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Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies

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PREEMPTION OF SECTION 1983 BY TITLE VII: AN UNWARRANTED DEPRIVATION OF REMEDIES

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Few laws have been subject to more extreme shifts in judicial theory than section 1983.[1] Following ninety years of dormancy, section 1983 was resurrected in the 1960s and early 1970s as a viable tool for the protection of civil rights. In the last decade, however, a growing number of Supreme Court opinions have once again restricted the scope and coverage of the section.

One of the most recent steps in the contraction of section 1983 are the holdings of *Middlesex County Sewerage Authority v. National Sea Clammers Association*[2] and *Smith v. Robinson*,[3] which hold that a section 1983 cause of action may be precluded by a comprehensive statutory scheme. Several federal district courts have applied this proposition to bar actions under section 1983 when an alternate cause of action is available under Title VII of the Civil

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1. *See* Rader, *Section 1983, The Civil Civil Rights Action: Legislative and Judicial Directions*, 15 CUMB. L. REV. 571 (1985). Section 1983 provides inter alia:

> 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 proceedings for redress.

42 U.S.C. § 1983 (1982).

2. 453 U.S. 1 (1981). The Court held that the parties did not have a private right of action under the Federal Water Pollution Act, ch. 785, 62 Stat. 1115 (1948)(amended at 33 U.S.C. §§ 1251-1376 (1982)) and Pub. L. 92-532, 86 Stat. 1052 (1972) (codified as amended at 33 U.S.C. §§ 1401-1445 (1982)).

3. 468 U.S. 992 (1984) (denying plaintiff's claim for attorney's fees, which would normally be available under § 1983, because plaintiff asserted a meritorious claim under the Education of the Handicapped Act).

Rights Act of 1964.[4] The doctrinal inconsistency of a handful of Supreme Court opinions has left lower courts perplexed about the interrelations between Title VII and section 1983. This article reviews the overlap of Title VII and section 1983, analyzes the theories of implied repeal or exclusivity currently being applied in combined Title VII and section 1983 cases, and examines the viability of section 1983 as an independent remedy for civil rights violations. The article concludes that because of the convoluted procedural requirements of Title VII, the preclusion of a section 1983 cause of action could dramatically reduce the chances for a plaintiff to have a colorable civil rights claim decided on the merits and adequately remedied.

I. THE EXPANSION OF SECTION 1983

Following the Civil War, Congress enacted a series of laws designed to enforce the provisions of the newly ratified thirteenth, fourteenth, and fifteenth amendments.[5] Section 1 of the Civil Rights Act of 1871[6] provided civil remedies for deprivations of federal rights "under color of" state law. Due to an early series of restrictive Supreme Court decisions, the Act lay essentially unused for almost ninety years.[7]

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4. 42 U.S.C. §§ 2000e to e-17 (1982)(prohibiting employment discrimination on the basis of race, color, religion, sex or national origin). *See* W. CONNOLLY & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY 5-6 (rev. ed. 1979).

5. The thirteenth amendment was ratified in December of 1865. U.S. CONST. amend. XIII. The fourteenth amendment was adopted by Congress in 1866 and ratified by the states in 1868. U.S. CONST. amend. XIV. The fifteenth amendment was ratified in 1870. U.S. CONST. amend. XVI. Close on the heels of the amendments came the succession of civil rights statutes known as the Force Acts. Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Professor Mahoney suggests that because no common law action existed to remedy violations of constitutional rights and because not until Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), did the Supreme Court hold that such a cause of action arose directly under the Constitution, "in the absence of section 1983, the Fourteenth Amendment would presumably have been enforced only by the federal government." Mahoney, *The Prima Facie Section 1983 Case*, 14 URB. LAW. 131, 131 (1982) (footnote omitted).

6. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)).

7. *See* Gibson v. Mississippi, 162 U.S. 565 (1896); The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); Bush v. Kentucky, 107 U.S. 110 (1883); Hall v. DeCuir, 95 U.S. 485 (1877); United States v. Cruikshank, 92 U.S. 542 (1876); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). During the early part of the twentieth century, the scope of § 1983 was confined primarily to voting rights and discrimination cases. *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939) (involving a black denied registration); Nixon v. Herndon, 273 U.S. 536 (1927) (involving blacks who were denied the right to participate in Democratic Party primary election).

The Court restricted the reach of these provisions, not only because it felt the tre-

In 1961 the Supreme Court's ruling in *Monroe v. Pape*[8] began a revival of section 1983. One of the primary reasons section 1983 had historically been ignored was an early Supreme Court decision which held that an illegal act or one not authorized by state law was neither an act "under color of" state law nor state action.[9] *Monroe* removed this restriction and held that when a state officer's actions violated state law they were to be considered "under color of" state law for purposes of section 1983.[10] In addition, *Monroe* established that the substantive rights preserved by the Civil Rights Act of 1871 were precisely those guaranteed by the fourteenth amendment.[11] Finally, *Monroe* indicated that exhaustion of state remedies was not required to maintain a section 1983 action in federal court.[12]

The *Monroe* decision generated a flood of civil rights lawsuits in the federal courts.[13] It has been suggested that "the Supreme Court has attempted to limit the scope of section 1983 ever since *Monroe*."[14] However, at least two subsequent decisions by the Supreme Court have broadened the reach of section 1983.[15]

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mendous pressure exerted by Southern conservatives on the race question, but also because it was concerned about the extent to which the federal government should be allowed to regulate areas that traditionally rested within the states' domain.

Banks, *The Scope of Section 1985(3) in Light of Great American Federal Savings and Loan Association v. Novotny: Too Little Too Late?*, 9 HASTINGS CONST. L.Q. 579, 581-82 (1982) (citing J.H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR, 203-07 (1961)).

8. 365 U.S. 167 (1961) (damage action against policeman and the City of Chicago, where policeman allegedly entered and ransacked plaintiff's home, while the occupants were forced to stand naked; plaintiff was subsequently arrested but was never charged), *overruled*, Monnell v. Dep't of Social Servs., 436 U.S. 658 (1978). *See infra* notes 18-24 and accompanying text.

9. Barney v. City of New York, 193 U.S. 430 (1904) (holding city's construction of a railroad tunnel did not qualify as state action within the meaning of the fourteenth amendment because it was unauthorized and illegal). *See* Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49, 51 (1976).

10. 365 U.S. at 187.

11. *Id.* at 171. Previous decisions had more narrowly construed the scope of protectable interests. *See* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 § 2.02 (Supp. 1982).

12. 365 U.S. at 183. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

13. In 1960 only two hundred and eighty suits were filed in federal court under all the civil rights acts; in 1972 approximately eight thousand claims were filed under § 1983 alone. Developments in the Law, *Section 1983 And Federalism*, 90 HARV. L. REV. 1133, 1172 (1977).

14. *See* Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. U.L. REV. 93 (1985); Comment, *Civil Rights: The Supreme Court Finds New Ways To Limit Section 1983*, 33 U. FLA. L. REV. 776, 779 n.21 (1981).

15. The Supreme Court began to restrict certain aspects of § 1983 in the 1970s even as

In *Lynch v. Household Finance Corp.*,[16] a unanimous Supreme Court repudiated previous decisions[17] which held that section 1983 was available only to redress infringements of personal liberty. The *Lynch* Court held that section 1983 also reached deprivations of property rights.[18]

After expanding the scope of protectable interests in *Lynch*, the Supreme Court also enlarged the categories of entities subject to suit under section 1983 in *Monell v. Department of Social Services*.[19] In *Monroe* the Court had read the legislative history of the Civil Rights Act of 1871 to preclude damage actions against municipalities.[20] In *Monell* the Court lifted the blanket immunity for municipalities by holding that municipalities and local government bodies were "persons" amenable to suit under section 1983.[21] The *Monell* Court limited this liability by holding that it could be imposed on municipalities only for violations effected pursuant to an official policy or custom.[22] After *Monell* the number of section 1983 suits filed in federal courts leaped again,[23] and the crowding of the federal court dockets played a significant role in the calls to restrict the scope of section 1983.[24] By the late 1970s the Supreme Court had begun to narrow the contours of section 1983 suits.

II. THE CONTRACTION OF SECTION 1983

The Supreme Court is deciding an ever-increasing number of

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it broadened the reach of § 1983 in other areas. A legislative expansion during this era was the passage of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 (Supp. 1986), which provided for payment by defendants of successful plaintiffs' attorney's fees.

16. 405 U.S. 538 (1972) (holding that the delay between seizure of property and the federal government proceeding for its disposition violated the fifth amendment due process requirement).

17. *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939) (holding that a Jersey City ordinance that forbade the distribution of printed material regarding the National Labor Relations Act discriminately and arbitrarily suppressed public assembly).

18. 405 U.S. at 543-44.

19. 436 U.S. 658 (1978) (plaintiffs were pregnant employees compelled by the Department of Social Services and the Board of Education of the City of New York to take an unpaid leave of absence before such a leave was medically indicated).

20. Monroe v. Pape, 365 U.S. 167, 187-88 (1961).

21. 436 U.S. at 690-91. "[T]he Court reexamined the same legislative history and changed its mind." Rader, *supra* note 1, at 580.

22. 436 U.S. at 694. Thus, municipalities cannot be sued on a respondeat superior theory for the acts of their employees.

23. *See* Rader, *supra* note 1, at 581.

24. *See* Developments in the Law, *supra* note 13, at 1172; *see also* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, LAW & SOC. ORD. 557, 558-59 (1973).

cases that will preclude litigants from maintaining section 1983 suits in federal court. These decisions have affected a variety of aspects of section 1983: who can be sued, the types of conduct actionable, the interests protected, and the immunities available. Part of the impetus for defense attorneys to whittle away at the section 1983 cause of action is the increased availability of attorney's fees under section 1988 for plaintiffs who prevail in civil rights actions.[25] To establish a section 1983 claim, a plaintiff must show the following elements: 1) an entity acting under color of state law; 2) who subjects or causes to be subjected any person; 3) to the deprivation of any rights; 4) that are secured by the Constitution or laws of the United States. Through various means the Supreme Court has more stringently interpreted each element of the section 1983 cause of action.

A. *"Under Color of" State Law*

According to the statutory language, section 1983 reaches only persons acting "under color of" state law. The practices challenged must involve some state or local government action. While private parties are not ordinarily subject to suit under section 1983, a private entity may be reached under the section if its conduct is "fairly attributable to the State."[26]

In 1974, the Supreme Court began to interpret restrictively what constitutes state action. In *Jackson v. Metropolitan Edison Co.*,[27] the Court held that even extensive and detailed regulation of a utility by the state and the utility's status as a state-created monopoly that provided essential services did not convert the actions of the business into state action for purposes of section 1983. The *Jackson* Court ruled that there must be a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.[28]

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25. *See* Larson, *Current Developments in the Law of Attorneys' Fees*, in II CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 295-305 (1986).

26. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (holding that the attachment of property in a prejudgment procedure which did not include a prior hearing constituted a deprivation of constitutional rights). "[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.*

27. 419 U.S. 345 (1974) (holding that a privately owned, heavily regulated electric utility which did offer notice or a hearing prior to termination of plaintiff's electric service was not sufficiently connected to the regulating state to satisfy the state action criteria of the fourteenth amendment).

28. *Id.* at 352.

In *Flagg Bros. Inc. v. Brooks*,[29] the Supreme Court elaborated that either the private entity must exercise a function traditionally reserved exclusively to the state or the state must compel the private action.

The trend toward a limited concept of state action was continued in 1982 with the Court's decisions in *Rendell-Baker v. Kohn*[30] and *Blum v. Yaretsky*.[31] In *Rendell-Baker* and *Blum* the Court determined that public funding of schools and nursing homes was not a sufficient imprimatur to make the acts of the recipients state action.[32] The state action requirement, and the Supreme Court's narrow construction of that element, substantially limit the availability of section 1983.

B. *"Subjects or Causes To Be Subjected"*

For liability to accrue under section 1983, a defendant's conduct must subject a plaintiff to a deprivation of his or her federal rights. The Supreme Court has markedly constricted the scope of culpable official action that will satisfy this requirement. In 1976, the Court held in *Rizzo v. Goode*[33] that a plaintiff must establish direct participation by an official to state a claim under section 1983 and that such plaintiff must have a personal stake in the outcome.[34]

Depending on the underlying constitutional violation alleged, a plaintiff may also be required to prove the state of mind of the defendant. The intent requirement varies according to the nature of the rights involved.[35] The Court has exhibited an increasing tendency to narrowly construe the types of conduct that section 1983 was

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29. 436 U.S. 149 (1978) (holding that the sale of respondent's household goods by warehouseman pursuant to state law after her eviction was not state action).

30. 457 U.S. 830 (1982) (private school receiving 99% of its funding from the government was not acting under color of state law with respect to the discharge of personnel).

31. 457 U.S. 991 (1982) (nursing home's decision to discharge or transfer medicaid patients was not state action, even though home received state funds, because decisions regarding patient care were not related to funding).

32. 457 U.S. 830; 457 U.S. 991. *See also* Polk County v. Dodson, 454 U.S. 312 (1981) (a public defender representing an indigent client does not act under color of state law).

33. 423 U.S. 362 (1976) (involving a class action by a minority group against the mayor of Philadelphia for failing to stop a pattern of discriminatory police behavior).

34. *Id.* Either an exercise of control or a failure to exhibit control can create liability.

35. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)(requiring proof of a discriminatory purpose for a claim of racial discrimination under the equal protection clause); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (requiring "deliberate indifference to serious medical needs of prisoners" to establish a violation of the cruel and unusual punishment clause of the eighth amendment (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

designed to remedy. In the 1986 companion cases of *Daniels v. Williams*[36] and *Davidson v. Cannon*,[37] the Court overruled its holding of five years earlier in the case of *Parratt v. Taylor*,[38] that a state official's negligent act could constitute a deprivation of life, liberty or property remediable by section 1983.[39]

C. *"Deprivation of Any Rights"*

In addition to limiting when official conduct rises to the level of a constitutional tort, the Court has also reduced the body of tort violations actionable under section 1983. In *Paul v. Davis*,[40] the Supreme Court held that state torts were not a fortiori actionable under section 1983 merely because a state official was the perpetrator. The test advanced by the Court in *Paul* was whether the alleged damage constituted a deprivation of an interest specifically protected by the fourteenth amendment.[41] The *Paul* Court feared the creation of "a font of [federal] tort law to be superimposed upon whatever systems may already be administered by the States."[42]

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36. 106 S. Ct. 662 (1986).

37. 106 S. Ct. 668 (1986).

38. 451 U.S. 527 (1981) (concluding that the loss of prisoner's mail containing hobby material by negligent prison officials constituted a deprivation of property).

39. "We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Daniels*, 106 S. Ct. at 663 (emphasis in original).

40. 424 U.S. 693 (1976) (Davis brought suit alleging damage to his reputation due to police circulation of a flyer bearing his name and photograph and identifying him as a known shoplifter).

41. Thus, rights expressly granted by the Constitution or rights that have been deemed fundamental would be the types of constitutional torts actionable under the Court's rationale. *Id.* at 712. *See* Comment, *supra* note 9, at 68. In addition, interests recognized by the Constitution would be protected under § 1983 if they were "initially recognized and protected by state law." *Paul*, 424 U.S. at 710. The *Paul* opinion provided two examples of state-created interests: the right to operate a motor vehicle and the right to parole.

In *Paul* the Court held that defamation by a state official standing alone, did not rise to the level of a constitutional deprivation. *Id.* at 711-12. In decisions subsequent to *Paul*, courts have held that the stigma accruing from the defamation must result in a further deprivation of a right otherwise secured by the Constitution or state law. To measure the sufficiency of defamation claims, the appellate courts have devised a "stigma-plus" standard. *See, e.g.*, Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977) (holding that reassignment of a policeman to patrol duties does not meet the "stigma-plus" standard when there was no loss in civil service status); Colaizzi v. Walker, 542 F.2d 969, 973-74 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977)(a press release charging state officials with abusing their positions coupled with simultaneous discharge of those officials satisfied the "stigma-plus" test).

42. 424 U.S. at 701.

D. *State and Federal Relations*

The Supreme Court's concern that state tort law would be swallowed by section 1983 was evidenced by a series of decisions commencing in 1976 with *Bishop v. Wood*.[43] The Court held in *Bishop* that property interests secured by section 1983 must be determined by reference to state law. In *Allen v. McCurry*,[44] the Court held that a section 1983 action would be precluded by a prior state criminal proceeding reaching the same issues. The Court next held in several cases that section 1983 would be preempted not only by state adjudications but even by the mere availability of state judicial remedies. In *Ingraham v. Wright*,[45] the Court ruled that because a student who had been subjected to corporal punishment could bring a state tort action for damages, no additional federal remedy was required.

The principle applied in *Ingraham* to a claim of intentional deprivation of liberty was applied in *Parratt v. Taylor*[46] to a claim of negligent deprivation of property. The *Parratt* Court held that a prison inmate was not entitled to a pre-deprivation hearing to determine the propriety of his loss of a hobby kit because the available state tort remedies were sufficient.[47] The Court concluded that a postdeprivation remedy was all the process the plaintiff was due.[48] As one commentator notes, the doctrine developed in *Ingraham* and *Parratt* "relegates procedural due process claims to the state courts and effectively removes the procedural due process claims from the scope of [section] 1983."[49] Finally, the Supreme Court may have effectively channeled some civil rights claims to the state courts by restricting both pendent claim[50] and pendent party[51] jurisdiction.

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43. 426 U.S. 341, 344 (1976) (holding that a policeman's job is not a constitutionally protected property right requiring a hearing before discharge under the fourteenth amendment due process clause unless state law confers such a right).

44. 449 U.S. 90 (1980) (holding that collateral estoppel prevents respondent from relitigating a fourth amendment or fourteenth amendment search and seizure question already decided in a state court proceeding).

45. 430 U.S. 651, 672 (1977) (stating that community supervision of the school provided additional procedural safeguards).

46. 451 U.S. 527 (1981); *see supra* note 38 and accompanying text.

47. 451 U.S. at 544.

48. *Id.*

49. Lenhoff, *Federal Courts and the Decline of 42 U.S.C. § 1983*, 64 MICH. B.J. 532, 534 (1985). In 1984, the Supreme Court extended the *Parratt* and *Ingraham* holdings to claims of intentional property deprivation. Hudson v. Palmer, 468 U.S. 517 (1984). *See also* Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978).

50. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (prohibiting federal courts from instructing state officials on how to conform their conduct with respect to

E. *Immunities*

The spate of Supreme Court opinions reducing the circumstances under which section 1983 suits could be brought in federal court was paralleled by a stream of decisions enlarging the range of absolute and qualified immunities available to various state officials under section 1983. Absolute immunity is available in section 1983 suits to certain "functional categories" of officials.[52] The Supreme Court has granted absolute immunity to judges,[53] those performing essential judicial functions,[54] legislators,[55] those who perform essential legislative functions,[56] prosecutors,[57] witnesses,[58] and the President of the United States.[59]

Over the years the Court has developed qualified immunity for officials who commit deprivations of rights in good faith.[60] Qualified immunity is available to all public officials not entitled to absolute immunity. Prior to the Court's 1982 decision in *Harlow v. Fitzgerald*,[61] the qualified immunity defense was comprised of objective and subjective components.[62] In *Harlow* the Supreme Court transformed

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state law).

51. Aldinger v. Howard, 427 U.S. 1 (1976) (refusing to extend pendent jurisdiction to state law claim against county where Congress has already by implication declined to extend federal jurisdiction).

52. Briscoe v. LaHue, 460 U.S. 325, 342 (1983) (holding that all persons integrally involved in the judicial process are immune from liability, including a police officer whose perjured testimony resulted in plaintiff's conviction).

53. Stump v. Sparkman, 435 U.S. 349, 364 (1978) (upholding the immunity of a circuit judge responsible for the *ex parte* decision to sterilize a minor).

54. *Briscoe*, 460 U.S. at 343; Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976) (suit against prosecuting attorney for using false testimony and suppressing evidence at trial which resulted in petitioner's conviction).

55. Tenney v. Brandhove, 341 U.S. 367, 376-78 (1951) (plaintiff requested damages from an investigation by a California legislative committee).

56. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979)(holding defendants immune from liability to the extent they were acting in a legislative capacity).

57. *Imbler*, 424 U.S. at 430-31.

58. *Briscoe*, 460 U.S. at 331-34.

59. Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982) (upholding the absolute immunity of the President for his official actions).

60. The qualified immunity defense originated in Pierson v. Ray, 386 U.S. 547 (1967), and was refined in Scheuer v. Rhodes, 416 U.S. 232 (1974), and Wood v. Strickland, 420 U.S. 308 (1975). *See generally* Comment, *Civil Rights: A Modification of the Qualified Immunity Defense in Actions Brought Under 42 U.S.C. § 1983*, 24 WASHBURN L.J. 630, 632-33 (1985)(tracing the development of § 1983 good faith immunity).

61. 457 U.S. 800 (1982) (involving White House aides who participated in the illegal discharge of a government employee).

62. *Id.* at 815-16.

the test into an entirely objective one: whether the defendant's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[63] The *Harlow* qualified immunity doctrine will foster the summary resolution of defendants' immunity claims, since whether the law in question was clearly established when the conduct complained of occurred is a legal question to be resolved by the court.[64] Furthermore, *Harlow* posits an objective test concerned solely with whether the law is clearly established with respect to a particular right. Therefore, the state of mind is irrelevant: a "defendant could commit a malicious act against the plaintiff and still enjoy qualified immunity, provided that there was no constitutional right applicable to the malicious act as of the time that act occurred."[65]

In sum, the last decade has seen a narrowing of the entities amenable to suit under section 1983 and a concomitant expansion of immunities available to those who can be sued under section 1983. The Supreme Court has also reduced both the types of conduct actionable under section 1983 and the interests secured by the statute. Furthermore, the Court's concern with the potential displacement of state law by section 1983 has been manifested in a series of decisions limiting the ways in which civil rights actions can be brought in federal courts. The cumulative impact of these trends is a significant restriction of access to federal courts in civil rights litigation.

III. Rights "Secured by the Constitution and Laws"

Under section 1983, any person who is deprived "of any rights, privileges or immunities secured by the Constitution and laws" may sue for damages. The portion of section 1983 most recently targeted for erosion is the phrase "and laws." In *Maine v. Thiboutot*,[66] the Supreme Court held that the reference to "laws" in section 1983 "broadly encompasses violations of federal statutory as well as constitutional law."[67] The Court read the plain language of section 1983 to allow the respondents to employ that statute as a vehicle to redress an alleged violation of the Social Security Act.[68]

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63. *Id.* at 818. *See* Davis v. Scherer, 468 U.S. 183 (1984).

64. *See, e.g.*, Miller v. City of Mission, 705 F.2d 368, 375 n.6 (10th Cir. 1983).

65. Lenhoff, *supra* note 49, at 533.

66. 448 U.S. 1 (1980).

67. *Id.* at 4. The Court specifically rejected a construction that § 1983 applied only to violations of federal civil rights or equal protection laws. *Id.* at 6-8.

68. *Id.* at 5-6. Thus, an Aid to Families with Dependent Children (AFDC) recipient was permitted to bring a § 1983 action to require state compliance with the Social Security Act, 42

Amid concerns that the *Thiboutot* decision "would go far toward converting section 1983 into a state counterpart of the Administrative Procedure Act,"[69] the Supreme Court decided *Pennhurst State School & Hospital v. Halderman.*[70] In *Pennhurst* the Court limited the expansive construction of *Thiboutot* by holding that section 1983 could not be used to implement federal statutes which created no enforceable rights.[71]

The Court limited the *Thiboutot* doctrine further in *Middlesex County Sewerage Authority v. National Sea Clammers Association.*[72] The plaintiff in *Sea Clammers* filed a section 1983 action alleging damage to fishing grounds from ocean dumping of sewage.[73] The Court concluded that the Federal Water Pollution Control Act[74] and the Marine Protection, Research, and Sanctuaries Act of 1972,[75] contained comprehensive enforcement mechanisms which indicated congressional intent to preclude a cause of action under section 1983.[76] Thus, section 1983 is not available when Congress has created remedies for the enforcement of a federal statute that explicitly or implicitly preclude a section 1983 action.

In 1984 the Supreme Court reaffirmed the holding of *Sea Clammers* in *Smith v. Robinson.*[77] The plaintiffs in *Smith* sought an award of attorney's fees by relying on section 1983 as an additional remedy to their principal claim under the Education of the Handicapped Act (EHA)[78] to secure appropriate public education for a handicapped child. The Supreme Court dismissed the section 1983 claim because it concluded that the EHA's "carefully tailored administrative and judicial mechanism" was the exclusive avenue of relief for claims of the handicapped.[79]

U.S.C. §§ 601-610 (1985 & Supp. IV 1986), even though the Social Security Act did not provide a private right of enforcement.

69. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 394 (1982).

70. 451 U.S. 1 (1981).

71. *Id.* at 18.

72. 453 U.S. 1 (1981).

73. *Id.* at 4.

74. 33 U.S.C. §§ 1251-1376 (1982).

75. 33 U.S.C. §§ 1401-1445 (1982).

76. The *Sea Clammers* majority went out of its way to reach the issue of § 1983 preclusion. 453 U.S. at 19-21. The parties never raised the issue. *See* Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 DEPAUL L. REV. 31 (1983).

77. 468 U.S. 992 (1984).

78. 20 U.S.C. §§ 1400-1441 (1982).

79. 468 U.S. at 1009.

In the wake of *Smith* and *Sea Clammers* courts have attempted to curtail the circumstances under which section 1983 claims can be brought in conjunction with other types of actions. A growing number of federal district court decisions are applying the exclusivity theory of *Sea Clammers* and *Smith* to preclude combined Title VII and section 1983 actions. The next section analyzes the theories which lower courts have employed in addressing situations in which section 1983 claims are preempted by Title VII.

IV. PREEMPTION OF SECTION 1983 BY TITLE VII

The provision of an exclusive avenue of relief is nothing new to the employment discrimination field. In fact, defendants who argue that Title VII should supplant section 1983 rely upon a variety of antecedents other than *Smith* and *Sea Clammers*. A capsulization of the cases addressing this issue of overlapping remedies is important to an understanding of the arguments made in the Title VII exclusivity cases.

A. *Exclusive and Overlapping Remedies*

In *Alexander v. Gardner-Denver Co.*,[80] the plaintiff alleged he had been discharged from employment because of his race. Plaintiff presented his claim to an arbitration panel and then instituted a Title VII action in federal court. The Supreme Court reversed the lower court's ruling that the plaintiff had waived his right to bring a Title VII suit by submitting his grievance to the arbitration procedure. The Court held that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[81]

A year later, the Supreme Court reiterated the *Alexander* holding in *Johnson v. Railway Express Agency*.[82] In *Johnson* a black employee filed a Title VII suit charging racial discrimination in his employer's seniority policies. After a number of procedural delays, the plaintiff filed a supplementary complaint under section 1981 based on the same set of circumstances. The Supreme Court ruled that a Title VII action did not preempt a suit under section 1981,

80. 415 U.S. 36 (1974).

81. *Id.* at 48. "The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 48-49.

82. 421 U.S. 454 (1975).

since Title VII and section 1981 are "separate, distinct and independent" remedial statutes.[83]

In the year following *Johnson* the Supreme Court again addressed the interplay of Title VII and section 1981. Specifically at issue in *Brown v. General Services Administration*,[84] was section 717, which extends the protection of Title VII to federal employees.[85] The substance of the allegations in *Brown* virtually replicate those in *Johnson*: a black employee filed a complaint under both Title VII and section 1981 alleging racial discrimination. Unlike the result reached in *Johnson*, however, the Supreme Court affirmed the dismissal of the section 1981 claim partially on the basis that section 717 of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment."[86]

The reasoning of the Court in *Brown* is curious. The Court focused on the comprehensiveness of the remedial scheme provided by Title VII as justification for its exclusivity, even though the Court specifically rejected this rationale a year earlier in *Johnson*.[87] Furthermore, the *Brown* Court assumed that Congress intended section 717 to be an exclusive remedy because Congress apparently thought no other remedies were available to federal employees for employment discrimination.[88] The Court stated that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."[89] As one commentator has remarked, "the *Brown* Court's inference that Congress intended to extinguish all pre-existing rights that escaped its

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83. *Id.* at 461. The specific holding in *Johnson* was that the filing of a charge under Title VII did not toll the running of the statute of limitations for a parallel § 1981 action. *Id.* at 466. The *Johnson* Court examined the legislative history of Title VII, in which Congress commented that Title VII and § 1981 "augment each other and are not mutually exclusive." *Id.* at 459 (quoting H.R. REP. No. 238, 92d Cong., 1st Sess. 19 (1971)).

84. 425 U.S. 820 (1976).

85. *Id.* at 835. Congress added § 717 to Title VII when it passed the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16 (1982).

86. 425 U.S. at 821, 835.

87. In *Johnson* the Court wrote: "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." 421 U.S. at 459.

88. 425 U.S. at 828-29. Justice Stevens pointed out in his dissent that the assumption that § 717 provides the only judicial remedy for federal employees was erroneous, since the legislative history reveals that § 717 was purposely enacted without an amendment specifying it as the exclusive remedy for federal employees. *Id.* at 837-38 (Stevens, J., dissenting).

89. *Id.* at 828 (footnote omitted).

notice is unconvincing."[90]

In 1979 the Supreme Court addressed the concurrent use of another portion of the Civil Rights Act of 1871 and Title VII in *Great American Federal Savings & Loan Association v. Novotny*.[91] The male plaintiff in *Novotny* alleged that he was fired by his private employer in retaliation for expressing his support for female employees who charged the management with sex discrimination. Novotny asserted violations of Title VII and 42 U.S.C. section 1985(3) in separate counts. The section 1985(3) claim was premised on alleged injury due to a violation of a specific section of Title VII.[92] The question before the Court was "whether the rights created by Title VII may be asserted within the *remedial* framework of § 1985(3)."[93] The Court held that section 1985(3) could not be invoked to redress violations of Title VII,[94] reasoning that a section 1985(3) action would circumvent the comprehensive remedial scheme delineated in Title VII.[95] The Court ruled that Novotny could not claim violations of two independent rights because, although Title VII conferred rights on him, section 1985(3) created no substantive rights.[96] Therefore, the *Novotny* Court concluded that "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)."[97]

The *Novotny* decision has been a primary impetus for the recent torrent of decisions addressing the issue of whether a Title VII claim displaces a cause of action under section 1983.[98] Title VII exclusivity

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90. Comment, *Civil Rights—Employment Discrimination—Section 1985(c) Unavailable to Vindicate Title VII Rights*, 65 CORNELL L. REV. 114, 123 n.47 (1979).

91. 442 U.S. 366 (1979).

92. By adding the § 1985(3) claim, Novotny hoped to recover compensatory and punitive damages. His recovery under Title VII would have been limited to reinstatement and possibly up to two years of back pay. *Id.* at 374 n.16.

93. 442 U.S. at 377 (emphasis in original).

94. *Id.* at 376.

95. *Id.*

96. *Id.* at 372. In separate concurrences, Justices Powell and Stevens observed that § 1985(3) was intended to provide a remedy only for the violation of fundamental constitutional rights. *Id.* at 381 (Powell, J., concurring), 384-85 (Stevens, J., concurring). One writer suggests that the Court avoided the question of implied repeal of existing rights with this analysis, because "under . . . [the] Court's view of section 1985(c) the right asserted by Novotny did not exist prior to the passage of Title VII." Comment, *supra* note 90, at 121. The *Novotny* dissenters, however, contended that the majority's holding was tantamount to a silent repeal of § 1985(3). 442 U.S. at 393 (White, Brennan and Marshall, JJ., dissenting).

97. 442 U.S. at 378.

98. In addition to *Smith* and *Sea Clammers* and the *Alexander-Johnson-Brown-Novotny* line of cases, courts discussing Title VII exclusivity have considered the Supreme Court's decision in Preiser v. Rodriguez, 411 U.S. 475 (1973). In *Preiser* the Court examined

was first discussed in 1982.[99] Prior to that time, courts assumed that section 1983 and Title VII afforded parallel remedies.[100] The Title VII exclusivity decisions may be grouped analytically into three categories, which can be labeled "complete preemption theory," "independent rights theory," and "and laws analysis."

B. *Displacement of Section 1983 by Title VII*

1. Complete Preemption Theory. — In *Torres v. Wisconsin Department of Health and Social Services*,[101] male corrections officers challenged a bona fide occupational qualification (BFOQ) plan under which certain posts at a women's correctional facility were staffed only by women.[102] The plaintiffs alleged that the BFOQ program violated Title VII and sections 1985(3) and 1983.[103] The defendants filed a motion to dismiss the civil rights claims, arguing that the causes of action under sections 1983 and 1985(3) were preempted by the exclusive remedial scheme of Title VII.[104]

The *Torres* court dismissed both the section 1985(3) and the section 1983 claims. With respect to the cause of action under section 1985(3), the court observed that the male corrections officers challenged the BFOQ plan on grounds also protected by Title VII.[105] The court determined that because the "charged constitutional deprivation inheres in the very creation and implementation of an allegedly discriminatory plan . . . the claims are not sufficiently discrete to escape the *Novotny* proscription."[106] Although the plaintiff argued that *Novotny* involved discrimination by a private employer, the court rejected the distinction.

While the court acknowledged that the signals from the Su-

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the relationship between § 1983 and the more precisely drawn habeas corpus statute, 28 U.S.C. § 2254 (1982). The Court held that a prisoner seeking release from confinement for violations of his constitutional rights was limited to habeas corpus as his only remedy. *Id.* at 500. If prisoners were allowed to assert the same substantive rights via § 1983, the Court reasoned, they would be permitted to thwart the state exhaustion requirement of the habeas statute. *Id.* at 489-90.

99. *See* Huebschen v. Department of Health and Social Servs., 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983).

100. *See, e.g.*, Grano v. Department of Dev., 637 F.2d 1073, 1082 (6th Cir. 1980) (a plaintiff alleging unequal treatment is essentially asserting the same claim under either Title VII or § 1983).

101. 592 F. Supp. 922 (E.D. Wis. 1984).

102. *Id.* at 923.

103. *Id.*

104. *Id.*

105. *Id.* at 927.

106. *Id.*

preme Court regarding preemption of section 1983 were "decidedly mixed," the court extended the *Novotny* rationale of section 1985(3) preemption to section 1983.[107] To support its conclusion, the *Torres* court relied on the *Brown* analysis that Title VII provides a comprehensive statutory scheme.[108] Next the court looked at the policy articulated in *Preiser v. Rodriguez*,[109] that "a precisely-drawn, detailed statute preempts more general remedies."[110] Finally, the court based its decision on the *Sea Clammers* holding that the availability of specific statutory schemes may preclude the simultaneous invocation of section 1983.[111] The *Torres* court concluded that "the remedial framework of Title VII could be just as effectively circumvented by a litigant suing under section 1983 as it could by a party seeking relief under section 1985(3)."[112]

The precise holding of *Torres* is somewhat difficult to capsulize. The court held that the plaintiffs could not sue under section 1983 because they had a remedy available under Title VII.[113] The court's reason for this ruling, however, was that the plaintiffs' section 1983 "allegations are so tied up with their cause of action under Title VII that they are . . . nearly unidentifiable as discrete claims . . . ."[114] Although the *Torres* court implied that a section 1983 claim could be brought in tandem with a Title VII claim if the section 1983 claim were premised on a discrete constitutional basis, the decision left unclear what would constitute such an independent basis.[115]

Less than a year after its decision in *Torres*, the United States District Court for the Eastern District of Wisconsin clarified its position in *Ratliff v. City of Milwaukee*.[116] The plaintiff in *Ratliff* alleged that she was discharged from employment due to her race, in violation of Title VII, section 1983 and section 1985(3). The *Ratliff* court relied on its reasoning in *Torres* and dismissed both of the civil rights counts because the plaintiff had a Title VII remedy available.

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107. *Id.* at 928.
108. *Id.*
109. 411 U.S. 475 (1973).
110. *Torres*, 592 F. Supp. at 929.
111. *Id.*
112. *Id.* at 928.
113. *Id.* at 930.
114. *Id.*
115. "This is not to say, of course, that there may never be an action in which discrete claims of employment discrimination and some conspiratorial deprivation of equal protection of the laws might spring from the same set of operative facts—only that this is not such a case." *Id.* at 927.
116. 608 F. Supp. 1109 (E.D. Wis. 1985), *rev'd in part*, 795 F.2d 612 (7th Cir. 1986).

As in *Torres*, the court found in *Ratliff* that the plaintiff's section 1983 claim was "inherently bound up with her Title VII claim such that her sole remedy is provided by Title VII."[117] The court analyzed the interrelation of the basis for the section 1983 cause of action and the basis for the Title VII claim as follows:

> While the plaintiff may argue that the conspiracy, procedural due process, retaliation and equal protection claims pertain to distinct rights which are guaranteed under the Constitution, the Court feels that these claims are part and parcel of the same cause of action. Had the plaintiff not been terminated from her job or harassed in her employment situation as she contends, she would have no claim for damages for any of these other alleged constitutional and statutory violations. Each of her claims is premised upon her assertion that she was discriminated against because of her race, the very action that Congress intended to prohibit and provide a remedy for by means of Title VII.[118]

In *Torres*, a section 1983 equal protection challenge to a BFOQ plan was held not to state a cause of action discrete from a Title VII attack on the BFOQ plan. In *Ratliff* the same court held that claims of race discrimination, conspiracy and equal protection brought pursuant to section 1983 duplicated a Title VII challenge to the plaintiff's termination. While the court in *Torres* appeared to leave open the possibility of employing section 1983 and Title VII in the same case,[119] in *Ratliff* the court foreclosed the use of Title VII and section 1983 to challenge the same conduct. If conspiracy, equal protection and race discrimination are not constitutional claims distinct from Title VII, it is difficult, if not impossible, to imagine what would present an independent constitutional claim.

Two more recent decisions also belong in the complete preemption group. In *Reiter v. Center Consolidated School District No. 26-JT*,[120] the United States District Court for the District of Colorado gave lip service to the independent rights theory, but employed a rationale which unavoidably arrived at complete preemption. The *Reiter* court held that claims of gender and religious discrimination are not independent of Title VII because they are prohibited by Title VII.[121] Under this circular reasoning, it is impossible to conceive of a

117. *Id.* at 1128.
118. *Id.*
119. *See supra* note 115 and accompanying text.
120. 618 F. Supp. 1458 (D. Colo. 1985).
121. *Id.* at 1462-63.

type of claim that would be both prohibited by and independent of Title VII. [122] Thus, according to *Reiter*, no claim that can be remedied by Title VII can be framed as a section 1983 suit.

The United States District Court for the District of Maryland also adopted a somewhat misguided approach to exclusivity analysis. In *Keller v. Prince George's County Department of Social Services*,[123] the black female plaintiff instituted a civil rights suit under Title VII and section 1983. The court stated that "[i]t is not the rights asserted that determine separateness of remedies—otherwise, no rights or remedies could be preempted. It is the underlying conduct the law is asked to redress that determines what remedies can be asserted."[124] The court, however, then proceeded to analyze the plaintiff's claim as follows: "In this case, the underlying conduct—employment discrimination—is exclusively redressed by Title VII."[125]

Since both Title VII and section 1983 can be used to remedy employment discrimination, the court did not actually evaluate the "underlying conduct" for which relief was sought.[126] Employment discrimination is a generic label, encompassing many types of wrongful behaviors that differ in substantive content. The *Keller* court simply begged the question of when one employment discrimination statute preempts the other. Under *Keller*, no employment discrimination suit could ever be brought with both Title VII and section 1983 claims.

According to the complete preemption theory, if an employment discrimination suit is brought with both Title VII and section 1983, Title VII becomes the exclusive remedy and the section 1983 count is dismissed. In other words, any time Title VII and section 1983 are applied to the same set of facts in an employment discrimination case, the availability of a Title VII remedy preempts the use of section 1983.

2. Independent Rights Theory. — Most courts that have addressed the viability of parallel Title VII and section 1983 claims have adopted the independent rights theory. Under this theory, a

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122. The difficulty with the court's approach is that it does not analyze whether the *basis* of the Title VII claim is a right created by Title VII or one protected independently of Title VII, such as those protected by the fifth or fourteenth amendments.

123. 616 F. Supp. 540 (D. Md. 1985).

124. *Id.* at 543-44.

125. *Id.* at 544.

126. In this case racial discrimination formed the underlying conduct.

plaintiff may sue on both Title VII and section 1983 grounds when the section 1983 violation rests on a right independently guaranteed by the Constitution. If the substantive basis of the section 1983 cause of action is a violation of Title VII, however, the section 1983 claim is dismissed and the case proceeds only on the Title VII claim.

Two early cases are representative of the independent rights theory. In *Zewde v. Elgin Community College*,[127] the plaintiff brought a section 1983 action and a Title VII claim against a community college, alleging employment discrimination on the basis of race and national origin.[128] The court held that Zewde could maintain a section 1983 action even though the facts supporting the civil rights action were identical to those underlying the Title VII claim, since the alleged race-based job discrimination would be in violation of the equal protection clause of the fourteenth amendment.[129] The court rejected the defendant's analogy to *Novotny* and *Sea Clammers*, because "[i]n neither case was the plaintiff asserting constitutional rights or substantive rights other than those created by Title VII or the FWPCA [Federal Water Pollution Control Act]."[130]

In fact, the *Zewde* court reasoned that the logic of *Novotny* supported the independent rights theory. In *Novotny* the Supreme Court held that rights "created by Title VII" could not be asserted through section 1985(3).[131] Zewde, however, was "asserting rights 'created by' the Fourteenth Amendment, not by Title VII."[132] The *Zewde* opinion distinguished the Supreme Court's holding in *Sea Clammers*:

> It is one thing to say, as the Supreme Court did in . . . [*Sea Clammers*], that a comprehensive and specific statute like the FWPCA demonstrates implicit congressional intent to repeal the § 1983 right of action for violations of that statute. It is quite another thing to say . . . that the comprehensive Title VII framework demonstrates implicit congressional intent to repeal the § 1983 right of action for concurrent violations of the Constitution.[133]

The *Zewde* court also distinguished two cases relied on by the *Torres* court. According to the court in *Zewde*, the *Brown* decision

127. 601 F. Supp. 1237 (N.D. Ill. 1984).
128. *Id.* at 1239.
129. *Id.* at 1245 n.10.
130. *Id.* at 1245.
131. 442 U.S. 366, 377 (1979).
132. 601 F. Supp. at 1246.
133. *Id.*

did not command the result reached in *Torres*, since in *Brown* "there was no question of implied or express repeal of an existing and clear legislative grant of redress for constitutional violations; nothing akin to § 1983 had been on the books for federal employees."[134] In contrast, *Zewde* squarely addressed the issue of implied repeal. Finally, the court found that the *Preiser* decision was distinguishable in the same way as *Novotny* and *Sea Clammers*: in *Preiser* the plaintiff asserted, via section 1983, a violation of the same substantive right that could have been asserted through a more specific statute. The *Zewde* court held that "a plaintiff may state a *constitutional* claim under § 1983 even if it stems from the same operative facts as a Title VII claim."[135]

In *Day v. Wayne County Board of Auditors*[136] the Sixth Circuit tracked the reasoning of the *Zewde* opinion but reached the opposite result. The plaintiff in *Day* sued his state employer for retaliatory discharge based on the employee's filing of employment discrimination charges.[137] The court dismissed the section 1983 claim since that claim was premised on a violation of Title VII and therefore no independent right was infringed. The *Day* court reasoned that "[i]t would be anomalous to hold that when the only unlawful employment practice consists of the violation of a right created by Title VII, the plaintiff can bypass all of the administrative processes of Title VII and go directly into court under § 1983."[138] Some courts have arrived at results in accordance with *Day*.[139]

3. "And Laws" Analysis. — One court has constructed a theory diametrically opposed to the complete preemption theory developed in *Torres*. In *Huebschen v. Department of Health and Social Services*,[140] a demoted state employee filed a combined Title VII and section 1983 action against his employer, alleging sexual harassment.[141] The court recognized that Title VII was "the only substantive basis of the § 1983 claim."[142] The *Huebschen* court nevertheless

134. *Id.* at 1248.

135. *Id.* at 1246 (emphasis in original). *Accord* Green v. Illinois Dep't of Transp., 609 F. Supp. 1021, 1027 (N.D. Ill. 1985).

136. 749 F.2d 1199 (6th Cir. 1984).

137. *Id.* at 1200.

138. *Id.* at 1204.

139. *See, e.g.*, Tafoya v. Adams, 816 F.2d 555 (10th Cir. 1987); Hervey v. City of Little Rock, 787 F.2d 1223 (8th Cir. 1986); Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984).

140. 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd*, 716 F.2d 1167 (7th Cir. 1983).

141. *Id.* at 1172.

142. *Id.* at 1173.

held that a plaintiff may sue under section 1983 when the sole basis for the section 1983 claim is a violation of Title VII.[143]

Initially, the court rejected the extension of the *Novotny* holding regarding section 1985(3) exclusivity to section 1983. The *Huebschen* court projected how the *Novotny* concurrers and dissenters would analyze whether a section 1983 claim could be premised entirely on an infringement of Title VII. According to *Huebschen*, the three *Novotny* dissenters, who would have allowed a section 1985(3) claim to be based on only a Title VII violation, would arrive at the same result with respect to section 1983.[144] In addition, Justices Powell and Stevens, who concurred in *Novotny*, reasoned that section 1985(3) prohibited only conspiracies to deny constitutional, but not statutory, rights.[145] Thus, the *Huebschen* court assumed that they would permit actions under section 1983 for violations of statutes, such as Title VII. Tallying the votes, the *Huebschen* court concluded that "at least five justices would rule that a Title VII violation alone may provide the substance for an action under § 1983."[146]

After determining that the *Novotny* holding should be limited to section 1985(3) actions, the court analyzed the ambit of claims pursuable under section 1983:

> In *Maine v. Thiboutot*, the Supreme Court held that § 1983 encompasses virtually all congressional enactments by virtue of the phrase "and laws" in the statute . . . . Even the dissenters in *Maine* believed that § 1983, by the term "and laws," included violations of equal rights legislation. . . . Obviously, Title VII is equal rights legislation.[147]

Since section 1983 protects "rights, privileges or immunities secured by the Constitution and laws" without any delimiting language, the *Huebschen* court reasoned that one of the laws enforceable via section 1983 is Title VII.[148]

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143. *Id.* On appeal the circuit court held that the district court erred in permitting plaintiff to maintain an action under § 1983 based on Title VII because the plaintiff's supervisor was not a person who could be sued directly under Title VII. 716 F.2d at 1171.

144. 547 F. Supp. at 1175.

145. *Id.*

146. *Id.*

147. *Id.* at 1174 (citations omitted).

148. *Id.* at 1175.

V. FLAWS IN THE THEORIES

A. *Complete Preemption Theory*

The complete preemption theory depends upon two steps of analysis. First, the extension of the *Novotny* rationale to preempt section 1983 suits based on Title VII requires an analogy between sections 1983 and 1985(3). Second, the complete preemption theory necessitates a particular reading of the *Novotny* holding.

In drawing an analogy between the sections, the *Torres* court simply asserted that section 1983 could be circumvented as easily as section 1985(3).[149] The *Ratliff* decision noted that section 1985 is similar to section 1983 in that neither statute is the source of any substantive rights.[150] While both statutes only provide remedies for violations of the rights they designate, the rights protected by the two civil rights statutes differ.

Section 1985(3) is targeted at private conspiracies which deprive individuals of "equal protection of the laws, or of equal privileges and immunities under the laws."[151] Section 1983 reaches more broadly, protecting against deprivations of rights secured by all other provisions of the Constitution and by federal statutes.[152] Moreover, since section 1983 was designed to enforce the fourteenth amendment, which applies solely to state action, section 1983 redresses only deprivations "under color of any statute, ordinance, regulation, custom, or usage . . . ."[153] On the other hand, section 1985 also applies to private actions.[154]

Novotny involved discrimination by a private employer. In essence the Supreme Court's holding prohibited overlapping section 1985 and Title VII remedies for private discrimination. The argument can be made that the *Novotny* rationale should apply with less force to section 1983 actions because the victims of government discrimination should have a more complete arsenal to combat the machinery of the state. Viewed another way, since most constitutional rights do not apply to private action, private conspiracies are not as

149. *See supra* note 107 and accompanying text.

150. 608 F. Supp. at 1127 (citing Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1972)).

151. 42 U.S.C. § 1985(3) (1982).

152. In fact, *Thiboutot* expressly rejected a reading of § 1983 which would have confined the scope of the statute only to equal protection based claims. 448 U.S. at 8.

153. 42 U.S.C. § 1983 (1982).

154. C. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS D3-2 (rev. ed. 1987).

apt to trod on fundamental rights as are actions taken by the state. Thus, plaintiffs suing under section 1983 and Title VII should be afforded both remedies.

The critical problem with the *Torres* opinion lies in its misinterpretation of the *Novotny* holding regarding exclusivity. The *Novotny* Court held that "deprivation of a right *created by* Title VII cannot be the basis for a cause of action under § 1985(3)."[155] The *Torres* court engages in some intellectual sleight of hand when it holds that *Novotny* compels the conclusion that a wrong *redressable under* Title VII cannot be the basis for a cause of action under section 1983.[156] A much more limited variety of actions is uniquely created by Title VII than is redressable under Title VII.[157] Thus, the broad holdings of *Torres* and *Ratliff*, that claims under Title VII and section 1983 cannot co-exist in a case, regardless of the interrelation between the two statutes, simply is not supported by a fair reading of *Novotny*.

In essence, the complete preemption theory works an implied repeal of section 1983.[158] Such a result is not warranted by the Congressional history of Title VII, a history that the *Torres* court declined to re-examine.[159] As the United States District Court for the Western District of Wisconsin noted in *Meyett v. Coleman*,[160] "Congress has the authority to repeal § 1983 by providing an exclusive remedy elsewhere, but the fact that a statute contains a comprehensive remedial scheme does not mean that it was Congress' intent to rule out additional remedies under § 1983."[161] The legislative history of Title VII clearly indicates that it was not intended to displace existing section 1983 remedies. In 1964,[162] and again in 1972,[163]

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155. 442 U.S. at 378 (emphasis added).

156. 592 F. Supp. 922, 927 (1984).

157. For example, a cause of action for sexual harassment is specifically a Title VII creation. Race discrimination, on the other hand, while prohibited by Title VII, is also proscribed by a number of other laws.

158. *See supra* note 96.

159. 592 F. Supp. at 930. The court refused to engage in an exhaustive restatement of the legislative history.

160. 613 F. Supp. 39 (W.D. Wis. 1985).

161. *Id.* at 40.

162. 110 CONG. REC. 13650-52 (1964).

163. The House Report stated:

> In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected . . . . Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy

Congress contemplated and consciously rejected amendments which would have made Title VII the exclusive remedy for unlawful employment practices. Thus, in effecting a *de facto* repeal of section 1983, the complete preemption theory runs contrary to the legislative history of Title VII.[164]

Furthermore, it is unclear how far the complete preemption theory goes. The theory posits that conduct which gives rise to violations of both Title VII and section 1983 may be redressed only under Title VII. Courts employing complete preemption have not addressed whether a suit could be dismissed if a case to which Title VII might apply is brought solely under section 1983. All of the cases discussing this issue have involved complaints that have asserted both claims.

Under a natural extension of the *Torres* and *Ratliff* court's fear that plaintiffs will wiggle around the statutory requirements of Title VII, arguably Title VII should be the exclusive remedy for any claims to which it might apply. It is obviously much easier for courts to dismiss a section 1983 claim if there is still a viable Title VII claim extant. But the logic of the theory should apply equally when a plaintiff has not filed an otherwise applicable Title VII claim because, for instance, the plaintiff failed to file a timely charge with the EEOC. If Title VII has preempted section 1983, the preemption theory should apply even though the plaintiff has missed the shorter statute of limitations under Title VII. This would work an extraordinarily harsh result, however, since a plaintiff who has suffered wrongs recognized by two statutes might be left without even a single remedy.

Also unaddressed by current complete preemption cases is how the theory would deal with a set of facts that after a trial might be found to be a violation of one statute but not the other. For example, the facts might not establish retaliation in violation of Title VII, but would arguably support the finding of a violation of first amendment

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> to redress employment discrimination . . . . The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.

H.R. REP. NO. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2154.

164. The *Zewde* court commented that "[c]ourts should require express legislative intent to repeal statutory rights of action for constitutional violations. At the very least, judges should be more hesitant to find an implied repeal of a constitutional right of action than to find one of a statutory violation." 601 F. Supp. at 1246.

rights.[165] In sum, the complete preemption theory—which has yet to be theoretically fleshed out—hinges on a superficial analogy between two civil rights statutes, a misreading of Supreme Court precedent, and an ignorance of legislative history.

B. *Independent Rights Theory*

While the courts applying the independent rights theory concur that a section 1983 action can remain alongside a Title VII claim if there is an independent constitutional basis for the section 1983 action, these courts disagree as to when there is a discrete constitutional violation. The two areas in which courts have split over the existence of an independent right are suits alleging sex discrimination and suits brought against a state employer. In *Meyett v. Coleman*,[166] the court held that the male plaintiff who contended that he was discriminated against in employment on the basis of sex had asserted a cause of action premised on the Constitution, independent of his parallel Title VII claim.[167] The court determined that the due process clause of the fifth amendment, which has been held to prohibit sexual discrimination in employment,[168] provided a constitutional guarantee independent of Title VII.[169]

In *Storey v. Board of Regents of the University of Wisconsin System*,[170] the female plaintiff filed a combined Title VII and section 1983 suit with claims similar to those made in *Meyett*. The court allowed the plaintiff to recover under both section 1983 and Title VII, reasoning that "the right to be considered for employment without regard to her sex . . . was not created by Title VII. The Constitution itself addresses the matter by its guarantee of equal protection."[171]

A United States District Court judge for the District of Kansas

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165. *See, e.g.*, Holden v. Owens-Illinois, Inc., 793 F.2d 745, 749-50 (6th Cir.), *cert. denied*, 107 S. Ct. 649 (1986).

166. 613 F. Supp. 39 (W.D. Wis. 1985).

167. *Id.*

168. Davis v. Passman, 442 U.S. 228 (1979).

169. 613 F. Supp. at 40-41. The court stated that the fifth amendment's prohibition against sexual discrimination in employment is applicable to the states under the fourteenth amendment and a plaintiff should be free to pursue remedies made available by both Title VII and § 1983.

170. 600 F. Supp. 838 (W.D. Wis. 1985).

171. *Id.* at 841-42. *Accord* Jensen v. Board of County Comm'rs, 636 F. Supp. 293, 299 (D. Kan. 1986). "Because plaintiff's right to challenge discrimination based on gender was not created by Title VII, but in fact preexisted that act, plaintiff is free to pursue his remedies under both theories." *Id.*

apparently disagrees with the conclusion reached in both *Meyett* and *Storey* that allegations of sexual discrimination present a constitutional claim distinct from Title VII concerns. The plaintiff in *Goodall v. Sedgwick County*[172] alleged that her employer had committed sexual discrimination and sexual harassment, in violation of both Title VII and section 1983. The court dismissed Goodall's section 1983 cause of action, ruling that she had not articulated a deprivation of a right secured by the Constitution or laws of the United States independent of her claim under Title VII.[173] Unlike the courts in *Meyett* and *Storey*, the *Goodall* court did not look to the source of the rights allegedly violated, but focused instead on the nature of the harm suffered by the plaintiff:

> [W]hile it is conceivable that the plaintiff may be able to demonstrate sex discrimination or a sexually harassing work environment existed during her tenure with the County Sheriff, there is no indication from the evidence of any additional violation of the plaintiff's rights. The court can discern no pattern or practice of depriving females of equal protection of the law nor any First Amendment violation which is distinguishable from plaintiff's claim of being subjected to sexually offensive or discriminatory conduct on the job in violation of Title VII.[174]

Apparently, the *Goodall* court would require proof of a harm separate from that remediable under Title VII for there to be an independent constitutional violation.

Two courts have determined that section 1983 actions against state employers by their very nature involve allegations of independent rights violations. In *Trigg v. Fort Wayne Community Schools*,[175] the Seventh Circuit concluded that "the Fourteenth Amendment and Title VII have granted public sector employees independent rights to be free of employment discrimination."[176] The court in *Skadegaard v. Farrell*[177] reached the same conclusion and stated that a holding giving "public employees so victimized more rights than their privately employed counterparts finds its justifica-

172. No. 82-1914, slip. op. (D. Kan. Oct. 11, 1985)(on file at HOFSTRA LAW REVIEW).

173. *Id.* at 6.

174. *Id.* at 4-5. The "pattern or practice" language is curious, since "pattern or practice" is distinctly a Title VII concept. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1322 (1983).

175. 766 F.2d 299 (7th Cir. 1985).

176. *Id.* at 302. *See* Pollard v. City of Chicago, 643 F. Supp. 1244, 1252 (N.D. Ill. 1986).

177. 578 F. Supp. 1209 (D. N.J. 1984).

tion in the 'state action' requirement of the Fourteenth Amendment which mandates this result."[178] The *Meyett* court, however, carefully avoided reliance solely on the fourteenth amendment.[179] In *Goodall* the court did not consider whether a section 1983 action against a state employer, without more, asserted the violation of an independent right.[180]

A primary difficulty with the independent rights theory is that courts disagree on when a constitutional claim has an independent basis. The *Meyett* and *Storey* decisions state that sexual discrimination is proscribed by constitutional guarantees independent of Title VII.[181] *Goodall*, on the other hand, is perplexing.[182] The *Goodall* decision failed to analyze whether there is a constitutional right not to be discriminated against on the basis of sex. By focusing solely on whether the harm suffered by the plaintiff was remediable under Title VII, the *Goodall* court precluded any inquiry into whether a plaintiff may have suffered a deprivation of *rights* under section 1983 resulting in the same sort of harm. Arguably, under *Goodall*, if the ultimate harm suffered by a plaintiff is protected by Title VII, the section 1983 remedy is unavailable. Thus, the *Goodall* decision may simply be a complete preemption case masquerading under the independent rights theory. Similarly, *Trigg* and *Skadegaard* may belong in the "and laws" camp, since both decisions conclude that any time a section 1983 action is brought against a *state* employer—a *sine qua non* of section 1983 suits—the violation of a right independent of section 1983 is presented.[183] Given the limited analysis by the courts applying the independent rights theory, it is unclear whether there will be a constitutional litmus test for what constitutes an independent right.

C. *"And Laws" Theory*

The "and laws" theory is more difficult to analyze because it is

178. *Id.* at 1218.

179. *See supra* note 166.

180. The *Goodall* court raised and rejected a range of potentially available independent constitutional claims, but failed to mention an action against a state employer among them. No. 82-1914 at 5. Thus, the decision could be read as holding *sub silentio* that an action against a state employer does not present a discrete constitutional claim.

181. *See supra* notes 166-74 and accompanying text.

182. *See supra* note 174.

183. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (holding that conduct which is "state action" for purposes of the fourteenth amendment is also conduct "under color of state law" for purposes of § 1983).

not as fully developed as the other two theories. As formulated by the *Huebschen* court, a plaintiff may always bring parallel Title VII and section 1983 actions because one of the laws enforceable through section 1983 is Title VII. The theory rests on a literal interpretation of the *Thiboutot* decision: "and laws" means "and laws."[184] One commentator has suggested that "[n]o one contends that the decision means literally what it says—that section 1983 authorizes private enforcement of *all* federal statutes."[185] Other commentators disagree and suggest that *Thiboutot* means what it says:

> Although the historical record is far from unambiguous, the preferable interpretation of section 1983 is . . . that "and laws" comprehends all laws, not merely particular kinds of laws. To reach this conclusion is not, however, to say that an express enforcement mechanism in a governing substantive statute should never be taken as exclusive. For example, the section 1983 action could not survive as a means to enforce a statute that explicitly excludes that remedy.[186]

Huebschen fails to reconcile *Thiboutot* with *Sea Clammers*. The obvious import of *Sea Clammers* is that not all federal statutes are a valid source of section 1983 claims. *Huebschen* does not address when a statutory enforcement mechanism may preempt the "and laws" provision of section 1983. In short, the "and laws" theory, as delineated by the *Huebschen* court, ignores the holding of *Sea Clammers*.

Furthermore, the reach of the "and laws" theory is uncertain. Unanswered by *Huebschen* is whether a public employee whose cause of action is based on rights provided by Title VII may bring a section 1983 action without exhausting the administrative remedies provided by Title VII.[187] Finally, adequate theoretical support of the "and laws" theory requires analysis of why public employees, who would be permitted to stack remedies under Title VII and section 1983, should be afforded greater rights than private employees, who are relegated to Title VII rights alone.[188]

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184. 547 F. Supp. at 1174.

185. Brown, *supra* note 76, at 34 (emphasis in original).

186. Sunstein, *supra* note 69, at 411.

187. Presumably, the answer is no, since such a result would allow the wholesale circumvention of Title VII's remedial scheme.

188. *See infra* note 205 and accompanying text. It might be argued that public law makes advances in terms of affording rights which lay the groundwork for private law to later confer similar rights. *See, e.g.*, Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). For example, states have enacted legislation

VI. PROPOSED APPROACH

The independent rights theory is correct as far as it goes in affording plaintiffs the ability to obtain redress under two statutes for the violation of two independent rights. When a plaintiff claims the infringement of a constitutional or statutory right that existed prior to Title VII, he should be able to maintain either a Title VII action or a section 1983 action or both.[189] The independent rights theory, however, assumes that if a section 1983 suit is based solely on a violation of Title VII, the section 1983 remedy was intended to be displaced. Thus, the independent rights theory shares the flaws of the complete preemption theory by working an implied repeal of section 1983 with respect to rights created by Title VII.[190]

The complete preemption theory and the independent rights theory stem from the *Sea Clammers* and *Smith* holdings that section 1983 causes of action may be precluded by comprehensive statutory remedial schemes. The *Sea Clammers* Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[191] No theory has adequately addressed whether Title VII provides a satisfactorily "comprehensive" remedial scheme.

Both the independent rights theory and the complete preemption theory presume congressional intent to supplant section 1983 be-

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limiting public employers' freedom of action in job terminations. This legislation has led to recognition of public policy exceptions to the employment-at-will doctrine which governs private employment relations. *See generally* Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMPLE L.Q. 65, 67 (1985) (discussing the rights of at-will employees concerning their terminations).

189. This position is supported by courts employing independent rights theory or "and laws" analysis, as well as by commentators. *See* Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. U.L. REV. 93, 95 (1985); Note, *Title VII Preempting Section 1983 in Sex Discrimination—Torres v. Wisconsin Department of Health and Social Services*, 54 U. CIN. L. REV. 333 (1985). *See also* Jensen v. Board of County Comm'rs, 636 F. Supp. 293, 296 (D. Kan. 1986)(indicating that the significant differences in procedures, remedies and standards between Title VII and § 1983 make it advantageous for an employee to bring actions under both statutes).

190. Both theories depend on a revisionist view of Title VII's legislative history. *See supra* notes 161-63 and accompanying text. Both presume Congressional intent to supplant § 1983 with Title VII because of the detailed mechanisms for handling employment discrimination claims provided by Title VII.

191. 453 U.S. at 20. One commentator has questioned the *Sea Clammers* holding that the Federal Water Pollution Control Act (FWPCA) preempted the use of the § 1983 remedy, since the FWPCA contained broad savings clauses specifically intended to preserve any preexisting remedies. *See* Sunstein, *supra* note 69, at 428.

cause of the detailed framework provided by Title VII for handling employment discrimination claims. However, comprehensiveness must mean more than simply the amount of detail contained in a statute. It has been suggested that a statute may be considered comprehensive only when adequate relief is available to plaintiffs under its remedial provisions.[192]

A recent Supreme Court decision evaluated an analogous section 1983 preemption issue in precisely this fashion. In *Wright v. City of Roanoke Redevelopment and Housing Authority*,[193] the defendants argued that the plaintiffs' section 1983 action was preempted by the Housing Act of 1937. The Court held that the remedial mechanisms provided by the Housing Act were not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a section 1983 cause of action for the enforcement of tenants' rights secured by federal law."[194]

The question then is whether Title VII's remedial scheme is adequate in terms of affording plaintiffs complete relief. One method of assessing the adequacy of Title VII relief is by comparison with the remedies available under section 1983. Title VII contains a complicated series of administrative exhaustion requirements.[195] Compli-

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192. *See, e.g.*, Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183 (1982).

193. 107 S. Ct. 766 (1987).

194. *Id.* at 771. Lower courts are employing the *Wright* test of comprehensiveness by focusing on the efficacy of the remedial mechanisms in the statutes that are argued to preempt § 1983. *See, e.g.*, Victorian v. Miller, 813 F.2d 718 (5th Cir. 1987) (holding that the Food Stamp Act's remedies are not sufficiently effective to indicate an intent to foreclose a § 1983 cause of action); Young v. Sedgwick County, 660 F. Supp. 918 (D. Kan. 1987) (questioning Title VII's remedial scheme as to whether it is adequately comprehensive to work an implied repeal of § 1983).

195. A plaintiff initiates a Title VII suit by filing a complaint with the Equal Employment Opportunity Commission (EEOC). This complaint must be filed within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e) (1982). Separate time deadlines apply in states which have established local authorities to deal with employment discrimination. In such states, a plaintiff may not file an EEOC charge until sixty days after the commencement of the state or local proceedings. 42 U.S.C. § 2000e-5(c) (1982). The plaintiff must file with the EEOC within 300 days of the alleged unlawful practice or within thirty days of the state agency's termination of its proceedings. 42 U.S.C. § 2000e-5(e) (1982). The EEOC may attempt to effect a conciliation agreement between the parties, failing which the EEOC issues a "right to sue" letter. The plaintiff has ninety days from receipt of the right to sue letter in which to file a civil suit. 42 U.S.C. § 2000e-5(f) (1982). This capsulization of the administrative route is overly simplified. Complications arise in determining the time of occurrence of the discrimination, the circumstances under which the state proceedings have been terminated, issues of appeal of agency action, and various other matters. *See* B. SCHLEI & P. GROSSMAN, *supra* note 173, at 1013-1175. One judge has remarked that Title VII is "rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced law-

ance with these provisions is mandatory: if a plaintiff fails to jump through the requisite administrative hoops with precision, his claim may be barred.[196] This can work particularly harsh results in individual cases.[197] In contrast, section 1983 possesses no exhaustion requirements.[198]

Differences exist between Title VII and section 1983 as to what types of damages are available. Title VII allows only compensatory relief, such as back pay.[199] Moreover, Title VII has a two year statute of limitations for back pay awards.[200] On the other hand, section 1983 permits compensatory and punitive damages as well as equitable relief.[201] Furthermore, jury trials are generally not required in Title VII actions,[202] whereas they are usually available in civil rights cases.[203]

The limitations on relief afforded by Title VII are apparent from a comparison of that statute with section 1983. In many circumstances, Title VII and section 1983 may provide complete relief for plaintiffs only if they can be used in tandem. For instance, a plaintiff who files a suit for sexual harassment, a Title VII-based cause of action, may be limited to declaratory or injunctive relief.[204] If the same harassment suit is filed under both Title VII and section 1983, the measure of the plaintiff's relief could include compensatory and punitive damages. Courts and commentators have repeatedly noted that "[t]he inertia of discriminatory traditions . . . can only be curtailed by using a 'full arsenal' of statutory weapons." [205] If the

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yer." Egelston v. State Univ. College, 535 F.2d 752, 754 (2d Cir. 1976).

196. *See, e.g.*, White v. Dallas Indep. School Dist., 566 F.2d 906 (5th Cir. 1978), *vacated*, 581 F.2d 556 (5th Cir. 1978).

197. *See, e.g.*, Dixon v. Westinghouse Elec. Corp., 787 F.2d 943 (4th Cir. 1986)(EEOC's forwarding of a charge to the state agency under a worksharing agreement pursuant to which the state agency then waived jurisdiction did not constitute a "filing" with the state agency; therefore, the plaintiff could not take advantage of the extended 300-day charge filing period for deferral states).

198. Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). Section 1983 actions are subject to relevant state statutes of limitation. Wilson v. Garcia, 471 U.S. 261 (1985).

199. 42 U.S.C. § 2000e-5(g) (1982).

200. *Id.*

201. Carey v. Piphus, 435 U.S. 247 (1978) (compensatory damages); Smith v. Wade, 461 U.S. 30 (1983) (punitive damages).

202. Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

203. Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981).

204. Bundy v. Jackson, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981).

205. Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 260 (1977) (citing Johnson v. Railway Express Agency, 421 U.S. 454, 468 (1975)). A plaintiff should be able to bring suit "under as many

section 1983 remedy is precluded, Title VII would be a poor substitute in the vindication of individual plaintiffs' rights.

The argument may be made that in some cases Title VII remedies are adequate substitutes for section 1983 relief. Thus, the argument would be that individual courts should assess the comprehensiveness of Title VII in particular cases with respect to the nature of the plaintiff's claims and the relief sought. This approach presents severe feasibility problems. If the theories regarding Title VII's exclusivity are any indication, courts probably would differ dramatically in their conclusions regarding Title VII's comprehensiveness. Individual plaintiffs would not know whether to maintain both causes of action and would be forced to litigate the issue of comprehensiveness anew in each case. Furthermore, such a position is theoretically indefensible, since it would invite courts on an *ad hoc* basis to render meaningless the "and laws" reference of section 1983 and eviscerate the *Thiboutot* decision.

The reconciliation of *Thiboutot* and *Sea Clammers* turns on an analysis of comprehensiveness. *Smith* and *Sea Clammers* suggest that section 1983 remedies are precluded only by comprehensive statutory remedial schemes. Title VII's provisions are not sufficiently remedial to be considered comprehensive. It is inappropriate to apply the preclusion rationale of *Sea Clammers* to Title VII. Thus, the availability of a Title VII remedy should not preempt the maintenance of a section 1983 cause of action. Courts should adopt the "and laws" theory expressed in *Huebschen*, but should approach it theoretically in terms of the comprehensiveness of available remedies.

VII. CONCLUSION

The overlap between Title VII and section 1983 has come under scrutiny in the lower federal courts recently. This current of cases that analyze whether Title VII preempts section 1983 is part of a larger wave to contract the scope of section 1983.[206] The lower

applicable civil rights statutes as the facts of his case permit irrespective of the actual or potential overlap of statutory remedies." Johnson v. Ballard, 644 F. Supp. 333, 337 (N.D. Ga. 1986)(quoting Nilsen v. City of Moss Point, 701 F.2d 556, 561 (5th Cir. 1983)).

206. *See supra* notes 26-65 and accompanying text. The contraction may reach beyond § 1983. *See also* Tafoya v. Adams, 612 F. Supp. 1097 (D. Colo. 1985), *aff'd*, 816 F.2d 555 (10th Cir. 1987)(extending the *Novotny* rationale to preclude a concurrent claim for discrimination under § 1981, even though § 1981, unlike § 1983 and § 1985, provides substantive rights).

courts are faced with conflicting signals[207] and doctrinal tension[208] from the Supreme Court.

Amid the confusion, lower courts have developed several theories to deal with the Title VII—section 1983 overlap. The independent rights theory depends on a misinterpretation of Title VII's legislative history and on an overexpansive application of the *Sea Clammers* and *Smith* holdings. Far from clarifying the area, courts are muddying the waters by defining variously what constitutes an independent right. Perhaps the most charitable thing that can be said about the complete preemption theory is that it is rife with analytical mischief.

While the "and laws" theory affords plaintiffs the ability to combine remedies and obtain sufficient protection of their rights, courts have not adequately analyzed its theoretical underpinnings. Theoretical support for the "and laws" theory depends on an evaluation of the comprehensiveness of Title VII. While the section 1983 remedy may be precluded by a comprehensive statutory remedial scheme, the remedies offered by Title VII are not sufficiently comprehensive to warrant preemption of section 1983. Because the legislative history of Title VII indicates it was never intended to be exclusive, and because the operative effect of Title VII establishes that it does not provide adequate remedies for employment discrimination, plaintiffs should not be limited to Title VII remedies even when the basis of their claims are Title VII-created rights.

The theories regarding the Title VII-section 1983 overlap raise more questions than they answer. This points to the need for Congressional direction. "The proper remedy for statutory obsolescence . . . is amendment or repeal."[209] However, the latest indication is that the Supreme Court will adopt the independent rights theory

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207. The extent to which *Sea Clammers* and *Smith* limit*Thiboutot* is uncertain. Furthermore, the backdrop against which the Title VII-§ 1983 overlap may be analyzed is murky; the implications of *Alexander* and *Johnson* seem directly contrary to those of *Brown* and *Novotny*.

208. Compare Justice O'Connor's proposal to limit the § 1983 caseload in federal courts, O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 810 (1981) (written prior to Supreme Court appointment), with Justice Blackmun's lament that the call to restrict § 1983 actions has serious consequences because "fundamental constitutional rights are at stake." Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 21 (1985).

209. Sunstein, *supra* note 69, at 410. However, some commentators, this author included, have no desire to see the present Congress undertake the Procrustean task of streamlining employment discrimination laws. *See id.* at 439.

without giving much thought to the underlying rights or remedies affected.[210] Such a result would simply perpetuate the piecemeal dismantling of section 1983. Before the Supreme Court acts on the Title VII-section 1983 overlap, it should make a sensitive inquiry into the nature of the remedies afforded to plaintiffs and how effectively those remedies redress violations of fundamental constitutional rights. the remedies afforded to plaintiffs and how effectively those remedies redress violations of fundamental constitutional rights.

210. *See* Alexander v. Chicago Park Dist., 773 F.2d 850 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1492 (1986) (adopting the independent rights theory).