Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy

By PAUL WARTELLE* AND JEFFREY HADLEY LOUDEN**

Introduction

In *Maine v. Thiboutot*,[1] the Supreme Court gave 42 U.S.C. section 1983 an interpretation that, for the first time in the section's 110-year history,[2] matched the breadth of its literal language.[3] The Court in *Thiboutot* held that the phrase "and laws" in section 1983 means exactly that. Violation of rights created by any federal statute, not only rights created by statutes involving equal rights, gives rise to an action under section 1983.[4]

There was irony in the Court's decision. The judicial conservatism of the late nineteenth century had rendered section 1983 a dead letter for almost a century after its passage as a remedial provision of the Reconstruction era Civil Rights Acts.[5] The activist Warren Court re-

* Staff attorney with the San Francisco Neighborhood Legal Assistance Foundation. B.S.F.S., 1972, Georgetown University; J.D., 1976, Case Western Reserve University.

** B.A., 1978, University of California, Berkeley; member, third year class. Mr. Louden would like to express his appreciation for the refreshing analysis of these issues provided by Professor Wayne Brazil at Hastings College of the Law.

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

2. For two excellent discussions of the history of § 1983, see generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323-36, (1952); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135-89 (1977) [hereinafter cited as *Section 1983 and Federalism*].

3. Section 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1976) (emphasis added).

4. 448 U.S. at 4-8. *See generally* Jennings, *Statutorily Based Federal Rights: A New Role for Section 1983*, 14 J. MAR. 547 (1981). The remedy provided by the Court for statutory violations under § 1983 will be referred to hereinafter as "the *Thiboutot* remedy."

5. The Court's early interpretations of the provision appeared to limit its application to statutory and constitutional claims related to racial discrimination. *See, e.g.*, Holt v. Indi-

vived the section as a remedy for state and local governmental abuse of constitutional rights during the "second reconstruction" of the 1960's.[6] Paradoxically, however, the renewed dominance of judicial conservativism under the Burger Court has coincided with the real unshackling of the section.[7] This process has been capped by *Thiboutot*'s affirmation of a literal interpretation of section 1983—an interpretation that seems to have placed the section at the center of federal statutory, as well as constitutional, jurisprudence.[8]

There may prove to be further irony, however, in the apparent grandeur of the new role *Thiboutot* gives section 1983. Federal statutory jurisprudence is in a state of extraordinary flux. In the same term as *Thiboutot*, the Court also announced *Transamerica Mortgage Advisors v. Lewis*.[9] *Transamerica*, and the earlier decision of *Touche Ross & Co. v. Redington*,[10] virtually eliminated the implied right of action, the traditional doctrinal basis for litigation under statutes that do not themselves expressly provide a private judicial remedy.[11] The relation between this rejection and the recognition of section 1983 as a remedy for

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ana Mfg. Co., 176 U.S. 68 (1900). Limitation on the scope of the section limited its invocation, and in the first 50 years after its enactment, only 21 cases were decided under § 1983. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). In 1960, 280 suits were filed under all of the civil rights acts combined. *Section 1983 and Federalism*, *supra* note 2, at 1172. *See generally* Jennings, *supra* note 4, at 549; Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

6. In Monroe v. Pape, 365 U.S. 167, 184-87 (1961), the Court held that the "color of state law" provisions of the statute could be satisfied by official action that was not explicitly authorized by statute. In the same decision, however, the Court held that municipalities were not persons within the meaning of § 1983 and therefore could not be liable under it. *Id.* at 191.

7. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980) (common law immunity for discretionary functions provides no basis for immunity under § 1983); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (municipalities are persons within the meaning of § 1983); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) (§ 1983 applies to property rights).

8. By 1972, approximately 8000 suits were filed annually under § 1983 alone. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections* (pt. 1), 60 VA. L. REV. 1, 1 n.2 (1974). By 1977, the number had topped 13,000, where it has remained. (This number does not include prisoner petitions filed under § 1983.) Maine v. Thiboutot, 448 U.S. at 27 n.16 (1980) (Powell, J., dissenting). *See generally* Jennings, *supra* note 4, at 549.

9. 444 U.S. 11 (1980). For recent discussions of *Transamerica* and its effects, see generally Frankle, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Note, *Implied Causes of Action: A New Analytical Framework*, 14 J. MAR. 141 (1981) [hereinafter cited as Note, *Implied Causes of Action*].

10. 442 U.S. 560 (1979).

11. Several cases in the Court's most recent term have reiterated the Court's rejection of the implied right of action. *See, e.g.*, California v. Sierra Club, 451 U.S. 287 (1981); *see also* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981); Texas Industries v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

violations of federal statutes is unclear. On the one hand, *Thiboutot* raised the possibility that section 1983 will emerge as an alternative to the implied right of action where statutes are violated under color of state law. On the other hand, the implied right cases were spurred by a view of the judicial role that condemns supplementation of congressionally provided remedies.[12] Such supplementation, some members of the Court believe, is illegitimate usurpation of the legislative function.[13] This ambivalence toward the statutory cause of action may undermine the Court's resolve to provide a remedy for governmental violations of statutory rights under section 1983, thus rendering the bold promise of the *Thiboutot* decision illusory.

In two cases decided in the Court's last term, *Pennhurst State School & Hospital v. Halderman*[14] and *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[15] the Court began the work of reconciling *Thiboutot* and *Transamerica*. The results were mixed. Both cases reaffirmed *Thiboutot*'s reading of section 1983 as a remedy for statutory violations.[16] Each case, however, created limits on the availability of the remedy that were potentially quite restrictive. *Pennhurst* raised the underlying question of how statutory rights are created in the first place, asserting that the Developmentally Disabled Assistance and Bill of Rights Act[17] created no enforceable rights and thus could not furnish grounds for an action under section 1983.[18] *Sea Clammers* focused on the interaction of the section 1983 remedy with those contained in substantive statutes.[19] The Court found that the existence of an explicitly provided remedy may preclude resort to section 1983 as an alternative. Taken together, the two cases seem to indicate that the Court will be reluctant to give wide scope to the section 1983 remedy for statutory violations. This reluctance seems strongly

12. *See* notes 326-30 and accompanying text *infra*. *See generally* Note, *A New Direction for Implied Causes of Action*, 48 FORDHAM L. REV. 505 (1980).

13. *See generally* Cannon v. University of Chicago, 441 U.S. 677, 694-716 (1979).

14. 451 U.S. 1 (1981).

15. 453 U.S. 1 (1981).

16. In both cases the Court raised the § 1983 issue on its own accord. The plaintiffs in each had proceeded on an implied right of action theory. This conjunction of the two theories of relief may have colored the Court's consideration of the *Thiboutot* issues.

17. 42 U.S.C. §§ 6001-6080 (1978).

18. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 18-19.

19. In his dissent in *Thiboutot*, Justice Powell, citing Adickes v. Kress & Co., 398 U.S. 144, 150-51 (1970), and Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 422 U.S. 366 (1979), suggested that remedies provided in substantive statutes would limit the scope of § 1983. 448 U.S. at 22 n.11 (Powell, J., dissenting).

influenced by the Court's analysis of the implied right of action issue.[20]

This article examines the scope of the *Thiboutot* remedy in the wake of *Pennhurst* and *Sea Clammers*. Part I reviews the background of the Court's rejection of the implied right of action. Part II examines the historical context and legislative history of section 1983 and the reasoning behind the Court's recognition of the broad scope of that section in *Thiboutot*. The focus of Part III is the Court's attempts in *Pennhurst* and *Sea Clammers* to reconcile the implied right of action approach to statutory litigation with *Thiboutot*. Part IV suggests that the *Pennhurst* and *Sea Clammers* decisions erred in their failure to consider the historical and the institutional factors that distinguish the *Thiboutot* remedy from the implied right of action. These factors, it is argued in Part V, require that the Court's consideration of the *Thiboutot* remedy be guided by a presumption in favor of its availability.

I. Conceptual Background

Thiboutot and the implied right of action cases address the same question: Whether or not a private individual may judicially enforce federal statutes when the statute itself does not explicitly provide the cause of action asserted. They approach the question from different perspectives, however. Section 1983 serves only as a remedy for action under color of state law; the implied right of action applies to any violation of statutory rights.[21] The Supreme Court has yet to distinguish the answers provided by each of the remedies to the cause of action question. There is precedent, however, for suggesting that the focus of the *Thiboutot* remedy on governmental action should lead to a separate and more liberal standard of review.[22]

For most of this century, two threshold issues have determined whether or not private statutory enforcement actions will lie: standing and the implied right of action doctrine.[23] Although no explicit stan-

20. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 10-11.

21. For an excellent discussion of the cause of action issue, see generally Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

22. *See* note 110 *infra*.

23. It is perhaps indicative of the uncertainty with which the federal courts approach statutory litigation that such a basic issue as who may enforce a statute is unsettled after 200 years of federal jurisprudence. The federal courts did not have jurisdiction over federal questions at all until the passage of 28 U.S.C. § 1331 in 1875. The federal regulatory net is primarily the product of legislation in this century. Professor Albert points out that the lack

dard governed the relation between them, a rough division of the types of cases to which each doctrine applied,[24] reflecting the historical origins of the two doctrines, prevailed.[25] The standing doctrine, with its roots in constitutional and administrative law, determined whether or not the conduct of governmental entities would receive judicial review.[26] The implied right of action doctrine, which developed out of the law of torts, was applied when the action sought redress of a specific injury resulting from a statutory violation.[27] The implied right of action generally involved private conduct.[28]

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of the writs of mandamus and certiorari on the federal level inhibited the development of a public or statutory law tradition. Albert, *supra* note 21, at 433.

24. This rough division reflects the distinction between actions against governmental entities or public officials and those against private individuals, a distinction which would logically seem to be one of the most basic in statutory jurisprudence. Although the emergence of the *Thiboutot* remedy may now force an articulated recognition of the distinction, hitherto the courts have made the public-private distinction *sub silentio*, if at all. The muddling of the two is one of the most disturbing aspects of the Court's restriction of the private right of action in National R.R. Passenger Corp. (Amtrak) v. National Ass'n of R.R. Passengers, 414 U.S. 453, 465 (1974). *See* notes 69-112 and accompanying text *infra*. Justice Jackson pointedly described the confusion. "The painfully logical French . . . recognized from the beginning that controversies between the citizen and an official, in the performance of his duty as he saw it, involved some different elements and considerations than the contest between two private citizens over private matters . . . . But the United States and England have backed into the whole problem rather than face it." R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 46 (1955).

25. For comparisons of the two doctrines, see Potomac Passengers Ass'n v. Chesapeake & Ohio R.R., 475 F.2d 325, 329 (D.C. Cir. 1973), *rev'd sub nom.* National R.R. Passenger Corp. (Amtrak) v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974); Albert, *supra* note 21; Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1408-11 (1975) [hereinafter cited as Comment, *Private Rights of Action*].

26. Professor Jaffe, who has traced the origins of the standing doctrine in the English courts, finds its roots in the writ of mandamus. He quotes Lord Mansfield's broad description of the writ. "It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462 (1965) (citing Rex v. Barker, 3 Burr. 1265, 1267, 97 Eng. Rep. 823, 824-25 (K.B. 1762)). In the 18th century, this broad judicial power was limited in the English courts by a requirement that the one seeking issuance of the writ allege violation of a legal interest. L. JAFFE, *supra* at 463-64 (citing The King and Queen v. St. John's College, 87 Eng. Rep. 366 (K.B. 1693)). Similarly, standing developed in the American system as a restraint on the Court's exercise of its power of constitutional review, Frothingham v. Mellon, 262 U.S. 447 (1923), or on its review of administrative agency action, Edmund Hines Yellow Pine Trustee v. United States, 263 U.S. 143 (1923). The requirement was phrased in terms of sufficient adversity of interest to satisfy the requirement of article III that courts decide cases or controversies. *See* L. JAFFE, *supra*, at chs. 12-13.

27. *See* Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

28. *See* notes 326-30 and accompanying text *infra*.

This unstated balance between the standing and the implied right doctrines has not been sustained, however, as the concepts have evolved beyond their historical antecedents. Recent restrictions on the implied right of action doctrine have upset the balance completely. In the process, much of the conduct of state and local governments in administering federal programs has been rendered virtually unreviewable in the federal courts, unless such review is authorized by the *Thiboutot* remedy. A brief historical survey will indicate how this has occurred.

A. The Common Law Approach

The growth of the federal legislative role first raised the statutory cause of action issue in the early part of this century. The Supreme Court's natural response was to approach the question in the familiar terms of the common law.[29] Notions of legal interest rooted in the common law thus became a point of departure in shaping both the implied right of action doctrine and the standing doctrine.

The early implied right of action was essentially a federal doctrine of negligence *per se*[30]—the federal statute created the duty and standard of care. The Court implied a damage remedy on behalf of intended beneficiaries of the statute who had been injured as a result of its violation. The decision of *Texas & Pacific Railway v. Rigsby*,[31] in which the Court provided a damage action for a brakeman injured by a railroad's failure to install a handrail required by the Federal Appliance Safety Act, typified this approach. Since the statute contained an explicit standard of conduct but not a remedy, the Court implied the latter based on the former. This statutory tort approach to implication proved so broad that in a number of cases the Court simply refused to follow it, relying instead on legislative history or statutory construction of the underlying statute to show that Congress had not intended to

29. *See* note 26 *supra*. *See generally* Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 CALIF. L. REV. 1139, 1149-55 (1977).

30. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). As Justice Stevens pointed out in his dissent in *Sea Clammers*, the doctrine is also rooted in the maxim of jurisprudence, *ubi jus, ibi remedium* (where there is a right, there is a remedy). Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 23 n.2 (Stevens, J., dissenting). *See, e.g.*, Pollard v. Bailey, 87 U.S. (20 Wall.) 520, 527 (1874) ("a general liability created by statute without a remedy may be enforced by appropriate common-law action"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded").

31. 241 U.S. 33 (1916).

provide a private right of action.[32] The cases rejecting application of the doctrine, however, provided no alternative standard for implication and met with strong dissent and thus no coherent alternative was able to replace the common law approach.[33]

Despite the constitutional basis of the standing doctrine, common law principles also shaped its early development. It was to the common law that the Court looked to define the class of adversity of interests that would satisfy the article III requirement of a case or controversy.[34] As Justice Frankfurter put it, the standing inquiry was a determination of whether or not the question presented was "consonant with what was, generally speaking, the business of the colonial courts and the courts of Westminster when the constitution was framed."[35] This search for interests cognizable at common law led the Court to deny standing in a series of cases brought by business enterprises to challenge competition from publicly owned companies, since competitive injury was not recognized at common law.[36] For similar reasons, the Court refused to recognize actions by taxpayers seeking to assert the public interest[37] and actions by individuals seeking to assert the rights of third parties.[38] No such interests had been recognized at common law; therefore, the parties were not truly adverse. Another line of standing cases decided during the same period did recognize nontraditional interests where the underlying statute demonstrated a clear protective intent.[39] This standard was applied exclusively where the statute explicitly provided for private enforcement actions. The two standards interacted, however, when the Court, influenced by a common law indifference to certain kinds of injury, declined to infer a protective purpose from legal constraint or governmental authority even where such a purpose was apparent.[40]

32. For early restrictive applications of the doctrine, see T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951).

33. *See generally* Note, *Implied Causes of Action*, *supra* note 9.

34. *See* note 26 *supra*.

35. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

36. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

37. Frothingham v. Mellon, 262 U.S. 447 (1923).

38. Tileston v. Ullman, 318 U.S. 44 (1943).

39. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

40. *E.g.*, Perkins v. Lukens, 310 U.S. 113 (1940); Berry v. Housing & Home Fin., 340 F.2d 939 (2d Cir. 1965). *See* Albert, *supra* note 29.

B. The Functional Approach

Professor Davis and other scholars were critical of the Court's reliance on common law definitions of injury in the standing determination, charging that the common law approach shielded many of the fundamental conflicts that characterize modern industrial democracy from judicial scrutiny.[41] Under this pressure, analysis of both the implied right and standing issues shifted in the 1960's and early 1970's toward greater emphasis on the purposes of the statute under which rights were asserted. In *Association of Data Processing Service Organizations, Inc. v. Camp*[42] and *Barlow v. Collins*,[43] the Court formulated what might be termed a "functional approach" to the standing question. This approach focused on the need for a judicial remedy to give practical effect to Congress' remedial purpose. The Court, following this view, shaped its own judicial role to fit the overall purpose of the particular statute.

In *Association of Data Processing*, commercial sellers of data processing services challenged a ruling by the Comptroller of Currency that allowed national banks to make data processing services available to other banks. The lower court dismissed this suit for lack of standing since it was based on competitive injury.[44] The Supreme Court reversed. Noting that the plaintiffs had alleged injury in fact to their economic interest, the Court rejected the legally protected interest requirement of *Tennessee Electric Power Co. v. TVA*.[45] Justice Douglas, writing for the Court, stated:

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[46]

In addition, section 4 of the Bank Service Corporation Act of 1962[47] prohibited bank service corporations from engaging in any activity other than the performance of bank services for banks. The Court held

41. K. DAVIS, ADMINISTRATIVE LAW TREATISE 208-94 (1958); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

42. 397 U.S. 150 (1970).

43. 397 U.S. 159 (1970).

44. Association of Data Processing Serv. Org., Inc. v. Camp, 406 F.2d 837 (8th Cir. 1969).

45. 306 U.S. 118 (1939).

46. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. at 153.

47. 12 U.S.C. § 1861 (1976).

that this combination of injury in fact and protective legislative purpose created standing by arguably bringing competition within the zone of interests protected by the statute.[48]

Justice Douglas based a third element of the *Data Processing* test for standing on the Administrative Procedure Act (APA).[49] The APA provides that review of agency action will be permitted except where the statute precludes review or where the action is committed to agency discretion.[50] Citing *Abbott Laboratories v. Gardner*,[51] Justice Douglas rejected a "presumption against judicial review and in favor of administrative absolutism."[52] There was no evidence, he said, that the National Bank Act sought to preclude judicial review; therefore, those within a class of "aggrieved" persons under the terms of the Act were entitled to review.[53]

A similar approach was adopted in *Barlow v. Collins*.[54] In *Barlow*, tenant farmers sought to challenge regulations by the Secretary of Agriculture permitting assignment of farm subsidy payments as unauthorized by the Food and Agriculture Act. The Court of Appeals for the Fifth Circuit denied the farmers standing on the grounds that they had neither alleged a legally protected interest nor alleged any provision of the Food and Agriculture Act that expressly or impliedly granted standing.[55] Justice Douglas, again writing for the Court, reversed, declaring that tenant farmers were within the zone of interests protected by the Act since the legislative history indicated "a congressional intent to benefit the tenants."[56]

A functional viewpoint also influenced the Court's rationale for

48. 397 U.S. at 153-54.
49. *Id.* at 157.
50. *See* note 112 *infra*.
51. 387 U.S. 136 (1967).
52. 397 U.S. at 157.
53. *Id.*
54. 397 U.S. 159 (1970).
55. 398 F.2d 398 (5th Cir. 1968).
56. 397 U.S. at 164-65. In his concurring opinion, *id.* at 167-78, Justice Brennan argued that by incorporating the zone of interests test into the standing inquiry, Douglas had confused the standing question with issues that involve the merits. Brennan suggested an alternative framework that might have avoided much subsequent confusion. The standing issue, he said, should turn simply on the extent of the injury suffered by the plaintiff. Questions regarding the zone of interests protected by the statute relate to a second preliminary issue, reviewability. Reviewability, he indicated, "has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim." *Id.* at 174 (Brennan, J., concurring). If these threshold tests are satisfied, the Court, in Justice Brennan's scheme, would then proceed to the merits, determining whether or not the plaintiff was actually injured by agency conduct violative of the statutory standard.

the implied right of action doctrine. In *J.I. Case Co. v. Borak*,[57] an action by stockholders seeking relief for violation of the proxy provisions of the Securities and Exchange Act, the Court reaffirmed the need for judicial interpretation of the consequences of violating federally created rights.[58] As an additional justification for implication, the Court pointed to the beneficial role that recognition of a private action could play in the achievement of the policy goals sought by Congress through the passage of the Act.[59] Noting the volume of proxy statements received by the Securities and Exchange Commission (SEC) each year, the Court declared that this volume placed a burden on the SEC's enforcement capacity that did not permit an independent examination of the material set forth in each statement. The Court concluded that if Congress' original legislative goal was to be achieved, and if unlawful manipulation was to be prevented, implication of a private cause of action was a "necessity."[60]

C. The New Formalism

1. Standing

Warth v. Seldin[61] signaled a fundamental change in the Court's approach to litigant access questions, shifting the method used from functionalism to a self-conscious concern with the Court's own institutional role. In the ensuing era, the Court would focus on the letter rather than on the purpose of the legislation, interpreting and exercising its power with a strict concern for the formal distinctions between legislative and judicial roles.[62] In *Warth*, the Court denied standing to lower-income and minority individuals and associations, to municipal taxpayers, and to a group of developers who sought to challenge the restrictive zoning policies of the town of Penfield, New York.[63] The Court found that the injuries alleged by each plaintiff were too indirect

57. 377 U.S. 426 (1964).

58. *Id.* at 433.

59. *Id.* at 432-33.

60. *Id.* at 432-35. In *Borak*, Justice Clark caught the spirit of the functionalist approach to the role of the judiciary in statutory enforcement. Commenting on the administrative burden on the SEC he said, "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433.

61. 422 U.S. 490 (1975).

62. In a sense, formalism is simply the functionalist tune in a different key. Both approaches define the judicial role on the basis of the perceived place of courts in the political process and in the governmental system rather than on the basis of the received tradition of the common law. The formalist approach is distinguished from the functionalist approach, however, by a political preception more wary of the positive role of government.

63. 422 U.S. at 507.

or impersonal,[64] were not sufficiently likely to be remedied by a favorable decision,[65] or were, in fact, injurious to a third party.[66] Therefore, none of the plaintiffs' injuries constituted an appropriate basis for standing to challenge the municipality's zoning practices.[67] The Court admitted that the standing criteria it applied were not constitutionally required, declaring that the concept of standing was not solely a constitutional question but also embodied prudential concerns. The Court said:

> Without such [prudential] limitations—closely related to Article III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.[68]

2. *The Implied Right of Action: From* Amtrak *to* Transamerica

The Court's concern in *Warth* with judicial self-governance carried over into its consideration of the implied right of action issue. This concern was expressed by a new formalism in the Court's interpretation of congressional intent.

In *National Railroad Passenger Corp. (Amtrak) v. National Association of Railroad Passengers*,[69] the Court refused to imply a cause of action on behalf of an association of passengers who sought to challenge Amtrak's termination of lines that were deemed uneconomic. The Court said that Congress had not intended to provide a private remedy under the Rail Passenger Service Act.[70] The Court in *Amtrak* took a different approach to the question of congressional intent than had the Court in *Borak*. Instead of inquiring into the policy goals of Congress and seeking the means to further them, the Court tried to determine whether or not Congress had intended to allow private enforcement actions.[71] The Act did provide for a cause of action by the Attorney General, but an amendment offered in committee that would

64. *Id.*
65. *Id.* at 504; *see also* Linda R.S. v. Richard D., 410 U.S. 614 (1973).
66. 422 U.S. at 502.
67. *Id.* at 501. *Compare* Linda R.S. v. Richard D., 410 U.S. 614 (1973), *with* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).
68. 422 U.S. at 500. *See generally* Yarbrough, *Litigant Access Doctrine and the Burger Court*, 31 VAND. L. REV. 33 (1978).
69. 414 U.S. 453 (1974). *See* Comment, *Private Rights of Action*, *supra* note 25.
70. 45 U.S.C. §§ 501-645 (1976).
71. *Amtrak*, 414 U.S. at 457.

have permitted action by an aggrieved party had been rejected. The Court interpreted this rejection by the committee as a congressional rejection of implied private actions.[72]

The enforcement power of the Attorney General provided another link in the Court's reasoning. Resurrecting the ancient maxim of statutory interpretation, *expressio unius est exclusio alterius*,[73] the Court declared that the grant of express enforcement power to the Attorney General indicated a congressional intent to preclude a supplementary private cause of action.[74]

Finally, the Court considered the overall purpose of the Act itself and found support for its decision not to permit an implied remedy. It argued that the legislative purpose that it discerned in the Act—the rapid and economical consolidation of the nation's rail passenger system—would be hampered, not furthered, by private litigation.[75] Congress, in the Court's view, had thus chosen to bar private actions in order to facilitate the swift and efficient implementation of its policy goals.

a. The *Cort* Test

In *Cort v. Ash*,[76] the Court retreated from the emphasis given in *Amtrak* to the congressional remedial intent. Acknowledging the anomaly of searching for a congressional will regarding remedial procedures for which Congress had failed to provide explicitly,[77] the Court created a four-point test for determining whether or not a particular statute would support an implied private remedy. The factors deemed relevant were: (1) Is the plaintiff of a class for whose special benefit

72. 45 U.S.C. § 547(a) (1976).

73. "Expression of one thing is the exclusion of another." This maxim has been subject to severe criticism. As one court put it in a context unrelated to implication, "The doctrine *expressio unius est exclusio alterius* is at best an unreliable basis for ascertaining intention. Its premise is that the draftsman has made a comprehensive review of all possible related provisions, from which the inference is to be drawn that his silence indicates a discriminating judgment of rejection. Such a conclusion usually is unrealistic, for it assumes too much foresight in the draftsman." Durnin v. Allentown Fed. Sav. & Loan Ass'n, 218 F. Supp. 716, 719 (E.D. Pa. 1963). *See also* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1173-74 (temp. ed. 1958).

74. 414 U.S. at 458. *But see* Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

75. 414 U.S. at 462.

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

77. *Id.* at 82-83. The Court emphasized the need to concentrate on the actual legislative history. See *id.* at 82 n.14, where the Court said, "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling."

the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff?[78] (2) Are there any indications of legislative intent, explicit or implicit, either to create such a remedy or to deny one?[79] (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?[80] (4) Is the cause of action 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?[81] Although initially greeted by some commentators as the death knell of the implied right of action,[82] the *Cort* test has proven to be a flexible standard[83] that has often been successfully invoked by plaintiffs seeking judicial recognition of implicit statutory action.[84]

Several members of the Court have found the *Cort* test too flexible. In *Cannon v. University of Chicago*,[85] the majority relied on *Cort* to imply a cause of action under Title IX, section 901(a) of the Education Amendments of 1972,[86] for a university job applicant discriminated against on the basis of sex.[87] Justice Powell commented harshly in dissent on the amenability of *Cort* to successful implication:

> In the four years since we decided *Cort*, no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes. . . . It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action. Indeed, the accelerating trend evidenced by these decisions attests to the need to reexamine the *Cort* analysis.[88]

Justice Powell also condemned the entire concept of judicial implication as an unconstitutional usurpation of legislative function by courts.

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78. 422 U.S. at 78 (citing Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)).

79. 422 U.S. at 78 (citing National R.R. Passenger Corp. (Amtrak) v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 460 (1974)).

80. 422 U.S. at 78 (citing Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975)).

81. 422 U.S. at 78 (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).

82. Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978).

83. Note, *Implied Causes of Action*, *supra* note 9, at 156.

84. For a partial listing of cases that found an implied right of action under the *Cort* test, see Cannon v. University of Chicago, 441 U.S. 677, 741-42 (1979) (Powell, J. dissenting).

85. 441 U.S. 677 (1979).

86. 20 U.S.C. §§ 1681-1686 (1972).

87. The majority, following *Cort*, analyzed each of the four factors that decision had suggested for determining whether or not a cause of action should be implied. Writing for the Court, Justice Stevens indicated that all four factors weighed on the side of permitting a private action on behalf of the *Cannon* plaintiff. 441 U.S. at 688.

88. *Id.* at 741 (Powell, J., dissenting).

Reliance on judicial implication, he argued, allowed Congress to duck hard political issues raised by enforcement questions:

> Because the courts are free to reach a result different from that which the normal play of political forces would have produced, the intended beneficiaries of the legislation are unable to ensure the full measure of protection their need may warrant. For the same reason, those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation.[89]

Implication of a cause of action, Justice Powell argued, should never be allowed unless there appears to be compelling evidence of a legislative intent that private enforcement be permitted.[90]

b. Rejection of the *Cort* Test

Justice Powell's dissent in *Cannon* bore fruit in *Touche Ross & Co. v. Redington*[91] and in *Transamerica Mortgage Advisors, Inc. v. Lewis*.[92] These cases deemphasized the *Cort* test and evidenced a return to a more exclusive reliance on the congressional intent analysis that had been the Court's rationale for the *Amtrak* decision.

In *Touche Ross*, trustees in bankruptcy sought an action under the Securities and Exchange Act of 1934[93] against accountants for a securities broker who had filed false reports with the SEC. The Court rejected the implication of a private cause of action. Justice Rehnquist, writing for the Court, specifically condemned the tort theory of implication, declaring that the implied right of action rested solely on statutory interpretation[94] and that this statutory interpretation should seek only congressional intent;[95] the *Cort* factors themselves were merely useful as guides in determining whether or not Congress intended to provide a private remedy.[96] The Court concluded that Congress had not intended a private remedy. Pointing to the administrative relief provided by the Act, the Court stated that it would be extremely reluctant to provide a remedy broader than that chosen by Congress.[97]

Transamerica involved an action by shareholders of a real estate investment trust for fraud and breach of fiduciary duty in violation of

89. *Id.* at 743.
90. *Id.* at 749.
91. 442 U.S. 560 (1979).
92. 444 U.S. 11 (1979).
93. 15 U.S.C. § 78q(a) (1976).
94. 442 U.S. at 568-69.
95. *Id.* at 571.
96. *Id.* at 575.
97. *Id.* at 579.

the Investment Advisors Act of 1940.[98] The Court held that the Act permitted a limited remedy of recission but that the Act would not support any implied remedy.

A comparison of the *Transamerica* and *Amtrak* decisions reveals the Court's increasing reliance on formal maxims for determination of the implication question.[99] Each decision placed congressional intent at the center of its determination of whether or not to permit an implied action. In *Amtrak*, the Court had a significant basis for arguing that Congress had formulated an intent with respect to private enforcement actions. Both the legislative history and analysis of the policy goals underlying the Rail Passenger Service Act gave some support to the view that Congress had intended the enforcement mechanism it actually created to be exclusive. In *Amtrak*, in other words, there was substantial reason to believe that the *expressio unius* maxim matched Congress' actual intent. In contrast, the Court in *Transamerica* found no legislative history to indicate that Congress had any intent one way or another regarding implied actions when it passed the Investment Advisors Act in 1940,[100] nor did the Court argue that the substantive purpose of the Act—the protection of investors from fraudulent practices—would be hindered by permitting defrauded clients to sue their investment advisors for damages.[101] Instead, the rationale for the Court's decision that the Act provided no implied action for damages was simply that the legislation created only administrative and criminal sanctions.[102] Invoking *expressio unius est exclusio alterius*, the Court reasoned that Congress must have intended these remedies to be exclusive.

D. Standing and the Implied Right of Action

As long as the roots of the standing and implied action doctrines in article III and tort law, respectively, remained firm, the two doctrines were relatively easy to distinguish.[103] As the common law tradition has been subordinated, however, first to functional and then to prudential

98. 15 U.S.C. §§ 80b-1 to 80b-5 (1976).

99. Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 563-70 (1981).

100. Justice Stewart admitted that the legislative history was entirely silent on private rights of action. 444 U.S. at 18.

101. Justice White in dissent pointed out that the Court's admission that a recission remedy under the Act could be implied was a finding that the Act did permit an implied right of action. The Court's refusal to permit a damage action as well as one for recission, he said, stemmed from its confusion of the cause of action issue with the question of relief. *Id.* at 25 (White, J., dissenting).

102. *Id.* at 19-20.

103. *See* notes 25 & 56 *supra*.

considerations, distinguishing the two doctrines has become more difficult.[104] At the same time, the significance of the distinction has become greater. Despite *Warth*, standing remains, as it must, a test that plaintiffs can meet. After *Transamerica*, on the other hand, the burden a plaintiff must carry in order that a court will imply a private action may be so heavy as to be almost impossible.

A secondary aspect of the *Amtrak* case has therefore assumed paramount importance. The court of appeals' decision in *Amtrak* was not framed in terms of the implied right question at all.[105] Because *Amtrak* was a quasi-public corporation operating under statutory authority, the court of appeals found that the standing inquiry was appropriate in determining whether or not the parties were properly before the court.[106] The Supreme Court did not reject the application of the standing doctrine in *Amtrak*, but ruled simply that the question of whether or not an action may be implied must be resolved first. When no right of action exists, the Court said, "questions of standing and jurisdiction become immaterial."[107] The effect of this switch in the reasoning process is to reverse the presumption regarding the Court's power to review agency action. Although the third part of the *Data Processing* test for standing addressed the issue of congressional intent with respect to judicial review,[108] it followed *Abbott Laboratories v. Gardner*[109] in establishing a presumption of reviewability.[110] *Amtrak*,

104. *See* notes 25 & 62 *supra*. Compare Justice Brennan's relatively clear discussion of the distinctions in Barlow v. Collins, 397 U.S. 159, 167-78 (1970), with his tortured analysis in Davis v. Passman, 442 U.S. 228, 239-41 (1979).

105. Potomac Passengers Ass'n v. Chesapeake & Ohio Ry., 475 F.2d 325 (D.C. Cir. 1973).

106. *Id.* at 330.

107. *Amtrak*, 414 U.S. at 456. *See* Pillai, *supra* note 82, at 6.

108. *See* note 56 *supra*.

109. 387 U.S. 136 (1967). *See* note 46 and accompanying text *supra*. Judge Skelly Wright, in the court of appeals decision in *Amtrak*, had dealt with the issues of the legislative history, the purpose of the Rail Passenger Service Act and the attorney general's remedy in standing terms. Potomac Passengers Ass'n v. Chesapeake & Ohio Ry., 475 F.2d 325 (D.C. Cir. 1973). The effect of the *Abbott Laboratory* presumption of reviewability was telling. Reviewing the legislative history, Judge Wright pointed to sections of the Act that explicitly prohibited judicial review. "Where Congress intended to preclude judicial review it knew very well how to make its wishes clear." *Id.* at 336. Turning to the legislative purpose, he acknowledged that it included the swift elimination of uneconomic railway lines. He noted, however, that the purpose was also the preservation of the rail passenger system. Achievement of this goal required compliance with the Act, and "judicial review of Amtrak's actions is necessary if compliance is to be assured." *Id.* at 337. He also considered the effect of the Act's explicit remedies. Rejecting the logic of *expressio unius*, he declared, "Since we can explain the express provision of standing in the Attorney General, employees and employee representatives on grounds unrelated to any congressional intent to preclude other injured and aggrieved parties from bringing suit, we cannot reasonably infer from the statutory

by contrast, required a positive showing that Congress intended review through a private right of action. In light of the restrictive formalism of subsequent decisions, *Amtrak*'s assertion of the pre-eminence of the implied right test amounts to an elimination of the right to judicial review where it is not explicitly provided by statute.[111]

This transposition of issues has led to an institutional anomaly. Federal legislation has increasingly delegated responsibility for the administration of federally authorized social and regulatory programs to state and local governments. Such legislation seldom provides explicitly for judicial review, yet courts have generally granted such review upon a showing of the plaintiff's standing. A symmetry between the state and federal governments thus has been preserved with the reviewability of federally administered programs under the APA.[112] The pre-eminence of the right of action question over the standing question established in *Amtrak* and the rigid views the Court has adopted regarding the implied right of action, however, suggest that federally authorized programs administered by the states may suddenly be shielded from judicial scrutiny.

This is the doctrinal dilemma that gives *Thiboutot*'s interpretation of section 1983 its significance. An expansive interpretation of that

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language an intent to bar other parties from bringing suit, especially in light of the strong presumption in favor of review with which we began our analysis." *Id.* at 334.

110. The following cases, for example, involved review under the Social Security Act: Miller v. Youakim, 440 U.S. 125 (1979); Quern v. Mandley, 436 U.S. 725 (1978); Van Lare v. Hurley, 421 U.S. 338 (1975); Edelman v. Jordan, 415 U.S. 651 (1974); Hagans v. Lavine, 415 U.S. 528 (1974); Carleson v. Remillard, 406 U.S. 598 (1972); Jefferson v. Hackney, 406 U.S. 535 (1972); Carter v. Stanton, 405 U.S. 669 (1972); Townsend v. Swank, 404 U.S. 282 (1971); California Dep't of Human Resources Dev. v. Java, 402 U.S. 121 (1971); Dandridge v. Williams, 397 U.S. 471 (1969); Rosado v. Wyman, 397 U.S. 397 (1969); King v. Smith, 392 U.S. 309 (1967); Damico v. California, 389 U.S. 416 (1967). Review has also been routinely permitted under the National Housing Act of 1937. Thorpe v. Durham Hous. Auth., 393 U.S. 268 (1969); Chicago Hous. Tenants Ass'n v. Chicago Hous. Auth., 512 F.2d 19 (7th Cir. 1975); Fletcher v. Hous. Auth., 491 F.2d 793 (6th Cir. 1974); Brown v. Hous. Auth., 471 F.2d 63 (7th Cir. 1972).

111. *See, e.g.*, CETA Workers' Org. Comm. v. City of New York, 617 F.2d 926 (2d Cir. 1980) (no implied action under the Comprehensive Employment and Training Act of 1978); Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979) (no implied action under the National Housing Act of 1937); Perry v. Housing Auth., 486 F. Supp. 498 (D.S.C. 1980) (no implied action under the National Housing Act of 1937).

112. The APA, 5 U.S.C. § 702 (1976), is a general remedial statute that functions very much like § 1983. It does not itself provide jurisdiction for statutory claims against federal agencies; instead, it provides the cause of action upon which jurisdiction under 28 U.S.C. § 1331 (1976) may be based. Where a cause of action exists under the APA, an implied right of action under the substantive statute is unnecessary. Glacier Park Found. v. Watt, 663 F.2d 882, 885 (9th Cir. 1981); *see also* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

statute would preserve the symmetry with respect to judicial review between federally and locally administered programs.

II. Section 1983 and the Statutory Cause of Action

A. Legislative History: An Overview

Section 1983 was originally enacted as part of the Reconstruction era legislation, which brought a fundamental shift in the balance of power between the federal and state governments within the United States governmental system.[113] Prior to the Civil War, the Court embraced concepts of federalism that emphasized states' rights and fears of a powerful central government. The first ten amendments to the Constitution were thus concerned with limiting the action of the federal government but not the action of either states or individuals. The Civil War changed these views.

The victory of the Union armies, the infamy of secession, and the aftermath of the war during Reconstruction discredited the prior theories of federalism. The national government was now viewed not as a threat to individual rights but as a protector of those rights against infringement by state or private action. The Reconstruction Congress, controlled by abolitionists with strong federalist and nationalist tendencies, maneuvered the national government into a key position in providing for and defending the welfare of the individual. This new role for the national government was most evident in the area of civil rights.

During the Reconstruction years, Congress passed the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution as well as five major civil rights acts implementing those amendments.[114] The three amendments created a structure of national citizenship with broad new guarantees of liberty and equality. The Civil Rights Acts refined these amendments and contained jurisdictional provisions that conferred primary responsibility for the vindication of these rights on the federal judiciary. "As a result of these and other acts the lower federal courts emerged from the Reconstruction period with significantly greater importance, supplanting the state courts as the principal

113. *See generally* Gressman, *supra* note 2, at 1323-36; *Section 1983 and Federalism*, *supra* note 2, at 1135-89.

114. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (prohibiting racial discrimination in public accommodations); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (suppressing the Ku Klux Klan); Act of Feb. 28, 1871, ch. 99, 16 Stat. 443 (protecting voting rights); Act of May 31, 1870, ch. 14, 16 Stat. 140 (protecting voting rights); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (outlawing southern black codes).

forum for enforcing federal law."[115] The original version of section 1983 was part of this restructuring of federalism and of the role of the federal judiciary.

The language of section 1983 is very broad.[116] Perhaps for this reason, judicial interpretation of the section has relied heavily on exegesis of its legislative history.[117] Unfortunately, the legislative history on whether or not the section extends its protection to statutorily created rights is fragmentary and susceptible to contradictory characterizations.[118] The language defining the scope of the statute underwent numerous changes over the years, none of which received substantial comment in Congress.

The original version of section 1983 was section 1 of the Civil Rights Act of 1871, the Ku Klux Klan Act.[119] That statute was broadly directed at the violence and official persecution visited on emancipated blacks and on republicans in the Reconstruction South by the Klan and its sympathizers.[120] It created civil causes of action for violations of citizens' rights and provided jurisdiction in the federal courts to hear

115. *Section 1983 and Federalism*, *supra* note 2, at 1142.

116. *See* note 3 *supra* (quoting § 1983).

117. *See, e.g.*, *Section 1983 and Federalism*, *supra* note 2, at 1137. *But see* Maine v. Thiboutot, 448 U.S. 1 (1980), which gives the legislative history little attention, stating, "One conclusion which emerges clearly is that the legislative history does not permit a definitive answer." *Id.* at 7.

118. *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S 600, 623, 646, 672 (1979) (Powell, J., concurring) (White, J., concurring) (Stewart, J., dissenting). The debate over the meaning of the legislative history apparently reached a point of bitter disagreement for Justice Powell, who, in reference to the "ambiguities, contradictions, and uncertainties" that Justice White found in the history, stated, "These confusions, however, are for the most part not inherent in the legislative history. With all deference, it seems to me they are largely the product of [Justice White's] opinion concurring in the judgment." *Id.* at 640 n.24 (Powell, J., concurring).

119. The first section of the Civil Rights Act of 1871 reads 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 the other remedial laws of the United States which are in their nature applicable in such cases." Civil Rights Act of 1871, ch. 22, 17 Stat. 13.

120. *See* Gressman, *supra* note 2, at 1334; *Section 1983 and Federalism*, *supra* note 2, at 1153-56.

such cases,[121] regardless of the amount in controversy.[122] The remedial provisions it created extended to violations of rights, privileges, and immunities "secured by the Constitution," but did not explicitly refer to statutory rights as being among those protected.

In 1866, Congress authorized a comprehensive revision and recodification of all federal statutes,[123] an undertaking that was not completed until the enactment of the Revised Statutes in 1874.[124] Most of the civil rights legislation was enacted in the interim and was included in the revision.[125] The revision of the Civil Rights Act of 1871 wrought numerous significant changes.[126]

The language of section 1 of the Civil Rights Act was expanded to encompass rights secured by the "Constitution and laws."[127] The revised language is identical to what is presently codified at 42 U.S.C. section 1983. The revision also separated the remedial provision of section 1 from its jurisdictional provision.[128] When the revisers made this separation, they created three jurisdictional provisions: one for the fed-

121. As noted in text accompanying note 115, *supra*, this jurisdictional grant was part of a larger scheme by the Republican Congress to entrust protection of the Reconstruction program to federal, not state, courts. *See Section 1983 and Federalism*, *supra* note 2, at 1152-53.

122. Neither the 1871 Civil Rights Act nor the 1866 Act, incorporated therein by reference, included a jurisdictional amount requirement for these actions.

123. Revision of Statutes Act of June 27, 1866, ch. 140, 14 Stat. 74.

124. Revision of Statutes Act of 1874, ch. 333, 18 Stat. 113.

125. One notable exception, the Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, was passed after the revision.

126. The most significant changes in the Civil Rights Acts appeared in § 1 of the 1871 Act and in various criminal provisions of the 1870 Act. Prior to the revision, § 6 of the 1870 Act had been singularly expansive in its scope because it criminalized private as well as color-of-law conspiracies to deprive persons of either their federal constitutional or *statutory* rights. During the revision, however, § 17 of the 1870 Act, previously covering only statutory violations, was given expansive language to parallel that in § 6. Thus, the revised version of § 17 embraces, as the Supreme Court has recognized, "*all* of the Constitution and *all* of the laws of the United States." United States v. Price, 383 U.S. 787, 800 (1966) (emphasis in original). This expansion of § 6 of the 1870 Act closely parallels the expansion of § 1 of the 1871 Act. *See generally* Chapman v. Houston Welfare Rights Org., 441 U.S. at 653-58 (White, J., concurring).

127. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. § 1979 (1871) (current version at 42 U.S.C. § 1983 (Supp. III 1979)).

128. This separation of provisions by function was part of a carefully considered "systematic plan of a more minute topical arrangement" on the part of the revisers. 2 CONG. REC. 827 (1874) (comments of Rep. Lawrence).

eral district courts, one for what were then called the federal circuit courts,[129] and one for the Supreme Court. This development introduced an element of irremediable ambiguity into the legislative history of section 1983 because the three jurisdictional provisions contain considerably different language. Although both the district and circuit courts were courts of original jurisdiction, the scope of their authority, stemming from section 1 as revised, differed. Revised Statute section 563(12) granted the district courts jurisdiction over claims arising out of violations of rights "secured by the Constitution of the United States or of any right secured by any law of the United States."[130] Revised Statute section 629(16), on the other hand, limited jurisdiction in the circuit courts to suits alleging violations of constitutional rights "or of any right secured by any law providing for equal rights."[131] Last, Revised Statute section 699(4) authorized review in the Supreme Court of "[a]ny final judgment . . . in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States." The reasons for these differences in language are not clear.[132] When Congress reorganized the federal judiciary in 1911, however, it consolidated the two lower federal court jurisdictional provisions into what is presently 28 U.S.C. section 1343(3),[133] a statute

129. The federal circuit courts, not to be confused with the Circuit Courts of Appeals, were a tier of trial courts created under the Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73. These circuit courts had significant original jurisdiction as well as appellate jurisdiction. Their function in the federal judicial system was continually problematic and they were eventually abolished in the Judicial Code of 1911. Act of March 3, 1911, ch. 231, 36 Stat. 1087. *See* text accompanying notes 237-41 *infra*. The modern-day circuit courts of appeals were created in the Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-41 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

130. Subparagraph 12 of Rev. Stat. § 563 (1878) authorized district court jurisdiction "[o]f 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 United States to persons within the jurisdiction thereof."

131. Subparagraph 16 of Rev. Stat. § 629 (1878) granted 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."

132. *See* text accompanying notes 237-43 *infra*.

133. 28 U.S.C. § 1343(3) (Supp. III 1979) provides, "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .

which adopted the more restrictive language of the circuit court provision.[134]

B. Pre-*Thiboutot* Judicial Interpretation

In reference to the Civil Rights Acts of the Reconstruction era, Professor Tribe states, "The Supreme Court restrictively construed or simply invalidated much of this legislation, acting to preserve in law the autonomy that the states had largely lost politically in the wake of the Civil War."[135] Restrictive interpretation of section 1983 reflected similarly severe limits on the Fourteenth Amendment,[136] a process that the Court had begun even before the revisers presented the 1874 recodification to Congress. In *The Slaughter-House Cases*,[137] decided in 1873, the Supreme Court heard a Fourteenth Amendment challenge to a monopoly on slaughterhouses. The plaintiffs alleged that the monopoly, created by the City of New Orleans, violated their right to labor freely—one of the privileges and immunities they claimed to be guaranteed under the Fourteenth Amendment.[138] The Court rejected the claim, finding that the privileges and immunities clause protected only those rights inherent in national citizenship. In the Court's view, fundamental civil rights such as those alleged by the plaintiffs adhered only to state citizenship and were not comprehended by the Fourteenth

(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 citizens or of all persons within the jurisdiction of the United States."

134. The choice of this more restrictive language for § 1343(3) is most likely explained by the conservative political climate of the post-Reconstruction era. "Following its initial flurry of legislation, Congress, reflecting the changed political climate of the post-Reconstruction era, ceased for three quarters of a century its efforts to enforce the Civil War amendments." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 257 (1978).

135. *Id.* at 257 (footnotes omitted).

136. *See* Gressman, *supra* note 2, at 1336-39.

137. 83 U.S. (16 Wall.) 36 (1873).

138. The first section of the Fourteenth Amendment contains the "privileges and immunities clause." "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section five of the Fourteenth Amendment allowed Congress to enforce the Amendment "by appropriate legislation." U.S. CONST. amend. XIV, § 5. The Civil Rights Act of 1871 was such legislation and, indeed, was officially titled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Thus, "the construction there given the privileges and immunities clause went to the very constitutional heart of those statutes." Gressman, *supra* note 2 at 1337.

Amendment.[139] Significantly, however, in defining the rights attendant to national citizenship, the Court included those rights which "owe their existence to the federal government, its National character, its Constitution, or its laws."[140] The Court's reference to the Constitution and laws in defining national citizenship echoed similar language in an earlier case expounding the privileges and immunities clause of article IV, section 2 of the United States Constitution.[141]

Subsequent decisions directly limited section 1983,[142] requiring that deprivation under color of state law be strictly pleaded,[143] that state action be narrowly defined,[144] and that the term "secured" be narrowly defined.[145] The first case to consider the scope of the term "and laws," *Holt v. Indiana Manufacturing Co.*,[146] stated that section 1983 was limited to violations of civil rights. The actual holding of the case, however, rested solely on the interpretation of Revised Statute section 629(16), the jurisdictional grant to the circuit courts that limited jurisdiction to violations of equal rights.[147] The Court provided nothing more than a bare assertion of the proposition, however, stating that sections 1983 and 629(16) "refer to civil rights only and are inapplicable here."[148] The *Holt* view received some subsequent approval in *Hague v. CIO*,[149] when Justice Stone, in an influential concurring opinion, suggested that section 1983 protected personal, not property, rights.[150] *Holt*, however, cannot be considered authority for a general limitation on the scope of section 1983, and has been distinguished as a

139. 83 U.S. (16 Wall.) at 75-79.

140. *Id.* at 79.

141. "[T]he privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869), *cited in* The Slaughter-House Cases, 83 U.S. (16 Wall.) at 76-77.

142. *See Section 1983 and Federalism*, *supra* note 2, at 1156-67; Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404, 1419-20 (1972) [hereinafter cited as Note, *Welfare Challenges*].

143. *See, e.g.*, Huntington v. City of New York, 193 U.S. 441 (1904); Barney v. City of New York, 193 U.S. 430 (1904).

144. *See, e.g.*, Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913); Devine v. Los Angeles, 202 U.S. 313 (1906).

145. *See, e.g.*, Chrystal Springs Land & Water Co. v. Los Angeles, 177 U.S. 169 (1900); Bowman v. Chicago & N.W. Ry., 115 U.S. 611 (1885); Carter v. Greenhow, 114 U.S. 317 (1885).

146. 176 U.S. 68 (1900).

147. *Id.* at 71.

148. *Id.* at 72.

149. 307 U.S. 496 (1939).

150. *Id.* at 531 (Stone, J., concurring).

case of federal deference to state taxation powers.[151]

The growing volume of legislation involving federal-state cooperation in economic and social fields has caused a number of lower federal courts in recent decades to reconsider the *Holt* interpretation of section 1983.[152] The Social Security Act (SSA),[153] the oldest and largest federal-state cooperative program, produced the bulk of this litigation.[154] Indeed, a number of landmark Supreme Court decisions involving the SSA were jurisdictionally inexplicable without a right of action under section 1983.[155] The Court seemed to stray from this line of precedent, however, in *Chapman v. Houston Welfare Rights Organization*.[156] The plaintiff in *Chapman* sought to premise jurisdiction on section 1343(3) over a section 1983 claim that alleged a violation of the SSA.[157] Reaffirming *Holt*, the Court held that section 1343(3) conferred federal jurisdiction only over claims based on statutes securing "equal rights." The Court concluded that the SSA was not such a statute and therefore claims for violation of the SSA would have to meet the jurisdictional amount requirements of 42 U.S.C. section 1331.[158] Unlike the *Holt* de-

151. *See* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), *cited in* Note, *Welfare Challenges*, *supra* note 142, at 1419 n.118.

152. *See, e.g.*, Blue v. Craig, 505 F.2d 830, 835-38 (4th Cir. 1974) (§ 1983 applicable to Social Security Act); Gomez v. Florida State Employment Serv., 417 F.2d 569, 579 (5th Cir. 1969) (§ 1983 applicable to Wagner-Payser Act of 1933); La Raza Unida v. Volpe, 440 F. Supp. 904, 908-10 (N.D. Cal. 1977) (§ 1983 applicable to Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970).

153. 42 U.S.C. § 401 (1976).

154. Countervailing tensions between the welfare objectives of the federal government and the concerns of local governments administering the SSA may account for why the Act has been a source of so much § 1983 litigation. The federal government, on the one hand, may seek certain general goals through the program, one of which includes relatively uniform national application. Local administering governments, on the other hand, may have particular moral and fiscal priorities that set them apart from the typical recipient as contemplated by the federal government. Such tensions are bound to occur more frequently with fundamental social welfare legislation like the SSA than with legislation affecting less essential values. *See generally* Note, *Welfare Challenges*, *supra* note 142.

155. Miller v. Youakim, 440 U.S. 125, 132 n.13 (1979) (state foster care program inconsistent with SSA); Quern v. Mandley, 436 U.S. 725, 729 & n.3 (1978) (state emergency assistance program consistent with SSA); Van Lare v. Hurley, 421 U.S. 338 (1975) (state shelter allowance provisions inconsistent with SSA); Townsend v. Swank, 404 U.S. 282 (1971) (state prohibition against AFDC aid for college students inconsistent with SSA); King v. Smith, 392 U.S. 309, 311 (1968) (state cohabitation prohibition inconsistent with SSA). *Cf.* Hagans v. Lavine, 415 U.S. 528, 532-33, 543 (1974) (district court had jurisdiction to decide whether state recoupment provision consistent with SSA); Carter v. Stanton, 405 U.S. 669, 670 (1972) (district court had jurisdiction to decide whether state absent-spouse rule consistent with SSA).

156. 441 U.S. 600 (1979).

157. *See* note 133 *supra*.

158. *See* text accompanying notes 160-61 *infra*.

cision, however, the *Chapman* decision explicitly left open the question of whether or not the "and laws" language of section 1983 afforded a remedy for statutory violations. In a foreshadowing of later developments, Justices Powell and White entered into an animated debate of the tangential section 1983 issue in their concurring opinions in *Chapman*.[159]

C. Judicial Interpretation in *Maine v. Thiboutot*

The issue reserved in *Chapman* came up for decision a year later in *Thiboutot*. The jurisdictional amount requirements[160] of *Chapman* posed a substantial barrier to statutorily based section 1983 claims in federal courts.[161] Section 1331, however, poses no barrier to section 1983 litigation in state courts.[162] It was in this context, reviewing the application of a federal remedy in a state forum, that the United States Supreme Court received its first opportunity to rule directly on the scope of the statutorily based section 1983 remedy.

The claim of Lionel Thiboutot presented a classic instance of the deprivation of a federal right under color of state law.[163] The Maine Department of Human Services changed its method of calculating income available to families receiving Aid to Families with Dependent Children (AFDC), and as a result reduced its AFDC grant to Mr. Thiboutot's children.[164] The state claimed that its decision was re-

159. *See* note 118 *supra*.

160. At the time *Chapman* was decided, § 1331 had a jurisdictional amount requirement of $10,000. *See* note 161 *infra*.

161. Welfare claims and other statutorily based claims rarely exceed $10,000. Moreover, the Burger Court has restricted class actions so that each member of a class, whether or not a named party, must satisfy the jurisdictional amount. Zahn v. International Paper Co., 414 U.S. 291, 294-95 (1973). The net effect of *Chapman* was thus to restrict severely statutorily based § 1983 claims in federal courts. *See* Note, *Jurisdiction Under 28 U.S.C. § 1343 Does Not Include Statutorily Based Claims of Welfare Rights Deprivation*-Chapman v. Houston Welfare Rights Organization, 29 DE PAUL L. REV. 883, 900 (1980); Jennings, *supra* note 4, at 557-59.

162. Five months after the decision in *Thiboutot*, Congress resolved the anomaly of a federal right unenforcible in a federal forum by eliminating the jurisdictional amount requirement. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (amending 28 U.S.C. § 1331(a) (Supp. III 1979)). This amendment should greatly increase the availability of federal forums for § 1983 actions. For a discussion of these developments, see Jennings, *supra* note 4, at 558-59.

163. *See* Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

164. Mr. Thiboutot and his wife had eight children, three of whom were Mr. Thiboutot's by a previous marriage. The Maine Department of Human Services notified Mr. Thiboutot that in calculating the AFDC benefits for the three children it would no longer take into account the money he spent to support the other five children, even though he was legally obligated to support them.

quired by new federal regulations.[165] Mr. Thiboutot filed an administrative challenge to the determination, and when it was denied filed a challenge in state court to the agency's interpretation of the regulation. An amended complaint added a claim under section 1983.[166] The trial court found for the Thiboutots, ordering the state to adopt new regulations and to pay retroactive benefits. The Supreme Judicial Court of Maine upheld the decision and also ordered the state to pay attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976.[167] The state appealed to the United States Supreme Court on the attorney's fees award and on the cognizability of the SSA claim under section 1983.

Justice Brennan, writing for the majority, cut through the confusion of the legislative history by simply dismissing it as irrelevant. The plain language of the statute, he stated, does not require resort to the legislative history for its interpretation.[168] Section 1983 protects rights "secured by the Constitution and laws," and Congress attached no modifier to the term "laws."[169] Justice Brennan drew support for his reading of the language from dicta contained in earlier section 1983 cases. In *Greenwood v. Peacock*,[170] he observed, the Court had stated that state officers may be held liable "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other constitutional and statutory rights as well."[171] Similar statements were made in *Mitchum v. Foster*[172] and *Lynch v. Household Finance Corp.*[173] Justice Brennan also drew on the Court's implicit reliance on section

165. The regulation at issue was 42 U.S.C. § 602(a)(7) (1976).

166. Martinez v. California, 444 U.S. 277, 283 & n.7 (1980), held that state courts are allowed to entertain § 1983 actions.

167. Thiboutot v. State, 405 A.2d 230 (Me. 1979). The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1976), states: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

168. Maine v. Thiboutot, 448 U.S. 1, 6 (1980). Justice Brennan stated, "Where the plain language, supported by consistent judicial interpretation, is as strong as it is here, ordinarily 'it is not *necessary* to look beyond the words of the statute.' " *Id.* at 6 n.4 (quoting TVA v. Hill, 437 U.S. 153, 184 n.29 (1978)).

169. 448 U.S. at 4, 7.

170. 384 U.S. 808 (1966).

171. *Id.* at 829-30.

172. 407 U.S. 225, 240 (1972), *cited in* Maine v. Thiboutot, 448 U.S. at 5.

173. 405 U.S. 538, 543 (1972), *cited in* Maine v. Thiboutot, 448 U.S. at 5.

1983 in *King v. Smith*[174] and *Rosado v. Wyman*[175] for support in his reading of the section.[176]

Justice Brennan felt that the legislative history was ambiguous, stating, "[O]ne conclusion which emerges clearly is that the legislative history does not permit a definitive answer."[177] He cited Justice Powell's concurrence in *Chapman* for the proposition that a principal purpose behind the addition of the "and laws" language had been to bring federal equal rights law within the section's ambit.[178] "On the other hand," he asserted, "there are no indications that that was the only purpose."[179] The principle of statutory interpretation upon which Justice Brennan seems to have relied may be summarized as follows: Where the literal language of a statute is consistent with prior judicial interpretation, legislative history that is not clearly contradictory may be disregarded and Congress may be taken at its word.[180] On this basis, Justice Brennan approved the section 1983 statutory cause of action.[181]

Justice Powell's dissent vigorously condemned the majority's disregard of legislative history and its incaution in policy-making. The majority, he claimed, had "almost casually"[182] proclaimed a landmark decision on a basic question of federalism.[183]

Justice Powell criticized as simplistic Justice Brennan's reliance on plain meaning and his rejection of the legislative history.[184] Quoting with irony from *Lynch v. Household Finance Corp.*,[185] he reminded the Court that the Reconstruction era civil rights statutes " 'must be given

174. 392 U.S. 309 (1968).

175. 397 U.S. 397 (1970).

176. Maine v. Thiboutot, 448 U.S. at 4, 6-7.

177. *Id.* at 7.

178. *Id.* (citing Chapman v. Houston Welfare Rights Org., 441 U.S. at 637 (Powell, J., concurring)).

179. *Id.*

180. Essentially, this is the same philosophy of statutory interpretation employed by the Court in TVA v. Hill, 437 U.S. 153 (1978), and earlier in *Ex parte* Collett, 337 U.S. 55, 61 (1949), and cases cited therein. Ironically, the majority in *TVA v. Hill* undertook a substantial analysis of the legislative history of the Act in issue, but did so, in the Court's words, "only to meet Mr. Justice Powell's suggestion that the 'absurd' result reached in this case, is not in accord with congressional intent." 437 U.S. at 184 n.29 (citation omitted). The majority in *Thiboutot*, however, was not as obliging to Justice Powell, even though in Justice Powell's dissent in *Thiboutot* he suggests that the result reached by the majority is "idiotic." 448 U.S. at 21 n.9 (Powell, J., dissenting).

181. *Thiboutot*, 448 U.S. at 11.

182. *Id.* at 11 (Powell, J., dissenting).

183. *Id.* at 12. The question of federalism in issue is the extent of liability under § 1983 of state and local officials.

184. *Id.* at 13-14.

185. 405 U.S. 538 (1972).

the meaning and sweep' dictated by 'their origins and language'—not their language alone."[186] Justice Powell's own analysis of the legislative history, as originally set out in his concurrence in *Chapman*, led him to conclude that the unmodified phrase "and laws" in section 1983 was basically an "inadvertent" error,[187] and that Congress really meant the section to be read exactly as Revised Statute section 629(16) and later 42 U.S.C. section 1343 are read—to encompass only laws providing for equal rights.[188] Only such a reading, he argued, avoids the "idiotic"[189] result that section 1983 should have a broader scope than section 1343, its jurisdictional counterpart. To buttress this interpretation, Justice Powell cited various references in the legislative history which emphasized that the revisers were not to alter the meaning of the statutes as they revised them.[190] In Justice Powell's view, the majority's interpretation of the meaning of "and laws" was a substantial departure from the provision's earlier meaning and thus was not within the intended purview of the revision.[191] Further, the majority interpretation created a wide gap between the coverage of section 1983 and section 1343(3)—sections that were intended to be coextensive.[192]

The majority's decision, Justice Powell argued, was unwise as well as erroneous. It opened up the floodgates for litigation, seeking to hold states liable for their conduct of the ever increasing number of federal-state cooperative programs.[193] Such litigation would harass state officials and overburden the courts.[194] Such a sweeping change in the federal-state relationship, Justice Powell felt, could not have passed through the Forty-third Congress without debate and therefore could not have been the intended consequence of the recodification of section 1983.[195]

186. *Thiboutot*, 448 U.S. at 14 (Powell, J., dissenting) (quoting Lynch v. Household Fin. Corp., 405 U.S. at 549).

187. *Thiboutot*, 448 U.S. at 16 (Powell, J., dissenting).

188. *Id.* at 17-19.

189. *Id.* at 21 n.9 (citing Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights are Alleged*, 2 CLEARINGHOUSE REV. 5, 25 (1969)).

190. 448 U.S. at 17-18 (Powell, J., dissenting).

191. *Id.* at 22 (Powell, J., dissenting).

192. *Id.* at 20.

193. *Id.* at 22-23.

194. *Id.* at 23.

195. *See* text accompanying notes 229-30 *infra*.

III. The *Thiboutot* Decision: A Critique

Whatever one may think of the Court's result in *Thiboutot*, it is difficult not to find, along with Justice Powell, an air of casualness in the Court's reasoning. *Thiboutot* is a landmark decision on the federal-state relation,[196] making section 1983 a linchpin in federal statutory, as well as constitutional, jurisprudence; yet the Court addresses neither the historical justification nor the policy rationale for suddenly granting such a role to this 110 year-old statute.[197] As a result, Justice Powell's shrewdly argued dissent has had a telling effect. The puzzle is why the majority left so much unsaid in defense of its own position.[198]

A. The Legislative History of § 1983 Revisited

However much Justice Powell may mock the dictates of the "meaning and sweep" and the "origins and language" of the Civil Rights Acts,[199] the fact remains that this legislation was enacted as part of a fundamental reconstruction of the federal system.[200] Changing notions of federalism after the Civil War emphasized a strong federal government. The Thirteenth, Fourteenth, and Fifteenth Amendments created rights in national citizenship, and the Civil Rights Acts asserted a strong role for the federal judiciary in protecting those rights.[201]

Section 1983 grew out of section 1 of the Civil Rights Act of 1871, which in turn was passed pursuant to the newly enacted Fourteenth Amendment.[202] While the 1871 version of the provision did not contain the words "and laws," Justice Powell's assertion that these words could only have appeared in the 1874 revision through inadvertence appears patently false. The *Slaughter-House Cases* of the year prior to

196. Justice Frankfurter, dissenting in Monroe v. Pape, 365 U.S. 167 (1961), observed that the issues raised under § 1983 concern "a basic problem of American federalism" that "has significance approximating constitutional dimension." *Id.* at 222 (Frankfurter, J., dissenting).

197. Justice Powell points out this defect. Maine v. Thiboutot, 448 U.S. at 12, 33 (Powell, J., dissenting).

198. Undoubtedly, the majority in *Thiboutot* was a fragile coalition because it included not only Justices Brennan, Marshall, Stewart, and White, all of whom had adopted a similar interpretation of § 1983 a year earlier in *Chapman*, but also Justices Stevens and Blackmun who had declined to do so. It is likely that Justice Brennan had to restrict the focus of the opinion in order to obtain the support of Justices Stevens and Blackmun.

199. *See* text accompanying note 186 *supra*. In light of the restrictive meaning Justice Powell gives to these dictates, his invocation of them can be little more than a mockery.

200. *See* text accompanying notes 113-16 *supra*.

201. The Supreme Court has recognized that a major purpose of the Civil Rights Acts was to "involve the federal judiciary" in protecting a "federal right in federal courts." District of Columbia v. Carter, 409 U.S. 418, 427-28 (1973).

202. *See* text accompanying notes 116-22 *supra*.

the recodification constituted the first judicial interpretation of the "rights, privileges and immunities" language of the Fourteenth Amendment.[203] This language had been incorporated exactly into section 1 of the 1871 Act.[204] The Court in *Slaughter-House*, a decision that seemed at the time to narrow the scope of the Fourteenth Amendment,[205] defined the source of the federal rights, privileges, and immunities that constitute national citizenship as being the Constitution, federal laws, and the structure of federal government.[206]

All of the individuals to whom Congress entrusted the revision of the statutes, including the commissioners on the two committees and the Hon. Thomas J. Durant who did the final redraft, were selected for their standing in the legal profession.[207] It is far more plausible to think that the revisers intended to incorporate the *Slaughter-House* language[208] in their definition of rights, privileges, and immunities than it is to presume that they were careless. Indeed, Thomas J. Durant himself successfully argued the *Slaughter-House Cases* on behalf of the defendants during the drafting of the revision.[209]

Justice Powell, in his analysis of the legislative history, makes a great deal of the margin note that the drafters appended to section 629(16).[210] That note itself, however, expressed the drafters' concern that restrictive judicial interpretation should not limit the authorized remedial provisions simply to constitutional rights. "Every right secured by a law authorized by the constitution" should find its remedy

203. *See* text accompanying notes 137-41 *supra*.

204. *See* note 119 *supra*.

205. *See* L. TRIBE, *supra* note 134, at 406-07; Gressman, *supra* note 2, at 1337-39.

206. *See* text accompanying note 140 *supra*.

207. This is emphasized throughout the *Congressional Record*, as the following examples illustrate. "[T]he act of Congress of June 27, 1866, authorized the appointment of three persons, learned in the law . . . . The commissioners, whose revision in two volumes is now before us, and Mr. Durant, whose work is also here . . . have all certainly displayed great learning, ability and skill in this very difficult and herculean labor assigned them." 2 CONG. REC. 825-26 (1874) (remarks of Rep. Lawrence). "[T]he Committee on Revision of the Laws employed Mr. Durant, a lawyer of eminence in this city, to go over this revision." 2 CONG. REC. 646 (1874) (remarks of Rep. Poland, chairman of the Comm. on the Revision of the Laws). "[A] commission of competent gentlemen, carefully selected for the work, have for three years been engaged in it, availing themselves of the labors of their predecessors." 2 CONG. REC. 648 (1874) (remarks of Rep. Hoar).

208. *Slaughter-House*, and its precursor, Paul v. Virginia, 75 U.S. 8 (Wall.) 168, 180 (1869), both refer to the "Constitution and laws" in defining the privileges and immunities of citizenship, language which, of course, was incorporated into the revised provisions of § 1 of the 1871 Act the following year.

209. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) at 44.

210. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. at 631-32 (Powell, J., concurring).

in the federal courts, the drafters insisted.[211]

The comment also indicates the drafters' concern with the contemporary legal context in which they operated.[212] It is inconceivable that in their continuing work of revision, they should not have considered the implications of *Slaughter-House*. Their jurisdictional grant to the Supreme Court is consonant with this hypothesis. It not only grants the Court power to review actions for violations of "any right, privilege or immunity secured by the Constitution," but also to review actions involving violations of "any right or privilege of a citizen of the United States." This is word-for-word the language of the *Slaughter-House* decision.[213]

B. The Revision of the Federal Statutes

The intended purpose and proper scope of the general statutory revision of the Reconstruction era has been a major point of controversy in the debate over the legislative history of section 1983.[214] It seems relevant to consider Congress' overall purpose in undertaking the revision. Although the stated purposes of the revision included consolidating and condensing the statutes,[215] this strengthening of federal laws must be seen as merely one aspect of the strengthening of the central governmental authority that attended the union victory. The 1866 Act authorizing the revision thus instructed the revision commission to "revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature" and mandated that the commissioners "mak[e] such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the im-

211. 1 HOUSE COMM. ON REVISION OF THE LAWS, 42D CONG., REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE 362 (Comm. Print 1872).

212. The Supreme Court has recently held that the contemporary legal context should be taken into account when interpreting legislation. "In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." Cannon v. University of Chicago, 441 U.S. 677, 699 (1979). It is reasonable to assume that this logic would apply with even greater force to the legal scholars involved in revising the statutes.

213. Justice Powell states that this provision "is not easily read to encompass rights secured by any federal law," Maine v. Thiboutot, 448 U.S. at 16 n.2 (Powell, J., dissenting), but he provides no support for this assertion.

214. *See, e.g.*, the majority opinion in *Thiboutot* which states in reference to this issue that "Justice Powell's argument proceeds on the basis of the flawed premise that Congress did not intend to change the meaning of existing laws when it revised the statutes." 448 U.S. at 8 n.5. Powell counters with the statement that "it is the Court's premise that is flawed." *Id.* at 17 (Powell, J., dissenting).

215. *See* 2 CONG. REC. 825-26 (1874) (remarks of Rep. Lawrence).

perfections of the original text."[216] Congress understood this to mean that "[t]hey were authorized to report amendments where there were doubtful provisions, or where the law could be made better by something which should not in their judgment substantially change it, or where through inadvertence the intent of the law had not perhaps been carried out in its enactment."[217]

The commissioners worked prodigiously beginning in 1866, and the statute authorizing their work was renewed upon expiration in 1870.[218] The final draft contained the many changes that they were authorized to make.[219] As the revision was nearing completion in 1873, however, the revisers and members of the congressional committees involved naturally started to focus on the political problems of securing its passage through Congress. Some statements before the House by Representative Poland, chairman of the House Committee on Revision of the Laws, are quite revealing:

> I take it for granted, Mr. Speaker, that every gentleman here feels the same anxiety that is felt by members of the committee, that after so much time and labor have been spent upon this work, it should be brought to a successful termination . . . . [T]he Committee on Revision of Laws at the last Congress came to the conclusion that within the limited time that could be allowed for the work in this House, it would be utterly impossible to carry the measure through, if it was understood that it contained new legislation. . . . [T]herefore we expect, if this work shall be adopted by Congress at all, it will be mainly upon their faith in the commissioners and in the committee which has it in charge.[220]

It is not surprising that it was the members of the committee who assured, as Justice Powell persuasively quotes, that the work "embodies the law as it is."[221] Nevertheless, the fact remains that an enormous number of changes were made, notwithstanding the "customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance."[222]

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216. Act of June 27, 1866, ch. 140, §§ 1-2, 14 Stat. 74.

217. 2 CONG. REC. 648 (1874) (remarks of Rep. Hoar, member of the House Comm. on the Revision of the Laws). *See also id.* at 646 (remarks of Rep. Poland) ("By the original law of 1866, under which the commissioners were appointed, they were authorized to make changes to some extent, of which liberty they availed themselves.").

218. Act of May 4, 1870, ch. 73, 16 Stat. 96.

219. *See* text accompanying notes 216-17 *supra*.

220. 2 CONG. REC. 646 (1874).

221. *See* Maine v. Thiboutot, 448 U.S. at 17 (Powell, J., dissenting); Chapman v. Houston Welfare Rights Org., 441 U.S. at 623-30 (Powell, J., concurring).

222. United States v. Price, 383 U.S. 787, 803 (1966) (holding that the revisions significantly broadened the forerunner of 18 U.S.C. § 242).

The procedure for having the House consider the revision was subject to considerable debate.[223] The members of the House who were primarily concerned about the revision were attorneys, and a sufficient number of these members were needed to reach a quorum.[224] As a result, special evening sessions were held during which the revision received careful attention by an audience composed largely of attorneys. Occasionally, a member with specific interest or expertise in an area of the law would lead the discussion, often quite sophisticated, of the relevant revised statutes. It was in this context that Representative Lawrence, in a remark that consumed four pages of the *Congressional Record*, introduced and evaluated the revised Civil Rights Acts.[225]

Representative Lawrence discussed the three primary Civil Rights Acts of 1866, 1870, and 1871,[226] and the revised statutory provisions implementing them. He quoted both the old and the new provisions and discussed variations between the two. He noted that "the manner in which the purposes of the several civil-rights statutes have been translated into the words of the compiler . . . possibly may show verbal modifications bordering on legislation."[227] Concluding his analysis, Representative Lawrence stated, "It requires great care to compare and examine the effect of all this, and it is possible that the new consolidated section may operate differently from the three original sections in a very few cases. But the change, if any, cannot be objectionable, but is valuable as securing uniformity."[228]

In light of this attention to detail, Congress was either fully aware of the ramifications of changes in the language or willing to accept the ambiguities implied. Given the historical context, it is hardly implausible that the Forty-third Congress should have meant what it said when it created expansive federal liability for violation, under color of state law, of federal statutes.[229] Justice Powell's complaint that congressional debate should have been more thorough seems more an exercise in formalistic judicial fastidiousness than statutory interpretation.[230]

223. *See generally* 2 CONG. REC. 646-50, 824 (1874).

224. 2 CONG. REC. 825 (1874) (remarks of Rep. Eldredge). Representative Eldredge and other members of the House were adamant that the revision only be considered if a quorum of the House were present. *Id.*

225. 2 CONG. REC. 825-28 (1874).

226. *See* note 114 *supra*.

227. 2 CONG. REC. 827 (1874).

228. *Id.* at 829.

229. The following year, this same Congress enacted the general federal question jurisdictional statute. *See generally* HART & WECHSLER, *supra* note 129, at 953-62.

230. *See* Justice Powell's remarks in Chapman v. Houston Welfare Rights Org., 441 U.S. at 638-39 (Powell, J., concurring).

C. The Anomaly of Incongruence Between Sections 1983 and 1343

In *Chapman*, six justices of the Supreme Court held that section 1343(3) was, as its plain language indicates, restricted to cases "providing for the protection of civil rights." One year later, in a mirror image of *Chapman*, six justices in *Thiboutot* held that section 1983, as its plain language indicates, extended to cases involving the deprivation of "the Constitution and laws." The anomaly of this development was lamented by Justice Powell.[231] Both sections derive from section 1 of the 1871 Act. As one section, they were necessarily coextensive. Nevertheless, different wording in the three jurisdictional and one remedial provisions emerged. There are two plausible explanations for these differences.

The first, suggested by Justice Powell, is mere inadvertence.[232] If there was error in the revision, however, the evidence suggests that it was of a quite different sort than that suggested by Justice Powell. In light of the text of the various provisions, the revisers' marginal references and explanatory notes, the purposes of the revision, and the general and specific historical context, it is the phrasing of section 629(16) that appears to be the oversight.[233] The marginal notations for both section 563(12) and section 629(16) are identical and state, "[s]uits to redress deprivation of rights secured by the Constitution *and laws* to persons within its jurisdiction."[234] It is only the phrasing in section 629(16) that refers more restrictively to laws providing for equal rights; the broader phrasing of section 563(12) is perfectly consistent with the marginal note, the explanatory note, and section 1983. The phrasing of section 629(16) is inconsistent with all of these, as well as with the Civil Rights Act from which it is supposedly derived.[235]

The second explanation assumes that the revisers knew what they were doing in employing the variations in phrasing. It was a central aim of the revisers of the statutes to reorganize the statutes into "the more systematic plan of a more minute topical arrangement."[236] The revisers thus intentionally created different jurisdictional grants for

231. Maine v. Thiboutot, 448 U.S. at 18 (Powell, J., dissenting).

232. The words of Justice Frankfurter support this possibility. "Strong post-war feelings caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues." United States v. Williams, 341 U.S. 70, 74 (1951).

233. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. at 664-65 (White, J., concurring).

234. Rev. Stat. 111 (1874) (emphasis added).

235. This was pointed out by Justice White in his concurrence in Chapman v. Houston Welfare Rights Org., 441 U.S. at 665-69.

236. 2 CONG. REC. 827 (1874) (remarks of Rep. Lawrence).

each level of the federal court system and specifically tailored those grants to the functions served by the respective courts.

The district courts were given the broadest grant. They have always been the mainstay of the federal court system—the court of first instance, the trial court. The Supreme Court, on the other hand, is the court of last review—the ultimate interpreter and guarantor of national citizenship. The jurisdictional grant to the Supreme Court reflected this role.

The circuit courts were the weakest link in the structure that the 1789 Judiciary Act had created.[237] By the time of the Civil Rights Acts, the circuit courts seemed to many to be a "more and more frequently futile" element in the federal judicial system.[238] They were greatly circumscribed in 1891,[239] and were finally abolished outright in 1911.[240] It makes perfect sense that legal scholars of the revisers' sophistication would have given the circuit courts the most restrictive jurisdiction.[241]

Whether or not either of these two explanations for the differences in phrasing between Revised Statute section 1979 and the jurisdictional sections are adopted, the real mistake occurred in 1911 when a more conservative Congress adopted the restrictive circuit court provision for section 1343(3),[242] eliminated a coextensive jurisdictional counterpart for section 1983, and created the "inherent illogic"[243] of incongruence between section 1983 and section 1343(3).

D. Section 1983 and Federalism

At the time of its passage, section 1983 represented a radical strengthening of the federal government in relation to the states. The Court's recognition in *Thiboutot* of the section's intended scope does not, however, in the 1980's, represent the "major new intrusion into state sovereignty under the federal system" that Justice Powell sug-

237. While both the circuit courts and the district courts were given original jurisdiction under the 1789 Act, the jurisdiction of the circuit courts was more restricted. HART & WECHSLER, *supra* note 129, at 33-34. Moreover, although the circuit courts also had some appellate jurisdiction, this was undermined by "the long-standing scandal of district judges sitting in review of their own judgments." *Id.* at 40.

238. *Id.* at 37.

239. The Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826.

240. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087.

241. It also makes sense that the revisers would not state this as a purpose behind their revisions.

242. *See* note 134 *supra*.

243. This is the phrase used by the majority in Maine v. Thiboutot, 448 U.S. at 8 n.6, and by Justice Powell, *id.* at 20 (Powell, J., dissenting).

gests.[244] It merely offers a limited and conceptually sound basis for a power of review that the Court has already exercised to a significant degree.[245]

Justice Powell's warning that state and local officials will be paralyzed by fear of liability and harassed by litigation[246] seems disingenuous.[247] The Court has developed numerous limitations on section 1983. First, individual officials are protected from liability by a good faith immunity.[248] Second, although municipalities liable for violations of rights protected by section 1983[249] can no longer avail themselves of a good faith immunity,[250] *City of Newport v. Fact Concerts Inc.*,[251] decided after *Thiboutot*, insured that they do not risk punitive damages awards. As one commentator has suggested, the result is more likely to be thoughtful concern on the part of local officials than paralysis.[252]

Justice Powell's assertion that the courts' dockets will be overwhelmed is similarly hyperbolic. Suits of the sort endorsed by *Thiboutot* have been the routine business of the federal courts for years.[253] The issue in *Thiboutot* was not whether or not to protect the courts from new litigation but whether or not the federal courts would close their doors to cases that are currently heard.[254] Furthermore, the recent case of *Parratt v. Taylor*[255] insures that section 1983 review will be available only for deprivations occurring as a result of "some established state procedure."[256]

Although the *Thiboutot* opinion will not create a revolution in federal-state relations, it does fly in the face of the Court's recent decisions on the role of the private litigant in statutory enforcement.[257] The majority declined to discuss the historical, structural, or policy factors that

244. *Id.* at 33 (Powell, J., dissenting).
245. *See* note 109 *supra*.
246. 448 U.S. at 22-25 (Powell, J., dissenting).
247. *See generally* Jennings, *supra* note 4, at 560-64.
248. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 556-57 (1967).
249. Monell v. Department of Social Servs., 436 U.S. 658 (1978).
250. Owen v. City of Independence, 445 U.S. 622 (1980).
251. 453 U.S. 247 (1981).
252. *See* Jennings, *supra* note 4, at 560-62.
253. *See* note 110 and accompanying text *supra*; Maine v. Thiboutot, 448 U.S. at 5-6.
254. *See* text accompanying note 110 *supra*.
255. 451 U.S. 527 (1981).
256. *Id.* at 537. The ramifications of this holding are profound but regrettably are beyond the scope of this article. *See* Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545 (1982).
257. *See* text accompanying notes 69-112 *supra*. *See generally* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Businesss of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977).

distinguish the section 1983 cause of action from the implied right of action;[258] it did not analyze the nature of the obligations a state undertakes when it participates in a federally funded program[259] or when it administers economic regulations in response to a federal mandate, nor did it distinguish such obligations from those imposed on a private party by federal regulation. In short, *Thiboutot* was a decision that left its own justification to the future. In doing so, it left determination of its impact to the unguided discretion of a future Court majority.

IV. *Pennhurst* and *Sea Clammers*: Limitations on the Section 1983 Statutory Cause of Action

A. *Pennhurst*

In *Pennhurst State School & Hospital v. Halderman*,[260] the Court did not reach the section 1983 issue, although it did, in its remand, direct the lower court to determine whether or not there was a section 1983 cause of action.[261] The way it avoided the issue and the terms of the remand gave a shape to the section 1983 statutory cause of action that *Thiboutot* had failed to supply.

The plaintiff, Terri Lee Halderman, a mentally retarded minor, filed suit on behalf of herself and other residents of Pennhurst school and hospital,[262] a facility for the developmentally disabled that was owned and operated by the State of Pennsylvania. She alleged that Pennhurst was a dangerous, unsanitary, and inhumane warehouse for the developmentally disabled.[263] Its residents were physically abused, unnecessarily drugged, and inadequately treated by the staff. The institution had no rehabilitation plan for its retarded patients, and residents of Pennhurst suffered physical, intellectual, and emotional deterioration.[264] These facts were undisputed by the state

258. *See* notes 301-19 and accompanying text *infra*.

259. "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states . . . ." Rosado v. Wyman, 397 U.S. 397, 423 (1969) (quoting Helvering v. Davis, 301 U.S. 619, 645 (1937)).

260. 451 U.S. 1 (1981).

261. The Court discussed the § 1983 issue in Part IV of its opinion. 451 U.S. at 27. As Justice Blackmun pointed out in his dissent, however, the § 1983 issue was not technically before the Court, and thus any discussion of it amounted to an advisory opinion. *Id.* at 32 (Blackmun, J., concurring in part and concurring in the judgment). For the decision on remand, see Garrity v. Gallen, 522 F. Supp. 171 (D.N.H. 1981).

262. Additional organizations intervened as plaintiffs after Halderman filed suit, notably the United States and the Pennsylvania Association for Retarded Citizens.

263. These facts are discussed in detail in the district court opinion. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977).

264. *Id.* at 1302-11.

defendants.[265]

The district court held that the plaintiffs' rights under the Eighth Amendment and the equal protection clause had been violated by the conditions at Pennhurst.[266] It ordered that a plan for the closing of Pennhurst and for the placement of patients in adequate community living arrangements be submitted to the court.[267] The Court of Appeals for the Third Circuit upheld the district court's order.[268] It based its decision, however, on the Developmentally Disabled Assistance and Bill of Rights Act[269] rather than on constitutional grounds.[270] The court held that the plaintiffs had an implied right of action under that Act.

The Supreme Court reversed. Justice Rehnquist, commanding a majority of the Court, began his analysis by making "a brief review of the general structure of the Act."[271] Section 6000(b)(1) of the Developmentally Disabled Act describes the "overall purpose" of the Act as assisting "the states to ensure that persons with developmental disabilities receive the care, treatment and other services necessary to enable them to achieve their maximum potential through a system which . . . *ensures the protection of the legal and human rights of persons with developmental disabilities*."[272] Section 6000(b)(2) lists the "specific purposes" of the Act. One of these specific purposes is: "to make grants to support a system in each State to protect the legal and human rights of all persons with developmental disabilities."[273] Section 6010 contains a number of "findings respecting the rights" of the developmentally dis-

265. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 7.

266. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1320-22 (E.D. Pa. 1977).

267. *Id.* at 1326-29.

268. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979).

269. 42 U.S.C. § 6000 (Supp. III 1979).

270. 612 F.2d at 97.

271. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 11.

272. 42 U.S.C. § 6000(b)(1) (Supp. III 1979) (emphasis added).

273. *Id.* § 6000(b)(2)(E). Justice Rehnquist describes this section as merely one of "various activities necessary to the provision of comprehensive services to the developmentally disabled." Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 12. Such a characterization of the section does not do it justice. It is difficult to see how a system designed to protect the legal and human rights of the developmentally disabled is *necessary* in order to provide them comprehensive services. To the contrary, the purpose set out as a specific goal in subsection (E) goes well beyond what is necessary merely to provide services.

abled.[274] Among these was a right to "appropriate treatment, services, and habilitation for such disabilities." Section 6063 conditions the approval of funds under the Act on the approval by the Secretary of Health and Human Services of a state plan that must, *inter alia*, contain assurances that any program receiving assistance is protecting the human rights of the disabled consistent with section 6010.[275]

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274. Section 6010 states the following, in pertinent part: "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 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 liberty.

"(3) The Federal Government and the States both have 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 persons; or (B) does not meet the following minimum standards [pertaining to diet, medical and dental services, physical or chemical restraints, relative's visiting rights, fire and safety precautions].

"(4) All programs . . . should meet standards which are designed to assure the most favorable possible outcome for those served, and . . . assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights. . . .

"The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." 42 U.S.C. § 6010 (1976 & Supp. III 1979).

Justice Rehnquist's presentation of § 6010 omits several important provisions of the section. He neither quotes nor mentions subsection (4) *supra*. Most importantly, he initially omits the concluding sentence, *supra*, which was expressly added by a Conference Committee as part of the 1978 amendments to the Act. These omissions are curious in light of the fact that Justice Rehnquist makes § 6010 the central focus of his consideration of the statute. After concluding his analysis of the Act, Justice Rehnquist does mention the final sentence of § 6010 in a footnote. He dismisses it as recognizing "that Congress only 'described' rights, not created them." Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 22 n.16.

275. 42 U.S.C. § 6063 (1976 & Supp. III 1979). Section 6063 is too lengthy to quote in full here. Section 6063(a) requires that "any State desiring to take advantage of [the Act]" must have a state plan submitted to and approved by the secretary of Health and Human Services. Section 6063(b) sets out conditions for approval of the state plan that occupy four pages of the United States Code. The state plan must provide for the establishment of a detailed state hierarchy to administer and evaluate the programs, § 6063(b)(1), and set out specific objectives to be achieved under the plan, § 6063(b)(2). Section 6063(b)(3) requires that federal funds provided under the plan supplement and not supplant any state or other federal funds otherwise available. The plan must prioritize funding, § 6063(b)(4), to make sure that a certain percentage of funds is allocated to particular services. Section 6063(b)(5) requires that the plan meet specific regulations and standards, including many of those set out in preceding sections of the Act. For example, § 6063(b)(5)(C) states, "The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected *consistent with section 6010 of this title (relating to rights of the*

Reviewing this statutory framework, Justice Rehnquist found that section 6010, the Bill of Rights portion of the Act, created no enforceable rights on behalf of the developmentally disabled.[276] Since no rights existed, neither an implied right of action nor a section 1983 action to enforce section 6010 could lie.[277]

Justice Rehnquist based his determination that the Developmentally Disabled Bill of Rights created no rights on the nature of the federal-state relationship created by the Act. Congress could have placed absolute requirements on the states, he conceded, had it legislated pursuant to section five of the Fourteenth Amendment,[278] but Congress rarely legislates pursuant to that power, he asserted, without explicitly saying it is doing so.[279] Inference of a section five action, according to

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developmentally disabled)" 42 U.S.C. § 6063(b)(5)(C) (1976 & Supp. III 1979) (emphasis added).

Section 6063(b)(5)(C) is particularly noteworthy because it contains the specific reference to § 6010 (see emphasis above) that was not in the original wording of its predecessor, § 6063(b)(24) of the 1975 Act. This reference to § 6010 was added during the 1978 amendments to the Act. The remaining two subsections of § 6063 govern the procedures the Secretary must follow in approving state plans, § 6063(c), and the disbursement of federal funds under the plan, § 6063(d).

276. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 11.

277. While allegedly holding these issues open, Justice Rehnquist suggests these conclusions. *Id.* at 11, 28 n.21.

278. Justice Rehnquist does suggest that the rights allegedly created by § 6010, namely, a right to treatment in the least restrictive setting, go beyond what would be allowable as "appropriate" legislation within the meaning of § 5 of the Fourteenth Amendment. *Id.* at 16 n.12. The Third Circuit had found that § 6010 was within the "judicially declared . . . limits of the fourteenth amendment." Halderman v. Pennhurst State School & Hosp., 612 F.2d at 98. This issue is interesting because the Court determines the level of review in examining legislation according to the nature of the constitutional power that authorizes congressional legislation. Thus, enactments pursuant to § 5 may invoke closer scrutiny by the Court compared with exercises of other powers. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976). *See generally* Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265, 1265-67 (1980). Of course, under the seminal case of Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court did hold that Congress, when exercising its § 5 power, can prohibit practices that the Court itself might uphold under the Constitution. Nevertheless, these issues are not explored because the dissenting opinion in *Pennhurst* agrees that § 6010 was not enacted pursuant to § 5. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 35 (White, J., dissenting).

279. 451 U.S. at 16-17. Justice Rehnquist cites no authority for this assertion, but merely cites some examples of legislation that has expressly stated it was enacted pursuant to § 5. Justice Rehnquist further distinguishes between legislation that prohibits certain kinds of state conduct and legislation that imposes affirmative obligations on the states. *Id.* The distinction Justice Rehnquist attempts to make, however, is by no means clear. He cites the Voting Rights Act Amendments of 1970 as an example of a statute "which simply prohibited certain kinds of state conduct," *id.* at 16, yet Title II of those amendments established uniform national rules for absentee voting in presidential and vice-presidential elections. These rules directly imposed affirmative obligations on the states and, concomitantly, substantial financial burdens as well. Although Justice Rehnquist does little to develop this distinction,

Justice Rehnquist, is most unlikely when meeting the congressional standard would require massive expenditure of state funds.[280] Instead, he held, Congress passed the Developmentally Disabled Act pursuant to the spending power.[281] Legislation pursuant to the spending power imposes only contract-like obligations upon the state. The state must knowingly and voluntarily undertake the obligations as conditions on the receipt of the federal funds, and consequently, the obligations must be unambiguously stated.[282] Section 6010 did not appear to Justice

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he goes on to argue, "The case for inferring intent [to legislate pursuant to § 5] is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17 (emphasis in original). Not only is the meaning of this statement unclear (in such a situation it is the source of the power that would be implicit, not the obligations imposed on the states), it appears to have little basis. Indeed, Justice Rehnquist cites absolutely no authority for this assertion and is evidently attempting to create new law. Although it is difficult to criticize the logical basis for this position, since Justice Rehnquist does not provide one, the factual basis, *see* note 280 *infra*, is far from definite and probably nonexistent.

280. 451 U.S. at 16-17. Justice Rehnquist claims repeatedly that § 6010 would "impose massive financial obligations on the States." Justice White, however, states in dissent that "there is no indication in the record before us that the cost of compliance with § 6010 would be 'massive' . . . . At best, the cost of compliance with § 6010 is indeterminate." *Id.* at 49 (White, J., dissenting). Indeed, the district court found that operation of a program that did satisfy the § 6010 requirements would be significantly less expensive than the cost of facilities like Pennhurst. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1312. Justice Rehnquist never refers to this factual finding of the court below, let alone claim it is wrong under a clearly erroneous standard of review.

That Justice Rehnquist is willing to make such a claim and overrule a lower court solely on the basis of conjecture illustrates the fundamental problems inherent in his approach to statutory rights in *Pennhurst*. *See* notes 335-37 and accompanying text *infra*. By treating the question of whether or not the statute created the rights claimed by the plaintiff as a threshold issue, Justice Rehnquist analyzes the question devoid of a factual context. His analysis is then at a loss when he needs factual support.

281. *Pennhurst*, 451 U.S. at 18.

282. *Id.* at 17. As support for this proposition, Justice Rehnquist cites several cases that in some respects discuss limits on the power of Congress to impose conditions on the states pursuant to the spending power, *e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976); Steward Machine Co. v. Davis, 301 U.S. 548 (1937). The seminal case, *Davis*, however, provides no support for his proposition that conditions in a statute must meet a high standard of clarity and knowing acceptance. Rather, *Davis* merely says that states may not be coerced into accepting the conditions of a statute in violation of the 10th Amendment. *Id.* at 585. This issue, central to the Court's decision holding the mandatory taxation of the Social Security Act's unemployment compensation provision constitutional in *Davis*, has little, if anything, to do with the nature of the conditions of § 6010, since it is the meaning and not the constitutionality of the latter provision that is in issue. Moreover, Justice Rehnquist's reliance on *Davis* for the proposition that the "legitimacy of Congress' power to legislate under the Spending Power . . . rests on whether the State voluntarily and knowingly accepts the terms of the '*contract*,' " Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 17 (emphasis added), is entirely inappropriate on another count. Justice Cardozo in *Davis* rested his decision in part on a careful distinction between statutes and contracts. Statutes

Rehnquist to meet these standards.[283] He admonished his colleagues not to be deceived by the description of section 6010's standards as "rights." They are merely state findings, he declared. These congressional preferences,[284] although useful to guide the Secretary in his review of applications, are "too thin a reed" to support the rights and obligations read into them by the court below.[285]

Despite the short shrift he gave to plaintiffs' rights under section 6010, Justice Rehnquist remanded the case to the court of appeals for determination of whether or not an action would lie under section 1983.[286] He recognized that the conditional section of the Act, section 6063(b)(5), placed some obligation on the state recipient.[287] He instructed the lower court to consider on remand,[288] however, exactly

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are substantially different from contracts, held Justice Cardozo, because the conditions that statutes impose may be readily altered. Moreover, joint federal-state programs are voluntarily entered into by the states. "We are to keep in mind steadily that the conditions [of the Act] are not provisions of a contract, but terms of a statute, which may be altered or repealed . . . . There is only a condition which the state is free at pleasure to disregard or to fulfill." Steward Machine Co. v. Davis, 301 U.S. at 594-95.

283. Justice Rehnquist's mode of analysis in making this determination is noteworthy. In assessing whether or not a statute may be construed to create rights, he first considers the source of power pursuant to which the statute was enacted. *See* notes 278-81 *supra*. Justice Rehnquist next establishes the standard of clarity which he thinks legislation enacted pursuant to that source of power should meet. If he feels Congress has failed to meet this standard of draftsmanship, then no rights are created. This is the analysis with which he disposed of § 6010.

284. One of the most obvious problems with Justice Rehnquist's mode of analysis is the fact that it renders much legislation useless. Justice Rehnquist maintains, however, that much legislation *is* merely "precatory," expressing innuendo and congressional preference "though falling short of legislating its goals." Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 19. *See* text accompanying notes 335-37 *infra*.

285. 451 U.S. at 19.

286. The issue was not before the Court, but Justice Rehnquist discussed it anyway. *Id.* at 28 n.21. On remand, the District Court for New Hampshire held that a § 1983 remedy was not available under the Developmentally Disabled Act, stating that the Act provided an exclusive remedy. The court did not find a private cause of action under § 504 of the 1973 Rehabilitation Act. *See* Garrity v. Gallen, 522 F. Supp. 171 (D.N.H. 1981).

287. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 29-30. For a discussion of § 6063, see note 275 *supra*.

288. Justice Rehnquist raised two additional questions to be considered on remand. First, what form of relief would be proper to remedy the problem. Justice Rehnquist suggested a termination of funds to the state, certainly a harsh remedy from the perspective of the intended beneficiaries, *i.e.*, the disabled citizens of Pennsylvania. Second, whether or not *Pennhurst* involved a "program assisted" under the Act, since the institution received no funds directly under the Act. 451 U.S. at 27-28. Justice Blackmun pointed out in his concurrence that this latter suggestion would undermine the entire Act by allowing states to insulate substandard institutions and still indirectly receive funds. *Id.* at 33 (Blackmun, J., concurring).

what rights were produced by statutorily required assurances.[289] Noting that Justice Powell, in his dissent in *Thiboutot*, had suggested that a section 1983 remedy would be foreclosed when the governing statute contained an exclusive remedy,[290] he suggested that the Secretary's option to terminate funding[291] might be an exclusive remedy.[292]

Both Justice Blackmun, in concurrence, and Justice White, in dissent, took exception to the views of Justice Rehnquist on the remanded issues. Justice Blackmun, although he condemned the Developmentally Disabled Act as "confused and confusing" legislation, expressed concern that the Court "avoid the odd and perhaps dangerous precedent of ascribing no meaning to a congressional enactment."[293] In his opinion, review of Pennhurst's conduct under the conditional funding section, section 6063, but with reference to section 6010, was mandated under the Act.[294] "That private parties, the intended beneficiaries of

289. *Id.* at 27-30. Similar assurances in other legislation have provided the basis for private rights of action in previous cases. *E.g.*, Lowell v. Secretary of Dep't of Hous. & Urban Dev., 446 F. Supp. 859 (N.D. Cal. 1977) (action based on assurances required under the Relocation Assistance Act, 42 U.S.C. §§ 4601-4655 (1976)); Lake Park Home Owners Ass'n v. Department of Hous. & Urban Dev., 443 F. Supp. 6 (S.D. Ohio 1976) (also based on the Relocation Assistance Act); Tenants & Owners in Opposition to Redevelopment v. Department of Hous. & Urban Dev., 406 F. Supp. 1024 (N.D. Cal. 1973) (action based on "satisfactory assurance" requirement in the Federal Housing Act, 42 U.S.C. § 1445(c) (1976)); Western Addition Community Org. v. Romney, 320 F. Supp. 308 (N.D. Cal. 1969) (also based on 42 U.S.C. § 1455(c) (1976)).

290. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 28. This suggestion by Justices Rehnquist and Powell constitutes a fundamental limitation on the availability of the § 1983 remedy. This limitation, suggested here in *Pennhurst*, became the basis of the Court's subsequent holding in *Sea Clammers*. *See* notes 310-12 *infra*. The merits of this limitation are discussed in text accompanying notes 338-41 *infra*.

291. Section 6065 of the Act specifically directs the Secretary to withhold funds from states that fail to comply with the provisions of § 6063, one of which requires that the state plan satisfy § 6010. *See* note 275 *supra*.

292. Justice Rehnquist's suggestion that a § 6065 funding termination be an exclusive remedy under this Act has much harsher implications than the subsequent application of the exclusive remedy rationale in *Sea Clammers*. *See* notes 305-14 *infra*. In *Sea Clammers*, plaintiffs failed to avail themselves of an easily accessible remedy permitting private enforcement actions. Under the Developmentally Disabled Assistance Act, however, no such private remedy is available. As Justice White pointed out in dissent in *Pennhurst*, "[A] funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act." Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 52 (White, J., dissenting) (citing Cannon v. University of Chicago, 441 U.S. 677, 708 n.42 (1979)). Thus, the remedy that Justice Rehnquist suggests not only injures the intended beneficiaries, thereby defeating the purpose of the Act, but also is not a remedy accessible to the intended beneficiaries.

293. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 32 (Blackmun, J., concurring). *See also* note 284 *supra*; text accompanying notes 335-36 *infra*.

294. 451 U.S. at 32-33 (Blackmun, J., concurring). Presumably, judicial review would evaluate the adequacy of the assurances required under § 6063. This has been the practice in previous similar litigation. *See* note 289 *supra*.

the Act, should have the power to enforce the modest legal content of § 6063," he noted, "would not be an unusual application of our precedents, even for a legislative scheme that involves federal regulatory supervision of state operations."[295]

In his dissent, Justice White dismissed Justice Rehnquist's entire analysis of section 6010. "As clearly as words can, § 6010(1) declares that the developmentally disabled have the right to appropriate treatment, services and habilitation."[296] Since, in his analysis, section 6010 creates rights, Justice White proceeded to the section 1983 issue. He viewed *Thiboutot* as creating "a presumption that a federal statute creating federal rights may be enforced in a § 1983 action."[297] He accepted the concept of an exclusive remedy but insisted that section 1983's protections apply " 'unless there is a clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention.' "[298] Justice White rejected the idea that the statutory scheme of the Developmentally Disabled Act set up an exclusive remedy. The Court, he argued, should not foreclose a remedy for those most affected by the program, no matter what remedies the administrative agency might theoretically have.[299] Those beneficiaries, after all, would surely not be benefited by the termination of funds[300] and can only protect their interest through judicial action.

B. *Sea Clammers*

Middlesex County Sewerage Authority v. National Sea Clammers Association[301] was announced later in the same term as *Pennhurst*. It confirmed the suggestion in *Pennhurst* that a section 1983 statutory cause of action will not lie when the governing statute provides its own exclusive remedy. Like the *Pennhurst* decision, however, the *Sea Clam-*

295. 451 U.S. at 33 (Blackmun, J., concurring) (citing Cannon v. University of Chicago, 441 U.S. 677 (1979); Rosado v. Wyman, 397 U.S. 397 (1969)).

296. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 39 (White, J., dissenting).

297. *Id.* at 51.

298. *Id.* (White, J., dissenting) (citing his own concurrence in Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 672 (1979)).

299. 451 U.S. at 52 (White, J., dissenting). Justice White stated, "As a general matter, it is clear that the fact that a federal administrative agency has the power to oversee a cooperative state-federal venture does not mean that Congress intended such oversight to be the exclusive remedy for enforcing statutory rights. *Id.* (White, J., dissenting).

300. *Id. See* note 292 *supra*.

301. 453 U.S. 1 (1981).

mers decision left open the question of how the courts are to determine whether or not a particular statutory remedy is exclusive.

The *Sea Clammers* case was brought by associations of fishermen and shellfish harvesters who claimed that their livelihood was being destroyed by the discharge of sewage and sludge from communities in the New York metropolitan area.[302] The associations alleged that the Federal Environmental Protection Agency, the state environmental agencies of New York and New Jersey, and the polluting counties, municipalities, and sewer districts had all violated the Federal Water Pollution Control Act (FWPCA)[303] and the Marine Protection, Research, and Sanctuaries Act (MPRSA)[304] by permitting the discharge.

Both the FWPCA[305] and the MPRSA[306] permit private enforcement actions. The citizen suit provisions of each, however, require that notice be given to the EPA and the alleged violators prior to filing and also provide for only prospective relief. The plaintiffs chose not to follow the statutory procedures of the FWPCA and MPRSA. Instead, they proceeded under a common law theory of nuisance and an implied right of action theory, seeking $500 million in compensatory and punitive damages. The district court granted dismissal of the action on the basis of the plaintiffs' failure to comply with the procedural prerequisites of the statutory citizen suit provisions. The Third Circuit reversed.[307]

Pointing out that both statutes contained "savings clauses" that preserved "any right which any person (or class of persons) may have

302. The plaintiffs alleged that the illegal discharge created a massive algae growth in the Atlantic off the coasts of New York and New Jersey. When the algae blooms died, they settled to the ocean floor, suffocating enormous amounts of marine life, including shellfish and other ocean bottom dwellers.

303. 33 U.S.C. §§ 1251-1376 (1976).

304. 33 U.S.C. §§ 1401-1444 (1976).

305. The citizen suit provisions of the FWPCA permit suits under the Act by any private citizen. 33 U.S.C. § 1365 (1976). The provisions authorize only prospective relief, however, and the citizen plaintiff first must give notice to the EPA, to the state, and to any alleged violator. Section 1365(e) of the Act, the "savings clause," indicates that other remedies besides the citizen suit provision are available. "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U.S.C. § 1365(e) (1976).

306. The MPRSA contains citizen suit provisions, 33 U.S.C. § 1415(g) (1976), with limitations similar to those under the FWPCA. Like the FWPCA, the MPRSA also contains a "savings clause." "The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency)." *Id.* § 1415(g)(5).

307. National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980).

under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief,"[308] the Third Circuit found that Congress had thereby expressed its intent to permit private suits for the enforcement of the statutes.[309] On this basis, the Court held that an implied right of action was available.

Justice Powell, writing for the majority, reversed the Third Circuit. The extensive remedial provisions of the FWPCA and the MPRSA, he said, precluded implication of private rights of action.[310] Savings clauses, he argued, that were designed to preserve remedies available under other laws, do not give the Court license to fashion additional remedies under the statute itself. He also dismissed the common law claim, citing the Court's ruling in *City of Milwaukee v. Illinois*[311] that the FWPCA and MPRSA preempted common law remedies.[312]

Although the argument had not been advanced below, the Court also considered *sua sponte* whether or not violation of the Acts by governmental bodies would be actionable under section 1983. Justice Powell's answer was that no action would lie under section 1983. His logic was precisely that which he used in finding no implied right of action. The comprehensive judicial remedies under the FWPCA and

308. *Id.* at 1227 & n.10.

309. *Id.* at 1227. The court of appeals distinguished between the injunctive relief provisions of the citizen suit sections of the acts, which it said were available to noninjured persons acting as private attorneys general, and the damage relief sought by the plaintiffs based on their actual injury. The latter, the court explained, would be available because of the savings clause and the general federal question jurisdiction of the Judicial Code, 28 U.S.C. § 1331 (1976). This remedy would not be restricted by the notice requirements of the citizen suit provisions.

310. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 13-15. Citing Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), and Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), the Court invoked the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 453 U.S. at 14-15. On this basis, Justice Powell rejected the court of appeals' distinction between injured and noninjured plaintiffs. The FWPCA, he pointed out, did in fact limit its citizen suit provisions to those "adversely affected" by the violation of the Act. *Id.* at 16. Although the MPRSA did not contain similar limitations, the Court said, "we are not persuaded by this fact alone that Congress affirmatively intended to imply the existence of a parallel private remedy, after setting out expressly the manner in which private citizens can seek to enjoin violations." *Id.* at 17.

311. 451 U.S. 304 (1981).

312. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 21-22. In City of Milwaukee v. Illinois, 451 U.S. at 328, the Court had indicated that the savings clause of the FWPCA applied only to the citizen suit provisions of the Act. The clause, the Court said, "means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common law action but only that the particular section authorizing citizen suits does not do so." *Id.* at 329.

MPRSA precluded resort to an alternative remedy.[313] The existence of these remedies, according to Justice Powell, "demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under [section] 1983."[314]

Justice Stevens, in dissent, took exception to the Court's approach to the question of the statutory cause of action in general and to the exclusion of the section 1983 remedy in particular. That approach, he charged, was "out of step with the Court's own history and tradition."[315] Quoting from *Texas & Pacific Railway v. Rigsby*,[316] he reminded the Court of its long-standing presumption that wrongs may be remedied:

> 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 the damages from the party in default is implied, according to the doctrine of the common law . . . . This is but an application of the maxim, *ubi jus ibi remedium*.[317]

313. The Court did not explicitly cite the *expressio unius* maxim in its discussion of its exclusive remedy doctrine. *See* notes 339-40 and accompanying text *infra*. Justice Powell denied dissenting Justice Stevens' charge that this reasoning placed the burden upon the plaintiff to demonstrate congressional intent with respect to a given substantive statute to preserve the § 1983 remedy. 453 U.S. at 20-21 n.31. It is difficult to see how Justice Powell's opinion can be interpreted as not placing the burden on the plaintiff to demonstrate such a congressional intent once the courts determine that express remedies within the substantive act are "comprehensive." Thus, if the Court's interpretation of comprehensive is broad, the difference between the exclusive remedy doctrine and the *expressio unius* maxim is minimal.

314. 453 U.S. at 21. Justice Powell himself, at the conclusion of his discussion of *Thiboutot* in *Sea Clammers*, seemed to recognize the danger of an overly broad interpretation of the comprehensiveness of remedies in his citation to Carlson v. Green, 446 U.S. 14, 23 (1980). Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 21. In *Carlson*, the Court had recognized that the lack of punitive damages and other limitations in the remedies provided under the Federal Tort Claims Act made the Act an inadequate replacement for a *Bivens* action. The remedy proclaimed in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), has served in many respects as the equivalent of § 1983 where federal officers violate constitutional rights; thus, Justice Powell seems to admit that inadequacies in a scheme of statutory remedies are relevant to the determination of whether or not the remedy will be deemed "comprehensive."

315. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 25-26 (Stevens, J., dissenting).

316. 241 U.S. 33, 39-40 (1916).

317. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 23-24 n.2 (Stevens, J., dissenting). Justice Stevens traced the lineage of this principle as far back as *Marbury v. Madison*, in which Chief Justice Marshall had stated, "[I]t is a general and indisputable rule, that where there is legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) 137 (1803).

Turning to the majority's treatment of the exclusive remedy issue in *Sea Clammers*, Justice Stevens argued that the Court had rested its finding that the FWPCA and MPRSA precluded section 1983 relief on nothing more than the fact that the statutes provide other express remedies and do not mention section 1983.[318] According to Justice Stevens, this reasoning is fundamentally flawed. It places the burden on the section 1983 plaintiff to show that Congress intended violations of the substantive statute to be redressed in private section 1983 actions. The correct formulation, Justice Stevens argued, would require a defendant seeking to defeat a section 1983 action to show that Congress intended to foreclose access to the section 1983 remedy.[319]

Justice Stevens rejected the argument that the comprehensive remedies provided under the FWPCA and MPRSA evidence a congressional intent to exclude section 1983 remedies. The preservation of all legal remedies otherwise available in the savings clauses of the two statutes seemed to Justice Stevens to negate such an inference. Indeed, for him, these sections were a clear expression of congressional intent that the section 1983 action be preserved.

V. The Section 1983 Statutory Cause of Action After *Pennhurst* and *Sea Clammers*

A. The Formalist Approach

In *Sea Clammers*, the Court summarized its dual test for finding a statutory cause of action under section 1983: "(i) Whether Congress [had] foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights' under [section] 1983."[320] These prerequisites to the application of section 1983 to statutory violations are, in themselves, little more than tautological. Could a general remedial statute, after all, provide a remedy where no rights had been violated or where the underlying substantive statute excluded an alternative remedy? The crucial question is how the Court will determine whether remedies contained within a statute are exclusive or whether the statute itself creates enforceable rights. Both *Sea Clammers* and *Pennhurst* addressed these questions with a formalistic mode of analysis that stressed the negative implications to be drawn from the failure of the legislative

318. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 27-30 (Stevens, J., dissenting).

319. *Id.* at 27-28 n.11.

320. 453 U.S. at 19.

language to meet the Court's own standards of logical rigor.[321]

In *Sea Clammers*, this formalism took the Court down a familiar path. The Court found that the relevant statutes, the FWPCA and the MPRSA, provided their own judicial remedies. Despite the statutes' explicit savings clauses that preserved other rights of action, the Court determined that Congress intended the statutory remedies to be comprehensive. If Congress had failed to make clear that it intended to preserve causes of action that might refer to the substantive standards contained in the statue itself, so much the worse for it. Lacking such a clear statement of preservative intent, the Court presumed that no such additional remedies had been preserved. This presumption against the private cause of action exactly parallels the reasoning of the Court in *Transamerica*.[322] All that is lacking is explicit invocation of the *expressio unius* maxim.

In *Pennhurst*, the Court's approach was more novel but no less formalistic. The Court created a new threshold question in statutory litigation: Does the statute create enforceable rights at all? To answer this question, the Court resorted to two rules of statutory interpretation. The first of these was a presumption that Congress does not exercise its Fourteenth Amendment power without an explicit statement that it is doing so.[323] The second principle was that compliance with explicit federal policy is not required of states receiving federal funds unless the authorizing statute contains a clear statement that the funds are conditioned upon such compliance.[324] It was upon a failure to satisfy these rules of legislative drafting that the Court based its finding that Congress had not intended the Developmentally Disabled Bill of Rights to create rights.

It is hard to escape the notion that the Court stacked the deck against private litigants and Congress in the *Pennhurst* and *Sea Clammers* cases. In *Pennhurst*, in particular, the Court's negative inference analysis seems less designed to interpret the congressional will than to frustrate congressional zeal.[325] While the case against a broad reading

321. *See* notes 278-79, 282-83 and accompanying text *supra*.

322. *See* notes 98-102 and accompanying text *supra*.

323. Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 15-16. *See* note 279 and accompanying text *supra*.

324. 451 U.S. at 16-17. *See* notes 282-83 and accompanying text *supra*.

325. Underlying both of the rules of legislative drafting that Justice Rehnquist employs to avoid finding a congressional intent to create rights are suggestions of substantive limits on congressional power. The scope of rights protected by the 14th Amendment itself may, Justice Rehnquist hints, define the scope of the legislative power under § 5 of the Amendment. 451 U.S. at 16 n.12. By the same token, he indicates that use of the spending power to lay down an affirmative obligation for the states as a condition for receipt of funds involves

of the savings clause in *Sea Clammers* may have been a bit stronger, the Court's reasoning there, as well, seems to have been governed by a determination to limit private litigation.

B. The *Thiboutot* Remedy and the Implied Right of Action: An Institutional Comparison

It should hardly be surprising that the Court would show an anti-plaintiff bias in its view of section 1983 statutory litigation. Since *Cannon*, the Court has become quite frank in its hostility toward private implied rights of action to enforce federal statutes.[326] The section 1983 and implied right issues are parallel and in individual cases often overlap. Moreover, in *Thiboutot* and in subsequent cases, the Court has failed to analyze the institutional considerations distinguishing the *Thiboutot* remedy from the implied right. It is natural, therefore, that the Court should have carried its bias against the one over into its view of the other without modification.

The problem is that very different institutional considerations affect the two issues. However one may view Justice Powell's critique of the implied right of action in his *Cannon* dissent, it simply is not an adequate basis for analysis of the section 1983 statutory action.

In *Cannon*, Justice Powell was able to make two telling criticisms of judicial implication of private actions. First, he contended that implication is an unconstitutional violation of the separation of powers.[327] Since Congress alone is given responsibility for determination of the jurisdiction of the lower federal courts, enlargement of that jurisdiction through implication of causes of action that Congress itself has not seen fit to provide usurps congressional power.[328] Second, he argued that judicial implication short-circuits the political process. The politics of legislation, in Justice Powell's analysis, is a two-front struggle. The

"constitutional difficulties." *Id.* at 17 n.13. It is consistent with the formalistic approach that such major constitutional issues should be resolved through analysis of drafting technique rather than on a substantive basis.

326. *See* notes 85-89 and accompanying text *supra*.

327. Cannon v. University of Chicago, 441 U.S. at 746-47.

328. Of course, jurisdiction over federal questions has been granted to the courts by 28 U.S.C. § 1331 (1976). Although any interpretation of the term "federal question" that expanded its scope would, under Justice Powell's strict interpretation of the exclusive power of Congress to assign jurisdiction, be offensive to the separation of powers, Justice Powell does not shrink from this implication of his argument. To the contrary, he declares, "To the extent an expansive interpretation of [section] 1331 permits federal courts to assume control over disputes which Congress did not consign to the federal judicial process, it is subject to the same criticisms of judicial implication of private actions discussed in the text." 441 U.S. at 746 n.17.

proponents of the regulation or program fight for both strong legislative standards and Draconian enforcement. The opponents may suffer defeat on the legislative standards but may nonetheless rally enough support to weaken the enforcement mechanism. Judicial implication, Justice Powell contends, permits Congress to evade responsibility for resolution of this conflict within its own halls. The affable legislators can please the proponents of measures with the strongest of legislative standards, satisfy the opponents of those measures with a nearly nonexistent enforcement mechanism, and be assured that the courts, through implication of private right of action, will make the hard decisions on how the law will really work. When this deference to the judiciary occurs, judicial review becomes a substitute for the political decisionmaking process. Justice Powell condemns this role for the courts and condemns the implied right of action for encouraging deliberate legislative vagueness.[329]

Justice Powell's critique of the implied right of action has little relevance to the *Thiboutot* remedy. First, the charge of judicial expansion of its own power cannot be made against interpretation of a general remedial statute such as section 1983. Here, Congress itself has exercised its prerogative and has granted jurisdiction.[330] If any interpretation of section 1983 may be termed intrusive on the congressional authority over federal jurisdiction, it is the overly restrictive one.

Second, the array of institutional actors and interests in the *Thiboutot* remedy is different from that in the implied right of action. The primary focus of the implied right of action analysis, despite the confusion caused by *Amtrak*, continues to be on actions against private parties who have violated federal regulatory or criminal statutes. The focus of the *Thiboutot* remedy, on the other hand, is on the maladministration of federal, social, and economic programs by state and local governments and officers. The nature of the responsibility legislation imposes on private parties is significantly different from the responsi-

329. The realism of Justice Powell's analysis has been strongly challenged. One commentator put it as follows: "In essence Justice Powell's opinion suggests that he may be unfamiliar with the legislative process. He wants Congress to speak loudly and clearly whenever it seeks to effectuate a legislative objective. Although the implementation of this practice would be desirable, it is unrealistic. Legislation is often ambiguous, not because ambiguity is desirable, but because compromise, with the attendant loss of clarity, is required for passage of the legislation." Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 41 (1979). To the extent that all legislative interpretation is simply the application of the broad language of legislative compromise to precise circumstances of individual action, it is difficult to see how any manifestation of this vital judicial role would escape Justice Powell's indictment.

330. *But see* note 328 *supra*.

bility that it imposes on governmental bodies. The private individual must merely refrain from violation of the law, whereas governmental bodies undertake a positive obligation to implement the legislative policy.

Moreover, legislative vagueness, which the Court feels shortcuts the political process and imposes unexpected burdens on private parties, has a very different significance when the legislation creates joint federal-state responsibilities. By the very structure of the legislation, some political, as well as administrative, choices on implementation of the legislative policy are left to the state or local government. The state's implementation, however, is expected to conform to the national policy embodied in the authorizing legislation. The question the judiciary is called upon to answer is whether or not the local government, in the discharge of its authority to implement, has strayed beyond the statutory grant of discretion.

C. State-Federal Joint Programs: The Need for Judicial Oversight

Adjudication regarding compliance with statutes in which funds and authority are granted to the states to implement a federal policy involves a balancing of interests. On one side are the concerns that prompt the delegation—usually either a congressional desire that the regulatory standard or mechanism for delivery of the benefit be adjusted to local conditions or a desire to use an administrative apparatus already in existence at the local level. The countervailing interest is the need for substantial uniformity in the administration of federal benefits programs.

Purely practical considerations require a degree of national uniformity. Excessive variety in regulation of economic activity can place undue hardship on interstate commerce. In the alternative, the same variety can lead to interstate bidding to attract industry through lax implementation of federally mandated regulation. By the same token, overly harsh administration of benefits programs can lead to interstate emigration that might, from a state's point of view, seem an advantageous way to export the needy. In all of these situations the principal purpose of enacting national legislation is defeated by unsupervised state or local administration.

In addition, simple equity may require substantial similarity in state administration of federal programs designed to benefit individual citizens. Through national legislation, Congress defines a benefit or protection as desirable. State participation in the program may be mandatory or voluntary, but once a state does participate, it seems in-

tuitively fair that the citizens of one state receive a benefit at least comparable in quality or amount to that received in another. As Justice Cardozo wrote in *Helvering v. Davis*, "When money is spent to promote the general welfare, the concept of welfare or its opposite is shaped by Congress, not the states."[331]

Administrative remedies on a national level are often insufficient to insure that state implementation conforms to national norms.[332] Administrative oversight of the state programs may be hobbled by a number of factors. First, the executive branch does not necessarily have the will to carry out the congressional purpose. Second, a change of administration or partisan split between the executive and legislative branches can leave the administration hostile to the policy goals that the legislation seeks to achieve. On a federal level, judicial review under the APA is sufficient to insure that executive action conforms to the law. Where programs are locally administered, however, an administration uncommitted to the legislative policy can insure its defeat through neglect—unless the programs are subject to judicial oversight.

Structural problems also inhibit administrative oversight of federal social programs.[333] These programs are funneled generally through agencies or departments such as the Department of Education, the Department of Labor, or the Department of Housing and Urban Development, whose orientation is toward funding and policymaking. The agencies have little capacity for quasi-judicial inquiry into the compliance of the local governments with statutory requirements, and often have no procedures for initiating such proceedings by the intended beneficiaries of their funds.[334] The agency often would have no recourse, if they did find noncompliance, other than to reduce or to cut

331. 301 U.S. 619, 645 (1937).

332. Justice Stevens underscored this problem in *Cannon*, in which he noted, "As the Government itself points out in this case, Title IX not only does not provide such a mechanism, but the complaint procedure adopted by HEW does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant. Furthermore, the agency may simply decide not to investigate—a decision that often will be based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint. In that case, if no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds. But surely this alternative is far more disruptive of HEW's efforts efficiently to allocate its enforcement resources under Title IX than a private suit against the recipient of federal aid could ever be." Cannon v. University of Chicago, 441 U.S. at 707 n.41 (citations omitted).

333. *See generally* Boasbery and Hews, *Washington Beat: Federal Grants and Due Process*, 6 URB. L. 399 (1974).

334. *See* note 332 *supra*.

off the state program's funding, thus defeating the purpose of the underlying statute in the very act of enforcing it.[335]

In sum, the factors relevant to the *Thiboutot* remedy impose none of the constraints on judicial intervention that Justice Powell perceived in his analysis of the implied right of action—quite the contrary. There is an unavoidable tension built into the basic structure of the joint state-federal program—a tension between the desirability of local decisionmaking and the need for national uniformity—that can only be effectively managed through judicial oversight.

D. The Scope of the *Thiboutot* Remedy: A Suggested Approach

If the Court accepts the legitimacy of the *Thiboutot* remedy, the limitations *Pennhurst* and *Sea Clammers* have placed upon it should be modified.

The question raised in *Pennhurst*, whether or not the underlying statute creates enforceable rights, is not, in itself, a section 1983 issue. It will turn on the Court's interpretation of each individual statute as well as on the Court's view of the congressional power to legislate under section five of the Fourteenth Amendment and under the spending power. The latter topics are beyond the scope of this article.

The Court's determination to give threshold treatment to the question of whether or not the statute creates rights does seem to be part of the evolving law of the *Thiboutot* remedy, however. This approach is troubling.[336] It implies that nationally adopted legislative policy may frequently turn out to be so much empty talk.[337] The standard of review is troubling as well. The distinction between legislating voluntary and mandatory guidelines[338] invites the judiciary to go through statutes with a nitpicking eye for the drafting error that can render the legislation meaningless. Even the courts of the substantive due process era did not enjoy such routine authority to frustrate legislative initiative.

An alternative approach to the threshold issue of whether or not rights exist would simply be the standing test: Does the plaintiff's in-

335. *Id.*

336. The Fourth Circuit's recent decision in Perry v. Housing Auth., 664 F.2d 1210 (1981), illustrates the degree to which this approach can undermine *Thiboutot*. The court determined that tenants of public housing could not enforce statutory requirements that low-income housing be decent, safe, and sanitary. 42 U.S.C. § 1437(a)(1) (Supp. III 1979). In line with the Supreme Court's restriction of the implied right of action, the Fourth Circuit determined that the National Housing Act provided no such right of action. Without shifting its frame of analysis, the court reasoned from this conclusion that the statute provided no rights at all. Therefore, there can be no action under § 1983. 664 F.2d at 1217-18.

337. *See* note 293 and accompanying text *supra*.

338. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 19.

jury fall within the zone of interests the statute is designed to protect?[339] This test would permit a court to proceed quickly to the real issue involved in the federal programs cases: Whether or not the administering local governmental entity or officer exceeded the discretion granted by the statute.

The exclusive remedy doctrine that the Court accepted in *Sea Clammers* need not prove overly restrictive, so long as the Court distinguishes it from the *expressio unius* maxim. *Expressio unius* is a tool for the construction of a single statute. It is based on the presumption that congressional silence is purposeful. The maxim is a rule of judicial restraint, in that it prevents the Court from filling apparent gaps in a legislative scheme. The exclusive remedy doctrine, on the other hand, deals with the coordination of two explicit remedial schemes created by separate statutes. The doctrine provides for the implicit repeal of the general remedy with respect to a substantive statute that itself creates an exclusive remedy.[340] The exclusive remedy doctrine, however, does not permit a presumption against availability of the section 1983 remedy. The Court has always looked upon implicit repeal with disfavor.[341] It will accept partial implicit repeal only where there is a clear expression of the legislative intent to repeal or where the provisions of the old and new statutes are too repugnant to be reconciled.[342]

It is not clear that the majority in *Sea Clammers* carefully distinguished between the *expressio unius* maxim and the exclusive remedy doctrine. Justice Stevens, in his dissent, charged that the majority had placed the burden on the plaintiff to show that Congress had intended to preserve the section 1983 cause of action. Justice Stevens' description of the standard for determining whether or not a statutorily provided remedy was intended to be exclusive was, in any case, clearly the correct one:

339. *See* notes 42-56 and accompanying text *supra*.

340. *See, e.g.*, Chicago & N.W. Ry. v. United States Transp. Union, 402 U.S. 570 (1971) (general restrictions on labor injunctions in Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976), implicitly overruled by specific provision of the Railway Labor Act, 45 U.S.C. § 152 First (1976)).

341. See, *e.g.*, Schlesinger v. Councilman, 420 U.S. 738 (1975), in which the Court said, "As we have had occasion recently to repeat, 'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Id.* at 752 (citing Regional Rail Reorg. Act Cases, 419 U.S. 102, 133-36 (1974)).

342. See, *e.g.*, Colorado Water Conservation Dist. v. United States, 424 U.S. 800 (1976), in which the Court said, " 'When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provision should not be disturbed by a mere implication flowing from subsequent legislation.' " *Id.* at 808 (quoting Rosencrans v. United States, 165 U.S. 257, 262 (1897)).

> Because the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable any time a violation of a federal statute is alleged . . . the burden is properly placed on the defendant to show that Congress, in enacting the particular substantive statute at issue, intended an exception to the general rule of § 1983. A defendant may carry that burden by identifying express statutory language or legislative history revealing Congress' intent to foreclose the § 1983 remedy, or by establishing that Congress intended that the remedies provided in the substantive statute itself be exclusive.[343]

Conclusion

On its face, *Maine v. Thiboutot* appears to augur a revolution in federal statutory jurisprudence. Over a hundred years after the passage of the section, the Court has finally recognized that the broad language of 42 U.S.C. section 1983 provides a comprehensive mechanism for private enforcement of federally created statutory rights where such rights are violated under color of state law. The seeming expansiveness of the *Thiboutot* decision, however, may, on closer examination, prove to be but another ironic twist in the history of section 1983, for *Thiboutot* comes just as the Court is engaged in a sweeping reevaluation of the judicial role in statutory enforcement.

Transamerica and other implied right of action cases have adopted a formalistic analysis of the remedial provisions of federal statutes that forecloses judicial enforcement of legislative standards in any terms beyond those strictly required by clear statutory language. These cases have eliminated, for all practical purposes, a broader statutory remedy than the one *Thiboutot* provides.

In *Pennhurst* and *Sea Clammers*, this bias against the statutory cause of action colors the Court's interpretation of the *Thiboutot* remedy. It is therefore possible that the two limits the Court placed on the *Thiboutot* remedy—that the substantive statute create enforceable rights and that it not contain an exclusive remedy—may swallow *Thiboutot* entirely. If the Court does abandon *Thiboutot*, however, it will do so because it has failed to examine the historical and structural justifications for the remedy.

Section 1983 itself expressed a congressional determination in the wake of the Civil War to subordinate the states to the supremacy of the Union. Contrary to Justice Powell's assertions, there is every reason to believe that Congress fully perceived the implications of the literal lan-

343. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 27-28 n.11 (Stevens, J., dissenting).

guage of the section. In short, Congress intended that state and local governments and officers be accountable for violations of federal statutes.

The modern expansion of federally legislated and locally administered social and economic programs requires that federal review of state conduct be placed on a sound conceptual foundation. The demise of the implied right of action and the subordination of the standing inquiry have threatened to insulate local implementation of federal programs from judicial review. Both the language and the history of section 1983 compel its use as the vehicle for that review.

Even if the Court accepts the legitimacy of the *Thiboutot* remedy, it will nonetheless have to face the issues raised in *Pennhurst* and *Sea Clammers*. The *Pennhurst* question—whether or not enforceable rights have been violated—should not generally be resolved as a threshold issue. Where Congress has acted pursuant to its lawful powers, the question of whether or not a local government has violated enforceable rights should be examined on the merits. It should be framed in terms of whether or not the local government, in light of the circumstances, has exceeded the discretion it is granted under the statute.

The *Sea Clammers* issue—whether or not the substantive statute creates an exclusive remedy—is a reasonable restriction on *Thiboutot* so long as it is not confused with the *expressio unius* maxim. Although the Court used that maxim in the implied right of action cases to create a presumption against judicial review, the presumption in the analysis of the exclusive remedy issue must be the opposite. The section 1983 remedy must be presumed to be available unless there is clear evidence that Congress intended to withdraw it.