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Pennies From Heaven: An Expanded Theory Of Entitlement For State Court Claimants Under The Civil Rights Fee-Shifting Statutes

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PENNIES FROM HEAVEN:[1] AN EXPANDED THEORY OF ENTITLEMENT FOR STATE COURT CLAIMANTS UNDER THE CIVIL RIGHTS FEE-SHIFTING STATUTES

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I. INTRODUCTION

This article will explore the availability of attorneys' fees under the federal civil rights fee-shifting statutes[2] in actions brought in

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1.

Every time it rains, it rains
Pennies from heaven.
Don't you know each cloud contains
Pennies from heaven.
You'll find your fortune falling all over town,
Be sure that your umbrella is upside down.
Trade it for a package of sunshine and flowers,
If you want the things you love, you must have showers.
So when you hear it thunder, don't run under a tree,
There'll be pennies from heaven for you and me.

Pennies From Heaven (Album & song lyrics recorded by Bing Crosby) (reproduced in CD format by Intersound International, 1988).

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2. This includes the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 (1976) (the "Fees Act"); Emergency School Aid Act of 1972, § 718, 20 U.S.C. § 1617 (1972) (repealed 1978); Voting Rights Act Amendments of 1975, § 402, 42 U.S.C. § 2973(e) (1978) (repealed 1981); Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976). Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976*, 59 NOTRE DAME L. REV. 1293, 1294 n.9 (1984). As set forth in the legislative history of the Fees Act, "Since 1964, every major civil rights law passed by the Congress has included, or been amended to include, one or more fee provisions . . . ." Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), *reprinted in* SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS, 94TH CONG., 2D SESS., SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (Comm. Print 1976) [hereinafter SOURCE BOOK].

state courts and won on state claims. As Congress and the courts have recognized, the availability of such fees is critical in the continuing struggle for civil rights.[3] The question of attorneys' fee awards in state courts is particularly urgent as we enter the 1990's for three basic reasons.

First, state courts offer a relatively attractive forum for civil rights claimants faced with an unreceptive, if not hostile, federal bench. Second, it has been suggested that we are in a new stage of civil rights litigation,[4] grappling with subtler, and perhaps more deeply ingrained, threats to those rights.[5] Through carefully structured litigation in state courts, and the opportunity for local experimentation which they provide, civil rights claimants can generate productive new approaches to these difficult issues.[6] Third, and perhaps most significant, the law regarding fee awards under the fee-

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"The Act's legislative history indicates that Congress intended the standards for awarding fees under the Act, including the meaning of 'prevailing,' to be generally the same as that under the Civil Rights Act of 1964." Note, *supra*, at 1295-96 & n.18.

Most of the discussion in this article refers generally to any of the civil rights fee-shifting statutes, although each has its own idiosyncrasies and the reader should check the particular statute before assuming that the general proposition applies. *See* Sager, *The Supreme Court 1980 Term*, 95 HARV. L. REV. 17, 307 & n.51 (1981).

3. *See Poll Reports Majority Believe Race Prejudice is Still Strong*, N.Y. Times, Aug. 9, 1988, at A13. ("Majorities in all education, income and ideological groups, said American society was racist over all.").

See generally Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that civil rights laws sabotage necessary radical change by promising reform); *see also* Kelman, *Trashing*, 36 STAN. L. REV. 293, 297-98 & n.12. *But cf.* Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (discussing rights theory and practice as a venerable and critical component in the dialectic of social change in this country).

4. *See generally* L. EISENBERG, CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS 459 *passim* (1981).

5. *See, e.g.*, City of Memphis v. Green, 451 U.S. 100 (1981) (no statutory or constitutional violation established, notwithstanding finding of psychological harm to black plaintiffs who had objected to the closing of a public road which effectively forced them to drive around, rather than through, an all-white neighborhood on trips within the city), *criticized in* Sager, *supra* note 2, at 310-19.

6. *See, e.g.*, Robinson v. Cahill 62 N.J. 473, 303 A.2d 273 (1973), *supplemented*, 63 N.J. 196, 306 A.2d 65 (1973), *cert. denied*, 414 U.S. 976 (1973), *modified on reh'g*, 69 N.J. 133, 351 A.2d 713 (1975), *cert. denied*, 423 U.S. 913 (1975), *vacated* 69 N.J. 449, 355 A.2d 129 (1976) (vacated on grounds of new legislation); NAACP v. Mount Laurel Township, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975); "[W]e should expect that as public interest litigants increasingly use the state forums, more state cases will be decided under the Fees Act." M. DERFNER & A. WOLF, COURT AWARDED ATTORNEYS' FEES 14-28 (1986). *See generally* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 8 SUP. CT. REV. 341 (1985) (analyzing the theoretical foundations of federalism).

shifting statutes is in the process of being remolded by the Supreme Court. There have been several important fee award decisions[7] since the enactment of the Civil Rights Attorney's Fees Awards Act of 1976 (the "Fees Act"[8]) in which the Court considers questions central to the scope and purpose of the fee-shifting statutes. The impact of these decisions on state court awards is an open question. This article attempts to clarify the role of attorneys' fee awards by state courts in the changing federal scheme. Moreover, it suggests an approach for determining whether such fees should be awarded which better comports with the Supreme Court's latest decisions, as well as to the mandate of the Civil Rights Acts, than the tests currently applied.

II. OUTLINE OF THE ARTICLE

This article is divided into three main sections. The first section, Part III, provides the background essential for an understanding of the purpose and operation of the federal fee-shifting statutes. It describes the origins of the civil rights fee-shifting statutes; recounts the legislative history of the Fees Act; and briefly considers the significance of attorneys' fee awards for plaintiffs prevailing on state claims in state courts today.

The second main section, Part IV, discusses the two tests (the "State Claims Tests"[9]) under which attorneys' fees are awarded where a plaintiff prevails on a state claim. This section describes the two tests and discusses the ways in which the states have interpreted and applied them. It concludes that the State Claims Tests have outlived their usefulness.

Finally, in Part V, a proposal is made to eliminate the State Claims Tests and replace them with a "prevailing party" test. The consequences of rejecting the State Claims Tests are analyzed in light of the Supreme Court decisions rendered since their adoption, and some of the questions left open by the proposal are explored.

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7. Hensley v. Eckerhart, 461 U.S. 424 (1983); Smith v. Robinson, 468 U.S. 992 (1984); Hewitt v. Helms, 482 U.S. 755 (1987); North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 61 (1986); Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486 (1989).

8. 42 U.S.C. § 1988 (1976).

9. The tests are set forth at text accompanying *infra* note 49.

III. BACKGROUND

A. *Protecting Civil Rights*

The thirteenth, fourteenth and fifteenth amendments were passed by the Reconstruction Congress to dismantle the institution of slavery.[10] These rights were effectively buried by Justice Bradley's decision in The *Civil Rights Cases*.[11] In that decision, the rights protected by the Wartime Amendments[12] were characterized as being within the exclusive jurisdiction of the states, as opposed to federal rights cognizable in federal court. In view of the state courts' notorious enmity toward the recently emancipated blacks, especially in the south, as a practical matter this left claimants without a remedy.[13]

Thus, for almost a hundred years the Wartime Amendments were dormant.[14] They were resurrected in the early 1960's by the civil rights movement and the enactment of the Civil Rights Acts of 1957, and 1960[15] and were recognized by the Court in *Brown v. Board of Education*.[16] The Civil Rights Acts of 1964, 1965 and 1968[17] represented Congress' renewed commitment to essential principles of racial equality. These three pieces of legislation, considered as a whole, expanded both the conceptual scope[18] and the functional application of these principles.[19]

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10. For a comprehensive portrayal of the aftermath, see E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988). *See generally* Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 508 (1928) (characterizing enactments occasioned by the Civil War, providing for removal of cases from state to federal court, as "ad hoc legislation not abstract or systematic assertion of federal power, but measures . . . directed towards demonstrated inadequacy of state agencies.").

11. 109 U.S. 3 (1883).

12. U.S. CONST. amends. XII, XIV & XV.

13. *See* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967); Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475, 476 n.9 (1969) (discussing the infamous Hayes-Tilden Compromise of 1877).

14. L. Eisenberg, *supra* note 4, at 2; *See generally* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1976).

15. L. Eisenberg, *supra* note 4, at 1.

16. 347 U.S. 483 (1954). For discussion of the aftermath of *Brown*, including the difficulties presented by its implementation, see Wilson, *Brown v. Board of Education Revisited*, 12 KANSAS L. REV. 507 (1964); Pollack, *Ten Years After the Decision*, 24 Fed. B.J. 123 (1964); Comment, *De Facto Segregation-The Elusive Spectre of Brown*, 9 VILL. L. REV. 283 (1964).

17. L. Eisenberg, *supra* note 4, at 2.

18. The Civil Rights Acts addressed previously did not include persons and acts. Segregation in places of public accommodation, for example, was barred by subchapter two. 42 U.S.C. § 2000a (1982).

19. "Under a coordinated scheme of federal civil rights laws enacted to end discrimination . . . [these] statutes [are to be] construed expansively." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 429-30

In addition to establishing stiff sanctions for violations of the statutes, Congress sought to devise more effective mechanisms for their affirmative enforcement. A major thrust of this effort was the notion of private citizens acting as "private attorney generals,"[20] who could vindicate these rights in the courts even if the state was lax in enforcing them.[21] Access to the courts for these "private attorney generals" was a major concern. The focus was on the federal courts, which were still generally regarded as more sympathetic as well as more principled than the state courts.[22]

In the 1960's, scant attention was given to the question of state court attorneys' fee awards because to those who were familiar with the history of civil rights, it was virtually unimaginable that a state court would be the forum of choice for a civil rights plaintiff.[23] Far from being concerned about access to state courts, the drafters of the 1960's legislation were worried that the states would somehow undermine the federal scheme. It was feared, for example, that the states could short circuit the process and prevent claimants from ever reaching court by requiring that state administrative remedies first be exhausted.[24]

It was further recognized that if enforcement were to be effective, a mechanism was needed to assure that the attorneys bringing such suits would be paid. In this country, each party bears her own legal expenses under what is commonly referred to as the "American rule."[25] This approach, however, is impractical in civil rights litigation. Civil rights cases are often in court for years.[26] Persons who

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(1971).

20. The phrase was first used by Judge Jerome Frank in Associate Indus., Inc. v. Ickles, 134 F.2d 694 (2d Cir. 1943) *vacated as moot*, 320 U.S. 707 (1943). Comment, *Court Awarded Attorneys Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 658 (1974).

21. Congress has other means of encouraging litigation. Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 34 & n.184 (Winter 1984). As Professor Leubsdorf has noted, however, fee-shifting statutes are politically expedient. "They are popular with at least some members of the practicing bar, call for no immediate [c]ongressional appropriation, and leave at least some of the blame for the resulting litigation on private clients and private lawyers." *Id.* at 35. *Cf.* Freeman, *supra* note 3 (arguing that such laws may actually legitimize discrimination).

22. *See generally* Hyman, Book Review, 36 RUTGERS L. REV. 971, 984-85 (1984).

23. The Warren Court was particularly sensitive to the question of federal court access. *See* Griffin v. County School Board, 377 U.S. 218 (1964) (abstention doctrine should not be applied in civil rights case where further delay is unjustifiable.)

24. Interview with Howard Glickstein, Dean of Touro College, Jacob D. Fuchsberg Law Center in Washington, D.C. (Nov. 17, 1988).

25. *See generally* Leubsdorf, *supra* note 21.

26. *See, e.g.*, EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (adminis-

have been discriminated against are unlikely to have the resources to finance prolonged litigation.[27] There is rarely an economic incentive for any individual to persist in such litigation since the cost is likely to exceed any damages which are recoverable.[28] Civil rights litigation, as the Supreme Court has pointed out, often benefits persons who are not parties, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them.[29] Given the reluctance of Congress to appropriate funds for comprehensive, ongoing enforcement,[30] as well as the political undesirability of total reliance on the government, attorneys' fee awards were seen as necessary to safeguard civil rights. Fee-shifting provisions were included in several of the federal civil rights statutes.[31] Where attorneys' fees were not explicitly available, the courts did not hesitate to exercise their traditional equitable powers to establish a private attorney general exception to the American rule.[32] There was no codification of the rules for shifting fees in civil rights cases—and no pressing need for it—until the Supreme Court's decision in *Alyeska Pipeline Service v. Wilderness Society*.[33]

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trative complaint filed in 1973, lawsuit filed in 1977, decision rendered in 1988).

27. SOURCE BOOK, *supra* note 2, at 267.

28. *See* City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986) *aff'd*, 479 U.S. 1048 (1987) (discussing damages for a constitutional claim). *See generally* Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985) (urging the adoption of compensatory remedies for state constitutional interests).

29. Hensley v. Eckerhart, 461 U.S. 424, 432 n.5 (1983).

30. *See* SOURCE BOOK, *supra* note 2, at 4.

31. *See* sources cited *supra* note 2. *See generally* Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651; Note, *Pro Se Can You Sue? Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659 (1982); *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984); *Attorneys' Fees*, 2 W. NEW ENGLAND L. REV. 165 (1979).

32. The *Alyeska* Court disapproved of this trend:

> In recent years, some lower federal courts, erroneously, we think, have employed the private-attorney-general approach to award attorneys' fees. *See, e.g.*, Souza v. Travisono, *supra*; Hoitt v. Vitek, 495 F.2d 219 (CA1 1974); Knight v. Auciello, 453 F.2d 852 (CA1 1972); Cornist v. Richland Parish School Board, 495 F.2d 189 (CA5 1974); Fairley v. Patterson, 493 F.2d 598 (CA5 1974); Cooper v. Allen, 467 F.2d 836 (CA5 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (CA5 1971); Taylor v. Perini, *supra*; Morales v. Haines, 486 F.2d 880 (CA7 1973); Donahue v. Staunton, 471 F.2d 475 (CA7 1972), *cert. denied*, 410 U.S. 955; Fowler v. Schwarzwalder, 498 F.2d 143 (CA8 1974); Brandenburger v. Thompson, *supra*; La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).

The *Aleyska* Court held that only Congress, and not the courts, could authorize an exception to the American rule. *See infra* notes 36-38.

33. 421 U.S. 240 (1975).

B. *Legislative History of the Fees Act*

In 1975, environmental groups won a lawsuit to bar construction of the trans-Alaska pipeline in *Alyeska*. In response to their request for attorneys' fees and costs, and absent express statutory authority, the Court of Appeals for the District of Columbia Circuit adopted the private attorney general exception to the American rule. The United States Supreme Court, while noting that Congress "has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation,"[34] and citing *Newman v. Piggie Park Enterprises, Inc.*[35] for the applicability of that concept to the civil rights context, held that only Congress could authorize such exceptions.[36]

The decision in *Alyeska* was widely condemned by commentators.[37] But it galvanized Congress, which passed the Fees Act in 1976.[38] This legislation was not the first effort by Congress to develop a uniform approach to shifting attorneys' fees. In 1973 there were six days of hearings on the "Effect of Legal Fees on the Adequacy of Representation" during which extensive testimony was taken on this issue.[39] In 1975, there were 3 days of hearings, basi-

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34. *Id.* at 263.

35. 390 U.S. 400, 402 (1968).

36. *Alyeska*, 421 U.S. at 263. Note, *supra* note 2, at 1293 n.5 ("In Alyeska, the Supreme Court rejected this judicially created exception to the 'American Rule' as invading the legislature's province." *Alyeska*, 421 U.S. at 271).

37. *See, e.g.*, Comment, *After Alyeska: Will Public Interest Litigation Survive?* 16 SANTA CLARA L. REV. 267 (1976); Comment, *Alyeska Pipeline Turns Off the Tap: Can Public Interest Law Survive?* 71 NW. U.L. REV. 239 (1976).

38. 42 U.S.C. § 1988 (1976). As the legislative history noted:

> This bill, S.2278, is an appropriate response to the Alyeska decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

1976 U.S. CODE CONG. & ADMIN. NEWS 5912. *See generally* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 347-50 (1980); Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS U.L.J. 441 (1977).

It is well settled that "cases arising under our Civil Rights laws" may include cases decided on other grounds. *See infra* note 49. These "other grounds" may arise under state or federal law. *See infra* notes 86-114 (state law); *see also infra* notes 241-44. *But cf. infra* notes 118-24 (cases granting fees notwithstanding absence of explicit Civil Rights claim).

39. *Effect of Legal Fees on the Adequacy of Representation: Hearing Before the Subcomm. on Representation of Citizen Interests*; 93rd Cong., 1st Sess. (1973) [hereinafter *1973 Hearings*]; *see also* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379 (1973).

cally affirming the earlier proceedings.[40] During these nine days of testimony, the question of fee awards in state court proceedings was essentially ignored. Indeed, Senator Tunney, a champion of the fee-shifting legislation, testified in the 1973 hearings: "I don't think the federal Government ought to be involved in determining what the situation is going to be in state courts."[41]

In 1976, there were no hearings. For the first time, however, there was the political will to get this legislation passed. Not only had the *Alyeska* Court thrown down the gauntlet, but Senators Hart and Scott, long-time civil rights advocates, were retiring from the Senate. The Senate leadership wanted to honor them with a piece of significant legislation.[42] Efforts to derail the bill by filibuster were thwarted and it was passed in the Senate only two days before the end of the 1976 session with minimal debate.[43] Again, the operation of the proposed legislation in state courts was not addressed.

The Fees Act was passed by the House on October 1, 1976, the last day of the session.[44] A bill almost identical to the Senate bill had been reported by the House Judiciary Committee on September 9, 1976, too late for processing. It was placed on the Suspension Calendar, "a procedure usually reserved for the expeditious consideration of noncontroversial measures."[45] Even so, there would not have been any vote on the bill if the Rules Committee had not convened to create a special rule the day after the bill passed the Senate. Since the Republicans were less than enthusiastic about this maneuvering and refused to attend, the Committee meeting would have lacked a quorum had not then-Congressman John Anderson broken ranks.[46]

The only reference to state courts in the House debate was made by Congressman Drinan, who merely noted that the legislation

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40. *Hearings on Awarding of Attorneys' Fees Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice*, 94th Cong., 1st Sess. (1975) [hereinafter *1975 Hearings*].

41. *1973 Hearings*, *supra* note 39, at 1125.

42. Wolf, *Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fee Awards Act*, 2 W. NEW ENGLAND L. REV. 193, 195-96 n.11 (1979).

43. Senator Jesse Helms noted:

> We have not had an explanation of the bill, Mr. President, of course. It was immediately brought up. There was not one word of explanation about it. . . . I might add also that since this is a substitute, if it should be adopted . . . it would cut the senate off from any amendment whatsoever on this bill. . . . Ram it through.

SOURCE BOOK, *supra* note 2, at 28.

44. SOURCE BOOK, *supra* note 2, at 196.

45. SOURCE BOOK, *supra* note 2, at 196 n.12.

46. Telephone interview with Professor Wolf, Western New England College of Law (Nov. 11, 1988).

would authorize state as well as federal courts to award fees.[47] The only guidance as to fee awards where litigants prevail on claims not subject to fee-shifting statutes,[48] including state court litigants prevailing on state claims, appears in footnote 7 of the House Report submitted in support of the bill. The State Claims Tests are set forth for the first time in this footnote:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorneys fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. . . . In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *see Hagans v. Lavine*, 415 U.S. 528 (1974) attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966).[49]

The two State Claims Tests (the *Morales* test for statutory claims and the *Hagans/Gibbs* test for fee claims "involving a constitutional question") were an afterthought, an eleventh hour addition.[50] According to Professor Arthur Wolf, one of the coauthors of the State Claims Tests,[51] the purpose of footnote 7 was to indicate

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47. SOURCE BOOK, *supra* note 2, at 253. In 1976, it was less unthinkable to bring civil rights actions in certain state courts. *See* Friesen, *supra* note 28, at nn.4-7. Moreover, after seven years of the Burger Court, some civil rights claimants were finding that the doors to the federal house were swinging shut. *See* Hyman, *supra* note 21, at 984-85 (1984); *cf.*, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

48. Hereinafter, claims which are not directly covered by fee-shifting statutes are referred to as "non-fee claims," and claims which are subject to such statutes are referred to as "fee claims."

49. H.R. REP. NO. 94-1558 (1976).

50. *See generally* Rothfeld, *Judging Law: Never Mind What Congress Meant?* N.Y. Times, Apr. 14, 1989, at B5, col. 3 (noting that "an increasingly vocal group of federal judges . . . [argue] that legislative history has become an unreliable guide to Congressional intent" and quoting Professor Stephen Ross, who attributes controversy, at least in part, to the fact that "conservative Republican judges are interpreting law passed by a Democratic Congress."); Blanchard v. Bergeron, 489 U.S. 87 (1989) (Scalia, J., concurring).

51. Professor Wolf was special counsel to Congressman Robert Drinan, floor manager of the bill. Wolf, *supra* note 42, at 193, 196 n.14. Mary Frances Derfner was the other coauthor. Ms. Derfner wrote *Attorneys' Fees in Pro Bono Publico Cases: A Compilation of Federal Court Cases, reprinted in Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate*

clearly that fees should be available even if there was not an explicit, favorable decision on the fee claim. It was plain under earlier case law that fees could be available when there had been no adjudication.[52] The drafters of footnote 7 were concerned, however, that courts might construe the legislative silence as a disavowal if awards under such circumstances were not expressly addressed. They thought that courts might hesitate to grant fees on a claim that had not been proven where other claims had actually been litigated.[53]

The intent behind footnote 7 was admirable but like many eleventh hour inspirations, it needed work. The footnote may well have been improved, or abandoned, had it been subject to the full and rigorous debate that would typically be generated by such a proposition. Because of the circumstances of its passage, however, it evaded this process. As explained below, footnote 7 hinders the civil rights plaintiffs it was meant to benefit, in part because the tests set forth in the footnote have confused the courts.

C. *Availability of Fees for State Claimants in State Courts Today*

State courts may now be the preferred forum for certain kinds of civil rights litigation.[54] If the Burger Court was considered less

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Comm. on the Judiciary, 93rd Cong., 1st Sess., pts. 3 & 4, 862-1107 (1974). Ms. Derfner also assisted in the preparation of the SOURCE BOOK, *supra* note 2.

52. *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Fogg v. New England Tel. & Tel. Co., 346 F. Supp. 645 (D.C.N.H. 1972) (female former employee entitled to fees because she performed valuable public service by instituting action, although she did not show that she was personally discriminated against). *Cf.* Hoitt v. Vitek, 495 F.2d 219, 220-21 (1st Cir. 1974) (noting in dicta that it is appropriate to grant fees to encourage settlement). *See also* text accompanying *infra* notes 214-22.

53. Telephone interview with Professor Wolf, *supra* note 46.

54. *See generally* Note, *Developments in the LawThe Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Neisser, *Celebrating the Bicentennial by Going to State Court*, 1987 N.J. LAW. 44 n.19. Indeed, state courts may be the only realistic forum. *See* Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. CIV. RTS.—CIV. LIABILITY L. REV. 63, 64 (1977) (arguing that restrictive standing decisions of the Burger court effectively deny civil right plaintiffs access). *But cf.* Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245, 270 (1980) (noting the role of the federal courts as the "primary vindicators of federal rights").

Even if state courts may be the better forum now, this was certainly not the case when the 13th, 14th and 15th amendments were passed by the reconstruction congress. *See* Note, *Developments in the Law Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1182 (1977). The point is that the receptivity of state and federal courts will vary depending on the times and the cases. As then Professor Frankfurter noted, "A division of judicial labor among different courts, particularly between a dual system of federal and state courts, is especially subject to the shifting needs of time and circumstance." Frankfurter, *supra* note 10, at 503. To maximize the opportunities for the vindication of civil rights, both state and federal courts should be

hospitable to civil rights claimants than its predecessor, the Warren Court, the Rehnquist Court is perceived as downright hostile. Indeed, its unprecedented, sua sponte decision to reconsider *Runyon v. McCrary*[55] in connection with *Patterson v. McLean Credit Union*,[56] not only outraged the civil rights community, but drew sharp condemnation from a moderate Congress as well.[57] The Court's decision in *City of Richmond v. Croson*,[58] which places a hefty burden on affirmative action plans to demonstrate that they do not unjustly discriminate against whites, can only confirm the apprehensions of its critics.[59] Considered in conjunction with *Wards Cove Packing Co. v. Atonio*,[60] and *Martin v. Wilkes*,[61] these decisions "make discrimination suits harder to bring, harder to win and more vulnerable to attack if successfully concluded,"[62] and have left "[c]ivil rights leaders . . . reeling."[63] The perception is widespread that the lower federal courts are similarly unsympathetic to civil rights plaintiffs.[64]

State courts, in striking contrast, are viewed as increasingly receptive to civil rights claims. There have been notable advances in the law on the state level, particularly in the more progressive states.[65] State law, whether statutory or constitutional, may well pro-

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available to those seeking to promote or defend civil rights.

55. 427 U.S. 160 (1976).

56. 108 S. Ct. 1419 (1988). Although the Court unanimously refused to overrule *Runyon*, it held 5-4 that section 1981 does not apply to on-the-job racial harassment.

57. On June 24, 1988 an amicus brief was filed, signed by 67 U.S. senators and 119 U.S. representatives, urging the Court to uphold its decision in *Runyon*. Brief for Amici Senators and Members of the House in Support of Petitioner, Patterson V. McLean Credit Union, 108 S. Ct. 1419 (1988) (No. 87-107).

58. 109 S. Ct. 706 (1989).

59. *But see Even So, Affirmative Action Lives*, N.Y. Times, Jan. 25, 1989, at A22, col. 1 (*Richmond* "leaves room for affirmative action that is carefully constructed.")

60. 110 S. Ct. 38 (1989).

61. 109 S. Ct. 2180 (1989). (white employees who were not parties to employment discrimination suit settled by consent decree were not barred from later challenging its terms).

62. Greenhouse, *A Changed Court Revises Rules on Civil Rights*, N.Y. Times, June 18, 1989, § 4 (Week in Rev.), col. 1. *See also Court's 'Redefining' Worries Rights Groups*, Nat'l L.J., June 26, 1989, at 5, col. 1 (noting that majority in *Patterson* redefined scope of section 1981); *but see* Bork, *The Supreme Court and Civil Rights*, Wall St. J., June 30, 1989, at A12 (arguing that the "morality of process [demonstrated by the Court] is the highest morality of the jurist").

63. Greenhouse, *supra* note 62; *accord* Coyle, *How Far Will the Court Go?* Nat'l L.J., June 26, 1989, at 1, col. 1. *See also* Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986) (section 1981 does not authorize damage suits against state and local governments).

64. *See generally* H. SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988); Professor Schwartz has been criticized for assuming "the rightness of liberal jurisprudence[.]" Taylor, Book Review, N.Y. Times, Dec. 18, 1988, § 7, at 33.

65. Frequently cited examples include New Jersey, Washington and Wisconsin. The

vide a better basis for relief.[66] Even if favorable precedent has not yet been established, state law may offer the possibility of more creative approaches to intransigent civil rights problems.[67] The New Jersey Supreme Court, for example, found a right to equal education under the New Jersey Constitution in *Robinson v. Cahill*.[68] This inspired fair housing advocates to include an analogous state constitutional claim in the landmark *Mt. Laurel* litigation.[69] State civil rights claims often raise novel questions of state law, moreover, which a federal court is unlikely to decide.[70] Even where federal court is a viable option, state courts may be less congested, state judges more sympathetic or state jurisdictional requirements less stringent. For all of these reasons, state courts are an increasingly likely choice for civil rights claimants.[71]

The Supreme Court has similarly acknowledged the importance

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characterization, of course, varies according to the issue. *See generally* B. MCGRAW, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (1985); M. PORTER & G. TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (1982).

66. *See* Note, *supra* note 54, at 1180 & n.266; Payne, *The Bicentennial, Constitutionalism and the States*, N.J. LAW. Aug. 1987, at 10, 11 (noting the utilization by state courts of "far-ranging substantive due process doctrines that have not proven workable in the federal system"); Neisser, *supra* note 54, at 42, 43 (discussing possible advantages of state constitutional litigation and noting that "for the vast bulk of our history, the people depended for their liberty upon their state constitutions"). *See* Wolf, *supra* note 42, at 242 (discussing creative alternatives offered by state law).

But see Rapaczynski, *supra* note 6, at 408-09 (criticizing the notion of the states as "laboratories of experiment[,]" as "one of the least examined verities of constitutional theory[,]" and arguing that even if decentralization did "contribute to governmental efficiency," the ways in which it might most constructively do so requires a "very complex and largely pragmatic" determination, "unsuitable . . . for elevation to the constitutional level or for judicial assessment")

67. *See supra* note 54. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See also* Stevens, *Rights Group Hails National Shift Toward Enforcing Civil Liberties*, N.Y. Times, June 22, 1987, at A13 (discussing the relatively progressive recent decisions of certain state courts in civil liberties cases). *See generally* Falk, *Foreword: The State Constitution: A More Than 'Adequate' Nonfederal Ground*, 61 CALIF. L. REV. 272, 281-82 (1973) (arguing that a state may freely invalidate state legislation as violative of the state constitution, regardless of federal constitutional precedent); Relkin & Solomon, *Using State Constitutions to Expand Public Funding for Abortions: Throwing Away the Carrot with the Stick*, 9 WOMEN'S RTS. L. REP. 27 (1986).

68. 67 N.J. 35, 335 A.2d 6 (1975).

69. NAACP v. Mount Laurel Township, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975).

70. Under the second, discretionary step in the jurisdictional analysis mandated by United Mineworkers v. Gibbs, 383 U.S. 715 (1966), the court should generally leave pendent state claims raising novel questions of state law to the "surer-footed" state courts. *Id.* at 726. *See generally* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

71. *Cf.* Frankfurter, *supra* note 10, at 519 (noting the desirability of having "the special local facts upon which constitutional questions now so frequently turn . . . canvassed [in the first instance] by [state court] judges presumably most familiar with them.").

of the availability of state forums, requiring state courts to hear certain federal claims even where contrary to state law.[72] But as the courts, Congress and scholars have noted, the availability of attorneys' fees will in many cases determine whether a forum is truly available to civil rights claimants. If fees are not available in state court, plaintiffs may be effectively precluded from utilizing their forum of choice. As a corollary, they may be deterred from relying on those "novel" state laws which are likely to trigger abstention on the part of a federal court. Thus, the circumstances under which attorneys' fees may be recoverable in state courts becomes a critically important issue, not only for civil rights lawyers and their clients, but for the development of the law.

The growing utilization of state courts has resulted in the correspondingly extensive reliance on footnote 7 of the House bill, which sets forth the State Claims Tests. These tests may have been an afterthought in 1976, but they seem prescient in today. Despite their flaws, the clear indication of legislative support for the principle that fees should be available in state courts has been invaluable for civil rights claimants.

The next part describes the State Claims Tests and their role in determining the availability of attorneys' fees for plaintiffs who prevail on state claims in state court. These tests have served their purpose; the principle that fees should be available in state court for civil rights claimants who prevail on state grounds is now well established. It will be shown how the State Claims Tests, as interpreted and applied by the state courts, have come to frustrate litigants seeking to avail themselves of the benefits of the civil rights fee-shifting statutes in state courts. By doing so, the tests contravene the federal scheme for the full, vigorous and creative enforcement of civil rights.

IV. THE STATE CLAIMS TESTS

A. *What They Are*

The State Claims Tests are used to determine whether an award of attorneys' fees may be granted in an action involving both a claim under the federal civil rights fee-shifting statutes and a non-fee claim, when the case is resolved on the basis of the non-fee claim and

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72. *See, e.g.*, Testa v. Katt, 330 U.S. 386(1947); M. DERFNER & A. WOLF, *supra* note 6, at 14-13, 14-14 & n.5 (noting that "the United States Supreme Court has reserved the question whether state courts must hear cases based on Section 1983.") (citing Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980); Maine v. Thiboutot, 448 U.S. 1, 3 n.7 (1980)).

there is no ruling with respect to the fee claim.[73]

There are actually two State Claims Tests. Which test is used depends on the nature of the federal fee claim, at least in theory.[74] Where the federal claim is statutory, such as a Title VIII claim, the plaintiff is entitled to a determination of her claim under the *Morales* test, solely for purposes of awarding attorneys' fees.[75] In *Morales*, a black plaintiff who had contracted to buy a federally subsidized house sued city officials to enjoin them from preventing its construction within city limits. She was awarded injunctive relief, but denied damages and attorneys' fees. The Seventh Circuit held that she would be entitled to fees and damages if she could establish racial discrimination and that the case should be remanded to give her an opportunity to do so.

Hagans/Gibbs is the second State Claims Test. It is supposed to be applied where the federal fee claim "involves a constitutional question." *Hagans/Gibbs* was originally a test for determining whether a federal court could assert jurisdiction over a pendent state claim. Since it requires only that the federal claim be "substantial" (*Hagans*) and that the federal and state claims arise out of a "common nucleus of operative facts" (*Gibbs*), *Hagans/Gibbs* as a jurisdictional test[76] assures liberal access to federal courts for claimants

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73. The State Claims Tests are set forth at *supra* text accompanying note 49. These tests would apply to federal, as well as state, non-fee claims, but we are focusing on non-fee state claims here. The State Claims Tests are frequently applied in federal court, in connection with non-fee federal claims as well as pendant state claims. At least 13 of the state courts have adopted the tests in reported decisions, and only one state court has considered the State Claims Tests and failed to adopt them. *See infra* note 83 (states which have followed the tests); Caputo v. Chicago, 446 N.E.2d 1240, 113 Ill. App. 3d 45 (1983) (rejecting test in dicta). In federal courts, the tests are less problematic since "by the time the case concludes, [the federal court] will have already applied [them] in taking jurisdiction over the pendent claim at the onset of the litigation." M. DERFNER & A. WOLF, *supra* note 6. *See, e.g.*, Exeter-West Greenwich Regional School Dist. v. Pontarelli, 788 F.2d 47 (1st Cir. 1986); Elbe v. Yankton Indep. School Dist., 640 F. Supp. 1234 (D.S.D. 1986).

Fees in connection with non-fee state claims were expressly contemplated by Congress. SOURCE BOOK, *supra* note 2, at 253. In some states, such as California, the state claim may also be a "fee claim" in that fees may be allowable under state law absent the federal fee shifting statute. CAL. CIV. PROC. CODE § 1021.5 (West 1982). ("Attorney fees: enforcement of important rights affecting public interest."). *See also infra* note 282.

74. It may be difficult, or otherwise undesirable, to distinguish between a constitutional claim and a statutory claim in this context. This suggests the expedience of a single test. *See infra* notes 87-103 and accompanying text.

75. *Morales* was among the lower federal court opinions explicitly disclaimed by the *Alyeska* Court. *See supra* note 31.

76. Pendent jurisdiction cannot be asserted unless the article III requirement that the state and federal claims comprise one constitutional "case" is satisfied. There is authority for the transactional view of "cases" under article III. FED. R. CIV. P. 13(a). Schenkier, *supra* note 54, at 272 & n.140. *But cf.* Baker, *Toward a Relaxed View of Federal Ancillary and*

suing under the fee-shifting statutes. By adopting *Hagans/Gibbs*, the drafters[77] of the State Claims Tests intended to afford the broadest opportunity for the application of these statutes.[78] Where a plaintiff claims a denial of due process under Section 1983, for example, fees may be granted under the Fees Act if the federal constitutional claim is (1) "substantial" within the meaning of *Hagans v. Lavine*[79] and, (2) the federal claim and the state claim on which plaintiff prevailed arise from "a common nucleus of operative facts," as set forth in *United Mineworkers v. Gibbs*.[80]

Hagans/Gibbs, unlike *Morales*, does not require a ruling with respect to the fee claim. Indeed, the purpose of the test is to discourage the otherwise unnecessary determination of constitutional questions. This is known as the "avoidance doctrine." Although generally adhered to by the federal courts, it is a policy of judicial construction rather than an ironclad rule. As we shall see, its acceptance among the state courts is far from universal.[81]

Both State Claims Tests are quoted in their entirety in most of the cases addressing the question of fee awards for plaintiffs prevailing on non-fee claims, including the Supreme Court's oft-cited decision in *Maher v. Gagne*.[82]

B. *Interpretation of the State Claims Tests by the State Courts*

1. *An Overview—Why Are the State Claims Tests Interpreted at all?*

There are reported decisions, most of which cite the State Claims Tests in their entirety, from at least 13 of the state courts.[83] It is surprising that so many of the states have adopted some version

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Pendent Jurisdiction, 33 U. PITT. L. REV. 759, 765 (1971-72) (relating the doctrine of pendent jurisdiction to the concept of "case" in the Rules, but suggesting that that concept is "far broader and more flexible than is the phrase 'common nucleus of operative fact.' ").

77. *See supra* text accompanying notes 42-53 for an account of the origins of the tests.

78. *But see* Comment, *Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds*, 130 U. PA. L. REV. 488, 495-97 (1981-82) (arguing that Congress' intent in this regard, especially as shown in the senate history, is "far from clear"). For a doctrinal analysis of *Hagans/Gibbs*, see *infra* notes 169-90 and accompanying text.

79. 415 U.S. 528 (1974).

80. 383 U.S. 715 (1966). As the court explained in Stratos v. Department of Pub. Welfare, 387 Mass. 312, 439 N.E.2d 778, 783 (1982): "The [*Hagans/Gibbs*] rule is a compromise between accurate application of § 1983 and § 1988, and traditional policy of refraining from unnecessary resolution of constitutional questions."

81. M. DERFNER & A. WOLF, *supra* note 6, at 14-20.

82. 448 U.S. 122, 132-33 n.15 (1980). *See infra* notes 85-86.

83. New York, Massachusetts, California, Delaware, Maryland, Maine, Alabama, Kansas, Oregon, Indiana, Arkansas, Arizona and the District of Columbia.

of the State Claims Tests since a strong argument can be made that their adoption by the state courts is not compelled by law. The State Claims Tests were merely a footnote in the House Report accompanying the bill. They were never actually incorporated in the legislation. Even as a statement of legislative intent, they are of dubious significance since they were never mentioned during the debate.[84]

Nor is the Supreme Court's citation of the State Claims Tests in footnote 15[85] of its decision in *Maher v. Gagne* controlling. Footnote 15 is mere dicta in *Maher*. Although both a Section 1983 fee claim and a non-fee claim under the Social Security Act were raised in that case, the matter was settled by the parties. The award of fees was predicated on the relief obtained by the plaintiff. The Court's observation that fees would have been allowable had the plaintiff prevailed on her non-fee Social Security claim was not part of the holding. There is nothing in *Maher*, moreover, suggesting that the State Claims Tests should be applied by a state court when the non-fee claim arises under state law.[86]

Although state courts could have rejected the State Claims Tests, none have explicitly done so.[87] Instead, they have uniformly failed to consider the arguments noted above, any one of which could have justified nonapplication of the State Claims Tests. Indeed, the

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84. The Report was distributed on September 15, 1976, presumably permitting adequate time for review prior to the house debate on October 1, 1976. SOURCE BOOK, *supra* note 2, at 209, 235. It appears that the Senate, on the other hand, did not have the opportunity to study the Report prior to its vote. *See supra* note 43.

85. *Maher*, 448 U.S. at 132-33 n.15 (1980).

86. *Cf.* Anderson v. Redman, 474 F. Supp. 511, 515 (1979): "This Court agrees with at least three Courts of Appeals that . . . [the State Claims Tests set forth at footnote 7 of the House Report] present as strong an indication of congressional intent on the question as could reasonably be expected." (citing, without further explanation, Gagne v. Maher, 594 F.2d 336, 340 (2d Cir. 1979); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423, 426-27 (8th Cir. 1978); Seals v. Quarterly County Court, 562 F.2d 390, 394 (6th Cir. 1977)). The court proceeded to reject defendant's contention that fee awards for plaintiffs prevailing on state grounds was "an improper exercise of congressional authority under § 5 of the Fourteenth Amendment" citing the Supreme Court's decision in Hutto v. Finney, 437 U.S. 678, 698 (1978) (Congress intended to abrogate states' eleventh amendment immunity in enacting the Fees Act). *Anderson*, 474 F. Supp. at 516.

It could be argued that the State Claims Tests should apply where plaintiff brings a federal fee claim and a federal non-fee claim in state court, prevailing on the latter. Such cases are likely to be removed to federal court under 28 U.S.C. § 1443, however, and in fact there are no reported state court decisions involving such claims. Of course, any civil rights matter may be removed under the cited provision regardless of the nature of the non-fee claim, but removal is more likely where the second claim also arises under federal law. *See generally* Redish, *Revitalizing Civil Rights Removal Jurisdiction*, 64 MINN. L. REV. 523 (1980).

87. *But see* Caputo v. Chicago, 113 Ill. App. 3d 45, 446 N.E.2d 1240, 1242 (1983) (rejecting test in dicta).

court observed in *Filipino Accountants v. State Board of Accountancy*,[88] that "[w]e know of no principle that would allow us to disregard these views of the highest court of the land. Where the Supreme Court of the United States interprets a statute enacted by the Congress, that interpretation is binding upon the state courts of California." The force of this statement belies the several leaps that the California court, like all the state courts, had to take in determining that dicta appearing in a footnote, in an easily distinguishable context, amounted to a binding " interpretation." Why did the California court, and the twelve other state courts, do so?

While the state courts may not have been compelled by the law to follow the State Claims Tests, powerful inducements for the adoption of the tests were provided by the growing numbers of civil rights actions being brought in state court and the sense that such claimants should be as entitled to fees as their federal court counterparts. As the drafters of the State Claims Tests expected, explicit authorization for such awards was welcomed by state courts attempting to apply unfamiliar federal law. The tests were a road sign on an otherwise unmarked expanse. The State Claims Tests were relied on without question by state courts seeking to do equity where the plaintiff plainly vindicated her civil rights, even though she only prevailed on her non-fee state claim. The fundamental illogic of the tests, and the resultant problems in applying them, were viewed as technical difficulties. In practice, many states have already modified the State Claims Tests so that they are scarcely recognizable, although these states continue to cite the tests in their original form.

2. *Merger of the State Claims Tests*

The states which cite the State Claims Tests typically cite both the *Morales*[89] and the *Hagans/Gibbs*[90] prongs. There is rarely any attempt to specify which test is to be applied, and there is correspondingly little differentiation between statutory fee claims (which technically should trigger *Morales*) and constitutional fee claims (which call for *Hagans/Gibbs*). There are basically three reasons for this blurring of the State Claims Tests. First, it is a practical consequence of the way in which state civil rights suits are usually structured. Second, it reflects the underlying doctrinal fuzziness between constitutional and statutory claims in the civil rights context.

88. 155 Cal. App. 3d 1023, 1034, 204 Cal. Rptr. 913, 919 (1984).
89. *See supra* text accompanying note 71.
90. *See supra* text accompanying notes 72-76.

Third, there are compelling policy reasons for treating constitutional and statutory civil rights claims alike for purposes of fee awards. There is also some textual support for this interpretation.

a. *Practical Considerations*

Since the enactment of the Fees Act, constitutional claims are routinely appended to claims brought under the civil rights statutes so as to maximize the possibility of a fee award. (Such practice, of course, also increases the likelihood of a favorable decision on the merits.) If the case involves discrimination in housing, for example, the complaint will usually include constitutional claims under the thirteenth and fourteenth amendments as well as a statutory claim under Title VIII.[91] In order to prove her constitutional claim, plaintiff must demonstrate intentional discrimination.[92] Title VIII merely requires a showing of "discriminatory effect." Thus, even if plaintiff cannot prove intent, she may prevail under Title VIII.[93] On the other hand, she may be able to show intent to discriminate, and thereby be entitled to fees based on her constitutional claims, but fail to satisfy Title VIII's requirement that she be unable to pay her own legal expenses.[94] Prudent counsel, accordingly, typically includes both types of claims in the complaint. As a result, when a plaintiff prevails on her state claim, there is often no adverse decision with respect to *either* her federal statutory or constitutional claim. Neither the legislative history nor the case law provide any guidance for the court as to which of the two State Claims Tests[95] should apply in this situation.

b. *Doctrinal Fuzziness*

As a doctrinal matter, the distinction between a statutory and a constitutional fee claim is spurious in this context because the statu-

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91. 42 U.S.C. §§ 3601-3631 (1982).

92. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

93. *See* Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974); United Farmworkers, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Citizens Committee for Faraday Wood v. Lindsay, 362 F. Supp. 651, 658 (S.D.N.Y. 1973); Banks v. Perk, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972); Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

94. 42 U.S.C. § 3612(c) (1982).

95. *See supra* text accompanying notes 73-81.

tory claim necessarily embraces a constitutional claim.[96] Indeed, the constitution is at the very core of claims advanced under the civil rights statutes. As the Court noted in *U.S. v. City of Black Jack, Missouri*,[97] the purpose of the civil rights statutes is to enforce the thirteenth and fourteenth amendments. The *Black Jack* Court saw no more reason, at least for purposes of abstention, for denying a federal forum to a plaintiff relying on Title VIII than for denying a federal forum to a plaintiff alleging a constitutional claim.[98] The Court treated a claim under the Civil Rights Act like a constitutional claim. Similarly, in *Fitzpatrick v. Bitzer*[99] the Supreme Court held that, for the purposes of sovereign immunity, a claim under Title VII should be considered tantamount to a constitutional claim. Under *Bitzer* and its progeny, civil rights claimants may obtain recovery from the state which would otherwise be barred by the eleventh amendment.

In *Stratos v. Department of Public Welfare*,[100] the court pointed out a further source of doctrinal obscurity in the context of distinguishing statutory and constitutional claims:

> The full reach of Sec. 1983 as a remedy for statutory violations is not yet clear. The Supreme Court has held that Sec. 1983 encompasses violations of statutory as well as constitutional provisions, and has rejected the view that statutory Sec. 1983 actions must be based on 'civil rights' legislation.[101]

The *Thiboutot* Court refused to distinguish between statutory and constitutional claims for purposes of awards under the Fees Act, without suggesting that the two kinds of claims might be subject to different proofs.[102]

c. *Policy Considerations*

The underlying policy reasons for avoiding otherwise unnecessary statutory determinations in this context may well be as compel-

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96. *See* County Executive v. Doe, 300 Md. 445, 454 n.13, 479 A.2d 352, 360 n.13 (1984) (referring to "federal civil rights claims" presumably embracing statutory and constitutional claims).

97. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), *reh'g denied*, 423 U.S. 884 (1975).

98. *Id.* at 1184.

99. 427 U.S. 445 (1976).

100. 387 Mass. 312, 439 N.E.2d 778 (1982).

101. *Id.* at 316, 439 N.E.2d at 782 (citing Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980)).

102. "Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory 1983 actions, § 1988 plainly applies to this suit." *Thibontot*, 448 U.S. at 9.

ling as the reasons for avoiding constitutional determinations. In the *Mount Laurel* litigation, for example, the determination of the statutory Title VIII claim would have required a finding as to whether the defendant municipalities engaged in racial discrimination. Although such a finding would reflect a lower standard of proof under Title VIII than it would under the thirteenth and fourteenth amendments,[103] voters would be unlikely to pay much attention to such fine distinctions and the political consequences would be the same. In any case, a determination of racial discrimination would make no difference to the parties, since the New Jersey Supreme Court had already granted all of the relief, on state constitutional grounds, which could have been awarded under the federal constitution.[104] Such adjudications, furthermore, may be especially undesirable since state courts will often be called upon to interpret unsettled federal law.[105]

Finally, it could be argued that the text of the State Claims Tests fails to establish a clear statutory/constitutional dichotomy. Rather than making a bright-line distinction between statutory and constitutional claims, the State Claims Tests differentiate between statutory claims and claims which "may involve a constitutional question which the courts are reluctant to resolve." This formulation leaves a court with considerable latitude to determine, first; whether a constitutional question is "involved," and second; whether it is "reluctant" to resolve it. As shown in *Black Jack* and *Bitzer*, a constitutional question may be "involved" without being explicitly presented. A court may well be "reluctant" to decide a question even though it technically has the power to do so. The ambiguity of the text leaves state courts with substantial discretion, but very little guidance as to its exercise.

There is little practical, policy, doctrinal or textual justification for making what may be a very subtle distinction between a statutory and a constitutional claim. In general, state courts have sensibly not attempted to do so. At least as applied in state court, the tests have functionally merged. The question then becomes one of formu-

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103. Title VIII merely requires a showing of "disparate impact" while the constitution may require evidence of intent. 42 U.S.C. §§ 3601-3631 (1982); *see supra* notes 91-03.

104. NAACP v. Mount Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983) ("Mt. Laurel II").

105. Indeed, the court may well have relied on state grounds precisely to avoid such a determination. Why should plaintiff be awarded a fee if it is not clear as a matter of law that she could have prevailed on federal grounds? First, as discussed more fully below (*see infra* text accompanying notes 246-54), the focus should be on whether she could have obtained the relief granted under state law had she prevailed on her federal claim. Second, defendant always has the option of litigating the federal claim, by moving to dismiss it at the trial level.

lating the test to be applied to determine entitlement to fees in the resultant category of cases.

3. *Morales and Morales-like Determinations of Constitutional Questions*

Under *Morales v. Haines*,[106] a plaintiff is entitled to a determination of her statutory fee claim for purposes of deciding whether she may be granted attorneys' fees. Even though the underlying dispute has been resolved, the court is required to rule on the fee claim. Where the record is inadequate, as it was in *Morales*, plaintiff is entitled to a remand.

There have been no reported remands by state courts under *Morales* since the enactment of the Fees Act. This may be attributable to two factors; first, the tremendous cost and the limited utility of a proceeding solely to determine entitlement to fees; and, second, the routine inclusion of constitutional claims falling under the Fees Act in civil rights litigation. As noted above, constitutional questions trigger an analysis under the *Hagans/Gibbs* prong of the State Claims Tests, and such an analysis does not require a determination of the constitutional fee claim. Indeed, the point of *Hagans/Gibbs* is to permit fee awards while avoiding such determinations. Although state courts explicitly cite *Hagans/Gibbs*, several of them have nonetheless adopted a *Morales* approach in these cases, addressing the merits of the constitutional fee claim solely for purposes of deciding whether or not to grant fees. This is typically justified on the theory that such a *Morales*-type determination is necessary to ascertain the "substantiality" of the constitutional claim within the meaning of *Hagans*. Other state courts, while not actually deciding the constitutional claim, have engaged in a far more detailed *Morales*-like consideration of the merits of the claim than that which is contemplated by the *Hagans* test.

a. *The State Cases*

In *Jackson v. Inhabitants of the Town of Searsport*,[107] for example, the defendant municipality failed to take any action on the plaintiff's application for public assistance within the twenty-four hours required by the applicable Maine statute and local ordinance. The plaintiff filed suit, alleging violation of the fourteenth amend-

106. 486 F.2d 880 (7th Cir. 1973).
107. 456 A.2d 852 (Me. 1983).

ment as well as state law. The trial court, without specifying the grounds, granted the plaintiff's demand for injunctive relief and ordered the town to act on his application. The trial court denied the plaintiff's application for attorneys' fees. On appeal, the Maine Supreme Court cited *Hagans/Gibbs* but pointed out the difficulty of applying it in the context of a post-judgment fee application. The court noted that the *Hagans* standard is a "*threshold* test for getting into federal court," that is, a test made prospectively at the inception of the litigation, and observed that, "[g]rafting the *Hagans* standard onto the necessarily *retrospective* inquiry of whether a party has prevailed for purposes of section 1988 has scant support in logic."[108] The court was simply not persuaded that the mere fact that a fee claim might have been a sustainable basis for jurisdiction justified a fee award without a more rigorous analysis of that claim. While purporting to address only the "substantiality" of the plaintiff's constitutional claim, the court effectively decided its merits.

In *Slawik v. State*,[109] similarly, the Delaware Supreme Court reached the merits of plaintiff's constitutional claim under the guise of determining its "substantiality." After the reversal of a conviction which had resulted in Slawik's removal from the office of county executive, plaintiff sought damages under state law and the federal constitution, claiming deprivation of a property interest in violation of the due process clause of the fourteenth amendment. Citing the State Claims Tests, the *Slawik* court offered the baffling explanation that it was necessary to decide the merits of the plaintiff's federal constitutional claim in order to determine its substantiality because the constitutional question was one of first impression.[110] It appears well-established, however, that such questions would be considered "substantial" under the *Hagans* jurisdictional test since it is their very openness which makes it appropriate for the court to address them. Since some jurisdictions had adopted the view of property rights on which the plaintiff's argument relied, it seems apparent that the plaintiff's claim could have withstood a motion for dismissal

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108. *Id.* at 855 n.13.

109. 480 A.2d 636 (Del. 1984).

110.

> Whether in Delaware a public official has a constitutionally cognizable 'property' interest in his elected post is a question of first impression for this Court. Having considered the various federal and state decisions, we hold today that a public officer in this state takes his position under the aegis and for the benefit of the public, subject to suspension or removal by any constitutionally permissible means.

Id. at 644.

on the grounds of insubstantiality had it been brought in federal court. As another state court has explained:

> In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions render the claims frivolous . . . only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'[111]

Contrary to the *Slawik* court's reasoning, it is only where the question is "no longer open to discussion" that it is deemed "insubstantial" under *Hagans*.[112] The plaintiff's federal constitutional claim should have been considered "substantial" precisely because it was unsettled and therefore "open to discussion" in Delaware.

The *Slawik* decision is particularly striking because the court was well aware of the foregoing precedent, much of which it had cited.[113] The *Slawik* court, like the *Searsport* court, was frustrated by the lack of a coherent rationale in the State Claims Tests. It must have been clear to the court that Slawik satisfied the "painstakingly minimal standard of substantiality defined in *Hagans*."[114] But it was equally plain that fees should not be granted if the relief obtained under state law would not have been available under the federal fee claim. Thus, the *Slawik* court felt compelled to decide whether plaintiff could have achieved the same result under his federal constitutional theory, although the issue should not have been reached under the avoidance doctrine.[115] In *County Executive, Prince George's Co. v. Doe*,[116] the Maryland Court of Appeals suggests the inevitable erosion of the avoidance doctrine under the State Claims Tests. While correctly applying the tests, the court urged the lower courts

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111. Filipino Accountants v. State Bd. of Accounting, 155 Cal. App. 3d 1023, 1034, 204 Cal. Rptr. 913, 919 (1984) (citing *Hagans*, 415 U.S. at 537-38).

112. *Hagans*, 415 U.S. at 537.

113. *Slawik*, 480 A.2d at 636, 641. *Cf.* County Executive v. Doe, 300 Md. 444, 479 A.2d 352 (1984) (finding that plaintiff's fee claim should be considered "insubstantial" because, "[i]n light of the Supreme Court's decision in Poelker v. Doe, the unsoundness of the plaintiff's Section 1983 ground for relief in this case is absolutely clear." *Id.* at 361 (citations omitted)).

114. Stratos v. Department of Public Welfare, 387 Mass. 312, 439 N.E.2d 778, 784 (1982). For a description of the *Hagans* test in the fees context, see *infra* notes 169-75 and accompanying text.

115. *See infra* notes 132-34 and accompanying text. As explained in part V, this is probably the result that would be reached, albeit less laboriously, under the prevailing party test.

116. 300 Md. 444, 479 A.2d 352 (1984).

in future cases to "consider" deciding the federal civil rights issue if "it can be decided relatively easily in light of higher court decisions."[117]

This approach reaches its nadir in those cases where the court sifts through the record to find some basis for a fee claim that *could* have been made, although it was not. Fees are then predicated on that "phantom" claim. In *Viglietta v. Blum*,[118] for example, the plaintiff brought a writ of mandamus challenging the Department of Social Services' policy of denying benefits to certain otherwise entitled claimants unless they commenced mandamus proceedings in accordance with New York state law.[119] The plaintiff challenged this policy on equal protection grounds. The court correctly held that the plaintiff lacked standing, since claimants who failed to file mandamus proceedings, unlike the plaintiff, were the only ones denied relief. Because the plaintiff was clearly vindicating a significant right, the *Viglietta* court strained to find a justification for a fee award. Fees were awarded on the ground that petitioner "may have had a valid and substantial federal claim premised on both federal statutory and constitutional grounds, not on the grounds he argues, but upon the ground of unjustifiable administrative delay."[120] The court proceeded to find that on the record, the plaintiff could have shown a violation of the federal social security statute[121] as well as the due process clause of the fourteenth amendment, although neither argument was raised. In *Viglietta*, the court made *Morales*-type determinations of both a statutory claim and a constitutional argument, neither of which was ever advanced by plaintiff.[122]

In *Maldonado v. Nebraska Department of Public Welfare*,[123]

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117. *Id.* at 460 n.13, 479 A.2d at 360 n.13.

118. 108 Misc. 2d 516, 437 N.Y.S.2d 625 (1981); *see also* Johnson v. Blum, 58 N.Y.2d 454, 457 & n.2, 448 N.E.2d 449, 450 & n.2 (1983) (New York's highest court adopts *Hagans/Gibbs* test).

119. *Viglietta*, 108 Misc. 2d at 520, 437 N.Y.S.2d at 629.

120. *Id.*

121. Social Security Act, 42 U.S.C. § 1396a (a)(8) (1972).

122. This is particularly surprising because the case was settled, and neither of the State Claims Tests should have been triggered. The court, moreover, introduces a variant of the proper test: "[I]t does not matter which claim [fee or non-fee] induced the settlement or would have been successful at trial as long as the fee claim is substantial and arises from the same operative facts as the non-fee claim." *Viglietta*, 108 Misc. 2d at 516, 437 N.Y.S.2d at 629 (citing Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979)). "Similarly, where the action proceeds to trial, counsel fees may be awarded even where relief is premised on non-fee grounds provided the decision could have been premised on a violation of federal law or the federal constitution." *Id.* (citing Holley v. Blum, 75 A.D.2d 998, 429 N.Y.S.2d 103 (1980); McNeil v. Shang, 69 A.D.2d 985, 416 N.Y.S.2d 117 (1979)).

123. 223 Neb. 485, 391 N.W.2d 105 (1986).

similarly, plaintiff Maldonado was awarded fees although she had never alleged any claim under a fee-shifting statute. Maldonado's welfare grant had been incorrectly calculated. On appeal, the court agreed with the plaintiff that the agency below had erred. The court further held that, "even though Maldonado's petition did not expressly state that it was brought under Section 1983, 'the allegations of the petition relate to deprivation of constitutional rights which would permit attorneys' fees pursuant to Section 1988.'"[124] The court rejected defendants' argument that since they had no notice of any Section 1983 claim, they had no opportunity to counter it. The court distinguished *Ingram v. Moody*,[125] in which the Alabama Supreme Court held that in the absence of an express claim or of any indication that the action was tried on Section 1983 grounds, there could be no fees awarded under Section 1988. Rather, the *Maldonado* court held that under Nebraska's system of pleading, "the facts well pled, and not the theory of recovery, state the cause of action."[126] In any case, the court continued, the final order indicated that the matter was decided under a Section 1983 theory.[127] Under this line of cases, as the Court in *Guardianship of Hurley*[128] succinctly observed: "A complaint need not mention explicitly the underlying statute as long as the elements of a cause of action are pleaded."[129]

There are grave due process problems with this approach, despite the *Maldonado* court's airy dismissal of such concerns. Moreover, it is clearly inconsistent with the United States Supreme Court's holding in *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*[130] that, "only a court *in an action to enforce one of the civil rights laws*,"[131] could award fees.

What is striking here is the courts' willingness to ignore what they plainly consider technical obstacles in order to reach what they feel is a fair result. Courts which are prepared to dispense with notice to defendants of the claim against them are not likely to be

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124. *Id.* at 487, 391 N.W.2d at 107.

125. 382 So. 2d 522 (Ala. 1980).

126. *Maldonado*, 223 Neb. at 489, 391 N.W.2d at 108.

127. *Id.* at 492, 391 N.W.2d at 109. Other cases holding that express citation of section 1983 is not required for an award under section 1988 include Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979); Stanton v. Godfrey, 415 N.E.2d 103 (1981), Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982).

128. 394 Mass. 554, 559, 476 N.E.2d 941, 945 (1985).

129. *Id.* at 559, 476 N.E.2d at 945.

130. 479 U.S. 6 (1986).

131. *Id.* at 15 (emphasis added). *See infra* notes 239-44 and accompanying text.

overly concerned with the niceties of the State Claims Tests. Such courts may well be inclined to reject those tests in favor of the more substantive prevailing party test discussed in Part V, below.

In all of the cases discussed in this section, moreover, the determination of the constitutional claim is completely irrelevant to the actual situation of the parties, except, of course, that it serves as a predicate for the award of attorneys' fees. As explained below, adoption of the prevailing party test would focus a court on the actual relief obtained by the prevailing plaintiff, while obviating the need for otherwise unnecessary constitutional determinations.

b. *What's Wrong with Morales?*

Perhaps the rulings discussed above are not so objectionable. It could be argued, for example, that these *Morales*-type determinations are well within the legislative scheme. It could be urged that their consequences are not so dire and, in any case, that they are preferable to the alternative; i.e., mechanical application of *Hagans/Gibbs*. Neither argument is persuasive.

The first contention recognizes that the restraints imposed on the court by the State Claims Tests are essentially precatory as applied to constitutional issues. As discussed above, the award of attorney's fees is to be determined under *Hagans/Gibbs* if the court is "reluctant" to decide the constitutional question. Where the court is not "reluctant" to decide the constitutional claim, as in *Slawik*, *Searsport* and the "future cases" referred to in *County Executive*, the State Claims Tests do not require it to refrain from doing so. Under this interpretation, however, the State Claims Tests would encourage state courts to address constitutional questions solely to determine whether attorneys' fees are to be awarded. This is inconsistent with the implicit congressional intent to further the application of the avoidance doctrine, which is generally accepted in the federal courts.[132]

In response to the second contention, focusing on the consequences of these rulings, the arguments against these *Morales*-like decisions are even stronger than those underlying the original adoption of the avoidance doctrine. The avoidance doctrine deters courts from considering otherwise justiciable constitutional questions where the underlying dispute may be resolved without doing so.[133] In the

132. *But see* M. DERFNER & A. WOLF, *supra* note 6, at 14-20 (noting that several state courts do not adhere to the avoidance doctrine).

133. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring);

context of deciding whether fees may be awarded where a plaintiff has prevailed on a state non-fee claim, on the other hand, the underlying dispute has already been decided. There is no longer a live constitutional issue. These retroactive determinations may establish constitutional precedent binding on future litigants, at least in that particular jurisdiction, where in fact no constitutional right is at stake. This is contrary to our jurisprudence[134] in part because it creates a serious risk of ill-considered law. The *Searsport* court, for example, unnecessarily reaches the rather complex question of defining property rights for purposes of the due process clause, engaging in a convoluted analysis completely irrelevant to the rights and obligations of the parties before it. While *Morales*-type determinations may be preferable in some cases to a mechanical application of *Hagans/Gibbs*, neither approach is satisfactory, especially where there is a simpler alternative.[135]

It could further be argued that considerations of judicial economy militate against *Morales*-type rulings. The judicial economy argument may not seem very compelling where, as in *Slawik* and *Searsport*, the court holds that the constitutional claim can be decided without a remand for a plenary hearing. The dubious justification for committing scarce judicial resources to such a remand, solely to decide whether to award attorneys' fees, is inevitably a factor in the court's decision that a remand is unnecessary. This may be prejudicial to the plaintiff since the court is well aware that the only consequence of an adverse ruling (at least in the case at bar) is a denial of attorneys' fees. A post-judgment constitutional adjudication may also disadvantage the plaintiff where it becomes clear relatively early in the proceedings that the court will decide the matter on state grounds. Under these circumstances, plaintiff would probably not focus on proving her federal constitutional claim unless defendant moved for its dismissal. Such a motion would give plaintiff both notice of the grounds for dismissal and an opportunity to rebut. In contrast, where the court addresses the issue in the context of a post-judgment fee application, as a practical matter the plaintiff is less

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Rescue Army v. Municipal Court, 331 U.S. 549 (1947); *but cf.* Client's Council v. Pierce, 778 F.2d 518 (8th Cir. 1985) (granting fees where plaintiff prevailed on constitutional claim rather than "identical" statutory-fee claim). *See generally* Bernard, *Avoidance of Constitutional Issues in the U.S. Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261 (1951).

134. U.S. v. Fruehauf, 365 U.S. 146, 157 (1961); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924); Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement*, 93 HARV. L. REV. 297 (1979).

135. *See infra* Part V.

likely to have either notice or an opportunity to rebut since fees rather than the merits are at stake.[136]

Nor are these *Morales*-type determinations necessary to protect defendants. There are other safeguards to ensure that defendants are not unfairly compelled to pay attorneys' fees. Defendants have the option of seeking dismissal of a frivolous fee claim at any phase of the litigation. If a defendant does not choose to do so, she should not have a second chance following what would become merely a preliminary determination in the plaintiff's favor.[137] Defendants can always appeal a fee award to the United States Supreme Court, moreover, because entitlement under the civil rights fee-shifting statute raises a question of federal law.[138]

Finally, the superfluous determinations required by *Morales* should be abjured because it is unclear how they should be made. It is obviously unfair to restrict the plaintiff to a record developed for another purpose. Yet a full evidentiary hearing represents a stupendous squandering of resources, even if the defendant is ultimately held responsible for the resulting fees. In many cases, moreover, such a hearing would be unproductive because of the prolonged period of time between the commencement of the case and the fee determination.[139]

As explained elsewhere,[140] there are good reasons for the uneasiness which has led state courts to adopt a *Morales* approach to constitutional questions for fee purposes. *Morales* is not the answer, however, because it contravenes well-established principles of justiciability, because in doing so it may distort the developing law, and, above all, because it is so blatantly inefficient.

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136. *See infra* notes 174-75 and accompanying text.

137. Indeed, a rule mandating adjudication of non-constitutional claims (or, in certain states, even an undecided constitutional claim) may have an adverse impact on defendants, who may well be held liable for the additional costs if they lose. While defendants would have the option of avoiding that additional increment by defaulting, as a practical matter default may not be an option, particularly for the elected officials who are frequently defendants in such cases. Declining to affirmatively appeal, on the other hand, may be more feasible. *See generally* P. SCHUCK, SUING GOVERNMENT (1983).

138. *See* 28 U.S.C. § 1257 (1982) (providing for Supreme Court review of state court cases involving rights under federal statutes); Murdock v. Memphis, 87 U.S. (20 Wall) 590 (1874). *But see infra* note 295.

139. In Urban League v. Mayor and Council of Carteret, 115 N.J. 536, 559 A.2d 1369 (1989), for example, the federal fee claim would have had to be determined on a fragmentary 13-year old record.

140. *See* text accompanying notes 90-106 (discussing difficulty and dubious utility of distinguishing between statutory and constitutional claims in the fee context). *See also* text accompanying notes 163-69 (noting lack of a nexus between relief obtained and fee award under *Hagans/Gibbs*).

4. *Hagans / Gibbs*

In addition to the *Morales*-like determinations discussed above, *Hagans / Gibbs* has been increasingly relied on by state courts hesitant to render otherwise unnecessary determinations of fee claims. This demonstrates the state courts' acceptance of the basic premise of *Hagans / Gibbs*, i.e., that a result achieved under state law can be a legitimate basis for an award of attorneys' fees. The *Hagans / Gibbs* test itself, however, remains problematic, as shown by its operation in the cases considered below.

a. *Parallel State and Federal Claims*

Hagans / Gibbs is frequently relied on where a plaintiff's claims under state law track her claims under federal law, and are based on essentially the same facts. A federal due process claim may be coupled with a due process claim under the state constitution, for instance. In such cases, following a recitation of the parallels between the state non-fee claim and the federal fee claim, the courts formalisticly invoke *Hagans / Gibbs* and grant fees. The implication is that a plaintiff prevailing on her state claim could as easily have prevailed on her federal claim. In *Davis v. Everett*,[141] for example, the plaintiff had been denied an application for a liquor license on the ground that her premises were less than 600 feet from a church, measured in a straight line, while other businesses had been granted such licenses where they were within 600 feet measured by a straight line but greater than the specified distance when measured by the "public access" method. The plaintiff claimed that the City violated her due process and equal protection rights under the state and federal constitutions by applying the ordinance in a discriminatory manner.[142] The Alabama Supreme Court found that "[a]ll of [plaintiff's] claims arose from the same underlying facts, i.e., the commissioners' denial of plaintiff's application for the license."[143] In granting fees, the court tersely applied the *Hagans / Gibbs* test, noting the similarity between the plaintiff's state and federal constitutional claims:

> Defendants violated plaintiff's equal protection rights under the Alabama Constitution. It may also follow that plaintiff's federal constitutional rights were violated; she alleged a substantial fed-

141. 443 So. 2d 1232 (Ala. 1983).

142. *Id.* at 1234.

143. *Id.* at 1236. While the court's characterization of the facts as the "same" rather than "common" suggests evidentiary identity, the broad, occurrence-based description of those facts is more consistent with a transactional approach.

> eral claim, which was not dismissed, and ultimately prevailed on her state constitutional claim. The *Gibbs* test was satisfied because both claims arose from a common nucleus of operative facts.[144]

In *Cepulonis v. Registrars of Voters*,[145] the Massachusetts court similarly granted fees in a perfunctory opinion after noting the parallels between the state and federal claims. The *Cepulonis* court struck the statutory restrictions under which the inmate plaintiffs were not permitted to register to vote as violative of the state constitution. While the plaintiffs had not proven all the elements of a federal claim, the court observed that under the federal constitution a state could not arbitrarily discriminate among inmates without violating analogous federal equal protection guarantees.[146]

As the *Cepulonis* court recognized, a plaintiff prevailing on a state claim would not necessarily prevail on a parallel federal claim. Federal law may mandate a different result than state law; the standard of proof, the procedural prerequisites, and the conceptual approach may all be different.[147] Indeed, the plaintiff probably brought parallel state and federal claims in response to such differences. Yet, state courts freely grant fees in such cases.

The most compelling explanation for fee awards under these circumstances is that the relief sought under the two legally related claims is likely to overlap.[148] By obtaining the relief sought under their state claims, the plaintiffs in *Davis* and *Cepulonis* basically achieved the same relief that they sought under their federal civil rights claims. Since the defendants failed to have the federal claims dismissed, and the result might have been the same had the plaintiffs prevailed on those claims, it is presumed that the plaintiffs have vindicated rights cognizable under federal, as well as state, authority. They have a legitimate right to an award of attorneys' fees because they have furthered Congress' goal in enacting the federal civil rights

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144. *Id.* at 1236.

145. 396 Mass. 808, 488 N.E.2d 1166 (1986).

146. Although it is not clear what plaintiffs had to prove to meet the state constitutional standard, the opinion suggests that the additional proofs required for the federal claim would have involved a rebuttal of any facts showing that the "statutory classification . . . fulfil[led] some compelling state interest or even ha[d] a rational relation to a legitimate end." *Id.* at 810, 488 N.E.2d at 1168.

147. As the *Cepulonis* court noted, for example, under the federal constitution a state may deny all convicted felons the right to register (citing Richardson v. Ramirez, 418 U.S. 24 (1974)). *Id.* at 809, 488 N.E.2d at 1167.

148. A secondary justification may be that there is little question in such cases of a frivolous fee claim that a more diligent adversary would have moved to dismiss.

statute. The state courts discussed in this section have implicitly recognized that the juridical means by which plaintiffs further the underlying purpose of the federal civil rights statutes should not affect their entitlement to fees. This is reflected in the ubiquitous references to the court's "choice of an alternative route."[149] It is the result achieved, and not the coincidental, mechanical satisfaction of *Hagans / Gibbs*, that justifies the fee award.

b. *Reliance on the Hensley Test*

Probably the most significant trend in state courts is the application of *Hagans / Gibbs* in conjunction with the prevailing party test formulated by the Supreme Court in *Hensley v. Eckerhart.*[150] A fee award predicated on both tests not only satisfies the technical criteria of *Hagans / Gibbs*, but is legitimated by the substantive rationale of *Hensley.*

In *Hensley*, the plaintiffs sued on behalf of all persons involuntarily held in the forensic unit of a state hospital. The District Court found violations under the U.S. Constitution in five of the six general areas of treatment received by the inmate patients. The court awarded fees under the Fees Act, and rejected the defendant's argument that there should be no award for that portion of the attorney's time spent on unsuccessful claims. The Supreme Court held that:

> Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.[151]

As some state courts have recognized, *Hensley* provides crucial clarification as to the relationships among relief, claims and fees. Although *Hensley* distinguished between unsuccessful and successful fee claims, the principle enunciated; i.e., that the award of fees depends on results; is equally applicable where state non-fee claims and federal fee claims are involved. In *Hensley*, the Supreme Court for the first time addresses the *kinds* of claims for which fees may properly be awarded. Although it does so in the context of determin-

149. Bung's Bar & Grille, 206 N.J. Super. 432, 502 A.2d 1198 (1985).

150. 461 U.S. 424 (1983). *See generally* Dobbs, *Reducing Attorneys' Fees for Partial Success: A Comment on Hensley and Blum*, 1986 WIS. L. REV. 835 (arguing that *Hensley* fails to provide a standard by which "success" is to be determined).

151. *Hensley*, 461 U.S. at 440.

ing the amount of fees, it is clear that the analysis is equally applicable for ascertaining whether the award of fees may properly be predicted on a particular claim, including a state non-fee claim.[152]

This principle was firmly grasped by the Massachusetts court in *Stratos v. Department of Public Welfare*.[153] The plaintiff had asked the welfare department to help him purchase a washing machine. He was refused because department regulations only permitted assistance to families whose washing machines were beyond repair, not to those making initial purchases. The plaintiff challenged the regulation on equal protection and federal statutory grounds,[154] and under the Massachusetts State Administrative Procedure Act. The court awarded the plaintiff a vendor payment enabling him to purchase a washing machine and granted his application for fees under the Fees Act. On appeal, the Massachusetts court upheld the fee award, citing *Hagans/Gibbs*. While recognizing that *Hagans/Gibbs* may have been sufficient on its face under existing law, the court tacitly acknowledged its dissatisfaction with the test, which it characterized as "a compromise."[155] The court went beyond the technical application of *Hagans/Gibbs*, correctly incorporating the *Hensley* analysis:

> The fee incentive is equally useful and necessary whether the right in question is secured by Federal law alone, or by State law as well. Therefore, the fact that a plaintiff claiming relief under § 1983 *could have obtained relief solely by means of a State remedy—even a "routine" one—does not foreclose a fee award*."[156]

The Massachusetts court focused on the relief obtained by the parties, stressing that the legal route through which it was achieved was irrelevant. Where relief contemplated by the civil rights statutes is obtained, it is only where that relief *cannot* be attributed to a fee claim—as it could not be attributed to the unsuccessful claims in *Hensley*—that fees must be denied in connection with such a claim. As applied in conjunction with *Hensley*, *Hagans/Gibbs* simply shifts

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152. *See id.* at 449 n.8 (discussing various tests utilized by the Courts of Appeals, and citing with approval the First Circuit's *Nadeau* formulation).

153. 387 Mass. 312, 439 N.E.2d 778 (1982).

154. Plaintiff cited a federal regulation under the Social Security Act, 45 C.F.R. § 233.10 (a)(1) (1981), which provided in pertinent part that state assistance programs "must not result in inequitable treatment . . . ." *Id.* at 315, 439 N.E.2d at 781.

155. "The [*Hagans/Gibbs*] rule is a compromise between accurate application of § 1983 and § 1988, and traditional policy of refraining from unnecessary resolution of constitutional questions." *Id.* at 317, 439 N.E.2d at 783.

156. *Id.* at 317, 439 N.E.2d at 783 (emphasis added) (citations omitted).

the burden of proof, effectively creating a presumption in favor of the plaintiff. If the plaintiff obtains some of the relief sought under her federal fee claim by prevailing on her state non-fee claim, and the defendant has failed to have the plaintiff's federal fee claim dismissed, a fee award can properly be predicated on that claim without any further determination under *Hagans / Gibbs.*

The California courts have also applied *Hensley* in the context of fees based on state claims. In *Filipino Accountants v. State Board of Accountancy*,[157] petitioner Filipino Accountants Association claimed that the California State Board of Accountancy (the "Board") had consistently refused to grant waivers permitting accountants certified in the Philippines to practice in California without taking the qualifying examination, although it typically granted such waivers to accountants certified in Commonwealth countries whose licensing standards were lower than those of the Philippines. Petitioners claimed that in doing so the Board violated the applicable California statutes as well as the due process and equal protection rights of its members under the federal and state constitutions. The trial court issued a Notice of Intended Decision, in which it found that the Board had abused its discretion under the cited provisions of the California Business and Professions Code. The parties subsequently entered into a stipulation of judgment, following which the court granted the petitioners' request for attorneys' fees under the Fees Act. Although the court cited *Hagans / Gibbs* in granting fees, it relied in equal measure on the *Hensley* test, noting that "[a]pparently the [Supreme] Court was unanimous on [the following] point:"[158]

> A plaintiff must be a 'prevailing party' to recover an attorney's fee under [the Fees Act]. The standard for making this threshold determination has been framed in various ways. A typical formulation is that 'plaintiffs may be considered *prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.*'[159]

The *Hensley* court explicitly addressed the dilemma which is at the core of the State Claims Tests; i.e., that those tests fail to provide the court with a rationale for determining whether to award fees:

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157. 155 Cal. App. 3d 1023, 204 Cal. Rptr. 913 (1984).

158. *Id.* at 1031 n.6, 204 Cal. Rptr. at 917 n.6.

159. *Hensley*, 461 U.S. at 433 (citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)) (emphasis added).

> The *legislative history, therefore, does not provide a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success.* Consistent with the legislative history, Courts of Appeals generally have recognized the relevance of the results obtained to the amount of a fee award. They have adopted varying standards, however, for applying this principle in cases where the plaintiff did not succeed on all claims asserted.[160]

Hensley, by adopting the *Nadeau* standard of "[success] on any significant issue . . . which achieves some of the benefit the parties sought in bringing suit," provides the theory *manque*. It could not have been put more plainly: "The result is what matters."[161] The *Hensley* formulation not only clarifies the State Claims Tests, it renders them superfluous.

C. *The State Claims Tests Have Outlived Their Usefulness*

The State Claims Tests had two basic purposes. First, they were intended to make it absolutely clear that fees would be available for civil rights claimants who obtained some of the relief sought on federal fee claim grounds by prevailing on state law grounds. Second, they were supposed to provide a procedural framework for such fee awards. Their success with respect to the first point is irrefutable. The notion that state claimants may be granted fees is firmly entrenched at the state as well as the federal level. As shown in the state cases discussed above, on the other hand, the State Claims Tests have been a failure as a procedural guide in state court.

The State Claims Tests are like the first stage of a rocket which holds the fuel essential for blast off, enabling the missile to overcome gravity and reach its proper orbit. Once that is accomplished, it serves no further purpose and is jettisoned. The State Claims Tests have already served their purpose. Their continued presence, far from guiding the state courts in awarding fees, only causes them to wobble. By occupying the court with technical requirements that have "scant support in logic," the State Claims Tests become a distraction from the proper focus of the fee inquiry as clarified in *Hensley*; i.e., the civil rights-related relief actually obtained. The State Claims Tests should be abandoned because their first purpose has been achieved and, at least in state courts, their application impedes rather than facilitates the emergence of a clear standard for fee

160. *Id.* at 431-32 (emphasis added).
161. *Id.* at 435.

awards.

The previous section considered some of the difficulties state courts have had in applying the State Claims Tests. Before considering the consequences of rejecting these tests, it might be useful to briefly dissect their failure, if only to highlight some of the pitfalls awaiting those who seek to apply federal tests in state courts. Since *Morales* has not been relied upon by a state court since the enactment of the Fees Act, its *de facto* abandonment may be assumed, especially in view of the strong arguments against its revival.[162] Unlike *Morales*, the *Hagans/Gibbs* prong of the State Claims Tests is frequently, if ambivalently, relied upon and accordingly merits a more exacting analysis. Why does it not work?

Hagans/Gibbs was originally devised to determine whether a federal court could properly assert jurisdiction over a pendent state claim.[163] The test addresses the power of a federal court. When it is used in the context of fee awards in state court, however, the question is not whether the state court has the power to adjudicate the claim, but whether Congress has the authority to require it to consider a fee award.[164] Whether Congress may decide that certain claimants in state courts can be granted attorneys' fees depends on whether the grant of such fees is "necessary and proper" to further a legitimate congressional purpose under *McCulloch v. Maryland*.[165]

There is no question that the protection and enforcement of civil rights is a legitimate federal goal within the meaning of *McCulloch*.[166] Denial of civil rights remains pervasive.[167] Local experimentation by the states may generate promising new approaches to this problem.[168] Encouraging such experimentation by assuring state

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162. *See supra* text accompanying notes 132-40.

163. *See supra* text accompanying notes 76-80.

164. The distinction blurs in federal court because of Congress' authority with respect to the jurisdiction of article III courts. Aldinger v. Howard, 427 U.S. 1, 14-15 (1976).

165. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

166. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding provisions of the Civil Rights Act of 1964 as a valid exercise of Congress' power under the commerce clause).

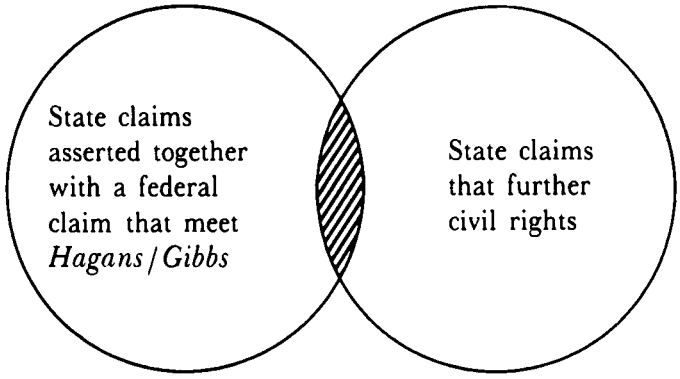
167. *See Verbatim: A Widening Gap*, N.Y. Times, May 29, 1988, § 4, at 4, col. 1:

> America is moving backward not forward in its effort to achieve the full participation of minority citizens in the life and prosperity of the nation. In education, employment, income, health, longevity and other basic measures of individual and social well-being, gaps persist—and in some cases are widening—between members of minority groups and the majority population.

See also One Third of a Nation, Commission on Minority Participation in Education and American Life, report released the week of May 22, 1988. The Commission is a 37 member panel, including former presidents Jimmy Carter and Gerald R. Ford.

168. *See, e.g.*, Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301-27D-329 (West

claimants the same availability of attorneys' fees as they would have in federal court certainly furthers a legitimate congressional purpose. But the *Hagans / Gibbs* test does not do so because a state claim may satisfy that test without furthering Congress' goals in promoting the enforcement of civil rights. We can draw a simple diagram:



Instead of assuring attorneys' fees for those who vindicate civil rights, *Hagans / Gibbs* arbitrarily showers fees on those who satisfy a two-prong test unrelated to those rights. Only in the shaded area where the circles overlap do fee awards granted under *Hagans / Gibbs* actually advance civil rights. Pennies from heaven, falling only on *some* civil rights claimants as well as on those whose suits do not in any sense promote civil rights, further no congressional goal.

1. *The Hagans prong*

The *Hagans* requirement that the federal fee claim be "substantial" appears to bear a direct relation to Congress' goal in enacting the fee-shifting civil rights statutes. Accordingly, it would pass constitutional muster.[169] Indeed, it could be argued that the cases in which fees have been granted in the absence of such a "substantial"

1985). Under this Act, each municipality in New Jersey is required to provide a specified number of housing units affordable to lower income households. *See generally*, *supra* notes 65-67; Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361 (1988). *See also*, Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987).

169. This does not detract, of course, from a possible coextensive obligation on the part of the states. *See generally* Hallee, *Within the States' Jurisdiction: Metropolitan, Northeast, Bankcorp, and the Equal Protection Clause*, 96 YALE L.J. 2110 (1987) (analyzing the jurisdictional scope of the states' obligation to provide equal protection).

federal fee claim invite challenge on due process[170] as well as "necessary and proper" grounds.

Defendant may move to dismiss the plaintiff's federal claim at any time during the proceeding if it is "insubstantial." The use of this test for fee purposes, however, shifts the burden of proof, requiring the plaintiff to come forward and show that her federal claim is *not* "insubstantial." More importantly, it requires her to do so after the matter has been decided. In effect, the plaintiff is thereby required to retroactively prove the substantiality of her federal claim, on a record developed for another purpose.[171]

There may be cases where a plaintiff focuses on her state claim because it is simpler to prove than her federal fee claim. It may be extremely time consuming and expensive, for example, to prove that state prison officials are failing to set bail promptly as required by *Gerstein v. Pugh*[172] because no records are kept from which to ascertain the appropriate fact-based standard to which the officials should be held.[173] Proceedings under a state statute requiring the establishment of bail schedules may result in the same relief sought under the still unproven federal claim.[174] It may well be impossible for a plaintiff to show that her federal fee claim was "substantial" at this phase of the proceedings, since a court is unlikely to permit the exhaustive discovery necessary for her to do so where the underlying substantive dispute has already been resolved. Under *Hagans/Gibbs*, there would be no fee award even though the goal of the fee-shifting civil rights statutes may have been appreciably advanced. This is inconsistent with those cases which have focused, correctly in the author's view, on the relief obtained.[175]

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170. The due process clauses of the fifth and fourteenth amendments require some form of notice before property rights may be impaired. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 507-13 (1st ed. 1978).

171. *Cf. supra* text accompanying notes 131-39 (discussing arguments against post-judgment adjudications of constitutional questions solely to determine fee entitlement under *Morales*).

172. 420 U.S. 103 (1975).

173. Williams v. Ward, 845 F.2d 374 (2d Cir. 1987).

174. *See infra* notes 275-76 and accompanying text.

175. As Wolf points out, doubts as to the validity of *Gibbs* as a jurisdictional test are equally pertinent in this context. *See infra* note 189. A related question is whether utilization of *Gibbs* here interferes with the states' authority over their courts in violation of the tenth amendment. It may seem less problematic since Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) affirmed that "the principal and basic limit on the federal commerce power is that inherent in all congressional action the built-in restraints that our system provides through state participation in federal government action." *Id.* at 556. But this is a volatile area of the law. "After changing course four times . . . within a period of nine years, the [*Garcia*] Court has initiated a search for a more durable theory of tenth amendment limita-

2. *The Gibbs prong*

Where the *Gibbs* "common nucleus" formulation is liberally construed, it will eliminate very few state claims. Where it is narrowly read, it will foreclose many. But the *Gibbs* test is troublesome[176] in this context because in neither case, nor in any along the continuum thereby defined, will the qualifying state claims necessarily further civil rights. *Gibbs* permits fees in cases where no such goals are furthered, and precludes fees in other cases where they are.

a. *Doctrinal origins of Gibbs*

Gibbs is probably not the last in a line of cases concerned with the constitutional scheme which establishes the federal courts as courts of limited jurisdiction.[177] The question of the proper limits of that jurisdiction, and whether it extends to nonfederal claims, was first addressed in *Osborn v. Bank of the United States.*[178] In that case, Chief Justice Marshall articulated the principle that the Supreme Court could not properly function unless it could assert jurisdiction over all questions, including nonfederal ones, presented by a particular case.[179] This has been characterized as a "rule of necessity" since a contrary holding would have effectively closed the federal courts to cases requiring resolution of state as well as federal issues.[180] In *Osborn*, federal jurisdiction was predicated on the bank's federal charter, addressed by the Court as a threshold matter.[181]

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tions on federal power." Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1665-66 (1987) (footnotes omitted).

176. Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). *See, e.g.*, Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); United Handicapped Fed'n v. Andre, 622 F.2d 342 (8th Cir. 1980); Williams v. Leatherbury, 672 F.2d 549 (5th Cir. 1982); Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979).

177. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS 22-26 (4th ed. 1983); THE FEDERALIST NO. 82 (A. Hamilton); U.S. CONST. art. III; Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962).

178. 22 U.S. (9 Wheat.) 738 (1824).

179. As noted in 13 B. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567 (1984) [hereinafter FEDERAL PRACTICE], this "functional justification of the Osborn rule" is consistent with the language of article III, which grants jurisdiction over "cases" instead of questions.

180. FEDERAL PRACTICE, *supra* note 179, at § 3567 n.4 (citing Hagans v. Lavine, 415 U.S. 528, 554 (1974)).

181. *But see* C. WRIGHT, *supra* note 177, at 91 (noting that the bank's status under its federal charter could have enabled the Court to find a federal element in any claims involving the bank).

The question in *Osborn* was not whether Congress' presumably legitimate purpose in chartering the bank would be served by a particular decision on the state claim. Rather, the issue was simply whether it was within the *court's* power to render a decision at all. The *Osborn* Court was struggling to accommodate concerns of "judicial economy, convenience and fairness to litigants"[182] with the limitations on federal jurisdiction imposed by the Constitution. *Osborn* addressed the authority, not of Congress, but of the courts.[183]

In *Hurn v. Oursler*[184] the Court sought to clarify the question of pendent jurisdiction by focusing on the "relatedness" of the federal and state legal claims. *Hurn* was a suit to enjoin the production of a play on grounds of copyright infringement and unfair competition, the second ground referring to an uncopyrighted version of the same play. The Court held that the second ground constituted "[a] separate and distinct" cause of action "entirely outside the federal jurisdiction."[185] Thus, *Hurn* required a determination as to the parameters of the cause of action in each case. The confusion generated by this test, as well as its "unnecessarily grudging"[186] application by the lower courts, led to its rejection in *Gibbs*.

The *Gibbs* court clarified the issue by bifurcating the analysis, addressing first the question of the power of the federal courts to assert jurisdiction over a pendent state claim, and second, as a matter of discretion, the circumstances under which that power should be exercised.

Paul Gibbs was a mine superintendent who also had an arrangement with his coal company employer to haul coal. He was hired to attempt to open a new mine but was prevented from doing so by the United Mine Workers union. After one incident of violence, the union maintained a peaceful picket line for nine months. Gibbs lost his job as well as other trucking contracts he held in the

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182. United Mineworkers v. Gibbs, 383 U.S. 715, 726 (1966).

183. The distinction here is not affected by Congress' role in determining the balance of authority as between state and federal courts. Frankfurter, *supra* note 10, at 501. As then Professor Felix Frankfurter observed, referring to the Judiciary Acts and the

> perplexing problem of the relation of the United States courts to the states . . . [h]ere is a conflict full of political explosives, because entangled in the complex of relations between states and nation . . . [t]he formulation of the compromises demand legal skill, and of a high order. But the bases of adjustment must be evolved by statesmen, and ought both to enlist and to satisfy public understanding.

Frankfurter, *supra* note 10, at 500-01.

184. 289 U.S. 238 (1933).

185. *Id.* at 248.

186. *Gibbs*, 383 U.S. at 725.

area. He filed suit against the union claiming that he lost his job because of secondary boycotts by the union, in violation of the Labor Management Relations Act of 1947.[187] In addition, he asserted interference with contract under state common law.

The Supreme Court held that the district court had not abused its discretion in proceeding to judgment on the state claim under the doctrine of pendent jurisdiction. The Court went on to define a standard that vastly expanded the capacity of the federal courts to entertain state claims:

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[188]

Gibbs is generally acknowledged to have effected a significant enlargement of federal pendent jurisdiction.[189] Expansion of the judicial power to adjudicate claims under state law does not affect Congress' power to regulate such claims in state court. While both forms of expansion may intrude upon the states, the potential threat to the states comes from different branches of government. By adopting the *Gibbs* test for attorney fee awards in state court, Congress has provided the states with superfluous protection from the threat of a potentially overreaching federal judiciary. There is no such threat, of course, when the matter is already before a state court. At the same time, utilization of *Gibbs* in this context leaves the states fully exposed to interference from another branch of government; i.e., Congress itself.[190]

b. *The Gibbs Continuum—Examples and Consequences*

The "common nucleus of operative facts" test has been subject

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187. 29 U.S.C.A. § 187 (West 1988).

188. *Gibbs*, 383 U.S. at 725 (emphasis in original).

189. Indeed, some commentators have argued that it has resulted in an undesirable expansion of that jurisdiction. *See* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 266 (1967-68) (predicting that *Gibbs* would result in federal courts deciding more questions of state law which the state courts are "better equipped" to decide). As Wolf has noted, those who find *Gibbs* constitutionally overexpansive may find the Fees Act beyond Congress' power. Wolf, *supra* note 42, at 200 n.41.

190. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1591 (1977) (discussing political branches as judges of the scope of their own constitutional power); *see generally* Rapaczynski, *supra* note 6.

to varied readings. Courts and commentators have disagreed as to the underlying rationale for the test[191] as well as the way in which it should be applied to a particular set of facts. Some courts have held that it required evidentiary identity, others differing degrees of evidentiary overlap.[192]

The *Gibbs* test, as interpreted by the courts, describes a continuum rather than a point. Construed restrictively, *Gibbs* requires evidentiary identity or substantial overlap[193] between the state and federal claims. Given a broader reading, it requires merely a "loose factual connection"[194] between the federal and state claims. *Gibbs*, which was developed to expand the availability of federal forums,[195] does not correspondingly expand the availability of fees under the civil rights fee-shifting statutes.[196] Indeed, the broader the construction given *Gibbs*, the more attenuated the nexus between the state and federal claims, and the less likely it is that a claimant prevailing on the state claim is furthering the goals of the applicable federal statute.

i. *Narrow construction*

Where the facts necessary to support the federal and state claims are identical, which would be the narrowest reading of *Gibbs*, courts have had no difficulty granting fees. Such claims are perforce legally related.[197] The relief sought under the two legally related claims is likely to overlap. By obtaining the relief sought under her state claim, the plaintiff probably achieved at least some of the relief sought under her federal civil rights claim, thus furthering the goal of the federal statute.

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191. *Cf.* Shakman, *supra* note 189 and Schenkier, *supra* note 54 (arguing that *Gibbs* is intended to assure a meaningful choice of forum).

192. Schenkier, *supra* note 54, at 262. *See, e.g.*, Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D.N.J. 1981) (noting appropriateness of pendent jurisdiction where there is an overlap of evidence necessary to prove state and federal claims).

193. *See, e.g.*, Wisconsin Hosp. Ass'n v. Reivitz, 820 F.2d 863 (7th Cir. 1987).

194. FEDERAL PRACTICE, *supra* note 179, at 117 n.9 (section 3567.1).

195. *See generally* Schenkier, *supra* note 54, at 247-48 (arguing for the adoption of a stronger rationale than the generally accepted "judicial economy and convenience" for pendent jurisdiction and suggesting the provision of a "true choice between state and federal forums for the adjudication of [plaintiff's] federal claims").

196. *Cf.* Schenkier, *supra* note 54, at 305 (arguing that differences between state and federal remedies should not affect the existence or exercise of pendent jurisdiction).

197. *See supra* text accompanying notes 134-41.

ii. *Broad construction*

The majority of states give *Gibbs* a liberal reading as a purely transactional test. This expands the availability of fee awards to a large class of cases. Absent a requirement that some of the relief obtained by means of the state claim could have been predicated on the federal claim, there is no basis for finding that Congress' purpose will be served by such awards.[198] This is precisely the nexus demanded by *Hensley*.[199]

This lack of a clear relationship between the state non-fee claim on which the plaintiff prevails and the federal fee claim has plainly troubled the state courts. They have strained to establish the requisite relationship by focusing, where possible, on parallel state and federal claims; by applying *Hensley* or simply by deciding the federal fee claim.

Although *Hagans/Gibbs* has not yet been challenged on the ground that it promotes no federal purpose, in view of the increase in state court litigation involving the civil rights fee-shifting statutes it may only be a matter of time.[200] As discussed in the next part, the Supreme Court's decision in *Smith v. Robinson*[201] (emphasizing the

198. Civil rights may be vindicated where the plaintiff prevails on her state claim even though the relief could not have been awarded under the federal claim. Whether plaintiffs may be entitled to fees under such circumstances is an open question. *See infra* notes 278-85 and accompanying text.

199. Thus, *Hensley* arguably saves *Hagans/Gibbs* from unconstitutionality. A case may include a "substantial" federal fee claim which arises from a "common nucleus of operative fact" as the state claim upon which plaintiff prevails without in any sense furthering civil rights. Consider the following hypothetical: A black family applies for an apartment in federally subsidized housing. The landlord accepts their security deposit but rents the apartment to a white couple. The black family claims that they are being discriminated against under the federal Fair Housing Act and section 1983. In addition, they sue under state law for punitive damages in connection with the retention of their security deposit, relief which would not be available under the federal law. Learning through discovery that the other occupants of the apartment house are predominantly black, plaintiffs' counsel focuses on the state law claim. The family wins on that claim and there is no decision on section 1983, the federal constitutional claim. The fee claim, while ultimately without merit, was certainly substantial when brought within the meaning of *Hagans* and it arose out of "a common nucleus of operative fact" as the state claim. Yet plaintiffs, who have prevailed on their state claim, have not vindicated any civil right. Unless the relief obtained under state law is related to relief available under the federal statute, there is no nexus justifying a fee award. This is the relationship required by *Hensley*, under which plaintiffs in this hypothetical would be denied fees.

200. *See* Leubsdorf, *supra* note 21, at 35 (predicting repercussions of "fee award revolution" in state courts). State courts, where the unconstitutionality of *Hagans/Gibbs* is plainest, are generally less inclined to base their decisions on general constitutional principles which are not clearly established law. Neuborne, *supra* note 14, at 1125.

201. 468 U.S. 992 (1984). Although the *Smith* plaintiffs prevailed on a non-fee federal rather than a non-fee state claim, under prior cases this should not have made any difference.

requirement that the fee claim be "related" to the claim on which plaintiff actually prevailed before fees may be granted) suggests that the Court might be responsive to such an argument.[202]

V. THE PREVAILING PARTY TEST—TOWARD AN EXPANDED THEORY OF ENTITLEMENT

The State Claims Tests should be eliminated. In their place, state plaintiffs would be required to satisfy the "prevailing party" test first articulated in *Newman v. Piggie Park Enterprises, Inc.*[203] Thus, fees could be granted where the party seeking fees "prevailed" as long as there was no express adverse ruling with respect to her federal fee claim. That is the law now for all plaintiffs except those governed by the State Claims Tests; i.e., those claimants who obtain some of the relief sought in their federal fee claims by means of a favorable determination on their state claim.

Except for the brief, unexplained segment in which the State Claims Tests are set forth, the legislative history supports the interpretation urged here. This interpretation is equally consistent with the major pertinent decisions of the U.S. Supreme Court rendered since the passage of the Fees Act. Indeed, except for the footnote in the House Report, there is little legal basis, and less policy justification, for the restricted construction of the fee-shifting statutes presently followed in state courts.

A. *The Prevailing Party Test in the State Claim/State Court Context*

This section sketches the development of the prevailing party test, from the early, expansive constructions to the narrower interpretations by the Rehnquist Court. While the early decisions described a broad area in which fee awards could be granted, the Rehnquist Court is rigorously circumscribing the boundaries of that territory. The point here is that state claimants who "prevail" under state law fall well within even the narrow parameters set by the Rehnquist Court, especially in view of the Court's recent decision in *Texas State Teachers Association v. Garland Independent School*

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202. Congress overruled *Smith* by enacting the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986). This does not detract from my argument which addresses the Court's *interpretation* of fee-shifting statutes absent explicit directives from the legislature, rather than Congress' actual intent.

203. 390 U.S. 400 (1968).

District.[204] All civil rights claimants—including those raising state law claims—should be held to no more and no less than the "result" focused test painstakingly enunciated in this series of cases. By imposing additional unrelated requirements on certain state court plaintiffs, the State Claims Tests detract from and impede this judicially sanctioned approach. An important caveat here is that fee awards be limited to those cases in which a federal fee claim has actually been raised.[205]

1. *In Light of an Expansive Interpretation of the Fees Act*

The Civil Rights Act of 1964[206] provides that the "prevailing party" is entitled to a "reasonable attorney's fee" in the court's discretion.[207] In *Newman v. Piggie Park Enterprises, Inc.*,[208] the Supreme Court clarified the standard. In *Newman*, class action plaintiffs filed suit under Title II of the Act to enjoin racial discrimination at five drive-in restaurants and a sandwich shop owned by respondents in South Carolina. The district court incorrectly held that Title II was not applicable to drive-in restaurants. The court of appeals, reversing the district court's refusal to enjoin the discrimination, instructed the lower court on remand to award attorneys' fees to the

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204. 109 S. Ct. 1486 (1989).

205. Where no such claim has been raised, there may be a due process problem where defendants are held liable for fees without notice. At least four states have permitted awards under section 1988 "so long as the complaint inferentially stated or made out a claim under section 1983," M. DERFNER & A. WOLF, *supra* note 6, at 14-19 n.34 (citing Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982), *cert. denied*, 459 U.S. 1103 (1983); Boldt v. State, 101 Wis. 2d 566, 305 N.W.2d 133, *cert. denied*, 454 U.S. 1973 (1981); Harradine v. Board of Supervisors, 73 A.D.2d 118, 425 N.Y.S.2d 182 (4th Dep't 1980); Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (1979)).

206. 42 U.S.C. § 2000a (1982).

207.

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

42 U.S.C. §§ 2000a-3(b) (1982).

208. 390 U.S. 400 (1968). The legislative history also noted the usefulness of the private attorney general model as an alternative to the development of a more extensive enforcement bureaucracy:

> Modern civil rights legislation reflects a heavy reliance on attorneys' fees . . . . Since 1964, every major civil rights law passed by the Congress has included, or been amended to include, one or more fee provisions . . . . These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.

SOURCE BOOK, *supra* note 2, at 9-10.

extent that the respondent's defenses had not been advanced in good faith. The Supreme Court granted certiorari to determine the standard under which such awards should be made.

The Court held that a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust."[209] This test, commonly referred to as the *Newman-Northcross* standard,[210] has been applied to other civil rights fee-shifting statutes containing similar language.[211] Unless the fact that the plaintiff obtained the relief sought in her federal fee claim by prevailing on a non-fee state claim amounts to "special circumstances"—and there is no legal authority for such a proposition—there is no reason to hold her to a higher standard for fee awards.

By "prevailing" on her federal fee claim the party has by definition advanced Congress' goal of promoting civil rights and is entitled to compensation under the federal scheme. The prevailing party test provides a sufficient framework for a fundamentally equitable determination.[212] It should be the only test to be met by a party seeking fees who prevails on a state claim in state court.[213]

The term "prevailing" has been read expansively.[214] Parties have been held to be prevailing under the *Newman-Northcross* test where they succeeded on some but not all of their asserted claims,[215]

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209. *Newman*, 390 U.S. at 402.

210. Note, *supra* note 2, at 1296 n.22. *See Newman*, 390 U.S. 400 (1968); Northcross v. Board of Educ., 412 U.S. 427 (1973).

211. *See Northcross*, 412 U.S. 427 (1973) (holding that statutes containing similar language and sharing common raison d'etre should be interpreted pari passu; prevailing plaintiff under section 718 of Emergency School Aid Act, 20 U.S.C.A. § 1617 held entitled to fees "unless special circumstances would render such an award unjust." *Id.* at 428); *see generally* E. LARSON, DEVELOPMENTS IN THE LAW OF ATTORNEYS FEES (Supp. 1986).

212. This does not completely preempt the need for an analysis of the underlying right in the undecided federal fee claim. *See infra* text accompanying notes 286-88. But such analysis may be necessary even when the fee award is directly predicated on the federal claim. *Cf.* Note, *supra* note 2, at 1297 (noting that some courts have "emphasized that the successful plaintiff-applicant need not show the defendant proceeded in bad faith or frivolously, that the nature of his conduct was intentional or wanton, or that the plaintiff himself is unable to pay the fees."). *But cf.* 42 U.S.C. § 3612(c) (1982) (plaintiff must show that she cannot pay fees).

213. Each case may be viewed as an opportunity for the education of state court judges as to the availability of fees in civil rights actions. *See generally* Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960) (discussing application of federal law by state court judges).

214. *See* SOURCE BOOK, *supra* note 2, at 214; *see generally* Leubsdorf, *supra* note 21, at 32-33 (noting "signs of a movement to compensate litigants who do not prevail but who represent a group whose members could otherwise not afford to be heard.")

215. Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978).

where nominal damages are awarded,[216] where remedial action moots the case prior to adjudication,[217] where a settlement is reached,[218] where a consent decree issues,[219] where they have obtained relief although not judgment and even where they have merely acted as "catalysts"[220] in obtaining the relief sought.[221] As the court of appeals observed in *Bonnes v. Long*[222] inquiry may turn to:

> whether as a quite practical matter the outcome . . . is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden . . . . Further, some courts have stated that a party need not achieve total success in order to be considered prevailing; others, that the proper focus is whether the party has been successful on the central issue; and still others that a plaintiff who has lost his individual claim may be considered to have prevailed if he has succeeded on a class claim. Finally, it appears that even a plaintiff who has prevailed through a settlement or consent judgment rather than through litigation may be labeled the prevailing party for attorneys' fees purposes.

Claimants who prevail on state claims should not be held to a higher standard, even if it may appear to be a minimally higher standard.[223] A determination that she has prevailed by means of a state claim is as sufficient as a determination that plaintiff has prevailed through any other means. The crucial question is whether the relief has been achieved as a result of the litigation.[224] Whether a

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216. Milne v. Cavuto, 653 F.2d 80 (2d Cir. 1981).

217. Doe v. Marshall, 622 F.2d 118, 120 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981).

218. Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979).

219. Johnson v. University College, 706 F.2d 1205 (11th Cir. 1983).

220. *See* Fields v. Tarpon Springs, 721 F.2d 318 (11th Cir. 1983).

221. Note, *Attorneys' Fees—How Much Can A Partially Prevailing Plaintiff Recover in Civil Rights Actions?*, 59 TUL. L. REV. 473, 476 (1984) (noting that the courts have addressed the issue of when a party should be considered prevailing in several cases and citing Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978): "[W]e conclude that plaintiffs' may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.*). *See also* Maher v. Gagne, 448 U.S. 122 (1980); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (claim of racially discriminatory employment practices). Although there was no decision on the merits, fees were awarded because the court found that defendant adopted fair employment practices "in response" to the lawsuit.

222. 599 F.2d 1316, 1319 (4th Cir. 1979).

223. As set forth at *supra* text accompanying notes 34-53, while the drafters may have intended a minimal test, this has not been the result in state court.

224. *Nadeau*, 581 F.2d at 279. It must also be determined whether the relief could have been attained under the federal fee claim. *Id.* at 281. Again, this focus on the nature of the

legitimate federal purpose is furthered is an "ends" rather than a "means" oriented test.[225]

There is no justification, for example, for imposing a greater burden on claimants prevailing on state claims than on settling claimants. The settling plaintiff does not necessarily have a more meritorious claim. Although the claimant prevailing on the state claim has not obtained a favorable ruling on her fee claim, the defendant has failed to defeat that claim even though plaintiff had the burden of proof.

Moreover, by holding plaintiffs who prevail on state claims to a higher standard, the State Claims Tests indirectly provide a disincentive for defendants to settle, since litigating gives them a greater chance of avoiding fees.[226] Any additional deterrent to settlement is particularly burdensome for plaintiffs because of the rule established by the Supreme Court in *Evans v. Jeff D.*[227] The *Evans* Court held that defendants could insist on settlement of attorneys' fee claims as part of the settlement of civil rights cases. Many commentators have criticized this rejection of the *Prandini*[228] rule, under which fees were required to be the subject of separate negotiations.[229] As the commentators and the *Prandini* court noted, merger of the merits and fee issues put the self-interest of the civil rights lawyer in direct conflict with that of her client.[230]

In most private litigation, there is little need to separate the settlement of claims for attorneys' fees from the merits of the case since the client will be liable for the fee in any case. In civil rights cases, as Congress expressly acknowledged in enacting the fee-shifting statutes, the client is typically unable to pay. Thus, the defendant can condition settlement on the plaintiff's waiver of fees, rendering the

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relief is more of an 'ends' than a 'means' oriented inquiry.

225. As Justice Scalia observed in *Hewitt*: "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. . . . The 'equivalency' doctrine is simply an acknowledgment of the primacy of the redress over the means by which it is obtained." 482 U.S. at 760-61.

226. The fees, of course, are likely to be substantially less at the settling stage.

227. 475 U.S. 717 (1986).

228. Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977).

229. *See, e.g., The Supreme Court Leading Cases*, 100 HARV. L. REV. 100, 258-67 (1986) [hereinafter *Leading Cases*] (agreeing with Justice Brennan's criticism that the majority misread the purpose of the Fees Act "by assuming that the attorneys' fee award is merely a remedy like damages and injunctive relief." *Id.* at 263 & n.34); Comment, *Evans v. Jeff D. and the Proper Scope of State Ethics Decisions*, 73 VA. L. REV. 783 (1987) (examining conflict between *Evans* and state ethics decisions).

230. The New Jersey Supreme Court is the first state court to address this issue. In Coleman v. Fiore, 113 N.J. 594, 592 A.2d 141 (1989), it held that bifurcated settlement negotiations were appropriate where a public interest group was the plaintiff.

attorneys' fee theoretically available to civil rights plaintiffs at the settlement stage illusory.[231]

The State Claims Tests become another hurdle to plaintiffs, requiring additional argument and perhaps proofs which do not directly inure to the client's benefit. This further reduces the defendant's incentive to offer, and the plaintiff's leverage to insist upon, a fee award as part of settlement. Requiring the plaintiff to satisfy only the prevailing party test, while far from correcting the inequity of the *Evans* rule, simplifies the issue of court-awarded fees if the plaintiff rejects settlement and prevails on her state non-fee claim.

Similarly, there is no reason for distinguishing between plaintiffs who have acted as a "catalyst" without litigating a matter to conclusion and those who have served as a catalyst by litigating until they obtained a ruling on their state non-fee claim. Here, as in the case where there is no settlement, the additional litigation may simply be attributable to a recalcitrant defendant. Intractable adversaries may well be more common in state court, since the federal rules deter such behavior.[232]

Abandoning the State Claims Tests does not give any advantage to plaintiffs litigating in state court. It would merely assure that they are not subject to a more difficult standard than their counterparts in federal court. There is no justification for requiring plaintiffs who further civil rights through the use of state law to meet a higher standard than plaintiffs achieving the same result through other means.[233]

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231. *See Leading Cases*, *supra* note 229, at 260-61 & n.19 (noting that the majority's argument that a proscription of fee waivers would "reduce the attractiveness of settlement" ignored respondents' argument that the "lack of any potential liability for fees will provide an incentive to delaying settlement." *Id.*).

232. See, e.g., FED. R. CIV. P. 11, 68. Some states have enacted similar rules. *See, e.g.*, N.J. STAT. ANN. 2A:15-59.1 (West 1989).

233. Nor, after Garcia v. San Antonio Metro. Hous. Transit Auth., 469 U.S. 528 (1985), can there be any serious contention that the question of such entitlement must be left to the states. *See* Field, *Garcia v. San Antonio Met. Hous. Trans. Auth.: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). *But cf.* Baird, *State Empowerment After Garcia*, 18 URB. LAW. 491 (1986) (arguing that *Garcia's* impact is limited). *See generally* Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Michelman, *States Rights and States Roles: The Permutations of State 'Sovereignty' in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977) (grappling with the implications of *National League of Cities*, the case that was overturned in *Garcia*); Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (arguing that "the Constitution's political structure of federalism and sovereignty is designed to protect . . . individual rights." Amar, *supra*, at 1426). *See also supra* note 170.

This does not mean that the states are foreclosed from enacting fee-shifting legislation of

2. *In Light of a More Restrictive Construction of the Fees Act*

In several recent decisions, the Supreme Court has curtailed the availability of fees for prevailing civil rights plaintiffs. While these cases are certainly open to criticism,[234] the standards enunciated in *Smith v. Robinson*,[235] *Hewitt v. Helms*[236] and *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*[237] provide a far more coherent set of guidelines than those established by the State Claims Tests. In *Texas State Teachers Association v. Garland Independent School District*,[238] the most recent pronouncement, the Court, while not reversing its restrictive trend, at least calls a halt to it.

In *Smith* the Court elucidates the requisite relationship between the fee claim and the rest of the litigation. In *Crest Street*, the Court limits the kind of "proceedings" which are covered by the Fees Act. In *Hewitt*, Justice Scalia stresses the actual relief obtained, rather than the juridical means of doing so. In *Garland*, Justice O'Connor resolves a split in the courts of appeals by holding that the plaintiff need not prevail on the "central issue" in the litigation in order to be awarded fees.

As explained below, in these cases the Court considered the core issues involved in determining whether an award of fees is available for state claimants who prevail on state grounds. These decisions supply strong, if indirect, support for the proposition that fees should be available for state civil rights claimants under the prevailing party test. The additional proofs currently imposed under the State Claims Tests are clearly irrelevant to the demanding but carefully delineated framework established by the Court.

a. *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*

In *Crest Street*,[239] the plaintiffs stopped the extension of a fed-

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their own. *See infra* note 282.

234. Perhaps the most cogent criticism is to be found in the dissents. *See, e.g., Hewitt*, 482 U.S. at 764 (5-4 decision; Marshall, J., dissenting); *Crest Street*, 479 U.S. at 16 (6-3 decision; Brennan, J., dissenting). *See also* Gans, *infra* note 239, at 910 (noting that "[r]ecent Supreme Court interpretation of Section 1988 has diluted the effectiveness of its fee-shifting provisions.").

235. 468 U.S. 992 (1984).

236. 482 U.S. 755 (1987).

237. 479 U.S. 6 (1986).

238. 109 S. Ct. 1486 (1989).

239. 479 U.S. 6 (1986). *See generally* Conroy, *Recent Developments, Section 1988 Claim for Attorneys Fees Limited to Costs of Actual Court Proceedings*, 16 STETSON L. REV.

erally funded expressway through a predominantly black neighborhood by filing an administrative complaint with the U.S. Department of Transportation. They claimed that the proposed action violated Title VI of the Civil Rights Act of 1964.[240] Negotiations resulted in a resolution favorable to the plaintiffs, who then sought fees under the Fees Act. Their request was eventually granted by the court of appeals. The Supreme Court reversed, holding that "only a *court* in an action to enforce one of the civil rights statutes" could award fees.

Noting that the "legislative history is replete with references to the enforcement of civil rights statutes 'in suits', 'through the courts' and by 'judicial process' "[241] the Court emphasized that under the Fees Act a "judicial complaint" was requisite to an award. The Court's insistence that fees be strictly confined to litigation[242] highlights the importance of fee availability in state court in two ways.

First, the Court made it absolutely clear that the source of the law upon which relief is predicated is not dispositive as to the availability of fees. Although the *Crest Street* plaintiffs were proceeding under administrative regulations promulgated under Title VI, the Court expressly affirmed earlier decisions in which it had held that fees could be awarded "even if the prior proceeding is not 'a proceeding to enforce' one of the Section 1988 civil rights laws, [as long as it] was 'both useful and of a type ordinarily necessary to advance the civil rights litigation.' "[243]

Thus, the Court explicitly endorsed the availability of fees where plaintiffs have utilized a body of law separate and distinct from federal civil rights law. The question is whether the *result* is compatible with that law.[244] There is no reason, and the Court has never suggested one, for distinguishing between state law and federal administrative law in this context.

Second, the Court found that Congress was well within its authority in determining that fees should be limited to judicial

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1091 (1987); Gans, *The Supreme Court's Interpretation of Section 1988 and Awards of Attorney's Fees for Work Performed in Administrative Proceedings: A Proposal for a Result-Oriented Approach*, 62 WASH. L. REV. 889 (1987).

240. The Civil Rights Act prohibits "any program or activity receiving Federal financial assistance from discriminating on the basis of race, color, or national origin." *Crest Street*, 479 U.S. at 8.

241. *Crest Street*, 479 U.S. at 12.

242. This includes fees for proceedings which are "followed by a lawsuit." *Id.* at 13.

243. *Id.* at 15.

244. *Cf.* Gans, *supra* note 239, at 903 (arguing that under a results test, fees should have been awarded in this case).

proceedings.

> But an award of attorney's fees under Section 1988 depends not only on the results obtained, but also on what actions were needed to achieve those results. It is entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court.[245]

Whatever the merits of this argument, and whatever the special features of such proceedings may be that justify such a limitation, they are surely just as compelling in state court as they are in federal court.

b. *Hewitt v. Helms*

In *Hewitt*,[246] respondent inmate was sentenced to six months' disciplinary confinement for his alleged participation in a state prison riot. The only evidence against him had been an officer's report of the statements of an undisclosed informant. The respondent filed a lawsuit against the prison officials under Section 1983, but he was released on parole before the case was decided. The Third Circuit Court of Appeals reversed the district court and held that the respondent's due process rights were violated by his conviction because it was based solely on hearsay. While the matter was pending on remand, the State Corrections Bureau revised its regulations to address the use of such information. The Third Circuit awarded fees on the basis of its earlier determination that the respondent had shown a violation of his due process rights. The matter was remanded to the district court to determine whether the lawsuit was a "catalyst" for the change in prison regulations.

The Supreme Court reversed. It held that the respondent was not a prevailing party under the Fees Act because he achieved none of the relief he sought through his lawsuit. Moreover, the Court held that the catalyst theory was inapplicable because the respondent himself obtained no relief by means of the change in regulations, since he had been released from prison by the time it was made. Justice Scalia rejected the respondent's argument that the declaration by the Third Circuit that he had been denied due process amounted to "relief" within the meaning of the Fees Act:

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245. *Crest Street*, 479 U.S. at 14.

246. 482 U.S. 755 (1987). *See generally* Jones & Rhine, *Due Process and Prison Disciplinary Practices: From Wolff to Hewitt*, 11 N. ENGLAND ON CRIME & CIV. CONFINEMENT 44 (1985); Comment, *Liberty Within Prison Walls as a Natural Right? Hewitt v. Helms*, 11 N. ENGLAND J. ON CRIME & CIV. CONFINEMENT 217 (1985).

> To suggest such an equivalency [that the Third Circuit's statement of law was equivalent to declaratory relief] is to lose sight of the nature of the judicial process. In all civil litigation, the judicial decree is not the ends but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant . . . The 'equivalency' doctrine is simply the acknowledgment of the primacy of the redress over the means by which it is obtained.[247]

Although there is much in this decision that is troubling,[248] there could be no clearer statement of the foundation for fee awards when the relief is obtained through state law. Such fees simply "[acknowledge] the primacy of the redress over the means by which it is obtained." Fees could not be predicated on the Third Circuit's statement of law prior to judgment because that statement did not result in actual relief. It is the tangible relief actually achieved which determines entitlement to a fee award, not the route by which the court reaches its conclusion. The fact that relief is obtained by way of state law is no basis for denying fees, or for subjecting state claimants to additional proof requirements.

c. *Smith v. Robinson*

In *Smith*,[249] the plaintiffs argued in pertinent part that they were entitled to fees because they had obtained injunctive relief from the school board's refusal to grant them a hearing at the beginning of their litigation.[250] The Supreme Court held that the vindication of a constitutional right in connection with a separate preliminary hearing[251] did not entitle the plaintiffs to fees for the remainder of the litigation, which they won on non-fee federal grounds. The *Smith* plaintiffs' demand for a hearing, and the school board's initial re-

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247. *Hewitt*, 482 U.S. at 761.

248. *See, e.g.*, Justice Marshall's dissent, in which he notes, inter alia, the majority's acceptance of "the remarkable proposition that the request for expungement of respondent's record became moot upon his parole." *Id.* at 761 n.1 (Marshall, J., dissenting).

249. 468 U.S. 992 (1984).

250. *See generally* Note, *Congress, Smith v. Robinson, and the Myth of Attorney Representation in Special Education Hearings: Is Attorney Representation Desirable?* 37 SYRACUSE L. REV. 1161, 1170-76 (1987) (reviewing *Smith's* rationale for denying attorneys fees for EHA claims).

251. The *Smith* plaintiffs were awarded fees in connection with obtaining that preliminary injunctive relief. 468 U.S. at 1008.

fusal to grant it, was characterized by the Court as "entirely separate" from the plaintiffs' claims in the ensuing litigation for a free public education.

Under *Hagans / Gibbs*, as noted above, the relationship between the fee claim and the state claim on which the plaintiff prevails may be as attenuated as the relationship between the claims raised in the preliminary hearing and those adjudicated in the main case in *Smith*.[252] Even the *Smith* plaintiffs' initial demand for a hearing could have been melded into the main proceeding under the broad transactional interpretation of *Gibbs*. Thus, the *Smith* Court's rejection of the plaintiff's fee claim on the ground that it was insufficiently related to the non-fee federal claim on which they prevailed bodes ill for *Hagans / Gibbs* on the issue of fees.

Smith requires a clear nexus between the fee and non-fee claims, and looks for that nexus in the relief sought under the two claims. The crux of the decision in *Smith* was the distinction between the relief granted as a result of the denial of a preliminary hearing and the relief obtained as a result of the proceedings that followed. The Court concluded that the preliminary order maintaining the handicapped child's placement in school throughout the litigation did not contribute to the ultimate relief won the interpretation of state law holding that the School Committee was responsible for the cost of his education.[253]

In denying fees, the *Smith* Court focused on the relief obtained under what it determined to be the plaintiff's non-fee claim in the main action,[254] and the relief available under plaintiff's preliminary fee claim. This is precisely what a court would do in applying the prevailing party test where the plaintiff prevails on a non-fee state claim, if the State Claims Tests were no longer considered binding. Thus, *Smith* provides powerful, albeit implicit, support for both the rejection of *Hagans / Gibbs* and the adoption of the prevailing party test in the state claim context.

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252. *See supra* text accompanying notes 198-202.

253. *Smith*, 468 U.S. at 1008.

254. The U.S. Supreme Court found that the fee claim in the main action was preempted by the EHA, which provided a parallel basis for relief. It did so in such a comprehensive manner, opined the Supreme Court, as to show that Congress intended the EHA to preempt an action under section 1983, which would have given rise to a fee claim. Thus, Justice Blackmun concluded that Congress did not intend to permit fees in such actions since there was no fee-shifting provision in the express EHA. *Smith*, 468 U.S. at 1015. The flawed reasoning underlying this result was pointed out in the stinging dissent of Justices Marshall, Brennan and Stevens, and rectified by Congress through passage of an amendment.

d. *Texas State Teachers Association v. Garland Independent School District*

In *Garland*,[255] the petitioners, state and local teachers associations and members, claimed that respondent school district violated their first and fourteenth amendment rights by prohibiting communication regarding employee organizations by or with teachers during the school day.[256] The primary issue was access to teachers and school facilities by employee organizations. In addition, internally proscribed activities included teacher-to-teacher discussion and the use of internal bulletin boards and mail. While petitioners failed to obtain the primary relief sought, the district court granted summary judgment with respect to their other claims.[257] The Fifth Circuit Court of Appeals upheld the denial of their application for fees under the Fees Act on the ground that an award of fees was precluded under the "central issue test" followed in that circuit.[258] Under that test, only plaintiffs prevailing on the main issue, as opposed to those prevailing on merely "significant" issues, were entitled to fees.[259]

Reversing the Fifth Circuit, the Supreme Court expressly adopted the standard enunciated in *Nadeau v. Helgemoe*.[260] Under *Nadeau*, fees are available to parties who "succeed on any significant issue in the litigation which achieves some of the benefit [they] sought in bringing suit."[261] This decision is worth noting here for two reasons.[262] First, the requirement that the plaintiffs isolate a "central issue" in often labyrinthine litigation and then demonstrate that they have prevailed with respect to that issue would have had a particularly harsh impact on state claimants in multi-claim litigation. By rejecting this test, the Court not only unanimously refused to condone the evisceration of the Fees Act, but explicitly recognized the complex nature of the cases in which claims under the Act are likely to arise.[263] Second, confirming its focus in *Hensley*, the Court

255. 109 S. Ct. 1486 (1989).

256. *Id.* at 1487.

257. *Id.*

258. *Id.* at 1488.

259. *Id.*

260. *Id.* (citing *Nadeau*, 581 F.2d 275 (1st Cir. 1978)).

261. *Nadeau*, 581 F.2d at 278-79 (quoted in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

262. *See generally* Greenhouse, *Justices Broaden Basis For Fee Award in Civil Rights Cases*, N.Y. Times, Mar. 29, 1989.

263. As Professor Richard Larson has observed, *Garland* was not a difficult case. Given the nearly universal repudiation of the "central issue" test, and the weight of authority against

reiterated its emphasis on the actual relief obtained. State claimants prevailing on state grounds remain eligible for fees under the test as clarified by *Garland*.

The reasoning of the *Garland* Court is similarly pertinent to the analysis here. The Court rejected the "central issue" test in part because it seemed irreconcilable with the well-settled availability of interim fees to prevailing plaintiffs.[264] Such fees are awarded before it is known whether the relief obtained is "central" or merely peripheral to the result ultimately achieved.[265] It would be inconsistent to deny fees to plaintiffs seeking them at the conclusion of litigation in connection with what may at that point be considered a "significant" issue, when fees would have been granted had they been sought at an earlier stage, when the issue looked more "central."

This is structurally analogous to the argument advanced above, where fees are frequently available to plaintiffs who have not obtained a favorable ruling on their federal claim,[266] but instead, have obtained relief through settlement or merely because they have acted as "catalysts."[267] The merits of the federal fee claim are left unaddressed in such circumstances, precisely as they are where the plaintiff obtains the relief sought by prevailing on her state claim. All that can be said with certainty about the merits of the federal fee claim in either case is that the defendant was 1) unable or unwilling to get it dismissed, and 2) unable to avoid the relief sought thereunder. Denial of fees to state claimants, like denial of fees to plaintiffs prevailing on a "significant" issue, would clash with firmly established precedent, as well as the spirit of the Fees Act.[268]

The *Garland* Court sensibly avoids the mysteries of causality in favor of the relative certainty of demonstrable results. As Justice O'Connor observed:

> [T]he search for the 'central' and 'tangential' issues in the lawsuit, or for the 'primary' as opposed to the 'secondary' relief

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it, the Court's rejection of the test was predictable. Telephone interview with Professor Larson, N.Y.U. School of Law (Apr. 10, 1989).

264. *See* Bradley v. Richmond School Bd., 416 U.S. 696 (1974).

265. It is not precisely clear why the *Garland* Court viewed this as dispositive. If the central issue test were adopted, subsequently vindicated defendants could simply seek reimbursement with regard to interim fees later found to have been improvidently granted. This is what happens now when fees are paid prior to exhaustion of all appeals.

266. *See supra* text accompanying notes 215-22.

267. A plaintiff may be considered a "catalyst" in changing defendant's policy, and thus be entitled to fees, even though she achieves no formal judgment or consent decree. *See supra* notes 52 & 220-22.

268. *Garland*, 109 S. Ct. at 1488.

> sought, much like the search for the Golden Fleece, distracts the district court from the primary purposes behind [sec.] 1988 and is essentially unhelpful in defining the term 'prevailing party.'[269]

At the same time, *Garland* merely halts the erosion of the Fees Act; it expands entitlement only for those in the Fifth and Eleventh Circuits, formerly subject to the "central issue" test. It does not benefit prevailing plaintiffs elsewhere. Indeed, dicta may encourage some courts to adopt a more restrictive approach: "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied."[270]

The Court explicitly refers to the "situation" in *Hewitt* as an example of an undeserving claim.[271] As Justice O'Connor opines: "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."[272]

3. *Policy Reasons for Applying the Prevailing Party Test to State Law Claims*

There are two basic policy reasons for abandoning the State Claims Tests and simply applying the prevailing party test to claimants seeking fees predicated on state law claims.[273] First, this would further refine the applicability of the Fees Act. More of the plaintiffs who actually vindicate civil rights would be awarded fees. Second, such relief-focused awards graphically place state law in the federal civil rights context, thereby expanding the actual as well as the symbolic scope and impact of the remedial statutes.

Clarification of the standards for granting fees to state civil rights claimants is crucial because of the mounting numbers of such cases, and the demonstrated inability of the State Claims Tests to deal with them in a coherent, predictable fashion. Under existing law, prevailing plaintiffs who achieve that status by virtue of a successful state claim are the only state court plaintiffs who must satisfy a further test before fees may be awarded. Abandonment of that test permits awards for those prevailing plaintiffs who would have been

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269. *Id.* at 1493.
270. *Id.*
271. *See supra* text accompanying notes 248-49.
272. *Garland*, 109 S. Ct. at 1493.
273. *Cf. supra* text accompanying notes 255-72 (rejection of "central issue" test).

unfairly eliminated by it.[274] Civil rights lawyers, moreover, are far more likely to be familiar with the prevailing party test, which is ubiquitous in civil rights litigation, than the State Claims Tests which, as we have seen, have a limited and idiosyncratic application.[275]

The second policy justification for the utilization of the prevailing party test in this context, while less concrete, is probably more important. This involves the symbolic value of measuring the results achieved under state law by a federal test, and requires a subtle conceptual shift. By predicating the award of fees on the result achieved, even if that result is reached by way of state law, the state law is no longer merely an end in itself but becomes the means of accomplishing a federal purpose. As various state laws are used in this way, and state precedent established, the body of law under which civil rights are protected may be exponentially expanded. Fee awards under the prevailing party test for relief obtained via state law show that plaintiffs have obtained substantive relief available under a federal fee-shifting statute by using state law. Thus, by demonstrating a clear nexus between the result achieved through state law claims and the result which could have been achieved through a federal civil rights claim, use of the prevailing party test charts an alternative route for future litigants.

State legislators may object to the use of state legislation for the promotion of civil rights. The author does not suggest any substantive expansion of state law for that purpose, however, but merely a greater recognition of pre-existing law which can already be utilized. State legislative intent should not thwart the creative and vigorous use of law, even if such use was not explicitly contemplated by its drafters.[276]

B. *Some Problems with the Prevailing Party Test Where the State Court Claimant Has Prevailed on a State Claim*

This section considers some of the difficulties with the proposal, including the apparent necessity of a legal determination as to

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274. *See infra* text accompanying note 289 (noting lack of empirical data as to the actual numbers of such plaintiffs and the consequences of the prevailing party test in general). Whatever the numbers, however, an additional group may well be discouraged by the State Claims Tests from applying for fees.

275. *See supra* text accompanying notes 73-161.

276. *See generally* Tribe, *supra* note 233; Raveson, *Unmasking the Motives of Decisionmakers: A Subpoena for Your Thoughts*, 63 N.C.L. REV. 879 (1985). Of course, the state legislature can always amend or repeal a law which does more than it was expected to do.

whether the relief obtained was in fact "properly available" under applicable law,[277] and whether the proposal ultimately shifts greater discretion back to the federal courts. The problems raised by utilization of the test are not limited to the state claim/state court context. Rather, these are problems inherent in the prevailing party test itself. As solutions are devised for these problems, by the courts or Congress, the impact on prevailing state claimants should be taken into account. Analysis of these questions in the context of state court litigation, moreover, may generate fresh approaches facilitating their eventual resolution.

1. *What relief entitles a plaintiff to prevailing party status?*

Perhaps the major difficulty is deciding whether the plaintiff in fact prevailed. Where the relief obtained as a result of the decision on the state claim is relief conventionally granted under the fee claim;[278] for example, the right to live in subsidized housing[279] or the right to employment previously denied women;[280] the fee entitlement is clear. But where it is plain that the relief may *not* be ordered under the fee claim, or where it is questionable whether it could be ordered,[281] entitlement to fees becomes more problematic. Since proceedings in state court on state claims are more apt to involve novel questions of state law, which may well include claims for equally novel forms of relief, this scenario is correspondingly more likely in state court.

Where the relief is clearly unavailable under the federal claim—even if it unquestionably promotes civil rights—it could be argued that fees should not be allowable for several reasons. The defendants had no notice of their potential liability. Moreover, no "legitimate federal purpose" has been furthered if it has already been determined that the relief obtained is *not* within the ambit of the fee-shifting statute. Finally, as a corollary, since there is no federal authority for the relief obtained, a fee award represents the usurpation of the legislative function by the state court. A provision

277. "[T]he benefit must not only result from the suit, but must also be one to which the plaintiff was legally entitled," Note, *supra* note 221, at 476.

278. *See generally* Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513 (1958).

279. Jones v. Orange Hous. Auth., 559 F. Supp. 1379 (D.N.J. 1983).

280. Johnson v. Transportation Agency Santa Clara City, 480 U.S. 616 (1987).

281. Requiring a city to institute a computerized system to monitor administrative procedures in connection with arraignment, for example. *Cf.* Williams v. Ward, 845 F.2d 374 (2d Cir. 1987).

for attorneys' fees awards is effectively being grafted onto a state law by the state court, rather than by the state legislature.[282]

In many cases it may be unclear whether the relief obtained could have been predicated on the federal fee claim.[283] The arguments in favor of awards, under these circumstances, indicate the potential sweep of the proposal to abandon the State Claims Tests. The language of the fee-shifting statutes is arguably broad enough to include almost any relief which furthers the purpose of those statutes. Relief may further the purpose of the fee claim even if the statute does not explicitly provide for such relief. Title VIII does not expressly contemplate the actual construction of housing, for example.[284] If housing is in fact produced as a result of a lawsuit, however, plaintiff should be considered prevailing.[285] Under federal law, even if a result could not have been ordered by the court, its achievement may nevertheless confer "prevailing party" status on the plaintiff. By extending this analysis to state law, relief adroitly molded to address particular local conditions could be considered within the scope of the civil rights statutes and fees could be awarded to those who had achieved such relief.

2. *The analysis required of the court*

Where it is an open question whether the relief obtained could have been ordered under the federal fee-shifting statute, the analysis required by the state court raises problems. First, the court is being called upon to render a legal determination which the parties and the court have successfully avoided up to this point. Since this determination is more a question of law than of fact, it is unlikely that significant additional evidence will be required. Although this adjudication may be less time consuming than that required by

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282. *Cf.* Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303 (1977) (legislation authorizing fee awards where plaintiff prevails on a state constitutional claim had already been passed, although it was not yet in effect when the Court applied the same principle). CAL. CIV. PROC. CODE § 1021.5 (West 1980). *See generally* McDermott & Rothchild, *The Private Attorney General Rule and Public Interest Litigation in California*, 66 CALIF. L. REV. 138 (1978); Hermann & Hoffman, *Financing Public Interest Litigation in State Courts: A Proposal for Legislative Action*, 67 CORNELL L. REV. 173 (1978).

283. *See, e.g.*, Jenkins v. Missouri 788 S.W.2d 536 (1990); Greenhouse, *Justices to Study Power of Judiciary in Taxation*, N.Y. Times, Apr. 25, 1989, at A22, col. 1 (Supreme Court will decide whether federal courts exceeded their constitutional authority by ordering tax increases to finance school desegregation).

284. 42 U.S.C. § 3601 (1982).

285. *See* Urban League v. Mayor and Council of Carteret, 115 N.J. 536, 559 A.2d 1369 (1989) (one of the *Mount Laurel* cases).

Morales,[286] many of the same arguments against *post hoc* adjudications apply.[287] The real difference is that the *post hoc* adjudication has been altered from one of fact and law to a narrower one of law. This becomes a question of balancing a somewhat dubious improvement in efficiency against the risks that are inherent in a completely speculative legal determination.

This is a problem faced by all courts in applying the prevailing party test, however. The state courts' reluctance to order otherwise unnecessary plenary proceedings[288] and their apparent willingness to render decisions with respect to similarly speculative constitutional questions, suggest that the determinations required under the prevailing party test would not be especially troublesome for state courts.

3. *More open questions*

Several difficult questions remain open, reflecting the theoretical and political tensions underlying the proposal. It is beyond the scope of this article to exhaustively explore such questions. Broad areas offering rich opportunities for further consideration include the desirability of empirical validation; the impact, if any, on the balance of power between state and federal governments, and the threshold dilemma presented by implementation: how would abandonment of the State Claims Tests be accomplished?

a. *Empirical studies*

A comprehensive, fact specific analysis of state court litigation under the fee-shifting statutes would be invaluable. The prevailing party test is already used in state courts where plaintiff's relief is not predicated on her state law claim. The abandonment of the State Claims Tests merely expands its application to an additional class of cases. The empirical consequences of the utilization of the prevailing party test in state court should at least be considered before urging such an expanded application.

State courts have often been unsympathetic to the constitutional rights that underlie the civil rights statutes. As Burt Neuborne has noted, "No comparative study of the relative performance of state and federal courts in the enforcement of constitutional rights appears to exist. However, the impact of state hostility to Supreme Court

286. *See supra* text accompanying notes 106-07.
287. *See supra* text accompanying notes 132-40.
288. *See supra* text accompanying notes 132-40.

mandates has been noted."[289]

Even if, as argued above, state courts provide an increasingly attractive forum for the vindication of civil rights violations, they might be more reluctant than federal courts to award fees, or more conservative in doing so.

b. *Federalism questions*

By increasing the opportunities for state courts to define "prevailing parties" under the federal fee-shifting statutes, the abandonment of the State Claims Tests could affect the balance of power between the federal and state courts with respect to this issue. Is it desirable to increase the states' influence in interpreting the law governing fee awards? As Judge Uter reminds us, "State courts do not have to consider the national implications of their decisions."[290] Even though a state court decision is not binding on federal tribunals or the courts of other states, it may be very influential, particularly where it addresses a matter of first impression.

This is, of course, a continuation of a very old debate.[291] In 1928, then-Professor Felix Frankfurter urged a careful analysis of the underlying rights in order to decide whether the case involved "lively local interests" more properly adjudicated in federal court. The federal rights in issue, moreover, may themselves be "heavily enmeshed in conflicts between state and national authority."[292] Are

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289. Neuborne, *supra* note 13, at 1116 n.46. Professor Neuborne's observation 13 years ago certainly remains true of some state courts with regard to the pro-civil rights Supreme Court mandates to which he was referring. The extent of state court hostility to the recent opinions of the Supreme Court curtailing civil rights is an open question. *See supra* text accompanying notes 54-64.

290. Uter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1045 (1985). *But see* M. DERFNER & A. WOLF, *supra* note 6, at 14-18 (observing that state courts have generally applied federal standards in interpreting section 1988, including awarding fees when federal constitutional claim pretermitted because the case is decided on state law grounds). M. DERFNER & A. WOLF, *supra* note 6, at 14-19 & n.32.

291. *See, e.g.*, THE FEDERALIST NO. 82, at 491 (A. Hamilton) (C. Rossiter ed. 1961); THE FEDERALIST NO. 45, at 288 (J. Madison) (C. Rossiter ed. 1961).

292. Frankfurter, *supra* note 10, at 515:

> National sentiment also regards federal tribunals as the appropriate guardians of federal rights. But it is a practical sentiment. There are limits to the effective enforcement of national law. Wise distribution of judicial power also depends upon the nature of the issues. Some federal rights are readily adapted to enforcement by state tribunals; others are clearly meant for the federal courts. Some federal rights involve no lively local interests; others are heavily enmeshed in conflicts between state and national authority. Civilized law rests on discrimination.

state courts the best place for the resolution of such questions?

Abandonment of the State Claims Tests may, on the other hand, indirectly expand the role of the federal courts in matters previously left to the states. As suggested above, rejection of the State Claims Tests may shift the court's emphasis in deciding fees, from a mixed law and fact determination to more of a legal question.[293] Such a shift might encourage Supreme Court review since the Court is generally more inclined to consider whether there was an error of law than an abuse of discretion below.[294] How would this affect claimants who looked to state court as a refuge from an unfriendly federal bench?[295]

Although a major justification for rejection of the State Claims Tests is to facilitate adjudication of fee claims in state court, doing so is likely to alter the existing balance of power between state and federal government in ways which we cannot foresee. It is similarly impossible to predict how increased utilization of the prevailing party test in the state court/state claim context may transform the test itself.

C. *How Could the State Claims Tests Be Abandoned?*

Even if the State Claims Tests were, as suggested above, ignored by the state courts,[296] it is not clear that the prevailing party

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293. *See supra* text accompanying notes 287-88.

294. *See* Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 604 (1984) (noting practical limitations on Supreme Court review of federal claims denied by state courts). *But see* Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 54 & n.109 (1981) (providing examples of the Supreme Court's exercise of "jurisdiction to ride herd on the state courts") *Cf.* Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 982 (1985) (The state court could avoid review of its decision by making a " 'plain statement' that it used the federal law for guidance only." This would be limited to states whose laws provided an independent basis for the award of fees.)

295. This presents a slight, perhaps even a trivial, risk in view of the minute percentage of appeals accepted for review by the Supreme Court. *See, e.g.*, G. CASPER & R. POSNER, THE WORKLOAD OF THE SUPREME COURT (1976); *see generally* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984).

296. Where the highest state court has already adopted the State Claims Tests, of course, overruling that adoption would have to be justified. One possibility might be a constitutional challenge under the necessary and proper clause. *See supra* notes 165-70 & 199 and accompanying text. But who would bring such a suit? Public interest groups might be hesitant to attack the State Claims Tests since they have often benefitted from them. (Such groups could certainly challenge the tests, however, while pleading in the alternative that in their particular lawsuits plaintiffs satisfied the tests). Would a private party have standing to raise this issue?

test would automatically become operative, like water flowing into the empty space when an island sinks. It is problematic whether judicial action, or inaction, would render further clarifying legislation unnecessary. Would civil rights claimants, who arguably have the most to gain, risk reopening the legislation? Even if there was less at stake, it is questionable whether legislative revision would be sought for what would be considered a merely technical flaw. As Professor Leubsdorf has pointed out:

> Political realities discourage legislative procedural reform. The public has little grasp of civil procedure and little interest in it. Those who suffer from a bad procedural rule usually do not know in advance that they will be its victims, or even that the rule exists, and are usually scattered and disorganized. They will therefore not seek change.[297]

While these are real problems, they are certainly not insurmountable if civil rights advocates decide that the prevailing party test is in fact the better test for determining whether fees should be awarded in connection with state claims brought in state courts.

VI. CONCLUSION

As we have seen, the revival of the civil rights struggle was accompanied by the realization that continuing efforts required "private attorney generals" and a mechanism for paying their legal fees. After being prodded by the *Alyeska* decision, Congress enacted the Fees Act. The somewhat fortuitous inclusion of the State Claims Tests reflected an astute appreciation of the increasingly important role of the state courts.

The State Claims Tests had two purposes: first, they sought to legitimate fee claims in state as well as federal court predicated on state law. Second, they purported to establish standards, borrowed from federal court decisions in *Morales* and *Hagans/Gibbs*, which would ensure that the court had the authority to award fees. The viability of the State Claims Tests has generally been acknowledged by the state courts. Indeed, their first purpose has been basically accomplished. It is widely accepted that fees may be awarded where

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Would the court hear such a challenge? Could it do so without revisiting *Garcia*? *See generally* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979). How often will a state have fees imposed against it where, regardless of the State Claims Tests, a strong case cannot be made that such imposition does in fact further Congress' purpose? Could a state, by means of a legislative bar, immunize itself from liability, notwithstanding Hutto v. Finney, 439 U.S. 1122 (1978).

297. Leubsdorf, *supra* note 294, at 613.

the plaintiff prevails on state law in state court.

The State Claims Tests have been conspicuously less successful in establishing a framework for such awards. *Morales* and *Hagans/Gibbs* effectively have been rejected because they are incompatible with the structure of civil rights lawsuits in state court. The state courts, while embracing the State Claims Tests as authority for awards, have been forced to develop convoluted analyses to accommodate the fundamental illogic of the tests in the state court fee context. This undermines the federal fee-shifting scheme.

Fees should be awarded to state plaintiffs who further civil rights by prevailing under state laws. Such fees are "necessary and proper" to advance the congressional purpose of protecting civil rights as long as they satisfy the already extant prevailing party test. This test has been clarified by the Supreme Court in several decisions since the passage of the Fees Act. Although these decisions may severely circumscribe the scope of fee awards, they are completely consistent with the application of the prevailing party test as the only prerequisite for fees for civil rights claimants in state court. The State Claims Tests have served their purpose, insofar as they had a valid purpose, and they should be jettisoned. As state courts and state law are increasingly relied upon by civil rights claimants, impediments to the fully effective operation of the private attorney general model, such as the State Claims Tests, should be eradicated.

Attorneys' fees in civil rights litigation are not a windfall. In fact, they rarely compensate claimants and their attorneys for the real costs of such cases. Much civil rights litigation would be unthinkable without these "pennies from heaven," however, and they should fall as freely on state court claimants as they do on their federal court counterparts.