"Drive-By Jurisdictional Rulings": The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims

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Federal statute 42 U.S.C. § 1983 is the bulwark statute of civil rights litigation. Originally enacted as part of the Civil Rights Act of 1871 to enforce the Thirteenth, Fourteenth and Fifteenth Amendments against southern states either unwilling or unable to protect their citizens against violence committed by the Ku Klux Klan, the statute provides a cause of action to individuals who are deprived of their civil rights by one acting "under color of" state law. Section 1983 provides a cause of action not only for violations of constitutional rights, but for violations of federal statutory rights as well. However, federal courts have constructed a maze of legal doctrine designed to limit the availability of § 1983 for vindicating violations of federal statutory rights. Under one of these restrictions, an otherwise valid § 1983 claim will be precluded where the federal statute on which the claim is grounded contains a "comprehensive remedial scheme." This Note examines the procedural nature of this doctrine, referred to here as comprehensive remedial scheme ("CRS") preclusion. This Note asks whether CRS preclusion should be treated as a facet of subject matter jurisdiction, as an affirmative defense or as an element of a plaintiff's claim. This determination may greatly affect the availability of § 1983 to plaintiffs seeking to vindicate their federal statutory rights. Relying on a series of normative and formal arguments based in the case law, history and policy behind CRS preclusion, this Note argues that CRS preclusion should be treated as an affirmative defense.

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I. INTRODUCTION

Federal statute 42 U.S.C. § 1983 provides a private right of action in federal court to individuals who have suffered a violation of a right secured under the Constitution or federal law by a party acting "under color of" state law.[1] On its face, § 1983 applies to "*every* person" who subjects "*any* citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws."[2] Section 1983 confers no rights of its own but merely provides a cause of action for rights secured via the Constitution or federal law.[3] Additionally, a plaintiff must provide independent grounds for federal jurisdiction, most often under 28 U.S.C. § 1331 or 28 U.S.C. § 1343.[4]

While § 1983's language implies no limitation on its application under the circumstances it sets forth, a number of judicially-inferred restrictions have developed since the Supreme Court gave life to the statute in its seminal decision in *Monroe v. Pape*.[5] One of these limitations, introduced in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, provides that an otherwise valid § 1983 claim may be precluded when the rights-providing federal statute on which the claim is based sets

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1. 42 U.S.C. § 1983 (2006); Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Serv. of City of New York, 436 U.S. 658 (1978) ("The question with which we now deal is the narrower one of whether Congress . . . meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. We conclude that it did so intend.") (internal citations omitted). While 42 U.S.C. § 1983 provides a remedy only for the violation of a right by an individual acting under color of *state* law, an analogous right of action for the violation of a right by an individual acting under color *federal* law was established by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. 42 U.S.C. § 1983 (emphasis added).

3. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573.2 (2d ed. 2008).

4. *See Monroe*, 365 U.S. at 169. 28 U.S.C. § 1331 (2006) provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" while 28 U.S.C. 1343(a)(3) (2006) provides jurisdiction over an action commenced

> [to] redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Id.

5. 365 U.S. 167 (1961).

forth a "comprehensive remedial scheme."[6] This doctrine — which this Note will refer to as "CRS preclusion" — is grounded in the notion that a comprehensive remedial scheme signals congressional intent to limit enforcement of the federal right to the mechanisms contained within the remedial scheme.

This Note examines the procedural nature of CRS preclusion, asking whether CRS preclusion is best treated as a matter of subject matter jurisdiction, as an affirmative defense or as an element of a plaintiff's claim. In other words, this Note recounts the procedures litigants and courts *could* use to raise and dispose of CRS preclusion, explores the procedural manner in which they actually *do* handle the issue, and finally, proposes a procedural scheme under which courts and litigants *should* treat the issue. This Note concludes that CRS preclusion is best treated as an affirmative defense.

Most courts, including the Supreme Court, have treated CRS preclusion as pertaining to whether or not a plaintiff has stated a cause of action. But none have explicitly identified the procedural device — and the framework of rules — that should apply to the issue. The courts must resolve this question for several reasons. First, as discussed in Part III below, the procedural rules that apply to each device may expand or contract the availability of § 1983 remedies to litigants. Second, establishing uniformity in this area would enhance the efficiency of litigation in highly burdened federal courts. District courts continue to erroneously dismiss § 1983 and *Bivens* actions[7] for lack of subject matter jurisdiction based on CRS preclusion; assigning CRS preclusion a specific procedural label would provide definitive guidance to district courts and ensure that all litigants may prepare for and re-

6. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."); *see also* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005); Blessing v. Freestone, 520 U.S. 329, 334 (1997).

Implied preclusion by a statutory comprehensive remedial scheme applies to *Bivens* actions as well. *See* Kwai Fun Wong v. United States, 373 F.3d 952, 961 (9th Cir. 2004). Additionally, "comprehensive remedial scheme" preclusion has, in *Sea Clammers* and in subsequent cases, been applied to preclude claims based on an implied right of action and on common law. *See* Myron D. Rumeld, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183, 1186 (1982).

7. See *supra*, note 1 and accompanying text.

ceive consistent adjudication of § 1983 claims based on federal rights.

Part II describes the history and purpose of 42 U.S.C. § 1983 and the doctrine of CRS preclusion. This material — in particular, the policies behind § 1983 and CRS preclusion— provides context and guidance to the process of answering the more technical question of how CRS preclusion should be treated procedurally. Part III of this Note sets forth the nature of the problem. It explains why the procedural nature of the issue is important to litigants and courts. Part IV lays out the relevant rules and theory behind subject matter jurisdiction, affirmative defenses and elements of a claim, which are central to this Note's argument that courts have incorrectly regarded CRS preclusion as within the rubric of subject matter jurisdiction and that the issue is most appropriately viewed as an affirmative defense.

Finally, Part V examines the current, unsettled state of this issue in courts and proposes that CRS preclusion should be treated as an affirmative defense, based on a combination of normative and formal arguments. Part V begins by providing examples of how federal courts explicitly or implicitly treat CRS preclusion as falling into one or another of the aforementioned categories. The formal arguments in Part V then examine the rules of each procedural device side-by-side with the procedure and theory under which courts have actually resolved questions of CRS preclusion, as well as the way in which courts have assigned other legal issues to specific procedural categories. These arguments seek to identify the theoretical framework that best comports with actual adjudication of the issue by courts of the highest authority. Part V's normative arguments focus on the policies and history behind § 1983, CRS preclusion and each of the possible procedural categories, keeping in mind the overarching importance of protecting and vindicating litigants' federal rights.

II. SECTION 1983 AND PRECLUSION

This Part summarizes the purpose and operation of 42 U.S.C. § 1983 and the jurisprudence underlying comprehensive remedial scheme preclusion. First, it outlines the basis for recovery under § 1983 and the nature and elements of a § 1983 claim based on a deprivation of a federal statutory right. It then describes the

function and origin of the comprehensive remedial scheme doctrine.

A. SECTION 1983: PURPOSE AND SCHEME

Title 42 U.S.C. § 1983 is "the bulwark statute for federal civil rights litigation."[8] The statute's very existence represents longstanding congressional recognition that a federal right is of little practical value without a corresponding remedy for violation of that right. Originally enacted as Section 1 of the Civil Rights Act of 1871, the measure was intended to enforce the Thirteenth, Fourteenth and Fifteenth Amendments, which were being widely flouted by southern states either unwilling or unable to protect the civil rights of their citizens during a wave of violence by the Ku Klux Klan against African-Americans and Union organizers.[9] As Ninth Circuit Judge Marsha Berzon has noted, "[t]hat unenforceable rights would be ignored was precisely the concern that gave rise to Section 1983 in the first place."[10] Additionally, besides providing plaintiffs an opportunity to recover for violations of their civil rights, § 1983 represents a potent deterrent against abuse of power by the States.[11] The fairly recent movement within the federal courts to recognize rights but deny remedies for those rights — a movement of which CRS preclusion is part and parcel — therefore undermines the historical purposes of § 1983 to deter civil rights abuses and to give practical effect to paper rights via judicial remedy.[12]

Section 1983 establishes a federal cause of action for violations of rights created under the Constitution or federal law committed by any person who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . ."[13] While a § 1983 claim contains only two

8. Marsha Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 527 (2004).

9. Ngiraingas v. Sanchez, 495 U.S. 182, 187 (1990).

10. Berzon, *supra* note 8, at 535.

11. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." (citing Carey v. Piphus, 435 U.S. 247, 254–57 (1978)).

12. For a more detailed analysis of the "uncoupling" of federal rights, see Berzon, *supra* note 8.

13. 42 U.S.C. § 1983 (2006). Section 1983's historical precursor was section 1 of the Ku Klux Klan Act of 1871, which was enacted to enforce the Fourteenth Amendment. In

essential elements — a deprivation of a federal right and a defendant who has acted "under color of" state law — the statute's practical application is governed by a complex web of rules.[14] A basic outline of these will serve for the purposes of this Note.[15]

Remedy under § 1983 is available only against defendants who have acted "under color of state law."[16] This encompasses not only individuals acting according to official state authority but also those who act in excess or abuse of that authority,[17] as well as private individuals who have "obtained significant aid from state officials," or whose "conduct is otherwise chargeable to the State."[18] All forms of remedy are generally available under

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1874, Congress codified section 1 of the Ku Klux Klan Act as a new section identical to § 1983, expanding the law to allow recovery for violations of federal rights and well as constitutional rights. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972). An analogous right of action for rights violations by one who acts under color of *federal* law was established by the Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

14. WRIGHT, MILLER & COOPER, *supra* note 3, § 3573.2.

15. *Id.*

16. 42 U.S.C. § 1983 (2006). Courts have struggled to identify what actions, under what circumstances, may be considered "under color of state law," but the commonly invoked modern test is a two-pronged "fair attribution" analysis whereby first, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and second, the "party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). The test has been called the "fair attribution" test, *see, e.g.*, Marguerite L. Butler, *Rule 11-Sanctions and a Lawyers's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, n.193 (2001), based on the *Lugar* court's statement that "[o]ur cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." *Lugar*, 457 U.S. at 937. A number of tests may be applied to ascertain who is a "state actor," *id.*, but the phrase in a § 1983 context generally implies "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)), *overruled on other grounds by* Monell v. Dep't of Soc. Serv. of City of New York, 436 U.S. 658 (1978).

17. *See* Hafer v. Melo, 502 U.S. 21, 28 (1991) (noting that § 1983 was enacted "to enforce provisions of the Fourteenth Amendment against those who carry a badge of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it").

18. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). While § 1983 only applies to "persons," it is established that municipalities and other local government bodies may be sued under the statute where they are responsible for violating a right through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or through "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell v. Dep't of Soc. Serv. of City of N.Y., 436 U.S. 658, 690–91 (1978). State officials sued in their personal capacities are "persons" under § 1983, *Hafer v. Melo*, 502

§ 1983,[19] with some exceptions, particularly for certain classes of defendants.[20] While § 1983 does not itself provide litigants with a right to a jury trial,[21] a § 1983 suit for legal relief is an action at law under the Seventh Amendment, thus guaranteeing litigants a right to a jury trial.[22] A number of defenses are available to § 1983 actions, including absolute and qualified immunity for certain government officials,[23] issue and claim preclusion,[24] and statutory requirements such as the Prison Litigation Reform Act's exhaustion requirement.[25]

Section 1983 provides only a cause of action; the substantive right to be enforced must be identified separately in the Constitution or federal law.[26] The language of § 1983 is broad, establishing no limitations to its availability for deprivations of federal rights;[27] the Supreme Court's decision in *Maine v. Thiboutot* acknowledged this breadth.[28] The liberal interpretation of § 1983 in *Thiboutot* is consistent with the Supreme Court's historical willingness to assume broad authority in the judiciary to ensure that

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U.S. 21, 26 (1991), while neither a state nor its officers sued in their official capacity are considered a "person" for the purposes of § 1983. Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989).

19. 42 U.S.C. § 1983 (2006) (stating that those who violate constitutional or federal rights of another "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"); *see* Smith v. Wade, 461 U.S. 30, 35–36 (1983) (punitive damages are available in § 1983 actions); Carey v. Piphus, 435 U.S. 247, 255–56 (1978) (holding that compensation principle applies to award of damages under § 1983 such that plaintiff is entitled to all damages that are required to compensate for their injury); Bell v. Hood, 327 U.S. 678, 684 (1946) (holding that "it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done").

20. *See, e.g.*, Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that municipalities are immune from punitive damages awards under § 1983).

21. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 707 (1999).

22. *Id.* at 709.

23. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 638 (1987) (holding that qualified immunity generally available to government officials performing discretionary functions); Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (holding judges absolutely immune for actions taken within their judicial jurisdiction).

24. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84 (1984).

25. Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e(a) (2006); Nelson v. Campbell, 541 U.S. 637, 650 (2004).

26. WRIGHT, MILLER & COOPER, *supra* note 3, § 3573.2.

27. 42 U.S.C. § 1983 (2006).

28. 448 U.S. 1, 4 (1980) (noting that the plain meaning of the phrase "and laws" and the Court's jurisprudence supported its holding "that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law").

violations of federally protected rights are fully remedied.[29] Soon after *Thiboutot*, however, § 1983's availability for that purpose began to be restricted. In *Sea Clammers*, decided a year later, the Court held that § 1983 would only be available for statutes that created enforceable rights, and that a comprehensive remedial scheme within the statute would demonstrate congressional intent to foreclose the availability of § 1983 action.[30] Restrictions have also developed regarding whether the federal statute in question provides individual rights to its beneficiaries,[31] which might then be enforceable under § 1983.

Even where a plaintiff is able to articulate an enforceable right under a federal statute, a claim may be limited or destroyed by a host of restrictions, including those arising from the definition of "under color of,"[32] by state and individual immunity[33] and by express or implied preclusion by Congress.[34] One indication of implied preclusion, examined in this Note, is the existence of a comprehensive remedial scheme.[35]

B. IMPLIED PRECLUSION OF SECTION 1983 CLAIMS BY A FEDERALLY-CREATED COMPREHENSIVE REMEDIAL SCHEME

Implied preclusion by a federally-created comprehensive remedial schemes applies not only to § 1983 actions, but to implied rights of action, federal common law claims, and *Bivens* actions.[36] In these cases, where the remedies available under the federal

29. Bell v. Hood, 327 U.S. 678 (1946) (noting that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done").

30. Middlesex County Sewerage Auth. v. Nat'l. Sea Clammers Ass'n, 453 U.S. 1, 19–20 (1981).

31. *See* Gonzaga v. Doe, 536 U.S. 273, 283 (2002) (noting that "[o]ur more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes" and holding that nothing short of "an unambiguously conferred right" may support a cause of action under § 1983).

32. A few of the key cases in this area include, *Lugar v. Edmunson Oil. Co.*, 457 U.S. 922 (1982), *Monroe v. Pape*, 365 U.S. 167 (1961), and *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

33. U.S. CONST. amend. XI; Will v. Mich. Dep't. of State Police, 491 U.S. 58 (1989); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

34. *See, e.g.*, Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

35. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005); Blessing v. Freestone, 520 U.S. 329, 346 (1997).

36. Rumeld, *supra* note 6, at 1186.

statute are "sufficiently comprehensive," it is inferred that Congress intended to preclude alternate or additional remedy via § 1983.[37] Implied preclusion by a comprehensive remedial scheme may be found even where the plaintiff has demonstrated that the federal statute in question confers an individually enforceable right under the *Blessing/Gonzaga* analysis.[38] This is because such a showing establishes "only a rebuttable presumption that the right is enforceable under section 1983";[39] this preclusion may be defeated if Congress did not intend a § 1983 remedy for that right.[40] Ascertaining congressional intent is explicitly the goal of CRS preclusion. The analysis is one of statutory interpretation:

> "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.[41]

In *Sea Clammers*, as in other cases,[42] the Court struggled to honor congressional intent while reconciling preclusion of § 1983 actions by the relevant statute's remedial scheme with the statute's savings clause. In *Sea Clammers*, the statute in question was the Federal Water Pollution Control Act ("FWPCA"), which included a savings clause stating that the statute's remedial scheme would not "restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ."[43] It is hard to imagine how this clause could be worded any more broadly, yet the Court interpreted it narrowly, so as to ex-

37. *Sea Clammers*, 453 U.S. at 20.
38. *Abrams*, 544 U.S. at 119–20.
39. *Blessing*, 520 U.S. at 341.
40. *Abrams*, 544 U.S. at 119–20.
41. *Sea Clammers*, 453 U.S. at 14–15 (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)) (citation omitted).
42. Sprint Telephony PCS, L.P. v. County of San Diego, 311 F. Supp. 2d 898, 915 (S.D. Cal. 2004) (stating that the existence of a savings clause makes it difficult for a court to find that Congress intended to preclude § 1983 as a remedy, particularly when the clause is "broad and sweeping" in its language).
43. 33 U.S.C. § 1365(e) (2006).

clude remedies based on rights found within the statute itself.[44] The Court cited the Senate Report on the FWPCA Amendments of 1972, which Report noted that the savings clause of the FWPCA would "preserve any rights or remedies under any other law."[45] The Court, in quoting from the report, italicized the word "other" and concluded that this conveyed Congress's intention to preserve only rights and remedies found outside of the Act.[46] While it is not unusual for courts to refer to congressional reports in order to interpret the meaning of a statute,[47] it seems unnecessary in this case, if not disingenuous, to rely on an ambiguous comment in a Senate report in such a way as to contradict the statute's plain language.[48]

The FWPCA,[49] the Education of the Handicapped Act,[50] the Americans with Disabilities Act, the Rehabilitation Act,[51] and the Telecommunications Act,[52] are a few of the statutes that courts have found to contain remedial schemes sufficiently comprehensive to preclude § 1983 as a cause of action. It appears settled for now that while the plaintiff bears the burden of showing that a statute contains enforceable rights, a defendant bears the burden of demonstrating that Congress intended to foreclose a § 1983 cause of action, whether expressly or impliedly, by the existence of a comprehensive remedial scheme.[53]

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44. *Sea Clammers*, 453 U.S. at 15–16.

45. S. Rep. No. 92-414, at 81 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

46. *Sea Clammers*, 453 U.S. at 16 n.26.

47. *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 59 n.104 (1995).

48. It is not that the Court's reasoning is without merit: it would be odd for Congress to place restrictions (such as 33 U.S.C. § 1365(b)'s 60-day notice requirement) on the ability of citizens to enforce their rights under the statute only to permit them, through the savings clause, to sidestep those restrictions by suing under § 1983. Rather, given the general rule that, when possible, a statute ought to be accorded its plain meaning, *see, e.g.*, Barber v. Gonzales, 347 U.S. 637, 641 (1954), it would seem appropriate to follow that plain meaning in this case and allow Congress to make clarifications as it sees fit.

It has been observed that the comprehensiveness test itself represents a different mode of statutory interpretation; rather than referring to a broad range of legislative materials to determine legislative intent, the court focuses on the facial structure of the statute, deemphasizing congressional intent. Rumeld, *supra* note 6, at 1189 (citing John Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333 (1976)).

49. *Sea Clammers*, 453 U.S. at 20.

50. Smith v. Robinson, 468 U.S. 992, 1009 (1984).

51. Grey v. Wilburn, 270 F.3d 607, 611 (8th Cir. 2001).

52. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 127 (2005).

53. *Id.* at 120; Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423 (1987).

So, what does a remedial scheme sufficiently comprehensive to preclude a § 1983 cause of action look like? In *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Court held that the Housing Act did not foreclose resort to § 1983, noting that "[i]n both *Sea Clammers* and *Smith v. Robinson*, the statutes at issue themselves provided for private judicial remedies," whereas "[t]here is nothing of that kind found in the Brooke Amendment or elsewhere in the Housing Act."[54] The Court added that the availability of state administrative remedies or state-court remedies generally do not amount to a comprehensive remedial scheme.[55] Finally, the generalized power of the Department of Housing and Urban Development ("HUD") to enforce the Housing Act, without any formal procedure for bringing legal or regulatory violations to HUD's attention, was not sufficient to foreclose the availability of § 1983.[56]

In its most recent treatment of the matter, in *City of Rancho Palos Verdes, California v. Abrams*, the Court clarified that "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under section 1983" and those where it was held that Congress did not intend the broader remedy of § 1983 to be available.[57] The Court emphasized, however, that the existence of a private remedy did not conclusively establish congressional intent to preclude § 1983 claims; "the ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983."[58]

54. *Wright*, 479 U.S. at 427.

55. *Id.* at 427–29 (stating that state-court remedies do not preclude § 1983 actions because the latter is intended to provide federal remedy for federal rights).

56. *Id.*

57. *Abrams*, 544 U.S. at 121 (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)). It also emphasized this point by phrasing it negatively, noting that "in *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue . . . *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated." *Abrams*, 544 U.S. at 122.

58. *Abrams*, 544 U.S. at 122.

III. WHY THE PROCEDURAL NATURE OF CRS PRECLUSION MATTERS

This Part explains why the procedural identity of the doctrine is important to litigants. Section A introduces CRS preclusion in the context of the increasing number of restrictions on § 1983 actions. Section B explains the impact that CRS preclusion can have on plaintiffs seeking recovery under § 1983. Section C describes how an issue's procedural identity has practical effects on litigants. Section D concludes with a brief explanation of the approach by which the question of an issue's procedural nature ought to be resolved.

A. COMPREHENSIVE REMEDIAL SCHEME PRECLUSION IN LIGHT OF THE SUPREME COURT'S INCREASINGLY RESTRICTIVE APPROACH TO CIVIL RIGHTS CLAIMS

Comprehensive remedial scheme preclusion is one of many obstacles federal courts have created that limit the remedies available to litigants alleging violations of their constitutional or federal statutory rights.[59] The Supreme Court's convergent and increasingly restrictive approaches to implied rights of action and § 1983 claims typify federal courts' hostility towards claims based on rights originating in federal law generally. In implied right of action cases, a defendant asks a court to infer a right of action from a statute that does not explicitly provide one.[60] The Court's

59. *See* Marsha Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004) ("[F]ederal courts, particularly the Supreme Court, have tended to be reluctant not just to accord broad structural remedies, but to accord any remedies at all in many instances, even when federal constitutional and statutory rights have been violated."); *see also* Gonzaga v. Doe, 536 U.S. 273, 283 (2002) (noting that "[o]ur more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes" and holding that nothing short of "an unambiguously conferred right" may support a cause of action under § 1983); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (holding that in implied right of action cases, a Congressional statute "must display[ ] an intent to create not just a private right but also a private remedy"); Steven H. Steinglass, Section 1983 Litigation in State Courts § 12:2, *available at* WESTLAW, S1983LITIG § 12:2 (noting that the use of special pleading requirements in § 1983 cases has become widespread, particularly where absolute or qualified immunity may be available to the defendant, despite the liberal pleading requirements of Rule 8 of the Federal Rules of Civil Procedure).

60. Cort v. Ash, 422 U.S. 66, 78 (1975), *abrogated on other grounds by* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), *and* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

approach to such cases has shifted from presuming that a cause of action exists[61] to requiring that litigants show Congress manifested "an intent 'to create not just a private *right* but also a private *remedy*'" for that right.[62] Meanwhile, in appraising § 1983 claims, the Court has gone from presuming a right of action unless Congress has affirmatively foreclosed one[63] to requiring an affirmative showing that Congress has intentionally conferred a right upon the specific class of beneficiaries of which the plaintiff is a member.[64] The Court made explicit its convergent approach to implied rights of action and § 1983 cases in *Gonzaga v. Doe*, where the Court emphasized that "[a] court's role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context," in that "both . . . require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries."[65]

The processes by which courts appraise implied rights of action and § 1983 claims remain distinct in at least one respect. An ordinary plaintiff asking a court to recognize an implied right of action must demonstrate Congress's intent to provide both a private right and a private *remedy*; a § 1983 claimant who establishes that a statute confers a right upon a class of beneficiaries creates a "rebuttable presumption that the right is enforceable under § 1983."[66] However, a "defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right."[67] One way defendants can do this is to

61. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (holding that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" in finding an implied right of action to enforce the Securities Exchange Act of 1934).

62. *Gonzaga*, 536 U.S. at 284 (quoting *Sandoval*, 532 U.S. at 286) (emphasis added by *Gonzaga*).

63. *See* Wright v. City of Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423–24 (1987) (holding that § 1983 provides a cause of action to enforce a federal statutory right unless Congress expressly foreclosed such remedy and, quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984), for the proposition that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy")

64. *Gonzaga*, 536 U.S. at 283.

65. *Id.* at 285.

66. City of Rancho Palos Verdes v. Adams, 544 U.S. 113, 120 (2005) (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)).

67. *Id.* (citing *Blessing*, 520 U.S. at 341 and Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

show that a comprehensive remedial scheme — or, synonymously, a "comprehensive enforcement scheme" — is included in the statute conferring the right in question.[68] Upon such a showing, the only remedies available to a plaintiff are those offered by the statutory remedial scheme.[69]

B. THE IMPACT OF CRS PRECLUSION ON LITIGANTS

In discussing CRS preclusion, scholar Cass Sunstein noted that "[w]hether a private right of action is available for statutory violations under § 1983 is a question of enormous practical significance."[70] How severe the impact of the unavailability of a § 1983 claim due to CRS preclusion will depend, of course, on the specific nature of the alternative statutory remedy. The defining characteristic of a comprehensive remedial scheme that precludes § 1983 claims is that it provides for more restrictive relief than that available under § 1983.[71] In *City of Rancho Palos Verdes v. Abrams*, for instance, the Court noted that in contrast to the statutory scheme in question, which it held to preclude § 1983 claims, a "section 1983 action . . . can be brought much later than 30 days after the final action, and need not be heard and decided on an expedited basis. And the successful plaintiff may recover not only damages but reasonable attorney's fees and costs under 42 U.S.C. § 1988."[72] Additionally, with several notable exceptions,[73] a full menu of remedies is generally available to plaintiffs

68. *Blessing*, 520 U.S. at 341. Courts have used the phrases "comprehensive enforcement scheme" and "comprehensive remedial scheme" interchangeably. *Compare* Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987) ("In *Sea Clammers*, an intent to foreclose resort to § 1983 was found in the comprehensive remedial scheme provided by Congress . . . .") *with* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 521 (1990) ("In *Sea Clammers*, . . . we held that the comprehensive enforcement scheme found in the Federal Water Pollution Control Act . . . evidenced a congressional intent to foreclose reliance on § 1983.").

69. Rumeld, *supra* note 6, at 1186.

70. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396 (1982).

71. *See* City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 121 (2005) (holding that "existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not").

72. *Id.* at 123 (citing Maine v. Thiboutot, 448 U.S. 1, 9 (1980)) (footnote omitted).

73. *See, e.g.*, 42 U.S.C. § 1983 (2006) (stating "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief

under § 1983, including compensatory and punitive damages, and injunctive or declaratory relief.[74]

Another aspect of § 1983 favorable to plaintiffs is that the Civil Rights Attorney's Fees Awards Act of 1976 allows for the recovery of attorney's fees to the prevailing plaintiff in a § 1983 action.[75] This advantage cannot be overemphasized. The possibility of attorney's fees makes § 1983 not only an attractive option in relation to other sources of relief for violations of constitutional or federal law,[76] but also one that supports low-income individuals in obtaining adequate legal representation against much better-funded defendants.[77] This aspect of § 1983 reflects the statute's pedigree as an essential source of protection for the most vulnerable members of our society. As discussed in Part II.A., *supra*, § 1983 originated in the Civil Rights Act of 1871, which was passed to enforce the provisions of the Fourteenth Amendment in the Reconstruction-era South.[78]

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was unavailable"); 42 U.S.C. § 1997e (2006) (a prisoner's civil rights lawsuit may be delayed up to 180 days to require the prisoner to exhaust administrative remedies); Heck v. Humphrey, 512 U.S. 477 (1994) (plaintiff must prove that a conviction or sentence has been reversed prior to recovering damages for unconstitutional conviction or imprisonment); City of Newport v. Fact Concerts, 453 U.S. 247, 271 (1981) (punitive damages not available against a municipality); Younger v. Harris, 401 U.S. 37 (1971) (a federal plaintiff is barred from seeking declaratory or injunctive relief relating to ongoing state criminal judicial proceedings).

74. *See* 42 U.S.C. § 1983 (2006) (stating that those who violate constitutional or federal rights of another "shall be liable to the party injured in an action at law, [s]uit in equity, or other proper proceeding for redress"); Smith v. Wade, 461 U.S. 30, 35–36 (1983) (punitive damages are available in § 1983 actions); Carey v. Piphus, 435 U.S. 247, 255–56 (1978) (holding that compensation principle applies to award of damages under § 1983 such that plaintiff is entitled to all damages that are required to compensate for their injury); Bell v. Hood, 327 U.S. 678, 684 (1946) (holding that "it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done").

75. 42 U.S.C. § 1988 (2006).

76. *See, e.g.*, Martin A. Schwartz , *Section 1983 Cases in the October 2004 Term*, 21 TOURO L. REV. 763, 769 (2006) (noting that prisoners prefer § 1983 actions over *habeas corpus* actions partially because attorney's fees are available for successful § 1983 claims).

77. *See, e.g.*, Riddle v. Egensperger, 266 F.3d 542, 547 (6th Cir. 2001) (citing Roane v. City of Mansfield, No. 98-4560, 2000 WL 1276745, at 1 (6th Cir. Aug. 28, 2000)); Jane Rutherford, *Community Accountability for the Effect of Child Abuse on Juvenile Delinquency in the Brave New World of Behavioral Genetics*, 56 DEPAUL L. REV. 949, 986 (2007).

78. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 934 (1982); *see also infra* Part III.A.

Finally, the statute of limitations under a § 1983 action does not come from the underlying right-creating federal statute. Rather, the applicable state-law period for personal injury torts supplies the statute of limitations; or where the underlying federal statute was passed after 1990, 28 U.S.C. § 1658 provides a default statute of limitations of four years.[79] Thus, preclusion of a cause of action under § 1983 can significantly restrict the time a litigant has to seek remedy for a violation of their federal rights. For instance, the Telecommunications Act, which was found to contain a comprehensive enforcement scheme that precluded enforcement via § 1983, requires that actions be filed within thirty days of the "action or failure to act" on which the claim is based, a far more restrictive time period than the four years offered by § 1983.[80]

C. THE RELEVANCE OF CRS PRECLUSION'S PROCEDURAL "IDENTITY"

Clearly, there is much at stake in determining whether a § 1983 claim is available. Consequently, the procedural umbrella for CRS preclusion affects litigants considerably where it influences the availability of a § 1983 claim. The case law is muddled as to whether CRS preclusion is an affirmative defense, a jurisdictional requirement, or an element of the plaintiff's claim.[81] This determination must therefore be guided by the policy and principles behind § 1983, Congressional intent, comparison to other procedural devices and the practical consequences of placing CRS preclusion into any particular procedural category.

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79. 28 U.S.C. § 1658 (2006) ("[A] civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 124 n.5, 125 (2005).

80. 47 U.S.C. § 322(c)(7)(B)(v) (2006); *Abrams*, 544 U.S. at 124 n.5, 125 (2005). On the other hand, claims brought under the Clean Water Act, which contains a comprehensive remedial scheme precluding § 1983 claims, *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20–21 (1981), but no statute of limitations, have a five-year statute of limitations under 28 U.S.C. § 2462 (2006). *See also* Sierra Club v. Chevron, USA, Inc., 834 F.2d 1517, 1521–22 (9th Cir. 1987) (holding that the five-year statute of limitations of 28 U.S.C. § 2462 applies to citizen enforcement suits under the CWA).

81. *See infra* Part V.A.

Each procedural category is distinguished by its own set of rules. These rules govern when and by whom issues falling into that category must be raised, consequences of failing to raise the issue, availability and the standard of review applied on appeal, and the effect of dismissal on grounds relating to that issue.[82] Rules dictating when issues falling into each category must be raised during litigation, and allocating the burden of pleading and proof have a particularly acute affect on litigants. For instance, the issue of subject matter jurisdiction is a threshold issue that may be raised by any party at any time, including upon review.[83] A court is required to raise and consider the issue *sua sponte* if it is in doubt,[84] and "because it involves the court's power to hear a case, [subject matter jurisdiction] can never be forfeited or waived."[85] Additionally, the burden is on the plaintiff to allege a court's subject matter jurisdiction in her complaint and, if challenged, to prove the existence of jurisdiction.[86] In contrast, an affirmative defense, with some exceptions, must generally be raised by the defendant in a responsive pleading or else it is waived.[87] If CRS preclusion is considered an affirmative defense, the burden would be on the defendant to plead its presence rather than on the plaintiff to plead its absence[88] and the defendant would also bear the burden of *proof* on the issue.[89] Finally, as

82. While these characteristics are detailed in Part IV, it will be instructive to set out here some examples of the way litigants might be affected were CRS preclusion to fall into each of the aforementioned procedural categories.

83. FED. R. CIV. P. 12(h)(3); Arbaugh v. Y&H Corp., 546 U.S. 500, 506–07 (2006).

84. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977).

85. United States v. Cotton, 535 U.S. 625, 630 (2002).

86. *See* Thomson v. Gaskill, 315 U.S. 442, 446 (1942) ("[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof."); McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936) ("It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case.").

87. FED. R. CIV. P. 8(c) (stating that a party "in responding to a pleading, must affirmatively state any avoidance or affirmative defense"). For exceptions to this rule, see discussion *infra* note 146.

88. FED. R. CIV. P. 8(b)–(d); Tregenza v. Great Am. Commc'n Co., 12 F.3d 717, 718 (7th Cir. 1993) ("[A] plaintiff is not required to negate an affirmative defense in his complaint.").

89. *See, e.g.*, Tovar v. U.S. Postal Serv., 3 F.3d 1271, 1284 (9th Cir. 1993) (stating that "[i]n every civil case, the defendant bears the burden of proof as to each element of an affirmative defense").

with subject-matter jurisdiction, elements of a plaintiff's claim must be plead and proven by the plaintiff.[90]

If one examines the burden and waiver rules of each of the procedural categories, it is obvious how litigants would be affected by placing CRS preclusion in one category rather than another. If CRS preclusion implicates subject matter jurisdiction, it cannot be waived. Even if the government fails to raise the issue, a court must do so if there is any possibility that a comprehensive remedial scheme is set out in the relevant statute.[91] The burden to prove the absence of a comprehensive remedial scheme would rest with the plaintiff, who, in bringing a claim, is required to state the grounds upon which the subject matter jurisdiction of a court rests.[92] Where a plaintiff made such an assertion, a defendant's failure to challenge it would not be deemed a concession of the court's jurisdiction,[93] as the court is required to confirm on its own that a case falls within its subject matter jurisdiction.[94]

Laird v. Ramirez, a case from the Northern District of Iowa, offers a tangible example of how the procedural treatment of CRS preclusion affects litigants.[95] The plaintiff in that case filed a class action lawsuit pursuant to § 1983 after being denied disability benefits for depression and back spasms by the Director of the

90. *See infra* Part IV.C. If the plaintiff fails to adequately plead an element of a claim, the claim may be challenged via a motion for failure to state a claim upon which relief can be granted. A "failure to state a claim" defense challenges the "availability of a legal formula justifying relief on the alleged facts . . . ." GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 5.01(1) (3d ed. 2002). In other words, it asserts that the plaintiff has not stated a valid cause of action. Plaintiffs can raise this defense in a number of ways and at various stages in the course of litigation, including in any pleading, by motion or at trial on the merits. Alternatively, a defendant may challenge a plaintiff's ability to meet its burden of proof on an element through a negative defense attacking the merits of a claim. A negative defense attempts to negate an element of the plaintiff's claim and, like any defense on the merits, must be raised at the district court level in order to preserve the issue for appeal.

91. United States v. Cotton, 535 U.S. 625, 630 (2002) (holding that subject matter jurisdiction cannot be waived); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (holding that court must raise issue implicating subject matter jurisdiction *sua sponte* if relevant).

92. *See* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936) ("It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case."); Thomson v. Gaskill, 315 U.S. 442, 446 (1942) ("[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof.").

93. *Cotton*, 535 U.S. at 630.

94. *Mt. Healthy*, 429 U.S. at 278.

95. 884 F. Supp. 1265 (N.D. Iowa 1995).

Iowa Department of Education, who made initial determinations as to whether disability claimants were "disabled" under the Social Security Act.[96] The plaintiff, represented by the Legal Services Corporation of Iowa, whose mission is to provide legal assistance to low-income Americans,[97] sought injunctive and declaratory relief to require the defendant to "properly incorporate federal regulations, judicial decisions and standards in the evaluation of disability cases."[98] The court treated the defendant's motion to dismiss for lack of subject matter jurisdiction as turning, *inter alia*, on the question of whether the Social Security Act contained a comprehensive remedial scheme precluding a cause of action under § 1983.[99] The court noted the dramatic difference between the rules that apply to a determination of subject matter jurisdiction and rules governing a challenge to the plaintiff's claim based on a failure to state a claim or a motion for summary judgment on the merits of the claim:

> [H]ere the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56 . . . In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.[100]

While the court eventually denied the motion to dismiss for lack of subject matter jurisdiction, it is clear that the plaintiff was significantly disadvantaged by the court's procedural treatment of the CRS preclusion issue. A low-income plaintiff or class of plaintiffs in need of the financial support provided by disability

96. *Id.* at 1268.

97. *Id.* at 1267.

98. Complaint at ¶ 25, Laird v. Ramirez, 884 F. Supp. 1265 (N.D. Iowa 1995) (No. C 95-3015).

99. *Id.* at 1274–75, 1286–87 (denying the defendant's motion to dismiss for lack of subject matter jurisdiction on the grounds that neither of the plaintiff's claims were precluded by a comprehensive remedial scheme within the SSA). The coherence and legitimacy of treating CRS preclusion within the context of subject matter jurisdiction is discussed in Part V and VI of this Note. The discussion here focuses on the extent to which treating CRS preclusion as a jurisdictional question affects the plaintiff during the course of litigation.

100. *Id.* at 1272–73.

benefits would reasonably be expected to suffer significant hardship from the delay and expense resulting from procedural machinations favoring the defendant, even if the claim survives a motion to dismiss. Each additional obstacle in a plaintiff's path to recovery under § 1983 discourages attempts to seek remedy for rights-violations and undermines the deterrent affect of such remedies.

There are additional consequences that arise from placing CRS preclusion in any one of the procedural categories,[101] but the timing, burden and waiver rules provide potent examples of why the determination is significant. For a party bringing a claim against a well-funded institutional defendant, these procedural matters can determine whether a § 1983 claim is worth pursuing. The procedural nature of CRS preclusion thus implicates the question of whether the broad relief available under § 1983 — and any accompanying deterrent effect — will continue to protect and remedy violations of federal statutory rights.

D. APPROACHES TO RESOLVING THE QUESTION OF CRS PRECLUSION'S PROCEDURAL IDENTITY

The philosophy underlying § 1983 itself should guide resolution of the CRS preclusion procedural question. Section 1983 seeks to make whole those injured by deprivations of their federal rights and to prevent abuses of power by the state.[102] Statutory § 1983 actions are "predicated on a presumptively operative and favored source of judicial authority. A consistent and principled approach to federal remedies thus calls for an application of comprehensiveness that results in preclusion only when adequate relief is otherwise available to the individual plaintiff under the statutory remedial scheme."[103] From this perspective, it is disloyal to the policy behind § 1983 to recognize statutory rights while denying full compensation for their violation.[104]

Utter devotion to a rights-focused approach would seem to preclude the CRS preclusion doctrine entirely. This Note makes the background assumption, however, that the CRS doctrine is

101. *See infra* Part IV.
102. Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978).
103. Rumeld, *supra* note 6, at 1183.
104. *Id.*

firmly entrenched. Nonetheless, a rights-focused approach can and should be applied to the procedural questions, such that the favored procedural category is the one most likely to ensure full compensation for deprivations of statutory rights by providing greatest access to § 1983 and its attendant remedies.

The aspirational policies of § 1983 are not the only values implicated by this question. For instance, courts have largely justified CRS preclusion on grounds of honoring Congressional intent.[105] There is nothing inherent in a comprehensive remedial scheme that bars the availability of a § 1983 claim; it is rather the Congressional *intent* expressed by its creation of a comprehensive remedial scheme that requires preclusion of a § 1983 cause of action.[106] Thus, the exercise is one of statutory interpretation.[107] If the purpose of CRS preclusion is to honor Congressional intent to deny access to a § 1983 cause of action, then it may plausibly be argued that treating the issue as an affirmative defense or a defense on the merits, both of which can be waived or forfeited (thus allowing a § 1983 action to go forward) would undermine this intent.[108]

Additionally, various policies and values attach to each of the procedural categories at issue. These will be addressed in Part IV, which describes each of the procedural categories and their rules. In appraising each of the categories as a possible home for CRS preclusion, it will be useful to ask to what degree their values coincide with the philosophy of § 1983 and the desire of courts to honor Congressional intent.

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105. *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119 (2005). The Court in *Abrams* noted that a defendant may defeat the presumption that a federal right is enforceable under § 1983 by demonstrating that "Congress did not intend that remedy for a newly created right . . ." and "that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme'. . . ." *Id.* (citation omitted).

106. Middlesex County. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

107. Delgado-Greo v. Trujillo, 270 F. Supp. 2d 189, 195 (D. P.R. 2003) (citing *Sea Clammers*, 453 U.S. at 13) (noting "[t]o determine whether Congress impliedly foreclosed recourse to § 1983, the Court must review legislative history and other traditional aids of statutory interpretation to determine congressional intent").

108. This same argument might be made about a statute of limitations defense, because it presumably reflects Congressional intent to bar claims after a certain amount of time has passed; it is nonetheless included in Rule 8(c) as an affirmative defense and is thus waivable. *See* FED. R. CIV. P. 8(c).

IV. THE PROCEDURAL POSSIBILITIES: SUBJECT MATTER JURISDICTION, AFFIRMATIVE DEFENSES AND ELEMENTS OF A CLAIM

Where a defendant wishes to raise — or a court to address — the issue of comprehensive remedial scheme preclusion, the procedural paradigm applied to the doctrine will dictate how and when this must be done. This Part describes three legal devices — and the procedural rules tied to them — that might plausibly accommodate comprehensive remedial scheme preclusion. The devices described are, in turn, subject matter jurisdiction, affirmative defenses and elements of a claim.

A. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction refers to the authority of a court to decide a particular case or controversy. Black's Law Dictionary defines subject matter jurisdiction as, "[j]urisdiction over the nature of the case and the relief sought; the extent to which a court can rule on the conduct of persons or status of things."[109] It is worth noting that this definition itself includes the word "jurisdiction," distinguishing subject matter jurisdiction from, or perhaps identifying it as a subset of "jurisdiction" generally. This distinction provides insight into what a court may mean when it refers to CRS preclusion as a "jurisdictional" question. The court may be referring to its own power to hear a case and grant relief. Or it might be confusing this power with the question of whether a litigant is entitled to recover on a particular claim (that is, whether the plaintiff has stated a claim upon which relief may be granted).

As the Supreme Court has noted, "[j]urisdiction . . . is a word of many, too many, meanings"[110] and "[j]udicial opinions . . . 'often obscure the issue by stating that the court is dismissing "for lack of jurisdiction" when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to

109. BLACK'S LAW DICTIONARY 870 (8th ed. 2004).

110. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

state a claim.'"[111] In such circumstances, a court has confused subject matter jurisdiction — that is, the court's actual authority to adjudicate the claim in question — either with "the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties"[112] or with the issue of whether a party can prevail on the merits of their claim.[113] "The question of whether a cause of action exists is not a question of jurisdiction";[114] a court thus errs when it describes a dismissal based on the unavailability of a cause of action as implicating the court's subject matter jurisdiction to hear the case.[115] The Supreme Court has derisively labeled these dispositions "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit."[116]

Identifying whether an issue truly pertains to *subject matter* jurisdiction is crucial, as it implicates a particular set of threshold questions on which a case might turn. Subject matter jurisdiction is the first question that every court must decide, with regard either to its own jurisdiction or to that of the court whose decision it is reviewing.[117] A party's original complaint must set forth "a short and plain statement of the grounds on which the court's jurisdiction depends."[118] A challenge to subject matter jurisdiction may be raised by any party at any time or the issue

111. Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (quoting Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000)).

112. *Steel Co.*, 523 U.S. at 90 (offering as an example of this use of "jurisdiction," 7 U.S.C. § 13a-1(d): "In any action brought under this section, the Commission may seek and the court shall have *jurisdiction* to impose . . . a civil penalty in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation") (emphasis added).

113. Adarbe v. United States, 58 Fed. Cl. 707 (Fed. Cl. 2003) (noting that the government had "made the common mistake of confusing 'the issue of [subject matter] jurisdiction with the question of whether [the plaintiffs] can prevail on the merits' of their claim" (quoting Clark v. United States, 322 F.3d 1358, 1363 (Fed. Cir. 2003)).

114. Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979).

115. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.*, 523 U.S. at 89 (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974)).

116. *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co.*, 523 U.S. at 91).

117. *See* Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884).

118. FED. R. CIV. P. 8(a).

may be raised by a court sua sponte, including upon review.[119] Where a defendant challenges subject matter jurisdiction, they may do so by motion under Rule 12(b)(1) before submitting a responsive pleading,[120] at trial,[121] or even after a verdict has been rendered or on appeal.[122] If a court determines that it lacks jurisdiction over the subject matter of the case, it must dismiss the action.[123] Where subject matter jurisdiction turns on questions of law, a de novo standard of review is applied on appeal;[124] where the matter turns on material facts, a clear error standard is applied to the review of those facts.[125]

Jurisdiction over § 1983 claims is based on its specific jurisdictional counterpart, 28 U.S.C. § 1343(3)[126] or 28 U.S.C. § 1331.[127] If CRS preclusion is a matter of subject matter jurisdiction then it must implicate the applicability of these jurisdictional grants.

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119. FED. R. CIV. P. 12(h)(3).

120. FED. R. CIV. P. 12(b)(1).

121. FED. R. CIV. P. 12(b).

122. Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 576 (2004) (citing Kontrick v. Ryan, 540 U.S. 443, 455 (2004)). It has been argued that allowing subject matter jurisdiction to be raised at any time by a litigant discourages efficiency and fairness and allows litigants to "game the system . . . either by waiting until an adverse verdict or ruling has been rendered to appeal on jurisdictional grounds, or using the threat of such a challenge to persuade the opposing party to settle." Qian A. Gao, *"Salvage Operations Are Ordinarily Preferable to the Wrecking Ball": Barring Challenges to Subject Matter Jurisdiction*, 105 COLUM. L. REV. 2369 (2005). While either party may challenge a court's subject matter jurisdiction at any time, no party may consent to subject matter jurisdiction or confer it upon the court. In other words, the rules of estoppel do not apply when a party fails to challenge or concedes subject matter jurisdiction. *See* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). If a claim is dismissed due to lack of subject matter jurisdiction, the doctrine of claim preclusion will not preclude asserting that claim again in future actions. *See* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 382 (1985). The rules of *res judicata* do apply, however, to specific decisions regarding a court's subject matter jurisdiction. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982).

123. FED. R. CIV. P. 12(h)(3).

124. *See, e.g.*, United States v. McPhee, 336 F.3d 1269 (11th Cir. 2003); Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396 (9th Cir. 1996).

125. Drevlow v. Lutheran Church, Mo., Synod, 991 F.2d 468, 470 (8th Cir. 1993).

126. 28 U.S.C. § 1343(3) states: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

127. 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

While § 1343 provides for federal court jurisdiction over civil rights claims,[128] under § 1331 Congress vested jurisdiction in the lower federal courts over any case involving a "federal question."[129] Section 1331 is therefore much broader than § 1343 and subsumes it. In establishing that a particular matter qualifies for federal question jurisdiction, a plaintiff must show that the cause of action is based on a right or immunity created by the Constitution or laws of the United States, and "the right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."[130] Note again that in determining a court's subject matter jurisdiction, the dispositive issue is not whether the cause of action exists but rather the process by which courts determine if a cause of action exists (i.e., the interpretation of federal law).

The fundamental requirement that a court have subject matter jurisdiction in order to adjudicate a case distributes federal judicial power and serves the separation of power between the branches.[131] The judicial power of federal courts is limited to that which the Constitution and Congress provide; "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[132] It has been argued, however, that slavish dedication to the rule that lack of subject matter jurisdiction may justify dismissing a suit at any time, even after judgment has been issued, discourages both fairness and efficiency.[133] Efficiency is implicated because lack of subject matter jurisdiction requires dismissal no matter how much time or resources — judi-

128. *See supra* note126.

129. *See* 28 U.S.C. § 1331 (2006). Federal subject matter jurisdiction is set out in Article III of the Constitution. U.S. CONST. art. III, § 2. The primary form of federal subject matter jurisdiction is federal question jurisdiction. The controlling decision with regard to federal question jurisdiction is *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). While Article III directly vests the Supreme Court with appellate jurisdiction and original jurisdiction over cases with particular subject matter, it provides that Congress may establish the jurisdiction of lower federal courts. U.S. CONST. art. III, § 1.

130. Gully v. First Nat'l Bank, 229 U.S. 109, 112 (1936).

131. *See* SHREVE & RAVEN-HANSEN, *supra* note 90*,* § 5.01(1).

132. *Ex parte* McCardle, 74 U.S. 506, 514 (1868).

133. Qian A. Gao, *"Salvage Operations Are Ordinarily Preferable to the Wrecking Ball": Barring Challenges to Subject Matter Jurisdiction*, 105 COLUM. L. REV. 2369, 2371 (2005).

cial or otherwise — have been expended on a case.[134] Fairness becomes an issue where a party "games the system" by waiting until after an adverse ruling to challenge subject matter jurisdiction or uses the issue to extract a settlement from an opposing party.[135]

B. AFFIRMATIVE DEFENSES

Once a court is satisfied that a case falls within its subject matter jurisdiction, substantive issues — of which affirmative defenses are one — may be addressed. Affirmative defenses must be differentiated from negative defenses or denials, which directly engage and refute elements of the plaintiff's claims.[136] The features of affirmative defenses with the most practical affect on litigation — and litigants — are their timing requirements, waivability, and the burden they place on the defendant.

An affirmative defense argues that even if all the allegations in a plaintiff's complaint were conceded, the defendant's actions do not incur liability.[137] The defendant may not merely point out a defect in the plaintiff's claim — this would be done via a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted[138] — but must argue additional facts in support of the defense.[139] The Supreme Court made this point succinctly in *Price Waterhouse v. Hopkins*, stating that "the [defendant]'s burden is most appropriately described as an affirmative defense: the plaintiff must persuade the factfinder on one point and the [defendant] employer, if it wishes to prevail, must persuade it on another."[140]

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134. *Id.*

135. *Id.*

136. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2008).

137. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (holding that qualified or "good faith" immunity is an affirmative defense that must be pleaded by defendant official).

138. *See infra* Part IV.C.

139. Boldstar Technical, LLC v. Home Depot, Inc., 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007).

140. Price Waterhouse v. Hopkins, 490 U.S. 228, 246 (1989), *superceded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Tender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305 (N.D. Cal. 1992).

The nature of CRS preclusion accords nicely with this theoretical conception of an affirmative defense; CRS preclusion concedes the plaintiff's prima facie case — that a federal statute provides a right to the plaintiff and that this right has been violated — but "avoids" the prima facie case by arguing that the Congress has limited remedy to the

One test for identifying an affirmative defense is to ask whether the evidence offered in support of the defense "tend[s] to destroy rather than avoid the cause of action as alleged by the complaint."[141] This test is based on the notion that an affirmative defense does not engage with the plaintiff's prima facie case, but rather raises new matter beyond the plaintiff's claim and in this way "avoids" it.[142]

In contrast with subject matter jurisdiction, the burden of pleading an affirmative defense and proving its elements lies with the defendant.[143] Federal Rule of Civil Procedure 8(c) sets out a list of affirmative defenses that must be raised in a responsive pleading,[144] although courts have established a variety of other affirmative defenses.[145] As a general rule, if a defendant fails to raise an affirmative defense at the proper time, it is waived.[146]

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mechanisms contained within the statute's comprehensive remedial scheme. Or, put in terms used by the Supreme Court in *Price Waterhouse*, 490 U.S. at 246, the plaintiff must persuade the court on one point (that the statute provides a right and that the right has been violated) and the defendant must persuade the court on another point (the statute contains a comprehensive remedial scheme that refutes presumptive enforceability of the rights within via § 1983).

141. Denham v. Cuddeback, 311 P.2d 1014, 1016 (Or. 1957).

142. SHREVE & RAVEN-HANSEN, *supra* note 90, § 8.08(2)(a).

143. *See e.g.*, Tovar v. U.S. Postal Service, 3 F.3d 1271, 1284 (9th Cir. 1993) (stating that "[i]n every civil case, the defendant bears the burden of proof as to each element of an affirmative defense").

144. Although Rule 8(c) requires that a defendant raise any affirmative defense in a responsive pleading, several circuits have held that a district court may raise an affirmative defense sua sponte and dismiss on the basis of that defense, particularly a statute of limitations. *See* WRIGHT, MILLER & COOPER, *supra* note 3, § 1271.

145. Some of the affirmative defenses cited by Rule 8(c) include assumption of risk, contributory negligence, res judicata, statute of limitations and waiver. FED. R. CIV. P. 8(c). Federal courts have additionally recognized many affirmative defenses not cited in Rule 8(c). For instance, in *Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 610 (5th Cir. 2007), the Court held that substantive state law may determine what amounts to an affirmative defense in a case involving a state law claim. Additionally, federal courts have recognized the following affirmative defenses, among many others, not located in state law: plaintiff's failure to mitigate damages, the presence of multiple suits, unconstitutionality of a statute relied upon by a plaintiff, federal preemption and various forms of immunity. *See* WRIGHT, MILLER & COOPER, *supra* note 3, § 1271.

146. *See* FED. R. CIV. P. 8(c) (stating that a party, "in responding to a pleading, must affirmatively state any avoidance or affirmative defense"). Some courts have held that an affirmative defense is not waived as long as it is raised at a "pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond." Lucas v. U.S., 807 F.2d 414, 418 (5th Cir. 1986) (quoting Allied Chem. Corp. v. Mackay, 695 F.2d 854, 855–56 (5th Cir.1983)); *see also* Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971) (remanding case so that petitioner who failed to plead affirmative defense of colla-

There are several reasons for requiring early assertion of affirmative defense that might guide the determination of which defenses are to be considered "affirmative" in nature. One purpose of early assertion is to give the opposing party both fair notice of the issues to be litigated and a chance to rebut their opponent's arguments.[147] Similarly, it is reasoned that when one party controls or has access to the relevant information on a particular element of a claim, that party should bear the burden of raising the issue.[148] Finally, "probability" may be a guiding factor, in that "the burden of pleading should be put on the party who will be benefited by establishing a departure from the supposed legal or behavioral norm."[149]

C. ELEMENT OF A PLAINTIFF'S CLAIM

The last possibility is that CRS preclusion is an element of the plaintiff's claim.[150] Black's Law Dictionary defines an "element"

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teral estoppel in accord with a case that was subsequently overruled in relevant part — thus preventing respondent from responding to such an assertion on the record — should be permitted to amend its pleadings to include affirmative defense); WRIGHT & MILLER, *supra* note 136, at § 1278. In addition, Federal Rule of Civil Procedure 15(a) permits a party who has failed to assert an affirmative defense in its answer to amend its pleading "within 20 days after serving the pleading if a responsive pleading is not allowed . . . ." and rule 15(b) permits a pleading to be amended as late as the trial itself if it is tried by the parties with implied or express consent or if it "will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." FED. R. CIV. P. 15(a)–(b).

Even where an affirmative defense is not asserted in an answer, Rule 15(a) permits a party to amend its pleading with permission of the court, which "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Under Rule 15(b), where issues not raised in pleadings are tried by express or implied consent, those issues are treated as if they had been raised in the pleadings. FED. R. CIV. P. 15(b). Rule 15(b) additionally permits amendment of the pleadings where the adverse party will not be prejudiced by permitting the amendment to occur. *See, e.g.*, Senn v. Carolina Eastern, Inc., 111 F. Supp. 2d 1218, 1223 (M.D. Ala., 2000).

147. *See Blonder-Tongue Lab*., 402 U.S., at 350; Williams v. Lampe, 399 F.3d 867, 87 (7th Cir. 2005) (discussing case in which court disallowed late assertion of affirmative defense based on statute of limitations because plaintiff had been prejudiced, where defense asserted "at the eleventh hour . . . giving plaintiff almost no time to respond").

148. *See* WRIGHT & MILLER, *supra* note 3, § 1271.

149. *Id.*

150. Under this possibility, the plaintiff would have to plead and prove Congressional intent to preserve § 1983 as an enforcement mechanism for the rights under the statute in question, as evidenced by the *absence* of a comprehensive remedial scheme within the statute. The conceptual convolutions required to articulate the way in which CRS might fall into this procedural category lend support for the argument that it is not a logically appropriate paradigm in which to place the issue.

as "[a] constituent part of a claim that must be proved for the claim to succeed."[151] The dominant view under modern notice pleading is that Federal Rule of Civil Procedure 8(a)(2)'s requirement that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief"[152] means that every element of the plaintiff's claim must be alleged, directly or by inference.[153] The primary purpose of this requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[154]

If CRS preclusion — or rather, its *absence* — is an element of the plaintiff's claim, the issue might be raised or challenged in at least two ways. The first would be an assertion by the defendant that the plaintiff has failed to state a claim upon which relief may be granted. Such a defense may be asserted at many different points during litigation, including in any pleading, in a pre-answer 12(b)(6) motion judgment, at trial by a Rule 50 motion for judgment as a matter of law or at trial on the merits.[155] All of these devices reflect the essential assertion embodied by Rule 12(b)(6), which is that the plaintiff's complaint, and any evidence

151. BLACK'S LAW DICTIONARY 559 (8th ed. 2004).

152. FED. R. CIV. P. 8(a)(2).

153. *See e.g.* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984). The Supreme Court recently abrogated *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and its oft-stated rule that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief." *Conley*, 355 U.S. at 45–46 (citing Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Continental Collieries v. Shober, 130 F.2d 631 (3d Cir. 1942) and Leimer v. State Mutual Life Assur. Co., 108 F.2d 302 (8th Cir. 1940)). In doing so, the court stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). The Court held that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)). The Court cited favorably a statement by the Seventh Circuit that a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery," *Car Carriers*, 745 F.2d 1101, 1106 (7th Cir. 1984), although it did not clearly adopt this statement as its holding. *See Twombly*, 550 U.S. at 562.

154. *Twombly*, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); *see generally* WRIGHT, MILLER & COOPER, *supra* note 3, § 1202.

155. *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(h)(2); SHREVE & RAVEN-HANSEN, *supra* note 90*,* § 8.07(2)(c), n.227.

offered to support it, do not represent a valid cause of action;[156] "[t]he province of Rule 12(b)(6) motions . . . is to test the availability of a legal formula justifying relief on the alleged facts, not to test or determine the facts themselves."[157] A defense of "failure to state a claim" directed at an element of the plaintiff's cause of action would assert either that the element was absent from the plaintiff's claim or that the plaintiff's articulation of the element fails to "raise a right to relief above the speculative level."[158]

A defendant challenging a court's jurisdiction over a § 1983 claim on the grounds of CRS preclusion may be raising matters outside the pleadings. Where matters outside the pleadings are raised, a Rule 12(b)(6) motion is to be treated like a Rule 56 motion for summary judgment,[159] which requires that all inferences be viewed in the light most favorable to the non-moving party.[160] In contrast, a 12(b)(1) motion challenging subject matter jurisdiction is not converted into a Rule 56 motion when raising issues outside the pleadings; therefore, "no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist."[161]

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156. FED. R. CIV. P 12(b)(6); SHREVE & RAVEN-HANSEN, *supra* note 90*,* § 8.07(2)(c) (Disposition of a Rule 12(b)(6) motion will depend on a given jurisdiction's requirements for stating a claim or cause of action and all "well-pleaded facts (*e.g.*, not legal conclusions . . .) in the challenged pleading are taken as true . . . and all reasonable inferences drawn in favor of the pleader.").

157. SHREVE & RAVEN-HANSEN, *supra* note 90*,* § 8.07(2)(c). In contrast with subject matter jurisdiction, for which a judge may resolve relevant disputed facts, *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 514 (2006) (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1350 (3d ed. 2004)), "[i]f satisfaction of an essential element of a claim for relief is at issue . . . the jury is the proper trier of contested facts." *Arbaugh*, 546 U.S. at 514. In the case of CRS preclusion, however, this distinction is likely of little practical import, since the issue of CRS preclusion is likely to be considered an issue of law that the court may resolve. *See* Communities for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 680–82 (6th Cir. 2006) (noting, in case involving issue of CRS preclusion, that constitutional and statutory interpretation questions are issues of law).

158. *Twombly*, 550 U.S. at 555.

159. FED. R. CIV. P. 12(b).

160. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2713.1 (3d ed. 2008).

161. Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990).

An element of the plaintiff's claim may also be challenged by the defendant as a question of law going to the merits of the case. The defendant's challenge would then be considered a negative defense that directly refutes or "destroys," rather than avoids, an element of the plaintiff's claim.[162] The burden of pleading a negative defense rests on the defendant,[163] but a negative defense involves a showing — the adequacy of which is tested by the production of sufficient evidence to raise a genuine issue as to the validity of the plaintiff's claim[164] — that the plaintiff has failed to meet its burden of proof.[165] The burden therefore remains on the plaintiff to establish the challenged element of her claim.[166]

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162. *See* WRIGHT & MILLER, *supra* note 136, § 1270. As will be discussed in Part VI.A., a conceptual incoherence results if CRS preclusion is raised as a negative defense that directly refutes an element of the plaintiff's claim. Because a negative defense "destroys" or refutes an element of the plaintiff's claim, it is necessary to ask what element of the plaintiff's claim CRS preclusion refutes. CRS preclusion is treated as conclusive evidence of Congressional intent to preclude § 1983 as a basis for enforcing a federal right, but under § 1983 jurisprudence, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002). This is in contrast to implied right of action cases, where "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

As a federal statutory right is presumptively enforceable under § 1983, "enforceability" cannot be said to be an element of the plaintiff's claim and CRS preclusion, which refutes "enforceability under § 1983," cannot be said to be refuting an element of the plaintiff's claim. CRS preclusion thus fails to possess a key aspect of a "negative defense."

163. FED. R. CIV. P. 8(b); Gilbert v. Eli Lilly Co., Inc., 56 F.R.D. 116, 124 (D.P.R. 1972) (noting that "[w]hile the affirmative defenses are governed by Rule 8(c) of the Federal Rules of Civil Procedure . . . the negative defenses are governed by Rule 8(b) of the same federal rules").

164. Wayne D. Collins, *California Dental Association and the Future of Rule of Reason Analysis*, 14 ANTITRUST 54, 60 (1999).

165. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis* 27 N.M. L. REV. 101, 107 (1997). One court articulated the relationship between a negative defense and an element of the plaintiff's claim in relation to the defense of "misuse" in a product liability case: "[b]ecause defectiveness and causation are elements which must be proved by the plaintiff, we conclude that misuse is not an affirmative defense. Misuse, therefore, is a 'defense' only in the sense that proof of misuse negates one or more essential elements of a plaintiff's case . . . ." Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 256 (Md. 1985).

166. *See* Kim, *supra* note 165, at 107.

V. GIVING CRS PRECLUSION A PROCEDURAL HOME: WHY COURTS SHOULD TREAT CRS PRECLUSION AS AN AFFIRMATIVE DEFENSE

This Part argues that CRS preclusion is best treated as an affirmative defense. Section A examines the procedural manner by which some federal courts have treated CRS preclusion. Section B then offers formal arguments for treating CRS preclusion as an affirmative defense, based on a comparison of the theory and rules of each procedural scheme with the rules and theory of CRS preclusion. Section C presents further support for treating CRS preclusion as an affirmative defense, founded on the way in which courts have assigned other legal issues to particular procedural categories. Section D explores policy arguments in favor of treating CRS preclusion as an affirmative defense. Section E raises and disputes additional counterarguments against the positions taken in this Note.

A. THE PROCEDURAL NATURE OF PRECLUSION OF SECTION 1983 CLAIMS BY A FEDERAL STATUTORY COMPREHENSIVE REMEDIAL SCHEME

The primary case establishing preclusion of § 1983 claims by a federal statutory comprehensive remedial scheme is *Middlesex County Sewerage Authority v. National Sea Clammers Association*.[167] The Court treated the issue as whether the respondents had stated a valid cause of action under federal law, as opposed to whether the court had subject matter jurisdiction to decide the case.[168] The Supreme Court's most recent treatment of the issue, in *Fitzgerald v. Barnstable School Committee*, also treated the issue as pertaining to whether the plaintiff could state a cause of action, noting that "the existence of a more restrictive private

167. 453 U.S. 1 (1981).

168. *See* Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 19–20 (1981). Here, the Court raised sua sponte the possibility that the plaintiff might locate authorization of private suits in the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972. The Court concluded that § 1983 claims were precluded by the remedial schemes included in these Acts. Nowhere does the Court treat the issue as one that implicated its subject matter jurisdiction over the case.

remedy for statutory violations has been the dividing line between those cases in which we have held that *an action would lie* under § 1983 and those in which we have held that it would not."[169] Several circuit courts have echoed this approach in *Bivens* actions, correcting district courts that had mistakenly concluded that the plaintiff's failure to state a cause of action implicated a lack of subject matter jurisdiction over the case.[170] This approach comports with the Supreme Court's position in *Bell v. Hood*, in which it held that "[w]hether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."[171]

Other courts have treated CRS preclusion as a non-jurisdictional issue by inference, applying rules contradictory to the jurisdictional framework described in Part IV of this Note. For instance, in *West Virginia University Hospitals, Inc. v. Casey*, the Third Circuit noted that "the burden of proving a congressional intent to foreclose a section 1983 remedy . . . lies with the state actor, and that burden is not easily satisfied."[172] This reasoning suggests that the Third Circuit did not view CRS preclusion as an issue of subject matter jurisdiction, given that under the Federal Rules of Civil Procedure, the *plaintiff* must affirmatively plead the grounds for subject matter jurisdiction and prove them if challenged.[173]

Nevertheless, numerous courts have treated the CRS preclusion issue as a "jurisdictional." In *Laird v. Ramirez*, for example, the District Court for the Northern District of Iowa heard a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[174]

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169. 129 S.Ct. 788, 790–91 (2009) (quoting City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 121 (2005) (emphasis added).

170. *See* Janicki Logging Co. v. Mateer, 42 F.3d 561, 563–64 (9th Cir.1994) (holding that a *Bivens* claim precluded by a comprehensive remedial scheme amounted a failure to state a cause of action and that the district court was incorrect to say that the preclusion meant that it did not have subject matter jurisdiction to hear the case). Presumably, the reasoning in *Janicki Logging Co.* would apply to § 1983 actions as well.

171. Bell v. Hood, 327 U.S. 678, 682 (1946); *see also* Kwai Fun Wong v. United States, 373 F.3d 952 (9th Cir. 2004).

172. 885 F.2d 11, 18 (3d Cir. 1989).

173. FED. R. CIV. P. 8(a); *see also* Thomson v. Gaskill, 315 U.S. 442, 466 (1942) (stating that "[i]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof").

174. Laird v. Ramirez, 884 F. Supp. 1265, 1286 (N.D. Iowa 1995).

In the court's opinion, the motion hinged on whether the Social Security Act ("SSA") provided the plaintiff with enforceable rights and whether the plaintiff's § 1983 claims were precluded by a comprehensive remedial scheme under the SSA.[175] The court denied the defendant's Rule 12(b)(1) motion, holding that because the SSA created enforceable rights and because neither of the plaintiff's claims had been precluded by Congress, the claims presented federal questions over which the court had jurisdiction.[176] In determining whether the plaintiff had stated a cause of action as a prerequisite for the court's subject matter jurisdiction, the *Laird* court exactly reverses the order of analysis prescribed in *Bell v. Hood*.[177] Other courts appear to take this same approach, treating preclusion as a jurisdictional issue.[178] For instance, in *Sherwin-Williams Co. v. Crotty*, a case in the Northern District of New York, the court held that the "plaintiffs' section 1983 argument fails to demonstrate the existence of jurisdiction" for their claims based on rights located the Clean Air Act, because the Act's comprehensive remedial scheme precluded § 1983 claims.[179]

B. COURTS' CONCEPTUAL TREATMENT OF CRS PRECLUSION SUGGEST THAT THE ISSUE SHOULD BE CONSIDERED AN AFFIRMATIVE DEFENSE

Of the three options being examined in this Note, treating CRS preclusion as a defense rather than as an issue pertaining to subject matter jurisdiction is the proper approach according to a purely *technical* legal inquiry. Because the analysis of CRS preclusion centers on statutory interpretation of federal law,[180] federal

175. *Laird*, 884 F. Supp. at 1287; *see also* Sherwin-Williams Co. v. Crotty, 334 F. Supp. 2d 187, 193–94 (N.D.N.Y. 2004) (holding that due to comprehensive remedial scheme in the Clean Air Act, plaintiff failed to establish subject matter jurisdiction under § 1983).

176. *Laird*, 884 F. Supp. at 1286.

177. Bell v. Hood, 327 U.S. at 682 (1946); *see also* Kwai Fun Wong v. United States, 373 F.3d 952 (9th Cir. 2004).

178. *See, e.g.*, *Sherwin-Williams*, 334 F. Supp. 2d at 194–94; Maniktahla v. John J. Pershing Va. Med. Ctr., 967 F. Supp. 379, 382 (E.D. Mo. 1997) (holding that claim brought in federal court for emotional distress was precluded by comprehensive remedial scheme under CSRA).

179. *Sherwin-Williams*, 334 F. Supp. 2d at 193.

180. *See* Delgado-Greo v. Trujillo, 270 F. Supp. 2d 189, 195 (D.P.R. 2003) (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) in noting: "[t]o determine whether Congress impliedly foreclosed recourse to § 1983, the Court

question jurisdiction exists in all cases involving the issue, under the previously stated rule that a federal "court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'"[181] If the Supreme Court in *Bell* is to be taken at its word, it is clear that a § 1983 action in which CRS preclusion is at issue implicates a federal question and satisfies the requirements for subject matter jurisdiction.

In taking a jurisdictional approach to CRS preclusion, in apparent contradiction with *Bell v. Hood*, courts have "made the common mistake of confusing 'the issue of [subject matter] jurisdiction with the question of whether [the plaintiffs] can prevail on the merits' of their claim,"[182] resulting in the sort of "drive-by jurisdictional ruling" referred to in section A of this Part. Again, this is true because the determination of whether a comprehensive remedial scheme exists under a particular federal statute is itself a federal question, which grants subject matter jurisdiction to courts adjudicating § 1983 claims in which the issue is implicated. It is incoherent to say that if a court determines through statutory interpretation that a comprehensive remedial scheme precludes a § 1983 cause of action, this means the court does not have jurisdiction to rule on the question of whether the plaintiff has stated a valid cause of action, for this is exactly what the court has just done.[183] Therefore, under current case law, it does not appear that CRS preclusion may logically be considered an issue of subject matter jurisdiction. The question remains whether case law provides support for considering the issue to be

must review legislative history and other traditional aids of statutory interpretation to determine congressional intent").

181. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (quoting Bell v. Hood, 327 U.S. at 685 (1946)). The Court in *Steel Co.* asserted that dismissal for lack of subject matter jurisdiction based on the inadequacy of a claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not involve a federal controversy." 523 U.S. at 89 (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974)). Because CRS preclusion requires statutory interpretation, a federal controversy is inherent in the issue.

182. Adarbe v. United States, 58 Fed. Cl. 707, 714 (Fed. Cl. 2003) (quoting Clark v. United States, 322 F.3d 1358, 1363 (Fed. Cir. 2003)).

183. Alternatively, if jurisdiction is based on 28 U.S.C. § 1343(3), then asserting the existence and deprivation of a statutory right "providing for equal rights" should establish a court's subject matter jurisdiction over the claim. 28 U.S.C. § 1343(3) (2006).

either an affirmative defense or an element of the plaintiff's claim.

Much of the case for treating CRS preclusion as an affirmative defense is based on a negative inference from the fact that the nature of CRS preclusion suggests it is *not* related to subject matter jurisdiction, as noted above. But courts also have discussed CRS preclusion in ways that positively suggest that it contains the essential elements of an affirmative defense. An affirmative defense is plead by the defendant and, by arguing that liability does not attach to the defendant's actions even if all the plaintiff's averments are conceded, it seeks to avoid the plaintiffs claim, rather than destroy it.[184] In a § 1983 action based on a federal statutory right, a plaintiff is required only to plead that the statute unambiguously confers a right on a class of beneficiaries to which the plaintiff belongs.[185] A defendant who raises CRS preclusion raises new issues outside the plaintiff's pleading by arguing that even where the statute unambiguously confers a right on the plaintiff, the statute's comprehensive remedial scheme establishes that Congress intended to preclude § 1983 actions. Such an argument is the archetype of an affirmative defense.

The Supreme Court's conceptualization of CRS preclusion provides additional support for treating it as an affirmative defense. The Court has stated clearly that the burden is on a defendant to establish that the remedial scheme under a statute is sufficiently comprehensive to foreclose availability of a § 1983 cause of action.[186] Since the burden for establishing a court's subject matter jurisdiction rests on the plaintiff,[187] the Court's treatment of CRS

184. One test for identifying an affirmative defense is to ask whether the evidence offered in support of the defense "tend[s] to destroy rather than avoid the cause of action as alleged by the complaint." Denham v. Cuddenback, 311 P.2d 1014, 1016 (Or. 1957). This test is based on the notion that an affirmative defense does not engage with the plaintiff's prima facie case, but rather raises new matter beyond the plaintiff's claim and in this way "avoids" it. SHREVE & RAVEN-HANSEN, *supra* note 90, at 238.

185. Gonzaga Univ. v. Doe, 536 U.S. 273, 283–85 (2002).

186. *See* Golden State Transit Corp. v. City of L.A., 493 U.S. 103 (1989); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 424 (1987) (holding that defendant failed to meet its burden of establishing the existence of a comprehensive remedial scheme in the Brooke Amendment to the Housing Act, 42 U.S.C. 1437(a) (1982)).

187. FED. R. CIV. P. 8(a); Thomson v. Gaskill, 315 U.S. 442, 466 (1942) (stating that "if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof").

preclusion is incompatible with the notion that the issue is jurisdictional in nature.

This still leaves to be resolved whether CRS preclusion might plausibly be considered an element of the plaintiff's claim, subject to challenge by a motion to dismiss for failure to state a claim or by a negative defense on the merits. It cannot. The Supreme Court in *Abrams* stated clearly that after a plaintiff demonstrates that a statute confers an individually enforceable right, presumptively enforceable under § 1983, a "defendant may defeat this presumption by demonstrating that Congress did not intend that remedy" through its creation of a comprehensive remedial scheme.[188] The Court is clear that the plaintiff's burden is to establish the existence of a federal right and that it is the defendant's responsibility to establish preclusion by a comprehensive remedial scheme. Under this articulation of the burdens, the issue cannot be an element of the plaintiff's claim. Nor, given the nature of CRS preclusion, would it make sense conceptually for the issue to be an element of the plaintiff's claim. The essence of CRS preclusion is that a comprehensive remedial scheme represents conclusive evidence of Congressional intent to preclude a § 1983 cause of action; yet, according to § 1983 jurisprudence, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by section 1983."[189] If federal rights are *presumptively* enforceable under § 1983, then the plaintiff cannot be required to plead and prove enforceability (i.e., that no comprehensive remedial scheme precludes her claim) as an element of her claim.[190]

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188. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005); *see also* ASW v. Oregon, 424 F.3d 970, 977 (9th Cir. 2005) ("Because Plaintiffs have asserted a federal right presumptively enforceable under § 1983, the *burden falls on the State* to rebut this presumption by showing that Congress has 'specifically foreclosed a remedy under § 1983' either expressly 'or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)) (emphasis added)).

189. *Gonzaga Univ.*, 536 U.S. at 284. This is in contrast to implied right of action cases, where "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

190. Given that federal statutory rights are presumptively enforceable under § 1983, it is then conceptually untenable that the issue might be raised by the defendant as either a negative defense or in a motion to dismiss for failure state a claim. As noted, *supra* note 162, a negative defense "destroys" or refutes an element of the plaintiff's claim. CRS preclusion clearly cannot then be raised as a negative defense, because it raises the issue of

C. HOW COURTS HAVE RESOLVED THE "PROCEDURAL PARADIGM" QUESTION FOR ISSUES OTHER THAN CRS PRECLUSION

In exploring how courts ought to categorize CRS preclusion procedurally, it is instructive to observe how other issues without procedural "homes" have had a roof put over their heads. In *Jones v. Bock*, for instance, the Supreme Court addressed the question of whether exhaustion under the Prison Litigation Reform Act was a pleading requirement for the complainant or whether the lack of exhaustion was an affirmative defense that must be raised by the defendant.[191] The Court held that the issue should be considered an affirmative defense rather than a pleading requirement, as Federal Rule of Civil Procedure 8(a) requires that a complaint contain only a "short and plain statement of the claim" (exhaustion is not part of the claim itself) and because such claims are typically brought under § 1983, which does not require exhaustion.[192] The Court added that courts "should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."[193] Under this reasoning, CRS preclusion should be treated as an affirmative defense, since the text of § 1983 requires only the "deprivation of any right . . . secured under the Constitution and laws" and a "short and plain statement of the claim" would not logically include asserting the *absence* of grounds upon which the defendant might "rebut" the presumed enforceability of the right.[194] The holding in *Jones v. Bock* also reinforces the notion set forth in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* that federal courts may not impose heightened pleading standards — essentially new elements of the claim — in § 1983 cases,

whether Congress intended a particular statutory right to be enforceable via § 1983 — an issue that has been shown to be outside the elements of the plaintiff's claim.

Similarly, a motion to dismiss for failure to state a claim would be an incoherent way to raise the CRS preclusion issue where the issue is not an element of the plaintiff's claim. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); WRIGHT, MILLER & KANE, *supra* note 160, § 2713.1 (3d ed. 1998). This is because a motion for failure to state a claim must be limited to matters within the plaintiff's pleadings, which would not include the matter of CRS preclusion, as it is not an element of the plaintiff's claim.

191. FED. R. CIV. P. 8(a); Jones v. Bock, 549 U.S. 199 (2007).

192. *Bock*, 549 U.S. at 212.

193. *Id.*

194. 42 U.S.C. § 1983 (2006).

beyond the "liberal" notice pleading requirements of the Federal Rules.[195]

In *Arbaugh v. Y&H Corp.*, the Supreme Court examined whether the "employee-numerosity requirement" of Title VII of the Civil Rights Act of 1964 — a provision limiting application of the Act to businesses with fifteen or more employees — implicated subject matter jurisdiction or if it pertained only to the merits of the plaintiff's claim.[196] The Court noted that "'[s]ubject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief — a merits-related determination.'"[197] In holding that the employee-numerosity requirement would be considered an element of the plaintiff's claim rather than an issue pertaining to subject matter jurisdiction, the Court reasoned that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[198] The Court's reasoning reflected a belief that it is more prudent to allow the legislature to resolve the matter than to treat the issue as jurisdictional in the absence of any clear indication of Congressional intent to do so.

The reasoning in *Arbaugh* is relevant to the procedural nature of CRS preclusion in two ways. First, the Court's characterization of a merits-related determination as one pertaining to the plaintiff's need to prove the defendant bound by the statute in question would appear to be at odds with CRS preclusion, which has been articulated as an issue that the *defendant* might use to rebut the presumption that a statutory right is enforceable.[199] Second, the Court's statement that a statutory requirement should not be considered "jurisdictional" when Congress has not "ranked" it as such lends support to the argument that CRS preclusion, a doctrine created by the judiciary, ought not to be considered an issue of subject matter jurisdiction. Since Congress has

195. 507 U.S. 163, 113, 168 (1993).

196. Arbaugh v. Y&H Corp., 546 U.S. 500, 503 (2006).

197. *Id.* at 511 (quoting 2 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[1], 12-36.1 (3d ed. 2005)).

198. *Arbaugh*, 546 U.S. at 515.

199. City of Rancho Palos Verdes v. Adams, 544 U.S. 113, 120 (2005) (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)).

created a wide variety of restrictions on the subject matter jurisdiction of federal courts, it is reasonable to assume that it could do so in the case of CRS preclusion if it wished.[200]

While *Arbaugh* and *Jones* dealt with statutory requirements, in *Gomez v. Toledo* the Supreme Court addressed the procedural nature of qualified immunity, a judicially-created defense originating in the common law.[201] Qualified immunity from damages liability under § 1983 is available to certain officials who were historically entitled to such a defense at common law and where such a defense is "compatible with the purposes of the Civil Rights Act."[202] In *Gomez*, the Court overturned holdings by the District Court and Court of Appeals that a plaintiff was required to plead the bad faith of the defendant.[203] The Court held that qualified immunity was unrelated to whether the plaintiff had stated a cause of action, saying, "[i]t is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith."[204] In holding that qualified immunity is an affirmative defense,[205] the Court emphasized that its holding was supported by the nature of qualified immunity, in that it depended on facts "peculiarly within the knowledge and control of the defendant."[206]

The Court's reasoning in *Gomez* is instructive in that it rejected the lower court holdings that the plaintiff was required to plead the *absence* of a possible set of facts that would enable the defendant to avoid the plaintiff's claim. Specifically, *Gomez* held that the plaintiff should not be required to show that the defen-

200. The same argument could be made with regard to CRS preclusion generally. If, as the Supreme Court suggests, deference to Congressional intent is the purpose of CRS preclusion, it might logically be left to Congress to state explicitly when a particular remedial scheme is meant to supplant alternative causes of action, including § 1983.

201. Gomez v. Toledo, 446 U.S. 635 (1980).

202. *Id.* at 639 (quoting Owen v. City of Independence, Mo., 445 U.S. 622, 638 (1980)).

203. *Gomez*, 446 U.S. at 640 (quoting *Owen*, 445 U.S. at 640).

204. *Id.*

205. *Id.* (citing FED. R. CIV. P. 8(c)'s requirement that a defendant must plead any "matter constituting an avoidance or affirmative defense" in support of its statement that because qualified immunity is a "defense," it must be plead by defendant).

206. *Gomez*, 446 U.S. at 640–41. Facts presumed to be exclusively within the defendant's knowledge and control are that "[t]he official himself [is] acting sincerely and with a belief that he is doing right" and "an objectively reasonable basis for that belief." *Id.* at 641 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)).

dant had acted in *bad faith* as a way of preempting an assertion of good faith that would allow the defendant to avoid the plaintiff's claim.[207] We have seen that CRS preclusion allows the defendant to "rebut" a presumption that individual rights provided by a federal statute are enforceable under § 1983.[208] Under the reasoning of *Gomez*, it would be unacceptable to require the plaintiff to anticipate this rebuttal by pleading it in the negative.

The *Gomez* Court's consideration of the nature of the qualified immunity defense is informative as well. Unlike the qualified immunity defense, CRS preclusion does not depend on knowledge "peculiarly within the knowledge and control of the defendant,"[209] at least not to the extent that a defendant's "good faith" (i.e. their subjective intent) would so depend. Even so, in a § 1983 action based on a federal statute providing individual rights, the plaintiff will be the beneficiary of the statute and the defendant the bearer of its obligations.[210] The nature of CRS preclusion is that it enables the defendant to limit the consequences of its failure to satisfy its obligations under a statute to only those remedial measures available under the statute.[211] Given that a plaintiff is required to plead and prove that the statute benefits him or her by providing them with an individual right, the defendant ought to bear the burden of establishing the aspect of the statute that benefits her by minimizing her liability for violating that right.

207. *Gomez*, 446 U.S. at 639–40.

208. City of Rancho Palos Verdes v. Adams, 544 U.S. 113, 120 (2005).

209. *Gomez*, 446 U.S. at 641.

210. This is not to say that a defendant state would receive no benefit under any statute providing individual rights to a plaintiff. But by definition under a § 1983 action, the portion of the statute being litigated is one providing a right that benefits the plaintiff and which it is the defendant's responsibility to provide or respect. *See* 42 U.S.C. § 1983 (2006); Maine v. Thiboutot, 448 U.S. 1 (1980).

211. Remedial measures under a statute containing a comprehensive remedial scheme are necessarily narrower than those offered under § 1983. In *City of Rancho Palos Verdes, Cal. v. Abrams*, the Court clarified that "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under section 1983" and those where it was held that Congress did not intend the broader remedy of § 1983 to be available. 544 U.S. at 121 (citing *Alexander*, 532 U.S. 275, 290 (2001)).

D. POLICY REASONS FOR TREATING CRS PRECLUSION AS AN AFFIRMATIVE DEFENSE

It has been noted that "intemperate application of comprehensiveness would render the statutory reference of section 1983 without effect and eviscerate the *Thiboutot* decision."[212] Whatever procedural identity CRS preclusion receives ought to reflect an appropriate balance between the purpose and policy behind § 1983, its extension to rights under federal law, and the comprehensive-remedial-scheme test itself.

Given that Congressional intent and separation-of-powers concerns are guideposts for determining the availability of private actions for violations of federal rights, it is noteworthy that § 1983 claims represent explicit Congressional authorization in a way that common law and implied causes of action do not.[213] Section 1983's *raison d'etre* arises from concerns underlying the civil rights statutes and amendments of the Reconstruction era,[214] and from post–Civil War restructuring of law under which "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established."[215] In *Owen v. City of Independence*, the Supreme Court discussed § 1983's expansive language as reflecting the legislative history behind its precursor, Section 1 of the Civil Rights Act of 1871.[216] The Court quoted statements by Representative Shellaberger, who was the author and manager of the bill in the House of Representatives, as illuminating the construction that the Act was to receive:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where

212. Rumeld, *supra* note 6, at 1189.
213. *Id.* at 1194–95.
214. *Id.* at 1195, n.77 (noting that § 1983 was enacted under the Civil Rights Act of 1871, 17 Stat. 13).
215. Mitchum v. Foster, 407 U.S. 225, 239 (1972).
216. 445 U.S. 622, 635–36 (1980).

> there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.[217]

The purpose and effect of § 1983, as stated above, could hardly be more expansive or ambitious. This broad purpose need not control where Congress clearly expresses its intent to preclude § 1983 as an enforcement mechanism for a particular statutorily-provided right. But in the case of CRS preclusion, where Congressional intent is murky, separation of powers concerns are partially obviated by the fact that § 1983 was "enacted precisely to ensure judicial remedies, and precisely because of a special concern with the need for federal remedies to 'secure' federal rights against state infringement."[218] The values of human rights and human liberty — those values at the core of § 1983 — demand a procedural treatment of CRS preclusion that does not belittle the statute's purpose.

As noted above, in spite of this pedigree behind § 1983, plaintiffs have increasingly had the deck stacked against them. For example, courts have moved towards requiring that § 1983 plaintiffs show that Congress has affirmatively established a right on the class of beneficiaries of which the plaintiff is a member, where they had previously assumed the existence of such a right.[219] Yet, once a right is identified, there is a presumption that the right is enforceable under § 1983, which must be "rebutted" by a showing that Congress intended to withdraw the remedy.[220] The procedural category into which CRS preclusion falls should reflect this presumption in favor of the plaintiff.

It would further chip away at the body of rights violations that may be remedied under § 1983 — a body that is already crumbling under the weight of absolute and qualified immunity, implied Congressional preclusion and restrictive judicial statutory interpretation of § 1983's own language — to treat the CRS prec-

217. *Id.* at 636 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).
218. Berzon, s*upra* note 8, at 541.
219. Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).
220. City of Rancho Palos Verdes v. Adams, 544 U.S.113, 120 (2005) (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)).

lusion issue as one that determines a federal court's authority to even decide a case. It has been observed that since nearly every statute containing potentially enforceable individual rights contains some sort of remedial mechanism, "it is a simple matter to invoke the talisman of comprehensiveness and thereby preclude otherwise available private remedies."[221] Such unrestrained invocation of the doctrine would render meaningless the protection of federal statutory rights offered by § 1983 and the Supreme Court's holding in *Maine v. Thiboutot*.[222] Assuming that CRS preclusion is here to stay, treating the issue as an affirmative defense that must be pled and proved by a defendant best respects the Supreme Court's admonition that "[a]s remedial legislation, section 1983 is to be construed generously to further its primary purpose."[223]

In addition, the rules applying to each procedural paradigm have their own underlying policies, as discussed in Part IV. It is instructive to ask whether placing CRS preclusion into each category serves the policies of that category. Subject matter jurisdiction primarily serves a policy of balancing federal power between the branches, reflecting the fact that federal courts are courts of limited jurisdiction, a portion of which is granted by Article III of the Constitution and the rest by Congress.[224] Placing CRS preclusion into the subject matter jurisdiction paradigm might appear to serve this general policy goal, because CRS preclusion limits the ability of courts to provide remedies beyond those prescribed by Congress within a particular statute. In reality, however, this actually undermines the balance of powers, because CRS preclusion is a judicially-created doctrine and its application allows courts and defendants to limit access to § 1983 — passed into law by Congress for specific policy reasons — where Congress has not explicitly stated its intent to do so.

The primary policy behind the pleading requirements that apply to the elements of a plaintiff's claim is to give the defendant warning of the claims against her and the general basis for these

221. Rumeld, *supra* note 6, at 1189.
222. *Id.*
223. Gomez v. Toledo, 446 U.S. 635, 639 (1990) (citing *Owen,* 445 U.S. 622, 636 (1980)).
224. SHREVE & RAVEN-HANSEN, *supra* note 90, § 5.01(1)–(2).

claims.[225] Requiring a plaintiff to plead the absence of CRS preclusion does not substantively serve this policy. The existence or non-existence of a comprehensive remedial scheme in a statute is unrelated to the basis and nature of the plaintiff's claim, which is predicated on an individual right provided by a federal statute and a violation of this right by one acting under color of law.[226] Thus, requiring the plaintiff to plead its absence does not give warning to the defendant of the claims against her; rather, it undermines the adversarial nature of the United States' legal system.[227]

By contrast, treating CRS preclusion as an affirmative defense does serve the policies underlying that procedural paradigm. First, requiring early assertion of CRS preclusion by the defendant, who stands to benefit from its assertion, serves the policy of giving fair notice to the opposing party, who stands to be harmed by it.[228] Second, while the defendant does not "control access"[229] to the relevant information pertaining to CRS preclusion, a state defendant should be better versed in the state's obligations under a statute and the remedial measures that a statute provides against the state if it fails to meet these obligations. Finally, treating CRS preclusion as an affirmative defense places the burden of pleading on the defendant, who will be benefited by the

225. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). *See generally* WRIGHT, MILLER & COOPER, *supra* note 3, § 1202.

226. WRIGHT, MILLER & COOPER, *supra* note 3, § 3573.2.

227. *See* Margareth Etienne, *Parity, Disparity and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 310 (2005) (noting that evidentiary and procedural rules establish equilibrium between parties in an adversarial system and the elimination of which results in inequity, undermining the adversarial process).

228. There are several purposes for requiring early assertion of an affirmative defense that might guide the determination of which defenses are to be considered "affirmative" in nature. One of these purposes is to give fair notice to the opposing party of the issues to be litigated and a chance to rebut an opponent's arguments. *See* Williams v. Lampe, 399 F.3d 867, 871 (2005) (discussing case in which court disallowed late assertion of affirmative defense based on statute of limitations because plaintiff had been prejudiced, where the defense was asserted "at the eleventh hour . . . giving plaintiff almost no time to respond"); Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971).

229. It is reasoned that when one party controls or has access to the relevant information on a particular element of a claim, that party should bear the burden of raising the issue. *See* WRIGHT & MILLER, *supra note 136,* § 1271.

departure from the presumption that federal statutory rights are enforceable under § 1983.[230]

E. ADDITIONAL COUNTERARGUMENTS

A primary counterargument against treating CRS preclusion as an affirmative defense lies in separation-of-powers concerns. In creating a comprehensive remedial scheme to enforce a statute, the argument goes, Congress has expressed its intent to deprive courts of jurisdiction over § 1983 claims based on federal rights within that statute.[231] Courts therefore have no authority to enforce statutory rights unless Congress so intends and courts should treat the question of CRS preclusion as a jurisdictional issue that must be resolved in order to even hear the case.[232] As noted in Part IV.A. of this Note, this position confuses "jurisdiction" with a court's power to provide a remedy for a particular violation of federal law or with the plaintiff's ability to state a claim.[233] When a court adjudicates the question of CRS preclusion, it asks whether a particular federal right may be enforced under § 1983; that is, whether Congress has provided potential plaintiffs with a cause of action.[234] Any case involving CRS preclusion necessarily presents federal questions — i.e., whether a

230. *Id.* (stating that "probability" may be a guiding factor in whether an issue should be considered an affirmative defense to be plead by the defendant, in that "the burden of pleading should be put on the party who will be benefitted by establishing a departure from the supposed legal or behavioral norm").

231. *See, e.g.*, Middlesex County. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."); *see also supra* Part II.B.

232. In *Colorado Dept. of Human Services v. U.S.,* the court granted the defendant's motion to dismiss for lack of subject matter jurisdiction, 74 Fed. Cl. 339, 341 (Fed. Cl. 2006), stating:

> In the absence of a clear indication to the contrary, Congress's creation of a comprehensive remedial scheme is a strong indication that the scheme prescribed by statute was intended to be exclusive. The Court thus lacks jurisdiction under both the APA and the Tucker Act to review an arbitration panel's decision and, as a consequence, lacks jurisdiction to entertain plaintiffs' motion for a preliminary injunction pending the outcome of the Randolph-Sheppard arbitration proceeding.

Id. at 348 (citations omitted).

233. See also, *supra* Part IV.A., notes 110–11 and accompanying text (noting the varied meanings of the term "jurisdiction" and citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) and *Adarbe v. United States*, 58 Fed. Cl. 707 (Fed. Cl. 2003)).

234. See *supra* Part II.B.

particular federal statute provides a plaintiff with individual rights, whether those rights may be enforced via a private cause of action and if so, whether a state actor has in fact violated the right in question — which provide for subject matter jurisdiction under 28 U.S.C. § 1331.[235]

Additional arguments counseling against treating CRS preclusion as an affirmative defense are equally unpersuasive. It is true that the rule that affirmative defenses may be waived if not raised at the proper time raises potential concerns. One could argue that a defendant ought not to be able to subvert the will of Congress, where Congress intended to preclude remedies outside of a statutorily created scheme, simply by failing to raise the issue.[236] However, even in the unlikely instance that a state defendant failed to raise the issue in a particular case, there would be no danger that this would result in large-scale subversion of congressional intent to preclude § 1983 actions. Because the issue of whether the statute in question contained a comprehensive remedial scheme would not have been litigated, the next time a private cause of action was asserted to enforce the statute, the defendant could assert a CRS preclusion defense and the issue could be fully adjudicated.

A related concern arises in the case of a statute that specifically provides for agency enforcement of its terms. In instances such as this, the fear is that recognition of a private right of action under the statute "could disrupt the statutory enforcement scheme and undermine the agency's ability to make law and policy."[237] It seems reasonable, first of all, to expect Congress to say explicitly if it wishes to preclude remedies outside of a statutory remedial scheme, and otherwise to assume that federal statutory remedial schemes complement rather than preclude existing remedies. If Congress is concerned about interference with agency enforcement of a given statute, it need only expressly provide that pri-

235. See *supra* Part IV.A.

236. *Cf.* Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (quoting Justice Stewart's dissenting opinion in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 673 n.2 (1979), which stated that where "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983").

237. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 395 (1982).

vate causes of action are precluded. But even if Congress decides for some reason to convey its intentions only implicitly, treating CRS preclusion as an affirmative defense will not prevent the issue from eventually being litigated. If, upon litigation, federal courts come to a conclusion with which Congress disapproves, Congress need merely pass a legislative fix to correct the courts' interpretation of the statute.

It is also true that the balance of procedural benefits and drawbacks of handling CRS preclusion under any one of the three conceptual frameworks is not entirely obvious. For instance, allowing a court to dismiss precluded § 1983 claims sua sponte for their failure to confer subject matter jurisdiction on the court would, in the hands of a conservative judiciary, seem to bode ill for plaintiffs. On the other hand, dismissal for lack of jurisdiction would not have res judicata effects.[238] This might arguably be beneficial to plaintiffs, who could reform their arguments in light of a court's particular disposition and file suit again. In contrast, if CRS preclusion were treated as a defense on the merits or as an affirmative defense, the case might be dismissed with prejudice, thus barring any attempt to re-litigate the matter.[239] It is unlikely, however, that where a court dismisses a claim on the basis of a comprehensive remedial scheme, a plaintiff would consistently be more likely to succeed by re-filing at the district court level than if he or she appealed, given that a de novo standard of review applies to legal questions such as CRS preclusion regardless of whether the issue is treated as jurisdictional or as a defense.[240] Additionally, since dismissal for lack of subject matter jurisdiction has no preclusive effect, a clearly frivolous claim might be brought many times, consuming significant judicial resources.[241]

VI. CONCLUSION

Federal statute 42 U.S.C. § 1983 has historically been a judicially and congressionally favored source of protection for the

238. Lewis v. United States, 70 F.3d 597, 603 (Fed. Cir. 1995).

239. Adarbe v. United States, 58 Fed. Cl. 707, 715 (Fed. Cl. 2003).

240. *See, e.g.*, United States v. McPhee, 336 F.3d 1269 (11th Cir. 2003); Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396 (9th Cir. 1996).

241. *Adarbe*, 58 Fed. Cl. at 715.

rights of Americans. In providing a wide range of remedies, such as attorneys' fees for successful plaintiffs, § 1983 offers an attractive recourse to those whose Constitutional and federal statutory rights have been violated by a far more powerful and better-funded institutional defendant. While the face of § 1983 offers no limitations on its availability to those suffering a deprivation of rights at the hands of one acting under the color of state law, the availability of § 1983 as a cause of action has been restricted by a morass of judicially-created rules, immunities and procedures. The Supreme Court's holding in *Sea Clammers* created yet another of these restrictions, denying a cause of action under § 1983 for a violation of a federal statutory right where the statute offering that right includes a comprehensive remedial scheme that implicitly precludes any remedy other than those contained within the scheme. The unavailability of § 1983 has a significant effect on litigants because the remedies available under any comprehensive remedial scheme are by definition more restrictive than those offered under that section. While the CRS preclusion doctrine represents a major obstacle to plaintiffs' recovery for violation of federal statutory rights, courts have failed to clarify how and when the issue is to be raised.

The choice of procedural paradigm for CRS preclusion will affect litigants considerably, making preclusion of a § 1983 cause of action more or less likely through differing rules on burden of pleading and proof, timing requirements and the effect of dismissal on grounds relating to that issue, among others. The procedural categories in which CRS preclusion might plausibly be included are subject matter jurisdiction, affirmative defenses and elements of a plaintiff's claim.

Treating CRS preclusion as an affirmative defense is most loyal to the policies underlying § 1983 – which seeks to broadly remedy and deter rights violations by the states – and to the policies underlying the procedural schemes themselves. Considering CRS preclusion as an affirmative defense would also accord with the manner and reasoning courts have applied when labeling other procedural issues. Finally, and most conclusively, the Supreme Court's treatment of CRS preclusion both conceptually and logically comports with the notion of an affirmative defense: the issue is to be raised by a defendant as a way of rebutting a presumption that an identified federal statutory right is enforceable

under § 1983. In doing so, the defendant may concede all the plaintiff's averments but nonetheless avoid liability on other grounds — the very definition of an affirmative defense. While a number of courts have treated CRS preclusion as a jurisdictional issue, implicating a court's power to hear a case rather than whether or not the plaintiff is entitled to recovery on their particular claim, it is apparent that such "drive-by jurisdictional rulings" are incoherent under the established rules of subject matter jurisdiction, and offend the Supreme Court's conception of CRS preclusion and 42 U.S.C. § 1983's history and purpose as a preferred mechanism for vindicating civil rights.