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Notes

State Remedies for Federally-Created Rights

State courts are often required to enforce federally-created rights that are silent as to appropriate remedies, and therefore, the state court must itself determine an applicable remedy. In instances where the state court has failed to provide an adequate remedy for the federal right, the United States Supreme Court has required the state court to grant a specific remedy; the Court, however, has not established the basis for this result. The author of this Note examines three possible bases: the remedy is state-created; the remedy is federally-created; or the Constitution requires the state to provide an adequate remedy. He concludes that the constitutionally-required state remedy theory best accommodates both federal and state interests, yet secures the effective enforcement of federal rights.

A significant aspect of the American federal system is that the state courts are regularly employed for the enforcement of federally-created rights having no necessary correlation with state law.\(^1\) In adjudicating substantive rights created by either federal statutes or the federal constitution, the state courts apply their own procedural rules\(^2\) and to some extent their own remedial concepts,\(^3\)

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1. Congress need not employ state courts for the enforcement of federal rights, but can instead grant exclusive jurisdiction to federal courts. The Constitution provides that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish.” U.S. CONST. art. III, § 1. See The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867).
2. Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190 (1925). The application of state procedural rules to an action based on a federal right may preclude consideration of the merits of the federal question and thus, in effect, deny the federal right. The Supreme Court does not normally have jurisdiction to review the state court decision, if the procedural rules are fair and have a sufficient basis at state law. See, e.g., Parker v. Illinois, 333 U.S. 571 (1948); Herndon v. Georgia, 295 U.S. 441 (1935); Comment, Supreme Court Treatment of State Procedural Grounds Relied on in State Courts To Preclude Decision of Federal Questions, 61 COLUM. L. REV. 255 (1961). If the application of the rules is so stringent that it nullifies the federal right, however, the Supreme Court will exercise jurisdiction. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); New
for generally "federal law takes the state courts as it finds them." In addition, federal law is interstitial in nature, building upon "legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." As a result, the laws and the Constitution of the United States are frequently silent regarding the remedies available for their contravention, leaving the determination of the applicable remedy to the courts. Nevertheless, the Supreme Court has overturned state court decisions that in effect deny federal rights and has required the state court to grant a specific remedy where the Court implicitly finds that the vindication of the federal right outweighs the deference to state remedial concepts. This poses the principal inquiry of this Note—a determination of the basis upon


In actions to enforce federal rights over which state and federal courts have concurrent jurisdiction, differences between state and federal procedural rules may yield different results and induce undesirable forum-shopping by the litigants. Although a consideration of this problem is beyond the scope of this Note, a possible solution that would allow the states to retain independence in determining their judicial administration "does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure, of a federal forum equally accessible to both litigants." Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 508 (1954) [hereinafter cited as State and Federal Law].

3. Where a federal right is silent as to a remedy, state law determines the appropriate remedy; a choice of the wrong remedy is an adequate state ground and precludes the appellate jurisdiction of the Supreme Court. See, e.g., Woods v. Nierstheimer, 328 U.S. 211 (1946) (coram nobis appropriate post-conviction remedy rather than habeas corpus); McCoy v. Shaw, 277 U.S. 302 (1928) (payment of tax and suit for refund appropriate rather than injunction); Mellon Co. v. McCafferty, 239 U.S. 134 (1915) (administrative remedy appropriate rather than court action). See also ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 103 (2d ed. Wolfson & Kurland 1951) [hereinafter cited as ROBERTSON & KIRKHAM].


6. See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); Ward v. Board of County Comm'rs, 253 U.S. 17 (1920). Contrast this approach with that of the Supreme Court in post-conviction efforts of state prisoners alleging that their conviction was in violation of the federal constitution. The Court has repeatedly said that the states are constitutionally obligated to provide adequate post-conviction remedies. See, e.g., Young v. Ragen, 337 U.S. 235, 238-39 (1949); New York ex rel. Whitman v. Wilson, 318 U.S. 688, 690 (1943); Mooney v. Holohan, 294 U.S. 103, 113 (1935); Moore v. Dempsey, 261 U.S. 86, 91 (1923). The Court, nevertheless, has never compelled a state to grant post-conviction remedies, assuming instead that the proper relief is by way of federal habeas corpus. See Jennings v. Illinois, 342 U.S. 104, 116 (1951) (Frankfurter, J., dissenting); Young v. Ragen, supra.
which the Supreme Court can compel a state court to provide a particular remedy to redress the violation of a federally-created right.

A principle basic to American federalism is that "if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable." This is not to say that the states must provide courts of competent jurisdiction to enforce a federal right or even that state courts cannot decline to adjudicate an action based upon a claim of federal right; these problems are not resolved by this principle. Yet once a state court assumes the adjudication of a cause of action, the supremacy clause of the Constitution makes clear that the court's judgment must not conflict with applicable federal law. Upon this basis, if federal law were determined to provide the remedy for a federal right, the Supreme Court would have the authority to compel a state to grant that remedy when a state court undertakes to enforce that right. Similarly, if federal law were determined to require an adequate state remedy for the federal right, the Supreme Court could compel the state to grant a remedy sufficient to vindicate the federal right. As a result, the determination of the source of the remedy as either federal or state is essential.

Underlying the analytical determination of the source of the remedy, however, is a complex problem inherent with federalism—the accommodation of federal and state interests. The role of the state courts in enforcing federal rights itself actuates the complexities of accommodating both federal and state interests within the structure of federalism; the federal interest of securing the effective enforcement of federal rights may conflict with the state interest in remaining an independent, viable political unit able to direct the objectives of its judicial system. If the Supreme Court is able to compel state courts to grant a remedy in cases where no remedy exists at state law, the states' independence is restricted. In light of the states' interest in directing their judicial systems, when federal law creates rights without specifying remedies, the pre-existence of a system of state remedial law is perhaps the primary determinant in adjudging whether federal law displaces state law or is integrated with it. Yet counterbalancing

8. See text accompanying notes 87–88 infra.
11. See Wechsler, *The Political Safeguards of Federalism: The Role of*
these factors is the pre-eminence of federal rights, which perhaps should not be defeated by state policies, and the co-ordination of federal law, which requires uniformity in the enforcement of federal rights.\footnote{12}

A consideration of the leading case of Ward v. Board of County Comm’rs\footnote{13} will exemplify the nature of both the federal and the state interests and will serve as an analytical tool for examining the alternative sources of the remedy. In this case, an Oklahoma county levied a tax on land allotted to the Choctaw Indians and protected from taxation by an act of Congress. The county collected the tax by threatening to sell the land if the tax were not paid. The Oklahoma Supreme Court held that the tax was unconstitutional, but denied the Choctaw Indians’ suit for a refund on the ground that the tax was paid voluntarily and that the tax receipts had already been dispersed to other governmental agencies, with the result that under state law there was no remedy.\footnote{14} On certiorari, the United States Supreme Court reversed and remanded, requiring the county to refund the taxes paid unless the state court found that the suit for refund was subject to the state statute of limitations. The Court reached this result by overturning the state court’s finding that the tax was paid voluntarily and by overriding a state rule that dispersion of taxes collected could defeat an action for refund as a violation of federal law. The Court’s opinion did not, however, determine the source of its authority to require the state to grant the remedy. This Note examines three possible bases for the decision in the Ward case: the remedy is state-created; the remedy is federally-created; and the Constitution requires the state to create the remedy.

I. THE REMEDY IS STATE-CREATED

The Supreme Court’s mandate requiring the state court to grant a particular remedy for a federal right could be based on a finding by the Court that the remedy exists under state law. Upon this basis, the Court could determine that existing state law provides the specific remedy for the asserted right and that the state court misapplied state law by denying that remedy.

\footnote{12}{The States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 546 (1954).}

\footnote{13}{Initially Congress limited the Supreme Court’s appellate jurisdiction to cases in which the state courts had denied federal rights. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85. Congress extended this jurisdiction to all causes involving federal rights by the Judiciary Act of 1914, ch. 2, 38 Stat. 790, probably to enable the Court to secure uniformity in the interpretation of federal law. See ROBERTSON & KIRKHAM § 98.}

\footnote{14}{Board of Comm’rs v. Ward, 68 Okla. 287, 173 Pac. 1050 (1918).}
The Ward case, on the issue of a taxpayer's right to recover an involuntary payment of taxes, is conformable to the state-created remedy basis. The Supreme Court determined that the state court's finding of a voluntary payment of the taxes was untenable, and held that the taxes could be recovered even without a permissive statute, for "the law, independent of any statute, will compel restitution."15 "The law" alluded to apparently was not state, but federal.16 The Supreme Court, however, could have determined that state law granted restitution of undue taxes that were involuntarily paid; therefore, the Court's decision would have required the state court to grant to the claimants the remedy available at state law. Moreover, the wording of the Court's mandate, making the remedy subject to "any valid local law in force when the claim was filed,"17 would be consistent with this analysis.

The application of the state-created remedy basis first requires a determination of whether the Supreme Court's appellate jurisdiction confers upon it the right to review the state court denial of the remedy. The Court will not exercise jurisdiction if the state court decision is based on an independent and adequate nonfederal ground.18 Since a decision that state law does not provide a remedy for an asserted federal right is, by hypothesis, independent of a federal question, the Court must inquire into the adequacy of that decision19 to determine whether the nonfederal ground is a mere pretext put forward with a purpose of evading federal

15. 253 U.S. at 24. (Emphasis added.)
16. All of the cases that the Court cited as authority for this principle were cases arising in federal courts. Chapman v. County of Douglas, 107 U.S. 348, 355 (1882); Louisiana v. Wood, 102 U.S. 294, 298–99 (1880); Marsh v. Fulton County, 77 U.S. (10 Wall.) 676, 684 (1870).
17. 253 U.S. at 25.
18. See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45 (1908). See generally ROBERTSON & KIRKHAM §§ 89–103. The Court has indicated that this restriction upon its jurisdiction derives from the general prohibitions against advisory opinions. See Herb v. Pitcairn, 324 U.S. 117, 125–27 (1945).
19. The Court applies its own criteria in determining the adequacy of the state decision. See, e.g., Abie State Bank v. Bryan, 282 U.S. 765 (1931); Ward v. Board of County Comm'rs, 253 U.S. 17 (1920); ROBERTSON & KIRKHAM § 94.
For this purpose, the Court determines the adequacy of state court findings both of state law and of fact. Once the Court resolves that the state court has, in effect, voided a federal right by misapplying state remedial law, its appellate jurisdiction is established, and its mandate will necessarily require the state court to grant the applicable state-created remedy, absent a determination on remand of a new adequate state ground.

The Supreme Court has applied this approach to state remedial law to both federal statutory and constitutional rights. The Court determined in Creswill v. Grand Lodge Knights of Pythias that a state court's failure to find laches, which resulted in the denial of a federal statutory right, was inadequate. In making this determination, the Supreme Court expressly applied the same standard as the state court—the equitable principles of general law—but concluded that the state court was bound to find laches. In Brinkerhoff-Faris, the state court declined to exercise equity jurisdiction because administrative remedies were available to the claimant; the Supreme Court determined that the administrative remedies were illusory and that the failure of the state court to exercise jurisdiction was thus a denial of due process of law as guaranteed by the fourteenth amendment.

A problem of enforcing the state-created remedy arises, however, if on remand the state court does not proceed in accordance with the Supreme Court's mandate. On a claim of deviation from the mandate, the proper procedure is plainly by appeal or writ of certiorari to the Supreme Court for review of the state court proceedings under the mandate and for entry of judgment and award of execution; as long as Supreme Court review is possible, the alternative remedy of mandamus is unavailable. A more difficult problem arises when the state court on remand fails to enter final judgment promptly, thus precluding immediate review by the

21. The Supreme Court has determined that its authority to examine state court findings of law and of fact is implicit in its jurisdiction, conferred by Congress, to maintain the supremacy of the laws of the United States. Ward v. Board of County Comm'rs, 253 U.S. 17, 23 (1920); see Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246, 261 (1912); ROBERTSON & KIRKHAM § 96.
22. The Supreme Court's mandate will allow the state court to reconsider its determination of underlying state law; a reversal, of itself, is not conclusive of final judgment. See, e.g., Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938); Georgia Ry. & Elec. Co. v. Decatur, 297 U.S. 620 (1936).
25. This is the procedure followed in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
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Supreme Court. Although the availability of mandamus is an open question in such a case, the Supreme Court has the power to issue a writ of mandamus, and the Court has found mandamus to be proper where no other adequate remedies are available. Disobedience of the writ of mandamus by the state court may give rise to the sanction of contempt against the state judges. The usage of a compulsory process like the writ of mandamus, however, directly interferes with the state judicial process and enhances the possibility of friction between the state and federal judiciary. A preferable solution might be for the Supreme Court, with the broad disposition powers available under the grant of appellate jurisdiction, to recall its mandate, enter judgment, and enforce the decree by available federal processes.

27. The Supreme Court's appellate jurisdiction of state court decisions only extends to "final judgments or decrees rendered by the highest court of a State in which a decision could be had ..." 28 U.S.C. § 1257 (1958).

28. ROBERTSON & KIRKHAM § 12; Comment, 20 TEXAS L. REV. 358, 361-65 (1942). In Ex parte Texas, 315 U.S. 8 (1942), the question of whether the Court has jurisdiction to award mandamus when review is precluded by the absence of a final judgment was argued, but not decided. The Supreme Court in dicta has indicated somewhat conflicting views. A writ of mandamus will not issue to a state court. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816) (concurring opinion). Yet the statutory authority to issue writs of mandamus to federal courts and officers includes the authority to issue writs to state officers where mandamus is issued as a process to enforce judgments. Graham v. Norton, 82 U.S. (15 Wall.) 427, 428 (1872). But see Ohio Oil Co. v. Thompson, 120 F.2d 831, 835 (8th Cir. 1941) (dictum); In re Dowd, 133 Fed. 747, 751 (C.C.D. Colo. 1904) (dictum).

29. 28 U.S.C. § 1651(a) (1958) provides that "the Supreme Court ... may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." See In re Dowd, 133 Fed. 747, 751 (C.C.D. Colo. 1904) (dictum): "[B]y virtue of its appellate jurisdiction the Supreme Court of the United States has the power to issue its writ of mandamus to the Supreme Court of the State of Colorado ... ."


31. 18 U.S.C. § 401 (1958) provides that "a court of the United States shall have power to punish ... such contempt of its authority, and none other, as . . . disobedience or resistance to its lawful writ, process, order, rule, decree, or command." See In re Copenhagen, 54 Fed. 660 (C.C.W.D. Mo. 1893) (disobedience of a writ of mandamus by county officers a contempt); cf. United States v. Shipp, 214 U.S. 386 (1909) (state sheriff's defiance of Supreme Court's order of a stay of execution a contempt).

32. See 28 U.S.C. § 2106 (1958): the Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. This should confer upon the Court the power to recall its mandate and enter judgment.

33. A United States marshal appointed by the Supreme Court pursu-
Viewing the remedy as state-created is unsatisfactory, however, since the remedy would be subject to the state court's determination of when to invoke it. Clearly the state court could not discriminate against a federal right through its application of state remedial law, but it could invoke only the same remedy as it would for an analogous state-created right. In fact, a state court's nondiscriminatory decision not to grant a state remedy would be an independent and adequate nonfederal ground foreclosing review by the Supreme Court, as the Court has recognized, for example, with respect to laches, estoppel, and statutes of limitation. For this reason, the Ward case is inconsistent with the state-created remedy basis. In Ward, if the Court's power to require the state to grant the tax refund were based on the existence of that remedy at state law, the state court's judgment that dispersion of the taxes to other governmental agencies defeated the refund claim would have been controlling. The result of the state-created remedy basis, then, is to allow the states to determine the remedial concepts that their judicial systems will enforce since the remedies developed for state-created rights are also applied to analogous federally-created rights. In balance, however, the federal interest of securing the effective enforcement of federal rights, without regard to whether the action is instituted in a federal or a state court, outweighs any deference that federal law owes to state remedial policies, and federal rights should not be subject to the existence of a remedy at state law.

A determination that the remedy for federal rights can be state-created is also unsatisfactory because a federal claim might then not constitute a cause of action enforceable in federal courts of original jurisdiction. Under federal question jurisdiction, federal courts require that to state an enforceable cause of action, a federal right, whether statutory or constitutional, must be pleaded and a federal forum must be able to afford a remedy. In de

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34. Cf. McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934); Second Employers' Liab. Cases, 223 U.S. 1 (1912). In McKnett, the Court, relying on both the privileges and immunities and the full faith and credit clauses, reasoned that the federal constitution prohibited the states from discriminating against rights arising under federal law. 292 U.S. at 233–34.


38. Where the claimant relies on a federal statutory right that is silent as to the availability of damages, the federal courts have dismissed a suit for damages on its merits, holding that federal law failed to provide the remedy. See Downing v. Howard, 68 F. Supp. 6 (D. Del. 1946), aff'd on
determining whether a federal court has the power to award the desired remedy, the Supreme Court has not employed existing state-created remedies, but has only considered whether federal law itself provides the remedy. Therefore, an action instituted in a federal court based upon a federal right for which neither federal statute nor the federal common law provides a remedy would be dismissed upon the merits, even though state law provides a remedy for that federal right. Litigants claiming under a federal right, however, should have access to a federal forum to provide a means of avoiding state hindrance of federal rights without sacrificing the independence of either system. In practice, apparently, federal courts are easily satisfied that there is a federal remedy, finding that the remedy either arises by implication from the federal right or exists under "general principles of the law." Such a practice makes available a federal forum to most federal claimants, albeit in an arbitrary way. But allowing federal and state courts each to determine the proper remedy for a given federal right creates an incentive for forum-shopping between federal

other grounds, 162 F.2d 654 (3d Cir. 1947); cf. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir.), cert. denied, 323 U.S. 737 (1944). With respect to constitutional rights, however, the federal courts have distinguished between claims seeking money damages, where they determined that federal law lacked the remedy, and claims seeking preventive relief, where they have granted a federal remedy. Compare Viles v. Symes, 129 F.2d 828 (10th Cir.), cert. denied, 317 U.S. 633 (1942) (alleged violation of the first, fifth, and sixth amendments); Taylor v. De Hart, 22 F.2d 206 (W.D. Mo. 1926), appeal dismissed, 274 U.S. 726 (1927) (alleged violation of the fourth amendment), with Hays v. Port of Seattle, 251 U.S. 233 (1920) (injunction against legislation impairing the obligation of contracts); Weeks v. United States, 232 U.S. 383 (1914) (suppression of evidence to protect rights under the fourth amendment). See generally Note, Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy, 48 COLUM. L. REV. 1090 (1948).

39. Cf. Bell v. Hood, 327 U.S. 678 (1946), where the Supreme Court determined that a federal court had original federal question jurisdiction to consider whether it could grant money damages to vindicate alleged violations of the fourth and fifth amendments; the Court concluded that the power to grant the money recovery depended upon an interpretation of federal law, and it failed to consider the possibility of a state-created remedy conferring this power upon the federal courts.

40. See id. at 682. The Court stated that "it is well settled that the failure to state a proper cause of action [because the federal right fails to afford a remedy] calls for a judgment on the merits and not for a dismissal for want of jurisdiction."

41. This is the same solution that was suggested to remedy material differences in procedural law affecting federal rights. See note 2 supra.

42. See, e.g., Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944).

and state courts sitting in the same state. Clearly, then, if the Supreme Court determines that the remedy for a federal right is state-created, it should also require that federal courts employ the state-created remedy in enforcing federal rights silent as to a remedy; only then can the litigant claiming under a federal right be assured of access to a federal forum yet be prevented from forum-shopping.

II. THE REMEDY IS FEDERALLY-CREATED

A. STATUTORY RIGHTS

When a federal statute creates rights and duties without providing express vindication for their breach, a state court denial of a federal statutory right could be overturned and a remedy granted by the Supreme Court on the basis that the remedy is federally-created because it arises by implication from the statute. Whether Congress in such a situation intends the remedy to be supplied by state law or assumes that the remedies will be determined by the independent judgment of the federal courts in the exercise of their grant of original federal question jurisdiction is unclear. Congress has not clarified this question, and its resolution has been left to the judiciary.

In approaching the question of which system, federal or state, is to supply the remedial gloss, the Supreme Court has distinguished between equitable and legal remedies. In *Holmberg v. Armbrrecht*, the Court made it clear that if an equitable remedy were sought to redress a federal right, then the federal courts would formulate the remedial details. Where a legal remedy is desired, however, there may be more uncertainty as to which system is to supply the remedy. The Court’s basis for such a distinction is

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46. 327 U.S. 392 (1946).

47. See Bell v. Hood, 327 U.S. 678 (1946), where the Supreme Court held that the federal courts had federal question jurisdiction to determine if compensatory damages were appropriate for a violation of a constitution-al right.
that Congress must have intended that federal equitable rights, which require flexible remedies to be adequately vindicated, should be redressed by remedies created by federal courts,48 while with federal legal rights, which can be satisfactorily vindicated within the established confines of state law, Congress intended to adopt the applicable state remedies.49 It would seem, however, that the federal interest of effectively vindicating federally-created rights through flexible remedies50 requires the federal judiciary, in the absence of direction from Congress, to assume this duty whether equitable or legal remedies are sought.51 Moreover, since the authority to supply the remedial gloss for federal rights would lie in the grant by Congress of federal question jurisdiction, the allegation of the federal right itself would constitute a valid cause of action enforceable in the federal courts. As a result of this approach, the federal judiciary would assume the duty of providing remedies for federal rights, and the state courts, when enforcing federal statutory rights, would look to federal common-law remedies to determine the applicable remedy. Upon this basis, the Supreme Court could plainly determine the particular federal remedy that arises by implication from the federal statute.

The Ward case, if analyzed in terms of this approach, is indicative of a remedy arising by implication from a federal statute. The act of Congress in Ward provided that the Choctaw Indians' land would be nontaxable. The Supreme Court might have determined that the remedy for recovery of taxes was implicit in the federal statute.

Analytically, the legal-equitable dichotomy as discussed is not complete. An action, such as a stockholder's derivative suit, may be instituted in equity even though legal relief is pleaded. In Cope v. Anderson, 331 U.S. 461 (1947), the Court applied the state statute of limitations to such a suit in equity, reasoning that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." Id. at 464; see HART & WECHSLER, op. cit. supra note 5, at 695.


50. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946).

51. Professor Wechsler advocates a general enabling statute in favor of the federal courts as a solution. "In neither case [equitable nor legal remedies], however, should the answer be left merely to an implication; nor should the states provide the governing rule—unless the Congress has made clear in the particular area an intention to refer questions of remedies to state law." Wechsler, supra note 45, at 241. (Emphasis added.)
statute creating immunity from taxation; hence, this equitable remedy would have been of federal origin, and the Court would have the jurisdiction to consider and the authority to grant it. Yet, this analysis seemingly does not conform with the mandate in Ward allowing the state statute of limitations to defeat the federal right. Analytically, such statutes should be treated similarly to remedial details, for the underlying consideration is the same—whether state law is to be absorbed as the governing federal rule. If state law is absorbed, it does not operate of its own force, but is incorporated by Congress, either expressly or impliedly, as part of the federal law.\textsuperscript{52} Absent direction by Congress, it is the duty of the federal courts to establish the governing federal rule;\textsuperscript{53} the courts have assumed this duty on an \textit{ad hoc} basis, absorbing state law if the codified state interests are not considered inconsistent with federal policy.\textsuperscript{54} For this reason, the suggested rationale for Ward—that federal common law provides the remedy, but absorbs the state statute of limitations—is not inconsistent with the mandate in that case.\textsuperscript{55}

Even assuming that the remedy arises by implication from the statute, whether a state court would be constitutionally bound to enforce the federal right is unclear. State courts, however, may voluntarily enforce federal rights.\textsuperscript{56} Of course, once a state court undertakes to adjudicate a cause of action, the supremacy clause requires that it do so in accordance with whatever federal law is

\begin{footnotesize}
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\item The process of absorption is not attributable to the law-making agencies of the state, but is “ultimately attributable to the Constitution, treaties or statutes of the United States . . . .” Board of County Comm’rs v. United States, 308 U.S. 343, 349–50 (1939). The absorption of state law is premised upon a recognition of state interests; the Court may determine state law to be absorbed where state interests are not considered inconsistent with federal policy and absent “explicit legislative policy cutting across state interests . . . .” Id. at 352.

\item The Court has candidly recognized that “in absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.” Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

\item With respect to state statutes of limitation, for example, the Court, in Holmberg v. Armbrecht, 327 U.S. 392 (1946), held that the statute did not defeat the federal equitable right, but in Benedict v. New York, 250 U.S. 321 (1919), it held that the state statute became the applicable federal rule. See Note, \textit{Federal Statutes Without Limitations Provisions}, 53 COLUM. L. REV. 68 (1953); Note, 53 COLUM. L. REV. 991 (1953).


\item See Claflin v. Houseman, 93 U.S. 130 (1876).
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applicable; the question of enforcement arises only when the state court declines to adjudicate the federal right.\(^{57}\) Until recently, Congress was not considered capable of requiring a state to enforce a federal right unless the right was nonpenal in nature\(^{58}\) and the state enforced analogous forum-created rights.\(^{59}\) In Testa v. Katt,\(^{60}\) the Court assumed that a federal right was penal, yet nonetheless held that the state court must enforce it. In so holding, the Court used reasoning broad enough to imply that a state is constitutionally obligated to enforce all federally-created rights.\(^{61}\) Relying on the supremacy clause, the Court reasoned that an act of Congress established the policy for all; therefore, a contravening state policy cannot exist to justify a state court's refusal to adjudicate a federal right. As a practical matter, since the remedy is federally-created, the federal courts are available to the litigant by their federal question jurisdiction, thus somewhat alleviating the hardship that results if the state court declines to adjudicate.

B. CONSTITUTIONAL RIGHTS

Several Supreme Court decisions compelling a state court to grant a remedy are consistent with the approach that the Constitution creates both the right and the remedy. In Iowa-Des Moines Nat'l Bank v. Bennett,\(^{62}\) the Court granted a tax refund to the claimant upon finding that the collection of the tax was in violation of the equal protection clause of the fourteenth amendment. Reversing the state court's decision\(^{63}\) that the claimant's remedy

\(^{57}\) See text accompanying notes 7–10 supra.

\(^{58}\) This distinction was apparently based on the conflict-of-laws rule that one sovereign cannot enforce the penal statutes of another. See Huntington v. Attrill, 146 U.S. 657, 672–74 (1892); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).


\(^{60}\) 330 U.S. 386 (1947); see Note, State Enforcement of Federally Created Rights, 73 HARV. L. REV. 1551, 1554–56 (1960).

\(^{61}\) The Court reasoned that:

So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories [penal or nonpenal] the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI of the Constitution [the supremacy clause] . . . .

330 U.S. at 389.

\(^{62}\) 284 U.S. 239 (1931).

was to await the exaction of a higher tax from its competitors, the Supreme Court apparently determined that the fourteenth amendment conferred the right to a refund. Similarly, the Court in *Poindexter v. Greenhow* found that the constitutional provision prohibiting state impairment of the obligation of contracts conferred upon the claimant the right to recover property detained by the state in violation of the state's contract with the claimant.

The *Ward* case is also analytically consistent with the constitutionally-created remedy basis. The Court declared that for a state to use coercion in the collection of taxes without incurring an obligation to repay them would be an appropriation of property without due process of law in contravention of the fourteenth amendment. Arguably, the fourteenth amendment created the remedy of repayment coexistently with the right to protection from the taking of property without due process of law. While this argument would not seem to explain the Court's mandate subjecting the remedy to the state statute of limitations, in fact, state law could be absorbed as the governing federal law since the state interest is not inconsistent with federal policy.

Adoption of the approach that the Constitution creates the remedy results in several desirable ramifications. If the Constitution creates the remedy as well as the right, then the federal claim would clearly constitute a cause of action enforceable in the federal courts; this makes available to the federal claimant a sympathetic tribunal and allows the litigants to avoid a potentially recalcitrant state court. In addition, although there are situations in which it is unclear whether a state court is constitutionally obligated to enforce federal statutory rights, a proper accommodation of federal and state interests does not preclude the state

64. With respect to the remedy, the Court stated:
   The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid.
284 U.S. at 247.
65. 114 U.S. 270 (1884).
66. 253 U.S. at 24.
67. Unless prohibited by Congress, any civil action brought in a state court can be removed by the defendant to the federal district court if that court would have had original jurisdiction over the action. 28 U.S.C. § 1441 (1958).
68. See notes 56–61 supra and accompanying text.
courts from being bound to enforce constitutionally-created rights and remedies. The broad reasoning of Testa v. Katt should assure that state courts are required to enforce constitutional rights even though the remedies granted are in fact supplied by a process of federal judicial legislation.

Although the results of this approach are appealing, a determination that the Constitution itself creates remedies is conceptually difficult. The prohibitions embodied in the Constitution, especially those protecting individuals from abusive state action, create remedies mainly in a protective sense. Granting positive remedies where state action is prohibited also introduces competing public interests—allowing money damages might discourage good faith official action, while preventive relief entails danger of undue influence over state governmental processes. Nonetheless, injunctive relief is treated as being conferred directly by the Constitution. In the absence of an act of Congress, compensatory damages for violation of a constitutional right, however, have not been recognized by the federal courts. Obviously, the Constitution does not uniformly create remedies for the infringement of constitutional rights. Instead, each controversy based on a constitutional right requires a balancing of competing interests, a function best performed by the judicial system. The judicially-developed remedial law in this area may be supplemented and revised considerably by congressional enactments authorized by express

70. See, e.g., Yarborough v. Yarborough, 290 U.S. 202 (1933), where the full faith and credit clause was held to require the South Carolina courts to give effect to the defense recognized in Georgia.
72. Id. at 843–90; State and Federal Law 523 n.121.
enabling clauses,75 or by the implied powers of Congress.76 This factor seemingly would refute the contention that the Constitution itself creates the remedies to vindicate its violation. Moreover, since constitutional rights are often complexly integrated with existing state law and since some constitutional rights are defined in terms of rights that the states themselves have created,77 state interests may be better accommodated by state court creation of the remedies.

III. THE CONSTITUTION REQUIRES THE STATE TO CREATE THE REMEDY

The Supreme Court could compel a state court to grant a remedy on the basis that the Constitution requires state courts to create remedies adequate to vindicate federally-created rights. The states are free to grant such remedies as they choose for violations of federal rights if the remedies do not conflict with any provision of federal law.78 The argument that the states are compelled by the Constitution to provide adequate remedies for federal rights finds its basis in the supremacy clause; federal law, both constitutional and statutory, is integrated into the law of each state through the purview of that clause, and the state courts may not choose to disregard it.79 Yet superseding this analytical argument is a consideration of the basic relationship of federal substantive law to state law in American federalism; federal law either displaces state law or accepts state authority in an area and seeks simply to regulate its exercise.80 If the Constitution is deemed to require adequate state-created remedies for federal rights, federal law performs another function—compelling state courts to originate concepts not existing at, and perhaps rejected by, state law.

The Supreme Court in General Oil Co. v. Crain81 indicated

75. E.g., the full faith and credit clause provides that Congress shall prescribe methods of proving judicial proceedings to which states must give full faith and credit, U.S. CONST. art. IV, § 1; the fourteenth amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article," U.S. CONST. amend. XIV, § 5.

76. See CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 23–24 (1947).

77. The existence of a property interest falling within the due process clause is a question of state law. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944). Similarly, the establishment of a valid contract that cannot be impaired under the constitutional prohibition on the impairment of contracts is also a question of state law. Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

78. See State and Federal Law 523.


80. See State and Federal Law 495.

81. 209 U.S. 211 (1908).
support of this approach. Tennessee law forbade Tennessee courts from exercising jurisdiction over the particular claim raised in the Crain case. The Supreme Court, though dismissing the appeal on its merits, concluded that the state courts were required to grant jurisdiction to protect the federal constitutional right involved. In reaching this result, the Court relied on the theoretical basis of Poindexter v. Greenhow\(^5\) that the Constitution and federal laws in accordance with it are the law of the state by virtue of the supremacy clause. Furthermore, the Ward case may authorize this approach. The language of that opinion perhaps indicates that the fourteenth amendment compelled the state court to create an adequate remedy to avoid violating the due process clause.\(^6\) Moreover, it is not inconsistent with this basis to remand the cause subject to the state statute of limitations.

The adoption of this basis might preclude a federal court from considering the cause on its merits. Original federal question jurisdiction must be established by what is properly pleaded in the complaint,\(^6\) which excludes improperly anticipated defenses.\(^5\) Federal jurisdiction will thus be precluded in an action based on state remedial law if dependent upon federal questions that cannot be immediately raised, such as the federal claimant's constitutional guarantee of an adequate state remedy.\(^6\)

Although original federal jurisdiction might be foreclosed as a result of this approach, the federal claimant would not be deprived of a forum competent to adjudge his claim, for the state courts would be obligated to enforce the federal right. A recognition that the Constitution requires the states to create remedies for federal rights, based as it is upon the supremacy clause establishing federal law as the law of the state, would resolve *a fortiori* that the states are under a constitutional obligation to provide courts of competent jurisdiction to enforce federal rights. The Court recognized in Testa v. Katt\(^7\) that the supremacy clause clearly requires the states to enforce federal rights if they enforce analogous forum-

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82. 114 U.S. 270 (1884).
83. In finding the state court obligated to refund the taxes, the Supreme Court reasoned that:
To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment . . . .
253 U.S. at 24.
created rights.\textsuperscript{88} If, however, the supremacy clause is deemed to require the state courts to create remedies for federal rights, the supremacy clause must necessarily also require the state courts to provide jurisdiction competent to enforce federal rights.

The solution that the Constitution requires the states to create a remedy embodies a minor question of appellate jurisdiction since the Supreme Court cannot review a state court decision based on a nonfederal ground, such as the applicable state remedy.\textsuperscript{89} Yet, since the state remedy is required by the Constitution to be adequate to vindicate a constitutional right, this necessarily raises a "substantial federal question" sufficient to confer appellate jurisdiction upon the Court.\textsuperscript{90} The prohibitions of the fourteenth amendment raise another possibility for review of the state court judgment. The guarantee of due process is addressed generally to the entire scope of state judicial authority.\textsuperscript{91} As a result, the Supreme Court has reviewed a state court decision because it failed to provide a judicial remedy for violation of a federal right and the administrative remedies provided were inadequate.\textsuperscript{92} This same reasoning would confer appellate jurisdiction upon the Supreme Court if a state judicial system failed to provide courts of competent jurisdiction to enforce federal rights.

A state-created remedy that is required by the Constitution accommodates both federal and state interests. By allowing the states to formulate their own remedies to vindicate federal rights adjudicated in state courts, the states are able, to a large extent, to control the objectives of their judicial system. At the same time, the federal interest of securing the enforcement of federal rights is satisfied, without sacrificing the independence of the states, through the Supreme Court's power to determine the adequacy of the state remedy. Moreover, the determination that states must provide competent courts to enforce federal rights does not seriously contravene any legitimate state interest. Since the supremacy clause vitiates state policy considerations as a basis for declining to enforce federal rights, the only significant state interest is in the increased number of cases the state would be required to adjudicate. Since federal rights are integrated into state law by the supremacy clause, states are required to provide competent courts to enforce them.

\textsuperscript{88} The fact that the state court enforced analogous state-created rights was not contested in Testa v. Katt, 330 U.S. 386 (1947). The Court, however, used reasoning broad enough to go beyond that test. See note 61 supra.
\textsuperscript{89} See ROBERTSON & KIRKHAM §§ 89–103.
\textsuperscript{90} Id. § 58.
\textsuperscript{91} See State and Federal Law 518.
clause, however, it is not for the state to complain about the number of controversies arising within its boundaries.93

CONCLUSION

The objectives of federalism require a determination of the source of remedies for federal rights in order to secure their effective enforcement while according proper recognition to the state interests involved. A determination that the remedy is state-created is unsatisfactory because it subjects the federal right to the state court's judgment of when to invoke a remedy and thus fails to assure enforcement of the federal right. A decision either that the remedy is federally-created or that the Constitution requires an adequate state-created remedy, however, would be in accordance with these objectives.

A federally-created remedy affords the effective enforcement of the federal right since a sympathetic tribunal would create the applicable remedy and its judgment would be subject to Supreme Court review; the state courts would then also be bound to apply this remedy. Furthermore, this basis permits Supreme Court review for the purpose of establishing uniform remedies throughout the United States. Moreover, if the states were determined capable of declining to adjudicate a federal right where the enforcement of the federal right would contravene state policy, state interests would be accommodated.

Likewise, if the Court were to determine that the Constitution requires an adequate state-created remedy, the federal right would be assured of being vindicated since the Supreme Court would have appellate jurisdiction to consider the adequacy of the remedy. By allowing state courts to formulate the remedies within the guidelines of "adequacy" as established by the Supreme Court, this approach would clearly accommodate the state interest in controlling the objectives of their judicial systems. This source of the remedy, however, would not provide for national uniformity of remedies for a federal right.

Although both of these remedies satisfy the objectives of feder-

93. Historically, it seems clear that the Constitution was intended to require the states to enforce federal rights. A major weakness of the Articles of Confederation was the lack of state enforcement of federal laws. See 14 U. CHI. L. REV. 287, 289 (1947). In addition, the decision to grant Congress the power to create lower federal courts was made after the first discussion of the supremacy clause. 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 287 (1911). This fact and the fact that Congress need not exercise its power to create federal courts indicate that without state enforcement of federal laws, there is no assurance that federal laws would be enforced if the states are not required to enforce them. See Note, 73 HARV. L. REV. 1551, 1556 (1960).
alism, the constitutionally-required state remedy would seem to
be most satisfactory in balance. Since Congress has the power to
enact remedies for both constitutional and statutory federal rights,
a Supreme Court determination that the remedy is federally-cre-
ated would amount to legislation by the Court overriding a possible
congressional intention that state remedies should be applied. Fur-
thermore, the federal remedy basis does not necessarily accommo-
date state interests since the federal right that the state court
would decline to adjudicate as contrary to its policies may be
enforced by a federal court sitting within the same state; instead,
states would be allowed to shift the burden of adjudicating certain
federal rights to the federal courts. It would seem, therefore, that
the constitutionally-required state remedy approach best recog-
nizes the state courts as co-ordinate organs of authority in the dis-
charge of the constitutional functions of the states, while still pro-
viding for adequate vindication of federal rights.