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Suing Under §1983: The Future after Gonzaga v. Doe

Bradford Mank
University of Cincinnati College of Law, brad.mank@uc.edu

ARTICLE

SUING UNDER § 1983: THE FUTURE AFTER *GONZAGA UNIVERSITY V. DOE*

*Bradford C. Mank**

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* James B. Helmer, Jr., Professor of Law, University of Cincinnati. J.D., 1987, Yale Law School; B.A., 1983, Harvard University.

I. INTRODUCTION

In 2002, the Supreme Court in *Gonzaga University v. Doe*[1] held that the nondisclosure provisions of the Family Educational Rights and Privacy Act[2] (FERPA) did not establish an individual right enforceable through 42 U.S.C. § 1983.[3] More broadly, Chief Justice Rehnquist's majority opinion adopted a general rule that spending legislation that provides federal funding to various state actors[4] does not ordinarily create enforceable rights under

1. 122 S. Ct. 2268 (2002).

2. 20 U.S.C. § 1232g (2000).

3. *Gonzaga*, 122 S. Ct. at 2279. Section 1983 currently 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 (2000) (emphasis added).

4. While Gonzaga University is a private university, both the Washington Court of

§ 1983 unless Congress demonstrates through clear and unambiguous evidence that it intends to provide individual rights against any state actor that accepts federal funding.[5] While previous cases had distinguished between implied right of action cases, where evidence is required that Congress intended a private remedy, and § 1983 cases, where a remedy is generally presumed, the majority found that the two types of cases are similar in determining whether Congress intended to create a federal right.[6]

In dissent, Justice Stevens, joined by Justice Ginsburg, argued that FERPA's nondisclosure provisions did establish individual rights enforceable through § 1983.[7] He maintained that the majority's requirement of clear textual evidence that Congress intended to establish an individual right inappropriately adopted the test used in implied right of action cases about whether Congress intended to establish a private remedy.[8] Furthermore, the majority had acknowledged that this requirement was unnecessary in § 1983 cases because that statute allows private enforcement of any statute creating a distinct federal right, even if there is no private right of action under the substantive statute.[9] While the majority opinion claimed that it was not importing the entire implied right of action framework into the § 1983 arena, Justice Stevens argued that the majority's approach effectively did just that and undermined the "presumptive enforceability of rights under § 1983."[10]

This Article will focus on the impact of *Gonzaga* in future § 1983 cases rather than on whether the Court was correct in finding that FERPA does not establish individual rights enforceable under § 1983. While it does not purportedly change the prevailing three-part enforcement test for § 1983,[11] the

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Appeals and the Washington Supreme Court determined that the university had "acted 'under color of state law' for purposes of § 1983 when they disclosed respondent's personal information to state officials in connection with state-law teacher certification requirements." *Gonzaga*, 122 S. Ct. at 2272 n.1 (citing Doe v. Gonzaga Univ., 24 P.3d 390, 401–02 (Wash. 2001)). The university's petition for certiorari challenged this holding, but the U.S. Supreme Court assumed without deciding that the "relevant disclosures occurred under color of state law." *Id.*

5. *See id.* at 2273, 2275 ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.").

6. *Id.* at 2275–76.

7. *Id.* at 2280–86 (Stevens, J., dissenting).

8. *Id.* at 2284 (Stevens, J., dissenting).

9. *Id.* at 2285–86 (Stevens, J., dissenting).

10. *Id.* at 2285 (Stevens, J., dissenting).

11. *See* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997); Bradford C. Mank,

Gonzaga decision places a heavy and unnecessary burden of proof on plaintiffs by requiring unambiguous and explicit evidence that Congress intended to create an individual right benefiting a class including the plaintiff.[12] While purporting to examine only whether Congress intended to create an individual right, the majority in fact blurred the line between rights and remedies by improperly considering in a § 1983 case whether Congress intended to create a cause of action.[13] Chief Justice Rehnquist's majority opinion in *Gonzaga* seriously harmed civil liberties by undermining the principle that federal statutory rights are presumptively enforceable through § 1983's express provision for enforcement of statutory rights.[14] In exceptional cases, the presumption that all federal rights are enforceable can be rebutted, but the defendant has the burden of demonstrating that Congress has specifically foreclosed enforcement under § 1983 or that a statute provides comprehensive remedies incompatible with § 1983.[15] By blurring the line between rights and remedies, the majority effectively shifted the burden of proof from the defendant to the plaintiff to demonstrate that § 1983 may be used to enforce and provide a remedy for a federal statutory right. Chief Justice Rehnquist's majority opinion in *Gonzaga* represents the culmination of his efforts since his 1981 *Pennhurst State School & Hospital v. Halderman*[16] decision to bolster states' rights by restricting suits seeking to enforce federal statutory rights through § 1983, especially suits by individuals based on spending clause statutes in which states accept federal aid in return for accepting certain obligations.[17]

The *Gonzaga* case purports to clarify when federal statutory rights may be enforced by § 1983. However, the majority opinion in fact does not clarify how courts should determine what is "clear" and "unambiguous" evidence of congressional intent to

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Using § 1983 to Enforce Title VI's Section 602 Regulations, 42 U. KAN. L. REV. 321, 332–33 (2001) [hereinafter Mank, *Using § 1983*] (summarizing the three-part test).

12. Refer to notes 287–90 *infra* and accompanying text (arguing that the burden should have been placed on the defendant).

13. Refer to note 290 *infra* and accompanying text (noting the blurred distinction between right and remedy under Chief Justice Rehnquist's analysis).

14. *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990) (distinguishing the inquiry under § 1983 express enforcement provisions from that involved in implied rights of action cases). Refer to notes 432–35 *infra* and accompanying text.

15. *See Wilder*, 496 U.S. at 508. Refer to note 137 *infra* and accompanying text (discussing the "strong presumption in favor of using § 1983 to enforce statutory rights").

16. 451 U.S. 1, 31–32 (1981).

17. Refer to Part IV.A *infra* (discussing Chief Justice Rehnquist's further endorsement of the restrictive approach in the *Gonzaga* opinion).

establish an individual right.[18] It is unclear whether the majority's test requires a textualist approach or allows consideration of legislative history. Chief Justice Rehnquist's majority opinion in *Gonzaga* largely focused on the "text and structure" of the FERPA provisions directly at issue,[19] although the Court briefly considered one aspect of the statute's legislative history.[20] While agreeing that whether private individuals may enforce a federal statute through § 1983 is "a question of congressional intent," Justice Breyer, with whom Justice Souter joined, concurred in the judgment, but disagreed with the "majority's presumption that a right is conferred only if set forth 'unambiguously' in the statute's 'text and structure.'"[21] The majority opinion never responded to Justice Breyer's claim that its approach was textualist. The *Gonzaga* decision provides little guidance on which types of evidence may be considered in determining congressional intent.

This Article makes two specific proposals that are consistent with a narrow reading of *Gonzaga's* requirement that § 1983 may be used to enforce rights only if there is clear and unambiguous evidence of congressional intent to establish individual rights on behalf of a class including the plaintiff. First, the Court should consider legislative history in determining congressional intent. The Court should consider a statute's legislative history because it often contains important evidence regarding congressional intent or purpose.[22] A textualist approach is likely to underestimate those instances where Congress really intends to establish an individual right. While Chief Justice Rehnquist's majority opinion primarily addressed the "text and structure" of the FERPA provisions directly at issue, the *Gonzaga* decision never explicitly stated that clear and unambiguous evidence of congressional intent to establish an individual right must be found in the statute's text alone. Because examination of a wide range of evidence is more likely to reveal Congress's intent in enacting a statute, courts should look more broadly at the entire statutory context and the statute's legislative history to determine whether Congress intended to benefit a class that includes the plaintiff and whether the right claimed by the

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18. Refer to notes 270–73 *infra* and accompanying text (discussing the *Gonzaga* requirement of "clear" and "unambiguous" evidence).

19. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2278 (2002).

20. *Id.* at 2279.

21. *Id.* (Breyer, J., concurring in the judgment) (quoting *id.* at 2273, 2278).

22. Refer to Part VI.C *infra* (advocating the use of legislative history to determine whether Congress intended to establish a right under § 1983).

plaintiff is sufficiently definite to be capable of judicial enforcement under § 1983.[23]

Second, consistent with the Court's decision in *Wright v. City of Roanoke Redevelopment & Housing Authority*,[24] the Court should consider agency regulations in defining the scope of a right as long as there is sufficient evidence that Congress intended to establish an individual right.[25] By considering evidence in a statute's legislative history and administrative regulations defining the scope of statutory rights, lower courts are more likely to find Congress's intent than through a textualist approach. By rejecting textualism, judges can partially save the enforcement of statutory rights under § 1983 despite the *Gonzaga* Court's overly restrictive approach.

II. PRIVATE RIGHTS OF ACTION: THE SUPREME COURT'S GROWING EMPHASIS ON CONGRESSIONAL INTENT

In determining whether Congress intended to create a federal right, the *Gonzaga* decision adopted the same test for § 1983 that has been used in determining whether a private right of action can be implied from a particular statute.[26] Even so, the majority acknowledged a difference between the two types of suits: plaintiffs asserting an implied private right of action must show that Congress intended to establish a private cause of action for a class including them, but § 1983 plaintiffs do not have to show congressional intent to establish a remedy under the statute because § 1983 has already established a remedy.[27] However, Justice Stevens argued in his dissent that the Court had in fact inappropriately applied the standard for whether Congress intended to establish a cause of action in the § 1983 context.[28] Before discussing § 1983, it will be helpful to first discuss implied private rights of action.

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23. Refer to notes 418–26 *infra* and accompanying text (suggesting that judges may miss congressional intent absent an examination of the legislative history surrounding the statute in question).

24. 479 U.S. 418, 430–32 (1987).

25. Refer to Part V.C *infra* (finding room for regulations to explicate or fill in the details of a statute and thereby to broadly evince congressional intent to create an individual right).

26. *Gonzaga*, 122 S. Ct. at 2275 (declaring that, because implied right of action cases and § 1983 cases are not separate and distinct, "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983").

27. *Id.* at 2276.

28. *Id.* at 2284–86 (Stevens, J., dissenting).

Before 1964, the Supreme Court generally required explicit statutory authorization for lawsuits and rarely recognized an implied cause of action.[29] However, in 1964, the Supreme Court in *J.I. Case Co. v. Borak*[30] acknowledged an implied private right of action under the Securities Exchange Act of 1934 (SEC Act). From 1964 until 1975, the Supreme Court and lower courts found implied private causes of action under several statutes.[31]

In 1975, the Supreme Court in *Cort v. Ash*[32] announced a four-part test for deciding whether a private remedy is implicit in a statute:

> (1) is the plaintiff part of a class that the statute intends to provide special status to or benefits?;
>
> (2) is there implicit or explicit evidence that Congress intended to create or deny the proposed private right of action?;
>
> (3) is such a private right of action consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?; and
>
> (4) is the cause of action one traditionally relegated to state law and, thus, in an area where a federal cause of action would intrude on important state concerns?[33]

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29. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 732–35 (1979) (Powell, J., dissenting) (discussing the early history of Supreme Court decisions allowing or denying private rights of action); Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 294 (1996) (same); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 25–26 (1999) [hereinafter Mank, *Private Cause of Action*] (same); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864–65 (1996) (same).

30. 377 U.S. 426 (1964).

31. *E.g.*, Rosado v. Wyman, 397 U.S. 397, 399, 407, 420 (1970) (implying a private right of action in the Social Security Act of 1935, as amended in 1967); Allen v. State Bd. of Elections, 393 U.S. 544, 547–48, 557 (1969) (implying a private right of action in the Voting Rights Act of 1965); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200–01 (1967) (implying a private right of action in the Rivers and Harbors Act of 1899); Key, *supra* note 29, at 294–95; Mank, *Private Cause of Action*, *supra* note 29, at 26 n.155; Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1073–74 (1992) (observing that between 1964 and 1975 the Supreme Court took an expansive approach to private rights of action). *But see* Stabile, *supra* note 29, at 866, 867 & nn.32, 34 (arguing that courts were reluctant before 1975 to imply private rights of action, except perhaps in securities area).

32. 422 U.S. 66 (1975).

33. *Id.* at 78; *see also* Mank, *Private Cause of Action*, *supra* note 29, at 26–27; Mank, *Using § 1983*, *supra* note 11, at 354–55; Stabile, *supra* note 29, at 867 & n.38.

While the *Cort* majority may have intended the four-part test to reduce the number of cases in which courts implied private causes of action, lower courts used the *Cort* test to find a private right of action in many cases, especially by emphasizing whether such a cause of action would serve the statute's purposes, the third prong of the test.[34] In 1979, Justice Powell observed: "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."[35]

In *Cannon v. University of Chicago*,[36] the Supreme Court recognized an implied right of action for individuals suing educational institutions under section 901(a) of Title IX of the 1972 Education Act Amendments.[37] However, in his dissenting opinion in *Cannon*, Justice Powell argued that the separation of powers principle prohibited federal judges from engaging in judicial lawmaking by implying a private right of action to enforce a statute.[38] He contended that courts should imply a private right of action only if there is substantial evidence that Congress intended to allow such a suit.[39] According to Justice Powell's dissent, under separation of powers principles only the second prong of the *Cort* test, whether Congress intended to authorize a private right of action, should be relevant.[40]

While it has never overruled *Cort*, in subsequent decisions the Supreme Court has followed Justice Powell's *Cannon* dissent by focusing on the second prong of the *Cort* test—whether there is significant evidence that Congress intended to create a private right of action.[41] For example, in 2001, the Supreme Court in

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34. Mank, *Private Cause of Action*, *supra* note 29, at 27 & n.159.

35. Cannon v. Univ. of Chi., 441 U.S. 677, 741–42 (1979) (Powell, J., dissenting) (citing cases).

36. 441 U.S. 677 (1979).

37. *Cannon*, 441 U.S. at 680, 688–89; *see also id.* at 682 n.3, 684 n.4 (quoting 20 U.S.C. §§ 1681–1682); Mank, *Private Cause of Action*, *supra* note 29, at 27–28 (summarizing *Cannon*).

38. *Cannon*, 441 U.S. at 730–31 (Powell, J., dissenting); *see also* Key, *supra* note 29, at 298; Mank, *Private Cause of Action*, *supra* note 29, at 31–32; Mank, *Using § 1983*, *supra* note 11, at 356.

39. *Cannon*, 441 U.S. at 749 (Powell, J., dissenting); Mank, *Private Cause of Action*, *supra* note 29, at 31–32; Mank, *Using § 1983*, *supra* note 11, at 356.

40. Key, *supra* note 29, at 298–99; Mank, *Private Cause of Action*, *supra* note 29, at 31; Mank, *Using § 1983*, *supra* note 11, at 356. Additionally, a second separation of powers concern arguably relates to the view that only Congress should enact laws limiting the authority of states because Congress is the only branch in which states are represented. Key, *supra* note 29, at 299–300; Mank, *Using § 1983*, *supra* note 11, at 354 n.248.

41. *See, e.g.*, Cent. Bank v. First Interstate Bank, 511 U.S. 164, 178–80 (1994) (focusing on what Congress intended in the absence of an express provision); Suter v. Artist M., 503 U.S. 347, 363–64 (1992) (stating that the *Cort* test puts the burden of proof

Alexander v. Sandoval[42] held in a five-to-four decision that there is no private right of action to enforce disparate impact regulations promulgated under section 602 of Title VI of the 1964 Civil Rights Act.[43] Justice Scalia's majority opinion determined that neither section 602's language nor subsequent amendments to Title VI demonstrated congressional intent to establish a private cause of action to enforce section 602.[44] The Court held that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under [section] 602. We therefore hold that no such right of action exists."[45] In *Gonzaga*, the Court later explained:

> We have recognized, for example, that Title VI . . . create[s] individual rights because those statutes are phrased "with an *unmistakable focus* on the benefited class."[46] But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private *right* but also a private *remedy*."[47]

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on plaintiffs to show that Congress intended to establish a private remedy for plaintiffs); Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 536 (1989) (emphasizing that courts should concentrate on evidence of congressional intent in determining whether to imply a private cause of action); Thompson v. Thompson, 484 U.S. 174, 179 (1988) (indicating that the four factors in *Cort* are all ultimately concerned with congressional intent); Key, *supra* note 29, at 285, 297; *see also* Mank, *Private Cause of Action*, *supra* note 29, at 31–32, 44–46 (discussing these cases); Mank, *Using § 1983*, *supra* note 11, at 356 & n.268 (citing these cases); Stabile, *supra* note 29, at 868–71 (arguing that the Supreme Court beginning in 1979 began shifting away from the four-part *Cort* test to "an exclusive reliance on legislative intent"); Mazzuchi, *supra* note 31, at 1075–80 (arguing that the Supreme Court since the late 1970s has focused on whether Congress intended to create a private right of action).

42. 532 U.S. 275 (2001).

43. *Id.* at 278, 293. Section 602 of Title VI of the 1964 Civil Rights Act states in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of [§] 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

42 U.S.C. § 2000d-1 (2000); *see also* Mank, *Private Cause of Action*, *supra* note 29, at 12 (summarizing section 602).

44. *Sandoval*, 532 U.S. at 289–93.

45. *Id.* at 293 (citation omitted).

46. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 691 (1979) (emphasis added)).

47. *Id.* at 2275–76 (emphases added) (footnote omitted) (citing *Sandoval*, 532 U.S.

As a result of the Court's heavy emphasis on whether there is clear evidence that Congress intended to establish a right of action, courts have implied very few rights of action in recent years.[48] The Court has placed the burden on plaintiffs to demonstrate that the *Cort* factors are satisfied.[49] The Court has acknowledged that evidence of such intent may be implicit in a statute rather than explicit, although Justice Scalia has disagreed with the majority and demanded explicit textual evidence.[50] Additionally, for the first ten years after it decided *Cort*, the Supreme Court frequently considered a statute's legislative history if the text was not clear.[51] After Justice Scalia became an Associate Justice in 1986 and strongly lobbied his colleagues to adopt a textualist approach to statutory interpretation,[52] the Court has more frequently emphasized whether there is evidence of intent in the statute's text, although the Court has never stated that it will not consider evidence from a statute's legislative history.[53] As a result of the Court's increasingly narrow intent-based interpretation of implied

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at 286).

48. Thompson v. Thompson, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment) (observing that the Court rejected claims of implied right of action in nine of eleven recent cases); Key, *supra* note 29, at 297; Mank, *Private Cause of Action*, *supra* note 29, at 31–32, 44–46; Mank, *Using § 1983*, *supra* note 11, at 353–56; Stabile, *supra* note 29, at 868–69, 870 & n.54, 871 (listing lower court decisions denying private rights of action based on lack of congressional intent); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 91 (2001) (noting that a requirement of clear evidence of congressional intent ensures that few private actions will be found).

49. Suter v. Artist M., 503 U.S. 347, 363 (1992) (explaining that *Cort* places the burden on plaintiffs to demonstrate Congress's intent to make a private remedy available); Mank, *Private Cause of Action*, *supra* note 29, at 31 & n.187.

50. *Compare Thompson*, 484 U.S. at 179 (stating that congressional intent to create a private right of action may be inferred from statutory language or structure or from "the circumstances of its enactment"), *with id.* at 189 (Scalia, J., concurring in the judgment) (insisting that congressional intent should not be inferred based on the "context" of the legislation after finding "no such indication in either text or legislative history"). *See also* Zeigler, *supra* note 48, at 89–91.

51. Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979) (stating that "the *Cort* analysis requires consideration of legislative history").

52. Refer to notes 384–85 *infra* and accompanying text (noting Justice Scalia's role as the leading proponent of textualism on the Court).

53. *E.g.*, Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 533–34 (1989) (concluding "neither the language nor the structure of the Act shows any congressional intent to provide a private cause of action to enforce federal employees unions' duty of fair representation" and further observing that "[n]othing in the legislative history . . . has been called to our attention indicating that Congress contemplated" otherwise); *see also* Mank, *Private Cause of Action*, *supra* note 29, at 31–32 (discussing *Karahalios*).

private rights of action, plaintiffs have turned to § 1983 to vindicate statutory rights that do not contain explicit remedies.[54]

III. SECTION 1983 AND IMPLIED PRIVATE RIGHTS OF ACTION

A. Introduction to § 1983

Section 1983 traces its origins to the Civil Rights Act of 1871, which Congress enacted to protect the civil rights of African-Americans against former Confederates who were trying to reestablish white supremacy in various southern states.[55] The 1871 statute guaranteed only constitutional rights and did not refer to statutory rights.[56] In 1874, during a comprehensive revision of existing statutes, Congress added the phrase "and laws" to section 1 of the Civil Rights Act.[57] There is no legislative history regarding why Congress made this change, and thus it is not clear whether Congress intended the addition of the term "and laws" to alter the meaning of the statute.[58]

There has been a long debate over whether and how the addition of the term "and laws" to the statute changed its meaning.[59] First, proponents of the "Consistency Theory" contend that the phrase "and laws" must be read in conjunction with other provisions in the Civil Rights Act to mean "and laws providing for equal rights."[60] Second, advocates of the "No Modification Theory" suggest that Congress merely intended the revisions to clarify existing law, but that argument creates serious problems because it implies that courts should generally ignore the addition "and laws."[61] Third, commentators proposing

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54. Mank, *Using § 1983*, *supra* note 11, at 353–59 (noting that the standard for § 1983 is easier for plaintiffs to meet).

55. *Id.* at 327 & n.38 (citing the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (2000)); Key, *supra* note 29, at 303–04; Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 54–61 (1998)).

56. *Id.* at 327 & n.39 (citing Key, *supra* note 29, at 304 & n.125 (quoting the original 1871 statute); Pettys, *supra* note 55, at 57 (noting the original Act said nothing about rights secured by federal "laws")).

57. *Id.* at 327 & n.40 (citing Key, *supra* note 29, at 304–05; Pettys, *supra* note 55, at 57–60).

58. *Id.* at 327 & n.41 (citing Key, *supra* note 29, at 305; Pettys, *supra* note 55, at 59–60).

59. *Id.* at 327 & n.43 (citing Key, *supra* note 29, at 306–13).

60. *Id.* at 328 & n.44 (citing Key, *supra* note 29, at 306–07).

61. *Id.* at 328 & n.45 (citing Key, *supra* note 29, at 307–08). Some proponents of the No Modification Theory contend that the phrase "and laws" should be read as to mean "and laws providing for equal rights." *Id.* at 328 n.45 (citing Key, *supra* note 29, at 308). Yet that interpretation is logically at odds with their contention that the 1874 revision did

the "Plain Language Theory" maintain that the plain meaning of the language "and laws" refers to any federal law or statute.[62]

Before 1980, the Supreme Court had only clearly allowed § 1983 suits in cases alleging violations of constitutional rights.[63] During the 1960s and 1970s, federal grant-in-aid programs to states grew significantly, and there was an increasing number of welfare beneficiaries who received funds through various state agencies.[64] As a result of both program growth and an increasing awareness of possible legal avenues of redress, many beneficiaries began to file § 1983 suits alleging that states had violated their federal statutory rights under grant-in-aid statutes.[65] However, because of uncertainties about whether there was federal jurisdiction to raise statutory claims under § 1983, most suits also alleged constitutional violations.[66] During the 1960s and 1970s, a few Supreme Court decisions suggested in dicta that a § 1983 claim may be based on the violation of a statutory right, but the cases were generally decided on constitutional grounds instead.[67]

The Supreme Court in its 1979 decision *Chapman v. Houston Welfare Rights Organization*[68] held that there was no such jurisdiction under 28 U.S.C. § 1343(a)(3)[69] to address statutory claims that were not based on constitutional rights or

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not change the statute at all. *Id.* (citing Key, *supra* note 29, at 308).

62. *Id.* at 328 & n.46 (citing Key, *supra* note 29, at 308–13).

63. *Id.* at 328 & n.47 (citing Pettys, *supra* note 55, at 52).

64. Key, *supra* note 29, at 314.

65. *Id.*

66. *Id.* at 314–15 (explaining that pendent jurisdiction could be established by asserting constitutional claims).

67. *E.g.*, Edelman v. Jordan, 415 U.S. 651, 675 (1974) (stating in dicta that "[i]t is, of course, true that . . . suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States"); City of Greenwood v. Peacock, 384 U.S. 808, 829–30 (1966) (stating in dicta that an individual has cause of action under § 1983 "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well"); *see also* Mank, *Using § 1983*, *supra* note 11, at 328 & n.48 (citing *Edelman* and Key, *supra* note 29, at 313–18).

68. 441 U.S. 600 (1979).

69. *Id.* at 603, 616 (citing 28 U.S.C. § 1343(3) (renamed § 1343(a)(3) in 1979)). Section 1343(a)(3) allowed suits for injunctive relief to enforce certain civil rights statutes and did not require a minimum amount in controversy. Mank, *Using § 1983*, *supra* note 11, at 328 n.50 (citing 28 U.S.C. § 1343(a)(3)). On the other hand, the general federal-question jurisdiction statute, § 1331(a), at the time required a minimum amount in controversy of $10,000 and was therefore unavailable to the plaintiffs in *Chapman*. *Id.* at 328 n.50 (citing 28 U.S.C. § 1331(a) (1976); *Chapman*, 441 U.S. at 606 & n.9). In 1980, Congress eliminated the $10,000 amount in controversy requirement for 28 U.S.C. § 1331 and, as a result, plaintiffs have generally stopped using § 1343(a)(3). *Id.* (citing Key, *supra* note 29, at 310–12; Pettys, *supra* note 55, at 63 n.77).

equal protection statutes.[70] The Court did not decide whether § 1983 claims may be based on violations of statutory rights,[71] although Justice Stevens's majority opinion suggested that § 1983's statutory language "and laws" allowed such claims.[72] In his concurring opinion, Justice White maintained that the plain meaning of the term "and laws" in § 1983 clearly encompassed all federal statutory rights.[73] Justice Stewart's dissenting opinion, which was joined by Justices Brennan and Marshall, agreed with Justice White's argument that § 1983 applied to violations of statutory rights.[74] Conversely, Justice Powell's concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, argued there was no support in § 1983's sparse legislative history that Congress sought to alter the scope of the statute when it enacted the 1874 revisions.[75] Justice Powell contended that the phrase "and laws" should be interpreted as "and laws providing for equal rights."[76] Additionally, Justice Powell contended that a broad reading of § 1983 to include enforcement of many federal statutory rights would upset federalism by drastically enlarging federal judges' role in supervising state programs receiving federal grant monies absent evidence that Congress wanted courts to exercise such jurisdiction.[77]

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70. *Chapman*, 441 U.S. at 602–03; *see also* Mank, *Using § 1983*, *supra* note 11, at 328 (summarizing the Court's holding).

71. Neither claim in *Chapman* met the $10,000 amount in controversy threshold then in existence for general federal-question jurisdiction under 28 U.S.C. § 1331 and, therefore, the Court did not examine whether § 1331 established jurisdiction for statutory claims under § 1983. *Chapman*, 441 U.S. at 606 & n.9 (citing the then-current version of 28 U.S.C. § 1331); *see also* Key, *supra* note 29, at 311–12; Mank, *Using § 1983*, *supra* note 11, at 328; Pettys, *supra* note 55, at 63. In 1980, Congress eliminated the $10,000 amount in controversy requirement for 28 U.S.C. § 1331. Mank, *Using § 1983*, *supra* note 11, at 328 & n.50 (citing Federal Question Jurisdiction Amendments of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331); Key, *supra* note 29, at 310–12; Pettys, *supra* note 55, at 63 n.77).

72. *See Chapman*, 441 U.S. at 610–15; *see also* Mank, *Using § 1983*, *supra* note 11, at 328, 329 & n.53 (citing *Chapman*; Pettys, *supra* note 55, at 64 (discussing Justice Stevens's opinion in *Chapman*)).

73. *Chapman*, 441 U.S. at 649–69 (White, J., concurring in the judgment); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.54 (citing *Chapman*; Key, *supra* note 29, at 318–19; Pettys, *supra* note 55, at 65–66).

74. *Chapman*, 441 U.S. at 674–75 (Stewart, J., dissenting); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.57 (citing *Chapman*; Pettys, *supra* note 55, at 66 n.92).

75. *Chapman*, 441 U.S. at 623–27, 645–46 (Powell, J., concurring); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.55 (citing *Chapman*; Key, *supra* note 29, at 319–20 (discussing Justice Powell's concurring opinion); Pettys, *supra* note 55, at 65 (same)).

76. *Chapman*, 441 U.S. at 623–27, 645–46 (Powell, J., concurring); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.55 (citing *Chapman*; Key, *supra* note 29, at 319–20; Pettys, *supra* note 55, at 65).

77. *Chapman*, 441 U.S. at 645 (Powell, J., concurring); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.56 (citing *Chapman*; Key, *supra* note 29, at 320).

While *Chapman* did not decide whether § 1983's provision "and laws" includes suits for violations of statutory rights, the debate in Justice White's and Justice Powell's concurring opinions was influential when the Court addressed the problem one year later.[78] Justice Powell was alarmed that allowing suits to vindicate federal statutory rights through § 1983's jurisdiction would authorize federal courts to assume broad authority over numerous state grant-in-aid programs receiving federal funding.[79] Conversely, Justice White argued § 1983 was intended to protect the intended beneficiaries of federally funded programs from violations by state officials.[80]

B. Statutory Rights and § 1983

1. Maine v. Thiboutot.[81] In 1980, the Supreme Court in *Thiboutot* finally addressed whether § 1983 protected federal statutory rights. The Court held that the plain meaning of the term "and laws" in § 1983 referred to federal statutory rights and allowed private individuals who were beneficiaries of those rights to bring suit.[82] Justice Brennan's majority opinion acknowledged that the statute's legislative history was inconclusive,[83] but concluded that the language "and laws" in the text clearly pertained to all federal statutory rights and not only civil rights statutes.[84]

However, in dissent, repeating his arguments in *Chapman*, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that § 1983's origins in the 1871 Civil Rights Act made it most likely that Congress intended the phrase "and laws" to apply only to civil rights legislation protecting African-Americans from discrimination.[85] Additionally, Justice Powell

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78. Mank, *Using § 1983*, *supra* note 11, at 329–30.

79. *See Chapman*, 441 U.S. at 645 (Powell, J., concurring); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.58 (citing *Chapman*; Key, *supra* note 29, at 320).

80. *Chapman*, 441 U.S. at 671–72 (White, J., concurring in the judgment); *see also* Mank, *Using § 1983*, *supra* note 11, at 329 & n.59 (citing *Chapman*; Key, *supra* note 29, at 318–19; Pettys, *supra* note 55, at 65–66).

81. 448 U.S. 1 (1980).

82. *Id.* at 4–8; *see also* Mank, *Using § 1983*, *supra* note 11, at 330 & n.61 (citing *Thiboutot*; Pettys, *supra* note 55, at 52).

83. *Thiboutot*, 448 U.S. at 7; *see also* Mank, *Using § 1983*, *supra* note 11, at 330 & n.62 (citing *Thiboutot*; Pettys, *supra* note 55, at 66–67). The majority included Justices Brennan, Stewart, White, Marshall, Blackmun, and Stevens. Mank, *Using § 1983*, *supra* note 11, at 330 n.62 (citing *Thiboutot*, 448 U.S. at 1).

84. *Thiboutot*, 448 U.S. at 4–8; *see also* Mank, *Using § 1983*, *supra* note 11, at 330 & nn.63–64 (citing *Thiboutot*; Pettys, *supra* note 55, at 66–67).

85. *Thiboutot*, 448 U.S. at 13–18, 19 & n.6, 20–22 (Powell, J., dissenting); *Chapman*, 441 U.S. at 623–37 (Powell, J., concurring) (arguing that the legislative history of § 1983

contended that the majority had failed to evaluate the burden imposed on state and local governments by interpreting § 1983 jurisdiction to include numerous federal statutory rights.[86] Justice Powell was particularly worried that the decision would give federal courts "unprecedented authority to oversee state actions" in administering federal grant-in-aid programs.[87] Thus, he contended that the Court's expansion of § 1983 jurisdiction "creates a major new intrusion into state sovereignty under our federal system."[88]

For proponents of states' rights and limited federal government, Justice Powell's negative reaction in *Thiboutot* is understandable. While states must voluntary accept federal funds and may not under the Tenth Amendment be coerced into doing so,[89] it is clear that federal grant-in-aid programs have the effect of shifting power from the states to the federal government because states generally cannot afford to turn down federal largess.[90] Usually, the federal agency providing a grant has the duty of ensuring a state's compliance with any conditions and may terminate funding.[91] However, as a practical matter, federal

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demonstrates that the phrase "and laws" refers only to civil rights legislation and not federal statutes in general); *see also* Mank, *Using § 1983*, *supra* note 11, at 330, 331 & n.65 (citing *Thiboutot*, *Chapman*, and Pettys, *supra* note 55, at 52, 67–68 (discussing Justice Powell's interpretation of "and laws")).

86. *Thiboutot*, 448 U.S. at 11–12, 22–25 (Powell, J., dissenting); *see also* Mank, *Using § 1983*, *supra* note 11, at 330, 331 & n.66 (citing *Thiboutot*; Key, *supra* note 29, at 323–24; Pettys, *supra* note 55, at 68).

87. *Thiboutot*, 448 U.S. at 22–25, 36–37 (Powell, J., dissenting); *see also* Mank, *Using § 1983*, *supra* note 11, at 331 & n.67 (citing *Thiboutot*; Key, *supra* note 29, at 323–24 (discussing Justice Powell's dissenting opinion)).

88. *Thiboutot*, 448 U.S. at 33 (Powell, J., dissenting); Mank, *Using § 1983*, *supra* note 11, at 331 & n.68 (citing *Thiboutot*).

89. *See* Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 142–44 (1947) (holding that a grant-in-aid program was not coercive because the state could refuse the grant); Steward Mach. Co. v. Davis, 301 U.S. 548, 585–93 (1937) (stating that under the Tenth Amendment, the federal government may not coerce a state into receiving a grant, but must allow voluntary choice); Key, *supra* note 29, at 290–91 (summarizing the Supreme Court's test for determining whether a federal funding condition is constitutional under the Tenth Amendment).

90. Key, *supra* note 29, at 289.

91. 42 U.S.C. § 2000d-1 (2000) (requiring the federal funding agency to establish a framework for investigating and assessing complaints of discrimination by recipients); Key, *supra* note 29, at 292–93 (exploring possible reasons for federal agencies' "lack of success" in achieving state compliance with federal grant-in-aid funding conditions); Mank, *Private Cause of Action*, *supra* note 29, at 12–13 (discussing the requirement in Title VI of the 1964 Civil Rights Act that a funding agency investigate complaints of discrimination by state recipients and deny funding if necessary); Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 619–23 (1972) (assessing the steps taken in determining state compliance with federal grant-in-aid requirements and possible reasons for "less than total success").

agencies rarely invoke the draconian remedy of terminating funding to a state found to have violated the conditions because there are often lengthy procedural hurdles that allow a state to challenge any proposed termination of funding, and members of Congress from that state will usually oppose termination of funding.[92] Instead, federal agencies typically negotiate a settlement that promises future compliance.[93] Federal agencies are often more concerned with preserving good relationships with state administrators and maintaining popular programs than protecting individual beneficiaries.[94] Furthermore, administrative remedies often do not provide for individual restitution.[95]

Suits under § 1983 by intended beneficiaries of grant-in-aid programs are threatening to state officials—and indirectly to federal judges solicitous of their interests—precisely because such suits might result in far stricter enforcement of the program's conditions.[96] Furthermore, suits under § 1983 could allow for individual remedies, including damages against state officials in their individual or personal capacity,[97] although a state's Eleventh Amendment immunity[98] and the qualified

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92. *See, e.g.*, 42 U.S.C. § 671(a)–(b) (providing procedural protections for state grant-in-aid recipients); *id.* § 2000d-1 (same); 40 C.F.R. § 7.130(b)(1)–(3) (providing procedural protections for recipients in the form of EPA regulations to obtain compliance); Key, *supra* note 29, at 292–93 (arguing that agencies are reluctant to terminate aid to state recipients and face procedural barriers even if they wish to do so); Tomlinson & Mashaw, *supra* note 91, at 619–20 (same); *see also* Mank, *Private Cause of Action*, *supra* note 29, at 21–23 (discussing EPA's reluctance to terminate funding to recipients even if found guilty of discrimination).

93. Mank, *Private Cause of Action*, *supra* note 29, at 21–23 (explaining the common agency practice of settling Title VI discrimination complaints with recipients of federal aid).

94. Key, *supra* note 29, at 292–93; Mank, *Private Cause of Action*, *supra* note 29, at 23 (discussing the EPA's reluctance to terminate funding to recipients even if found guilty of discrimination because the Agency is concerned about terminating funding for important pollution control projects that benefit the public in general); Tomlinson & Mashaw, *supra* note 91, at 619–20.

95. Mank, *Private Cause of Action*, *supra* note 29, at 22–24 (discussing limitations of administrative remedies under Title VI of the 1964 Civil Rights Act and advantages of private lawsuits in providing individual remedies).

96. Key, *supra* note 29, at 322–24 (positing that Justices Powell and Rehnquist dissented in *Thiboutot* because they are "champions of states' rights" and that expansive § 1983 jurisdiction would force states to comply with federal mandates).

97. Hafer v. Melo, 502 U.S. 21, 31 (1991) (allowing a § 1983 suit seeking damages against a state official in her individual or personal capacity, even if she acted in her official capacity in committing the alleged violation).

98. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 712–13 (1999) (holding that the Eleventh Amendment's sovereign immunity principle prohibits suits against states in federal court); Will v. Mich. Dep't of State Police, 491 U.S. 58, 70–71 (1989) (holding that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not persons capable of being sued under § 1983 even if suit is brought in state court).

immunity[99] enjoyed by many state officials often limits the remedy to prospective injunctive or declaratory relief.[100] Despite its limitations, *Thiboutot* promised a new era in which individuals could enforce federal statutory rights against states through § 1983.[101] For judges concerned with protecting states' rights against what they perceived as intrusive federal suits, it became imperative to limit *Thiboutot*'s scope.[102] For the next twenty-two years, the Court's decisions have vacillated between broad and narrow readings of *Thiboutot*.

2. Pennhurst State School & Hospital v. Halderman.[103] In *Pennhurst*, the Supreme Court did not directly address § 1983 but limited the ability of beneficiaries of federal grant-in-aid programs to bring a private cause of action against states that had allegedly violated conditions in their grants. Justice—now Chief Justice—Rehnquist's majority opinion declared that federal agencies rather than federal courts have the primary role in enforcing conditions in federal grant-in-aid programs against states.[104] "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State."[105] The Court held that a private right of action must be based on "enforceable rights" and that

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99. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding that a state official enjoys qualified immunity unless the official's conduct violated a clearly established constitutional or legal standard); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504, 516 (10th Cir. 1998); Jensen v. City of Oxnard, 145 F.3d 1078, 1085 (9th Cir. 1998).

100. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 276–80 (1997) (stating that *Ex parte Young* remains available where the plaintiff seeks prospective relief for an ongoing violation of federal law); *id.* at 293–95 (O'Connor, J., concurring in part and concurring in the judgment) (same); *Ex parte* Young, 209 U.S. 123, 149–58 (1908) (holding that suits for injunctive relief against state officials are allowed even where the Eleventh Amendment bars suit for damages); Rounds v. Or. State Bd., 166 F.3d 1032, 1036 (9th Cir. 1999) (recognizing that the Eleventh Amendment did not bar students' claim for declaratory and injunctive relief against university officials sued in their official capacities); Mank, *Using § 1983*, *supra* note 11, at 336–38 (discussing the availability of damages, injunctive relief, and immunities under § 1983); Stephen R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court's "New" Federalism*, 29 ENVTL. L. REP. 10665, 10669 & nn.78–85 (1999) (recognizing that *Ex parte Young* suits prevent future violations of federal rights but do not redress past violations, for which damages typically would be the appropriate remedy).

101. Key, *supra* note 29, at 321–24.

102. *Id.* at 323–24.

103. 451 U.S. 1 (1981).

104. *Id.* at 27–28.

105. *Id.* at 28.

mere "precatory" language in a federal statute may not create a federal right of action.[106]

The primary question in *Pennhurst* was whether there is a private right of action under § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act[107] for disabled persons to sue states that allegedly fail to meet certain requirements for receiving grants in the statute.[108] Although the so-called patients' "bill of rights" in the statute says that states should provide appropriate treatment, services, or housing for the developmentally disabled, § 6010 does not explicitly mandate that states must achieve these goals to obtain federal funds, unlike other sections of the statute that contain detailed rules for receiving aid.[109] Justice Rehnquist argued that

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."[110]

Accordingly, for conditions in a grant-in-aid statute to be enforceable against a state, they must be sufficiently clear that one can assume the state voluntarily and knowingly accepted them.[111] Because § 6010 only suggests treatment standards rather than mandating detailed conditions, the Court determined that § 6010 did not create enforceable substantive rights, but that the patients' "bill of rights" constitutes mere precatory language suggesting what Congress hoped states would offer.[112] Thus, the Court concluded that there is no enforceable private cause of action under § 6010.[113]

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106. *Id.* at 15–22; *see also* Key, *supra* note 29, at 300–02; Mank, *Using § 1983*, *supra* note 11, at 331.

107. 42 U.S.C. §§ 6000–6081 (1976 & Supp. V 1981) (current version at 42 U.S.C. §§ 6000–6083 (2000)).

108. *Pennhurst*, 451 U.S. at 5; *see also* Key, *supra* note 29, at 300; Mank, *Using § 1983*, *supra* note 11, at 331.

109. 42 U.S.C. § 6010 (1976 & Supp. V 1981) (current version at 42 U.S.C. § 6009 (2000)); Courtney G. Joslin, *Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment*, 34 HARV. C.R.-C.L. L. REV. 201, 219–20 (1999); Key, *supra* note 29, at 300–01; Mank, *Using § 1983*, *supra* note 11, at 331.

110. *Pennhurst*, 451 U.S. at 17.

111. *Id.*; *see also* Key, *supra* note 29, at 301–02.

112. *Pennhurst*, 451 U.S. at 17–20; *see also* Joslin, *supra* note 109, at 220; Key, *supra* note 29, at 301–02; Mank, *Using § 1983*, *supra* note 11, at 331.

113. *Pennhurst*, 451 U.S. at 22–28; *see also* Joslin, *supra* note 109, at 220; Key, *supra* note 29, at 302; Mank, *Using § 1983*, *supra* note 11, at 331.

After holding there was no implied cause of action, the Court remanded the case to the U.S. Court of Appeals for the Third Circuit to decide the issue of whether certain other provisions in the statute were enforceable under § 1983.[114] In remanding the case, Justice Rehnquist observed that the law was unclear regarding whether a § 1983 suit must be grounded on specific statutory violations or could be based on the failure of a state to meet goals included in a state written plan required by the statute, even though these aspirations exceeded the statute's obligations.[115] Justice Rehnquist strongly implied that a § 1983 suit must be based on the violation of specific statutory rights.[116] His opinion made clear that a beneficiary may not use § 1983 to enforce conditions in a grant-in-aid statute against a state unless Congress "speak[s] with a clear voice" and manifests an "unambiguous" intent to create individually enforceable rights.[117]

However, other Justices disagreed with Justice Rehnquist's suggestion that the Third Circuit should limit any § 1983 suit to specific rights in the statute. In a concurring opinion, Justice Blackmun refused to join that portion of Justice Rehnquist's majority opinion because of its "negative attitude" toward the use of § 1983 to enforce the treatment goals in the statute.[118] Dissenting in part, Justice White contended that *Thiboutot* established a clear presumption in favor of allowing intended beneficiaries to enforce federal statutes through § 1983, even where a federal agency has the authority to terminate funding to a state for violations of significant conditions.[119] While not deciding the § 1983 issues on the merits, *Pennhurst* demonstrated strong disagreements within the Court about when beneficiaries of federal grant-in-aid programs may challenge alleged violations by a state through § 1983.

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114. *Pennhurst*, 451 U.S. at 27–30; *see also* Key, *supra* note 29, at 325; Mank, *Using § 1983*, *supra* note 11, at 331.

115. *Pennhurst*, 451 U.S. at 27–30; *see also* Key, *supra* note 29, at 325; Mank, *Using § 1983*, *supra* note 11, at 331–32.

116. *Pennhurst*, 451 U.S. at 28; *see also* Key, *supra* note 29, at 325; Mank, *Using § 1983*, *supra* note 11, at 332.

117. *Pennhurst*, 451 U.S. at 17, 28 & n.21; *see* Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2273, 2275 (2002) (interpreting *Pennhurst* to require clear and unambiguous evidence of congressional intent to confer individual rights before federal funding provisions may provide grounds for private suit under § 1983).

118. *Pennhurst*, 451 U.S. at 32–33 (Blackmun, J., concurring in part and concurring in the judgment); *see also* Key, *supra* note 29, at 326; Mank, *Using § 1983*, *supra* note 11, at 332.

119. *Pennhurst*, 451 U.S. at 49–52 (White, J., dissenting in part); *see also* Key, *supra* note 29, at 326; Mank, *Using § 1983*, *supra* note 11, at 332.

C. *The Standard for § 1983 Suits*

1. The Three-Part Test for Which Rights Are Enforceable. Following *Pennhurst*, the Supreme Court has sought to explain which types of federal rights are enforceable under § 1983, and under what circumstances. In its 1989 decision *Golden State Transit Corp. v. City of Los Angeles*,[120] the Court restricted § 1983 suits to the enforcement of specific "federal right[s]" that are intended for the benefit of a class including the plaintiff and that are capable of judicial enforcement.[121] Conversely, the Court has stated that § 1983 may not be used to enforce vaguer benefits or interests emanating from mere precatory statements in a federal statute.[122] Thus, the Court mandated that a complaint under § 1983 assert the "violation of a federal *right*, not merely a violation of federal *law*."[123] Additionally, the plaintiff must demonstrate that Congress intended the statute at issue to benefit a class including the plaintiff.[124] To determine whether a federal statute establishes a federal right that is enforceable by a plaintiff through § 1983, the Supreme Court in its 1997 *Blessing v. Freestone* decision refined a three-part test it had first used in *Golden State*:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[125]

If a federal statutory right meets the *Blessing/Golden State* three-part test, there is a strong presumption that a plaintiff may use § 1983 to enforce that right.[126]

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120. 493 U.S. 103 (1989).

121. *Id.* at 106–07; *see also* Mank, *Using § 1983*, *supra* note 11, at 332; Pettys, *supra* note 55, at 68.

122. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990); *see also* Mank, *Using § 1983*, *supra* note 11, at 332 & n.81; Pettys, *supra* note 55, at 68–69.

123. Blessing v. Freestone, 520 U.S. 329, 340 (1997) (citing *Golden State*, 493 U.S. at 106); *see also* Mank, *Using § 1983*, *supra* note 11, at 332.

124. *Golden State*, 493 U.S. at 106; *see also* Mank, *Using § 1983*, *supra* note 11, at 332 & n.82, 333; Mazzuchi, *supra* note 31, at 1095.

125. *Blessing*, 520 U.S. at 340–41 (citations omitted); *see also* Mank, *Using § 1983*, *supra* note 11, at 332–33 (summarizing the Court's three-part test for § 1983 rights).

126. *Blessing*, 520 U.S. at 341, 346–47; *Wilder*, 496 U.S. at 520 ("[Courts] do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the

2. Exceptions to the Enforceability of § 1983. However, there are limited exceptions to the general presumption of enforceability of federal rights through § 1983. In 1981, the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*[127] held that a defendant may show Congress specifically "foreclosed a § 1983 remedy," either expressly or impliedly, by providing a "comprehensive enforcement mechanism[]" for protection of a federal right.[128]

> [The *Sea Clammers*] Court determined that a § 1983 suit was [inappropriate] because the two federal environmental statutes at issue, the Federal Water Pollution Control Act[, 33 U.S.C. §§ 1251–1387 (2000),] and the Marine Protection, Research, and Sanctuaries Act, [33 U.S.C. §§ 1401–1445,] contained 'unusually elaborate' enforcement mechanisms that authorized private citizens to bring injunctive actions after giving sixty days' notice to the [U.S.] Environmental Protection Agency, the state, and the alleged violator.[129]

The *Sea Clammers* Court assumed Congress intended to preclude § 1983 suits where a remedial statute provides broad remedies because a § 1983 suit would allow plaintiffs to circumvent those remedies.[130] However, there is a heavy burden on the defendant to prove that a statute's enforcement scheme is so comprehensive that a court must presume Congress could not have intended to allow a separate remedy through a § 1983 suit.[131] In *Livadas v. Bradshaw*, the Court explained that "apart from [some]

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deprivation of a federally secured right." (quotation marks omitted)); *see also* Mank, *Using § 1983*, *supra* note 11, at 333 & n.87.

127. 453 U.S. 1 (1981).

128. *Id.* at 19–20; *Golden State*, 493 U.S. at 106 (discussing *Sea Clammers* and its test for preclusion of § 1983 suits); Mank, *Using § 1983*, *supra* note 11, at 334–36 (same).

129. Mank, *Using § 1983*, *supra* note 11, at 335 & n.104 (quoting *Sea Clammers*, 453 U.S. at 13, 20; citing Lisa L. Frye, Note, Suter v. Artist M. *and Statutory Remedies Under Section 1983: Alteration Without Justification*, 71 N.C. L. REV. 1171, 1181–82 (1993); Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1468 (1998)).

130. *Sea Clammers*, 453 U.S. at 20–21; Mank, *Using § 1983*, *supra* note 11, at 335 & n.105 (citing Frye, *supra* note 129, at 1181–82; Zwibelman, *supra* note 129, at 1468). The *Sea Clammers* exception to § 1983 suits addresses only statutory claims. In *Smith v. Robinson*, the Court applied a somewhat different analysis in deciding whether a plaintiff may bring a constitutional claim under § 1983. 468 U.S. 992, 1008–09 (1984) (stating that a statutory remedy precludes a constitutional claim under § 1983 if that claim is virtually identical to the statutory claims and if Congress intends such a result); Mank, *Using § 1983*, *supra* note 11, at 335 & n.106 (citing *Robinson*; Zwibelman, *supra* note 129, at 1469–70).

131. Mank, *Using § 1983*, *supra* note 11, at 334–35.

exceptional cases, § 1983 remains a generally and presumptively available remedy for claimed violations of federal law."[132]

In analyzing whether a statute's remedial scheme is incompatible with a separate § 1983 claim, the Supreme Court has placed the burden on the defendant, who normally is a recipient of federal aid, to show that a statute's express remedies conflict with those available under a § 1983 suit.[133]

> In *Wright v. City of Roanoke Redevelopment & Housing Authority*, [479 U.S. 418 (1987),] the Court stated that § 1983 normally established a remedial cause of action for violation of federal statutory rights "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." In *Wilder v. Virginia Hospital Ass'n*, [496 U.S. 498 (1990),] the Court declared that it would "recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy." Thus, the Supreme Court has created a strong presumption in favor of [using] § 1983 . . . [to enforce] statutory [rights] unless the statute explicitly forecloses § 1983 claims or contains a comprehensive remedial scheme that is incompatible with separate [remedies] under § 1983.[134]

D. Section 1983 Allows Enforcement of Rights Even if There Is No Private Right of Action

In 1990, the Supreme Court in its five-to-four *Wilder* decision[135] concluded that § 1983 may be used to enforce federal statutory rights—even if Congress did not create a remedy for the statute and the plaintiff could not file an implied right of action under the statute.[136] The Boren Amendment to the Medicaid statute[137] requires each participating state to submit a plan regarding how the state will determine reasonable and adequate rates for payment of health care providers.[138] The Secretary of Health and Human Services (HHS) has authority to

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132. 512 U.S. 107, 133 (1994); *see also* Mank, *Using § 1983*, *supra* note 11, at 334.

133. Mank, *Using § 1983*, *supra* note 11, at 335 & n.107 (citing Frye, *supra* note 129, at 1187–88; Zwibelman, *supra* note 129, at 1475–76).

134. Mank, *Using § 1983*, *supra* note 11, at 335–37 (footnotes omitted).

135. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990).

136. *Id.* at 508; Mank, *Using § 1983*, *supra* note 11, at 357.

137. Social Security Act, Medicaid, Grants to States for Medical Assistance, 42 U.S.C. §§ 1396–1396v (2000).

138. *Id.* § 1396a(a)(13)(A); *Wilder*, 496 U.S. at 502; Key, *supra* note 29, at 334.

withhold funding if a state fails to comply substantially with any required provision of the statute, including the creation of a reasonable reimbursement scheme.[139] The Secretary approved Virginia's scheme for determining rates, but the plaintiff, a non-profit organization representing both public and private hospitals in Virginia, sued on the grounds that the reimbursement rates were not reasonable.[140] The primary question was whether the Boren Amendment merely established a limited procedural duty that a state submit a plan to the federal government, or created a substantive right enforceable under § 1983 on behalf of health care providers that the State actually provide reasonable and adequate reimbursement to them.[141]

In his majority opinion, Justice Brennan explicitly recognized that there is a "different inquiry" regarding whether a suit may be filed under § 1983 than if the same underlying statute allows a private cause of action.[142] Justice Brennan noted that in implied right of action cases, courts use "the four-factor *Cort* test to determine 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights."[143] Citing Justice Powell's dissenting opinion in *Cannon v. University of Chicago*, Justice Brennan explained that "[t]he [*Cort*] test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes."[144] By contrast, "[b]ecause § 1983 provides an 'alternative source of *express* congressional authorization of private suits,'"[145] the *Wilder* Court concluded "these separation-of-powers concerns are not present in a § 1983 case."[146] Accordingly, the *Wilder* Court determined that a different standard applies for § 1983 actions than for implied rights of action because separation-of-powers concerns are not present in a § 1983 case.[147] Because § 1983 itself supplies the remedy, courts "recognize an exception to the general rule that

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139. 42 U.S.C. § 1396c; Key, *supra* note 29, at 334.

140. *Wilder*, 496 U.S. at 503–04.

141. *Id.* at 509–10; Key, *supra* note 29, at 334–38.

142. *Wilder*, 496 U.S. at 508 n.9; Mank, *Using § 1983*, *supra* note 11, at 357 & n.274.

143. *Wilder*, 496 U.S. at 508 n.9 (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575–76 (1979)).

144. *Id.* (citing Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in judgment); Cannon v. Univ. of Chi., 441 U.S. 677, 742–49 (1979) (Powell, J., dissenting)).

145. *Id.* (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981)).

146. *Id.*

147. *Id.*

§ 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy."[148]

The *Wilder* Court acknowledged that only federal rights are enforceable under § 1983, and not just any federal law.[149] In determining whether the Boren Amendment to the federal Medicaid statute gave health care providers a right to reasonable reimbursement, the *Wilder* Court examined the three-part test the Court had used in *Golden State* for whether a federal statute creates an enforceable right under § 1983: first, is the plaintiff an intended beneficiary of the statute; second, does the statute establish a binding obligation rather than a mere "congressional preference"; and third, is the statute not too ambiguous or vague to be enforced by the judiciary.[150] The *Wilder* Court "conclude[d] that the Boren Amendment impose[d] a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and that this obligation is enforceable under § 1983 by health care providers."[151] The majority relied heavily on the Boren Amendment's legislative history in determining that the statute imposed a binding substantive duty on participating states to develop reasonable and fair reimbursement rates.[152] Additionally, the majority determined that the requirement in the statute that participating states provide postpayment state administrative appeal remedies to health care providers to allow them to challenge allegedly inadequate reimbursement rates was not "sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983" because health care providers had limited rights of appeal, and the Secretary only had a limited role in reviewing rates.[153]

In dissent, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Kennedy, argued that the standard for implied rights of action was still relevant because Congress must intend to establish a statutory right on behalf of the plaintiffs in order for it to be enforceable under § 1983.[154] Chief Justice Rehnquist argued,

> while the Court's holding in *Thiboutot* rendered obsolete some of the case law pertaining to implied rights of action,

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148. *Id.* (citing Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 106–07 (1989); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423–24 (1987)).

149. *Id.* at 509 (citing *Golden State*, 493 U.S. at 106).

150. *Id.*; Frye, *supra* note 129, at 1186 (summarizing the *Wilder* Court's examination of the three-part test).

151. *Wilder*, 496 U.S. at 512.

152. *See id.* at 515 & n.13.

153. *Id.* at 522 (discussing 42 U.S.C. § 1396a(a)(37) (1982)).

154. *Id.* at 524–26 (Rehnquist, C.J., dissenting).

> a significant area of overlap remained. For relief to be had either under § 1983 or by implication under *Cort v. Ash* . . . the language used by Congress must confer identifiable enforceable rights.[155]

He did acknowledge, however, that § 1983 suits could be used to enforce identifiable statutory rights that lacked a statutory remedy and could not be enforced as a private right of action.[156] In determining whether a statute conferred enforceable rights, he contended that courts should follow "the traditional rule that the first step in our exposition of a statute always is to look to the statute's text and to stop there if the text fully reveals its meaning."[157] Focusing on the text of the Boren Amendment, he argued that "the text does not clearly confer any substantive rights on Medicaid services providers."[158] Accordingly, he contended that no right existed that could be enforced under § 1983.[159] Chief Justice Rehnquist's textualist approach to determining statutory rights in his *Wilder* dissent foreshadowed his methodology in the *Gonzaga* majority opinion.

Wilder established a broad standard for enforcing statutory rights under § 1983. Because of § 1983's general presumption in favor of enforcing mandatory and definite federal statutory rights on behalf of their intended beneficiaries, a plaintiff is not required to prove that Congress intended the statutory right be enforceable under § 1983.[160] Thus, while plaintiffs in a private right of action case have the burden of demonstrating that Congress intended a private cause of action under the Supreme Court's present reading of *Cort*'s four-part test,[161] there is a presumption that a plaintiff may file a § 1983 suit if the plaintiff can establish that it is the intended beneficiary of a definite federal right.[162] To meet the three-part *Blessing/Golden State*

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155. *Id.* at 526 (Rehnquist, C.J., dissenting); Key, *supra* note 29, at 335–36 (discussing Chief Justice Rehnquist's dissenting opinion in *Wilder*).

156. *Wilder*, 496 U.S. at 525–26 (Rehnquist, C.J., dissenting) (stating that § "1983 generally . . . supplies the remedy for the vindication of rights arising from federal statutes"); Mank, *Using § 1983*, *supra* note 11, at 359.

157. *Wilder*, 496 U.S. at 526 (Rehnquist, C.J., dissenting) (citing Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)).

158. *Id.* at 527–28 (Rehnquist, C.J., dissenting); Key, *supra* note 29, at 336 (discussing Chief Justice Rehnquist's dissenting opinion in *Wilder*).

159. *Wilder*, 496 U.S. at 527–28 (Rehnquist, C.J., dissenting); Key, *supra* note 29, at 336 (discussing Chief Justice Rehnquist's dissenting opinion in *Wilder*).

160. Key, *supra* note 29, at 332–33; Mank, *Using § 1983*, *supra* note 11, at 357–59.

161. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also* Mank, *Using § 1983*, *supra* note 11, at 354–55 (summarizing *Cort*'s four-part test).

162. Key, *supra* note 29, at 332–33; Mank, *Using § 1983*, *supra* note 11, at 357–59.

standard[163] for ascertaining whether a federal right is enforceable under § 1983, a plaintiff must establish that the right is sufficiently definite to be capable of judicial enforcement, and that Congress intended to benefit a class that includes the plaintiff.[164] If a statute creates a federal right, there is a strong presumption that the right is enforceable under § 1983 unless the statute explicitly forbids alternative remedies such as § 1983, or a § 1983 suit would conflict with the remedial scheme in the statute.[165] Accordingly, courts have recognized a § 1983 cause of action even while refusing to infer a private right of action under the same statutory provision.[166] Because Congress has explicitly authorized § 1983 suits to enforce federal statutory rights, it is appropriate to use § 1983 to enforce federal rights that may not be enforced through a private right of action.[167]

E. Suter v. Artist M.*: An Implicit Attack on the Presumptive Enforcement of § 1983?*

By 1992, just two years after *Wilder*, Justices Brennan and Marshall, who were in the majority in *Wilder*, had retired and had been replaced by Justices Souter and Thomas. The change in

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163. Blessing v. Freestone, 520 U.S. 329, 340–41 (1997); Mank, *Using § 1983*, *supra* note 11, at 332. Refer to notes 121–26 *supra* and accompanying text.

164. Key, *supra* note 29, at 332–33; Mank, *Using § 1983*, *supra* note 11, at 357–59.

165. Key, *supra* note 29, at 332–33; Mank, *Using § 1983*, *supra* note 11, at 357–59. Refer to notes 128–37 *supra* and accompanying text.

166. *See* Mallett v. Wis. Div. of Vocational Rehab., 130 F.3d 1245, 1256–57 (7th Cir. 1997) (concluding that a plaintiff could bring a § 1983 claim based on the Rehabilitation Act because it created an enforceable right and did not preclude such relief, and also concluding that there was no private right of action under the statute because its language and legislative history suggested that the statute's administrative remedy was a more appropriate enforcement mechanism); Chan v. City of N.Y., 1 F.3d 96, 102–04 (2d Cir. 1993) (determining under the *Cort* test that § 5310 of the Housing and Community Development Act, 42 U.S.C. §§ 5301–5321, did not create an implied private right of action, but concluding that the statute created substantive rights which could be enforced through a § 1983 action under the *Blessing/Wilder* test); Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986) (finding no private right of action under FERPA, 20 U.S.C. § 1232g, but concluding that plaintiffs could sue under § 1983 to enforce FERPA rights); Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1470–71 (9th Cir. 1984) (stating that plaintiffs could bring § 1983 action because the relevant statute established a right for the benefit of Hawaiians such as plaintiffs and did not preclude § 1983 remedy, but determining that no private right of action existed under the statute); Mank, *Using § 1983*, *supra* note 11, at 357–59; Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 246–47 (1991). *But see* Mazzuchi, *supra* note 31, at 1064, 1093 (arguing that enforcement of statutory rights by § 1983 should be restricted in future to cases in which rights could be enforced through an implied or explicit private right of action, but conceding that many cases have applied a more lenient standard in § 1983 suits).

167. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990) (observing that whether a § 1983 suit is available presents a "different inquiry" than whether an implied right of action exists); Mank, *Using § 1983*, *supra* note 11, at 357–59.

the Court's membership arguably was responsible for the different result in its next major § 1983 decision.[168] Chief Justice Rehnquist wrote the majority opinion in *Suter v. Artist M.*,[169] which held that § 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 (the "Adoption Act") "neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf."[170] The Adoption Act provided funds to states to offset expenses involved with providing foster care and adoption services, but required participating states to issue a plan insuring "'reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.'"[171] The Secretary of HHS was required to approve the plan and could terminate funding if the state failed to substantially comply with the provisions of its approved plan.[172] The issue before the Court was whether states had a duty to use reasonable efforts to avoid removal of the child from the parent, or promote reunification with the parents, that was enforceable by parents through an action under § 1983.[173]

While not overruling *Wilder* and attempting to distinguish that case, Chief Justice Rehnquist's majority opinion in *Suter* took a far narrower approach in determining which types of rights are enforceable under § 1983.[174] In determining whether the Adoption Act established enforceable rights under § 1983, *Suter* framed the issue this way: "Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family?"[175] The majority determined that the statutory term "reasonable efforts" was relatively vague, and that the HHS regulations did not sufficiently clarify the provision to make it

168. Key, *supra* note 29, at 338–39.

169. 503 U.S. 347, 350 (1992).

170. *Id.* at 364; *see also* 42 U.S.C. § 671(a)(15) (2000).

171. *Suter*, 503 U.S. at 351 (quoting 42 U.S.C. § 671(a)(15)(B)(i)–(ii) (1988 & Supp. I)).

172. *Id.* at 360, 369 (quoting 42 U.S.C. § 671(b)); *see also* Key, *supra* note 29, at 339 (summarizing § 671(a)–(b) as considered in *Suter*).

173. *Suter*, 503 U.S. at 354, 357; Key, *supra* note 29, at 339 (summarizing the *Suter* case).

174. Key, *supra* note 29, at 339–40.

175. *Suter*, 503 U.S. at 357; *see also* Mank, *Using § 1983*, *supra* note 11, at 333 (analyzing the *Suter* case).

enforceable on behalf of parents.[176] "To the extent [legislative] history may be relevant," the Court decided it suggested Congress wanted states to make "reasonable efforts," but also "left a great deal of discretion" to states, which undermined the respondents' argument that the reasonable efforts language imposed definite rights.[177] Chief Justice Rehnquist concluded that the HHS "regulations are not specific and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government."[178] In other words, the HHS regulations simply required that a state meet the procedural requirement of having its plan approved by the Secretary to receive funding, but did not give the states adequate notice that conditions set forth in the plan, such as the "reasonable efforts" condition, would create substantive duties enforceable by individuals.[179]

The Court required the plaintiffs to show not just that the "reasonable efforts" language itself is clear, but that Congress intended that the language confer enforceable benefits on the plaintiffs.[180] The Court stated:

> Careful examination of the language relied upon by respondents, in the context of the entire [Adoption] Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.[181]

By requiring unambiguous evidence that Congress conferred a right on the plaintiffs and not just a generalized duty on the state, Chief Justice Rehnquist implicitly placed a burden of proof on the plaintiffs that was similar to their burden of proof to show that Congress intended to create an implied right of action.[182] In *Suter*, Chief Justice Rehnquist blurred the line between § 1983 suits and implied rights of action and laid the foundation for his later *Gonzaga* opinion.

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176. *Suter*, 503 U.S. at 359–62.

177. *Id.* at 362 & n.15.

178. *Id.* at 362.

179. *Id.* at 362–63. *But cf.* Key, *supra* note 29, at 340–45 (critiquing the *Suter* Court's rationale).

180. *Suter*, 503 U.S. at 363–64.

181. *Suter*, 503 U.S. at 363; *see also* Key, *supra* note 29, at 343–45 (examining the *Suter* opinion).

182. *See Suter*, 503 U.S. at 363–64; Key, *supra* note 29, at 343–45.

In his dissenting opinion, Justice Blackmun argued that the "reasonable efforts" issue in *Suter* was "functionally identical" to the question decided in *Wilder*.[183] He contended that the majority's opinion was "plainly inconsistent" with *Wilder*.[184]

> Justice Blackmun criticized the majority for failing even to mention the three-part [*Golden State*] test for determining whether a federal statute creates an enforceable right under § 1983 and for shifting the burden onto the plaintiffs to prove that Congress had [intended to] confer[] on them the right to enforce the statute under § 1983.[185]

Before *Gonzaga*, some commentators argued that the *Suter* decision was limited to its peculiar facts and did not fundamentally narrow the liberal standard for enforcing § 1983 in *Wright*, *Golden State*, and *Wilder*.[186] Initially, *Suter* had little impact. The Supreme Court in *Blessing* endorsed and slightly refined *Golden State*'s three-part test rather than using *Suter*'s approach,[187] and most lower courts continued to apply the three-part standard.[188] After *Gonzaga*, *Suter*'s restrictive approach to § 1983 now appears to be the model rather than the liberal standard presented in the *Wright*, *Wilder*, *Blessing*, and *Golden State* line of cases.

IV. *GONZAGA UNIVERSITY V. DOE*

A. *Chief Justice Rehnquist Narrows § 1983 by Following* Suter *and* Pennhurst

In *Gonzaga University v. Doe*, Chief Justice Rehnquist stated that the Court had granted certiorari in the case both because of a split in the circuits regarding whether FERPA is

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183. *Suter*, 503 U.S. at 365 (Blackmun, J., dissenting); *see also* Key, *supra* note 29, at 339–40 (examining this statement from Justice Blackmun's dissent in *Suter*).

184. *Suter*, 503 U.S. at 365 (Blackmun, J., dissenting).

185. Mank, *Using § 1983*, *supra* note 11, at 333 & n.92 (citing *Suter*, 503 U.S. at 364–77 (Blackmun, J., dissenting); Frye, *supra* note 129, at 1179–80, 1201–05 (arguing that *Suter* confused lower courts as to whether the three-part test under § 1983 still applied)).

186. *E.g.*, Albiston v. Me. Comm'r of Human Servs., 7 F.3d 258, 263 n.9 (1st Cir. 1993) (stating that *Suter* did not overrule *Wilder* or *Wright*); Joslin, *supra* note 109, at 222 & n.173; Mank, *Using § 1983*, *supra* note 11, at 333–34; Pettys, *supra* note 55, at 69 n.112; Frye, *supra* note 129, at 1194–97.

187. Blessing v. Freestone, 520 U.S. 329, 339–40 (1997); Mank, *Using § 1983*, *supra* note 11, at 334.

188. *E.g.*, Harris v. James, 127 F.3d 993, 1004 (11th Cir. 1997); Buckley v. City of Redding, 66 F.3d 188, 190–91 (9th Cir. 1995); Wood v. Tompkins, 33 F.3d 600, 606 (6th Cir. 1994); Miller v. Whitburn, 10 F.3d 1315, 1319 (7th Cir. 1993); Joslin, *supra* note 109, at 222 & n.173; Mank, *Using § 1983*, *supra* note 11, at 334 n.94 (citing cases and Pettys, *supra* note 55, at 69 n.112).

enforceable under § 1983 and, more generally, because it recognized that its decisions regarding when federal statutes are enforceable under § 1983 are not "models of clarity."[189] In addressing the broader question of when federal statutes are enforceable, Chief Justice Rehnquist not surprisingly emphasized his restrictive analysis in *Pennhurst* and *Suter*.[190] He observed that in *Pennhurst*: "We made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983."[191] Treating *Pennhurst* as a defining case, he noted that *Wright* and *Wilder* were the only two subsequent cases in which the Court had found that spending legislation establishes rights enforceable through § 1983.[192] He interpreted *Wright* and *Wilder* as cases in which Congress had clearly conferred specific monetary entitlements on behalf of beneficiaries including the plaintiffs, suggesting that these two cases were relatively easy cases for finding rights enforceable through § 1983.[193] What he did not mention was that both *Wright* and *Wilder* were five-to-four decisions in which he had dissented. Justices O'Connor and Scalia also had dissented in both cases;[194] Justice Kennedy had dissented in *Wilder*, but was not on the Court when *Wright* was decided.[195] Chief Justice Rehnquist's *Gonzaga* opinion glossed over the difficulties the Court had in deciding both *Wright* and *Wilder* when he tried to show that the Court had always followed the "clear" and "unambiguous" test regarding congressional intent used in *Pennhurst*.[196]

Additionally, Chief Justice Rehnquist emphasized that since *Wilder*, the Court had "rejected attempts to infer enforceable rights from Spending Clause statutes."[197] He observed that his majority opinion in *Suter* read the statute at issue "'in the light shed by *Pennhurst*'"[198] and found that the statute did not confer

189. 122 S. Ct. 2268, 2272 (2002).

190. *Id.* at 2273–74.

191. *Id.* at 2273 (quoting and citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 28 & n.21 (1981)).

192. *Id.* at 2273–74 (citing Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987)).

193. *Id.*

194. *See Wilder*, 496 U.S. at 524 (indicating that Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy dissented); *Wright*, 479 U.S. at 419 (indicating that Chief Justice Rehnquist and Justices O'Connor, Scalia, and Powell dissented).

195. *See Wright*, 479 U.S. at 419.

196. *Gonzaga*, 122 S. Ct. at 2273–74.

197. *Id.* at 2274.

198. *Id.* (quoting Suter v. Artist M., 503 U.S. 347, 358 (1992)).

"specific, individually enforceable rights."[199] Likewise, Chief Justice Rehnquist observed that in *Blessing v. Freestone*[200] the Court had found that the statute did not establish individual rights, but merely required the federal agency to determine if a state's child-welfare agencies met certain requirements in the aggregate.[201]

Next, Chief Justice Rehnquist addressed the respondent's argument that the Court's § 1983 cases, especially *Blessing* and *Wright*, "establish a relatively loose standard for finding rights enforceable by § 1983" and that courts should find an enforceable right "so long as Congress intended that the statute 'benefit' putative plaintiffs."[202] Furthermore, the respondent contended that "a more 'rigorous' inquiry would conflate the standard for inferring a private right of action under § 1983 with the standard for inferring a private right of action directly from the statute itself, which he admits would not exist under FERPA."[203] The respondent pointed to language in both *Blessing* and *Wright* that an enforceable right exists under § 1983 when Congress intends a statutory provision to "benefit" the plaintiff.[204]

In response to the respondent's arguments, Chief Justice Rehnquist acknowledged that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983."[205] For example, despite *Blessing*'s emphasis that only violations of "*rights*, not *laws*,"[206] may establish a § 1983 action, he admitted that some courts have interpreted *Blessing*'s three-part test

> as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action.[207]

Furthermore, he conceded that *Wilder* supported the view of some that "our implied private right of action cases have no bearing on the standards for discerning whether a statute creates

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199. *Id.*

200. 520 U.S. 329 (1997).

201. *Gonzaga*, 122 S. Ct. at 2274 (quoting *Blessing*, 520 U.S. at 343).

202. *Id.* (citing Brief for Respondent at 40–46).

203. *Id.* (citing Brief for Respondent at 41–43).

204. *Id.* at 2274–75 (citing *Blessing*, 520 U.S. at 340–41; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990)).

205. *Id.* at 2275.

206. *Id.* (citing *Blessing*, 520 U.S. at 340).

207. *Id.*

rights enforceable by § 1983," although he maintained that *Suter* and *Pennhurst* suggested that this notion was wrong.[208]

In *Gonzaga*, Chief Justice Rehnquist firmly endorsed the restrictive approach to § 1983 rights in *Suter* and *Pennhurst* and rejected any contrary views expressed in *Wilder*.[209] "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[210] He emphasized that § 1983 may enforce only statutory "*rights*, [and] not the broader or vaguer 'benefits' or 'interests.'"[211]

Furthermore, Chief Justice Rehnquist significantly changed the test for which rights are enforceable under § 1983 by emphasizing that the same issue of congressional intent controls as in implied right of action cases. "[W]e further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."[212] Chief Justice Rehnquist acknowledged that *Wilder* had stated "whether a statutory violation may be enforced through § 1983 'is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.'"[213] However, he maintained that "the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*."[214]

The difference between a private right of action and an individual right enforceable through § 1983 is that the former also requires "an intent 'to create not just a private *right* but also a private *remedy*.'"[215] Accordingly, Chief Justice Rehnquist noted:

> Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. Once a plaintiff

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208. *Id.* (citing *Wilder*, 496 U.S. at 508 & n.9, 509; Suter v. Artist M., 503 U.S. 347, 363–64 (1992); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 & n.21 (1981)).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (quoting *Wilder*, 496 U.S. at 508 n.9).

214. *Id.*

215. *Id.* at 2275–76 (alterations in original) (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

> demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.[216]

However, Chief Justice Rehnquist maintained that "the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons.'"[217] Thus, he concluded:

> A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.[218]

Chief Justice Rehnquist responded to Justice Stevens's dissenting argument that a different standard should apply in § 1983 cases than in implied right of action cases because separation-of-power concerns are greater in the latter context than in the former:[219]

> [W]e fail to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not. Nor are separation-of-powers concerns within the Federal Government the only guideposts in this sort of analysis.[220]

Instead, the Court cited *Pennhurst* and subsequent cases in which it had declared that Congress must state its intention clearly in the language of the statute if it wishes to alter the balance of power between the states and the federal government.[221] In a footnote, the Court observed that Justice Stevens's assumption that Congress intended to provide millions of students the right to sue despite the absence of any explicit

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216. *Id.* at 2276 (citation omitted).

217. *Id.* (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

218. *Id.* (citations omitted).

219. *Id.* at 2277 (summarizing Justice Stevens's argument); *see also id.* at 2284 (Stevens, J., dissenting).

220. *Id.*

221. *Id.* The Court quoted *Will v. Michigan Department of State Police*: "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute' (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984))." *Id.* (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (alteration in original) (parallel citations omitted)).

evidence in the text was unconvincing because such a policy would be contrary to "a tradition of deference to state and local school officials."[222] However, even if he is correct that Congress did not intend to give millions of students the right to sue under FERPA, Chief Justice Rehnquist failed to respond to the argument in Justice Stevens's dissent that this observation really raised the issue of whether Congress intended to create a cause of action under the statute, which is only supposed to be an issue in implied action cases and not under § 1983.[223]

Having adopted a restrictive test for whether federal statutes are enforceable through § 1983, the *Gonzaga* Court easily found that FERPA did not establish individual rights on behalf of the plaintiffs, but that the statute only created aggregate duties that educational institutions owed to the Secretary of Education.[224] The majority concluded that FERPA's nondisclosure provisions, which prohibit the Secretary of Education from funding "'any educational agency or institution which has a *policy or practice* of permitting the release of education records,'"[225] address only "institutional policy and practice, not individual instances of disclosure."[226] Similar to its analysis in *Blessing*, the Court concluded that the statute in question did not establish individual rights, but only aggregate ones, because recipient institutions are only required to be in substantial compliance with federal regulations.[227] According to the majority, any references in FERPA to individual consent were "'policy or practice'" measures for determining aggregate compliance by the institution and whether the federal government should terminate funding, rather than evidence of congressional intent to establish individual rights.[228]

Furthermore, unlike *Wright* or *Wilder*, where one could not file an individual written complaint for review, FERPA required the Secretary of Education to establish a review board (the Family Policy Compliance Office) to redress complaints, and the

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222. *Id.* at 2277 n.5.

223. Refer to notes 282–90 *infra* and accompanying text (illustrating the distinction between an implied right of action inquiry and the presumptive enforceability of individual rights in § 1983 cases).

224. *Gonzaga*, 122 S. Ct. at 2277–78.

225. *Id.* at 2278 (alteration in original) (quoting FERPA, 20 U.S.C. § 1232g(b)(1)–(2)).

226. *Id.*

227. *Id.* (citing FERPA, 20 U.S.C. § 1234c(a) (stating that educational institutions can avoid termination of funding if they "'comply substantially' with [FERPA's] requirements"), and Blessing v. Freestone, 520 U.S. 329, 335, 343 (1997) (concluding that Title IV-D did not establish individual rights because recipients need only achieve "'substantial compliance' with federal regulations")).

228. *Id.*

Court interpreted the statute's creation of this review board as evidence that Congress did not intend to establish individually enforceable rights.[229] Additionally, the Court concluded that Congress's prohibition against regional offices' review of complaints was significant in showing that there was no congressional intent to allow individual suits.[230] While the Court's opinion generally addressed only the text of FERPA, Chief Justice Rehnquist quoted a joint statement in the congressional record that explained that Congress had centralized review in the Secretary to avoid "multiple interpretations" of FERPA.[231] The Court concluded that it was "implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid."[232]

The majority concluded that rights are enforceable through § 1983 only if there is "clear" and "unambiguous" evidence that Congress intended to establish an individual right.[233] The standard for enforcing rights under § 1983 was "no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."[234] Because FERPA's nondisclosure provisions had an aggregate focus on the behavior of educational institutions and the Secretary of Education, the Court held that the statute did not create rights enforceable through § 1983.[235] Accordingly, it reversed the judgment of the Supreme Court of Washington, which had erroneously found that the statute created rights enforceable by § 1983.[236]

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229. *Id.* at 2278–79. Because it concluded that FERPA did not establish enforceable rights, the Court did not address "whether FERPA's [review] procedures are 'sufficiently comprehensive' to offer an independent basis for precluding private enforcement." *Id.* at 2279 n.8 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981)).

230. *Id.* at 2279 (citing FERPA, 20 U.S.C. § 1232g(g)).

231. *Id.* (quoting 120 CONG. REC. 39,863 (1974) (joint statement) (expressing "'concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions'").

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

B. *Justice Breyer's Concurrence in the Judgment Questions the Majority's Textualism*

Concurring in the judgment of the Court, Justice Breyer, with whom Justice Souter joined, agreed with the majority that the "ultimate question" regarding whether private individuals may enforce a federal statute through § 1983 is "a question of congressional intent."[237] Citing *Blessing*, *Suter*, *Wilder*, and *Wright*, Justice Breyer offered his opinion that "the factors set forth in this Court's § 1983 cases are helpful indications of that intent."[238] He argued, however, that "the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance."[239] He disagreed with the Court's attempt to "pre-determine" the evaluation of congressional intent regarding a specific statute through "the majority's presumption that a right is conferred only if set forth 'unambiguously' in the statute's 'text and structure.'"[240]

Justice Breyer agreed with the majority that Congress did not intend private judicial enforcement of FERPA's nondisclosure procedures.[241] He concurred with the Court's analysis that the statute has an institutional focus, and that the relevant statutory provision does not refer to individual rights.[242] He was likewise in accord with the Court's determination that the statute's centralized administrative enforcement procedures suggest that Congress did not intend to allow private federal suits.[243]

Additionally, he argued that the statute's "broad and nonspecific" language left schools uncertain about their duties.[244] He thought it unlikely that Congress intended to subject schools to suits over the statute's broad and uncertain terms.[245] In light of FERPA's open-ended language, he thought it likely that Congress intended to give the Department of Education exclusive jurisdiction to interpret the statute's terms in order to provide consistent guidance and to avoid inconsistent interpretations that might arise in private suits for damages.[246]

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237. *Id.* at 2279 (Breyer, J., concurring in the judgment).
238. *Id.* (Breyer, J., concurring in the judgment).
239. *Id.* (Breyer, J., concurring in the judgment).
240. *Id.* (Breyer, J., concurring in the judgment) (quoting *id.* at 2273, 2278).
241. *Id.* at 2279–80 (Breyer, J., concurring in the judgment).
242. *Id.* at 2280 (Breyer, J., concurring in the judgment).
243. *Id.* (Breyer, J., concurring in the judgment).
244. *Id.* (Breyer, J., concurring in the judgment).
245. *Id.* at 2279–80 (Breyer, J., concurring in the judgment).
246. *Id.* at 2280 (Breyer, J., concurring in the judgment).

C. *Justice Stevens's Dissent Defends the Presumption that Federal Rights Are Enforceable Through § 1983*

In his dissenting opinion, Justice Stevens, joined by Justice Ginsburg, attacked both the majority's conclusion that FERPA did not establish individual rights and its broader methodology for determining whether Congress intended to establish individual rights enforceable under § 1983.[247] In Part I of his dissent, Justice Stevens contended that the majority should have considered the context of the entire FERPA statute, which includes ten subsections, rather than just a single provision, in determining whether its purpose was to establish an individual right.[248] He argued that FERPA's provisions for both parental rights of access to student records and student rights of privacy in such records did establish individual rights for both students and parents enforceable through § 1983.[249] While conceding that the specific statutory provision at issue in the case, 20 U.S.C. § 1232g(b), was "not as explicit" as other parts of the statute, he argued that "it is clear that, in substance, § 1232g(b) formulates an individual right: in respondent's words, the 'right of parents to withhold consent and prevent the unauthorized release of education record information by an educational institution . . . that has a policy or practice of releasing such information.'"[250] He contended that the provision met *Blessing*'s three-factor test because "[i]t is directed to the benefit of individual students and parents; the provision is binding on States, as it is 'couched in mandatory, rather than precatory, terms'; and the right is far from 'vague and amorphous.'"[251] Additionally, he maintained that "the right at issue is more specific and clear" than rights previously determined to be enforceable by § 1983 in *Wright* or *Wilder*.[252]

He disagreed with the majority's conclusion that § 1232g(b) has an aggregate focus. He pointed out that the provision allows

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247. *See id.* at 2280–86 (Stevens, J., dissenting) (criticizing the majority's *ratio decidendi* as seeming to find both that FERPA does not create federal rights and, in the alternative, that the rights created by FERPA "are of a lesser value because Congress did not intend them to be enforceable by their owners").

248. *See id.* at 2281–82 (Stevens, J., dissenting) ("Although § 1232g(b) alone provides strong evidence that an individual federal right has been created, this conclusion is bolstered by viewing the provision in the overall context of FERPA.").

249. *Id.* at 2280–81 (Stevens, J., dissenting).

250. *Id.* at 2281 (Stevens, J., dissenting) (alteration in original) (quoting Brief for Respondent at 11).

251. *Id.* (Stevens, J., dissenting) (quoting Blessing v. Freestone, 520 U.S. 329, 340–41 (1997)).

252. *Id.* (Stevens, J., dissenting).

institutions to release information "*so long as* 'there is written consent'" from the individual student or a parent, if the student is a minor child.[253] Furthermore, even if a pattern or practice of inappropriate treatment is necessary to assert an individual right, he argued that the right is still individually enforceable.[254] Additionally, he maintained that other provisions of FERPA support the view that the statute establishes individual rights.[255]

In Part II, Justice Stevens attacked "the Court's novel use of our implied right of action cases in determining whether a federal right exists for § 1983 purposes."[256] He argued that the majority's requirement of clear textual evidence that Congress intended to establish an individual right inappropriately adopted the test used in implied right of action cases; whether Congress intended to establish a private remedy is an unnecessary inquiry in § 1983 cases, which the majority acknowledged because § 1983 allows private enforcement of any statute creating a distinct federal right, even if there is no private right of action under the substantive statute.[257] Under the separation-of-powers principle that the legislature alone has the authority to establish remedies for violations of statutory conditions, it is necessary to demonstrate that Congress intended to create an implied right of action.[258] By contrast, the same separation-of-powers issues do not apply under § 1983 "because Congress expressly authorized private suits in § 1983 itself."[259] Justice Stevens charged that the Court's use of the implied right of action framework in § 1983 cases was inconsistent with precedent and that the majority's clear and unambiguous test had *sub silentio* overruled the *Wilder* and *Wright* decisions.[260]

Justice Stevens further argued that the majority had gone beyond *Pennhurst*, *Blessing*, and *Suter*'s requirement that § 1983 may only enforce individual rights binding on states—rather than mere precatory hopes found in a statute—and imposed a new requirement that there be clear and unambiguous evidence that Congress intended to make a right enforceable through

253. *Id.* at 2282 (Stevens, J., dissenting).

254. *Id.* (Stevens, J., dissenting).

255. *Id.* (Stevens, J., dissenting).

256. *Id.* at 2284 (Stevens, J., dissenting).

257. *Id.* at 2284–86 (Stevens, J., dissenting).

258. *See id.* at 2284 (Stevens, J., dissenting) ("[O]ur implied right of action cases 'reflec[t] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.'") (second alteration in original) (quoting Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990)).

259. *Id.* (Stevens, J., dissenting) (citing *Wilder*, 496 U.S. at 508 n.9 (1990)).

260. *Id.* at 2284 & n.8 (Stevens, J., dissenting).

§ 1983.[261] While the Court stated that it was not adopting the remedies portion of the test for implying a private right of action into the § 1983 context, Justice Stevens argued that the majority's approach essentially did so and, thus, defeated the "presumptive enforceability of rights under § 1983."[262] He argued that the Court's "implied right of action cases do not necessarily cleanly separate out the 'right' question from the 'cause of action' question."[263] The majority claimed that it was not requiring proof that Congress intended to allow a remedy under § 1983, but only that the statute at issue creates an individually enforceable right.[264] If the majority was being truthful, Justice Stevens argued, its "new" approach was no different from *Blessing*'s three-factor test, and "[i]ndeed, the Court's analysis, in part, closely tracks *Blessing*'s factors, as it examines the statute's language, and the asserted right's individual versus systematic thrust."[265] However, Justice Stevens contended that the majority had in fact placed the burden on the plaintiffs to show that Congress intended to establish a private remedy enforceable through § 1983 by addressing whether it was likely that "Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges."[266] Thus, he argued that the majority had "eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under § 1983" and that, under the majority's approach, "a right under *Blessing* is second class compared to a right whose enforcement Congress has clearly intended."[267] He concluded by criticizing the majority for "blur[ring] the long-recognized distinction between rights and remedies" and for failing to clarify the Court's § 1983 jurisprudence.[268]

D. Analysis

Chief Justice Rehnquist correctly observed that the Court's § 1983 cases had failed to provide a consistent standard for when federal statutes are enforceable under § 1983.[269] However,

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261. *Id.* at 2284–85 (Stevens, J., dissenting).

262. *Id.* at 2285 (Stevens, J., dissenting).

263. *Id.* (Stevens, J., dissenting).

264. *Id.* (Stevens, J., dissenting) (citing *id.* at 2276).

265. *Id.* (Stevens, J., dissenting) (citing *id.* at 2277).

266. *Id.* (Stevens, J., dissenting) (quoting *id.* at 2279).

267. *Id.* at 2285–86 (Stevens, J., dissenting).

268. *Id.* at 2286 (Stevens, J., dissenting).

269. *See id.* at 2274–75 (noting the inconsistency in some of the Court's § 1983 opinions, and further claiming that "[f]ueling this uncertainty is the notion that our implied right of action cases have no bearing on the standards for discerning whether a

Gonzaga's requirement of "clear" and "unambiguous" evidence that Congress intended to establish an individual right does not provide a better test because the Court does not define these terms, other than to suggest that they are more stringent than the Court's approach in *Wilder*.[270] The Court does not explain what types of evidence should matter in making the determination of whether there is "clear" and "unambiguous" evidence of intent.[271] A similar problem arises when the Court wrestles with whether to infer an implied right of action. Justice Kennedy has conceded that "[t]he Court has encountered great difficulty in establishing standards for deciding when to imply a private cause of action under a federal statute which is silent on the subject."[272] Some portions of the *Gonzaga* opinion suggest a preference for textual evidence of intent, but as Part VI of this Article will show, courts may still consider legislative history when assessing intent.[273]

Justice Breyer suggested that he preferred a case-by-case analysis of whether Congress intended to provide individual rights rather than the majority's restrictive focus on whether congressional intent to confer an individual right was "unambiguously" included in a statute's "text and structure."[274] He thus implied that he disagreed with an exclusively textual approach to ascertaining congressional intent,[275] although Part VI of this Article will show that whether the majority's opinion actually was textualist in nature is open to debate.[276] Justice Breyer struck a middle-of-the-road position by citing a range of Court opinions—*Blessing*, *Suter*, *Wilder*, and *Wright*—some of

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statute creates rights enforceable by § 1983").

270. Refer to notes 229–32 *supra* and accompanying text (inferring that the Court found evidence of congressional intent to establish individual enforcement less "clear" in cases such as *Wilder*, in which the statute did not allow for a review board such as that created under FERPA).

271. *See Gonzaga*, 122 S. Ct. at 2279 (declaring that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms," finding no new enforceable rights, and merely explaining that "FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions").

272. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting); *see also* Zeigler, *supra* note 48, at 91.

273. Refer to notes 356–72 *infra* and accompanying text (acknowledging *Gonzaga*'s textualist emphasis while also arguing that the decision, along with the Court's precedent, reveals an acceptance of using both the statute's text and its legislative history when determining intent).

274. *Gonzaga*, 122 S. Ct. at 2279 (Breyer, J., concurring in the judgment) (quoting *id.* at 2273, 2278).

275. *Id.* at 2279 (Breyer, J., concurring in the judgment).

276. Refer to notes 356–72 *infra* and accompanying text.

which took broader or narrower approaches to the question of enforcing federal statutes through § 1983.[277] Unlike Chief Justice Rehnquist, Justice Breyer appeared to prefer the Court's hitherto ambiguous § 1983 jurisprudence to a clear approach that might prevent the enforcement of some statutory rights that did not fit the precise mold of the majority's clear and unambiguous test for congressional intent.

In Part II of his dissent, Justice Stevens argued that the Court was adopting an unnecessarily stringent standard in § 1983 cases that inappropriately adopted the framework used in implied right of action cases, even though the same separation of powers concerns did not apply.[278] Justice Stevens vigorously defended the broad approach to enforcement of § 1983 implicit in *Blessing*'s three-factor test, as well as in *Wilder*, under which there is a strong presumption that definite and mandatory federal rights may be enforced by their intended beneficiaries.[279] Additionally, Justice Stevens contended that the majority's approach in fact placed a burden on plaintiffs to show Congress intended to make a right "*enforceable*" through § 1983, and not just that Congress intended to establish an individual right on behalf of a class including the plaintiff.[280] The argument, advanced by both the majority opinion and Justice Breyer, that it was unlikely Congress wanted thousands of potentially conflicting federal lawsuits after it had centralized administrative enforcement, supports Justice Stevens's charge that the Court was blurring the line between rights and remedies.[281]

As Justice Stevens correctly observed, the Court's use of the implied right of action framework in § 1983 cases was inconsistent with precedent because the majority asked not just whether Congress intended to create a right, but also whether Congress intended to allow a remedy under § 1983.[282] By asking whether Congress intended to allow a remedy under § 1983 for FERPA violations, the majority effectively overruled the presumption that all individual rights derived from federal statutes are enforceable, which is the rule the Court followed in the *Wilder* and *Wright* decisions.[283] The Court has acknowledged

277. *Gonzaga*, 122 S. Ct. at 2279 (Breyer, J., concurring in the judgment).

278. *Id.* at 2284 & n.8, 2285–86 (Stevens, J., dissenting).

279. *Id.* (Stevens, J., dissenting).

280. *Id.* at 2284–85 (Stevens, J., dissenting).

281. *Id.* at 2279; *id.* at 2280 (Breyer, J., concurring in the judgment); *id.* at 2285–86 (Stevens, J., dissenting).

282. *Id.* at 2284 & n.8 (Stevens, J., dissenting).

283. *Id.* at 2284 & n.8, 2285–86 (Stevens, J., dissenting).

that it is more difficult to prove Congress intended to create an implied cause of action than an implied substantive right because a statute's legislative history is less likely to address an implicit right to sue.[284] Thus, the Court should not have considered whether it was likely that Congress would have wanted thousands of private FERPA suits under § 1983.[285] That is the right question regarding whether Congress intended to create a cause of action, but is not relevant regarding whether a statute has created an individual right that is in turn presumptively enforceable by § 1983.[286] If in fact the majority meant to overrule the presumption that individual federal statutory rights are presumptively enforceable, the Court should have said so directly.

The Court should have placed the burden on the defendant to prove that Congress intended to foreclose § 1983 remedies. In *Gonzaga*, the Court should have found an individual right under FERPA and then determined whether Congress intended to make the centralized administrative review process the exclusive remedy for any violations, thereby precluding suits under § 1983.[287] The burden of proof should have been on the defendant to show that Congress intended to preclude § 1983 suits in light of the statute's administrative review process. Justice Stevens made a fairly strong case that § 1232g(b), in light of the entire

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284. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 25 (1981) (Stevens, J., concurring in the judgment in part and dissenting in part) (arguing legislative history is unlikely to supply affirmative evidence of congressional intent to establish private remedies that the statute fails to mention); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) (observing that legislative history is usually silent regarding congressional intent to create a private right of action if the statute does not explicitly provide a private remedy); Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979) ("We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question."); Mank, *Private Cause of Action*, *supra* note 29, at 31–32 (observing that following Justice Powell's dissent in *Cannon*, the Court has placed a greater emphasis on legislative intent, but "has been less willing to rely on legislative history for evidence of [such] intent" when inferring a private right of action); Zeigler, *supra* note 48, at 111 & n.237 (analyzing the distinction between the determination of an implied right and the determination of an implied cause of action).

285. *Gonzaga*, 122 S. Ct. at 2279; *id.* at 2280 (Breyer, J., concurring in the judgment); *id.* at 2285 (Stevens, J., dissenting).

286. *See id.* at 2284–85 (Stevens, J., dissenting).

287. Because it concluded that FERPA did not establish individually enforceable rights, the Court did not address whether FERPA's review procedures are "'sufficiently comprehensive'" to preclude private enforcement. *Id.* at 2279 n.8 (quoting *Sea Clammers*, 453 U.S. at 20). Refer to note 232 *supra* and accompanying text (discussing how the Court did not reach the issue of whether the review procedures were "sufficiently comprehensive"). In dissent, Justice Stevens argued that FERPA's review procedures were not sufficiently comprehensive to preclude private enforcement. *Gonzaga*, 122 S. Ct. at 2283 (Stevens, J., dissenting).

FERPA statute, suggests Congress intended to give individual rights to students and their teachers, although some provisions do suggest a more aggregate focus, as the majority and Justice Breyer concluded.[288] After finding that an individual right existed, the Court should have determined if the centralized administrative review procedures were sufficiently comprehensive to overcome the strong presumption in favor of enforcing federal rights through § 1983. Most likely the review procedures are not enough to meet the *Sea Clammers* exclusion test because they do not provide individual remedies.[289] By blurring the right versus remedy distinction, Chief Justice Rehnquist inappropriately used evidence about whether the statute's remedies should preclude the enforcement of rights under § 1983 to address the separate issue of whether Congress intended to create an individual remedy under FERPA.[290] In effect the Court inappropriately placed the burden of proof on the plaintiff. Instead, the Court should have presumed that the FERPA rights are enforceable and then given the defendant the opportunity to prove that the narrow *Sea Clammers*' preclusion test applies.

V. ENFORCEMENT OF REGULATIONS THROUGH § 1983

Since the 1930s, it has been common for Congress to write statutes that address broad goals and then delegate the remaining details to executive agencies.[291] Courts have generally

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288. Refer to notes 248–51 *supra* and accompanying text (discussing Justice Stevens's contention that the majority should have considered the statute as a whole rather than evaluating a single provision).

289. *See Gonzaga*, 122 S. Ct. at 2283 (Stevens, J., dissenting) (contending that the FERPA review procedures are distinguishable from those in *Sea Clammers* because "FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to administrative discretion the decision whether to follow up on individual complaints").

290. Some commentators have argued that rights and remedies should be examined in an integrated fashion, but that clearly is not the current law, as they recognize. *See, e.g.*, Zeigler, *supra* note 48, at 123–47 (proposing integrated analysis for determining whether a statutory provision should be judicially enforceable, but recognizing that courts currently treat rights and remedies as separate issues in many cases); Mazzuchi, *supra* note 31, at 1064, 1093–96, 1117–18 (arguing that courts should apply the same test for enforcement of statutory rights by § 1983 as implied or explicit private rights of action, but acknowledging that current law applies a more lenient standard in § 1983 suits).

291. *See* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 326 n.20 (1987) ("The year 1937 signalled [sic] the end of the brief *Schechter* era during which the Court invoked the delegation doctrine to invalidate broad delegations of power."). *See generally* Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987) (discussing the appropriateness of congressional delegation of authority to agencies and that reporting courts have almost always approved such delegations); Thomas O. Sargentich, *The Delegation Debate and*

allowed such delegation of authority as long as Congress provides some guidelines for how the agency should promulgate any necessary regulations.[292] It is also common for agencies to interpret the statutes that govern them. Because agencies usually have more expertise with implementing statutes than federal judges, the Supreme Court in its 1984 decision *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[293] established the rule that courts should defer to an agency's reasonable interpretation of a statute if the statute is silent or ambiguous about the particular issue in question.[294]

If a regulation goes beyond the explicit language of a statute to clarify or establish a right that is generally compatible with the statute's goals, should courts treat that right as enforceable under § 1983?[295] Courts have divided about whether regulations alone may create rights enforceable through § 1983, or whether a regulation may merely clarify a right explicitly established in a statute.[296] "The Sixth Circuit has indicated most clearly that federal regulations may create rights that are enforceable under § 1983."[297] "Additionally, some federal courts have suggested that

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Competing Ideals of the Administrative Process, 36 AM. U. L. REV. 419 (1987) (same). Opponents of delegation often argue that vague delegations delegitimize representative governance or suggest that statutory vagueness leads to an overall reduction in public welfare. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 3–21 (1993); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296–312, 314–18, 321–22 (1987).

292. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001) (holding the Clean Air Act's delegation of determination of air quality standards to EPA is constitutional); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213–14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." (quotation marks omitted)); Mank, *Using § 1983*, *supra* note 11, at 339–40; Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 1–2, 8, 20–21 (1996) [hereinafter Pierce, *Agency Authority*].

293. 467 U.S. 837 (1984).

294. *See id.* at 842–43; Mank, *Using § 1983*, *supra* note 11, at 340; Pettys, *supra* note 55, at 81–82.

295. Mank, *Using § 1983*, *supra* note 11, at 339–40; *see also* Pierce, *Agency Authority*, *supra* note 292, at 1–2 & *passim* (discussing whether agency regulations may be enforced as implied rights of action).

296. *See* Hill v. S.F. Hous. Auth., 207 F. Supp. 2d 1021, 1025–26 (N.D. Cal. 2002) (discussing the split in the circuit courts over whether administrative regulations may establish enforceable rights under § 1983); Mank, *Using § 1983*, *supra* note 11, at 340, 346–53 (providing a detailed discussion of the split in the circuit courts over whether administrative regulations may establish enforceable rights under § 1983).

297. Mank, *Using § 1983*, *supra* note 11, at 347 (citing and discussing Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994)).

federal regulations may create a right enforceable under § 1983 if the regulation" was issued by the agency pursuant to an explicit congressional requirement and thus "has the 'force and effect of law.'"[298] The Third, Fourth, and Eleventh Circuits' decisions have adopted the narrow approach that regulations may create enforceable rights only if they clearly reflect rights already inherent in the statute itself.[299] For example, the Eleventh and Fourth Circuits have stated that regulations may not independently establish rights under § 1983, but may only "further define" or "flesh out" rights already implicit in the underlying statute.[300] In some decisions, it is not clear whether a court relied on a regulation alone or on both the regulation *and* the statute to establish a right enforceable under § 1983.[301]

After *Gonzaga*, it is likely that the Supreme Court would hold that a regulation by itself may not establish a right enforceable through § 1983 because of that decision's emphasis on proof that Congress intended to establish an individual right.[302] Yet even under *Gonzaga*'s restrictive requirement of "clear" and "unambiguous" evidence of congressional intent,[303] there is still a role for regulations to clarify, "further define," or "flesh out" statutory rights. Because agencies are usually

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298. Mank, *Using § 1983*, *supra* note 11, at 347 & n.196 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 301–03 (1979)); *id.* at 347 & n.197, 348 & nn.198–99 (citing Samuels v. District of Columbia, 770 F.2d 184, 199 (D.C. Cir. 1985) ("At least where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress' mandate constitute 'laws' within the meaning of [§] 1983."); *see also* DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 724 n.19 (10th Cir. 1988) (citing *Samuels*, the Tenth Circuit stated in dicta that "[i]n at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits")). *But see* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 783–85 (3d Cir. 2001) (arguing that prior cases including *Samuels* did not hold that regulations alone may create rights enforceable through § 1983), *cert. denied*, 122 S. Ct. 2621 (2002). The Supreme Court first used the "force and effect of law" test in *Chrysler Corp.*, 441 U.S. at 301–03, to give greater deference to agency regulations that are issued pursuant to an explicit congressional mandate.

299. *South Camden*, 274 F.3d at 781–90; Harris v. James, 127 F.3d 993, 1007–08 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980, 982, 984 (4th Cir. 1987); *see also* Mank, *Using § 1983*, *supra* note 11, at 348–53 (discussing in detail whether regulations may help define statutory rights under § 1983).

300. Doe v. Chiles, 136 F.3d 709, 717 (11th Cir. 1998); *Harris*, 127 F.3d at 1008–09; *Kirk*, 821 F.2d at 984; Mank, *Using § 1983*, *supra* note 11, at 348–53 (discussing the cited Fourth and Eleventh Circuit cases).

301. *See, e.g.*, Doe v. District of Columbia, 93 F.3d 861, 867 (D.C. Cir. 1996) (analyzing both the statute *and* its accompanying regulations in determining whether an enforceable § 1983 right existed); Mank, *Using § 1983*, *supra* note 11, at 343–44 (discussing the ambiguity in *Wright* as to whether statute or regulation created the right at issue).

302. Refer to text accompanying notes 190–95 *supra* (describing Chief Justice Rehnquist's "restrictive analysis").

303. *Id.*

involved in Congress's drafting of any statute within their jurisdiction, agency regulations often provide insight into congressional intent and, therefore, courts should consider them in determining Congress's likely intent.[304] *Gonzaga* did not overrule *Wright*, which clearly relied on agency regulations to define the scope of a statutory right.[305]

A. Wright v. City of Roanoke Redevelopment and Housing Authority

In *Wright v. City of Roanoke Redevelopment and Housing Authority*,[306] the Supreme Court held that particular Department of Housing and Urban Redevelopment (HUD) regulations established enforceable rights under § 1983.[307] In *Wright*, the plaintiffs, who were tenants in a municipal low-income housing project, argued that the public housing authority violated their rights by not including their utility costs as part of the maximum rent allowed under the statute, despite HUD regulations that defined the statutory term "rent" to include payments for reasonable utility costs.[308] Justice White interpreted the scope of the statute's limit on rent in light of the HUD's regulations.[309] The Court stated:

> The regulations . . . defining the statutory concept of "rent" as including utilities, have the force of law . . . . In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.[310]

Unfortunately, as Justice O'Connor's dissenting opinion correctly pointed out, the Court's opinion did not clearly explain whether the HUD regulations simply defined a right already implicit in the statute's definition of "rent," or whether the

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304. *See* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1283–84 (1996) [hereinafter Mank, *Textualist*] (explaining the close ties between federal agencies and the legislative process).

305. Refer to text accompanying notes 191–92 *supra* (explaining how Chief Justice Rehnquist interpreted *Wright* and *Wilder* in accordance with *Pennhurst* and *Gonzaga*).

306. 479 U.S. 418 (1987).

307. *Id.* at 431–32; Mank, *Using § 1983*, *supra* note 11, at 342.

308. *Wright*, 479 U.S. at 419, 420 & n.3, 421 & n.4, 422 (quoting 24 C.F.R. § 860.403 (1982), and citing 24 C.F.R. § 865.470 (1983)); Mank, *Using § 1983*, *supra* note 11, at 342–43.

309. *Wright*, 479 U.S. at 430; Mank, *Using § 1983*, *supra* note 11, at 343.

310. *Wright*, 479 U.S. at 431–32 (citation omitted); Mank, *Using § 1983*, *supra* note 11, at 343 & n.164.

regulations alone created rights enforceable though § 1983.[311] In a footnote, the majority suggested that regulations may establish rights as long as the statute delegates the authority to create such rights to the agency in charge of implementing the statute: "The dissent may have a different view, but to us it is clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute."[312] However, even that observation by Justice White was somewhat ambiguous as to whether the right in question arose from the statute or the regulation.[313]

In her dissenting opinion in *Wright*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, argued that the test for whether an enforceable right exists under § 1983 should be whether Congress intended to create a specific statutory right for the benefit of a class including the plaintiff.[314] Her argument foreshadows the majority opinion in *Gonzaga*. She maintained that the Court should examine implied right of action cases in determining whether a statute creates a federal right in favor of the plaintiff, because "[w]hether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court has also asked . . . whether 'the statute create[s] a federal right in favor of the plaintiff.'"[315] She contended that implied right of action cases focus on congressional intent in determining whether a federal right exists in favor of the plaintiff and that congressional intent was also the "'key to the inquiry'" in determining whether a broad statutory remedy precluded a suit under § 1983.[316] Even assuming that the regulations at issue created clear rights on behalf of the plaintiffs,[317] those rights should not be enforceable through § 1983 because there was no

311. *See Wright*, 479 U.S. at 437–38 (O'Connor, J., dissenting); Mank, *Using § 1983*, *supra* note 11, at 343–44; Pettys, *supra* note 55, at 74–75.

312. *Wright*, 479 U.S. at 420 n.3; Mank, *Using § 1983*, *supra* note 11, at 343 & n.165.

313. *See* Mank, *Using § 1983*, *supra* note 11, at 343–44.

314. *Wright*, 479 U.S. at 433 (O'Connor, J., dissenting); *see also* Mank, *Using § 1983*, *supra* note 11, at 344 & n.169.

315. *See Wright*, 470 U.S. at 432–33 (O'Connor, J., dissenting) (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)); Mank, *Using § 1983*, *supra* note 11, at 344 & n.170. *But cf.* Key, *supra* note 29, at 332–33 (arguing that Justice O'Connor incorrectly relied on implied right of action cases because "§ 1983 itself explicitly authorizes private causes of action").

316. *Wright*, 479 U.S. at 432–33 (O'Connor, J., dissenting) (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981)); Mank, *Using § 1983*, *supra* note 11, at 344 & n.171.

317. Justice O'Connor also argued, however, that the temporary HUD regulations were too vague in defining the term "reasonable" to create valid rights capable of judicial enforcement. *See Wright*, 479 U.S. at 438–40 (O'Connor, J., dissenting); Mank, *Using § 1983*, *supra* note 11, at 345 & n.178 (citing *Wright*; Pettys, *supra* note 55, at 75).

evidence that "Congress intended to create a statutory entitlement to reasonable utilities."[318] She argued that it was inappropriate to enforce regulations through § 1983 unless there was evidence in the statute itself that Congress intended to create an enforceable right.[319] Justice O'Connor stated:

> I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated the result. . . . Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.[320]

Subsequent Supreme Court decisions have not clarified *Wright*. In *Wilder v. Virginia Hospital Ass'n*,[321] the Supreme Court relied in part on implementing regulations in rejecting the defendant's contention that a statutory obligation requiring states to adopt "reasonable and adequate" reimbursement procedures for medicaid costs was "too vague and amorphous."[322] The Court stated: "As in *Wright*, the statute and regulation set out factors which a State must consider in adopting its rates."[323] Like *Wright*, the *Wilder* decision failed to specify to what extent the right was based on the statute or the regulations, but the *Wilder* Court apparently relied more on the statute and less on the regulations than the *Wright* decision.[324] In *Suter v. Artist M.*,[325] Chief Justice Rehnquist concluded that the HHS regulations were not specific and did not provide states with

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318. *Wright*, 479 U.S. at 434–37 (O'Connor, J., dissenting); Mank, *Using § 1983*, *supra* note 11, at 344 & n.172.

319. *Wright*, 479 U.S. at 433, 437–38, 441 (O'Connor, J., dissenting); Key, *supra* note 29, at 331; Mank, *Using § 1983*, *supra* note 11, at 344–45.

320. *See Wright*, 479 U.S. at 438 (O'Connor, J., dissenting).

321. 496 U.S. 498 (1990).

322. *Id.* at 519.

323. *Id.*

324. *See id.* at 519–21 (noting that the statute at issue "provides, if anything, more guidance than the provision at issue in *Wright*"); Pa. Pharmacists Ass'n v. Houstoun, 283 F.3d 531, 536–37 (3d Cir. 2002) (en banc) (emphasizing the *Wilder* Court's attention to the statute as opposed to the regulations at issue), *cert. denied*, 123 S. Ct. 100 (2002); Mank, *Using § 1983*, *supra* note 11, at 346 & n.187 (opining that because the *Wilder* Court relied so heavily on the statute, "*Wright* remains the Supreme Court's most direct and important use of regulations to create enforceable rights under § 1983"). *But cf.* Suter v. Artist M., 503 U.S. 347, 357 (1992) ("The opinions in both *Wright* and *Wilder* took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment . . . .").

325. 503 U.S. at 347.

notice that parents could sue if a state failed to comply with the conditions in its plan.[326] It is noteworthy that Chief Justice Rehnquist's *Suter* opinion examined the relevant regulations in deciding whether the state had notice that its plan created enforceable rights.[327]

B. The Split in the Circuits Since Wright

There has been controversy over the meaning of *Wright* and especially over whether the Supreme Court indicated that a regulation alone could be enforceable through § 1983.[328] Citing *Wright*, the Sixth Circuit in *Loschiavo v. City of Dearborn* declared: "As federal regulations have the force of law, they likewise may create enforceable rights."[329] On the other hand, in *Harris v. James*,[330] the Eleventh Circuit "conclude[d] that the *Wright* majority did not hold that federal rights are created either by regulations 'alone' or by any valid administrative interpretation of a statute creating some enforceable right."[331] In 2001, the Third Circuit in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[332] agreed with *Harris* and interpreted *Wright* as having decided that the regulation "merely defined the specific right that Congress had already conferred through the statute."[333] Furthermore, the Third Circuit in *South Camden* concluded that § 1983 may enforce only those rights that Congress has explicitly included in a statute

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326. *See id.* at 362–63.

327. Refer to notes 174–85 *supra* and accompanying text (describing the Court's rationale in *Suter*).

328. *See* Ceaser v. Pataki, No. 98 CIV.8532 (LMM), 2002 WL 472271, at *2–*3 (S.D.N.Y. Mar. 26, 2002) (discussing disagreement by courts over whether *Wright* allows § 1983 suits based on regulations alone or only where the "regulation is linked to federal statues [sic] authorizing it"); Bradford C. Mank, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?*, 32 ENVTL. L. REP. 10454, 10475–76 (2002) [hereinafter Mank, *South Camden*] (discussing conflicting interpretations of whether *Wright* allows regulation alone to establish a right enforceable through § 1983); Mank, *Using § 1983*, *supra* note 11, at 342–46 (same).

329. 33 F.3d 548, 551 (6th Cir. 1994). For a similar approach by the Ninth Circuit, see *Buckley v. City of Redding*, in which the court suggested agency regulations created an enforceable binding obligation on a municipality receiving federal funds for recreational boating facilities to allow access to a river for the benefit of recreational boaters. 66 F.3d 188, 189 (9th Cir. 1995) (citing 16 U.S.C. §§ 777–777k and 50 C.F.R. § 80.24); *see also* Mank, *Using § 1983*, *supra* note 11, at 347–48 (discussing these and other similar cases).

330. 127 F.3d 993 (11th Cir. 1997).

331. *Id.* at 1008; Mank, *Using § 1983*, *supra* note 11, at 348–49 (discussing *Harris*).

332. 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002).

333. *Id.* at 783 (citing Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 430 n.11 & 431 (1987)); Mank, *South Camden*, *supra* note 328, at 10475–76.

and may not be used to enforce otherwise valid regulations that go beyond the rights set forth in a statute.[334] Both *Harris* and *South Camden* explicitly rejected the Sixth Circuit's holding in *Loschiavo* that regulations alone may establish rights enforceable under § 1983.[335]

Both *Harris*[336] and *South Camden*[337] applied essentially the same "unambiguous" evidence of congressional intent test that the Supreme Court later endorsed in *Gonzaga*.[338] Citing Supreme Court decisions requiring congressional intent to create an implied right of action, the Eleventh Circuit in *Harris* determined that congressional intent was also crucial in determining whether a right was enforceable under § 1983:

> In our view, the driving force behind the Supreme Court's case law in this area is a requirement that courts find a Congressional intent to create a particular federal right. . . . In light of this focus [on congressional intent], we reject the Sixth Circuit's approach—i.e., finding a "federal right" in any regulation that in its own right meets the three-prong "federal rights" test. For the same reason, we also reject the approach labeled "troubling" by the dissent in *Wright*—i.e., finding enforceable rights in any valid administrative interpretation of a statute that creates some enforceable right.[339]

The Eleventh Circuit "conclude[d] [that] federal rights must ultimately emanate from either explicit or implicit statutory

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334. *See South Camden*, 274 F.3d at 789–90 (finding the regulations "too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983").

335. *Id.* at 787–88; *Harris*, 127 F.3d at 1008; *see also* Mank, *South Camden*, *supra* note 328, at 10475–76 (discussing *South Camden*); Mank, *Using § 1983*, *supra* note 11, at 348–49 (discussing *Harris*).

336. The *Harris* Court applied a test of whether there was evidence in the statute that Congress had "unambiguously conferred" upon Medicaid recipients a federal right to transportation enforceable under § 1983. *Harris*, 127 F.3d at 1011–12; *Recent Cases: Civil Rights—Availability of a § 1983 Remedy—Eleventh Circuit Holds that Federal Regulations Requiring State Medicaid Plans to Provide Transportation to and from Providers Do Not Create a Right Enforceable Under § 1983*—Harris v. James, 127 F.3d 993 (11th Cir. 1997), 111 HARV. L. REV. 2444, 2446 (1998) [hereinafter *Recent Cases*]; *see also* Mank, *Using § 1983*, *supra* note 11, at 351 & n.224 (citing the preceding authorities and noting that the *Harris* majority found the statute did not pass the test).

337. *South Camden*, 274 F.3d at 787–88 (concluding that because the regulations at issue went "beyond explicating the specific content of the statutory provision," they did not confer a "'federal right' enforceable under § 1983" because "[t]o hold otherwise would be inconsistent . . . with the Supreme Court's directive that courts must find that Congress has *unambiguously* conferred federal rights on the plaintiff").

338. Refer to text accompanying notes 191–96 *supra* (highlighting the *Gonzaga* majority's rationale for the test).

339. *Harris*, 127 F.3d at 1008; *see also* Mank, *Using § 1983*, *supra* note 11, at 348–49 (discussing *Harris*).

requirements."[340] A regulation may serve as the basis of a § 1983 suit only if there is an appropriate "nexus" between the right in the regulation and congressional intent to establish an enforceable federal right in the statute that authorized the regulation.[341]

C. A Broad Reading of "Fleshing Out" a Statute's Intent

In light of *Gonzaga*, the argument that regulations alone may create rights enforceable through § 1983 is probably untenable because a regulation alone normally cannot provide "clear" and "unambiguous" evidence that Congress intended to establish an individual right.[342] However, under *Wright* and the Eleventh Circuit's *Harris* decision there is room for regulations to explicate or fill in the details of a statute that broadly evinces an intent to create an individual right.[343] In *Harris*, the Eleventh Circuit stated that regulations may not themselves establish rights, but concluded that regulations could "further define" or "flesh out" rights that are implicit in the underlying statute.[344] The "fleshing out" approach reflects the reality that agencies often have the best understanding of what a statute means

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340. *Harris*, 127 F.3d at 1009 n.21. In *Harris*, the Eleventh Circuit held, in a two-to-one decision, that a Medicaid regulation purporting to give recipients the right of publicly funded transportation to and from health-care providers for non-emergency care exceeded the scope of any rights given by Congress in the underlying statute and, therefore, that the regulation did not create a federal right enforceable under § 1983. *See id.* at 1009–12; Mank, *Using § 1983*, *supra* note 11, at 348, 351; Pettys, *supra* note 55, at 79–80; *Recent Cases*, *supra* note 336, at 2444–49 (arguing that "[b]y failing to give deference to agency regulations, *Harris* forecloses private enforcement of congressionally authorized funding conditions and thus undermines federal agencies' administration of scores of federal programs"). The *Harris* Court held that the transportation regulation did not establish enforceable rights under § 1983 because it did not "define the content of any specific right conferred upon the plaintiffs by Congress" because there was no provision in the statute for non-emergency transportation. *Harris*, 127 F.3d at 1009–10; Mank, *Using § 1983*, *supra* note 11, at 351.

341. According to the Eleventh Circuit in *Harris*, "the nexus between the regulation and Congressional intent to create federal rights [was] simply too tenuous to create an enforceable right to transportation." *Harris*, 127 F.3d at 1010. Even assuming arguendo that the transportation regulation was a "valid interpretation" of the statute and might give rise to "some federal right," the *Harris* Court maintained that even those two assumptions were insufficient to establish an enforceable federal right to transportation for the plaintiffs under § 1983 because such a right must have a substantial nexus or basis in the statute, but the statute did not create any such right. *Id.* at 1010 n.23, 1011 & n.27 ("We assume for the sake of argument only that these provisions create some federal right."). For discussion, see also Mank, *Using § 1983*, *supra* note 11, at 348–51, and *Recent Cases*, *supra* note 336, at 2446.

342. Refer to note 304 *supra* and accompanying text.

343. Refer to notes 304–05 *supra* and accompanying text.

344. *See* Mank, *Using § 1983*, *supra* note 11, at 348–53. Refer to note 303 *supra* and accompanying text.

because they often help Congress write the statutes they will be in charge of implementing.[345]

In *Doe v. Chiles*,[346] the Eleventh Circuit applied *Harris*'s "fleshing out" standard in concluding that certain Medicaid regulations "further define[d] the contours of a statutory right" and determined that the statute "as further fleshed out by the[] regulations—creates [a] federal right."[347] The court in *Doe* initially found that the statute created a right, but also considered the regulations in combination with the statute to define a "federal right" that was enforceable through § 1983.[348] Similarly, the Hawaii District Court in *Makin ex rel. Russell v. Hawaii*[349] found that a provision in the federal Medicaid statute requiring that assistance under the Act "shall be furnished with reasonable promptness to all eligible individuals" was silent on what exact time period constituted an "unreasonable period."[350] However, other statutory provisions and especially applicable federal regulations made it clear that states could set population limits on the numbers eligible for services to help the mentally retarded, that persons on the waiting list were not entitled to demand reasonably prompt services, and therefore that persons on the waiting list were not intended beneficiaries of the statute entitled to sue under § 1983.[351] Accordingly, the Court observed: "Fortunately, the agency regulations clear up any ambiguity or doubt that the statute may have created."[352] Both *Doe* and *Makin* appropriately considered the federal agency's implementing regulations in defining the scope of the rights in the complex federal Medicaid statute.

While *Gonzaga* probably is inconsistent with using regulations alone to define rights enforceable under § 1983, because regulations by themselves cannot supply the necessary congressional intent, *Gonzaga* is compatible with an approach that initially considers whether a statute demonstrates that Congress intended to establish an individual right and then looks to the regulations to define the scope of that right as the Court did in *Wright*. While the three *Wright* dissenters who remain on the Court—Chief Justice Rehnquist and Justices O'Connor and

345. Refer to note 304 *supra* and accompanying text.

346. 136 F.3d 709 (11th Cir. 1998).

347. *Id.* at 717; Mank, *Using § 1983*, *supra* note 11, at 352–53.

348. *Doe*, 136 F.3d at 716–17; Mank, *Using § 1983*, *supra* note 11, at 352–53.

349. 114 F. Supp. 2d 1017 (D. Haw. 1999).

350. *Id.* at 1021, 1025–27 (quoting 42 U.S.C. § 1396a(a)(8)).

351. *Id.* at 1027–28, 1030–31 (discussing limitations on population size in 42 C.F.R. § 441.303(6)).

352. *Id.* at 1027.

Scalia—formed the nucleus of the *Gonzaga* majority, the *Gonzaga* decision clearly does not overrule *Wright*.[353] Furthermore, in *Suter*, the Court examined the relevant regulations in deciding whether the state had notice that its plan created enforceable rights under § 1983.[354] Under *Wright* and the Eleventh Circuit's *Harris* decision, courts may use agency regulations to clarify and define the scope of rights as long as the rights are first established by Congress in a statute.[355]

VI. TEXTUALISM, LEGISLATIVE HISTORY, AND § 1983

While it primarily focused on textual evidence, Chief Justice Rehnquist's *Gonzaga* opinion considered legislative history[356] and, therefore, the Court's decision implies that lower courts may evaluate such evidence when they try to ascertain congressional intent. Courts have traditionally considered a statute's legislative history in either determining whether a statute creates an individual right enforceable under § 1983 or whether a statute's remedies are so comprehensive that they preclude a § 1983 action.[357] For

353. Refer to text accompanying notes 192–96 *supra* (explaining how Chief Justice Rehnquist justified *Gonzaga* in light of *Wright* and *Wilder*).

354. *See* Suter v. Artist M., 503 U.S. 347, 361–63 (1992). Refer to text accompanying note 327 *supra*.

355. Refer to text accompanying note 300 *supra* (noting the Eleventh Circuit's conclusion that regulations alone may not establish rights but may "further define" or "flesh out" rights implicit in the underlying statute), and text accompanying note 328 *supra* (quoting the *Wright* majority's statement that regulations defining statutory concepts have the "force of law").

356. Refer to note 20 *supra* and accompanying text (noting that despite a highly textual analysis, Chief Justice Rehnquist in *Gonzaga* did briefly consider one aspect of the statute's legislative history).

357. *See, e.g.*, Pa. Pharmacists Ass'n v. Houstoun, 283 F.3d 531, 540–41 (3d Cir. 2002) (en banc) ("We have examined the legislative history of Section 30(A) and have found nothing inconsistent with our reading of the statutory language."), *cert. denied*, 123 S. Ct. 100 (2002); Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 757 (2d Cir. 1998) (concluding from legislative history that Title IX's remedies precluded § 1983 suit); W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 21 (3d Cir. 1989) ("The legislative history of [§] 1396a(a)(13)(A) buttresses our conclusion that WVUH has a private right to enforce the federal hospital reimbursement standard."), *aff'd on other grounds*, 499 U.S. 83 (1991); Prestera Ctr. for Mental Health Servs., Inc. v. Lawton, 111 F. Supp. 2d 768, 776 (S.D. W. Va. 2000) (discussing legislative history of the Medicaid statute in determining service providers are not intended beneficiaries); Ottis v. Shalala, 862 F. Supp. 182, 186–87 (W.D. Mich. 1994) (discussing the legislative history of the Omnibus Budget Reconciliation Act of 1987 in determining whether 42 U.S.C. § 1396r(h)(2), nursing home reform law, is enforceable by residents of nursing homes under 42 U.S.C. § 1983); N.Y. Airlines, Inc. v. Dukes County, 623 F. Supp. 1435, 1446–47 (D. Mass. 1985) ("The legislative history therefore indicates that Congress in enacting [49 U.S.C. § 2210(a)] intended to benefit air carriers by imposing the requirement on airport operators that carriers be subject to nondiscriminatory and substantially comparable treatment."); Mank, *Using § 1983*, *supra* note 11, at 373–75 (discussing the legislative histories of Title

example, both the majority opinion[358] and Justice O'Connor's dissenting opinion[359] in *Wright* considered both the HUD statute and its legislative history in assessing whether Congress intended to include a utility allowance within the definition of "rent." The *Wilder* decision relied heavily on legislative history in concluding that health care providers had a right to sue participating states.[360] Additionally, the Supreme Court in both the *Sea Clammers*[361] and *Smith v. Robinson*[362] decisions recognized that legislative history could be important in deciding whether Congress intended a statute's remedies to be so comprehensive that they preclude a separate suit under § 1983.

There is a certain irony about the relationships among the issues of textualism, legislative history, and enforcing statutory rights through § 1983. Initially, proponents of using § 1983 to enforce statutory rights focused on the "plain meaning" of § 1983's phrase "and laws."[363] Justice White's concurring opinion in *Chapman*[364] and Justice Brennan's majority opinion in *Thiboutot* focused on the textual meaning of the 1874 addition.[365] By contrast, Justice Powell's concurrence in *Chapman* and his dissent in *Thiboutot*, both of which Chief Justice Burger and Justice Rehnquist joined, focused more on legislative history and policy.[366] In *Pennhurst*, then-Justice Rehnquist carefully reviewed

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VI and Title IX to determine if they preclude § 1983 suits).

358. *See* Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 424–30 (1987) (concluding from statute and legislative history that Congress did not intend housing statute's remedies to preclude § 1983 suit); Frye, *supra* note 129, at 1183, 1197 n.178 (discussing use of legislative history in *Wright*).

359. *Wright*, 470 U.S. at 434 (O'Connor, J., dissenting); Key, *supra* note 29, at 330 (discussing Justice O'Connor's use of legislative history in the *Wright* dissent).

360. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 505–07, 515 & n.13 (1990); Frye, *supra* note 129, at 1187, 1197 n.178 (discussing use of legislative history in *Wilder*).

361. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) ("We look first, of course, to the statutory language . . . . Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.").

362. *See* 468 U.S. 992, 1005–13 (1984) ("Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.").

363. Refer to Part III.A *supra* (discussing various interpretations of § 1983's "and laws").

364. Refer to notes 73–80 *supra* and accompanying text (discussing Justice White's concurring opinion in *Chapman*).

365. Refer to notes 81–84 *supra* and accompanying text (discussing Justice Brennan's majority opinion in *Thiboutot*).

366. Refer to notes 75–80, 85–95 *supra* and accompanying text (discussing Justice Powell's opinions in *Chapman* and *Thiboutot*).

the statute's legislative history.[367] More recently, however, the opponents of using § 1983 to enforce statutory rights, including Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas, have emphasized a textualist reading of the statutes.[368] On the other hand, Justices Stevens, Souter, Ginsburg, and Breyer have often examined legislative history and policy arguments.[369]

In his concurring opinion in *Gonzaga*, Justice Breyer criticized the majority's view that a right may be enforceable through § 1983 "only if set forth 'unambiguously' in the statute's 'text and structure.'"[370] Justice Breyer may have overstated the extent to which *Gonzaga* relied on a textualist approach. Although Chief Justice Rehnquist's majority opinion primarily focused on the "text and structure" of FERPA,[371] his opinion did consider legislative history indicating that Congress did not want "'multiple interpretations'" of the statute by regional federal officials and, therefore, centralized decisionmaking in the Secretary of Education's office.[372] Despite a textualist tilt, *Gonzaga* does not prohibit courts from considering a statute's legislative history.

A. Textualism and Arguments For and Against Legislative History

Textualist judges generally attempt to ground the interpretation of a statute on its textual language alone.[373] Textualists usually refuse to consider the broader congressional

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367. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 20–22 (1981).

368. Refer to Parts III.E and IV.A *supra* (discussing Chief Justice Rehnquist's majority opinions in *Suter* and *Gonzaga*, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined).

369. Refer to Part IV.B–.C *supra* (discussing Justice Stevens's dissenting opinion, joined by Justice Ginsberg, and Justice Breyer's concurring opinion, joined by Justice Souter, in *Gonzaga University v. Doe*).

370. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2279 (2002) (Breyer, J., concurring in the judgment) (quoting *id.* at 2273, 2278).

371. *See id.* at 2278.

372. *Id.* at 2279 (quoting 120 CONG. REC. 39,863 (1974) (joint statement) (expressing "concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions").

373. *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 180–81 (1999) (observing that textualists focus on "ordinary meaning" of text, and criticizing textualists for ignoring the possibility of multiple textual meanings); Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. (forthcoming 2002) (manuscript at 4) [hereinafter Mank, *Legal Context*]; Mank, *Textualist*, *supra* note 304, 1235–37; Roger Colinvaux, Note, *What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens*, 72 IND. L.J. 1133, 1133 (1997) (same). *See generally* POPKIN, *supra*, at 157–85 (discussing textualism).

intent or purposes behind a statute because of the danger that judges will misuse such broad evidence to fit their political agendas.[374] Additionally, textualists frequently contend that it is misleading to infer that Congress as a whole has a clear single purpose or intent behind legislation when most statutes are the result of compromises among legislators with different goals.[375] Furthermore, textualists often argue that the Constitution's Presentment Clause demands that judges examine only the text of a statute because it alone has been approved by two houses of Congress and submitted for Presidential signature or veto.[376] Accordingly, textualists normally decline to consider a statute's legislative history because it has not been submitted for Presidential approval, and often represents the views of a small percentage of legislators.[377]

Many commentators and judges have criticized the textualist approach to statutory interpretation. They often

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374. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–23 (1997) (arguing that judges should look for statutory meaning in statute's text and not seek elusive "intent" or purpose of the legislature); *see also* Mank, *Legal Context*, *supra* note 373 (manuscript at 7); Mank, *Textualist*, *supra* note 304, at 1237; William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1135–36 (1992) (discussing Justice Scalia's skepticism in determining legislative intent); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330–32 (1995) (discussing the recent judicial trend toward legal textualism); Colinvaux, *supra* note 373, at 1149 n.69.

375. *See* POPKIN, *supra* note 373, at 166–67 (discussing Judge Easterbrook's theory that it is impossible to determine legislative intent because most legislation is based on a variety of public and private motives); William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 230 n.212 (2000) (observing that Judge Easterbrook has pointed out difficulty in determining the intent of collective bodies); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable."); Mank, *Legal Context*, *supra* note 373 (manuscript at 4).

376. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991) (Scalia, J.) (arguing that under the Constitution the text of a statute is the only relevant consideration); Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (same); *see also* Mank, *Legal Context*, *supra* note 373 (manuscript at 7) (discussing the textualist theory that the Presentment Clause limits judges to a statute's text); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 70–77 (2001) [hereinafter Manning, *Textualism*] (discussing textualists' view that judges should only consider a statute's text because it alone is presented to the President for signature or veto); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1300–01 (1990) (same); *cf.* INS v. Chadha, 462 U.S. 919, 927–28 (1983) (holding that a one-house legislative veto violates the requirements of bicameralism and presentment in Article I). *But see* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 230–32 (1994) (criticizing the textualist presentment theory and arguing that the Constitution does not prohibit judges from considering legislative history).

377. *See* SCALIA, *supra* note 374, at 29–37 (arguing that legislative history often represents the views of only a tiny minority of Congress); Buzbee, *supra* note 375, at 222–23, 230 n.212 (same); Mank, *Legal Context*, *supra* note 373 (manuscript at 7).

contend that judges should examine a statute's legislative history because it is essential to evaluate Congress's intent or purposes in enacting a statutory provision.[378] Additionally, Congress generally expects judges to consider legislative history relating to a statute's intent and purposes.[379] Accordingly, by examining only the language of a statute, textualist judges are likely in many cases to ignore Congress's true intent or purposes in enacting a statute.[380] Notably, there is some empirical evidence supporting Justice Stevens's argument that Congress is somewhat more likely to reject Supreme Court decisions relying on textualist interpretation, although the number of these cases is relatively small.[381] The most probable explanation for this empirical data is that Congress is more likely to disagree with a court's interpretation of a statute when the judge fails to consider external evidence such as legislative history about a statute's intent or goals.[382]

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378. *See* Mank, *Textualist*, *supra* note 304, at 1240–41 (arguing that Congress expects judges to consider legislative history and evidence other than just the text); Mank, *Legal Context*, *supra* note 373 (manuscript at 8–10); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386 (same); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 309 (1990) (same).

379. *See* Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 23–24 (1995) (arguing that textualism ignores congressional expectations); Mank, *Legal Context*, *supra* note 373 (manuscript at 8 & n.68).

380. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991) (Marshall, J., dissenting) (arguing that "the Court uses the implements of literalism to wound, rather than to minister to, congressional intent"); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 204 (1992); Mank, *Textualist*, *supra* note 304, at 1241, 1273 (discussing whether textualist decisions are more likely to be rejected by Congress); Mank, *Legal Context*, *supra* note 373 (manuscript at 8–9).

381. *See West Virginia University Hospitals*, 499 U.S. at 113–15 (Stevens, J., dissenting) (arguing that Congress is more likely to pass legislation overriding textualist interpretations of statutes, and that textualist interpretation is often inconsistent with how Congress intends courts to read statutes); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretations*, 101 YALE L.J. 331, app. III at 450–55 (1991) (demonstrating by a review of overridden cases that Congress is more likely to enact legislation rejecting Supreme Court decisions based on textualism); Mank, *Textualist*, *supra* note 304, at 1241, 1273 (discussing whether textualist decisions are more likely to be rejected by Congress); Mank, *Legal Context*, *supra* note 373 (manuscript at 10); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 448–51 (1992) (providing statistical data indicating that Congress more frequently overrides the Supreme Court's decisions using "plain meaning" interpretation, based on fifty-six overridden Court decisions).

382. *See* Mank, *Textualist*, *supra* note 304, at 1241, 1273 (discussing whether textualist decisions are more likely to be rejected by Congress); Mank, *Legal Context*, *supra* note 373 (manuscript at 10).

B. Why Textualism in Gonzaga

Justices Scalia and Thomas are the only two members of the Supreme Court who generally adhere to textualism.[383] In particular, Justice Scalia is the leading proponent of textualism on the Court and will frequently file a concurring opinion if the majority opinion addresses a statute's legislative history.[384] The other Justices on the Court are still willing to consider legislative history.[385] However, to win the votes of Justice Scalia or Thomas, or to avoid a concurring opinion by one or both, other Justices will sometimes omit discussion of legislative history if they can do so without serious harm to the integrity of their opinion.[386]

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383. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 462 & n.2 (1999) (Thomas, J., joined by Scalia, J., concurring in the judgment) (employing the textualist approach); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (Thomas, J.) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981) (citations omitted))); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 226 & n.22; Manning, *Textualism*, *supra* note 376, at 4 n.5 (stating that Justices Scalia and Thomas are the Court's consistent textualists); Mank, *Legal Context*, *supra* note 373 (manuscript at 8); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 532–33 (1998) [hereinafter Mank, *Canons*] (same); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994) (stating that Justice Thomas generally agrees with Justice Scalia's textualist approach to interpretation).

384. *See* Mank, *Legal Context*, *supra* note 373; Mank, *Canons*, *supra* note 383, at 533.

385. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (responding to a concurring opinion by Justice Scalia attacking the use of legislative history, Justice White, joined by every member of Supreme Court except Justice Scalia, briefly defended consideration of legislative history in "good-faith effort to discern legislative intent"); Mank, *Textualist*, *supra* note 304, at 1268; Mank, *Canons*, *supra* note 383, at 533; Merrill, *supra* note 383, at 363–65 (observing that the majority of Supreme Court Justices are willing to consider legislative history); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 383 (1992); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 263–64, 283 (stating that the majority of the Supreme Court continues to consider legislative history despite Justice Scalia's criticisms).

386. *See* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 398 (1996); Mank, *Textualist*, *supra* note 304, at 1268; Mank, *Canons*, *supra* note 383, at 533; Merrill, *supra* note 383, at 365–66; Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 217 (observing that Chief Justice Rehnquist and Justice O'Connor sometimes avoid discussion of legislative history to win support of Justices Scalia and Thomas, and that such efforts were especially common during the early 1990s). However, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy at times are willing to rely on legislative history even if that means disagreeing with Justices Thomas or Scalia. *See* Tiefer, *supra*, at 244–45 (same). For example, in *Department of Commerce v. United States House of Representatives*, Justice O'Connor's plurality opinion, which was joined by Chief Justice Rehnquist and Justice Kennedy, relied on silence in the legislative history

This may explain why Chief Justice Rehnquist's *Gonzaga* opinion largely focused on FERPA's "text and structure."[387] By contrast, in his 1981 opinion in *Pennhurst*, then-Justice Rehnquist had extensively discussed the statute's legislative history,[388] but that was before Justice Scalia joined the Court. Yet *Gonzaga* does refer to evidence from the Congressional Record that Congress wanted to avoid multiple interpretations of FERPA by regional Department of Education officials.[389] While it leans toward textualism, *Gonzaga* did not prohibit judges from considering legislative history when they ascertain what was Congress's intent in enacting a particular statute.

C. *In Determining Whether Congress Intended to Create a Right Under § 1983, Courts Should Examine a Statute's Legislative History and Not Just Its Text.*

The Individuals with Disabilities Act of 1990 ("IDEA"),[390] which provides funding to states on the condition that they provide individually tailored educational services to every student with a disability,[391] provides an excellent example of the importance of legislative history in determining whether a statute allows a remedy under § 1983. An important question is whether parents who are dissatisfied with their child's individualized education plan may sue states under § 1983. In *Smith v. Robinson*,[392] the plaintiffs sued directly under IDEA's predecessor statute, the Education for All Handicapped Children

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despite strong disagreement in Justice Scalia's concurring opinion, joined by Justice Thomas. 525 U.S. 316, 342–43 (1999). Similarly, in *United States v. Thompson/Center Arms Co.*, Chief Justice Rehnquist and Justice O'Connor joined Justice Souter's opinion despite strong disagreement by Justices Thomas and Scalia. 504 U.S. 505, 506, 519–21 (1992).

387. *See* Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2278 (2002).

388. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 20–22 (1981).

389. *Gonzaga*, 122 S. Ct. at 2279 (quoting 120 CONG. REC. 39,863 (1974) (joint statement) (expressing "concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions")).

390. 20 U.S.C. §§ 1400–1419 (2000).

391. *See* 20 U.S.C. § 1400(d)(1)(A) (stating that a student has the right to appropriate education at public expense); *id.* § 1412(a)(1) (stating that a condition of receiving federal funds is state provision of free public education for all children with disabilities between the ages of three and twenty-one); Jean M. Bond, *Making Up for Lost Time: The Third Circuit's Use of Remedies for Violations of the Individuals with Disabilities Education Act*, 46 VILL. L. REV. 777, 777, 781–84 (2001) (discussing the IDEA); Terry Jean Seligmann, *A Diller, a Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 468 & n.11 (2002) (same); Stephen C. Shannon, Note, *The Individuals with Disabilities Education Act: Determining "Appropriate Relief" in a Post-*Gwinnett *Era*, 85 VA. L. REV. 853, 855–56 (1999) (same).

392. 468 U.S. 992 (1984).

Act ("EHA"),[393] and under the Equal Protection and Due Process Clauses of the Fourteenth Amendment through § 1983.[394] They used § 1983 only to enforce constitutional remedies and not any statutory rights.[395] The Court held that the extensive remedies available under the EHA precluded constitutional claims under § 1983.[396] The Court observed that the EHA statute provided "an elaborate procedural mechanism to protect the rights of handicapped children."[397] The Court reasoned that Congress, by enacting a statutory remedy that is essentially identical to the constitutional remedy, must have intended to preclude a constitutional claim under § 1983.[398] Additionally, the Court implied that § 1983 could not be used to enforce the EHA when it stated that "[c]ourts generally agree that the EHA may not be claimed as the basis for a § 1983 action."[399]

Two years after *Smith*, Congress amended the EHA by enacting the Handicapped Children's Protection Act of 1986 (HCPA).[400] Section 1415(f), which is now renumbered as § 1415(l), stated: "Nothing in this title [currently chapter] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution . . . or other Federal statutes [currently laws] protecting the rights of handicapped children and youth [currently children with disabilities] . . . ."[401] Section

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393. *See* Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1419); Seligmann, *supra* note 391, at 468 n.10; Shannon, *supra* note 391, at 853.

394. *See Smith*, 468 U.S. at 994; Shannon, *supra* note 391, at 857–58. The plaintiffs also raised state law claims that are beyond the scope of this Article. *See Smith*, 468 U.S. at 995–1000 (discussing the procedural history).

395. *Smith*, 468 U.S. at 1004–05 ("In this case, petitioners made no effort to enlarge the remedies available under the EHA by asserting their claim through the 'and laws' provision of § 1983. They presented separate constitutional claims, properly cognizable under § 1983.").

396. *Id.* at 1009–13; Allan G. Osborne, Jr., *Can Section 1983 Be Used to Redress Violations of the IDEA?*, EDUC. L. REP., Mar. 28, 2002, at 21, 24 (discussing the *Smith* holding).

397. *Smith*, 468 U.S. at 1010–11.

398. *See id.* at 1009–13; *see also* Mank, *Using § 1983*, *supra* note 11, at 371–72, 376.

399. *Smith*, 468 U.S. at 1008 n.11.

400. Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415(i)(3) (applying to attorneys' fees) and § 1415(l) (regarding the availability of other statutory remedies); *see also* Seligmann, *supra* note 391, at 468 n.16.

401. Pub. L. No. 99-372, § 3(f), 100 Stat. 1145 (originally 20 U.S.C. § 1415(f), now codified as amended at 20 U.S.C. § 1415(l)); *see also* Bond, *supra* note 391, at 791 n.94. The IDEA Amendments of 1997 replaced § 1415(f) with a nearly identical provision, § 1415(l). *See* IDEA Amendments of 1997, Pub. L. No. 105-17, §§ 101, 615(l), 111 Stat. 37, 98; Marie O. v. Edgar, 131 F.3d 610, 621 n.19 (7th Cir. 1997). The main purpose of the 1997 amendment was to clarify that the statute does not preclude the pursuit of remedies under the Americans with Disabilities Act. Sellers v. Sch. Bd., 141 F.3d 524, 530 n.4 (4th Cir. 1998). Additionally, while § 1415(f) referred to "Federal statutes," § 1415(l) refers to "Federal laws." *Id.* at 530 & n.4. This Article will refer to all citations of § 1415(f) in pre-

1415(l) does not explicitly refer to suits under § 1983, although its language could be construed to authorize them.[402] The legislative history is more explicit concerning § 1983 suits. The Amendment's House Conference Report explained that Congress's goal in HCPA was to amend the EHA to explicitly authorize attorneys' fees and to demonstrate that the EHA does not bar other statutory remedies as long as a plaintiff first exhausts her administrative due process remedies under the statute.[403] Criticizing the *Smith* decision, the Senate Report states that Congress's "original intent" when it first enacted the EHA was to allow the "right to litigation."[404] While HCPA does not explicitly refer to § 1983, the House Conference Report clearly states that Congress intended HCPA to apply to "actions brought under 42 U.S.C. [§] 1983."[405] Neither the amendments nor the legislative history directly address whether § 1983 suits may include damages.[406] In 1990, the EHA was renamed the IDEA.[407]

Courts have disagreed about whether the HCPA amendments, including their legislative history, clearly demonstrate that Congress intended the IDEA to establish rights enforceable through § 1983.[408] Because the amendments to IDEA do not explicitly address the issue, some courts refuse to allow § 1983 claims to enforce the IDEA.[409] The Fourth Circuit has interpreted the text and legislative history of HCPA to allow only

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1997 decisions as references to § 1415(l).

402. *See* § 1415(l).

403. *See* H.R. CONF. REP. NO. 99-687, at 5, 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1807, 1807, 1809; Elizabeth Malloy, *Division Among the Circuits: Are Section 1983 Damages Available for Violations of the Individuals with Disabilities Education Act?* (draft July 2002) (manuscript at 11–12, on file with the Houston Law Review); Seligmann, *supra* note 392, at 468, 504, 521–26 (discussing IDEA's requirement of exhaustion of administrative remedies).

404. *See* S. REP. NO. 99-112, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799; Malloy, *supra* note 403 (manuscript at 11–12); Seligmann, *supra* note 392, at 504.

405. H.R. CONF. REP. NO. 99-687, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1807, 1809.

406. *See* Malloy, *supra* note 403 (manuscript at 12); Osborne, *supra* note 396, at 24–32 (discussing several cases allowing or rejecting § 1983 claims under IDEA).

407. *See* Marie O. v. Edgar, 131 F.3d 610, 612 (7th Cir. 1997); Seligmann, *supra* note 392, at 468 n.10 (stating that the IDEA is equivalent to its predecessor statute, EHA).

408. *See* Osborne, *supra* note 396, at 24–32 (discussing several cases allowing or rejecting § 1983 claims under IDEA); Seligmann, *supra* note, at 392, 496–98; Shannon, *supra* note 391, at 864–74 (discussing cases addressing whether implied right of action or § 1983 suits are available under § 1983).

409. *E.g.*, Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1273–74 (10th Cir. 2000) (concluding that *Smith v. Robinson*'s determination that IDEA's remedies are comprehensive still prohibits § 1983 suits under IDEA); Malloy, *supra* note 403 (manuscript at 14) (citing *Padilla*); Osborne, *supra* note 396, at 30 (discussing *Padilla*).

constitutional claims under § 1983 in light of *Pennhurst*'s requirement that Spending Clause statutes may impose liability on states only if the conditions are clearly stated.[410] Other courts allow § 1983 suits, but prohibit money damage awards.[411] Finally, some courts, most notably the Third Circuit, have interpreted § 1415(l) and HCPA's legislative history to allow suits under § 1983, including the possibility of damages.[412] The Seventh Circuit has held that infants with disabilities may bring a class action suit under § 1983 alleging that a state has not complied with the early intervention requirements of the IDEA, concluding that § 1415(l) demonstrates Congress's intent that § 1983 suits should be available to beneficiaries of the IDEA and that Part H of the IDEA,[413] which applies to disabled infants, is governed by § 1415(l), even though the former does not mention the latter.[414]

The IDEA and its HCPA amendments present an excellent example of the importance of legislative history as evidence concerning congressional intent.[415] Nothing in *Gonzaga* prohibits courts from considering HCPA's legislative history in determining whether the HCPA amendments allow § 1983 suits, including those for damages.[416] Just as Chief Justice Rehnquist's

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410. *See* Sellers v. Sch. Bd., 141 F.3d 524, 531–32 (4th Cir. 1998) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); Bond, *supra* note 391, at 792 (discussing *Sellers*); Osborne, *supra* note 396, at 29–30 (same); Seligmann, *supra* note 392, at 500–01, 516 & n.257 (same); Shannon, *supra* note 391, at 872–74 (same).

411. *See, e.g.*, Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386–87 (6th Cir. 1992); Malloy, *supra* note 403, at 14; Osborne, *supra* note 396, at 26, 29 (discussing *Crocker* and *Heidemann*); Seligmann, *supra* note 392, at 502.

412. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995) (relying on legislative history in determining that 1986 HCPA Amendments authorize § 1983 suits under IDEA); Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287, 1292–95 (C.D. Cal. 2001) (following *Matula*'s holding that legislative history of § 1415(f) makes clear Congress made the statute enforceable through § 1983); Zearley v. Ackerman, 116 F. Supp. 2d 109, 114 (D.D.C. 2000); Butler v. S. Glens Falls Cent. Sch. Dist., 106 F. Supp. 2d 414, 420 (N.D.N.Y. 2000); Cappillino v. Hyde Park Cent. Sch. Dist., 40 F. Supp. 2d 513, 515–16 (S.D.N.Y. 1999); Emma C. v. Eastin, 985 F. Supp. 940, 947 (N.D. Cal. 1997); Bond, *supra* note 391, at 791–92; Malloy, *supra* note 403, at 14, 23–26; Osborne, *supra* note 396, at 24–29 (discussing cases allowing § 1983 suits under IDEA); Seligmann, *supra* note 392, at 501; Shannon, *supra* note 391, at 867–70 (discussing *Matula*); *see also* Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987) (considering legislative history in holding that § 1983 is available for violations under pre-HCPA version of IDEA).

413. 20 U.S.C. §§ 1471–1485 (2000).

414. *See* Marie O. v. Edgar, 131 F.3d 610, 619–21 (7th Cir. 1997).

415. *See* Seligmann, *supra* note 392, at 502–06, 536 (discussing the legislative history of IDEA and arguing that the statute does not clearly establish rights enforceable by § 1983).

416. Whether HCPA's legislative history in conjunction with the 1986 Amendments is sufficient to establish an individual right is beyond the scope of this Article. *See generally* Malloy, *supra* note 403 (arguing that HCPA Amendments authorize § 1983 suits under IDEA).

Gonzaga opinion considered FERPA's legislative history relating to Congress's concern that "multiple interpretations" would result if regional federal officials were allowed to interpret the statute,[417] lower courts should routinely consider a statute's legislative history as one factor in ascertaining congressional intent about whether it creates individual rights, because considering a wider range of evidence is usually better.[418]

While legislative history provides valuable evidence and should be considered by courts, one must acknowledge that courts will sometimes disagree about the interpretation of legislative history. For example, courts have disagreed about whether the HCPA amendments authorize § 1983 claims under the IDEA.[419] Similarly, before the Supreme Court's *Blessing* decision decided that there was no right for parents to sue states by § 1983 for the states' alleged failure to provide child support enforcement services under Title IV-D of the Social Security Act,[420] the courts of appeals disagreed in reading the statute's legislative history about whether Congress intended to make parents beneficiaries of the statute.[421]

Like other types of evidence, courts need to assess the reliability and the relevance of any legislative history.[422] If the text of the statute has a clear meaning, courts generally will not use legislative history to contradict the text's plain meaning.[423]

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417. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2279 (2002) (quoting 120 CONG. REC. 39,863 (1974) (joint statement) (expressing "concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions")).

418. *See* Mank, *Textualist*, *supra* note 304, at 1275 (arguing that use of legislative history is likely to increase the odds that a court can find evidence regarding a specific issue relative to just considering text); Merrill, *supra* note 383, at 366–70 (same); Slawson, *supra* note 385, at 400 (same).

419. *See* Seligmann, *supra* note 392, at 502–06. Refer to notes 408–14 *supra* and accompanying text (comparing courts that allow these § 1983 claims with courts that do not).

420. Blessing v. Freestone, 520 U.S. 329, 332, 342–46 (1997) (citing 42 U.S.C. §§ 651–669b).

421. *Compare* Wehunt v. Ledbetter, 875 F.2d 1558, 1565–66 (11th Cir. 1989) (holding that there is no right to sue under § 1983 because Title IV-D does not make families with children beneficiaries of the statute, based in part on a reading of the statute's legislative history), *with* Carelli v. Howser, 923 F.2d 1208, 1211 (6th Cir. 1991) (holding that there is a right to sue under § 1983 because Title IV-D, in light of legislative history, intends to make families with children beneficiaries of the statute). *See generally* Ashish Prasad, Comment, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U. CHI. L. REV. 197 (1993) (arguing that Title IV-D creates enforceable rights but does not provide a comprehensive remedial scheme).

422. *See* Mank, *Textualist*, *supra* note 304, at 1267–75 (discussing advantages and disadvantages of considering legislative history); Merrill, *supra* note 383, at 366–70 (same); Slawson, *supra* note 385, at 400 (same).

423. Almost all scholars acknowledge "that the statutory text is the most

However, a statute's text is often ambiguous, and in those cases it is appropriate for courts to consider legislative history. Some types of legislative history are considered more reliable than others. For example, most judges generally give more weight to official conference reports or reports of the House or Senate than to remarks by individual legislators.[424]

Despite Justice Breyer's suggestion that the majority opinion relied only on FERPA's text and structure to determine if there was clear and unambiguous evidence of congressional intent to create a right, *Gonzaga* does not prohibit judges from considering legislative history, and Chief Justice Rehnquist's majority opinion did in fact consider such evidence.[425] As they have done in the past, judges should continue to consider legislative history when they interpret a statute's meaning and Congress's intent in enacting the statute. In particular, courts are more likely to find congressional intent about whether a statute creates individual rights by examining a statute's legislative history.[426] By failing to consider legislative history, judges are more likely to miss Congress's intent to benefit individuals.

VII. CONCLUSION

The *Gonzaga* decision will significantly harm the intended beneficiaries of federal grant-in-aid programs that give substantial federal aid to state agencies and institutions on the condition that they provide benefits and rights to individuals.[427] While states are free not to participate in such programs, states are supposed to be bound by various conditions in exchange for

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authoritative interpretive criterion." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990); *see* Mank, *Textualist*, *supra* note 304, at 1239–40. Nevertheless, courts sometimes reject statutory language that would lead to "an odd result" and instead rely on legislative history. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989)); *see* Mank, *Textualist*, *supra* note 304, at 1275 & n.237; Slawson, *supra* note 385, at 396, 400. *But see Public Citizen*, 491 U.S. at 473 (Kennedy, J., concurring) (arguing that courts should follow statutory text unless interpretation produces an "absurd" result).

424. *See* Mank, *Textualist*, *supra* note 304, at 1269 (noting, however, that "some textualists allege that legislators rarely read committee reports").

425. Refer to Part IV.A *supra* (discussing Chief Justice Rehnquist's *Gonzaga* opinion).

426. *See* Mank, *Textualist*, *supra* note 304, at 1275 (arguing that use of legislative history is likely to increase the odds a court can find evidence regarding a specific issue relative to just considering text); Merrill, *supra* note 383, at 366–70 (same); Slawson, *supra* note 385, at 400 (same).

427. *See* Key, *supra* note 29, at 284, 287–93 (discussing the role of federal grant-in-aid programs).

receiving federal aid.[428] In the past, courts often implied private rights of action to protect individuals who were harmed when states violated the conditions of their grant-in-aid programs, but the Supreme Court has largely eliminated implied private causes of action by demanding proof that Congress intended to provide both a right and a remedy to the individuals.[429] In response, many plaintiffs have sought to vindicate federal statutory rights through § 1983, which may provide a remedy even if the substantive right itself contains no right of action.[430] Unfortunately, *Gonzaga* shuts the § 1983 door not only for students who sought to challenge allegedly wrongful decisions by educational institutions, but likely for most intended beneficiaries of other federal grant-in-aid programs.

Chief Justice Rehnquist's requirement of clear and unambiguous proof that Congress intended to establish an individual right on behalf of a class including the plaintiff eroded the Court's precedent emphasizing the presumptive enforcement of federal statutory rights through § 1983. Even worse, the majority opinion placed an additional burden on the plaintiffs by effectively demanding proof that Congress would have wanted thousands of private suits, even though the majority acknowledged that in a § 1983 suit the plaintiff does not have to prove that Congress intended to create a cause of action because § 1983 supplies its own cause of action for the intended beneficiaries of a federal statutory right.[431] By blurring the right versus remedy distinction, Chief Justice Rehnquist inappropriately considered evidence about whether the statute's remedies should preclude the enforcement of rights under § 1983 to address the separate issue of whether Congress intended to create an individual remedy under FERPA, and placed a far heavier burden on the plaintiffs by doing so.[432] The defendants should have had the burden of proving that FERPA's centralized administrative review procedures preclude suits under § 1983, but *Gonzaga* placed the effective burden on the plaintiffs.[433]

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428. *Id.* at 284.

429. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 732–35 (1979) (Powell, J., dissenting) (discussing the history of Supreme Court decisions allowing or denying private rights of action); Key, *supra* note 29, at 294; Mank, *Private Cause of Action*, *supra* note 29, at 25–26; Stabile, *supra* note 29, at 868–71.

430. Mank, *Using § 1983*, *supra* note 11, at 357–59.

431. Refer to Part IV.A *supra* (discussing Chief Justice Rehnquist's *Gonzaga* opinion).

432. *Id.*

433. *Id.*

Yet *Gonzaga* is not necessarily a total disaster for civil rights plaintiffs because it did not overrule *Wilder*, *Wright*, or *Blessing*. Despite Chief Justice Rehnquist's focus on textual evidence, lower courts in good faith can still consider evidence regarding legislative history. Furthermore, while regulations alone may not establish the necessary intent, regulations can still define the scope of a right that is clearly established in a statute, especially because federal agencies often have unique insight regarding statutes they helped Congress draft.[434] By considering agency regulations and legislative history, courts are less likely to miss evidence that Congress intended to establish individual rights that in turn are presumptively enforceable under § 1983.

434. Mank, *Textualist*, *supra* note 304, at 1283. Refer to Part V *supra* (discussing enforcement of regulations through § 1983).