Inc. v. Arizona Bd. of Regents* involved a § 1983 action filed in state court. The appellant challenged the court's jurisdiction to hear a claim brought pursuant to § 1983. The court, however, rejected appellant's contention, and found that the grant of original jurisdiction contained in 28 U.S.C. § 1343 (see text & notes 59-66 *infra*) did not confer exclusive jurisdiction. 20 Ariz. App. at 426, 513 P.2d at 964. Moreover, the court stated that the congressional purpose to supplement state remedies with the enactment of § 1983 did not create an implication of exclusive jurisdiction. *Id.* at 427, 513 P.2d at 965.

58. See text & note 57 *supra*.

Therefore, following the Act of 1911, actions brought pursuant to secton 1979 of the Revised Statutes could be heard in either federal or state courts.

The substantive legal action provided for in the Civil Rights Act of 1871 was codified in 42 U.S.C. § 1983.[59] The jurisdictional counterpart contained in the Act of 1911 was eventually re-enacted as part of 28 U.S.C. § 1343.[60] This subsequent codification of the Act of 1911 buttresses the argument that Congress did intend to grant concurrent jurisdiction for claims brought pursuant to section 1983. This conclusion is based on the action taken by Congress to grant exclusive jurisdiction to federal courts with respect to other provisions of the 1911 Act. Specifically, Congress granted exclusive jurisdiction in admiralty and maritime cases,[61] bankruptcy proceedings,[62] actions arising out of patents, copyrights and trademarks,[63] consular cases,[64] all suits and proceedings for enforcement of any fine, penalty, or forfeiture incurred under any act of Congress,[65] and all seizures under any law of the United States not within the admiralty jurisdiction.[66] If Congress intended to have section 1983 actions heard exclusively by the federal courts, it would have made the necessary changes as it did in the above mentioned contexts. Its failure to do so indicates an intention to continue the prior law allowing concurrent jurisdiction.

The intricate evolution of sections 1343 and 1983 resulted in con-

59. This title has never been enacted into positive law, and has resulted in some confusion as to the proper jurisdictional interpretation. 1 U.S.C. § 204(a) provides that the matters set forth in the Code shall establish prima facie evidence of the laws of the United States. However, nothing in the Code is to be contrued as repealing or amending any congressional enactment, and in cases of controversy the original enactments are controlling. *See id.*; 2 SUTHERLAND, *supra* note 40, § 36.20, at 81. Therefore, the Act of 1911—granting original as opposed to exclusive jurisdiction—is controlling.

60. Act of June 25, 1948, ch. 646, 62 Stat. 932 (codified as amended at 28 U.S.C. § 1343 (1976)). This jurisdictional grant first found its way into the United States Code as 28 U.S.C. § 41(14) (1940). This was later changed to its present form as 28 U.S.C. § 1343 (1976). 28 U.S.C. § 1343 provides in pertinent part as follows:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

61. 28 U.S.C. § 1333 (1948) (originally enacted as Act of Mar. 3, 1911, § 24, ¶ 3, 36 Stat. 1087).

62. 28 U.S.C. § 1334 (1948) (originally enacted as Act of Mar. 3, 1911, § 24, ¶ 19, 36 Stat. 1087).

63. 28 U.S.C. § 1338 (1948) (originally enacted as Act of Mar. 3, 1911, § 24, ¶ 7, 36 Stat. 1087).

64. 28 U.S.C. § 1351 (1948) (originally enacted as Act of Mar. 3, 1911, § 24, ¶ 18, 36 Stat. 1087).

65. 28 U.S.C. § 1355 (1948) (originally enacted as Act of Mar. 3, 1911, § 24, ¶ 9, 36 Stat. 1087).

66. 28 U.S.C. § 1356 (1948) (originally enacted as Act of Mar. 3, 1911, § 24, ¶ 3, 36 Stat. 1087).

siderable confusion about the source of a court's jurisdiction to try cases brought under the latter. Many courts have properly stated that section 1983 is not itself a jurisdiction-conferring statute;[67] rather, actions based on that statutory provision are cognizable in state and federal courts by virtue of section 1343.[68] However, several courts have maintained that section 1343 is not the jurisdictional grant applicable to section 1983.[69] Still other courts have stated that there is exclusive jurisdiction in the federal courts for claims arising out of section 1983.[70] Once it is recognized that section 1343 is the jurisdictional statute for claims brought pursuant to section 1983, the confusion over whether there is exclusive or concurrent jurisdiction for section 1983 actions should disappear. Section 1343 specifies that the federal courts have original jurisdiction,[71] which in effect is a grant of concurrent jurisdiction.[72]

A very good illustration of the confusion that results from the lack of understanding as to the source of section 1983 jurisdiction is a case recently decided by the Supreme Court of Wisconsin, *Terry v. Kolski*.[73] A civil rights claim was originally filed in a county court pursuant to section 1983. The county court judge dismissed the complaint on the ground that it did not state a cause of action cognizable under state law, and therefore, the state courts lacked jurisdiction. On appeal to the circuit court, the judgment of the county court was affirmed. The circuit court concluded that section 1983 constituted a federal cause of action which could be vindicated only in the federal courts.[74]

The Supreme Court of Wisconsin, by a four to three majority, reversed the decisions below and held that Wisconsin state courts have jurisdiction over claims arising out of section 1983.[75] However, a strong dissent argued that the historical development of section 1983 led to the inescapable conclusion that Congress intended to vest exclusive jurisdiction in the federal courts.[76] The dissenters also argued that

67. Monell v. Department of Social Servs., 436 U.S. 658, 663 (1978); Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972).

68. Freeman & Bass v. New Jersey Comm'n of Investigation, 359 F. Supp. 1053, 1055 (D.N.J. 1973); *see* Howell v. Cataldi, 464 F.2d 272, 274 (3d Cir. 1972); New Times, Inc. v. Arizona Bd. of Regents, 20 Ariz. App. 422, 426, 513 P.2d 960, 964 (1973), *vacated*, 110 Ariz. 367, 519 P.2d 169 (1974).

69. McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969); Bourque v. Shapiro, 319 F. Supp. 729, 730-31 (D. Conn. 1970); *cf.* Hague v. Committee for Indus. Org., 307 U.S. 496, 530 (1939) (concurring opinion in which Justice Stone seems to imply that there is exclusive jurisdiction in the federal courts even after the passage of the Act of 1911).

70. *E.g.*, Basista v. Weir, 340 F.2d 74, 86-87 n.11 (3d Cir. 1965). *See* text & note 13 *supra*.

71. See note 60 *supra*.

72. See text & notes 57-58 *supra*.

73. 78 Wis. 2d 475, 254 N.W.2d 704 (1977).

74. *Id.* at 480, 254 N.W.2d at 705.

75. *Id.* at 479, 254 N.W.2d at 704.

76. *Id.* at 505, 254 N.W.2d at 718.

since the creation of the cause of action that evolved into section 1983, the United States Supreme Court had not devoted a single sentence to the proposition that federal and state courts have concurrent jurisdiction. Both of these arguments are erroneous. The historical analysis was correct as far as it went; however, the dissenters overlooked a crucial congressional enactment—the Judiciary Act of 1911.[77] In addition, the Supreme Court of the United States has stated in *Lynch v. Household Finance Corp.*, that 28 U.S.C. § 1343(3) is the jurisdictional grant for section 1983.[78] It therefore appears that the state courts do have jurisdiction for claims arising under section 1983, and a careful reading of congressional legislation and the pertinent case law should alleviate the confusion. However, a new problem has arisen. The applicability of the Attorney's Fees Awards Acts of 1976 to section 1983 actions brought in state court must be determined.

THE ATTORNEY'S FEES AWARDS ACT OF 1976 AND THE ENFORCEMENT OF SECTION 1983 IN STATE COURTS

Background

Until recently there were no substantial differences in the application of section 1983 in state courts as opposed to federal courts. This parallel, however, may have been changed by the Attorney's Fees Awards Act of 1976.[79] Under the provisions of this Act it may be possible for a litigant to obtain an award of attorney's fees if the action is brought in federal court, while attorney's fees need not be awarded if the same action were brought in state court.

Congressional legislation authorizing attorney's fees awards has its roots in the Supreme Court decision *Alyeska Pipeline Service Co. v. Wilderness Society*.[80] In *Alyeska*, the Wilderness Society brought suit seeking declaratory and injunctive relief in an effort to halt construction of a pipeline intended to transport oil from Alaska's North Slope to Prudhoe Bay. Congress subsequently enacted legislation allowing construction of the pipeline and thereby terminated the litigation as to its merits. The Wilderness Society then asked for an award of attorney's fees based on the "private attorney general" exception[81] to the

77. For a discussion of the implications of the Act of 1911 and its successors, see text & notes 54-66 *supra*. It is interesting that, while arguing against the position taken in the dissent, the majority never made mention of the Act of 1911.

78. *See* 405 U.S. 538, 543 n.7 (1972): "Sections 1983 and 1343(3) are direct descendants of § 1 of the Act of 1871." *Id.* Section 1343(3) grants "original" jurisdiction to the federal courts, and this has uniformly been interpreted to be concurrent jurisdiction. See text & note 57 *supra*.

79. 42 U.S.C. § 1988, *as amended by* Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641.

80. 421 U.S. 240 (1975).

81. The notion of a private attorney general was first used by Judge Jerome Frank in Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), to justify the litigant's standing to sue in that

"American rule" that the prevailing party may not recover attorney's fees.[82] The Court of Appeals for the District of Columbia Circuit granted the request for fees under the private attorney general exception, which encompassed actions in the advancement of substantial public interests.[83] The Supreme Court reversed this decision reasoning that it would be inappropriate for the judiciary to reallocate the burdens of litigation in this manner, deferring to the legislature for guidance.[84]

Several members of Congress felt that *Alyeska* left an anomalous gap in the federal civil rights laws. Courts were authorized to award attorney's fees under several other civil rights statutes;[85] however, under section 1983, which was meant to protect fundamental civil rights, attorney's fees were suddenly unavailable.[86] To cure this anomaly, Congress enacted the Attorney's Fees Awards Act of 1976.[87] With the passage of this Act, Congress sought to achieve consistency in the

case. Judge Frank reasoned that since Congress had the authority to empower officials, such as the attorney general, to bring actions to vindicate the interests of the public, the Congress, likewise, could authorize a private individual to bring such actions. "Such persons, so authorized, are, so to speak, private Attorney Generals." *Id.* at 704.

The Supreme Court has applied the private attorney general theory to the award of attorney's fees in civil rights litigation. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). *Newman* involved a case brought under a statute which specifically allowed for the award of attorney's fees to the successful plaintiff in the court's discretion. *See* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1976). Several lower courts borrowed this idea of a private attorney general and applied it to the award of attorney's fees in civil rights legislation even where there was no statutory authorization. Lee v. Southern Home Sites Corp., 444 F.2d 143, 143-44 (5th Cir. 1971); Dyer v. Love, 307 F. Supp. 974, 984-87 (N.D. Miss. 1969); Cato v. Parham, 293 F. Supp. 1375, 1378-79 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968). The justification for applying this exception to the usual rule that attorney's fees will not be awarded without specific statutory authorization was twofold. The litigation is vindicating some right, which Congress considered of the highest priority, not only for the individual plaintiff, but also for all others similarly situated. Lee v. Southern Home Sites Corp., 444 F.2d 143, 147 (5th Cir. 1971). In addition, while the Supreme Court's decision in *Newman* was not mandatory, it suggested that the best procedure was to award attorney's fees to prevailing plaintiffs seeking to vindicate the public interest. *See* Cato v. Parham, 293 F. Supp. 1375, 1378 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968). Prior to the *Aleyeska* decision, it appeared that the Supreme Court approved of the position taken by the lower courts. *See* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 396-97 (1970) (attorney's fees permissible where enforcement of statute benefits all shareholders).

82. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1976).

83. Wilderness Soc'y v. Morton, 495 F.2d 1026, 1028 (D.C. Cir. 1974).

84. In support of this position, the Court cited the development of the common law in England with respect to this issue and the position taken by the Supreme Court in this country. The Court stated that since Congress has seen fit to carve out specific exceptions to a general rule, the federal courts cannot award fees without specific statutory authorization. 421 U.S. at 269. The Court did, however, recognize that certain common law exceptions to the American rule exist, but none of these exceptions applied to this case. *Id.* at 257-59.

85. *E.g.*, Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1976); Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e) (1976), *as amended by* Pub. L. No. 94-73, §§ 207, 402, 89 Stat. 402, 404 (1975); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(C) (1976).

86. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5911.

87. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United

federal civil rights laws[88] and to provide the means to implement congressional policy through the proper enforcement of these laws.

In the legislative history of the Attorney's Fees Awards Act, it was noted that enforcement of civil rights laws depends heavily on private action.[89] By allowing for the award of counsel fees to the prevailing party, individuals whose rights have been infringed are encouraged to seek judicial relief.[90] Without an allowable award of attorney's fees, private citizens would be deprived of an economically feasible opportunity to vindicate the infringement of important federal rights contained in the civil rights laws. This is especially true in cases brought under section 1983, that seek equitable relief as opposed to monetary awards.[91] In the absence of monetary damages, the award of attorney fees becomes an integral part of the remedy necessary to achieve compliance with congressional policies.[92]

The discretionary language of the attorney's fees amendment to section 1988 appears to be anomalous in light of the importance Congress attached to awarding counsel fees to the prevailing party. However, a closer look at the legislative history behind the Act dispels any suspicion of a contradiction. Congress provides a fairly clear interpretation of the language used in the amendment, and this interpretation is consistent with the promotion of the congressional purpose of the Act.

The phrase allowing the court to award attorney's fees "in its discretion" is not as discretionary as it may seem. Congress adopted the interpretation the Supreme Court gave to the fee provision of the 1964

States, a reasonable attorney's fee as part of the costs.
42 U.S.C. § 1988, *as amended by* Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641.

88. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909.

89. *Id.* at 5910. This recognition of the importance of private enforcement applies to the statutes enumerated in the Attorney's Fees Awards Act in addition to several other civil rights statutes. *See, e.g.*, Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976), and § 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e) (1976). In these statutes Congress has specifically allowed for the award of attorney's fees. The language of the 1976 amendment to § 1988 follows the fee provisions in these statutes. *Compare* 42 U.S.C. § 1988 (1976) *with* 42 U.S.C. §§ 2000a-2(b), 2000e-5(k) (1976) *and* 42 U.S.C. § 1973*l*(e) (1976).

90. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910.

91. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), is an example of the monetary strictures in the equitable relief context. The case had a widespread impact on the inhabitants of several regions, and the relief sought was injunctive and declaratory. Therefore, the Wilderness Society was forced to expend large amounts of money without the possibility of regaining these funds through a monetary award. The average individual is certainly not able to bear the cost of such litigation.

This problem was also recognized by the United States Supreme Court in reference to Titles II and VII of the Civil Rights Act of 1964.

> If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress, therefore, enacted the provision for counsel fees . . . to encourage individuals injured . . . to seek judicial relief.

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

92. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910.

Civil Rights Act[93] in *Newman v. Piggie Park Enterprises, Inc.*[94] According to *Newman*, a successful litigant "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[95] It should be noted that the statute the Supreme Court was interpreting in *Newman*—Title II, section 204(a) of the Civil Rights Act of 1964—only authorized equitable relief, excluding monetary damages.[96] It was for this reason the Court found it necessary to erect a general rule that attorney's fees should be awarded.[97] Even though the statutes enumerated in the 1976 amendment to section 1988 allow for damages in some cases, Congress extended this general rule to all statutes covered in the Attorney's Fees Awards Act.[98] Thus, the award of counsel fees to the prevailing party is mandatory unless barred by special circumstances.[99]

Congress also felt that it was necessary to clarify what is meant by the "prevailing party." This term is used to define the procedure courts are to follow in determining when and to which parties an award of attorney fees is appropriate. It is not necessary for a party to prevail on all issues in order to be eligible for an award of attorney's fees. If a party prevails on an important matter, or if rights are vindicated without formal relief being granted, counsel fees may be in order.[100] The criteria for the propriety of granting an award are the necessity for bringing the action and success with respect to the central issue of the litigation.[101] Attorney's fees are recoverable even though the plaintiff merely prevailed on preliminary relief or the case was settled; formal relief is not necessary before an award can be granted under the Awards Act.[102]

The party seeking enforcement of the rights protected by the stat-

93. *Id.* at 5912.
94. 390 U.S. 400 (1968).
95. *Id.* at 402, *quoted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912.
96. 42 U.S.C. § 2000a-3(a) (1976).
97. *See* 390 U.S. at 402.
98. It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered . . . [by the Awards Act] if successful, "should ordinarily recover an attorney's fee unless special circumstances render such an award unjust." [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912 (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)).
99. Exactly what constitutes special circumstances is unclear. Neither the Supreme Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), nor Congress in the legislative history of the Awards Act, indicates what these circumstances might be. Also, to date, case law giving specific meaning to this exception has not developed.
100. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912.
101. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978); Howard v. Phelps, 443 F. Supp. 374, 376 (E.D. La. 1978); *see* Parker v. Mathews, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (interpreting identical language from Title VII of the 1964 Civil Rights Act).
102. Howard v. Phelps, 443 F. Supp. 374, 376 (E.D. La. 1978); *see* Parker v. Mathews, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

utes enumerated in the amendment is faced with the possibility of paying the opponent's counsel fees only where the suit was clearly frivolous or vexatious.[103] The "private attorney general" who acts in good faith, therefore, is not deterred from bringing an action by the possibility of having to pay the opposing party's attorney's fees should the suit terminate in the defendant's favor.[104] If this were not the case, the prospect of having to pay the opponent's counsel fees would have a chilling effect on the exercise of the private attorney general role and would defeat the purpose of the Awards Act.

It therefore appears that the courts are left with a substantial degree of discretion with respect to certain issues when awarding counsel fees in actions to which section 1988 applies. However, the discretion lies primarily in determining whether a party has prevailed in the action under the guidelines supplied by Congress or whether the action was brought in bad faith. It does not extend to the decision whether or not the party seeking relief shall be awarded any attorney's fees; once it has been determined that this party has prevailed, the award is generally mandatory.[105]

The courts also retain a large degree of discretion over the amount of the award. This discretion is subject, however, to certain restraints. The awards are to be "governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and [are] not to be reduced because the rights involved may be nonpecuniary in nature."[106] In all cases the award must be "reasonable"; a party will not be allowed compensation for needless and exorbitant legal expenses.[107] In this way, the court in its discretion can insure that the Awards Act is properly used for compensatory purposes

103. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912. The Attorney's Fees Awards Act thus "deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce the Federal rights created by the statutes listed" in the amendment. *Id.*

104. *Id.* A party brings a suit in good faith where the suit is not clearly frivolous, vexatious, or brought for harassment purposes. *See id.*

105. *See* Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861, 870 (8th Cir. 1977) (unless special circumstances make an award unjust, prevailing plaintiffs are entitled to an award of attorney's fees).

106. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913. The legislative history cited Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), as establishing the appropriate standards to guide the courts' discretion in making an award. These are: (1) The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-19.

107. Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861, 871 (8th Cir. 1977).

and not as a means of inflicting punitive damages.[108]

The legislative history of the Attorney's Fees Awards Act and the developing case law allow a fairly clear and certain interpretation of the Act's substantive provisions. However, the applicability of the Act to section 1983 claims brought in state courts is not nearly as certain. An expanded discussion of this issue is contained in the following section.

Enforcement of the Attorney's Fees Awards Act in State Court

Since the Supreme Court's decision in *Testa v. Katt*,[109] it has been clear that a state court cannot refuse to enforce a right arising out of federal law if that court can properly assert jurisdiction over the claim.[110] Moreover, the supremacy clause dictates that once a state court undertakes to adjudicate a federal right it must do so in accordance with whatever federal law is applicable.[111] Therefore, if Congress had expressly provided for application of the Attorney's Fees Awards Act to section 1983 actions brought in state court, the supremacy clause would require state court compliance with the Act.

However, it is not at all clear that Congress intended the Act to extend to section 1983 proceedings brought in state courts. The stated purpose of the Act reads: "This amendment . . . gives the *Federal* courts discretion to award attorney's fees to enforce the civil rights acts which Congress has passed since 1866."[112] Moreover, the Attorney's Fees Awards Act of 1976 is an amendment to 42 U.S.C. § 1988—a statute dealing with the jurisdiction of federal district courts and the proper exercise of those courts' power. The legislative history of the amendment refers to the forum to be affected as "courts" and "federal courts" interchangeably.[113] This can be read as implying that Congress intended the impact of the bill to be felt only in the federal courts, especially since there is no mention of state courts in the entire discussion of the bill.[114] In addition, Congress passed the Act to remedy the situation created by *Alyeska*,[115] where the Supreme Court disallowed use of the "private attorney general exception" to the "American rule."

108. *Id.*
109. 330 U.S. 386 (1947).
110. *See id.* at 394.
111. *See id.*; Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244-45 (1931); Ward v. Love County, 253 U.S. 17, 22 (1920); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954).
112. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909 (emphasis added).
113. *E.g., id.* at 5909, 5913.
114. In the concluding remarks of the discussion of the Attorney's Fees Awards Act, the following statement is made: "This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the *Federal courts* are to continue the practice of awarding attorneys' fees . . . ." *Id.* at 5913 (emphasis added).
115. See text & notes 80-88 *supra*.

Since *Alyeska* is mandatory only in the federal courts, state courts could still invoke the private attorney general exception.[116] Because the impetus for passage of the Attorney's Fees Awards Act of 1976 was not present with respect to state courts, Congress may not have intended the Act to apply to them. Since congressional intent cannot be clearly discerned, an analysis of the nature of the Act and its functional import in relation to section 1983 is necessary.

The thesis in the following discussion is that the applicability of the counsel fees amendment to state courts is analogous to the problem faced by federal courts in applying state law in diversity suits. Resolution of the latter problem is governed by the doctrine of *Erie Railroad Co. v. Tompkins*.[117] Many of the same principles developed to solve *Erie* problems apply to the converse situation presented by the Attorney's Fees Awards Act.[118]

The *Erie* doctrine is an exceedingly complex area of the law and has undergone several changes since the decision of the case of 1938.[119] *Erie* was primarily concerned with the relations between the federal government and the states.[120] In this case the Court sought to return the power of defining the substantive rights of litigants in diversity cases to the states, a function which had been usurped by the federal courts for nearly a century.[121]

In the early development of the *Erie* doctrine it was thought that the decision to apply the federal or state law in any given situation was

116. *See* 421 U.S. 240, 269 (1975); Mandel v. Hodges, 54 Cal. App. 3d 596, 620, 127 Cal. Rptr. 244, 259 (1976) (the court stated that the applicability of the "private attorney general concept" was undecided in California, and noted that the United States Supreme Court only prohibited use of this concept in the federal courts).

117. 304 U.S. 64 (1938).

118. *See* text & note 137 *infra*.

119. The complexity of this area of the law is evidenced by the amount of legal writing devoted to this subject. *See, e.g.*, Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L.REV. 427 (1958).

120. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 255 (3d ed. 1976). The new rule of law announced by the Supreme Court in *Erie* is contained in the following language:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

121. In Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), Justice Story, writing for the Supreme Court, developed the principle that federal courts sitting in diversity cases were not bound by state court decisions. *Id.* at 19. Rather, federal courts were to be guided by the common law. *See id.* In this way Justice Story sought to achieve uniformity among the federal courts. *See* C. WRIGHT, *supra* note 120, at 250. The *Swift* doctrine was renounced by the Supreme Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938). The court in *Erie* argued that *Swift* introduced discrimination into the administration of the law of the states when actions were brought in federal courts based on diversity of citizenship jurisdiction. *See id.* at 74. In addition, the doctrine of *Swift v. Tyson* was itself unconstitutional. *Id.* at 79. Application of the *Swift* doctrine by federal courts constituted an invasion into the rights reserved by the Constitution to the states. *Id.* at 80.

determined by classifying the law in question as "substantive" or "procedural." If the law were "substantive," the state law applied; if the law were classified as "procedural," the federal law applied.[122] These wooden categories were recognized as inadequate in *Guaranty Trust Co. v. York*.[123] The Court observed that *Erie* was not an attempt to formulate a set of terms that could be used to solve all federal-state choice of law problems.[124] The Court then proceeded to establish a test under which these types of questions could be answered—the outcome-determinative test.[125] This test was criticized because virtually every rule of substance or procedure has some effect on the outcome of the case.[126] However, the Supreme Court adhered to this test for several years after its decision in *Guaranty Trust*.[127]

It was not until 1958, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[128] that the Court retreated from the position taken in *Guaranty Trust*. In *Byrd*, the Court moved toward a type of interest analysis to resolve *Erie*'s choice of law problems. Essentially, this approach entailed a three-step process.[129] In the first step, the Court looked to the policies underlying the state law to determine whether or not the rule was "an integral part of the special relationship created by the statute" or "bound up with the definitions of the rights and obligations of the parties."[130] In *Byrd*, the Court found that the state rule involved was not of this type, but was merely a form or mode of enforcing a statute.[131] In other words, the state rule was merely "procedural" rather than "substantive."[132] Second, under the *Byrd* analysis, if the state rule

122. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495-96 (1941). This substance/procedure dichotomy was the result of two statements, one by Justice Brandeis and the other by Justice Reed. C. WRIGHT, *supra* note 120, at 272. Justice Brandeis, in the opinion of the Court, said that Congress does not have the authority to "declare substantive rules of common law applicable in a State . . . ." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Justice Reed, in his concurring opinion, asserted that "no one doubts federal power over procedure." *Id*. at 92.

123. 326 U.S. 99 (1945).

124. *Id.* at 109-10.

125. "[T]he outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." *Id.* at 109.

126. C. WRIGHT, *supra* note 120, at 256; Hart, *supra* note 111, at 512.

127. *See, e.g.*, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-33 (1949); Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949).

128. 356 U.S. 525 (1958).

129. The characterization of the Court's reasoning in *Byrd* as a three-step interest analysis was the result of discussions with Professor Winton Woods of the University of Arizona College of Law.

130. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958).

131. *See id.*

132. The terms "substantive" and "procedural" are useful labels in discussing choice of law problems as long as it is recognized that in many cases no definitive lines can be drawn between the two concepts; there is no one meaning applicable to all contexts. Moreover, it is possible for a rule to serve both procedural and substantive functions simultaneously. Ely, *The Irrespressible Myth of Erie*, 87 HARV. L. REV. 693, 726 (1974). For purposes of this Note, a rule will be considered "procedural" if it is a mode or form of conducting or enforcing a right, as in *Byrd*. If it is

is found to be "substantive," it is prima facie applicable unless it is unconstitutional. The rule may be unconstitutional in two ways: it may violate a specific provision of the Constitution,[133] or it may be contrary to some congressional enactment and, therefore, be void under the supremacy clause.[134] This second step, of course, is passed over if the rule is found to be procedural. Procedural state rules are given further consideration in the third step in the analysis. The basic policy behind the *Erie* doctrine is that a case brought in federal court solely due to diversity of citizenship should conform as much as possible to state practices. Therefore, *Byrd* generally requires that the state rule be followed by the federal court, even if the rule is procedural, unless there are "affirmative countervailing considerations" present;[135] important federal policies override the preference for application of the state rule. In *Byrd*, the federal policy at stake was the preference for jury trials in federal courts, and this was sufficient to prevent the use of the state rule.[136]

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determined that the rule is "an integral part of the special relationship created by the statute" or "bound up with the rights and obligations of the parties" as these phrases were used in *Byrd*, the rule will be labeled "substantive."

133. State-created laws must conform to the provisions of the Constitution in order to be applicable in federal courts. *Cf.* Van Alstyne, *supra* note 1, at 265-66 (Congress' control over the jurisdiction of the federal judiciary is plenary as long as it does not violate a specific guarantee contained in the Constitution).

134. *See* Testa v. Katt, 330 U.S. 386, 392-94 (1947).

135. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537-38 (1958).

136. 356 U.S. at 538. Seven years after the *Byrd* decision the Supreme Court decided Hanna v. Plumer, 380 U.S. 460 (1965), the last in a line of cases in which the Court attempted to provide guidelines for the resolution of choice of law problems. In *Hanna*, the Court was called upon to decide whether Rule 4(d)(1) of the Federal Rules of Civil Procedure was controlling when in direct conflict with a Massachusetts rule defining the proper means of service of process. The Court held that the federal rule must prevail. However, in deciding the applicability of the federal rule, the Court did not rely on the *Erie* doctrine. *Id.* at 469-70. *Hanna* was based upon the Court's finding that the Rules Enabling Act was a constitutional exercise of congressional power, and that Rule 4(d)(1) did not transgress the provisions of this Act.

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id. at 472. *See generally* Ely, *supra* note 132; Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1947); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Mishkin, *The Thread*, 87 HARV. L. REV. 1682 (1974). Therefore, *Hanna* is not a new formulation of the proper approach to be taken in resolving *Erie* problems; the *Byrd* method of analysis is controlling. *But cf.* C. WRIGHT, *supra* note 120, at 258 (the proper facts to be considered are the outcome-determinative test of *Guaranty Trust Co. v. York* considered in light of the twin aims of *Erie*: "discouragement of forum shopping and avoidance of inequitable administration of the law.").

The method the Court used to arrive at its decision in *Hanna* is consistent with the *Byrd* analysis. In the first step of the analysis the Court considered whether the Massachusetts rule was "substantive" or "procedural" for *Erie* purposes. The Court found the answer to this question to be unclear. *See* 380 U.S. at 468 n.9. The Court then turned its attention to the Rules Enabling Act. The Court found that Rule 4(d)(1)—enacted pursuant to the Rules Enabling Act—preempted the area of the law in question. In other words, the supremacy clause required that the federal rule prevail when in direct conflict with the state rule. This reasoning can be likened to the second step in the *Byrd* analysis: the state rule may be contrary to some congressional enactment.

The requirement that federal courts conform as closely as possible to state courts when deciding cases based on state law and the requirement that state courts conform as closely as possible to federal courts when deciding cases based on federal legislation are complementary concepts.[137] The policies and factors influencing the decision of a federal court sitting in diversity suits to apply state law apply with equal force when a state court is adjudicating a claim under a federal statute.[138] Therefore, the method of analysis developed in *Byrd* serves as a useful tool in determining the applicability of the Attorney's Fees Awards Act to section 1983 claims brought in state court.

First, it must be determined whether or not the Awards Act is an "integral part of the special relationship" created by section 1983 or "bound up with the definitions of the rights and obligations of the parties" in section 1983 claims. Section 1983 establishes a cause of action whereby a party who has suffered a deprivation of a federally secured right, privilege, or immunity under color of state law can obtain appropriate relief.[139] The question, therefore, is to what extent and in what way is an award of attorney's fees to the prevailing party related to the cause of action established by section 1983.

In the legislative history accompanying the Attorney's Fees Awards Act, it was indicated that fee awards are essential if the statutes to which the Act applies are to be fully enforced.[140] The fee awards are seen as an integral part of the remedy and are necessary to achieve compliance with the congressional policies embodied in section 1983.[141] Without the availability of attorney's fees, Congress would be unable to rely on private citizens for the enforcement of federal civil rights laws.[142] For these reasons, the congressional view is that the Awards Act is closely "bound up" with the rights protected by the civil

137. Friendly, *In Praise of Erie—And of The New Federal Common Law*, 39 N.Y.U.L. REV., 383, 422 (1964).

138. *See* HART & WECHSLER, *supra* note 1, at 762-70. The Supreme Court addressed this question in Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). The Court held that in cases tried in state courts where a federal statute is being construed, incompatible doctrines of local law must give way to principles of federal law. *See id.* at 102. The Court stated that important federal statutes must have a uniform application and interpretation regardless of whether the case is heard in a state court or a federal court. *Id.* at 103-04. This uniformity is necessary if the efforts of Congress in enacting a particular statute are not to be frustrated. *Id.* at 104. *Cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (in areas of federal concern, such as labor relations, the substantive law to be applied is federal law and courts must interpret this law in a way that is most likely to effectuate the policy behind national labor laws).

139. See text & notes 6-10 *supra*.

140. In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which . . . [the Attorney's Fees Awards Act] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.

[1976] U.S. CODE CONG. & AD. NEWS 5908, 5913 (footnote omitted).

141. *Id.* at 5910.

142. See text & notes 88-92 *supra*.

rights statutes. It may, therefore, be considered "substantive" for purposes of this converse *Erie* analysis.[143]

Despite the implications that can be drawn from the legislative history, it can be argued that the Attorney's Fees Awards Act is not "substantive" but is "procedural" in that the primary purpose of the Act is to facilitate the preferable mode of enforcing section 1983.[144] The fee shifting provision enables Congress to rely on private enforcement, which eliminates the need for a federal enforcement agency.[145] In other words, under this view, the Awards Act is a measure designed to achieve administrative convenience and avoid the expense that would otherwise be incurred by the federal government. Therefore, the Awards Act arguably is not bound up with the "rights and obligations" sought to be protected by section 1983 and can be considered "procedural" for choice of law purposes.

The Attorney's Fees Awards Act cannot definitively be classified as "substantive" or "procedural." It appears that Congress had two goals in mind when it enacted the Awards Act—one relating to the management of litigation, and one relating to the creation of a remedy necessary for the proper and complete enforcement of federal civil rights laws.[146] In one sense, an award of attorney's fees in a section 1983 action is compensatory, designed to compensate the plaintiff for attorney's fees incurred in successfully prosecuting the case. In this sense, an award may be considered merely remedial or procedural. It is merely part of the readjustment of the situation caused by a defendant's civil rights violation. But more is intended by an award of attorney's fees than a readjustment of private losses. Beyond compensating persons for their enforcement efforts, an award of attorney's fees increases the likelihood that suit will be brought and a defendant will be held accountable for breaching certain obligations (violating the civil rights of others). In this way, the award serves a deterrent function which is necessary to ensure that federally secured rights and responsibilities are given the meaning Congress intended. The award is therefore "an integral part of the special relationship created by the statute" because it is essential to the regulatory scheme. Because Congress had

143. In Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942), the Supreme Court stated that, if state courts were not required to make available all substantial rights of the parties, the remedy afforded by the state's applicable law might not adequately enforce the federal rights Congress sought to secure. Similarly, the failure of a state court to make an award of attorney's fees in a § 1983 action may result in inadequate enforcement of federal civil rights laws in state courts.

144. The Supreme Court has viewed the awarding of attorney's fees without specific authorization as an equitable remedy. Hall v. Cole, 412 U.S. 1, 4-5 (1973); Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392-93 (1970). This implies that courts have free reign over the awarding of attorney's fees in such instances.

145. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5911.

146. *Compare* text & notes 140-42 *supra with* text & note 145 *supra*.

more than one purpose in mind when enacting the Awards Act, a definitive classification of the Act as substantive or procedural for purposes of the converse *Byrd* analysis can only be achieved by an interpretation by the Supreme Court.[147]

If the Supreme Court found the Awards Act to be substantive, the second step of the *Byrd* analysis would come into play. That is, the Act is prima facie applicable to a section 1983 action brought in state court unless it is unconstitutional. There appears to be little doubt about the Act's constitutionality. Congress enacted this legislation in accordance with the powers granted under section 5 of the fourteenth amendment.[148] This provision reserves to Congress the power to grant jurisdiction to federal courts over any action necessary to achieve a full enforcement of the amendment's provisions.[149] Since both section 1983 and the Awards Act protect individual civil rights and ensure the equal protection of the laws, the eleventh amendment does not bar this legislation.[150] Therefore, the state courts would be required to apply the

147. It may be argued that the applicability of a federal statute in a state court action is different than a federal court sitting in a diversity suit and, therefore, to apply *Byrd* is inapposite. However, the *Byrd* analysis should be used because of both the important character of federal civil rights laws and the supreme nature of federal law in general. In addition, there are parallels between the reasoning behind *Erie* and the "converse *Erie*" analysis.

Erie was based on two general ideas: first, the desire to remove the discrimination resulting from application of different substantive rules of law in state and federal courts; and second, the notion that in the absence of congressional action decisional rules in diversity cases are within the control of the states. *See* text & note 118 *supra*. These same ideas apply to the "converse *Erie*" situation. Litigants would be discriminated against if an attorney's fee award were not available in state courts while the same litigants in federal court would be eligible for an award of attorney's fees. Also, just as the determination of substantive rights in diversity suits is subject to state control, the substantive rights of parties in actions brought to enforce federally secured civil rights is an area properly governed by congressional enactments. Since civil rights laws embody fundamental federal rights, and private actions serve an important function in deterring and remedying their violation, the substantive rules governing and defining the rights of the parties should be uniform between the state and federal courts.

The primary distinction between *Erie* and the "converse *Erie*" situation is as follows: *Erie* involved a choice of law problem that arose where Congress had not acted on the subject; the "converse *Erie*" situation involves a choice of law problem where Congress has acted and thus implicates a constitutional provision not implicated in *Erie* problems—the supremacy clause and the superceding character of federal policy. This distinction does not preclude the use of the *Byrd* analysis in "converse *Erie*" situations. The type of interest analysis employed in *Byrd* is a reasonable and appropriate method of analysis in these situations.

148. [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913.

149. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1455 (1975). Section 5 of the fourteenth amendment reads in pertinent part: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

150. The eleventh amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Supreme Court stated in Hutto v. Finney, 436 U.S. 678 (1978) that the eleventh amendment does not bar attorney's fee awards made pursuant to the Awards Act. *Id.* at 693-700. The award of attorney's fees is constitutional where the award must be paid from state funds, as well as by state officials in their individual capacity. *See id.* at 700.

It has also been suggested that in ratifying the fourteenth amendment the states waived a

Attorney's Fees Awards Act.

If, on the other hand, the Supreme Court found the fees provision "procedural" for choice of law purposes, the converse of the third step in the *Byrd* analysis would be applied. The state courts would still be required to apply the Act unless there were strong "countervailing considerations" of state law or policy cutting against its application.[151] In many states there would be no strong "countervailing considerations" since the state may find that the rule disfavoring awards is not compelling enough to override notions of comity and the basic policy in favor of conforming as closely as possible to the federal practice.[152] However, in some states the rule against awarding fees may be of sufficient import to override the factors favoring application of the Awards Act.[153] Thus, if it were determined that the Act is "procedural," applicability would be determined by the importance of the counsel fees issue in a particular state.

Conclusion

Given the legislative history accompanying the Attorney's Fees Awards Act, the most probable conclusion is that the Act is substantive for choice of law problems. However, as stated previously, this distinction is an uncertain one, and the nature of the Act cannot be conclusively determined without Supreme Court guidance. Until the Supreme Court resolves this issue, state courts may choose not to award attorney's fees in section 1983 actions. This would result in a hardship on successful plaintiffs that Congress sought to avoid.[154]

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portion of their immunity under the eleventh amendment. Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1898 n.132 (1975).

151. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

152. Prior to the passage of the Attorney's Fees Awards Act, a New Jersey state court indicated a willingness to follow the federal practice if there were statutory authorization. If there were such a statute, "a persuasive argument might be made that, our rules to the contrary notwithstanding, the salutary policy of safeguarding civil rights should warrant our following the federal practice as to attorney's fees." Endress v. Brookdale Community College, 144 N.J.Super. 109, 149, 364 A.2d 1080, 1101 (1976).

153. *See* Stone v. Town of Mexico Beach, 348 So. 2d 40, 44 (Fla. Dist. Ct. App. 1977) (although not referring to § 1988, the court stated, "an award of attorney's fees 'is in derogation of common law and . . . acts for that purpose should be construed strictly.' ").

Several arguments have been propounded in support of the American rule, which disallows the award of attorney's fees in the absence of statutory authorization. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.8, at 201-02 (1973). However, these arguments have been met with much criticism. *E.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 *passim* (1966); Goodhart, *Costs*, 38 YALE L.J. 849, 874-77 (1929); Kuenzel, *The Attorneys' Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78-82 (1963). The rule against awarding attorney's fees may be so ingrained in the common law of a particular jurisdiction that the rule constitutes a "countervailing consideration," while in other jurisdictions the rule may be of a lesser import and insufficient to prevent application of the Awards Act.

154. This was the result in a recent case decided by a New York state court. *See* Cooper v. Morin, 91 Misc. 2d 302, 358-60, 398 N.Y.S.2d 36, 79-80 (1977). However, this result was due to a misinterpretation of the discretionary clause in the Act, rather than the type of interest analysis suggested in this Note.

The grant of concurrent jurisdiction for claims arising under section 1983 demonstrates the intention on the part of Congress to have the federal and state courts share in the enforcement of important civil rights legislation. It is, therefore, incumbent upon the Supreme Court to ensure that state courts properly implement federal policies and goals. To reach this end, the Supreme Court must supply the appropriate guidelines. The importance Congress attaches to the availability of attorney's fees is indicated by the legislative history of the Awards Act. Proper enforcement of civil rights laws requires the award of counsel fees.[155] Therefore, ambiguities arising out of the wording of the legislative history of the Act[156] and the impetus for the Act's passage,[157] should not be allowed to obscure the importance of the Act. The Act should be declared substantive, and state courts should be required to award attorney's fees according to the dictates of the Act.

155. *See* text & notes 88-92 *supra.*
156. *See* text & notes 112-114 *supra.*
157. *See* text & notes 115-116 *supra.*