Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers

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INTRODUCTION

The doctrine of separation of powers is fundamental to our democratic system of government. It is designed to preserve liberty and prevent oppression by limiting the powers of each of the three branches of government and by providing a system of checks and balances.[1] Under the Constitution and consistent with the doctrine of separation of powers, Congress has primary authority for making laws.[2] While the executive branch in administering the laws and the judicial branch in enforcing the laws may engage in "lawmaking" to a certain degree,[3] they may

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[1] *See, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 32 (1965) (reasoning that object of separation of powers "is the preservation of political safeguards against the capricious exercise of power . . . "); James E. Westbrook, *The Use of the Nondelegation Doctrine in Public Sector Labor Law: Lessons from Cases that Have Perpetuated an Anachronism*, 30 ST. LOUIS U. L.J. 331, 360 (1986) (identifying goals served by nondelegation doctrine as protection from abuse of political power, promotion of political accountability, and furtherance of governmental effectiveness and efficiency).

[2] TVA v. Hill, 437 U.S. 153, 194 (1978).

[3] *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989). The precise scope of permissible judicial and executive "lawmaking" is a subject of debate. For a discussion of the two principle theories, formalism and functionalism, see Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961 (1995).

not act contrary to express congressional directives.[4] This Article will demonstrate, however, that, with respect to private enforcement of federal funding conditions contained in grant-in-aid statutes, the Supreme Court has in fact failed to follow express congressional directives. Instead, the Court has sought to advance its own policy preferences, and as a result has jeopardized the safeguards to democracy afforded by the separation of powers.

Congress has enacted numerous grant-in-aid programs pursuant to which states are given substantial amounts of federal money to help defray the costs of welfare programs.[5] Although grant-in-aid programs benefit the states by providing financial assistance, most are designed primarily to benefit those individuals who are qualified to receive aid, either financial or in the form of services, under the particular program.[6] A state is under no obligation to participate in any grant-in-aid program.[7] If a state chooses to participate, however, it must agree to be bound by specified conditions.[8] Although these conditions infringe on areas traditionally thought to be within the realm of state discretion, and are often sharply criticized by states' rights propo-

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[4] Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 305 (1992). *See also infra* notes 350-52, 372-74 and accompanying text.

[5] *See* Bruce J. Casino, *Federal Grants-In-Aid: Evolution, Crisis, and Future*, 20 URB. LAW. 25, 26 (1988); Leonard Weiser-Varon, Note, *Injunctive Relief from State Violations of Federal Funding Conditions*, 82 COLUM. L. REV. 1236, 1236 (1982).

[6] Alanson W. Willcox, *The Function and Nature of Grants*, 22 ADMIN. L. REV. 125, 131 (1970).

[7] Weiser-Varon, *supra* note 5, at 1237. *But see* Casino, *supra* note 5, at 40 (acknowledging that case can be made that, due to financial duress of states, participation in grant-in-aid programs is not truly voluntary); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 896 (1979) (characterizing state's choice not to participate in grant-in-aid program as nominal); Joseph Lesser, *The Course of Federalism in America - An Historical Overview, in* FEDERALISM: THE SHIFTING BALANCE 1, 11 (Janice C. Griffith ed., 1989) (stating that conditional grants "can more accurately be called coercive, rather than cooperative"); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 958 (1985) (noting that lure of federal money is so strong that states rarely forego participation in grant program); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1420 (1994) (claiming that Congress never intended to give states choice of whether to participate because state could not, in reality, ever refuse needed funds).

[8] Casino, *supra* note 5, at 26; Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 601 (1972); Weiser-Varon, *supra* 5, at 1237-38.

nents,[9] they nonetheless represent a legitimate policy choice by Congress.

The conditions imposed on a state that chooses to participate in a grant-in-aid program govern many aspects of how the program is operated. These include matters directly affecting putative beneficiaries, such as how eligibility for participation is determined and how benefits are calculated.[10] The failure of a state to comply with these conditions, therefore, can harm the program's intended beneficiaries.[11] Yet, statutes authorizing federal grant-in-aid programs rarely accord them a means of redress.[12] This does not mean that all remedies are foreclosed, however.

Historically, intended beneficiaries have had two primary means available to force state compliance with federal funding conditions. The first has been to base a claim on the existence of an implied cause of action in the statute authorizing the grant-in-aid program.[13] To maintain a claim based on an implied cause of action, an individual must demonstrate that Congress, when enacting the statute in question, although not expressly providing that individual with a private remedy, nonetheless intended to create such a remedy.[14] The second means has been to bring a cause of action pursuant to 42 U.S.C. § 1983.[15] This statute grants a federal remedy to any individual who, as a result of state action, has been deprived of any rights secured by the Constitution and laws of the United States.[16] An action brought under § 1983 typically alleges that a state's noncompliance with funding conditions has deprived the claimant of a

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[9] *See infra* notes 36-37 and accompanying text.

[10] Weiser-Varon, *supra* note 5, at 1240-41. *See also* Tomlinson & Mashaw, *supra* note 8, at 601 (noting that federal grants have strings attached to ensure that persons Congress intended to benefit from program actually receive benefits).

[11] Weiser-Varon, *supra* note 5, at 1239.

[12] Note, *Making the Old Federalism Work: Section 1983 and the Rights of Grant-in-Aid Beneficiaries*, 92 YALE L.J. 1001, 1003 (1983).

[13] *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (plaintiff claimed that § 6010 of Developmentally Disabled Assistance and Bill of Rights Act, a federal grant-in-aid program, created implied private cause of action).

[14] *See infra* notes 81-84 and accompanying text.

[15] *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1981) (plaintiff brought suit under § 1983 claiming that it provided cause of action for violations of Aid to Families with Dependent Children, a federal grant-in-aid program).

[16] 42 U.S.C. § 1983 (1988).

right secured by federal law, thereby entitling the claimant to a federal remedy.[17]

This Article will argue that the Supreme Court, in the name of federalism and the protection of states' rights, has improperly imposed restrictions on the ability of plaintiffs to bring actions for statutory violations under § 1983 and has refused to enforce legislative directives regarding states' obligations under grant-in-aid programs. Although it is within the Court's province to interpret statutes in light of broader principles such as federalism, the Court may not superimpose its own policy preferences over those clearly expressed by Congress. To do so would violate the doctrine of separation of powers.[18] Yet this is exactly what the Court has done. Under the guise of statutory interpretation, the Court has drastically limited courts' ability to enforce state compliance with congressionally mandated funding obligations, and has thereby succeeded in substituting its beliefs regarding states' rights for those of Congress. To accomplish this, however, the Court found it necessary to ignore the plain meaning of both § 1983 and federal grant-in-aid statutes, to overlook fundamental differences between § 1983 statutory causes of action and implied causes of action, and to disregard established precedent without any explanation.

Part I of this Article begins by examining the basic parameters of grant-in-aid programs. It explores some of the criticisms of grant-in-aid programs, considers whether there is any constitutional basis for limiting Congress's power to adopt such programs, and discusses some of the difficulties with agency enforcement of funding conditions. In Part II, this Article provides a summary of the law of implied causes of action. Recently, the scope of implied causes of action has been so restricted that private suits to enforce federal funding conditions based on the existence of an implied cause of action have essentially been foreclosed. Nonetheless, a basic understanding of implied causes of action is necessary to understanding the inappropriateness of the Court's recent actions in the § 1983 context.

Part III of this Article focuses on § 1983, beginning with an examination of its legislative history. This history is critical to

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[17] *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1981).

[18] *See infra* notes 350-52, 372-74 and accompanying text.

understanding the conflict that has existed for a number of years on the Supreme Court regarding the proper scope of § 1983 statutory causes of action — actions alleging violation of a right secured by *the laws*. Next, this Article provides a detailed analysis of those cases relevant to the ability of beneficiaries of federal grant-in-aid programs to bring § 1983 actions to compel state compliance with funding conditions. It concludes with an analysis of *Suter v. Artist M.*,[19] the most recent case in which the Court has considered this matter. This Article will demonstrate, in Part IV, that the Court, in its recent decisions regarding private enforcement of federal funding conditions, has ignored clear legislative directives and policy choices to advance its own notions of federalism. By doing so, however, the Court itself has betrayed one of the most basic concepts underlying our Constitution and thus threatens to upset the delicate balance of power that it embodies. As Justice Harlan so aptly stated in *Rosado v. Wyman*:

> It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.[20]

I. GRANT-IN-AID PROGRAMS

In 1887, Congress enacted the first program pursuant to which cash grants were available to the states from the federal government on an annual basis.[21] It was not until 1932, however, in the midst of the Great Depression, that federal grant-in-aid programs began to play a significant role in the relationship between the federal government and the states. Between 1932 and 1934, several grant-in-aid programs were established to re-

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[19] 503 U.S. 347 (1992).

[20] Rosado v. Wyman, 397 U.S. 397, 422-23 (1970).

[21] *See* Hatch Experiment Station Act, ch. 314, 24 Stat. 440 (1887) (codified as amended at 7 U.S.C. §§ 361(a)-361(i) (1994)).

spond to high unemployment levels nationwide and the resulting poverty.[22] These programs, which included the Social Security Act of 1935[23] and the National Housing Act of 1934,[24] were seen as a way to blend the powers of the state and federal governments — a concept known as cooperative federalism — to provide greater benefits for all.[25] Another major expansion of grant-in-aid programs occurred in the 1960s and 1970s.[26] Today, there are numerous federal grant-in-aid programs, including programs that provide funds for services such as food stamps,[27] public housing,[28] school lunches,[29] foster care,[30] and education for persons with disabilities.[31]

Although the specifics vary greatly, there are some common characteristics of virtually all grant-in-aid programs. For example, all grant-in-aid programs involve transfers of federal funds to the states, although the state is often required to contribute its own funds to the program. With most grants, a state may only spend the money for the purpose designated by Congress and according to conditions specified by Congress.[32] The state is usually required to file a plan, subject to the appropriate federal

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[22] Casino, *supra* note 5, at 30-31.

[23] Ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397e (1988 & Supp. V 1993)). The Social Security Act provides, among other things, aid for the aged, blind, or unemployed and for families with dependent children. *Id.*

[24] Ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1994)). The National Housing Act of 1934 provides, among other things, for the construction of public housing. *Id.*

[25] Stewart, *supra* note 7, at 957-58. Professor Stewart notes that grant-in-aid programs serve to correct the spillover disincentives that prevent state and local governments from adopting needed social programs and provide for minimum standards nationwide that protect states from being undercut by each other. *Id.*

[26] Casino, *supra* note 5, at 32-34.

[27] Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2030 (1994).

[28] United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437x (1988 & Supp. V 1993).

[29] National School Lunch Act, 42 U.S.C. §§ 1751-1769 (1988 & Supp. V 1993).

[30] Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679(a) (Supp. V 1993).

[31] Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400-1461 (1994).

[32] These are referred to as categorical grants. In contrast to categorical grants, a small number of grant-in-aid programs involve block grants. Block grants are generally designated for use within a broad functional area, leaving the states with much discretion as to exactly how the money will be spent. For the most part, the money comes with no strings attached. *See generally*, Casino, *supra* note 5, at 26-27 (describing difference between black grants and categorical grants). The focus of this Article is on categorical grants.

agency's approval, specifying how it will operate the program.[33] As part of the plan, most grant-in-aid programs require that the state designate or establish a state administrative agency to operate the program and interface with the federal government.[34] Finally, the federal government normally retains the power to impose regulations, adopt minimum standards, and inspect results.[35]

Through the enactment of grant-in-aid programs, Congress has undeniably shifted power from state governments to the federal government. From a policy standpoint, many have sharply criticized this shift in power as reducing the discretionary authority of states. Commentators argue that this undermines state autonomy, increases waste and inefficiency in the provision of services, and obscures the responsibilities of the various governments and their actors, resulting in an erosion of political accountability.[36] Commentators have further objected to such programs as being inconsistent with the federalist ideal embod-

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[33] *See infra* note 35.

[34] *See infra* note 35.

[35] For example, under the Adoption Assistance and Child Welfare Act of 1980, §§ 620, 670, 672, 673, and 677 describe the purposes for which the federal money may be spent by the state. Sections 622 and 671(a) specify requirements that the state must satisfy to receive the federal funding, including the development of a plan for implementing the program, which is subject to federal agency approval, and the designation of a state agency to administer the program. Sections 623 and 674 set out formulas for determining the amount of funds that the state is required to contribute to the program.

[36] JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM 118-21 (1992). *See also* DOMESTIC POLICY COUNCIL, WORKING GROUP ON FEDERALISM, THE STATUS OF FEDERALISM IN AMERICA 35 (Nov. 1986) (concluding that "the net result of the massive increase in conditional funding . . . has been to give the national government power to oversee the States' compliance with a wide range of conditional grants, and thus to direct state policy in areas of traditional state concern"); THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990) (arguing that government best serves its citizens when it is decentralized and competitive, and that this cannot be accomplished when there is excessive federal intervention into state and local affairs); Sam J. Ervin, Jr., *Federalism and Federal Grants-In-Aid*, 43 N.C. L. REV. 487, 495 (1965) (describing some of dangers to state autonomy inherent in grant-in-aid programs); Stewart, *supra* note 7, at 958-59 (finding that conditions contained in grant-in-aid programs limit state self-determination by restricting range of policy choices available to states, allocating state administrative resources to the service of federal policies, and requiring that states use their own funds to further federal programs). *But cf.* David Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate over Political Structure*, 59 S. CAL. L. REV. 449, 465-74 (1986) (discussing differences between theories of neofederalism, which assert that strong state and local governments are essential to our political structure, and neonationalism, which emphasize that the federal government has ultimate responsibility for all aspects of government).

ied in the Constitution.[37] The question has therefore arisen whether there are any limits on Congress's power to impose grant conditions.

Some argue that Congress's power to impose conditions on the receipt of federal funding is limited by the Tenth Amendment,[38] which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[39] However, the Constitution specifically authorizes Congress to collect taxes and spend for the general welfare of the United States.[40] A tension thus exists between the Tenth Amendment and the spending clause: To what extent can Congress, in exercising its powers under the spending clause, limit the powers otherwise reserved to the states by the Tenth Amendment?[41]

The Supreme Court has adopted a two-tiered test for determining whether a federal funding condition is constitutional under the Tenth Amendment.[42] The first tier requires that the condition be reasonably related to a legitimate end.[43] As long as the grant-in-aid program is in pursuit of the "general welfare," and the condition is rationally related to the grant-in-aid program's purpose, it will meet this test.[44] Thus, the first tier of the test does not put any practical limits on Congress's power.[45]

The second tier of the test provides that the state cannot be coerced into accepting the grant, but must voluntarily choose to

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[37] *See, e.g.*, Ervin, *supra* note 36, at 495 (warning that "[i]n the present grant programs, there are many inherent dangers to our federal system"); Kaden, *supra* note 7, at 883 (commenting "that the more the machinery of state government is federalized the less real is the separate existence [of the states] guaranteed by the Constitution").

[38] Casino, *supra* note 5, at 36.

[39] U.S. CONST. amend. X.

[40] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ").

[41] For a discussion of the historical debate over the scope of Congress' spending power, see Casino, *supra* note 5, at 36-39, and Ervin, *supra* note 36, at 492-94.

[42] *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 585-93 (1937).

[43] *See id.* at 590-93.

[44] *See id.*

[45] *See* Casino, *supra* note 5, at 40; *cf.* Kaden, *supra* note 7, at 896 (arguing that, because any condition, no matter how intrusive, is likely to pass constitutional muster under this test, a stricter test ought to be adopted).

accept it.[46] Because grant-in-aid programs do not require states to participate, this requirement is also easily satisfied.[47] Although a number of commentators argue that the financial condition of most state governments forces states to participate in grant-in-aid programs,[48] courts have uniformly rejected the argument that this renders conditions to grants unconstitutional.[49] Thus, despite arguments that funding conditions intrude on powers traditionally thought to be reserved to the states, and thus violate principles of federalism, it can be presumed that most, if not all, current funding conditions pass constitutional

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[46] *See Steward Machine*, 301 U.S. at 585-93.

[47] *See, e.g.*, Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947) (upholding grant-in-aid program as constitutional against challenge that it was coercive). The Court noted that "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual" and that states always have the choice of not accepting the federal benefits. *Id.* at 144.

[48] *See supra* note 7.

[49] *See, e.g.*, Florida Dep't of Health v. Califano, 449 F. Supp. 274 (N.D. Fla.) (finding that "strings attached" to receiving funding under Rehabilitation Act of 1973 were not coercive because state had option to refuse to receive federal funding), *aff'd per curiam*, 585 F.2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979); Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974) (concluding that Highway Beautification Act of 1965, which provided grants to states to compensate owners of billboards for their removal and withheld 10% of state's federal highway aid if state did not participate in program, did not so irresistibly compel state to participate so as to be unconstitutional). Nonetheless, a few courts have recognized, although in theory only, that at some point the economic pressure put on a state to participate in a grant-in-aid program may be significant enough to cross the line from inducement into coercion. *See, e.g.*, Montgomery County v. Califano, 449 F. Supp. 1230, 1247 (D. Md. 1978) (stating that ". . . the withholding of federal funds in some instances may resemble the imposition of civil or criminal penalties and . . . economic pressure may threaten such havoc to a state's well-being as to cause the federal legislation to cross the line which divides inducement from coercion . . . "), *aff'd*, 599 F.2d 1048 (4th Cir. 1979).

scrutiny.[50] Accordingly, the next question that arises is how to assure compliance with these conditions.

Typically, the federal agency charged with disbursing funds under the particular grant-in-aid program will have primary, if not sole, responsibility for ensuring state compliance with funding conditions.[51] These agencies have not had much success in achieving compliance, however.[52] Two leading scholars have proffered several possible reasons for this lack of success.[53]

First, they suggest that federal agencies are primarily oriented toward providing aid and support to the participating states, rather than toward enforcing conditions.[54] Because their primary role is part of a cooperative effort with the states, it is difficult for them to fill simultaneously the antagonistic role of a rule enforcer. Thus, federal agencies often give compliance and enforcement tasks low priority, concentrating instead on program development.[55]

Second, often the agency's only enforcement mechanism is a cutoff of federal funds for the program.[56] Yet this is an extremely drastic remedy. If used, it will likely help no one and at

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[50] In fact, no conditions contained in a modern federal grant-in-aid program have ever been found unconstitutional. *See* Ervin, *supra* note 36, at 494.

An alternative argument for finding federal funding conditions unconstitutional was advanced by Deborah Jones Merritt in *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). Professor Merritt makes the argument that federal statutes that impose too great a restriction on state autonomy in violation of federalism principles are unconstitutional, not under the Tenth Amendment, but under the guarantee clause of Article IV, Section 4 of the Constitution. In the guarantee clause, the United States pledges to guarantee to every state a republican form of government. *Id.* Although this argument is interesting, it has not been adopted by any court as a means of limiting congressional power.

[51] *See* Weiser-Varon, *supra* note 5, at 1242.

[52] Several commentators have noted that it is not unusual for state agencies and officials to fail to comply with the conditions of grant-in-aid programs in which the state participates. *See, e.g.*, Tomlinson & Mashaw, *supra* note 8, at 619; Weiser-Varon, *supra* note 5, at 1239.

[53] *See* Tomlinson & Mashaw, *supra* note 8, at 619-23.

[54] *Id.* at 619-20.

[55] *See id.* at 621. This problem is exacerbated when the president is opposed to the use of funding conditions and directs the agencies not to focus on compliance.

[56] For example, under the Adoption Assistance and Child Welfare Act of 1980, if a state's plan does not meet the statutory requirements or the state fails to comply with the provisions of the plan, the only recourse provided for in the statute is a total or partial cutoff of further federal funding. *See* 42 U.S.C. § 671(b) (Supp. V 1993).

the same time will destroy the program. Thus, a cutoff of funds is rarely, if ever, invoked.[57]

In addition, most programs do not prevent changes in a state's program from going into effect merely because an agency determines that they do not conform to federal requirements. Instead, because the agency's only remedy is a funds cutoff, a hearing process is usually required to determine whether this remedy should be invoked.[58] Due to this onerous procedure, the large number of plan submissions, and a lack of personnel, agencies rarely challenge many nonconforming provisions in state plans.[59]

Finally, because agency administrators are unaccountable to a popular constituency, they may be insensitive to local problems and conditions.[60] In particular, the concerns of putative beneficiaries may be unimportant to them.[61] They are, instead, more concerned with promoting and maintaining a good working relationship with state authorities.

Consequently, federal agencies clearly lack the incentive and the ability to ensure compliance by states with federal grant-in-aid funding conditions, leaving the rights of the program's intended beneficiaries unprotected. Although most grant-in-aid programs themselves do not provide for private remedies, this Article will argue that § 1983 nonetheless explicitly grants putative beneficiaries a private remedy for injuries resulting from state noncompliance with funding conditions. First, however, this Article, in Part II, will consider the use of implied causes of action to demonstrate how this remedy differs from a § 1983 remedy. It will begin with a general discussion of implied causes of action. Then it will discuss the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*.[62] This case is

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[57] *See* Tomlinson & Mashaw, *supra* note 8, at 620.

[58] *See, e.g.*, 42 U.S.C. § 671(b).

[59] Tomlinson & Mashaw, *supra* note 8, at 622. *See also* Note, *Making the Old Federalism Work: Section 1983 and the Rights of Grant-in-Aid Beneficiaries*, 92 YALE L.J. 1001, 1014 n.86 (1983) (suggesting that it is standard practice for agencies to rely on reports submitted by states in fulfilling their monitoring function, and as result, states often submit reports that fail to reveal any deficiencies).

[60] Tomlinson & Mashaw, *supra* note 8, at 618-19.

[61] *Id.* at 619.

[62] 451 U.S. 1 (1981).

particularly relevant to this topic because it concerns the use of an implied cause of action under a grant-in-aid statute.

II. IMPLIED CAUSES OF ACTION

A. A Brief History

The existence of an implied cause of action gives a private individual a remedy for violation of a federal statute when the statute itself does not explicitly provide for such a remedy. The Supreme Court first recognized the concept of an implied cause of action in *Texas & Pacific Railway Co. v. Rigsby*.[63] The Court found that the plaintiff could bring suit under a federal statute, even though the statute did not contain any express language creating a private cause of action.[64] In making this finding, the Court stated that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied . . . "[65]

Despite the broad language in *Rigsby*, in the fifty years that followed, the Court was generally reluctant to find implied causes of action and actually did so in relatively few of the cases brought before it.[66] The Court's 1964 decision in *J.I. Case Co. v. Borak*[67] signaled a reversal of this trend.[68] In *Borak*, the plaintiff was a shareholder who brought suit under § 14(a) of the Securities Exchange Act of 1934.[69] The plaintiff alleged that the defendant corporation had used false and misleading proxy statements to obtain shareholder approval of a merger.[70] The Court examined the express remedies in the statute and concluded that they were inadequate to accomplish the statute's

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[63] 241 U.S. 33 (1916).

[64] *Id.* at 39.

[65] *Id.*

[66] Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 976-77 (1983); Thomas L. Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium - Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333, 1351-52 (1980).

[67] 377 U.S. 426 (1964).

[68] Hazen, *supra* note 66, at 1352.

[69] 15 U.S.C. § 78n(a) (1994).

[70] *Borak*, 377 U.S. at 427.

purpose of protecting investors.[71] To achieve this goal, the Court found it necessary to imply a cause of action in favor of the plaintiff.[72]

Following *Borak*, there was a virtual explosion of cases in which the Court recognized the existence of an implied cause of action.[73] Often, the sole basis for finding an implied cause of action was the existence of a statute intended to benefit a special class of which the plaintiff was a member.[74] Where there was a right, there was a remedy. The only exception appeared to be in those cases in which the statute in question created an administrative enforcement scheme that would be thwarted if individuals were granted the right to a private cause of action.[75]

The Court's treatment of implied causes of action took another turn with the seminal decision of *Cort v. Ash*.[76] *Cort* enunciated four factors to consider in determining whether to imply a private cause of action.[77] Commentators disagree on whether *Cort* represented a significant departure from the Court's previ-

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[71] *Id.* at 432.

[72] *Id.* at 433.

[73] *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (recognizing private right of action under Securities Exchange Act of 1934); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (recognizing private citizen's implied cause of action under Voting Rights Act of 1965); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing private right of action to recover damages resulting from peace officer's Fourth Amendment violation); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (recognizing implied private right of action for violations of Securities Exchange Act of 1934); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (recognizing United States' implied cause of action under Rivers and Harbors Act of 1899).

[74] Stephen E. Ronfeldt, *Implying Rights of Action for Minorities and the Poor Through Presumptions of Legislative Intent*, 34 HASTINGS L.J. 969, 977 (1983).

[75] *See, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959); *see also* Susan Gluck Mezey, *Judicial Interpretation of Legislative Intent: The Role of the Supreme Court in the Implication of Private Rights of Action*, 36 RUTGERS L. REV. 53, 56-59 (1983) (describing circumstances under which Court refused to imply cause of action).

[76] 422 U.S. 66 (1975).

[77] *Id.* at 78. The first factor, whether the plaintiff is a member of the class for whose special benefit the statute was enacted, arises directly from *Rigsby*. The second factor looks at whether there is any evidence of legislative intent, explicit or implicit, to either create or deny a private remedy. The third factor considers whether it is consistent with the underlying legislative scheme to imply a private remedy. The final factor asks whether the cause of action is one traditionally relegated to state law in an area basically the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law. *Id.*

ous decisions or was merely a clarification and synthesis of those decisions.[78] Most commentators, however, do agree that several Supreme Court decisions, rendered shortly after *Cort*, have radically altered the law of implied causes of action.[79] These decisions reveal that the existence or nonexistence of legislative intent to create a private cause of action is now the primary factor for determining whether to imply a private cause of action.[80]

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[78] For examples of those who viewed *Cort* as a significant departure from prior decisions, see Mezey, *supra* note 75, at 63, K.G. Jan Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 13-17 (1978), Robert L. Carter & James E. Cumberworth Jr., Comment, *Implied Causes of Action: A New Analytical Framework*, 14 J. MARSHALL L. REV. 141, 152-56 (1980), Myron D. Rumeld, Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183, 1191 (1982), and Carol Scwetschenau Wood, Case Note, *Section 1983 and the Brooke Amendment to the 1937 Housing Act:* Wright v. Roanoke Redevelopment and Housing Authority, *107 S. Ct. 766 (1987)*, 56 U. CIN. L. REV. 1141, 1144 (1988).

For examples of those who viewed *Cort* as merely a clarification and synthesization of prior decisions, see Ronfeldt, *supra* note 74, at 978, Bruce A. Boyer, Note, Howard v. Pierce*: Implied Causes of Action and the Ongoing Vitality of* Cort v. Ash, 80 NW. U. L. REV. 722, 734 (1985), and Douglas W. Jessop, Note, *Implied Private Rights of Action and Section 1983: Congressional Intent Through a Glass Darkly*, 23 B.C. L. REV. 1439, 1443 (1982).

[79] *See, e.g.*, Mezey, *supra* note 75, at 65-66; Ronfeldt, *supra* note 74, at 979-80; Marc I. Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME L. REV. 33, 44 (1979); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 413 (1982); Boyer, *supra* note 78, at 740; Carter & Cumberworth, *supra* note 78, at 165-70; Donna L. Goldstein, Note, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 FORDHAM L. REV. 611, 616-17 (1982) (arguing that fundamental inquiry became legislative intent); Jessop, *supra* note 78, at 1446-48. *Cf.* Hazen, *supra* note 66, at 1367-68 (arguing that four *Cort* factors remain intact, albeit slightly refined).

[80] *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). The Court in *Touche Ross*, in considering whether a private cause of action was implied by § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a) (1994), stated:

> We need not reach the merits of the arguments concerning the "necessity" of implying a private remedy and the proper forum for enforcement of the rights asserted . . . for we believe such inquiries have little relevance to the decision of this case. It is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.

Touche Ross, 442 U.S. at 575.

These post-*Cort* decisions have severely restricted plaintiffs' ability to prove the existence of a private remedy when one is not expressly granted by the statute.[81] That the statute was intended to benefit the plaintiff is no longer enough. Plaintiffs must prove that Congress, when it enacted the statute in question, intended to provide the plaintiff with a private remedy to enforce the rights created by the statute, even though it did not explicitly do so.[82] Evidence of such an intent often is nonexistent. Absent an explicit remedy, the legislative history will not likely contain any evidence of Congress's intent either to permit or prohibit a private remedy.[83] Without specific evidence of an intent to create a private remedy, the Court will be reluctant to infer a private right of action, even absent evidence of a contrary intent.[84]

Reasons for the Court's change in policy concerning implied causes of action can be gleaned from Justice Powell's dissenting opinion in *Cannon v. University of Chicago*.[85] The *Cannon* Court, applying *Cort*'s four factor test, concluded that Congress intended to create an implied cause of action under Title IX of the Education Amendments of 1972.[86] Thus, the Court allowed the

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[81] *See* Sunstein, *supra* note 79, at 413 ("Because the question whether to create a private remedy arises only when Congress is silent, the consequences of this approach will be the denial of private rights of action in numerous settings in which they would formerly have been recognized.").

[82] *Touche Ross*, 442 U.S. at 568.

[83] Justice Stevens addressed this in his opinion in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 25 (1981) (Stevens, J., concurring in judgment in part and dissenting in part). In discussing the current state of the law with regard to implied causes of action, Justice Stevens stated: "The touchstone now is congressional intent . . . . Because legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention, that touchstone will further restrict the availability of private remedies." *Id.* (footnote omitted).

[84] *See Touche Ross*, 442 U.S. at 571 ("[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."). The existence of explicit remedies elsewhere in the act will further undermine any argument of congressional intent to create a private cause of action by implication. The only evidence of an intent to create a private cause of action other than legislative history that the Court appears willing to accept is a statutory provision that either makes specified conduct illegal or directly confers rights in favor of private parties. *See id.* at 569.

[85] 441 U.S. 677 (1979). For a summary of possible reasons for the Court's change in position, see Sunstein, *supra* note 79, at 413-15.

[86] *Cannon*, 441 U.S. at 709.

plaintiff's suits against the University of Chicago and Northwestern University for violations of Title IX.[87] Justice Powell, although disagreeing with the conclusions reached by the majority in applying the *Cort* factors, did not make this the focus of his dissent.[88] Rather, he criticized the *Cort* factors as inappropriate standards for determining whether to recognize an implied cause of action, and he advocated their abandonment.[89] He emphasized that under Article III of the Constitution, Congress alone has the power to define the jurisdiction of lower federal courts.[90] Moreover, as the legislative branch, Congress is the proper body for determining when private parties are to be granted private causes of action under federal statutes.[91] He further argued that the *Cort* analysis permitted Congress to shirk its responsibilities and avoid the often difficult question of whether private litigants should be allowed to enforce a statute by leaving the issue for the courts to decide.[92] Courts, by implying private causes of action under the *Cort* analysis, bypass the legislative process, denying society the benefits of public scrutiny and debate and subjecting it to dangers posed by judicial encroachment on the domain of Congress.[93] In Justice Powell's view, therefore, judicial creation of implied causes of action under the *Cort* analysis is, in essence, judicial lawmaking, which is contrary to the Constitution and the doctrine of separation of powers.[94]

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[87] *Id.* at 717.

[88] *Id.* at 730 (Powell, J., dissenting).

[89] *Id.* at 730-31 (Powell, J., dissenting).

[90] *Id.* at 730 (Powell, J., dissenting).

[91] *Id.* (Powell, J., dissenting).

[92] *Id.* at 743-44 (Powell, J., dissenting).

[93] *Id.* (Powell, J., dissenting).

[94] *Id.* at 731-32 (Powell, J., dissenting). Professor Cass Sunstein, a leading constitutional scholar, has acknowledged that this separation of powers concern has some merit. Sunstein, *supra* note 79, at 415 (stating that separation of powers concern is at least understandable). It is beyond the scope of this article to fully evaluate the separation of powers concerns attendant with implied causes of action. For articles analyzing Justice Powell's dissent in *Cannon*, see George D. Brown, *Of Activism and* Erie - *The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 630 (1984), Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 983 (1983), Linda Sheryl Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L.Q. 469, 485 (1980), Steinberg, *supra* note 79, at 40-41, Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 721 (1987).

There are, in fact, two distinct separation of powers concerns that potentially arise in the context of implied causes of action. The first concern relates to the exclusivity of Congress's power to determine federal court jurisdiction. Article III of the Constitution limits the cases that lower federal courts may hear to those matters for which there is a congressional statutory grant of jurisdiction.[95] Determining whether federal courts have jurisdiction to hear a private cause of action under a federal statute is thus solely the function of Congress, not the federal courts. Courts arguably usurp Congress's authority in this area whenever they rely on an implied cause of action for their source of jurisdiction because Congress, if it had wanted to create jurisdiction, certainly could have done so explicitly.

The second separation of powers concern relates to the exclusivity of Congress's power to interfere with the lawmaking powers of the states. The separation of powers among the three branches of the federal government has been characterized as a deliberate means of safeguarding states' rights.[96] As such, because Congress is the only branch in which the states are actually represented, it follows that Congress alone should have the power to impose a federal rule of law on areas that are

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Note that in support of abandoning the *Cort* factors, Justice Powell also expressed concern with the flood of litigation that he perceived as directly resulting from the liberal *Cort* analysis, which he believed too easily allowed courts to create an implied cause of action. *Cannon*, 441 U.S. at 740-41 (Powell, J., dissenting).

Justice White also filed a dissenting opinion. *Id.* at 718-30 (White, J., dissenting). Unlike Justice Powell, however, Justice White did not advocate the abandonment of the *Cort* factors, but merely disagreed with the majority's analysis. He acknowledged that Congress intended for litigation by private parties to be among the primary means of securing compliance with Title IX. *Id.* at 722-23 (White, J., dissenting). Nonetheless, he did not believe that Congress implicitly authorized a private cause of action under Title IX. Instead he believed, based on the legislative history to Title IX, that Congress contemplated that such private suits would be brought under § 1983. *Id.* (White, J., dissenting). As Justice White pointed out, however, although § 1983 provides a private remedy for deprivations under color of state law of rights secured by federal statutes, such as Title IX, § 1983 does not provide a remedy for the violation of federal rights by private entities or institutions that are not acting under color of state law. *Id.* at 724 (White, J., dissenting). Thus, he concluded that in this case, where the defendants were private institutions, Congress did not intend for there to be a private remedy. *Id.* (White, J., dissenting).

[95] U.S. CONST. art. III, § 1. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 7 (1983) (distinguishing courts of general jurisdiction from federal courts, which have limited jurisdiction).

[96] Creswell, *supra* note 94, at 991-92.

traditionally relegated to the states.[97] Accordingly, it would be unconstitutional for a federal court to impinge on a state's powers, including permitting a private cause of action against the state or its agents, absent congressional authorization.[98]

B. Pennhurst State School and Hospital v. Halderman

Pennhurst State School and Hospital v. Halderman[99] illustrates the Court's implied cause of action analysis concerning claims of state violations of federal funding conditions contained in grant-in-aid programs. The particular issue in *Pennhurst* was whether Congress intended, through § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act[100] (the "DDA"), to create rights enforceable by private causes of action.[101] Under the DDA grant-in-aid program, states received financial assistance from the federal government to aid them in establishing programs for the developmentally disabled.[102] The provision at issue, § 6010, was referred to as the bill of rights provision and, as its name implies, spelled out certain congressional findings regarding the rights of persons with developmental disabilities.[103]

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[97] *Id.* at 995-96. *See also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 497 (1954) (commenting that, in most cases, decision of whether to intervene in matters traditionally within realm of state power belongs to Congress); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) ("Federal intervention as against the states is . . . primarily a matter for congressional determination . . . .").

[98] *See* Creswell, *supra* note 94, at 995-96.

[99] 451 U.S. 1 (1981).

[100] 42 U.S.C. §§ 6000-6081 (1976 & Supp. V 1981). The DDA was substantially amended in 1984 by Pub. L. No. 98-527 and was renamed "Programs for Persons with Developmental Disabilities." Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, 98 Stat. 2662 (1984) (current version at 42 U.S.C. §§ 6000-6083 (1988 & Supp. V 1993)).

[101] *Pennhurst*, 451 U.S. at 5.

[102] *See* 42 U.S.C. §§ 6000-6081 (1976 & Supp. V 1981) (current version at 42 U.S.C. §§ 6000-6083 (1988 & Supp. V 1993)).

[103] In relevant part, § 6010 stated as follows:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
> (2) The treatment, services, and habilitation for a person with developmental

Section 6010 declared that states are obligated to assure that public funds are only provided to institutions that provide appropriate treatment, services, and habilitation to persons with developmental disabilities.[104] Section 6010, however, did not explicitly condition the receipt of federal funds on compliance with its provisions.[105] This was in sharp contrast to numerous other sections of the DDA that were specifically couched as conditions or requirements for receiving aid.[106]

The Court, in determining whether an implied cause of action existed, first considered whether § 6010 created enforceable rights, which the Court indicated was a prerequisite to any private cause of action.[107] The Court recognized that Congress, pursuant to the spending power, can fix the terms and conditions under which it will furnish federal funds to the states.[108] It then determined that, in essence, a contract is created - Congress agrees to grant a state money in return for which the state agrees to comply with certain conditions.[109] Continuing with the contract analogy, the Court stated that for conditions in the contract to be enforceable, and to therefore give rise to enforceable rights, the state must voluntarily and knowingly agree to

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> disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.
> (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program . . . that — (A) does not provide treatment, services, and habilitation which is appropriate to the needs of such person; or (B) does not meet the following minimum standards . . . .

42 U.S.C. § 6010 (1976 & Supp. V 1981) (current version at 42 U.S.C. § 6009 (1988 & Supp. V 1993)).

[104] *Id.*

[105] *Id.*

[106] For example, § 6005 stated that "[a]s a condition to providing assistance . . . the Secretary shall require that each recipient . . . take affirmative action to employ and advance in employment handicapped individuals . . . ." 42 U.S.C. § 6005 (1976) (current version at 42 U.S.C. § 6008 (Supp. V 1993)). *See also* 42 U.S.C. § 6011(a) (Supp. V 1981) (repealed by Pub. L. No. 98-527) ("The Secretary shall require as a condition to a State's receiving an allotment . . . ."); 42 U.S.C. § 6012(a) (Supp. V 1981) (repealed by Pub. L. No. 98-527) ("In order for a State to receive an allotment . . . the State must . . . .").

[107] *Pennhurst*, 451 U.S. at 15.

[108] *Id.* at 17.

[109] *Id.*

them.[110] If a state is unaware of a condition or is unable to ascertain what a condition requires, the state can not have knowingly agreed to be bound by it, and the condition is therefore unenforceable.[111] The Court thus concluded that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[112]

Applying this analysis to the facts before it, the Court concluded that § 6010 did not create enforceable rights because it did not unambiguously state that compliance with its provisions was a condition to receiving federal funds.[113] The Court relied in part on the existence of other provisions in the DDA that clearly imposed funding conditions on the states.[114] These provisions, it found, were evidence that Congress, if it intended to impose conditions, knew how to do so.[115] According to the Court, § 6010 was nothing more than a mere statement of congressional preference for certain kinds of treatment.[116]

As a result of *Pennhurst* and other Supreme Court decisions, it is extremely unlikely that a court will find an implied cause of action under any federal grant-in-aid statute. Furthermore, any plaintiff who attempts to prove an implied cause of action's existence will undoubtedly face a long and difficult battle. Plaintiffs have, therefore, looked for other avenues to provide them with a means of redress. In particular, they have looked to § 1983.

III. ENFORCEMENT OF FUNDING CONDITIONS PURSUANT TO SECTION 1983

A. Legislative History: A Starting Point

Section 1983 creates a cause of action for any person who, under color of any state "statute, ordinance, regulation, custom, or usage," is deprived "of any rights, privileges, or immunities secured by the Constitution and laws."[117] This Article concerns

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 22-27.
[114] *See supra* note 106.
[115] *Pennhurst*, 451 U.S. at 23.
[116] *Id.* at 19.
[117] In relevant part, § 1983 reads as follows:

causes of action arising from the deprivation of rights secured by federal laws, as opposed to rights secured under the Constitution, and will refer to these as "statutory causes of action." Familiarity with the legislative history of § 1983, particularly the history of the "and laws" language, is necessary to an understanding of the controversy that has surrounded the Court's treatment of § 1983 statutory causes of action. Furthermore, the legislative history reveals why the limitations the Court has imposed are improper.

Section 1983 arose out of civil rights legislation enacted by Congress during the Reconstruction Era after the Civil War.[118] The civil rights legislation enacted during this period revealed a fundamental change in political philosophy.[119] Prior to the Civil War, state autonomy was favored over a powerful federal government, which was seen as a threat to individual rights.[120] The Civil War and its aftermath undermined these beliefs and created a shift in ideology.[121] The federal government was seen as the protector of individual rights from state infringement and abuse.[122] For instance, concerning § 1983, the Supreme Court noted that one of the principal reasons for its enactment was to "afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws may not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the

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

42 U.S.C. § 1983 (1988).

[118] Sunstein, *supra* note 79, at 398.

[119] *See* Paul Wartelle & Jeffrey Hadley Louden, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 504-08 (1982); Daniel J. Lynch, Comment, *Compensatory Damage Awards in Section 1983 Actions Based on Federal Statutory Violations*, 34 WAYNE L. REV. 1373, 1374-79 (1988).

[120] Wartelle & Louden, *supra* note 119, at 504.

[121] *Id.*

[122] *Id. See also* Gene R. Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 974-76 (1987) (noting that refusal of state courts after Civil War to protect individual rights was major impetus for enactment of § 1983).

Fourteenth Amendment might be denied."[123] Thus, as a result of Reconstruction and the accompanying civil rights legislation, federal courts were given a far more significant role in the enforcement of federal laws and the protection of individual rights than they had played in the past.

Section 1983 was originally enacted as section 1 of the Civil Rights Act of 1871.[124] At that time, it did not contain any reference to deprivations of rights secured by federal laws, but rather was limited to violations of constitutional rights.[125] The phrase "and laws" was added in 1874 as part of a comprehensive statutory revision that sought to reorganize and recodify all federal statutes.[126] Although the purpose of the revision was to clarify existing law rather than to amend it,[127] numerous substantive changes were nonetheless made,[128] including the addi-

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[123] Monroe v. Pape, 365 U.S. 167, 180 (1960), *overruled in part by* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[124] *See* Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1988)).

[125] The original version of §1983, § 1 of the Civil Rights Act of 1871, commonly referred to as the Ku Klux Klan Act, read as follows:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;" and other remedial laws of the United States which are in their nature applicable in such cases.

[126] *See* REV. STAT. § 1979 (1874) (current version at 42 U.S.C. § 1983 (1988)); *see also* supra note 117.

[127] *See* 2 CONG. REC. 825 (1874) (remarks of Rep. Lawrence) (instructing revision committee to "revise, simplify, arrange, and consolidate all statutes of the United States" and to make "such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text"); 2 CONG. REC. 4220 (1874) (remarks of Sen. Conkling) ("[A]lthough phraseology of course has been changed, the aim throughout has been to preserve absolute identity of meaning, not to change the law in any particular, however minute").

[128] *See* 2 CONG. REC. 826 (1874) (remarks of Rep. Lawrence) ("[The] revision undoubtedly includes legislation, or rather I might say it has been impossible to avoid it.");

tion of the phrase "and laws" to section 1 of the Civil Rights Act. In introducing the revised Civil Rights Act to Congress, Representative Lawrence read aloud the new provisions.[129] He compared provisions of the old statutes with provisions in the revised statutes and noted several differences between the two.[130] He pointed out that the revised provisions "may show verbal modifications bordering on legislation"[131] and that they may in fact operate differently from the old provisions in some cases.[132] Unfortunately, although the new provisions were read to Congress, there was no discussion specifically focusing on the addition of the "and laws" language to section 1.

In addition to broadening the scope of enforceable rights to include rights secured by the laws of the United States, the revisers also separated the jurisdictional provision of section 1 from its remedial provision and divided it into two parts, each containing significantly different language. Section 563(12) of the revised statutes mirrored the remedial provision and granted the district courts jurisdiction over claims alleging deprivations of rights secured by the Constitution or "by any law of the United States."[133] This contrasts with the more restrictive grant of jurisdiction that was given circuit courts.[134] Section 629(16) of the revised statutes limited the circuit courts' original jurisdiction to suits alleging violations of rights secured by the

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see also Sunstein, *supra* note 79, at 401; Wartelle & Louden, *supra* note 119, at 518.

[129] 2 CONG. REC. 825-28 (1874).

[130] *Id.*

[131] *Id.* at 827.

[132] *Id.* at 828.

[133] This version of the statute gave district courts jurisdiction to hear:

> all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the Untied States to persons within the jurisdiction thereof.

REV. STAT. § 563(12) (1874) (current version at 28 U.S.C. § 1343(a)(3) (1994)).

[134] At the time of the revision, there were two classes of federal trial courts - district courts and circuit courts - which were given differing grants of jurisdiction. The district courts had a permanent judge assigned to them, whereas the circuit courts were manned by judges who rode the circuit from one court to the next. These circuit courts are distinguished from the circuit courts of appeals, which were established in 1891 and are now known as the United States Courts of Appeals. *See* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 31, 38, 55 (3rd ed. 1988).

Constitution or "of any right secured by any law *providing for equal rights* of citizens of the United States."[135]

1. The Consistency Theory

The meaning of these changes has been a source of continuing controversy, the debate over which has yielded three main theories.[136] The "Consistency Theory" maintains that the revisers did not intend for there to be any inconsistency among the provisions; the revisers' use of the phrase "and laws" was merely shorthand for "and laws providing for equal rights."[137] The Consistency Theory relies, in part, on the historical context in which the statutes were enacted.[138] The focus and primary purpose of Reconstruction legislation was to secure equal rights for blacks and to protect against state violations of those rights.[139] Thus, under the Consistency Theory, when Congress provided for a private cause of action for state violations of federal laws, it meant only those laws providing for equal rights.

The Consistency Theory also rests on the notion that Congress could not have intended for district courts to have broader jurisdiction than circuit courts.[140] Therefore, Congress must

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[135] REV. STAT. § 629(16) (1874) (repealed 1911) (emphasis added). Section 629(16) gave the circuit courts original jurisdiction:

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

[136] *See generally* Sunstein, *supra* note 79, at 405-09 (discussing various theories of how "and laws" language of § 1983 should be interpreted).

[137] *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 16 (1980) (Powell, J., dissenting) ("In my view, the legislative history unmistakably shows that the variations in phrasing introduced in the 1874 revision were inadvertent, and that each section was to have precisely the same scope."); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 624 (1978) (Powell, J., concurring) ("[T]here is sufficient evidence to indicate convincingly that the phrase 'and laws' was intended as no more than a shorthand reference to the equal rights legislation enacted by Congress."); *see also* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 511 (1982) (contending that it is absurd to believe that Congress intended by "and laws" language for § 1983 to be used in every case asserting violation of federal statutory right).

[138] *See Thiboutot*, 448 U.S. at 25 (Powell, J., dissenting).

[139] *See* Lynch, *supra* note 119, at 1375.

[140] *See Chapman*, 441 U.S. at 634-35 (Powell, J., concurring) ("[T]he difference in the

have intended to limit the jurisdiction of both courts to claims involving violations of rights secured either by the Constitution or by laws providing for equal rights. The Consistency Theory then takes the next step and argues that Congress could not have intended for the remedial provision permitting a private cause of action to be broader than its jurisdictional counterparts.[141] Accordingly, the phrase "and laws" contained in § 1983 should also be interpreted to mean "and laws providing for equal rights." This argument is somewhat supported by subsequent changes that occurred when Congress reorganized the judiciary and abolished circuit courts in 1911.[142] As a part of that reorganization, Congress altered the jurisdictional grant given to district courts, adopting the more restrictive language that had previously been found in § 629(16).[143] This has been touted as evidence that Congress had intended the two jurisdictional provisions to be identical from the beginning.[144]

2. The No Modification Theory

The "No Modification Theory" suggests that the changes made by the revisers should not be viewed as modifying prior law, but merely as a clarification of prior law.[145] The No Modi-

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wording of §§ 563(12) and 629(16) must be ascribed to oversight, rather than an intent to give the former provision greater scope than the latter.").

[141] *See id.* at 636 (Powell, J., concurring) (stating historical evidence does not justify conclusion that § 1979 should be broader than § 629).

[142] *See* Act of March 3, 1911, ch. 231, 36 Stat. 1087.

[143] The current version of this statute provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) [t]o 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 all citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343(a)(3) (1994).

[144] *See* Maine v. Thiboutot, 448 U.S. 1, 21 n.8 (1980) (Powell, J., dissenting); *Chapman*, 441 U.S. at 635 (Powell, J., concurring) ("It thus was § 629(16) that became 28 U.S.C. § 1343[(a)](3), a selection undoubtedly made by the drafters of the Judicial Code in recognition of the fact that this provision expresses more accurately the original intent of Congress than does § 563(12).").

[145] *See Thiboutot*, 448 U.S. at 17-19 (Powell, J., dissenting); *Chapman*, 441 U.S. at 625-27, 638-39 (Powell, J., concurring). Justice Powell, in his dissenting opinion in *Thiboutot* and in his concurring opinion in *Chapman*, does not distinguish between the Consistency Theory

fication Theory is based on the fact that the revisers were instructed not to amend existing law[146] and assumes that they did as they were instructed. The revised statutes must therefore be read in a manner consistent with prior law. Based on this, supporters of the No Modification Theory also appear to advocate that the phrase "and laws" be understood to mean "and laws providing for equal rights." This is incongruous, however. Prior law made no reference whatsoever to rights secured by laws, whether they be laws providing for equal rights or otherwise. It is therefore difficult to comprehend how interpreting "laws" to mean "laws providing for equal rights" is any more consistent with prior law than interpreting "laws" literally.[147]

3. The Plain Language Theory

Unlike the first two theories, which advocate that "laws" be read restrictively, the third theory — the "Plain Language Theory" — contends that the term "laws" should be given its plain and literal meaning.[148] This is the most plausible of the three theories. According to this theory, there was no conflict between the remedial and jurisdictional provisions. The revisers may have deliberately varied the language in the jurisdictional provisions to create different jurisdictional grants for each of the federal courts that had original jurisdiction.[149]

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and the No Modification Theory, but rather intertwines them in support of his position of a narrow reading of § 1983. This Article will treat the two theories separately, however, because they are founded on distinct arguments and are not interdependent on each other.

[146] *See supra* note 127 and accompanying text.

[147] Justice Powell's response to this argument is that the revisers believed that Congress, when it originally enacted § 1 of the Civil Rights Act of 1871, intended by its reference to "rights . . . secured by the Constitution" to include those rights enumerated in § 1 of the Civil Rights Act of 1866 and § 16 of the Civil Rights Act of 1870. *Chapman*, 441 U.S. at 632-33 (Powell, J., concurring). According to Justice Powell, the revisers realized that courts would likely read the phrase restrictively. *Id.* at 633 (Powell, J., concurring). Therefore, out of an abundance of caution, they chose to add the phrase "and laws" to the statute in order to clarify its original meaning. However, he argues that this change was not in any way intended to expand its scope. *Id.* at 633-34 n.14 (Powell, J., concurring).

[148] *See Thiboutot*, 448 U.S. at 4.

[149] Wartelle & Louden, *supra* note 119, at 520-21. *See also Chapman*, 441 U.S. at 658 (White, J., concurring) ("[T]here is nothing in the relevant provisions or in their history that should lead us to conclude that Congress did not mean what it said in defining the jurisdiction of the circuit and district courts in 1874 . . . .").

When the federal courts were established by the Judiciary Act of 1789,[150] two tiers of courts with original jurisdiction were created — district courts and circuit courts. The original jurisdiction granted to circuit courts often differed from that granted to district courts.[151] And because the circuit courts were viewed as a weak link in the federal court system,[152] it makes sense that the revisers would provide them with a more restricted jurisdictional grant.[153]

Furthermore, the relevant language that was added was conspicuous and its meaning clear. In light of the statements made by Representative Lawrence when introducing the legislation, indicating that some modifications were in fact made, and the attention to detail that was given in drafting the revised statutes,[154] Congress must have been fully aware of and willing to accept the ramifications of the changes in the language.[155]

Similarly, the Plain Language Theory is consistent with the textualist approach to statutory interpretation being espoused by some of the more conservative members of the Court — Justice Scalia in particular, and to a lesser degree Justice Kennedy.[156] In interpreting a statute, the textualist approach looks to the ordinary meaning of the statute's language.[157] Dictionaries are often used as an interpretive aid.[158] Legislative history, on the other hand, is never accepted as evidence of a statute's meaning.[159] Looking at § 1983, the statutory language creates a

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[150] Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73.

[151] BATOR, *supra* note 134, at 31-33. Justice White, in his concurring opinion in *Chapman*, also notes that this was not the only instance in which the district courts and the circuit courts were given differing jurisdiction. *Chapman*, 441 U.S. at 659 n. 46 (White, J., concurring).

[152] BATOR, *supra* note 134, at 35.

[153] Wartelle & Louden, *supra* note 119, at 521.

[154] *See id.* at 518-19.

[155] *Id.* at 519.

[156] *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1297 (1990). It has been noted that Chief Justice Rehnquist and Justices Thomas, O'Connor, and Souter have also followed the textualist approach to varying degrees. Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 427-28 (1993).

[157] Zeppos, *supra* note 156, at 1299-1300.

[158] Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 660 (1994).

[159] Zeppos, *supra* note 156, at 1300.

cause of action for any individual who alleges that a state actor has deprived him "of any rights, privileges, or immunities secured by the . . . laws." The plain meaning of the word "laws" is statutory rules of any sort,[160] and is not limited to equal protection laws. Thus, under a textualist approach to statutory interpretation, the "and laws" language of § 1983 should not be interpreted as being limited to equal protection laws, but should be interpreted as encompassing all federal laws.

An argument often levied against the Plain Language Theory points to the adoption of more restrictive language in the provision that granted jurisdiction to district courts when the federal court system was reorganized in 1911.[161] This provision was essentially the same as what is now 28 U.S.C. § 1343(a)(3), which limits the jurisdiction of district courts to violations of rights secured by the Constitution or by laws providing for equal protection.[162] Proponents of a narrow reading of § 1983 claim that a broad reading, which interprets the term "laws" literally to encompass all laws and not just equal protection laws, results in a remedial statute that is broader than its jurisdictional counterpart, thereby creating an inherent illogic that Congress surely could not have intended to exist.[163]

This argument presumes, however, that there are no other jurisdictional bases for § 1983 causes of action, and this is simply not the case. Although jurisdiction does not exist under §

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[160] This is an accepted dictionary definition, both currently and at the time the original statute was enacted. *See, e.g.*, BLACK'S LAW DICTIONARY 887 (6th ed. 1990) (defining "laws" as "[r]ules promulgated by government as a means to an ordered society. Strictly speaking, session laws or statutes . . . "); 2 JOHN BOUVIER, A LAW DICTIONARY 7 (1865) (defining "law" as a rule "of human action or conduct" - "a solemn expression of the legislative will" (quoting the civil code of Louisiana, art. 1)); JOHN OGILVIE, THE COMPREHENSIVE ENGLISH DICTIONARY 631 (1867) (defining "law" as "[a] rule, particularly an established or permanent rule, prescribed by the supreme power of a state"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1279 (1966) (defining "law" as "a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision, or usage) made, recognized, or enforced by the controlling authority").

[161] *See* Act of March 3, 1911, ch. 231, 36 Stat. 1087.

[162] 28 U.S.C. § 1343(a)(3) (1994).

[163] *See, e.g.*, Robert M. Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged*, 2 CLEARINGHOUSE REV. 5, 7, 24-25 (1969).

1343(a)(3) unless the claim alleges the violation of constitutional or civil rights, jurisdiction can nonetheless be found in 28 U.S.C. § 1331 for claimed violations of any federal law.[164] Section 1331 provides district courts with original jurisdiction of actions arising under the Constitution or laws of the United States.[165] Until 1980, it required a minimum amount to be in controversy for jurisdiction to be authorized.[166] Yet constitutional and civil rights, unlike many other rights secured by federal laws, are often incapable of valuation.[167] Congress may have recognized that imposing an amount in controversy requirement would be the equivalent of denying federal jurisdiction in many of these cases. Therefore, Congress created a separate jurisdictional provision for suits involving constitutional or civil rights, essentially exempting such suits from the amount in controversy requirement. Merely because Congress limited the exemption from the amount in controversy requirement to those cases alleging violations of constitutional or civil rights, however, does not mean that Congress left all other statutory claims under § 1983 without a jurisdictional basis. As stated, § 1331 provides a basis for federal court jurisdiction of statutory causes of action under § 1983, regardless of whether the statute at issue is an

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[164] 28 U.S.C. § 1331 (1994). This section currently provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

[165] *Id.*

[166] The amount required to be in controversy was $3,000 until 1958, at which time the amount was increased to $10,000. Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415, 415 (1958).

[167] *See* Hague v. Committee for Indus. Org., 307 U.S. 496, 528-30 (1939) (Stone, J., concurring). Justice Stone, in an influential concurring opinion, noted the existence of two possible provisions establishing jurisdiction for suits arising under § 1983. *Id.* (Stone, J., concurring). The first provision was substantially similar to § 1331 and the second was substantially similar to § 1343(a)(3). In holding that the amount in controversy requirement was inapplicable to claims alleging violation of a constitutional right under § 1983, Justice Stone stated:

> There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of jurisdictional amount were prerequisite.

Id. at 529 (Stone, J., concurring).

equal protection statute. Thus, a broad reading of § 1983 does not create an inherent illogic as alleged.[168]

It also makes sense that this change in the jurisdiction granted to the district courts took place in 1911. When the Revised Statutes were enacted in 1874, neither the district nor the circuit courts were given a general grant of federal question jurisdiction.[169] It was therefore necessary for Congress to specifically authorize jurisdiction in federal courts to the full extent of the remedy provided by § 1983, which it did through the combined grants of jurisdiction in § 563(12) and § 629(16).

With the abolition of the circuit courts in 1911, Congress granted jurisdiction to the district courts of all cases arising under the Constitution or laws of the United States having an amount in controversy in excess of $3,000.[170] This of course included cases arising under § 1983. It is certainly possible that at this time Congress reevaluated the needed scope of the jurisdictional counterpart to § 1983, which previously did not have an amount in controversy requirement.[171] In its reevaluation, Congress may have determined that only those cases involving alleged violations of constitutional rights or civil rights should fall within the courts' jurisdiction irrespective of whether the amount in controversy exceeded $3,000. Cases involving violations of any other federal laws would have to meet the amount in controversy requirement to obtain federal jurisdiction.[172]

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[168] *See* Maine v. Thiboutot, 448 U.S. 1, 8 n.6 (1980); *see also* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 658 (1978) (White, J., concurring) ("[I]t would appear that after 1911 § 1983 cases could be brought in federal court under general federal-question jurisdiction if they involved the necessary amount in controversy; otherwise, they could be entertained in federal court only if they sought redress for deprivation of a constitutional right or of a right under a federal statute providing for equal rights."). *Cf.* Wartelle & Louden, *supra* note 119, at 521 (arguing that mistake in wording in jurisdictional counterparts to § 1983 occurred not when statutes were revised in 1874, but when federal courts were reorganized and jurisdictional grant to district courts was amended in 1911).

[169] The jurisdiction of both courts was limited to specialized areas involving federal law. For example, jurisdiction over criminal cases was given to the circuit courts and jurisdiction over admiralty cases was given to the district courts. BATOR, *supra* note 134, at 32-33.

[170] Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091.

[171] *See* REV. STAT. § 563(12).

[172] Justice Stone, in his concurring opinion in *Hague*, stated:

> Thus, since 1875, the jurisdictional acts have contained two parallel provisions, one conferring jurisdiction on the federal courts, district or circuit, to entertain suits 'arising under the Constitution or laws of the United States' in which the

Finally, one can also find support for the Plain Language Theory in more recent congressional actions. In 1981, 1985, and again in 1987, Senator Hatch proposed an amendment to § 1983 that would explicitly limit the term "laws" to civil rights laws.[173] The proposed amendment did not pass on any of these occasions. Although this is not evidence of the original intent of the drafters of § 1983, it is evidence of the intent of more recent Congresses to not limit the scope of § 1983 statutory actions to cases arising under civil rights laws.[174]

B. Section 1983 and Statutory Violations: The Early Cases

The Supreme Court first addressed the meaning of the phrase "and laws" in 1900 in *Holt v. Indiana Manufacturing Co.*[175] As in many early decisions involving statutory causes of action under § 1983, the issue confronting the Court was one of jurisdiction.[176] In particular, the issue in *Holt* was whether § 629(16) gave circuit courts jurisdiction of suits that alleged a violation of a federal statute other than a civil rights statute.[177] The Court properly held that it did not.[178] In reaching its decision, how-

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> amount in controversy exceeds a specified value; the other . . . conferring jurisdiction on those courts of suits authorized by the Civil Rights Act of 1871, regardless of the amount in controversy.

Hague v. Committee for Indus. Org., 307 U.S. 496, 528-29 (Stone, J., concurring).

[173] S. 584, 97th Cong., 1st Sess. § 1 (1981); S. 436, 99th Cong., 1st Sess. § 1 (1985); S. 325, 100th Cong., 1st Sess. § 1 (1987).

[174] *See* Runyon v. McCrary, 427 U.S. 160, 174-75 (1976) (stating that Congress' consideration and rejection of amendment that would have repealed previous Supreme Court decision was clear indication of Congress' agreement with that decision); *see also* Grove City College v. Bell, 465 U.S. 555, 568 (1984) (finding that failure of Congress to disapprove agency regulations when it was given opportunity to do so strongly implies that regulations accurately reflected congressional intent); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 529 (1982) (discussing contexts in which silence may be indicative of congressional intent). *But see* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1133 (1983) (arguing against probative value of failure of Congress to adopt statutory amendments); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 737-54 (1984) (criticizing judicial interpretation of congressional silence as acquiescence).

[175] 176 U.S. 68 (1900).

[176] *Id.* at 71.

[177] The complaint alleged that the assessment of local taxes upon the value of patents owned by the plaintiff was illegal under the patent laws of the United States. *Id.* at 69.

[178] *Id.* at 73.

ever, the Court stated broadly in dicta that it believed § 1983 to be similarly limited to civil rights laws.[179] Despite this broad assertion, *Holt* has not generally been viewed as authority for a narrow interpretation of § 1983.[180] In fact, the Court later characterized it as an anomaly resulting from the significant degree of judicial deference traditionally given to states by federal courts in issues involving state taxation.[181]

Following *Holt*, the Supreme Court was silent on the question of the proper interpretation of the "and laws" language for several decades. Partially due to an increased number of grant-in-aid programs and an increased awareness of the rights of welfare beneficiaries, the volume of suits alleging state violations of rights secured by federal laws began to increase in the 1960s.[182] Initially, a major hurdle in these suits, and thus an issue often considered by the courts, was the establishment of federal jurisdiction.[183] It was clear that jurisdiction was not available under § 1343(3)[184] because the statutes that create grant-in-aid programs did not usually fall within the definition of an equal protection statute.[185] Furthermore, jurisdiction pursuant to § 1331 was often precluded due to an inability to meet the amount in controversy requirement.[186] The preferred course of action, therefore, was to allege a constitutional viola-

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[179] The Court stated that §§ 629, 563, and 1983 "refer to civil rights only." *Id.* at 72.

[180] *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 542 n.6 (1971); Wartelle & Louden, *supra* note 119, at 509-10.

[181] *Lynch*, 405 U.S. at 542 n.6.

[182] *See* Casino, *supra* note 5, at 32-33 (describing drastic increase in federal grant-in-aid programs during 1960s and 1970s); David L. Herzer, *Federal Jurisdiction over Statutorily-Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1, 1 (1970) (noting that, since 1960, number of welfare recipients bringing legal actions to enforce their rights has increased); Rand E. Rosenblatt, *The Courts, Health Care Reform, and the Reconstruction of American Social Legislation*, 18 J. HEALTH POL. POL'Y & L. 439, 445-46 (1993) (citing social movements, critical legal scholarship, and other cultural changes as responsible for recognition by lower federal courts in mid-1960s of legal rights of welfare recipients).

[183] *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Hagans v. Lavine, 415 U.S. 528 (1974); *Lynch*, 405 U.S. at 538; Rosado v. Wyman, 397 U.S. 397 (1970). This issue is no longer relevant due to the elimination of the amount in controversy requirement from § 1331 in 1980.

[184] Prior to 1979, §1343(a)(3) was designated § 1343(3). *See* Act of Dec. 29, 1979, Pub. L. No. 96-170, § 2, 93 Stat. 1284, 1284.

[185] *See* Herzer, *supra* note 182, at 2.

[186] Because most § 1983 statutory actions involve the deprivation of welfare benefits, the dollar amount in controversy is usually less than the $10,000 that was required by § 1331.

tion in addition to the statutory violation. The allegation of a constitutional violation established jurisdiction of the suit under § 1343(3). Federal jurisdiction of the statutory violation was then obtained pursuant to the doctrine of pendent jurisdiction, provided the constitutional claim was "of sufficient substance to support federal jurisdiction."[187]

Once jurisdiction was established, the Court often proceeded to decide the merits of the claim. Many of the cases involved state statutes or regulations alleged to be in conflict with the Social Security Act, and in particular with the provisions relating to the Aid to Families with Dependent Children program ("AFDC").[188] As with most grant-in-aid programs, to receive funding under AFDC,[189] the state is required to submit a plan for approval by the Secretary of the appropriate administrative agency. To be approved, the plan must comply with numerous statutory and regulatory requirements.[190] Normally, these requirements mandate that the plan contain provisions giving assurance that the state will or will not do specified acts.[191] For example, 42 U.S.C. § 602(10) requires that the state plan include a provision assuring that aid to families with dependent children will "be furnished with reasonable promptness to all eligible individuals."[192]

It was 42 U.S.C. § 602(10) that was at issue in *King v. Smith*,[193] one of the first of these cases to come before the Court. A separate provision in the statute defines a "dependent child" as one who has been deprived of parental support by reason of the death, continued absence from home, or physical

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[187] *Hagans*, 415 U.S. at 536. *See also Rosado*, 397 U.S. at 402 (finding that pendent jurisdiction existed to decide whether state law violated Social Security Act even though constitutional claim that had originally been brought had been rendered moot); King v. Smith, 392 U.S. 309, 312 n.3 (1967) (noting that jurisdiction existed to consider appellees' claim that state regulation was inconsistent with Social Security Act since appellees also alleged that statute violated Constitution, despite fact that Court did not address constitutional issue).

[188] *See e.g.*, Miller v. Youkim, 440 U.S. 125 (1979); Quern v. Mandley, 436 U.S. 725 (1978); Van Lare v. Hurley, 421 U.S. 338 (1975); Townsend v. Swank, 404 U.S. 282 (1971); Rosado v. Wyman, 397 U.S. 397 (1969); King v. Smith, 392 U.S. 309 (1967).

[189] *See* 42 U.S.C. § 601 (Supp. V 1993).

[190] *See* 42 U.S.C. § 602 (Supp. V 1993).

[191] *See id.*

[192] 42 U.S.C. § 602(10) (1988).

[193] 392 U.S. 309 (1967).

or mental incapacity of a parent.[194] The plaintiffs claimed that an Alabama regulation, which had the effect of excluding from the definition of "dependent child" any child whose mother lived with or was frequently visited by an able-bodied man for the purpose of cohabitation, was in conflict with these provisions.[195] The Court agreed, concluding that Congress must have meant the term "parent" to be limited to those individuals who owed a legal duty of support to the child, and declared the Alabama regulation invalid.[196] The *King* Court, although noting that the plaintiffs' action was brought under § 1983, unfortunately did not engage in a discussion of the scope of § 1983.[197] Language in *Greenwood v. Peacock*,[198] a decision rendered by the Court shortly before *King*, indicates that the Court may have presumed that a cause of action existed under § 1983 and did not consider this to be an issue. The *Greenwood* Court, in considering a constitutional claim brought under § 1983, stated matter-of-factly that an individual has a cause of action under § 1983 "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well."[199]

In the twelve years that followed *King*, the Supreme Court heard several cases in which a private plaintiff alleged that a state had violated federal funding conditions under AFDC.[200] In each of these cases, the plaintiff claimed that the state was not complying with the terms of the plan that the state had filed with the Secretary of Health, Education and Welfare ("HEW") as a condition of funding.[201] In none of these decisions did the Court dispute the plaintiff's ability to challenge the validity of the state's action or the state's obligation to comply with the assurances given in its plan, and in four of the five cases, the Court held the state action in question to be

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[194] 42 U.S.C. § 606(a) (Supp. V 1993).

[195] *King*, 392 U.S. at 311.

[196] *Id.* at 327-33.

[197] *Id.* at 311.

[198] Greenwood v. Peacock, 384 U.S. 808 (1966).

[199] *Id.* at 829-30 (citing Monroe v. Pape, 365 U.S. 167 (1961)).

[200] *See* cases cited *supra* note 188.

[201] *See* Miller v. Youkim, 440 U.S. 125, 126-29 (1979); Quern v. Mandley, 436 U.S. 725, 727-28 (1978); Van Lare v. Hurley, 421 U.S. 338, 339-43 (1975); Townsend v. Swank, 404 U.S. 282, 283-85 (1971); Rosado v. Wyman, 397 U.S. 397, 399 (1969).

invalid.[202] Again, however, the Court's discussion of the basis for the plaintiff's federal cause of action was limited, and in some cases nonexistent.[203] The Court appeared to have accepted and relied on a broad interpretation of § 1983, although it never explicitly stated this.[204]

The Court did discuss the scope of § 1983 statutory causes of action in *Edelman v. Jordan*,[205] although the specific question being considered in this case was whether § 1983 created a waiver of a state's Eleventh Amendment immunity from damage awards.[206] The plaintiff in *Edelman* had brought suit against state officials who were in charge of administering the Illinois Aid to the Aged, Blind and Disabled program.[207] Claiming that the officials were violating conditions imposed by federal law, the plaintiff requested an award of retroactive benefits.[208] In discussing the preliminary question of whether § 1983 created a cause of action for the plaintiff, Justice Rehnquist, writing for the majority,[209] stated that "[i]t is, of course, true that . . . suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."[210] Inexplicably, the Court cited *Rosado*

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[202] *See Miller*, 440 U.S. at 146; *Van Lare*, 421 U.S. at 340; *Townsend*, 404 U.S. at 285; *Rosado*, 397 U.S. at 401.

[203] *See, e.g., Rosado*, 397 U.S. 397 (1969).

[204] In a decision rendered shortly after *King*, however, the Court interpreted *King* as holding that the state regulation in question was invalid under the Supremacy Clause, implying that this was the basis for the plaintiffs' claim instead of § 1983. *Townsend*, 404 U.S. at 286. While not expressly rejecting the availability of § 1983 as a basis for the plaintiffs' claim, the Court nonetheless confused the issue. Why the Court would invoke the Supremacy Clause instead of relying on § 1983 is somewhat of a mystery. The most plausible explanation is that the majority was attempting to construct a constitutional basis for state statutory violations in order to avoid the jurisdictional problems that then existed. If this was the case, then the decision is in no way a repudiation of the broad scope of § 1983. In a concurrence, Justice Burger expressed his opinion that the Supremacy Clause was not relevant in cases involving alleged violations of AFDC provisions since the provisions are not mandatory on the states. *Id.* at 292 (Burger, J., concurring).

[205] 415 U.S. 651 (1973).

[206] *Id.* at 657-59.

[207] Aid to the Aged, Blind and Disabled is a federal grant-in-aid program that is part of the Social Security Act.

[208] *Edelman*, 415 U.S. at 651.

[209] The majority consisted of Chief Justice Burger and Justices Rehnquist, Stewart, White, and Powell. Justices Douglas, Brennan, Marshall, and Blackmun dissented, arguing that the Eleventh Amendment did not protect states from liability under the circumstances before them.

[210] *Edelman*, 415 U.S. at 675. The Court went on to find that, although § 1983 created a

v. Wyman[211] for this proposition, but nowhere in the *Rosado* decision was § 1983 even mentioned.

Nonetheless, in his opinion in *Edelman,* Justice Rehnquist accepted without quarrel, as apparently did all the justices on the Court at that time,[212] that § 1983 encompasses claims for violations of all federal statutory rights, not merely statutory rights related to equal protection. Of particular note, Chief Justice Burger and Justice Powell joined in the majority opinion.[213] Yet six years later, in a concurring opinion in *Chapman v. Houston Welfare Rights Organization,*[214] their positions drastically changed.

The issue in *Chapman* was again one of jurisdiction. Specifically, the issue was whether federal courts, under § 1343(3), have jurisdiction over a § 1983 statutory cause of action unrelated to equal protection absent a related constitutional claim.[215] The Court properly held that they do not.[216] The majority expressly refrained from addressing whether the remedial coverage of § 1983 is coextensive with § 1343(3),[217] the jurisdictional provision, finding it unnecessary to its decision.[218] Undeterred, Justice Powell (joined by Chief Justice Burger and Justice Rehnquist) and Justice White took advantage of the opportunity to write separate concurring opinions in which they engaged in a passionate debate over the scope of § 1983 statutory causes of action.

Justice White took the position that § 1983 and § 1343(3) were not equal in scope.[219] Section 1343(3), in granting jurisdiction to federal district courts, is clearly limited to those cases

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cause of action, the Eleventh Amendment restricted the court's remedial power to prospective injunctive relief and prohibited a retroactive award that would require the payment of funds from the state treasury. *Id.* at 677.

[211] 397 U.S. 397 (1970).

[212] The justices on the Supreme Court who participated in the *Edelman* decision were Chief Justice Burger and Justices Rehnquist, Stewart, White, Powell, Douglas, Brennan, Marshall, and Blackmun.

[213] *See supra* note 209 and accompanying text.

[214] 441 U.S. 600, 623-46 (1975) (Powell, J., concurring). Chief Justice Burger and Justice Rehnquist joined in the concurrence.

[215] *Id.* at 603.

[216] *Id.*

[217] Currently codified at 28 U.S.C. § 1343(a)(3) (1994).

[218] *Chapman,* 441 U.S. at 616.

[219] *Id.* at 649 (White, J., concurring in judgment).

involving rights secured by the Constitution or by laws providing for equal rights. Justice White contrasted § 1343(3) with § 1983. He found that § 1983, unlike § 1343(3), provides a remedy for deprivations of *all* federal statutory as well as constitutional rights.[220] He based his interpretation of § 1983 on the Plain Language Theory, stating that this interpretation "reflects a straightforward and natural reading" of the language of § 1983.[221] Justice White also examined the legislative history of § 1343(3) and § 1983 and, despite finding some ambiguities, contradictions, and uncertainties, argued that there was nothing that should lead the Court to conclude that Congress did not mean what it said.[222] Finally, he noted that a literal construction of § 1983 was supported by prior Supreme Court cases that had either assumed or indicated in dicta that § 1983 statutory causes of action are not limited to equal protection claims.[223]

Justice Powell, on the other hand, argued vehemently that the phrase "and laws" in § 1983 was intended as no more than a shorthand reference to equal rights legislation.[224] He acknowledged that the legislative history surrounding § 1983 did not provide a clear indication of the correct interpretation of the "and laws" language.[225] Yet he nonetheless relied primarily on legislative intent to support his position, invoking both the Consistency Theory and the No Modification Theory.[226] Justice Powell also conceded that several earlier decisions of the Court contained statements indicating that § 1983 causes of action were not limited to constitutional and equal protection claims.[227] Despite the fact that he had participated in some of these decisions, he nonetheless summarily dismissed the perti-

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[220] *Id.* (White, J., concurring in judgment). Although not joining in his concurrence, Justices Stewart, Brennan, and Marshall also agreed that § 1983 creates a cause of action for violations of all federal statutory rights, not just equal protection rights. They dissented from the majority on the grounds that they believed § 1343(3) did create federal jurisdiction in the case at hand. *Id.* at 673-76 (Stewart, J., dissenting).

[221] *Id.* (White, J., concurring in judgment).

[222] *Id.* at 650-58, 663-69 (White, J., concurring in judgment).

[223] *Id.* at 649 (White, J., concurring in judgment).

[224] *Id.* at 623-46 (Powell, J., concurring).

[225] *Id.* at 623-24 (Powell, J., concurring).

[226] *Id.* at 624-40 (Powell, J., concurring).

[227] *Id.* at 644 (Powell, J., concurring).

nent statements because they had been made without critical analysis.[228]

It is perhaps in the final argument presented by Justice Powell that the true reason behind his opinion emerges, however. He asserted that there were "weighty policy and pragmatic arguments" that supported the construction advanced by his opinion.[229] Those arguments boil down to a concern expressed by Justice Powell that if the "and laws" language of § 1983 is interpreted literally, then a private individual would have the right to bring suit to force compliance with virtually every federal funding condition, regardless of whether Congress would have approved such a right when the program was adopted.[230] That concern is clearly eliminated if § 1983 is read as encompassing only rights secured by the Constitution and laws providing for equal rights. Although there may be some merit in this concern, it does not eliminate the holes in the logic invoked under both the Consistency and No Modification Theories. In addition, as time goes on and Congress does not take any action to limit the availability of § 1983 actions to enforce federal funding conditions, this argument's validity weakens considerably.[231]

C. *The Rise and Fall of Section 1983 Claims for Statutory Violations:* Thiboutot *and Beyond*

It was not until 1980, in the landmark decision of *Maine v. Thiboutot*,[232] that the Supreme Court directly confronted the meaning of the "and laws" language in § 1983. The plaintiff in *Thiboutot* brought suit under § 1983, alleging that the State of Maine had violated federal law by improperly calculating the amount of AFDC benefits to which he was entitled.[233] The primary issue confronting the Court was essentially the same as the

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[228] *Id.* at 644-45 (Powell, J., concurring).

[229] *Id.* at 645 (Powell, J., concurring).

[230] *Id.* (Powell, J., concurring).

[231] Despite the fact that it is now accepted that statutory causes of action under § 1983 are not limited to violations of civil rights laws, Congress has yet to take action to eliminate the availability of § 1983 actions as a means of enforcing federal funding conditions, and has in fact rejected bills that would limit the scope of § 1983 to equal protection laws. *See supra* notes 173-74 and accompanying text.

[232] 448 U.S. 1 (1980).

[233] *Id.* at 3.

issue debated by Justices White and Powell in their concurring opinions in *Chapman*: whether the phrase "and laws" contained in § 1983 should be read literally to encompass all federal laws, or whether it should be limited to equal protection laws.[234] The Court,[235] in an opinion written by Justice Brennan, adopted the reasoning of the Plain Language Theory and Justice White's concurrence in *Chapman* and refused to adopt a restrictive interpretation of § 1983. Thus, the Court for the first time definitively determined that the relief provided by § 1983 is not limited to violations of rights protected by the Constitution and federal equal protection laws, but encompasses violations of rights protected by any federal law.[236]

The Court's opinion in *Thiboutot* prompted a sharp dissent from Justice Powell, which Chief Justice Burger and Justice Rehnquist joined.[237] The dissent accused the majority of blindly relying on the plain meaning of § 1983 and ignoring the legislative history underlying the statute.[238] After engaging in a lengthy analysis of the legislative history of § 1983, repeating much of what was said in the *Chapman* concurrence, the dissent concluded that despite the plain language of § 1983, the phrase "and laws" should be limited to those laws providing for the equal protection or civil rights of citizens.[239]

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[234] *Id.* at 4.

[235] The majority consisted of Justices Brennan, Stewart, White, Marshall, Blackmun, and Stevens.

[236] *Thiboutot*, 448 U.S. at 4. At least one commentator has criticized the Court's reliance on the Plain Language Theory and prior case law and suggested that the Court should have instead relied on the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (Supp. V 1993), which contains passages indicating Congress' belief at the time of the statute's enactment in 1976 that § 1983 provides a remedy for violations of *all* federal statutory rights. *See* Owen M. Field, Note, *The Application of Section 1983 to the Violation of Federal Statutory Rights* - Maine v. Thiboutot, 30 DEPAUL L. REV. 651, 662-64 (1981). Better yet, perhaps the Court should have cited to this legislative history not to the exclusion of the Plain Language Theory and prior case law, but as additional support for its holding. As Field points out, "although a subsequent legislative construction of a statute is not binding on a court, it is a valuable aid in resolving doubts in the interpretation of a statute." *Id.* at 662 (citing Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980)).

[237] *Thiboutot*, 448 U.S. at 11 (Powell, J., dissenting).

[238] *Id.* at 14 (Powell, J., dissenting). The majority did consider the legislative history of § 1983, but determined that it did not provide a definitive answer to the issue at hand. *Id.* at 7-8.

[239] *Id.* at 21-22 (Powell, J., dissenting). *See also* George D. Brown, *Whither* Thiboutot?

The dissent also considered previous decisions of the Court, including *Edelman*, and surprisingly found no support for the majority's interpretation of § 1983 in any of these decisions.[240] Writing for the dissent, Justice Powell stated that "none of the cited cases contains anything more than a bare assertion of the proposition that is to be proved" and "[m]ost say much less than that."[241] The dissent's treatment of *Edelman* is of particular interest. The dissent criticized *Edelman* for citing to *Rosado* as support for the proposition that § 1983's coverage of statutory causes of action extends beyond claimed violations of federal equal protection laws.[242] The criticism is proper because, as previously noted, *Rosado* did not explicitly refer to § 1983. Nevertheless, the criticism is puzzling because Justice Rehnquist wrote the opinion in *Edelman*, and both Justice Powell and Chief Justice Burger joined in that opinion.

The end results in *Edelman* and *Thiboutot* can perhaps explain the apparent change in their interpretation of *Rosado*. In *Edelman*, the end result was to limit state liability for violations of federal funding conditions. In contrast, the end result in *Thiboutot* was to increase state accountability for such violations. Thus, while *Edelman* provided for increased protection of state sovereignty, *Thiboutot* permitted increased intrusions on it. It is well-known that Justices Powell and Rehnquist are champions of states' rights.[243] In fact, the dissenting opinion in *Thiboutot*

Section 1983, Private Enforcement, and the Damages Dilemma, 33 DEPAUL L. REV. 31, 40 (1983) (arguing merits of Justice Powell's dissenting opinion in *Thiboutot*).

[240] *Thiboutot*, 448 U.S. at 26 (Powell, J., dissenting).

[241] *Id.* at 31 (Powell, J., dissenting). *Cf.* Brown, *supra* note 239, at 38 (noting that if Court's previous pronouncements on scope of § 1983 were as clear as Justice Brennan characterized them as being, it is difficult to understand why lower courts were divided over availability of § 1983 to enforce statutory claims and why many lower courts were not even apparently aware of existence of such possibility).

[242] *Thiboutot*, 448 U.S. at 33 (Powell, J., dissenting).

[243] Justice Powell's views on the importance of states' rights are well illustrated by his dissenting opinion in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting): *See also* Christina B. Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303, 311-15 (1982) (characterizing Justice Powell as an "advocate of minimizing federal interference in state and local government"); Martha A. Field, Comment, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 98-100 (1985) (discussing Justice Powell's federalist views as reflected in his dissent in *Garcia*). For a discussion of Justice Rehnquist's views, see *infra* notes 353-60 and accompanying text.

stressed that its greatest concern with the Court's decision was its effect on state sovereignty.[244] The change in their interpretation of *Rosado* may therefore be nothing more than a necessary means of obtaining their desired result.

The dissent further attempted to minimize *Edelman*'s importance by pointing out that on the same day *Edelman* was decided, the Court in *Hagans v. Lavine*[245] refused to express a view as to whether § 1983 creates a cause of action for purely statutory claims. This, however, is plainly a mischaracterization. The issue the Court refused to decide in *Hagans* was not whether § 1983 created a cause of action for purely statutory claims. Rather, the issue was whether a § 1983 statutory cause of action is a suit providing for the protection of civil rights such that jurisdiction in federal courts exists under 28 U.S.C. § 1343(4).[246] The Court found it unnecessary to consider this issue, and thus refused to do so, because it found that the federal court had pendent jurisdiction of the statutory claim.[247]

As he did in *Chapman*, Justice Powell, in writing for the dissent, again tried to justify his opinion on policy grounds by pointing out what he perceived to be the horrific effects of the Court's decision.[248] He first noted that federal grant-in-aid programs exist in virtually every area of state public administration.[249] He thus characterized the decision as conferring upon the federal courts "unprecedented authority to oversee state actions."[250]

He further opined that the decision would lead to the harassment of state and local officials and additional overburdening of

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[244] *Thiboutot*, 448 U.S. at 33-34 (Powell, J., dissenting).

[245] 415 U.S. 528 (1974).

[246] *Id.* at 534 n.5.

[247] *Id.*

[248] *Thiboutot*, 448 U.S. at 23-25 (Powell, J., dissenting). *See also* Brown, *supra* note 239, at 37-40 (identifying consequences, which he characterizes as negative, likely to result from *Thiboutot*).

[249] *Thiboutot*, 448 U.S. at 22-23 (Powell, J., dissenting). In an appendix to his dissenting opinion, Justice Powell listed thirteen federal grant-in-aid programs as examples. *Id.* at 36-37 (Powell, J., dissenting).

[250] *Thiboutot*, 448 U.S. at 25 (Powell, J., dissenting). *But see* Willcox, *supra* note 6, at 132 (arguing that enforcement by beneficiaries enables grant conditions to be effective instruments of government as they ought to be, but have not always been).

federal courts.[251] Assuming Justice Powell did not mean to imply that harassment occurs even when the state has not complied with federal law, this argument has some merit. Nonetheless, the same argument could be made about almost every situation in which we grant individuals judicial remedies to protect their rights or achieve justice. There will always be those individuals who bring meritless or frivolous actions, whether for harassment or other purposes, and these actions will undoubtedly burden the courts as well as those who are obligated to defend such actions. This is not, however, an adequate reason for disallowing such actions altogether and thereby foreclosing judicial remedies for those who have legitimate claims. Rather, the appropriate response is to penalize those who abuse the system by bringing such meritless or frivolous actions.[252]

Although *Thiboutot* resolved the question of whether § 1983 provides for a statutory cause of action, this was hardly the end of the debate. Less than a year later, in *Pennhurst State School and Hospital v. Halderman*,[253] the Court would begin the process of chipping away at the availability of § 1983 statutory causes of action, particularly in the context of grant-in-aid programs. The result has been to eliminate the practical utility of § 1983 statutory causes of action, while ostensibly still recognizing their existence.

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[251] *Thiboutot*, 448 U.S. at 24 (Powell, J., dissenting).

[252] *Cf.* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 84 (1989) (criticizing commentators who suggest that type of claim that produces great deal of litigation in federal courts should be limited for that reason alone, regardless of whether claim has merit, and arguing that, unless claim lacks merit, appropriate response "should be to expand the courtroom, not close the door"); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights - Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. REV. 1, 21 (1985) (questioning why screening out frivolous suits should be considered problem unique to § 1983 instead of part of more general problem that should be addressed on its own terms, noting that there are no statistics indicating that § 1983 claims are more likely to be frivolous than any other actions); Note, *Making the Old Federalism Work: Section 1983 and the Rights of Grant-in-Aid Beneficiaries*, 92 YALE L. J. 1001, 1017-20 (1983) (noting that § 1983 imposes no greater obligations on states than are contained in grant statutes themselves and suggesting that, if courts were permitted to evade at will their duty to enforce federal rights merely because their dockets were overloaded, then we would essentially be allowing courts to make value judgments regarding relative worth of particular rights).

[253] 451 U.S. 1 (1980).

As previously discussed, *Pennhurst* primarily involved a question of whether an implied cause of action existed under § 6010 of the DDA.[254] After deciding that an implied cause of action did not exist, however, the Court remanded to the Court of Appeals the question of whether, pursuant to § 1983, private individuals could compel state compliance with other sections of the DDA, in particular §§ 6011(a) and 6063(b)(5)(C).[255] Section 6011(a) required states to provide the Secretary with assurances that each program that received funds would have in place, for each program participant, a rehabilitation plan that met certain statutory requirements. In particular, § 6063(b)(5)(C) concerned the state's plan that was required to be filed with and approved by the Secretary for the state to receive funding. Section 6063(b)(5)(C) required that this plan provide or be supported by satisfactory assurances that the human rights of all persons with developmental disabilities would be protected consistent with § 6010 of the DDA.[256]

In remanding the question of whether a cause of action existed under § 1983, Justice Rehnquist[257] raised three critical issues. The first was whether a § 1983 cause of action alleging a violation of § 6063(b)(C)(5) was limited to a claim that the state did not provide adequate assurances in its plan, or whether a § 1983 cause of action could encompass a claim that the state failed to act in a manner consistent with its assurances, even though the assurances themselves were adequate. Justice Rehnquist intimated that it was only the first, more limited type of claim that was permissible. The second critical issue raised was whether the remedy provided for in the DDA, an action by the federal government to terminate federal funds, was exclusive. If it was exclusive, Justice Rehnquist suggested that a § 1983 cause of action would not be permitted. The final issue raised was whether, even if a § 1983 cause of action were allowed, the remedy would be limited to enjoining the federal government from providing any additional funds to the state.

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[254] *See supra* notes 99-116 and accompanying text.

[255] *Pennhurst*, 451 U.S. at 27-30.

[256] *See supra* note 103 (providing text of § 6010).

[257] The majority opinion was written by Justice Rehnquist and was joined in by Chief Justice Burger and Justices Powell, Stewart, and Stevens.

Expressing concern about ordering a state to comply with federal funding conditions, and thereby limiting a state's right to voluntarily choose whether to participate in a grant-in-aid program, Justice Rehnquist implied that the remedy should, in fact, be so limited.[258]

Not all of the justices agreed with the views espoused by Justice Rehnquist and the majority of the Court concerning the availability of a § 1983 action under the DDA. Justice Blackmun, who concurred in part and concurred in the judgment, declined to join in what he characterized as the Court's "negative attitude" as to the possibility of enforceable rights under the DDA.[259] Justices White, Brennan, and Marshall also disagreed with the advisory portion of the Court's opinion, and dissented in part.[260] Each of the issues raised by the majority was specifically addressed in a separate opinion written by Justice White. With respect to the first issue — whether under the DDA a state is required to actually comply with the terms of its plan once the plan is approved — Justice White stated that "it is difficult to believe that the Secretary must continue to fund a program that is failing to live up to the assurances that the State has given the Secretary."[261]

As to the second issue raised by the majority — whether the ability of the Secretary to terminate federal funding precludes a § 1983 cause of action — Justice White reminded the Court that *Thiboutot* creates a presumption that a federal statute creating federal rights may be enforced in a § 1983 action.[262] In his opinion, this presumption can only be overcome by an explicit directive on the part of Congress — that Congress gave a federal administrative agency the power to cut off funds does not mean that Congress intends to preclude a § 1983 action.[263] Justice White emphasized the drastic nature of a funds cutoff and the harm it would cause intended beneficiaries of the program.[264] Because of the drastic nature of a cutoff of funds,

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[258] *Pennhurst*, 451 U.S. at 29.

[259] *Id.* at 32-33 (Blackmun, J., concurring in part and concurring in the judgment).

[260] *Id.* at 33 (White, J., dissenting in part).

[261] *Id.* at 49 (White, J., dissenting in part).

[262] *Id.* at 51 (White, J., dissenting in part).

[263] *Id.* at 52 (White, J., dissenting in part).

[264] *Id.* (White, J., dissenting in part).

it should not be seen as an exclusive remedy, but as a remedy of last resort.

Justice White responded to the last concern raised by the majority, that any remedy beyond a cutoff of funds would impermissibly restrict the voluntary nature of a state's participation in the DDA program, by delineating a workable alternative.[265] He suggested that the lower court should announce what is required of the state to comply with the DDA, and then permit the state an appropriate amount of time in which to decide whether to make the required changes or to forego any further federal funding. If the state chooses to comply, it should file a plan proposing how it would achieve compliance, and, if acceptable to the court, the court should enter a decree incorporating the plan.

The Court again addressed the question of when Congress will be found to have foreclosed a § 1983 action, although not in the context of a grant-in-aid statute, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*[266] As in *Pennhurst*, *Sea Clammers* primarily involved the question of whether Congress intended to create an implied cause of action, in this case under either the Federal Water Pollution Control Act ("FWCPA") or the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"). After finding that Congress did not intend to create an implied cause of action, the Court then considered whether a cause of action existed as a result of § 1983, although the parties did not raise this issue. Citing to *Pennhurst*, the Court ruled that there is an exception to the application of § 1983 to a federal statute if it is determined either that the statute does not create enforceable rights or that Congress foreclosed § 1983 private enforcement of the statute in the enactment itself.[267] According to the Court, it is not necessary that Congress *explicitly* deny a § 1983 action if it can be shown that Congress *intended* to deny such an action. All the members of the Court appeared to agree that this intent can be implied if the remedial devices provided in a particular statute are comprehensive. Because the FWCPA and the MPRSA both

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[265] *Id.* at 53-55 (White, J., dissenting in part).

[266] 453 U.S. 1 (1980).

[267] *Id.* at 19.

contained comprehensive remedial devices, including suits by private citizens, the Court concluded that under these circumstances Congress could not have intended to preserve private enforcement pursuant to § 1983.[268]

In *Wright v. City of Roanoke Redevelopment and Housing Authority*,[269] the Court refined its test as to when an enforcement scheme provided in a statute is comprehensive enough to evidence congressional intent to foreclose a § 1983 action. The Court found that once a plaintiff had established a § 1983 cause of action,[270] a defendant could defeat the existence of such action only if it were able to demonstrate, either by express statutory language or by other specific evidence from the statute itself (such as the existence of a comprehensive remedial scheme), that Congress intended to override the enforcement scheme provided in § 1983. Since Congress clearly indicated an intent to allow a private remedy for deprivations of federally created rights through its enactment of § 1983, the Court stated that a determination that Congress intended to take that remedy away should not be made lightly.[271]

Specifically at issue in *Wright* was the Brooke Amendment to the Housing Act of 1937,[272] which imposed a ceiling on the

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[268] *Id.* at 20. The plaintiffs in *Sea Clammers* were prevented from obtaining relief under the private citizen suit provisions of both the FWCPA and the MPRSA because they failed to comply with specified notice requirements. Justice Stevens, in a separate opinion joined in by Justice Blackmun, agreed that a defendant may carry the burden of proving that Congress intended to foreclose a § 1983 remedy either by pointing to explicit language in the statute itself or in the legislative history that indicates such an intent or by establishing that Congress intended the remedies in the statute to be exclusive. *Id.* at 27-28 n.11 (Stevens, J., concurring in judgment in part and dissenting in part). Justice Stevens also agreed that a comprehensive remedial scheme can evidence a congressional intent to preclude other remedies. *Id.* at 28 (Stevens, J., concurring in judgment in part and dissenting in part). However, both the FWCPA and the MPRSA contained savings clauses explicitly preserving any right any person may have under any other statute or under the common law to seek enforcement or other relief of their provisions. Justice Stevens believed that these clauses, as well as similar language in the statutes' legislative history, indicated that, despite the remedial schemes provided for in the statutes, Congress did not intend to foreclose other remedies, including a § 1983 cause of action. *Id.* at 29-31 (Stevens, J., concurring in judgment in part and dissenting in part).

[269] 479 U.S. 418 (1987).

[270] A plaintiff does this by showing that state actors have deprived them of a right created by a federal statute for which they were an intended beneficiary. *See* Maine v. Thiboutot, 448 U.S. 1, 4-5 (1980).

[271] *Wright*, 479 U.S. at 423-24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

[272] 42 U.S.C. § 1437a (1988 & Supp. V 1993).

percentage of income that a low-income family living in a public housing project could be required to pay as rent. The Housing Act gave the Department of Housing and Urban Development ("HUD") considerable authority to oversee the operations of local public housing authorities, including the authority to conduct audits and cut off federal funds.[273] Rejecting the notion put forth by Justice Rehnquist in *Pennhurst*, the Court held that these types of enforcement powers were not sufficiently comprehensive to demonstrate congressional intent to foreclose § 1983 remedies.[274] The Court found significant the fact that the Housing Act did not provide for, and HUD had not instituted, any mechanisms whereby a tenant could seek enforcement of rights secured by the Housing Act. The case was therefore distinguishable from *Sea Clammers*. In reaching its determination, the Court also relied in part on evidence that HUD itself believed that tenants were entitled to bring private actions against public housing authorities for alleged violations of the Housing Act.[275] The Court found irrelevant the existence of state administrative and judicial remedies. In the Court's words, the existence of these remedies "is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights."[276]

A second issue before the Court was whether the asserted violation was of an enforceable right.[277] The plaintiffs were alleging that the defendant overbilled them for utilities and thereby charged them rent in excess of the ceiling prescribed by the Brooke Amendment. The defendant claimed that the statute did

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[273] *See id.*

[274] *Wright*, 479 U.S. at 428.

[275] *Id.* at 425-26.

[276] *Id.* at 429. *See also* David C. Frederick, Note, *Comprehensive Remedies and Statutory Section 1983 Actions: Context as a Guide to Procedural Fairness*, 67 TEX. L. REV. 627, 652-53 (1989) (arguing that, in determining whether Congress intended to foreclose § 1983 actions, "courts should ignore state procedures existing independently of a congressional mandate" because they are not indicative of congressional intent). *But see* Michael D. Daneker, Note, *Medicaid, State Cost-Containment Measures, and Section 1983 Provider Actions Under* Wilder v. Virginia Hosp. Ass'n, 45 VAND. L. REV. 487, 513-14 (1992) (taking position that allowing § 1983 actions in face of state remedies "undermines the effectiveness and comprehensiveness" of such remedies). For alternative means of determining whether Congress intended to preempt § 1983 remedies, see Rumeld, *supra* note 78, at 1201-05, and Sunstein, *supra* note 79, at 418-38.

[277] *Wright*, 479 U.S. at 429-30.

not create rights in favor of the plaintiffs that were specific or definite enough to be enforceable. Although the statute did not specify what costs were included in a tenant's rent, regulations promulgated by HUD required public housing authorities to include a reasonable allowance for utilities.[278] The Court found that these regulations were a valid interpretation of the statute, and as such had the force of law.[279] The Court also found that the judiciary was capable of determining whether utility allowances made by a public housing authority were "reasonable." Thus, the Court concluded that the commands of the Brooke Amendment, with the aid of interpretive HUD regulations, were sufficiently specific and definite under the test adopted in *Pennhurst* to qualify as enforceable rights. A deprivation of these rights was therefore actionable under § 1983.[280]

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, dissented on two grounds: (1) that the Brooke Amendment does not create an enforceable right to have "rent" include a reasonable allowance for utility charges;[281] and (2) that a "reasonableness" standard is too vague and indefinite to create enforceable rights.[282] The dissenting opinion first focused on the absence of any language in the statute or in its legislative history indicating congressional intent to include a utility allowance within the definition of "rent."[283] Justice O'Connor thus concluded that the statute itself did not create an enforceable right to have an allowance for utility charges included in a tenant's rent.

Justice O'Connor then turned to the HUD regulations. She questioned the ability of agency regulations to ever create enforceable rights beyond those explicitly created by statute.[284]

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[278] *See id.* at 420.

[279] *Id.* at 430-31 (citing Chrysler Corp. v. Brown, 441 U.S. 281 (1979)).

[280] *Id.* at 431-32.

[281] *Id.* at 433-35 (O'Connor, J. dissenting). The dissent did not discuss the issue of whether the enforcement scheme under the Housing Act was sufficiently comprehensive so as to infer congressional intent to preclude § 1983 remedies.

[282] *Id.* at 438-39 (O'Connor, J., dissenting).

[283] *Id.* at 434 (O'Connor, J., dissenting).

[284] *Id.* at 437 (O'Connor, J., dissenting). *See also* Stewart A. Baker, *Making the Most of* Pennhurst*'s 'Clear Statement' Rule*, 31 CATH. U. L. REV. 439, 443 (1982) (asserting that Eleventh Amendment prohibits federal agencies from imposing substantial new duties on states by issuing regulations under grant-in-aid programs).

She found it unnecessary to resolve this issue, however, because she determined that even if agency regulations could create enforceable rights, the regulations in this instance did not. The HUD regulations required public housing authorities to establish utility allowances that could reasonably be expected to meet the needs of ninety percent of dwelling units and to include these utility allowances as part of a tenant's rent. Despite the existence of additional guidance in the regulations,[285] Justice O'Connor argued that this formulation was not definite enough to determine whether a violation existed or to fashion a remedy in the event a violation could be determined. In her opinion, the regulation thus defied judicial enforcement, and as a result could not be viewed as creating an enforceable right.[286]

The dissenting justices in *Wright*, therefore, apparently wanted to impose two additional limitations on § 1983 statutory causes of action. First, to find an enforceable right and an accompanying § 1983 cause of action, the dissenting justices would require that the language of the statute itself, without aid or guidance from agency regulations, be sufficient to create an enforceable right. Even if the statutory language clearly indicates an intent to create a benefit, but the benefit's scope is ambiguous, the dissent appears to believe that agency regulations that clarify the scope of the benefit should not be considered in determining whether an enforceable right is created.[287] That the regulations were properly adopted and valid in scope seems to be irrelevant to the dissent.

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[285] The regulations provided that, in determining the utility allowance, housing authorities were not to include unusual cases, cases involving wasteful practices, or cases involving the use of major appliances. Adjustments could also be made for abnormal weather conditions or other circumstances that might affect consumption. *See* 24 C.F.R. § 865.477 (current version at 24 C.F.R. § 965.477 (1994)). Additionally, housing authorities were required to revise their utility allowance if more than 25% of tenants were receiving a surcharge. *See* 24 C.F.R. § 865.480(b) (current version at 24 C.F.R. § 965.480(b) (1994)).

[286] *Wright*, 479 U.S. at 438-39 (O'Connor, J., dissenting).

[287] Although in the end, in finding that the regulations at issue were incapable of judicial enforcement, the dissent relies on the fact that, at the time the case arose, the regulations were temporary regulations, the opinion nonetheless raises serious questions about whether regulations should ever be considered in determining whether rights created by a federal statute are sufficiently unambiguous. *Id.* at 441 (O'Connor, J., dissenting).

The dissenting opinion reached this conclusion by reasoning that congressional intent is key to determining whether a statute creates enforceable rights, and that regulations, even if properly adopted and valid in scope, are not indicative of congressional intent. The analysis used to reach this conclusion is suspect, however, in that it equates the determination of whether a § 1983 statutory cause of action exists with the determination of whether an implied cause of action exists. For example, in finding that congressional intent is key to determining whether a federal statute confers rights enforceable under § 1983, Justice O'Connor quoted directly from *Sea Clammers*. She stated that "[i]n determining whether a statute creates enforceable rights, the 'key to the inquiry is the intent of the Legislature.'"[288] This quote is taken out of context, however. What the *Sea Clammers* Court actually said was that in determining "whether Congress intended to create a private right of action under a federal statute without saying so explicitly. . . . [t]he key to the inquiry is the intent of the Legislature."[289]

The difference in language is more than mere semantics. Whether Congress intended to create a private cause of action without explicitly providing for one is a much different question from whether there is a right secured by federal law, and therefore a § 1983 remedy for individuals who have been deprived of that right.[290] It is tempting to equate the two because the plaintiff must make similar showings in both cases. The plaintiff must demonstrate that she has been deprived of a right secured by a federal law that was intended to benefit her, and the right must be sufficiently unambiguous to be enforceable. In the case of a § 1983 claim, the plaintiff's burden ends here. In the case of a claim of an implied cause of action, however, the plaintiff has the additional burden of showing that Congress intended to create a private cause of action when it did not explicitly do so, and evidence of legislative intent is a key factor in making this showing. This inquiry is inappropriate in the context of § 1983

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[288] *Id.* at 433 (O'Connor, J., dissenting) (quoting from Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981)).

[289] *Sea Clammers*, 453 U.S. at 13.

[290] *See* Brown, *supra* note 239, at 63 (noting that merger of § 1983 and implied cause of action analyses would come "quite close to overruling *Thiboutot* sub silentio").

causes of action because § 1983 itself explicitly authorizes private causes of action.

The separation of powers concerns attendant with implied causes of action are clearly not present in the context of § 1983, and therefore, proof that Congress intended for the right to be enforceable by a private individual is not necessary.[291] This is likely the reason why the Court had never previously imposed this stringent requirement in the case of a § 1983 statutory cause of action. Showing that the plaintiff is a member of the class of intended beneficiaries is enough. In fact, a serious separation of powers concern would be raised if the Court, as Justice O'Connor suggests, were to refuse to recognize the existence of a private cause of action in the face of explicit congressional authorization.[292]

The dissenting justices in *Wright* would also limit the availability of § 1983 actions by ruling that provisions which incorporate a "reasonableness" standard, such as provisions requiring action to be taken in a "reasonable" manner, are too vague and indefinite to create enforceable rights.[293] According to the dissent, such provisions "simply defy judicial enforcement."[294] Granted, a reasonableness standard is by its nature somewhat fluid, and there may be a number of possible actions that could fall within the realm of reasonableness. This does not mean, however, that there are no actions that are clearly unreasonable, and it simply

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[291] Sunstein, *supra* note 79, at 415. *See also* Wartelle & Louden, *supra* note 119, at 537-40 (recognizing two differences between implied remedies and § 1983 remedies: (1) unlike implied remedies, § 1983 remedies involve explicit grant of jurisdiction by Congress; (2) majority of implied causes of action are against private parties who have violated federal regulatory or criminal statutes, whereas most § 1983 actions are against state and local governments that have failed to comply with grant-in-aid programs; and arguing that these differences mandate against applying restrictions relevant to implied cause of action analysis in § 1983 context); Rumeld, *supra* note 78, at 1194-95 (noting that doctrinal and policy distinctions between implied causes of action and § 1983 causes of action dictate different analyses for determining whether remedy exists); Wood, *supra* note 78, at 1161-62 (arguing that, in contrast to implied causes of action where there is concern of judicial legislation, cautionary approach is unnecessary when dealing with express remedy enacted by Congress, such as § 1983).

[292] *See* Wood, *supra* note 78, at 1162 (explaining that Justice O'Connor's objection centered on fact that linking right to agency regulation arguably *circumvents* congressional intent, thereby creating separation of powers concern).

[293] *See Wright*, 479 U.S. at 438-39 (O'Connor, J., dissenting).

[294] *Id.* at 439 (O'Connor, J., dissenting).

defies logic to conclude that a court would be incapable of recognizing such acts.[295]

The Court continued the debate over the proper scope of § 1983 statutory causes of action in *Wilder v. Virginia Hospital Ass'n.*[296] The primary issue confronting the *Wilder* Court was the extent of a state's obligations under Medicaid.[297] Medicaid, like many federal grant-in-aid programs, requires that the state submit and have approved a plan detailing how the state will operate its Medicaid program as a condition to receiving federal funds.[298] Section 1396a lists provisions that the state plan is required to include. Among them is the requirement, referred to as the Boren Amendment, that the state plan provide a procedure for determining rates, which the state assures will be reasonable and adequate, for payment of hospital services.[299] Similar to many grant-in-aid programs, the Secretary of Health and Human Services ("HHS") is authorized to withhold funding

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[295] The Court made a similar argument in a subsequent case involving a § 1983 statutory action. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990). The statute in question obligated states to set Medicaid reimbursement rates that were reasonable and adequate. In concluding that the statute was not so vague and amorphous as to be incapable of judicial enforcement, the Court stated that "[w]hile there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate . . . . [S]uch an inquiry is well within the competence of the judiciary." *Id.* at 519-20.

In fact, courts have demonstrated their ability to make judgments as to whether a particular act was "reasonable" in a wide variety of contexts. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) (Justice O'Connor wrote opinion in which court considered whether prison regulation was "reasonable"); O'Connor v. Ortega, 480 U.S. 709 (1987) (Justice O'Connor wrote opinion in which court determined whether plaintiff had "reasonable" expectation of privacy and describing "reasonableness" standard to be used in determining constitutionality of workplace search); Strickland v. Washington, 466 U.S. 668 (1984) (Justice O'Connor wrote opinion in which Court addressed whether plaintiff had "reasonable" effective assistance of counsel).

[296] 496 U.S. 498 (1990).

[297] The Court also considered and rejected arguments that the obligations imposed by the statute at issue were too vague and amorphous to be judicially enforceable because they incorporated a reasonableness standard, *id.* at 519-20, and that the administrative scheme provided to enforce the statute demonstrated congressional intent to foreclose a § 1983 remedy, *id.* at 520-23. These aspects of the decision will not be discussed in detail because the Court's analysis added nothing significant to the law as it had been developed in cases previously discussed in this Article.

[298] 42 U.S.C. § 1396 (Supp. V 1993).

[299] 42 U.S.C. § 1396a(a)(13)(A) (Supp. V 1993).

if a state, in the administration of its plan, fails to comply substantially with any required provision.[300]

The question before the *Wilder* Court was whether the Boren Amendment created only procedural obligations, or whether it also created substantive obligations. If only procedural obligations were created, a state would meet the Boren Amendment's requirements if its plan contained a provision setting forth how rates were to be determined and an assurance to the Secretary that those rates would be reasonable and adequate. Whether the rates adopted by the states were actually reasonable and adequate would be irrelevant. If the Boren Amendment also created substantive obligations, however, a state would have to satisfy the additional requirement that its rates actually be reasonable and adequate.

Justice Rehnquist had earlier indicated in *Pennhurst* his belief that the only obligations placed on a state by such a statute were the more limited procedural ones. The majority in *Wilder*, which consisted of Justices Brennan, White, Marshall, Blackmun, and Stevens, soundly rejected such an argument.[301] According to the Court, to read the Boren Amendment as only requiring states to comply with the procedural requirements is nonsensical because it renders the statute virtually meaningless — a "dead letter."[302] "It would make little sense for Congress to require a State to make findings without requiring those findings to be correct."[303] The Court chose to adopt a more rational construction of the statute and found that it imposed substantive, as well as procedural, obligations on states, requiring them to actually adopt reasonable and adequate rates, instead of merely requiring assurances that they would do so.[304]

Not surprisingly, the majority opinion elicited a forceful dissent from Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Kennedy.[305] In Justice O'Connor's dissent in *Wright*, she insinuated that a similar, if not the same, analysis applies in

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[300] 42 U.S.C. § 1396c (Supp. V 1993).

[301] *Wilder*, 496 U.S. at 513-15.

[302] *Id.* at 514.

[303] *Id.*

[304] *See id.* at 515.

[305] Justice Kennedy had recently filled the seat left vacant by the retirement of Justice Powell.

determining whether a § 1983 or an implied cause of action exists. Chief Justice Rehnquist's dissent in *Wilder* took this one step further. In comparing § 1983 claims to implied causes of action, he explicitly stated that "while the Court's holding in *Thiboutot* rendered obsolete some of the case law pertaining to implied rights of action, a significant area of overlap remain[s]."[306] Applying an "implied right of action" type analysis, he concluded that the Boren Amendment did not confer any substantive rights enforceable under § 1983.[307] Citing to *Cannon v. University of Chicago*, a case in which an implied right of action was claimed, he determined that for a private remedial right to exist, whether pursuant to an implied right of action or § 1983, the language of the statute must explicitly confer a right in favor of the plaintiff.[308] Because the Boren Amendment did not contain any such explicit language, he found no basis for a private remedial action.[309] As Justice O'Connor did in *Wright*, however, Chief Justice Rehnquist ignored the critical distinctions between an implied cause of action and a statutory cause of action pursuant to § 1983.[310]

Most federal grant-in-aid programs do not explicitly confer rights in favor of their intended beneficiaries. Thus, under Chief Justice Rehnquist's analysis, virtually none of these programs would be found to confer substantive rights sufficient to permit a private individual to bring a § 1983 action. Indeed, this is most likely his intent. His opinion is replete with references to the sanctity of states' rights. For example, he expressed fear that if § 1983 actions were allowed to ensure compliance with the Boren Amendment, the rates preferred by providers would be substituted for those that states had determined to be reason-

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[306] *Wilder*, 496 U.S. at 526 (Rehnquist, C.J., dissenting).

[307] *Id.* at 527 (Rehnquist, C.J., dissenting).

[308] *Id.* at 525-26 (Rehnquist, C.J., dissenting) (citing Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979)).

[309] *Id.* at 527 (Rehnquist, C.J., dissenting).

[310] *See supra* notes 287-91 and accompanying text. However, these distinctions were recognized by the majority in *Wilder*. *Wilder*, 496 U.S. at 508-09 n.9. The Court stated that determining whether a cause of action exists under § 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. . . . Because § 1983 provides an 'alternative source of express congressional authorization of private suits,' . . . separation of powers concerns are not present in a § 1983 case." *Id.* (citations omitted).

able and adequate.[311] Further, he characterized the Court's suggestion that states would deliberately disregard statutory funding requirements as doing "less than justice to the states."[312]

Even if he accepted that the Boren Amendment conferred substantive rights on the intended beneficiaries of Medicaid, Chief Justice Rehnquist would still find that there was no violation enforceable by a private cause of action in this case. Under his interpretation of the statute, establishment of rates in accordance with the process specified in the statute "is the only discernible right accruing to anyone."[313] Thus, a plaintiff would have a cause of action only if the Medicaid plan filed by the state failed to contain a provision detailing how rates were to be determined or failed to contain an assurance that these rates would be reasonable and adequate. As long as the state followed these procedures, a plaintiff would not have a claim even if the rates adopted by the state were unreasonable or inadequate. Chief Justice Rehnquist claimed that this interpretation is more congruent with congressional intent - that Congress wanted to give the states latitude in how they established Medicaid reimbursement rates.[314]

While this is true, it is only a half truth. Congress clearly wanted to give the states latitude in establishing Medicaid reimbursement rates, but this does not mean that Congress intended

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[311] *Id.* at 524-25 (Rehnquist, C.J., dissenting).

[312] *Id.* at 528 (Rehnquist, C.J., dissenting). The Court did not actually make a statement suggesting that states would deliberately disregard statutory requirements. It stated, rather, that a state's method of calculating rates could be overturned only if the resulting rates were such that no state could ever have found them to be reasonable and adequate. *Id.* at 519-20. While it is likely that, under this standard of review, a state's method of calculating rates will only be overturned if the state acted deliberately or, at the very least, with gross negligence, it is a far stretch to read this statement as a suggestion by the Court that states in fact engage in this type of behavior. What the Court *is* saying is that if a state were to deliberately disregard statutory requirements, intended beneficiaries of those requirements have a means of redress pursuant to § 1983. Reliance on the Secretary for enforcement is misplaced since the Secretary's review focuses on the adequacy of the states' assurances. Further, the Secretary does not require states to submit the actual findings of the "reasonableness" of payment rates or the underlying data. *See id.* at 508. Therefore, Chief Justice Rehnquist's analysis essentially allows states to "get away" with this type of behavior if they so choose. This results in statutory requirements becoming choices rather than mandates.

[313] *Id.* at 527-28 (Rehnquist, C.J., dissenting).

[314] *Id.* at 528 (Rehnquist, C.J., dissenting).

to give the states absolute discretion.[315] In fact, the face of the statute itself reveals that, although states are free to choose how their rates are calculated, the calculations must nonetheless result in rates that are reasonable and adequate. Any other reading of the statute would mean that, although a state is required to assure the Secretary that its reimbursement rates will be reasonable and adequate, the assurances are not required to be true. As the Court observed, this would render the entire provision virtually meaningless.[316] In addition, Congress authorized the Secretary of HHS to cut off a state's funds if the state did not operate its program in substantial compliance with its plan. Thus, Congress indisputably intended for states to comply with their plans as well as to require states to file plans containing the features specified in § 1396a.

Furthermore, the dissent was wrong when it stated that a plaintiff's success in a suit challenging the reimbursement rates adopted by a state will result "in the displacement of rates created in accordance with the statutory process by rates established pursuant to court order."[317] If the rates were in fact adopted in accordance with the statutory process, including the requirement that they be reasonable and adequate, they would be upheld. A court may only intervene in those instances where a state does not comply with the statutory process and adopts unreasonable or inadequate rates.[318]

With the retirement of Justices Brennan and Marshall and the installation of Justices Souter and Thomas, the Court became more conservative and quickly embraced Justice Rehnquist's

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[315] *See, e.g.*, H.R. REP. NO. 131, 92d Cong., 1st Sess. (1971); S. REP. NO. 471, 96th Cong., 1st Sess. (1979); H.R. REP. NO. 158, 97th Cong., 1st Sess., Vol. II, at 292-93 (1981).

[316] *Wilder*, 496 U.S. at 513-14.

[317] *Id.* at 528 (Rehnquist, C.J., dissenting).

[318] A similar argument was made by Justice O'Connor in Florence County School District Four v. Carter, 114 S. Ct. 361, 363 (1993). *Carter* upheld the plaintiff's right to receive reimbursement for the costs of a private education when the local school failed to provide her with a free appropriate education as required by the Individuals with Disabilities Education Act. *Id.* In response to the school district's claim that allowing reimbursement would place an unreasonable financial burden on it, Justice O'Connor stated that school districts can avoid such reimbursement simply by complying with the statute. *Id.* at 366. *But see* Daneker, *supra* note 276, at 511-17 (arguing that *Wilder* will result in delay and uncertainty in Medicaid administration and will inhibit state efforts to develop new cost-containment methods, ultimately resulting in curtailment of scope of coverage).

analysis in his dissent in *Wilder*, despite its obvious flaws. As a result, only two years after its decision in *Wilder*, the Court all but reversed itself in *Suter v. Artist M.*[319] As seems fitting, Chief Justice Rehnquist wrote the opinion for the Court.

Under consideration in *Artist M.* was § 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980[320] (the "Adoption Act"). The Adoption Act is a federal grant-in-aid program that provides funds to participating states to help offset expenses incurred by them in connection with the provision of foster care and adoption services. Again, to participate in this program, the state must have a plan that is submitted to, and approved by, the Secretary of HHS. Section 671(a) of the Adoption Act lists the provisions required to be contained in the state's plan. Among them, § 671(a)(15) requires the state plan to provide that "reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."[321] Pursuant to § 671(b), the Secretary of HHS is authorized to cut off funding if it finds that the state has substantially failed to comply with the provisions of its approved plan.[322]

The plaintiffs in the case alleged that the State of Illinois failed to make such reasonable efforts and asserted that they could bring suit under § 1983 to force compliance.[323] Thus, the statutory provision at issue and the alleged basis for relief were, in the words of Justice Blackmun, "functionally identical"[324] to those considered by the Court in *Wilder*. Relying on past decisions of the Court, neither the district court[325] nor the

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[319] 503 U.S. 347 (1992). Joining the majority were Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas. Justices Blackmun and Stevens dissented.

[320] 42 U.S.C. § 671(a)(15) (Supp. V 1993).

[321] *Id.*

[322] 42 U.S.C. § 671(b).

[323] *Artist M.*, 503 U.S. at 352-53. The plaintiffs also claimed that the Adoption Act contained an implied cause of action. *Id.* The Court summarily dismissed this argument based on its earlier finding that Congress did not intend to create a private remedy to enforce § 671(a)(15). *Id.* at 363-64.

[324] *Id.* at 365 (Blackmun, J., dissenting).

[325] Artist M. v. Johnson, 726 F. Supp. 690 (N.D. Ill. 1989), aff'd, 917 F.2d 980 (7th Cir. 1990), *rev'd sub nom.* Suter v. Artist M., 502 U.S. 1088 (1992). At the time of the District

court of appeals[326] had any trouble finding that the "reasonable efforts" clause found in § 671(a)(15) was enforceable by

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Court's decision, *Wilder* had not yet been decided by the Supreme Court. Relying on *Sea Clammers* and *Wright*, the court found that a plaintiff who brings a § 1983 statutory action does not need to show congressional intent to allow such a remedy. Section 1983 is presumed to be available unless the defendant can demonstrate either that Congress foreclosed access to § 1983 in the statute itself or that the statute does not create enforceable rights within the meaning of § 1983. *Id.* at 696.

The court rejected the defendant's argument that the "reasonable efforts" clause found in § 671(a)(15) was too vague and amorphous to be capable of judicial enforcement. It stated that "[c]ourts have long proved themselves adequate to the task of enforcing contractual 'best efforts' obligations, and they equally regularly enforce commitments of parties to conduct themselves 'reasonably.'" *Id.* at 695 n.6. *See also* Barbara L. Atwell, *"A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980*, 60 U. CIN. L. REV. 593, 624-25 (1992) (noting long accepted use of reasonableness as standard in constitutional, tort, and contract law). The court also distinguished the case before it from *Pennhurst*, finding that any state that read the Adoption Act would be aware of its obligations, including the obligation to comply with the mandate of § 671(a)(15). *Artist M.*, 726 F. Supp. at 696. Finally, the court found that provisions in the statute authorizing the Secretary of HHS to withhold funds and providing for limited administrative review did not constitute a remedial scheme sufficient to indicate congressional intent to foreclose a § 1983 remedy. *Id.* at 697.

[326] Artist M. v. Johnson, 917 F.2d 980 (7th Cir. 1990), *rev'd sub nom.* Suter v. Artist M., 503 U.S. 347 (1992). The Seventh Circuit began its analysis by looking at whether the Adoption Act created a right enforceable by § 1983. Citing to *Wilder*, the court articulated the factors necessary to finding an enforceable right - the provision in question must be intended to benefit the plaintiff, the provision must impose a binding obligation on the state, and the right must not be so amorphous that it is incapable of judicial enforcement. *Id.* at 986. Applying these factors, the court first noted that it is indisputable that Congress enacted the Adoption Act to benefit needy children like those in the plaintiff's class. *Id.* at 987. The court then found, again relying on *Wilder*, that when the provision whose enforcement is sought is explicitly tied to a funding provision, as in this case, the provision creates a binding obligation on states participating in the funding program. *Id.* As to the final factor, the court determined that, although states are given substantial discretion in choosing how to provide services, the judiciary is completely capable of determining whether a state has in fact exerted the requisite "reasonable efforts" in doing so. *Id.* The only remaining question was whether Congress intended to preclude a § 1983 remedy by providing a comprehensive remedial scheme in the statute itself. Because the Adoption Act did not provide for private citizen suits or a right to judicial review, the court found no evidence that Congress intended to foreclose the right to a § 1983 action to enforce the Act's provisions. *Id.* at 988-89.

way of a § 1983 action.[327] The Supreme Court disagreed, however, and reversed.

The rationale for the Court's reversal was that neither the statute nor the regulations provide sufficient notice to the states that they are required to do anything other than establish a plan containing "a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family."[328] In other words, the Court found the state's obligation under § 671(a)(15) purely procedural. Although this appears to be in direct conflict with the holding in *Wilder*, the Court did not overrule *Wilder*. Instead, the Court attempted to distinguish *Wilder* on the ground that, unlike the Boren Amendment, the Adoption Act and its regulations do not contain any additional guidance as to what is meant by the term "reasonable efforts."[329] The Court interpreted this as indicative of an intent by Congress to give the states broad discretion in determining exactly how to comply with the directive

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[327] Prior to the Court's decision in *Artist M.*, two other circuits had specifically considered the question of whether § 671(a)(15) of the Adoption Act created rights enforceable through § 1983, and in both cases, enforceable rights were found to exist. *See* Winston v. Youth Servs., 948 F.2d 1380 (3rd Cir. 1991), *cert. denied*, 504 U.S. 956 (1992); Del A. v. Edwards, 855 F.2d 1148 (5th Cir.), *reh'g granted*, 862 F.2d 1107 (5th Cir. 1988), *appeal dismissed*, 867 F.2d 842 (5th Cir. 1989). Several other courts had also found that various other provisions of § 671(a) of the Adoption Act are enforceable under § 1983. *See, e.g.*, Yvonne L. v. New Mexico Dep't of Human Servs., 959 F.2d 883, 889 (10th Cir. 1992) (finding § 671(a)(10) of Adoption Act enforceable under § 1983); Darr *ex rel.* L.J. v. Massinga, 838 F.2d 118, 122-23 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989) (finding § 671(a)(9), (10), and (16) of Adoption Act enforceable under § 1983); Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983) (finding § 671(a)(16) of Adoption Act enforceable under § 1983); LaShawn A. v. Dixon, 762 F. Supp. 959, 988-89 (D.D.C. 1991) (finding Adoption Act enforceable under § 1983). Note that in *Yvonne L.*, the court explicitly rejected dicta from an earlier decision, Spielman v. Hildebrand, 873 F.2d 1377 (10th Cir. 1989), in which the court had suggested that the Adoption Act did not create any rights enforceable by way of § 1983. For a discussion of the Adoption Act and its enforceability under § 1983 prior to the Court's decision in *Artist M.*, see Atwell, *supra* note 325.

[328] *Artist M.*, 503 U.S. at 361 (quoting 45 C.F.R. § 1356.21(d)(4) (1991)).

[329] *Id.* at 359-60. As the Court itself points out, however, the regulations in fact specify preplacement preventative and reunification services that may be included in a state's plan in order to satisfy § 671(a)(15). *Id.* at 361-62 n. 14. *See also* Atwell, *supra* note 325, at 623 (claiming that these specific examples of reasonable services give states as much guidance as regulations in *Wilder* and *Wright*); Christina Chi-Young Chou, Special Project, *Family Law in the 1990s - New Problems, Strong Solutions - Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 698-704 (1983) (also criticizing this aspect of Court's decision).

contained in § 671(a)(15).[330] The Court was not clear, however, as to why the lack of more specific directives was fatal to a § 1983 cause of action.

One possibility is the Court concluded that, due to the degree of state discretion and lack of statutory guidance, the "reasonable efforts" clause is too vague and amorphous to be capable of judicial enforcement.[331] However, nowhere in the opinion did the Court even allude to this idea. In fact, the Court noted that another provision in the Adoption Act, § 672(a)(1), requires a judicial determination that reasonable efforts have been made to maintain the child in her home in accordance with § 671(a)(15) prior to removing a child from her home.[332] Thus, the statute itself anticipates that courts will be asked to determine whether a state has complied with the "reasonable efforts" clause of § 671(a)(15), and therefore Congress must have believed they were capable of doing so.

In addition, if the Court had found that a § 1983 cause of action was not available because the directive was too vague and amorphous, then it would follow that other statutory provisions could be enforceable by way of § 1983 if the directives contained in those provisions were clear and unambiguous. The Court was faced with this very issue because the plaintiffs also based their claim for relief on § 671(a)(9).[333] The directive in § 671(a)(9) was clear in its requirements and did not leave much room for state discretion. Yet, the Court responded to the plaintiffs' claim under § 671(a)(9) by stating that "[a]s this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a

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[330] *Artist M.*, 503 U.S. at 360.

[331] This would be similar to the argument advanced by Justice O'Connor in her dissent in *Wright*. *See supra* notes 294-96 and accompanying text.

[332] *Artist M.*, 503 U.S. at 360.

[333] *Id.* at 359 n.10. Section 671(a)(9) at the time of the alleged violation required that the state plan provide "that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency. . . . " 42 U.S.C. § 671(a)(9) (1988) (amended 1990).

cause of action to the respondents anymore than does the 'reasonable efforts' clause of § 671(a)(15)."[334]

In other words, the Court is really saying that regardless of their clarity, the mandates of the various subsections of § 671(a) are nothing more than procedural - the statute requires that a state's plan contain the listed provisions, but does not require states to comply with their plans. Because the statute does not require states to comply with their plans, a state cannot have knowingly agreed to do so. Therefore, under *Pennhurst*, courts may not unilaterally impose the additional condition of compliance on a state.[335]

Section 671(a)(15) is easily distinguishable from the statutory provision at issue in *Pennhurst*, however. *Pennhurst* involved § 6010 of the DDA. Neither § 6010 nor any other provision of the DDA contained any language that explicitly conditioned funding on a state's compliance with the findings set forth in § 6010.[336] In sharp contrast, § 671(b) of the Adoption Act plainly states that a state's funding may be terminated if the state does not comply with the provisions in its plan. In this sense, § 671(a) of the Adoption Act is more akin to the Boren Amendment, which was before the Court in *Wilder*, than it is to § 6010 of the DDA. In fact, although the Court has finessed the language some, the argument it makes in *Artist M.* is essentially the argument made by the dissent and expressly rejected by the majority in *Wilder*. Despite its protests to the contrary, it is incontrovertible that the Court has overruled this aspect of *Wilder*. And because the Court does not acknowledge that it has overruled *Wilder*, it has done so without sufficient explanation or justification.

Another aspect of the Court's opinion is equally troubling. By finessing language and playing with words, the Court has artfully changed the role of congressional intent in § 1983 statutory actions. For instance, in summarizing its conclusion, the Court stated that "the 'reasonable efforts' language does not unambiguously confer an enforceable right upon the Act's beneficiaries," and therefore does not create a cause of action under §

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[334] *Artist M.*, 503 U.S. at 359 n.10.

[335] *See id.* at 358.

[336] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 13 (1980).

1983.[337] Previous decisions of the Court have recognized that there is no enforceable right under § 1983 if the statute does not unambiguously require compliance with its provisions or if the right asserted by the plaintiff is too ambiguous for the judiciary to enforce.[338] None of the previous decisions, however, have required that the *conferral* of the right on the plaintiff be unambiguous. Such a requirement has previously been imposed only when an implied cause of action was alleged.[339] The Court's placement of the term "unambiguous" does not appear to be the result of accident or carelessness, for earlier in the decision the Court framed the critical inquiry in the case as whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the Act, a right to enforce the requirement that the State make 'reasonable efforts' . . . "[340] Once again, the Court has asserted as a rule of law a proposition that was made by the dissent and expressly rejected by the Court in *Wilder*: for there to be a private cause of action under § 1983, the plaintiff must point to language in the statute that explicitly confers a right on a class of persons of which they are a member.

The Court also confused the relevance of the availability of other enforcement mechanisms under the statute. The existence of alternative enforcement mechanisms is a factor in determining whether Congress intended to preclude reliance on § 1983 as a remedy under the statute. As the *Wilder* Court cautioned, however, the conclusion that Congress intended to preclude § 1983 enforcement is not to be made lightly.[341] In the absence of an express provision precluding enforcement, a § 1983 cause of action will be foreclosed only if the statute creates a remedial scheme that is sufficiently comprehensive to demonstrate congressional intent to preclude enforcement.[342]

In applying this standard to § 671(a)(15) of the Adoption Act, the Court began by noting that other sections of the Act

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[337] *Artist M.*, 503 U.S. at 363.

[338] *See, e.g.*, Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990).

[339] *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979).

[340] *Artist M.*, 503 U.S. at 357.

[341] *Wilder*, 496 U.S. at 520.

[342] *Id.* at 520-21.

provide enforcement mechanisms.[343] First, the Court mentioned that the Secretary of HHS may reduce or eliminate a state's funding if a state does not comply with the provisions of its plan.[344] Second, to receive federal reimbursement for foster care payments for a child involuntarily removed from his home, a court must conclude, prior to such removal, that reasonable efforts had been made to prevent removal of the child from the home.[345] The Court then appropriately concluded that these enforcement mechanisms do not provide a comprehensive enforcement scheme from which congressional intent to foreclose § 1983 actions can be gleaned.[346]

This is where the Court's discussion of this issue should have stopped. The Court continued, however, stating that these provisions nonetheless "show that the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter."[347] This could be interpreted as creating a new standard: § 1983 enforcement actions will be permitted only if not permitting such actions would render the statute a dead letter. This, however, blatantly conflicts with precedent and fundamentally alters the presumptions regarding congressional intent. Under this standard, the focus is not on whether Congress intended to preclude § 1983 actions as evidenced by a comprehensive enforcement scheme. Instead it is on whether Congress intended to allow § 1983 actions as evidenced by the statute being rendered a dead letter in the absence of § 1983 actions. This type of analysis, while perhaps appropriate in the context of an implied cause of action claim, is improper under § 1983.

Through his opinion in *Artist M.*, Chief Justice Rehnquist has thus succeeded in requiring that an implied cause of action type analysis be applied in the context of § 1983 statutory claims, and has therefore overruled that aspect of *Wilder* as well.[348] And

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[343] *Artist M.*, 503 U.S. at 360.

[344] *Id.* (citing 42 U.S.C. § 671(b)).

[345] *Id.* (citing 42 U.S.C. § 672(a)(1)).

[346] *Id.*

[347] *Id.* at 360-61.

[348] *See* Lisa L. Frye, Note, Suter v. Artist M. *and Statutory Remedies Under Section 1983: Alteration Without Justification*, 71 N.C. L. REV. 1171 (1993) (arguing that, after *Artist M.*, plaintiffs bringing suit under §1983 have virtually same burden as private plaintiffs claiming an implied cause of action).

again this has been done without acknowledgement, and therefore without any explanation or justification.[349]

IV. SECTION 1983 AND JUDICIAL LEGISLATION

The Court, in its application of § 1983 statutory causes of action and the enforcement of federal funding conditions, has ignored explicit congressional directives and imposed its own views of federalism over clear legislative policy choices. It is proper for courts to interpret legislative enactments and to invalidate them if they are unconstitutional. But to ignore them or impose conditions on their enforceability is to engage in judicial lawmaking in violation of the doctrine of separation of powers.[350] As the Court itself has recognized:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be

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[349] Two commentators have noted that much of what the Chief Justice said in his majority opinion in *Artist M.* was also said in his dissenting opinion in *Wilder*, and that as a result we may have moved away from presuming enforcement of federal statutes under § 1983 to presuming against such enforcement. George C. Pratt & Martin A. Schwartz, *Section 1983 Litigation*, 9 TOURO L. REV. 177, 197 (1993). They also expressed their opinion that this turn of events was due to a change in the composition of the Court. *Id.*

[350] *See* Nichol, *supra* note 122, at 963 ("Departing from statutory design . . . poses major problems of judicial legitimacy. Updating statutes, ignoring intention, and modifying enactments to suit present need each suggest substantial departures from traditional visions of the judicial role.") *See generally* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). In this article, Professor Redish argues that, by declining to exercise jurisdiction explicitly vested in them by Congress and thereby refusing to enforce certain substantive rights on the basis of the abstention doctrine, federal courts are violating the separation of powers doctrine. On the issue of the proper role of federal courts, Professor Redish stated:

> Presumably no one would deny that a federal court cannot legitimately invalidate a federal statute solely because of its unwise policies, or because it would make judges work harder than they believe they should, or because the judges themselves would not have enacted such legislation. Such behavior by the judiciary would amount to a blatant - and indefensible - usurpation of legislative authority. At most, the judiciary possesses authority to overturn federal legislation because it is unconstitutional, not because the judiciary considers it unwise.

Id. at 72 (footnote omitted). He concluded that "[j]udge-made abstention constitutes judicial lawmaking of the most sweeping nature" and that "[a]bsent a finding of unconstitutionality, it is not the judiciary's function to modify or repeal a congressional enforcement network." *Id.* at 114-15. Similar arguments can be made with respect to the Court's treatment of § 1983 statutory causes of action.

> put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.[351]

Even Chief Justice Rehnquist has opined that judges are not "a small group of fortunately situated people with a roving commission to second-guess Congress . . . concerning what is best for the country."[352] Despite these pronouncements, the Court has nonetheless refused to apply and enforce legislative enactments, not because the legislation is unconstitutional, but because the Court does not agree with its underlying policies.

It is no secret that Chief Justice Rehnquist has a strong preference for states' rights over the authority of the federal government.[353] This preference is based, in part, on his belief that

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[351] TVA v. Hill, 437 U.S. 153, 194-95 (1978).

[352] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

[353] This preference has been noted by numerous scholars. David Shapiro was apparently the first to reach this conclusion. *See* David Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976) (noting that in decisions involving conflicts between state and federal authority, whenever possible, Justice Rehnquist resolves conflicts in favor of state); *see also* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 149 (1989) ("A commitment to shift power away from the federal government toward more extensive, independent authority for the states underlies Rehnquist's decision making."); Merrill, *supra* note 158, at 655 ("[Rehnquist] uniformly supports the use of federalism canons in cases of statutory interpretation."); Jeff Powell, *The Complete Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1320 (1982) ("Rehnquist has argued that the constitutional first principle intended by the Framers was the maintenance of the federal system and of the dignity and autonomy of the states. In his view, solicitude for the values of federalism must therefore remain a primary goal of judicial decision-making."); Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*, 16 AKRON L. REV. 555, 569 (1983) ("Justice Rehnquist . . . emphasizes the importance of state sovereignty in the original scheme of things.").

Justice O'Connor has also demonstrated a strong preference for states' rights over those of the federal government. *See, e.g.*, New York v. United States, 505 U.S. 144, 149-88 (1992) (finding that federal statute that compelled state action was outside Congress's power and violative of the Tenth Amendment); South Carolina v. Baker, 485 U.S. 505, 530-34 (1988) (O'Connor, J., dissenting) (stating belief that Court, by permitting Congress to tax interest on state and local bonds, failed to enforce constitutional safeguards of state autonomy); South Dakota v. Dole, 483 U.S. 203, 212-18 (1987) (O'Connor, J., dissenting) (arguing that Congress lacked power to impose condition on state's receipt of federal funds); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580-89 (1985) (O'Connor, J., dissenting) (disagreeing adamantly with Court's decision for failing to recognize that states have legitimate interests that federal government is bound to respect); FERC v. Mississippi, 456 U.S. 742, 775-97 (1982) (O'Connor, J., dissenting) (arguing that

the will of the majority should be followed and his assumption that smaller units of government, such as states, will better reflect the will of the majority.[354] Emphasis is therefore placed on preserving state and local autonomy to enhance the ability of these governmental units to make and implement substantive policy. Underlying his beliefs is the presumption that states are largely unable to influence federal legislation.[355] Chief Justice Rehnquist would therefore see the imposition on states of federal funding conditions as a dangerous intrusion on states' rights and contrary to the principles of federalism.

Chief Justice Rehnquist's views regarding states' rights are abundantly evident in his opinions,[356] an illustrative example of which is found in *National League of Cities v. Usery*.[357] In *Nation-*

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federal statute was unconstitutional intrusion on state sovereignty); *see also* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1449 (1990) (noting Justice O'Connor's "consistent commitment to judicial defense of state governments against federal interference"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (analyzing Justice O'Connor's approach to federalism and protection of states' rights, particularly as reflected in her opinion in *New York v. United States*); Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 423 (1985) (remarking that Justice O'Connor has tried "to put some restraints on federal action in order to protect the independent mechanisms of state government").

Opinions of Justice Kennedy and Justice Thomas have likewise evidenced an ideology that favors restricting federal intrusion on state autonomy. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1634-42 (1995) (Kennedy, J., concurring) (defending Court's power to decide cases on federalism grounds); Evans v. United States, 504 U.S. 255, 290-94 (1992) (Thomas, J., dissenting) (criticizing Court's interpretation of statute that maximized federal criminal jurisdiction over state and local officials as repugnant to basic tenants of federalism).

[354] DAVIS, *supra* note 353, at 34. Chief Justice Rehnquist's perspective is consistent with Professor Rudenstine's theory of "neofederalism." *See* Rudenstine, *supra* note 36, at 467-71. According to Professor Rudenstine, a neofederalist believes that local control of local issues encourages citizen participation in the democratic process and results in a responsive and effective government.

[355] DAVIS, *supra* note 353, at 34. As Professor Merrill points out, this view indicates that Chief Justice Rehnquist has not given much consideration to the insights of public choice theory. Merrill, *supra* note 158, at 636-37.

[356] *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 432-43 (1979) (Rehnquist, J., dissenting) (arguing that state sovereignty is protect by the Constitution); Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting) (arguing that Fourteenth Amendment should not be interpreted so broadly that it functionally eliminates state sovereignty); Fry v. United States, 421 U.S. 542, 549-59 (1975), (Rehnquist, J., dissenting) (criticizing Court's decision for ignoring state's constitutional right to sovereignty).

[357] 426 U.S. 883 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469

al League of Cities, the Court struck down as unconstitutional an extension of certain requirements of the Fair Labor Standards Act[358] to state employees. In writing for the majority, Justice Rehnquist stated that "there are certain attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[359] He then concluded that "Congress may not exercise [its] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[360]

National League of Cities potentially could have served as a basis for invalidating many federal funding conditions. As commentators have observed, however, there is no solid constitutional basis for preserving the sovereignty of states over the authority of the federal government.[361] The Court, in recognition of this, subsequently overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[362] In renouncing most of its ability to overturn federal statutes on federalism grounds, the Court emphasized that the participation and influence of states in the federal legislative process "ensures that laws that unduly burden the States will not be promulgated."[363] It therefore concluded that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[364]

U.S. 528 (1985).

[358] 29 U.S.C. §§ 201-219 (1976) (amended 1977).

[359] *Usery*, 426 U.S. at 845.

[360] *Id.* at 855.

[361] *See, e.g.*, Sotirios A. Barber, National League of Cities v. Usery*: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161; Powell, *supra* note 353, at 1363-69; Field, *supra* note 243, at 95-103; *see also* DAVIS, *supra* note 353, at 149-52 (noting that this is especially true if one adopts a "literal" interpretation of Constitution as advocated by Chief Justice Rehnquist).

[362] 469 U.S. 528 (1985).

[363] *Id.* at 556. The belief that states are able to adequately protect their interests at the federal level is in direct conflict with the views of neofederalists. *See supra* note 354. Not surprisingly, this aspect of the *Garcia* decision was sharply criticized by the dissenting opinion, which was written by Justice Powell and joined in by Chief Justice Burger and Justices Rehnquist and O'Connor. *Garcia*, 469 U.S. at 576 (Powell, J., dissenting).

[364] *Garcia*, 469 U.S. at 552. *See also* Blackmun, *supra* note 252, at 23 ("We must avoid the

The lack of a constitutional basis for limiting the ability of Congress to impose federal funding conditions on the states has forced Chief Justice Rehnquist and other politically conservative members of the Court to find other means of attack. They have focused primarily on restricting the availability of private enforcement mechanisms. If federal funding conditions are unenforceable by private individuals, and the likelihood that the appropriate federal agency will cut off funding is minimal,[365] states are left with very little incentive to comply with conditions they disagree with or find onerous or burdensome. Thus, if the Court could substantially limit the ability of private individuals to force state compliance with federal funding conditions, it would significantly dilute Congress's power to effectively impose such conditions. It was not until there was a change in the makeup of the Court that the politically conservative members were finally successful, through the decision in *Artist M.*, in reaching this goal. *Artist M.* ignored basic propositions of legal analysis, however, and is nothing more than a subterfuge for judicial lawmaking.

To begin, the *Artist M.* Court completely disregarded the doctrine of stare decisis and the role of precedent. As the Court previously noted, "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."[366] Thus, unless a "special justification" can be shown,

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temptation to let 'federalism' become the Natural Law of the 1980's . . . .").

[365] *See supra* notes 51-61 and accompanying text.

[366] Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). *See also* Johnson v. Transportation Agency, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation is correct"). For a general discussion of the importance of stare decisis in cases of statutory interpretation, see Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989). Justice Scalia has voiced his disagreement with the rule of statutory stare decisis. *See Johnson*, 480 U.S. at 671-72 (Scalia, J., dissenting). A number of commentators have also challenged the logic of statutory stare decisis. *See, e.g.*, Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425-29 (1988); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388-90 (1988). *But see* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (offering statistical evidence that counters some of challenges brought against statutory stare decisis).

the Court will not overrule a decision involving statutory interpretation.[367] The argument for adhering to precedent is strongest when Congress, aware of the construction given a statute, nonetheless rejects a proposal to amend the statute.[368] With respect to § 1983, in direct response to the *Thiboutot* and *Wright* decisions, bills were introduced in Congress in 1981, 1985, and 1987 to amend § 1983 so that the reference to "laws" would be replaced by a reference to "any law providing for equal rights."[369] Congress, well aware of the effects of § 1983 on the ability of private individuals to bring enforcement actions against states for violating federal funding conditions,[370] nonetheless rejected the proposed amendment on all three occasions. The case for stare decisis in *Artist M.* was therefore particularly strong.

The Court also inappropriately applied implied cause of action principles to § 1983 statutory causes of action. Because § 1983, unlike an implied cause of action, is an express grant by Congress of a federal cause of action against state actors, it represents a legislative decision not only to grant federal courts jurisdiction, but also to permit interference with state actions.[371] Despite this critical difference between § 1983 and implied causes of action, the Court has chosen, nonetheless, to place the same restrictions on § 1983 statutory causes of action as have been placed on implied causes of action.

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[367] *Patterson*, 491 U.S. at 172. An example of a "special justification" given by the Court is when a subsequent act of Congress removes or weakens the conceptual underpinnings of the prior decision or renders the prior decision irreconcilable with new legislation. *Id.* at 173 (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

[368] *See* Runyon v. McCrary, 427 U.S. 160, 174-75 (1976).

[369] *See* S. 584, 97th Cong., 1st Sess. § 1 (1981); S. 436, 99th Cong., 1st Sess. § 1 (1985); S. 325, 100th Cong., 1st Sess. § 1 (1987).

[370] *See* 127 Cong. Rec. S3209-3212 (1981) (statement of Senator Hatch); *Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584 and S. 585 Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 21-25 (statement of Professor Charles Abernathy, Georgetown University Law Center, Washington, D.C.), 44-48 (statement of Steven H. Steinglass, National Legal Aid and Defender Association, Washington, D.C.), 343-47 (statement of Thomas J. Madden, Esq., Law Firm of Kaye, Scholar, Fierman, Hays & Handler), 403-08 (statement of Prof. Leon Friedman, Hofstra University, School of Law, on behalf of The American Civil Liberties Union); 131 Cong. Rec. S1322-27 (1985) (statement of Senator Hatch).

[371] The conditions placed on states pursuant to grant-in-aid programs likewise represent an affirmative congressional choice to encroach upon states' rights.

Finally, the Court has engaged in a specious method of statutory interpretation that disregards the plain language not only of § 1983, but of grant-in-aid statutes as well. With no firm legal foundation for its decision in *Artist M.*, the Court has improperly engaged in judicial legislation by avoiding enforcement of statutory directives that the Court, for policy reasons, disagrees with. Under our tripartite system of government in which Congress is the supreme lawmaker, however, the only circumstances under which the Court may lawfully refuse to enforce statutory directives is when it finds the statute in question to be unconstitutional.[372] If the constitutionality of a statute is without question, then a refusal by the Court to enforce its directives is a usurpation of congressional authority.[373] And although statutory interpretation is an accepted function of the Court, the Court may not use it as a pretext for legitimizing acts that would otherwise be improper. Congress has made explicit policy decisions regarding the relationship of the federal government with the states through its enactment of § 1983 and the various grant-in-aid programs. Despite its disagreement with these policy decisions, the Court is nonetheless bound to uphold the directives contained in these statutes.[374]

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[372] *See* Farber, *supra* note 3, at 293 (opining that once court finds statute constitutional, refusal to follow its mandates is "simply lawless"); Redish, *supra* note 350, at 76 (noting that judiciary may not ignore legislative judgment on any grounds other than unconstitutionality).

[373] See *supra* note 372. Justice Blackmun, in responding to concerns regarding federal-state comity raised in connection with § 1983 constitutional actions, stated that "to the extent the statute does create problems, those problems are political rather than judicial." Blackmun, *supra* note 252, at 23. He then suggested that those who were truly concerned about the protection of states' rights should want elected officials, and not unelected judges, to make decisions regarding the scope of § 1983. *Id.*

[374] To do otherwise runs afoul of the doctrine of separation of powers. It is interesting to note that the Court's decision in *Artist M.* is also inconsistent with the textualist approach to statutory interpretation embraced by Justice Scalia. *See supra* notes 156-60 and accompanying text. The plain meaning of § 1983 is to allow a private cause of action if the state violates a right secured by the laws of the United States.

In fact, this point was emphasized by Justice Powell in his dissenting opinion in *Thiboutot*. *See supra* notes 238-40 and accompanying text. Section 1983 does not place any further conditions on an individual's ability to bring such an action. For the Court to create such conditions, as it has, is to disregard the plain meaning of § 1983. It therefore appears that the Court is unwilling to apply the textualist approach to statutory interpretation when, as here, it would lead to a result that is at odds with the Court's policy preferences.

CONCLUSION

The Court has embarked on a dangerous path of second-guessing the wisdom of Congress. It is selectively choosing which laws it deems to be in the best interests of our country to enforce, and it is choosing not to enforce federal funding conditions. This encroachment on the legislative function is particularly dangerous when the party in control of the executive branch is at odds with the party in control of Congress, as it was during the 1980s. At such times, the administrative agencies charged with enforcing congressional directives are unlikely to vigorously enforce those directives to which the executive is opposed.[375] If the judiciary also refuses to enforce these directives, despite clear authority from Congress to do so, the potential exists to substantially deplete the powers that the Constitution has vested in the legislative branch. Without a mechanism for enforcement, the laws enacted by Congress are meaningless. It is thus vital to our system of government that the judiciary, particularly the Supreme Court, fully enforce the laws enacted by Congress, despite their opinion as to a particular law's wisdom or merit, unless it finds that a law is unconstitutional. No matter how tempting it may be, and no matter how unwise a congressional act or policy may be, the Court's role is to enforce the laws enacted by Congress, not to finesse a way around such enforcement.

The Supreme Court needs to rethink its treatment of private enforcement of federal funding conditions under § 1983 and eliminate the barriers it has created for such cases. Only by doing so will the Court be able to reinstate the proper balance between judicial and legislative authority and reestablish the importance of the doctrine of separation of powers.

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[375] *See* Wartelle & Louden, *supra* note 119, at 539 (citing executive branch that is hostile to legislative goals due to partisan split between executive and legislature as one possible reason for insufficiency of administrative enforcement of federal funding conditions).