

IMPLIED PRIVATE RIGHTS OF ACTION AND SECTION 1983: CONGRESSIONAL INTENT THROUGH A GLASS DARKLY

Federal courts are seeing an increasing number of plaintiffs demanding relief for alleged violations of federal statutes.¹ In any such action, one of the fundamental threshold questions is whether the plaintiff has a "cause of action."² When a plaintiff invokes a federal statute as the basis for his or her claim, the court will determine that a cause of action exists if it finds that (1) the statute expressly authorizes a private suit to enforce the specific rights created;³ (2) a private right of action is implied by the statute in issue;⁴ or (3) the independent, express cause of action provided by 42 U.S.C. section 1983 ("section 1983")⁵ encompasses the statute in issue.⁶ Whether a federal statute implies a private right of action or whether the federal statute is encompassed by section 1983 are the two threshold questions that have presented the Supreme Court with the most difficulty. The court's effort to address these questions is represented by two lines of cases. One line⁷ reveals how the courts find an implied private right of action under a federal statute which does not expressly grant such an action. In these cases, the Court examines the statute's

¹ *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 22-23 & n.1 (1981) (Stevens, J., concurring in part and dissenting in part).

² A "cause of action" has recently been defined by the Court as a "question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court. . . ." *Davis v. Passman*, 442 U.S. 228, 240 n.18 (1979). The *Davis* definition of a cause of action stands in contrast to the more familiar definitions associated with threshold pleading requirements. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693 (1949) (the alleged invasion of recognized legal rights upon which a litigant bases his claim for relief); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 2.9 at 75-76 (2d ed. 1977) ("a group of facts that give rise to one or more rights of relief"). Since "cause of action" has multiple meanings, "right of action" has been used in the *Davis* sense and avoids confusion with other possible meanings. For the purposes of this note, when "cause of action" or "right of action" is used, the *Davis* definition is intended.

A cause of action or right of action, although a question of "who" may sue, is not to be confused with the issue of standing, which is "a question of whether a plaintiff is sufficiently adversary to a defendant to create an art. III case or controversy. . . ." *Davis*, 442 U.S. at 239 and 240 n.18. Like the ascertainment of a cause of action, a finding by the court that a particular plaintiff has a right to relief is ostensibly not "on the merits;" rather, it is a condition precedent to any decision on the merits.

³ See, e.g., *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136, 1145 (D.R.I. 1977).

⁴ See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

⁵ 42 U.S.C. § 1983 (Supp. III 1979). The statute 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

⁶ See, e.g., *Maine v. Thiboutot*, 448 U.S. 1, 5-9 (1979).

⁷ See *infra* text accompanying notes 14-80.

language, structure, and legislative history to see if Congress intended to allow a private right of action. The other line⁸ has approached the question of a private right of action under a silent federal statute by interpreting the broad language of section 1983, which imposes liability upon any person acting under color of state law who deprives another person of any rights, privileges, or immunities secured by the Constitution and laws of the United States.⁹ In this instance, the Court has interpreted section 1983 to allow a private right of action where the litigant alleges that his or her injury was the result of a violation of a federal statute by one acting under color of state law. The two lines of cases overlap to a certain extent. For example, a plaintiff may argue both that a statute creates an implied right of action against the defendant and, when the defendant has acted under color of state law, that the same statute creates a substantive right enforceable by the express right of action provided by section 1983. A court could find, then, that while a statute does not provide a private right of action for its enforcement, the statute itself vests rights in an individual which are redressable under section 1983.¹⁰

Two recent Supreme Court cases, *Pennhurst State School and Hospital v. Halderman*¹¹ and *Middlesex County Sewerage Authority v. National Sea Clammers Association*,¹² have addressed the interaction between implied rights of action and section 1983. In each of these cases, the Court employed principles rooted in the implied right of action analysis to limit the scope of section 1983 actions.¹³

This note examines the framework the Supreme Court has established to determine whether a federal cause of action lies under either an implied right of action theory or section 1983. In the first section, the note examines the evolution of both the implied right of action analysis and section 1983 case law. The watershed cases expounding the Court's implied right of action analysis will be described, illustrating the Court's gradual narrowing of the implied right doctrine. The growth and current parameters of section 1983 as an express cause of action then will be treated, with attention to the underlying purposes, scope, and operative effect of the statute. The next section examines the paralleling of the implied right of action and section 1983 lines of analysis in the *Pennhurst* and *Sea Clammers* cases. Part II of this note presents a discussion of the *Pennhurst* and *Sea Clammers* cases which focuses, in particular, on the congressional intent element of the Court's section 1983 and implied rights of action analysis. It will be submitted that the governing principle in the Court's threshold search for an

⁸ See *infra* text accompanying notes 81-148.

⁹ See *supra* note 5.

¹⁰ The apparent paradox is more acute when the statute in question imposes obligations upon both the federal and state governments and the plaintiff alleges that his injury is the result of both federal and state actors. If the federal statute would allow a private right of action via section 1983 against the state, but preclude a private suit against the federal actor, the state would appear to be inequitably exposed to liability. See, e.g., The Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1976 & Supp. III 1979).

¹¹ 451 U.S. 1 (1981).

¹² 453 U.S. 1 (1981).

¹³ See *infra* notes 202-09 and accompanying text.

implied private right of action — the intent of Congress to provide or deny such a right — is not the proper framework for deciding whether a section 1983 action lies to remedy an alleged statutory violation. When applied to section 1983, the current intent analysis is fraught with the very same judicial speculation it seeks to avoid and frustrates the underlying purpose of section 1983 as previously articulated by the Court. Further, the Court's application of the implied right of action analysis to section 1983 analysis inappropriately prevents section 1983 from serving as an independent cause of action for abuses of state power. Finally, an alternative "clear expression" test is endorsed in order to shift the decision of whether section 1983 applies to specific statutes firmly into the hands of Congress.

I. DEVELOPMENT AND CURRENT STATUS OF JUDICIAL DOCTRINES REGARDING IMPLIED RIGHTS OF ACTION AND RIGHTS OF ACTION UNDER SECTION 1983.

A. *Implied Private Right of Action*

When a plaintiff asks a federal court to infer a private right of action from a federal statute, the court, in essence, is being asked to create a species of tort liability for the statute's violation.¹⁴ Rather than fashion interstitial rules pursuant to their common law power,¹⁵ the courts tend to address the existence of a private remedy in light of carrying forward the purposes and intent of a federal statute.¹⁶ This was not, however, always the case. For example, in the decision where the Supreme Court first inferred a right of action from the substantive provisions in a federal statute,¹⁷ the Court justified its action on the common law theory that where there is a right, there is a remedy.¹⁸

As will be seen,¹⁹ largely as a result of curtailments of the federal court's

¹⁴ See RESTATEMENT (SECOND) OF TORTS § 874A and comment g (1979). "A tort action is the form of civil relief that grants damages or injunctive relief for harm wrongfully inflicted upon or threatened to an interest of the injured party." *Id.*, comment f at 304. See also *id.* § 870.

¹⁵ See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 60 (3d ed. 1976). In discussing the federal common law subsequent to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), Wright states that:

Whether state law or federal law controls on matters not covered by the Constitution or an Act of Congress is a very complicated question, which yields to no simple answer in terms of the parties to the suit, the basis of jurisdiction, or the source of the right which is to be enforced. Whenever the federal court is free to decide for itself the rule to be applied, and there are many such situations, it is applying, or making, "federal common law."

Id. at 279.

¹⁶ RESTATEMENT (SECOND) OF TORTS, § 874A comment g, at 307.

¹⁷ *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916).

¹⁸ *Id.* at 39-40. The Court said:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . This is but an application of the maxim, *Ubi jus ibi remedium*.

Id.

¹⁹ See *infra* text accompanying notes 22-29.

powers by *Erie Railroad Co. v. Tompkins*,²⁰ as well as increased deference to congressional actions,²¹ the judiciary's willingness to infer private rights of action from federal statutes has steadily declined. This section will analyze the development of the current restrictive doctrines which are applied by the Court.

1. Doctrinal Development

The "presumption"²² that a right of action is implied by any statute enacted for the special benefit of a class of plaintiffs, adopted by the Supreme Court in 1916,²³ did not withstand the redefined role of the federal courts outlined in *Erie* twenty-two years later.²⁴ *Erie* ostensibly marked the end of the federal courts' power to fashion common law,²⁵ except in very restricted circumstances.²⁶ Thus, subsequent to *Erie*, the Court in *Wheeldin v. Wheeler*,²⁷ recognized that inferring a right of action for damages in cases where Congress did not clearly imply one was tantamount to fashioning a common law right and that after *Erie*, federal courts were restricted from fashioning such rights.²⁸ The Court stated that, except in areas primarily governed by federal law, and where Congress delegated to it the power to fill in the interstices of a statute, the judicial power did not permit federal courts to infer a private right of action for an alleged violation of a federal statute.²⁹

Notwithstanding the limitation of the federal judicial power that the *Wheeldin* Court derived from *Erie*, however, the Supreme Court, in *J.I. Case Co. v. Borak*³⁰ found an implied right of action in section 14(a) of the Securities Exchange Act of 1934 (the 1934 Act).³¹ In *Borak*, a shareholder sought to collect damages and to void a merger which allegedly had been accomplished through the use of false and misleading proxy solicitation material.³² Although section 14(a), and the regulations promulgated thereunder made such proxy material unlawful, the defendants denied that any private right of action existed under section 14(a).³³ The Court, however, pointing to the broad remedial purposes of the 1934 Act to protect investors, an express provision for federal court jurisdiction over suits to enforce the 1934 Act,³⁴ and the salutary effect of

²⁰ 304 U.S. 64 (1938).

²¹ See *infra* text accompanying notes 45-80.

²² See *Clammers*, 453 U.S. at 23 (Stevens, J. concurring in part and dissenting in part).

²³ *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916). See *supra* note 18.

²⁴ *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963).

²⁵ See *supra* note 15.

²⁶ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (commercial paper issued by United States is governed by federal law).

²⁷ 373 U.S. 647 (1963).

²⁸ *Id.* at 651.

²⁹ *Id.* at 651-52.

³⁰ 377 U.S. 426 (1964).

³¹ 15 U.S.C. § 78n(a) (1958) (amended in 1964, 1968, 1970) (section 14(a) of the Securities Exchange Act of 1934 prohibits false and misleading proxy solicitation material).

³² 377 U.S. at 431-32.

³³ *Id.* at 431.

³⁴ 15 U.S.C. § 78aa (1976).

private actions to aid the existing agency enforcement scheme created by the 1934 Act, readily found a private right of action in favor of the shareholder.³⁵ The decision in *Borak* to infer a right of action from a procedural provision in a statute which also provided a comprehensive enforcement scheme was later analyzed by Justice Harlan as not premised on statutory construction. Rather, Justice Harlan noted, *Borak* rests on the independent judicial power to provide remedies in accordance with "substantive social policies embodied in an act of positive law."³⁶

The Court's early presumption that a right of action is implied by a statute conferring special benefit to a certain class of individuals, the federalism concerns voiced by the Court in *Wheeldin*, and the Court's exercise of its power to facilitate substantive social policies in *Borak* provided a broad if not contradictory means of testing any particular statute for indications of potential private relief. Thus, in its 1975 *Cort v. Ash* decision,³⁷ the Court undertook to condense all prior implied right of action cases into a four factor analysis. In *Cort*, the stockholders of a corporation in a derivative suit sought damages against the corporation's directors in reliance on a federal criminal statute which prohibited corporations from making contributions in connection with presidential elections.³⁸ In analyzing whether the plaintiffs had a right of action, the Court set out the following test:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?³⁹

These four factors — the provision of a right, the intent of Congress, the legislative purposes and the balance of federalism — were derived, in essence, from prior cases addressing implied private rights of action.⁴⁰ The Court, on the facts and the statute at issue, found that none of the four factors supported an implied private right of action for damages under the federal criminal statute.⁴¹

The *Cort* test can be seen as at once liberal and restrictive. On the one hand, it seems to set up a broad range of considerations that courts may ex-

³⁵ 377 U.S. at 431-34.

³⁶ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 402 n.4 (1971) (Harlan, J., concurring in judgment).

³⁷ 422 U.S. 66 (1975).

³⁸ 18 U.S.C. § 610 (1970 & Supp. III 1973) (repealed 1976).

³⁹ 422 U.S. at 78 (emphasis in the original) (citations omitted).

⁴⁰ The Court cited, *inter alia*, cases cited *supra* notes 23, 26, 30, 36.

⁴¹ *Cort*, 422 U.S. at 80-85.

amine to determine whether a statute implies a private right of action. Moreover, the first three factors — which require a perusal of the legislative history to determine the existence of a special class, Congress' remedial intent, and the underlying purposes of the statute — confer great discretion on the courts since they each allow for judicial creativity. On the other hand, the test also might be considered restrictive since, as recognized by Justice Stevens, "multifactor balancing tests generally tend to produce negative answers. . . ."⁴² In operation, although the lower courts have found that the *Cort* factors make it easier to find an implied private right of action,⁴³ the Supreme Court has more often than not declined to infer a private right of action.⁴⁴

2. Post-*Cort* Developments

Discontent with what was seen as the *Cort* "open invitation"⁴⁵ to judicial legislation surfaced in the Supreme Court's *Cannon v. University of Chicago* decision.⁴⁶ In *Cannon* the Court was asked to find a private right of action in section 901(a) of Title IX of the Education Amendments of 1972⁴⁷ in order to remedy an allegedly discriminatory rejection of a medical school application.⁴⁸ The plaintiff in *Cannon* had alleged that a medical school which received federal financial assistance had denied her application because she was a woman.⁴⁹

⁴² *Sea Clammers*, 453 U.S. at 25 (Stevens, J., concurring in the judgment in part and dissenting in part).

⁴³ See, e.g., *Redington v. Touche Ross & Co.*, 592 F.2d 617, 621-23 (2d Cir. 1978), *rev'd*, 442 U.S. 560 (1979) (section 17(a) of Securities Exchange Act of 1934); *Riggle v. California*, 577 F.2d 579, 582-83 (9th Cir. 1978) (Rivers & Harbors Appropriations Act); *Lewis v. Transamerica Corp.*, 575 F.2d 237, 238-39 & n.1 (9th Cir. 1978), *rev'd in part, aff'd in part and remanded*, 444 U.S. 11 (1979) (Investment Advisers Act of 1940); *Davis v. Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd*, 442 U.S. 397 (1979) (section 504 of Rehabilitation Act of 1973); *Wilson v. First Houston Inv. Corp.*, 566 F.2d 1235, 1238-43 (5th Cir. 1978), *vacated and remanded*, 444 U.S. 959 (1979) (section 206 of Investment Advisers Act of 1950); *Association of Data Processing Serv. Orgs. Inc. v. Federal Home Loan Bank Bd.*, 568 F.2d 478, 483-84 (6th Cir. 1977) (section 11(e) of Federal Home Loan Bank Act); *Abrahamson v. Fleschner*, 568 F.2d 862, 872-76 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (section 206 of Investment Advisers Act of 1940); *Hughes v. Dempsey-Tegeler & Co. Inc.*, 534 F.2d 156, 166 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976) (section 6 of Securities Exchange Act of 1934). *But see*, e.g., *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074, 1078-85 (5th Cir.) *cert. denied*, 449 U.S. 889 (1980) (section 503 of Rehabilitation Act of 1973).

⁴⁴ See, e.g., *Sea Clammers*, 453 U.S. at 13-18 (Federal Water Pollution Control Act and Marine Protection, Research and Sanctuaries Act); *Pennhurst*, 451 U.S. 1, 11-27 (Developmentally Disabled Assistance and Bill of Rights Act of 1975); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 767-84 (1981) (Davis-Bacon Act); *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979) (Trade Secrets Act); *Piper v. Chris-Craft Industries, Inc.* 430 U.S. 1, 24-32, *reh'g denied*, 430 U.S. 976 (1977) (section 14(e) of the Securities Exchange Act of 1934). *See also* Supreme Court cases cited *supra* note 43. *But see Cannon v. University of Chicago*, 441 U.S. 677, 688-719 (1979) (Title IX of Education Amendments of 1972).

⁴⁵ *Cannon*, 441 U.S. at 731 (Powell, J., dissenting).

⁴⁶ 441 U.S. 677 (1979).

⁴⁷ 20 U.S.C. § 1681 (1976).

⁴⁸ 441 U.S. at 680 & n.2.

⁴⁹ *Id.* at 680.

This denial, she claimed, was a violation of section 901(a) which prohibits gender discrimination by education programs receiving federal financial aid.⁵⁰ Justice Stevens, speaking for the majority, analyzed the statute according to the four factor *Cort* test and found that each factor supported the inference of a private right of action.⁵¹ Thus, the plaintiff's complaint was held to state a cause of action.⁵²

Justice Powell, in dissent, urged a complete abandonment of the *Cort* test and proposed that a private right of action never be found unless there is "most compelling evidence" that Congress actually intended one.⁵³ According to Powell, since article III of the federal constitution grants to Congress the sole responsibility to determine the jurisdiction of the federal courts, the Court must refrain from creating remedies which necessarily enlarge the court's jurisdiction.⁵⁴ Thus, he asserted that the question at issue was not the existence of a legal right but, rather, the existence of a threshold right of the particular individual to invoke the enforcement power of the courts.⁵⁵ By inferring a right of action, Powell admonished, the judiciary was in effect assuming the policy-making authority constitutionally vested in Congress.⁵⁶ Further, he regarded the implied private right of action doctrine as ultimately encouraging Congress to avoid hard political choices — choices with which the courts are even less prepared to deal — which in turn increases the judiciary's exercise of governmental power.⁵⁷ By characterizing the *Cort* implied private right of action as an unconstitutional jurisdictional affront, Powell shifted the focus of the Court's inquiry away from considerations of whether the implied remedy would further the statute's remedial purpose towards considerations of whether the Court would be within its constitutionally and statutorily limited jurisdiction in hearing the case.

⁵⁰ *Id.* at 680-83.

⁵¹ *Id.* at 688-717. As to the first *Cort* factor, the Court found that the statute's express language — persons denied participation on the basis of sex — was focused on a benefited class and not merely a simple ban on discriminatory conduct by recipients of federal funds. *Id.* at 689-94. On the second factor, the Court found no evidence of any Congressional intent to deny a private right of action and, instead, found strong support that a private right was intended given that comparable language in a predecessor statute and another statute had been judicially construed to provide a private right of action before the statute in issue was enacted. *Id.* at 694-703. Weighing the third *Cort* factor, the Court found a private remedy was helpful to the statutory purpose of providing effective protection to individual citizens. *Id.* at 704-08. Lastly, the Court cursorily noted that the protection of citizens against invidious discrimination had been the task of the federal government and courts since the Civil War and thus not in conflict with an area basically the concern of the States. *Id.* 708-09. Justice White, on the other hand, found that the legislative history and the statutory scheme did not show Congress intended any private enforcement of the Act. *Id.* at 718-19 (White, J., dissenting).

⁵² *Id.* at 717.

⁵³ *Id.* at 731 (Powell, J., dissenting).

⁵⁴ *Id.* at 730-31 (Powell, J., dissenting).

⁵⁵ *Id.* at 740 (Powell, J., dissenting).

⁵⁶ *Id.* at 743 (Powell, J., dissenting).

⁵⁷ *Id.* at 743-44 (Powell, J., dissenting).

Echoes of Powell's strong dissent in *Cannon* resounded in Supreme Court majority opinions soon afterwards. In *Touche Ross & Co. v. Redington*,⁵⁸ the Court addressed whether a customer of a brokerage firm had an implied private right of action based on section 17(a) of the Securities Exchange Act of 1934.⁵⁹ The plaintiff in *Touche Ross* sought damages against accountants who had improperly performed an audit required by the Securities Exchange Act of 1934.⁶⁰ While holding that section 17(a) did not provide the plaintiffs with a private right of action, the court modified the test it had outlined in *Cort v. Ash*.⁶¹ According to Justice Rehnquist's majority opinion, *Cort* had not mandated that the four factors be accorded equal weight.⁶² Rather, the central inquiry, Rehnquist believed, was whether Congress explicitly or implicitly *intended* to create a private cause of action.⁶³ Further, Rehnquist noted, the first three factors of *Cort*, which emphasized the language and focus of the statute, its legislative history, and its purpose, were traditional methods of determining legislative intent.⁶⁴ Writing for the Court, Rehnquist found that the "plain language"⁶⁵ and structure⁶⁶ of the statute in issue, together with a silent legislative history⁶⁷ indicated a lack of any congressional intent to provide a private right of action.

In refusing to infer a private right of action from section 17(a), the majority also adopted a rule of statutory construction somewhat different from that used by the *Borak* Court. In *Borak*, a comprehensive statutory remedial scheme was found to be evidence of a broad remedial purpose in the legislation, which in turn supported the inference of a private right of action.⁶⁸ In *Touche Ross*, however, Justice Rehnquist and the majority held that the complex statutory scheme of remedies expressly provided in the statute was evidence that *no* additional remedies were intended.⁶⁹

Soon after *Touche Ross*, Justice Stewart writing for the majority in *Transamerica Mortgage Advisors, Inc. v. Lewis*,⁷⁰ reaffirmed Justice Rehnquist's distilla-

⁵⁸ 442 U.S. 560 (1979).

⁵⁹ 15 U.S.C. § 78q(a) (1970) (amended 1975).

⁶⁰ *Touche Ross*, 442 U.S. at 562.

⁶¹ *Id.* at 575.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 575-76.

⁶⁵ *Id.* at 571. Rehnquist interpreted the specific section as a record keeping provision which neither prohibited any specific conduct nor created any federal rights in favor of private parties. *Id.* at 569.

⁶⁶ The provision in issue was flanked by sections which did expressly grant comprehensive private rights of action for other violations. *Id.* at 571-72.

⁶⁷ *Id.*

⁶⁸ *Borak*, 377 U.S. at 431-35.

⁶⁹ *Touche Ross*, 442 U.S. at 571-72, 578. "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Id.* at 572. This structural inference was precisely the kind of "extrapolation of legislative intent" Justice Stevens had rejected earlier in *Cannon*, 441 U.S. at 711.

⁷⁰ 444 U.S. 11 (1979).

tion of the first three *Cort* factors into a consideration of congressional intent.⁷¹ Although the Court in *Transamerica* found language in the contested statute that said it was intended to benefit the class of litigants to which the plaintiff belonged,⁷² the Court treated the question of intent to create a private right of action as separate.⁷³ Since the legislative history was silent as to a private right of action,⁷⁴ the Court again turned to a consideration of the scheme of judicial and administrative remedies supplied in the statute to shed light on Congress' intent.⁷⁵ Applying the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it,"⁷⁶ the Court found that no private right of action was intended.⁷⁷ Justice Powell, in a one sentence concurrence, noted that the majority opinion in *Transamerica* was compatible with his dissent in *Cannon* which had urged an abandoning of the four factor *Cort* test and a higher threshold showing that Congress intended a private right of action before one was judicially inferred.⁷⁸ Thus, the maxim *ubi jus ibi remedium* was replaced by the maxim *expressio unius est exclusio alterius*.⁷⁹

As discussed above, the Court's search for an implied private right of action now largely focuses on the intent of Congress to create or preclude privately enforceable rights. In searching for intent, the plain language of the act, its structure, and the legislative history are all drawn upon by the Court. As a tool of construction, the Court has focused its intent analysis on the express remedial scheme of the statute. It then has applied a rule of construction which negates a private implied remedy whenever remedies are expressly provided as

⁷¹ *Id.* at 15-16. The issue was whether the Investment Advisers Act of 1940, which was enacted to deal with abuses in the investment advisers industry, creates a private cause of action for damages or other relief in favor of persons aggrieved by those who allegedly have violated it. *Id.* at 12-13.

⁷² *Id.* at 17. Section 206 of the Investment Advisers Act broadly proscribes fraudulent practices by investment advisers in transactions with clients or prospective clients. *Id.* at 16-17.

⁷³ *Id.* at 18.

⁷⁴ *Id.*

⁷⁵ *Id.* at 19-22.

⁷⁶ *Id.* at 19. The Court cited *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) (interpreting Revenue Acts); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (Rail Passenger Service Act of 1970); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 419 (1975) (Securities Investor Protection Act of 1970); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 471 (1959) (Motor Carrier Act of 1935).

⁷⁷ 444 U.S. at 24.

⁷⁸ *Id.* at 25.

⁷⁹ *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074, 1085 (5th Cir. 1980) (where there is a right there is a remedy replaced by the expression of one thing implies exclusion of another).

The *Touche Ross* and *Transamerica* "intent" analysis remains, for the time being, the backbone of the Court's implied right of action analysis in subsequent decisions. Compare *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 770 (1981) (restating the *Cort* test as restricted by *Touche Ross* to require the courts to examine (1) the statute's language and focus, (2) its legislative history, and (3) its purpose, in order to discern congressional intent) with *California v. Sierra Club*, 451 U.S. 287, 293, 296 (1981) (citing the *Cort* test in full but relying only on the first two *Cort* factors and the failure to provide any statutory enforcement scheme as indicative of Congress' lack of intent to provide a private right of action).

in *Transamerica* and *Touche Ross*.⁸⁰ The Court has replaced the assumption that any wrong should have a judicial remedy with the premise that all decisions regarding the availability of federal remedies should be made by Congress. Consequently, the Court is now very reluctant to fill the perennial interstitial gaps in federal legislation.

The barriers imposed by the Court's present implied rights analysis to litigants seeking to redress alleged violations of federal statutes are formidable and necessarily direct such litigants to consider other rights of action. As the next section will discuss, section 1983 provides access to the federal courts in certain situations, namely where the plaintiff alleges a violation of his or her federal rights by a defendant acting under color of state law. Although the implied right of action analysis applies when the defendant is a private, federal, or state actor, section 1983 expressly gives private litigants the right to invoke the power of the court where federal rights are violated by a person acting under color of state law. Even where a plaintiff has no implied right of action, then, section 1983 may provide the plaintiff with an express cause of action to redress a violation of a federal statute.

B. Section 1983: An Express Private Right of Action

Section 1983⁸¹ creates an express remedy for parties whose rights are deprived by persons acting under color of state law in contravention of the Constitution or laws of the United States.⁸² Section 1983 was originally contained in section one of the "Ku Klux Klan Act,"⁸³ a civil rights statute enacted in 1871 in response to the violent terrorism in the Reconstruction South perpetrated by the Klan and unhampered by local state officials.⁸⁴ It was enacted under the aegis of section five of the fourteenth amendment which gives to Congress the power to enact laws to enforce the other provisions of the amendment.⁸⁵ Although it laid dormant for nearly ninety years because of restrictive judicial construction,⁸⁶ section 1983 received new vitality in 1961 when the Supreme Court expanded its applicability in *Monroe v. Pape*.⁸⁷ This section sketches certain historical developments of section 1983. Specifically, the section will discuss the various purposes underlying the statute. Next, it will address the recent extension of section 1983 liability to include not only actions by state officials but actions by local governmental entities as well. It also will note the imposition of liability for acts which violate federal statutory law as well as constitutional law. Lastly, the nature of the section 1983 right of action will be explained.

⁸⁰ Or when *not* provided as in *California v. Sierra Club*, 451 U.S. 287, 296 (1981).

⁸¹ 42 U.S.C. § 1983 (Supp. III 1979).

⁸² See *supra* note 5.

⁸³ Chapter 22, 17 Stat. 13 (1871).

⁸⁴ *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 610 n.25 (1979).

⁸⁵ *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

⁸⁶ *Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1135-36 (1977).

⁸⁷ 365 U.S. 167 (1961).

1. The Purposes of Section 1983

As a result of the sweeping language used by Congress in section 1983, the Supreme Court has repeatedly turned to the underlying purposes of the section in seeking to determine the statute's proper meaning and scope.⁸⁸ The starting point for such inquiries into the purposes of section 1983 has traditionally been the legislative history surrounding the enactment of the "Ku Klux Klan Act,"⁸⁹ the precursor of the current version of section 1983.⁹⁰ There was, however, little discussion at the time of enactment of the particular section of the "Ku Klux Klan Act" which later became section 1983.⁹¹ Nevertheless, according to the *Monroe* Court's analysis, the purposes behind the act from which section 1983 originated⁹² suggest that the Reconstruction Congress intended to protect federal rights in the federal courts as an alternative to the perceived unreliability of state courts.⁹³ In light of the breadth of these purposes, the *Monroe* Court found that section 1983 did give a federal cause of action to a party deprived of his rights by a state official's abuse of power⁹⁴ even if the plaintiff could have brought suit in the state court for the state official's failure to act in conformity with the laws of the state as well.⁹⁵ The Court found, in other words, that the failure of the defendant to act in conformity with state law did not preclude a finding that his conduct was "state action."

In more recent cases, the Court has de-emphasized section 1983's provision of a federal forum. Instead, the Court has concentrated on the functional purposes of section 1983 which, in essence, allow section 1983 to protect individual federal rights. Thus, section 1983 has been characterized as serving the purposes of deterrence, punishment, and compensation as opposed to merely providing an alternative forum.⁹⁶ Section 1983 deters the potential abuse of power by persons acting under color of state law for all such persons before acting in a way which violates anyone's federally protected rights must

⁸⁸ See, e.g., *Monroe*, 365 U.S. at 173-74.

⁸⁹ Section 1 of the Civil Rights Act of 1971, Chapter 22, 17 Stat. 13 (1871) (Ku Klux Klan Act).

⁹⁰ See, e.g., the extensive historical debates in *Maine v. Thiboutot*, 448 U.S. 1, 14-19 (1980) (Powell, J., dissenting); *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980); *Monroe*, 365 U.S. at 172-92; *id.* at 192-202 (Harlan, J., concurring); *id.* at 204-19, 225-37 (Frankfurter, J., dissenting).

⁹¹ *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980).

⁹² The Court saw three related purposes behind the Act. One purpose was to override state discriminatory legislation which might endanger the rights and privileges of its citizens. *Monroe*, 365 U.S. at 173. A second, related purpose was to provide a remedy where state law was inadequate (e.g., discriminatory laws providing that blacks could not testify against whites). *Id.* at 173-74. A third, broader purpose was to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. This federal remedy, the Court held, was supplemental and did not require the exhaustion of the state avenues of relief. *Id.* at 183.

⁹³ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at 155 (1978).

⁹⁴ *Monroe*, 365 U.S. at 172.

⁹⁵ *Id.* at 183.

⁹⁶ *City of Newport v. Fact Concerts, Inc.* 453 U.S. 247, 252 (1981).

consider the possibility of later being a defendant in a section 1983 action.⁹⁷ Section 1983 punishes the actual wrongdoer by allowing the courts to award money damages against him. Lastly, section 1983 compensates the victim by making a damage award available. In sum, by allowing a private right of action, section 1983 serves to protect an individual's federal rights before they are violated as well as after they are violated.

The differences between the original purposes of protecting federal civil rights with a federal forum and the more specific purposes now understood as essential to section 1983 reveal the great distance section 1983 has travelled. Although the concerns of the Reconstruction Congress which gave rise to the "Ku Klux Klan Act" would suggest a narrower interpretation, the "ambulatory"⁹⁸ language of section 1983 has provided a vehicle for the courts to read contemporary concerns into the statute. Yet, the process of creating law from the broad language of a statute is not, as Justice Frankfurter noted in *Monroe*, the most effective means of protecting human liberties, for it requires the judiciary to make policy decisions which are more properly the task of the legislature.⁹⁹ Further, in the modern world of cooperative federalism, i.e. federal statutory programs which mandate the sharing of responsibilities by both federal and state actors, the protection of an individual's rights from abuses of power has been qualified and integrated into larger statutory schemes which provide their own review and enforcement mechanisms. For example, the Federal Water Pollution Control Act,¹⁰⁰ specifically provides that "citizen suits" may be brought under the Act by a person adversely affected by a violation of the Act.¹⁰¹

Thus, where the alleged wrongdoer while under color of state law has violated a federal statute, any decision by the Court to recognize a federal statutory right and to remedy the abuse of power with section 1983 may lead the Court into conflict with the remedial provisions of the statute in issue. If the statute in issue contains its own remedial provisions, the Court would have to decide that, of the two congressional enactments, section 1983 takes precedence.

2. Growth of Section 1983 Liability

Once the purposes of section 1983 to provide a federal forum to individuals whose federal rights have been violated and to deter abuses of power by individual actors under color of state law have been established, the Court uses these purposes to determine the meaning and scope of the language of section 1983. Thus, the issues of who were actors under color of state law, what

⁹⁷ *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978).

⁹⁸ *Monroe*, 365 U.S. at 244 (Frankfurter, J., dissenting).

⁹⁹ *Id.* at 243-44 (Frankfurter, J., dissenting).

¹⁰⁰ 33 U.S.C. § 1251 *et seq.* (1976 and Supp. III 1979).

¹⁰¹ *See* 33 U.S.C. § 1365 (1976 and Supp. III 1979).

actions violated a person's rights and what rights or harms were redressable under the section received the Court's attention in a variety of cases. This part briefly sets out some of the contours of liability under section 1983.

The principal issue in the seminal *Monroe* case was whether Congress intended section 1983 to be a remedy for deprivations caused by an official's abuse of power.¹⁰² Plaintiffs had sought relief under section 1983 to compensate them for an unreasonable search and seizure by city police officers in contravention of the fourth amendment.¹⁰³ The narrow issue was whether such conduct by state officials could be "under color of" state law and thus actionable under section 1983 even if the police officers' acts were forbidden by state law.¹⁰⁴ In light of the purposes of section 1983¹⁰⁵ and cases interpreting criminal statutes with language similar to the "under color of" language in section 1983,¹⁰⁶ the Court answered in the affirmative and reversed the appeals court's dismissal of the plaintiffs' complaint.¹⁰⁷ Thus, the complaint was deemed to state a cause of action against the officers for their allegedly illegal actions under section 1983.¹⁰⁸

The city that employed the police officers was also named as a defendant.¹⁰⁹ Examining the legislative history of section 1983, however, the Court found that Congress did not intend to expose municipal corporations to liability.¹¹⁰ Hence, the Court concluded that municipalities are not "persons" within the meaning of section 1983, and it dismissed the claim against the city.¹¹¹

Justice Frankfurter, in a lengthy dissent addressing the majority's finding that the police officers acted "under color of" state law, urged a narrow interpretation of the "under color of" language on the ground that there was more at stake than abstract statutory construction.¹¹² The decision to include illegal acts as "under color of" state law, he said, is an issue that raises critical constitutional issues of federalism.¹¹³ Extending section 1983 to reach actions that were not even authorized by the states, Frankfurter noted, would invite conflict avoidable only by the exercise of judicial restraint and would result in substantial federal oversight of the administration of local policies.¹¹⁴ Despite

¹⁰² *Monroe*, 365 U.S. at 172.

¹⁰³ *Id.* at 169-71 (as made applicable to the states through the fourteenth amendment's due process clause).

¹⁰⁴ *Id.* at 183-87.

¹⁰⁵ See *supra* notes 90-101 and accompanying text.

¹⁰⁶ See, e.g., *Screws v. United States*, 325 U.S. 91, 107-13 (1945); *United States v. Classic*, 313 U.S. 299, 326 (1941).

¹⁰⁷ *Monroe*, 365 U.S. at 187 & 192.

¹⁰⁸ *Id.* at 187.

¹⁰⁹ *Id.* at 170.

¹¹⁰ *Id.* at 187-91.

¹¹¹ *Id.* at 191-92.

¹¹² *Id.* at 202 and 222.

¹¹³ *Id.* at 222.

¹¹⁴ *Id.* at 241-42.

Frankfurter's warnings, section 1983 rapidly became the vehicle for redressing a large number of harms inflicted by state actors in a wide variety of contexts.¹¹⁵ Moreover, the majority of these cases were brought in the federal courts,¹¹⁶ thus creating situations of conflict between the federal courts and state actors.

In 1978, seventeen years after *Monroe*, the finding that municipalities were not "persons" subject to liability under section 1983 was overruled in *Monell v. Department of Social Services*.¹¹⁷ In *Monell*, several pregnant municipal employees who were compelled to take unpaid leaves of absence sued the city of New York under section 1983 for unlawful gender discrimination.¹¹⁸ A reconsideration of the legislative history of section 1983 compelled the Court to conclude that Congress indeed had intended that local governmental units be "persons" within the meaning of section 1983.¹¹⁹ The Court noted, however, that liability will only attach to such governmental units if the wrongful action was taken pursuant to an official municipal policy which itself violates the federal constitution rather than merely being the result of an employee's tortious act.¹²⁰

The contours of the new municipal liability are still in the process of being defined. The Court has since held in *Owen v. City of Independence*,¹²¹ that local governmental units are not entitled to a qualified immunity defense based on the good faith of their policy making officials.¹²² Dissenting in *Owen*, Justice Powell contended that the abolition of the immunity defense increases local governments' exposure to an extent tantamount to the imposition of strict liability.¹²³ But relief against a local governmental unit is not unlimited. For example, a municipality is not liable for punitive damages under section 1983, in contrast to other section 1983 defendants.¹²⁴ Despite the official policy limitation and the punitive damages prohibition, the potential exposure of local governmental units and their employees to section 1983 actions is a stark reality.

¹¹⁵ See generally 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS §§ 116-208 (1980) (listing 92 categories of rights actionable under section 1983).

¹¹⁶ In the twelve months ending June 30, 1980, some 12,944 cases were filed in the federal courts under civil rights statutes including section 1983 (exclusive of the 13,000 prisoner petitions filed). Director of Administrative Office of the United States Courts Ann. Rep. A16-A17, Table C-2 (1980). In 1961, there were only 296 cases filed. *Thiboutot*, 448 U.S. 1, 27 n.16 (1980) (Powell, J., dissenting).

¹¹⁷ 436 U.S. 658, 662-663 (1978).

¹¹⁸ *Id.* at 660-61.

¹¹⁹ *Id.* at 690. "Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

¹²⁰ *Id.* at 691 (respondent superior theory not applicable in § 1983 actions).

¹²¹ 445 U.S. 622 (1980) (police chief terminated without hearing and slandered by city manager alleged deprivation of due process rights).

¹²² *Id.* at 650.

¹²³ *Id.* at 658 (Powell, J., dissenting).

¹²⁴ *City of Newport v. Fact Concerts, Inc.* 453 U.S. 247, 271 (1981). In this case, a concert promoter was denied punitive damages for the city's cancellation of an entertainment license

The precise meaning of the language "and laws" in section 1983 has also received attention by the Court.¹²⁵ Section 1983 only creates a right of action if the plaintiff alleges a deprivation of rights secured by the Constitution and laws of the United States. Although numerous cases have dealt with constitutional rights violated by actors under color of state law, until recently, little direct attention was accorded to violations of federal statutory rights.¹²⁶

In *Maine v. Thiboutot*,¹²⁷ in an opinion written by Justice Brennan, the Court held that the reference to "laws" in section 1983 is not limited to civil rights or equal protection laws but rather it embraces all federal statutory laws.¹²⁸ The plaintiffs in *Thiboutot* brought suit against the state and the state Commissioner of Human Services alleging that they had been deprived of welfare benefits to which they were entitled under the federal Social Security Act by the state's wrongful interpretation of a specific section of the Act.¹²⁹ Relying on precedent, which had assumed that statutory violations were remediable under section 1983,¹³⁰ the "plain language" of the Act,¹³¹ and the inconclusive nature of the section's legislative history,¹³² the Court interpreted

which amounted to content-based censorship and a violation of free expression and due process under color of state law. *Id.* at 252-54, 271. This result, the Court determined, was consonant with history and public policy. *Id.* at 271. The historical justification was that the enacting Congress had intended to leave in place the common law immunities of municipalities from punitive damages. *Id.* at 258-66. As to public policy, the burden of such an award ultimately would fall on the community and individual taxpayers. *Id.* at 270.

¹²⁵ See *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1979).

¹²⁶ See, e.g., *King v. Smith*, 392 U.S. 309, 312 n.3 (1968) ("We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts."); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (The Court did not decide whether "claimants are correct that section 1983 provides a cause of action for all federal statutory claims. . .").

¹²⁷ 448 U.S. 1 (1980).

¹²⁸ *Id.* at 4 & 6.

¹²⁹ *Id.* at 2-3 (42 U.S.C. § 602(a)(7)(1976)).

¹³⁰ *Id.* at 4-6. The Court cited *Rosado v. Wyman*, 387 U.S. 397 (1970); *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹³¹ *Thiboutot*, 448 U.S. at 4 & 6.

¹³² *Id.* at 7-8. Section 1 of the "Ku Klux Klan" Act of 1871 provided jurisdiction and a cause of action for deprivations of constitutional rights only. Chapter 22, 17 Stat. 13 (1871). The section was split-up and codified by an 1874 statutory revision into a remedial section, Rev. Stat. § 1979 (the forerunner of § 1983) and into two jurisdictional sections, Rev. Stat. §§ 563(12) and 629(16) (the latter the forerunner of 28 U.S.C. § 1343(3)). Section 629(16) applied to rights secured by the Constitution or "by any law providing for equal rights." Section 1979 referred to rights secured by the Constitution "and laws," and § 563(12) applied to rights secured by the Constitution or "by any law of the United States." Brennan felt the statutory history was not definitive, *Thiboutot*, 448 U.S. at 7, while Powell argued that the broader phrasings contained in § 1979 were inadvertent and not intended. *Id.* at 16 (Powell, J., dissenting). Powell further argued that the narrow range of the jurisdictional statute should defeat any broader reading of the remedial section for a crucial purpose of the remedial section was to provide a federal forum. *Id.* at 20-22. The elimination of the jurisdictional amount in 28 U.S.C. § 1331 by the Federal Question Jurisdiction Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, will minimize the anomalous effect of *Thiboutot*, which had briefly created an actionable federal right redressable only in the state courts.

section 1983 to provide a cause of action and relief to those alleging deprivation of federal statutory rights.¹³³

Justice Powell, in dissent, severely criticized the transformation of purely statutory claims into "civil rights" actions under section 1983,¹³⁴ apparently taking the view that section 1983 should provide a right of action only for civil rights statutes. Such a dramatic expansion of state and local government liability, he declared, ignored the history of section 1983, logical statutory interpretation and public policy¹³⁵ and created a major federal intrusion into state sovereignty.¹³⁶ One of the most egregious problems, predicted Powell, would be that state and local governments would now be open to attack whenever a person based a claim for an injury on the maladministration of any federal-state cooperative program.¹³⁷ Moreover, even where the state and federal governments might both be culpable, he stated, only the state and its subdivisions were open to suit under section 1983 while suits against federal officials and agencies could be maintained only in the "relatively rare case" where a cause of action could be inferred from the statute at issue.¹³⁸ Justice Powell concluded his opinion with an appendix listing a small sample of the many federal-state regulatory and social welfare enactments which could now give rise to actionable "civil rights" under section 1983.¹³⁹

With *Monell's* expansion of section 1983 liability to local governmental entities, *Owen's* abrogation of a qualified good faith immunity, and *Thiboutot's* inclusion of statutory non-civil rights violations as sufficient to invoke a section 1983 remedy, the increased potential liability of municipalities or local governmental entities under section 1983 is starkly clear. Further, with the existing federal legislation addressing complex social problems necessitating state involvement, and the expansion of the federal question jurisdiction to no longer foreclose actions with less than \$10,000 in controversy,¹⁴⁰ more and more litigants will turn to the federal courts for relief.

3. A Section 1983 Right of Action

This part of the comment will describe how section 1983 serves as a right of action.¹⁴¹ In addition, it will explore the broader implications and effects of such an express right of action.

¹³³ *Thiboutot*, 448 U.S. at 4. The Court also held that 42 U.S.C. § 1988, which provides a successful section 1983 plaintiff in federal courts a right to recover attorney's fees, was applicable in a state court proceeding. *Id.* at 8-11.

¹³⁴ *Id.* at 11-12 (Powell, J., with Burger, C.J., and Rehnquist, J., dissenting).

¹³⁵ *Id.* at 12.

¹³⁶ *Id.* at 33.

¹³⁷ *Id.* at 22.

¹³⁸ *Id.* at 24. Even if a private right of action against the federal official exists, plaintiffs would still focus on the state to obtain attorney's fees under § 1988. *Id.*

¹³⁹ *See id.* at 34-37.

¹⁴⁰ Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (amending 28 U.S.C. section 1331).

¹⁴¹ Although the Court tends to discuss the operation of § 1983 as a cause of action, it is simpler to describe the operation of § 1983 as a right of action. *See supra* note 2.

To recover under section 1983, one typically must show (1) a deprivation of a right secured by the Constitution or laws of the United States and (2) that the defendant's act creating the deprivation was "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory."¹⁴² By its terms, section 1983 imposes liability on a wrongdoer in an "action at law, equity or other proper proceeding." Section 1983, by providing a remedy for certain deprivations, implicitly acknowledges the existence of a body of substantive federal rights inuring to the plaintiff when he is harmed by such deprivations. Yet it "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes."¹⁴³ Thus, section 1983 does not create rights but rather recognizes the redressable nature of the deprivation of rights created elsewhere.¹⁴⁴ In a manner of speaking, however, such recognition creates a right in itself: the right to relief from such deprivations. In other words, section 1983 provides a *right* to a cause of action; it identifies a class of litigants that can, as Congress provided, appropriately invoke the power of the Federal Courts.

Although section 1983 may be only a vehicle to a remedy, it can be seen also as creating a species of tort liability since it creates liability for certain culpable conduct by those acting under color of state law.¹⁴⁵ Yet, when a specific deprivation and injury had to be linked to a constitutional right, section 1983 was said *not* to create a body of general federal tort law.¹⁴⁶ But the "constitutional shoals"¹⁴⁷ have been undermined by the *Thiboutot* expansion, in effect, creating a potential field of federal tort liability for state actors based on federal statutory rights. This linkage with the constitutional or statutory spheres, necessary to maintain a section 1983 action and give the action its substantive content, gives section 1983 tremendous potential reach.

By identifying the defendant, the plaintiff, the injury, and the relief in broad generic terms, section 1983 can be seen as providing a federal framework to resolve the myriad disputes between the individual and the state which encompass the federal government's ordering of permissible infringements on individual federal rights. But the breadth of section 1983, which is its strength, is simultaneously an inherent weakness. When presented with a section 1983 claim, the court is required to determine which substantive rights are involved

¹⁴² *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

¹⁴³ *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

¹⁴⁴ *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). "(O)ne cannot go into court and claim a 'violation of § 1983' — for § 1983 by itself does not protect anyone against anything." *Id.*

¹⁴⁵ *Owen*, 445 U.S. at 635. *Accord Monroe*, 365 U.S. at 187 (section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."). Thus § 1983 is construed in harmony with general principles of tort law. See *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

¹⁴⁶ *Paul v. Davis*, 424 U.S. 693, 700-01 (1976). Cf. *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

¹⁴⁷ *Paul v. Davis*, 424 U.S. at 701.

since section 1983 only applies when some person has been deprived of such rights. As the Court must decide which rights are involved, the ultimate issue of whether the alleged injury is remediable under section 1983 is placed firmly in its hands. In this light, section 1983 could be seen as little more than a jurisdictional statute which gives the court the power to look at a certain kind of case. Moreover, with the expansion of federal question jurisdiction,¹⁴⁸ section 1983, as applied to federal statutory violations, may be little more than the statement of a truism: any plaintiff who alleges a violation of a federal statute states a federal question and gains admittance to the federal courts.

C. *The Relationship Between Implied Rights of Action and Section 1983*

Whether a federal statute implies a private right of action and whether the same federal statute is encompassed by section 1983 are two seemingly separate questions which can and do overlap. The elemental inquiry in the implied right of action cases is whether the plaintiff is a member of a class which may enforce the rights created or protected by the statute in question.¹⁴⁹ In other words, the question is *who* may use the power of the court to enforce statutory rights.¹⁵⁰ Section 1983, in contrast, creates an express right of action which ostensibly answers the generalized question of "who" can enforce a statutory right with a description: any person deprived of rights by one acting under color of state law.¹⁵¹ If a plaintiff can establish that he comes within the terms of section 1983, the right to invoke the court's power is essentially mandated by Congress rather than judicially inferred.

Since section 1983 is a statutory right of action, it would seem to be a preferred vehicle for relief. Nevertheless, there remains the problem of the overlap of section 1983 analysis with implied rights analysis. The implied right of action analysis, with its search for the congressional intent to allow or preclude a privately sought judicial remedy within a legislative scheme, would, at first surmise, seem to be unnecessary in light of section 1983's automatic grant of power to those parties falling within its scope. Although in a proper fact pattern both analyses are applicable, the express right of action of section 1983 is potentially an easier route than the implied right of action reached by way of inference and statutory construction. If this analysis is correct, a section 1983 cause of action would render the court's threshold private right of action inquiry unnecessary as the congressional intent of the statute in issue would be subsumed by the larger sphere of affirmative intent manifested by the right of action granted by section 1983. Nonetheless, difficult questions remain as to the relationship of section 1983, implied rights of action, and federal statutes.

Not very long after *Thiboutot*, the Court was presented with two oppor-

¹⁴⁸ See *supra* note 140.

¹⁴⁹ *Davis v. Passman*, 442 U.S. at 239.

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 5.

tunities to discuss the parallel applicability of the implied right of action analysis and section 1983 as alternative methods of entry into the federal courts. Both cases, *Pennhurst State School and Hospital v. Halderman*¹⁵² and *Middlesex County Sewerage Authority v. National Sea Clammers Association*,¹⁵³ involved alleged violations by state defendants of state obligations imposed by specific federal-state statutory schemes of the kind set out by Justice Powell in his appendix in *Thiboutot*.¹⁵⁴ This section sets out these two cases in detail, and focuses specific attention on how the Court treats the threshold cause or right of action issues in each case.

1. *Pennhurst*

In *Pennhurst*, the primary issue presented to the Supreme Court involved a determination of the scope and meaning of a complex joint federal-state statute, the Developmentally Disabled Assistance and Bill of Rights Act of 1975.¹⁵⁵ The plaintiff, a retarded minor, was a resident of the defendant state institution, Pennhurst State School and Hospital. She had originally brought a class action in the federal district court claiming that the allegedly unsanitary, inhumane, and dangerous conditions at Pennhurst were (1) a denial of due process and equal protection, (2) cruel and unusual punishment, and (3) a denial of statutory rights conferred by the Rehabilitation Act of 1973, the Developmentally Disabled Act, and a Pennsylvania statute.¹⁵⁶ The district court found, *inter alia*, that mentally retarded individuals have a constitutional right to "minimally adequate habilitation" in the "least restrictive environment," and that the conditions at Pennhurst violated these rights.¹⁵⁷ The Court entered a detailed order providing that new arrangements be made.¹⁵⁸ The court of appeals substantially affirmed the remedy but avoided the constitutional claims by resting their decision on the Developmentally Disabled Act,¹⁵⁹ notably section 6010:¹⁶⁰ a "bill of rights" provision calling for "ap-

¹⁵² 451 U.S. 1 (1981).

¹⁵³ 453 U.S. 1 (1981).

¹⁵⁴ *Thiboutot*, 448 U.S. at 34-37.

¹⁵⁵ *Pennhurst*, 451 U.S. at 5. The statute in issue was 42 U.S.C. § 6000 *et seq.* (1976 and Supp. III) (hereinafter Developmentally Disabled Act).

¹⁵⁶ 451 U.S. at 6.

¹⁵⁷ *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1319-1320 (E.D. Pa. 1977). The district court also found constitutional rights to be free from harm and discriminatory habilitation, a state statutory right to minimally adequate habilitation, and a federal statutory right to non-discriminatory habilitation. *Id.* at 1320-24.

¹⁵⁸ *Id.* at 1326-29.

¹⁵⁹ *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 94, 95-100 & 116 (3d Cir. 1979).

¹⁶⁰ 42 U.S.C. § 6010 (1976) (amended 1978). It states in relevant part: Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

propriate treatment, services and habilitation" in the setting that was "least restrictive on the person's liberty."¹⁶¹ Using a *Cort* analysis,¹⁶² the court of appeals found an implied private right to be available to the plaintiff as a vehicle for enforcing these rights.¹⁶³

The Supreme Court, with Justice Rehnquist speaking for the five member majority, first held that there were no substantive rights within the Developmentally Disabled Act to support an implied right of action.¹⁶⁴ In deciding that there were no substantive rights created by the Act, the Court first examined whether Congress could have created enforceable rights and obligations.¹⁶⁵ In other words, did Congress have the *power* to legislate such rights or obligations?¹⁶⁶ As possible sources for the congressional power to legislate, Justice Rehnquist examined the statute as grounded in both section five of the fourteenth amendment¹⁶⁷ and the spending clause.¹⁶⁸ Rather than immediately examining the scope of section five of the fourteenth amendment, Justice Rehnquist first considered what the test should be for determining *when* Congress intends to enforce the fourteenth amendment.¹⁶⁹ Because of the special nature of section five legislation, in that it imposes federal policy on a state involuntarily and intrudes on state authority, the Court would not assume that Congress had acted pursuant to this power where the intent to do so was not express.¹⁷⁰ As to the spending power, the Court found that precedent stated that such legislation was in the form of a contract and required that, for any obligations to be imposed on a state by funding statute, they must be express,

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution[] . . . that — (A) does not provide treatment, services, and habilitation which is appropriate to the needs of such person; or (B) does not meet [certain] minimum standards. . . .

Id.

¹⁶¹ *Id.*

¹⁶² See *supra* text accompanying notes 37-44.

¹⁶³ 612 F.2d 84, 95-100 (3d Cir. 1979).

¹⁶⁴ *Pennhurst*, 451 U.S. at 10-11.

¹⁶⁵ *Id.* at 15.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* Section 5 provides: "The Congress shall have the power to enforce, by appropriate legislation," the guarantees of the fourteenth amendment. U.S. CONST. amend. XIV, § 5.

¹⁶⁸ The spending clause, U.S. CONST. art. I, § 8, cl. 1, allows for Congress to provide for the general welfare of the United States and when coupled with the necessary and proper clause, U.S. CONST. art. I, § 18, cl. 18, it provides a generalized source of congressional power for federal funding statutes.

¹⁶⁹ *Pennhurst*, 451 U.S. at 15-17.

¹⁷⁰ *Id.* at 16. This, the Court noted, was especially true where the asserted rights to special kinds of treatment would entail the imposition of an affirmative funding obligation on the States. *Id.* at 16-17.

unambiguous conditions on the actual grant of federal money.¹⁷¹

Although dealing with each source separately, the Court applied a single rule of construction to the Developmentally Disabled Act. The rule required a clear expression of a congressional intent to impose upon states affirmative obligations to fund certain entitlements before such obligations would be found and enforced by the Court. Because the right that the plaintiff sought to enforce — appropriate treatment for the mentally retarded in the least restrictive environment — would require “massive financial obligations” on the part of the state rather than just a cessation of certain conduct, the Court was hesitant to read into the statute a congressional intent to impose such obligations.¹⁷² The Court, after discussing the purposes, legislative history, and plain language of the Act,¹⁷³ concluded that the federal-state funding statute in issue was “‘designed as a cooperative program of shared responsibilit[ies], not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund.’”¹⁷⁴ It therefore found only exhortatory provisions and not obligatory conditions attached to the receipt of federal funds.¹⁷⁵ Thus, with the power of the fourteenth amendment not applicable and the spending power applicable but requiring specific obligatory language which the Court found lacking, no substantive rights could have been created or, therefore, intended by the Developmentally Disabled Act.¹⁷⁶ The plaintiff’s possible private right of action under the bill of rights provision, therefore, was neatly precluded.¹⁷⁷ As the bill of rights provision conferred no substantive rights, it was also not necessary, the Court stated, to reach the parallel section 1983 claim.¹⁷⁸

The plaintiffs also had sought the Court’s aid in compelling the state to comply with other provisions of the Developmentally Disabled Act,¹⁷⁹ which required that certain “assurances” be made regarding the existence of

¹⁷¹ *Id.* at 17-18.

¹⁷² *Id.* at 16-17.

¹⁷³ *Id.* at 18-27.

¹⁷⁴ *Id.* at 22 (quoting *Harris v. McRae*, 448 U.S. 297 (1980)).

¹⁷⁵ *Id.* at 24.

¹⁷⁶ *Id.* at 10-11.

¹⁷⁷ *Id.* at 28 n.21.

¹⁷⁸ *Id.* The Court cited *Southeastern Community College v. Davis*, 442 U.S. 397, 404 n.5 (1979), wherein the Court had expressed *no* view as to a parallel § 1983 right of action as they had resolved the case “on the merits”, i.e. by statutory construction of the language of the statute to preclude petitioner’s factual situation. Whether or not *Pennhurst* is on the merits, a § 1983 action would be precluded as it protects only rights. See *supra* notes 142-48 and accompanying text.

¹⁷⁹ 42 U.S.C. § 6011 (1976 and Supp. III) (each state “as a condition” of receiving assistance must provide assurances to the federal government that programs receiving funds have a habilitation plan for each developmentally disabled person under the program); 42 U.S.C. § 6063(b)(5)(C) (1976 and Supp. III) (requiring each plan to contain or be supported by assurances that human rights of all persons with developmental disabilities receiving treatment under assisted programs are protected consistent with section 6010, the “Bill of Rights” provision).

habilitation plans and the protection of the participants' human rights as express conditions on the receipt of federal funds.¹⁸⁰ The availability of equitable relief to compel state compliance, Justice Rehnquist claimed, was dependent on whether the plaintiffs had a private cause of action.¹⁸¹ Although the usual remedy for a state breach of federally imposed conditions was not a private cause of action but an action by the federal government to terminate funds, the Court noted the potential applicability of section 1983, as newly expanded by *Thiboutot*, to include statutory violations.¹⁸² Because the court of appeals had not addressed these issues, the Court remanded the case with instructions that the court of appeals decide whether section 1983 creates a cause of action on the basis of the following considerations: (1) whether an individual's interest in having a state meet the conditions in the statute was a right secured by the laws of the United States within the meaning of section 1983 and (2) whether the statute provided the exclusive remedy for violations of the Act thus precluding a section 1983 action.¹⁸³

The parallels between the Court's treatment of whether the plaintiffs had an implied private right of action to enforce their claimed rights and its instructions to the court of appeals regarding whether section 1983 provides an express cause of action are notable. On the implied right of action issue, the Court increased the depth of the first *Cort* factor¹⁸⁴ by looking to the intended constitutional sources of power behind the specific statute in question to determine whether Congress could have intended to create enforceable rights and obligations. Further, the Court concluded that Congress, while acting pursuant to section five of the fourteenth amendment, could not obligate the states to provide expensive, least restrictive treatment since Congress had not conformed to the heretofore unannounced standard of clear expression. Further, as a piece of spending power legislation, the Court, in essence, held that the language in the Developmentally Disabled Act listing "rights" did not rise to the level of an obligatory condition. There was, then, no express obligation or right enforceable by anyone, particularly a plaintiff bringing a private action.

On the section 1983 issue, *Pennhurst* imposed two hurdles which a potential plaintiff must clear — hurdles remarkably similar to those relevant to the implied right of action analysis. According to the Court, a court must consider whether there is a right secured and whether Congress intended to exclude a section 1983 action.¹⁸⁵ As the Court has stressed that a private right of action is

¹⁸⁰ *Pennhurst*, 451 U.S. at 27.

¹⁸¹ *Id.* at 27-28.

¹⁸² *Id.* at 28.

¹⁸³ *Id.* at 28 & 30 (citing Justice Powell's dissent in *Thiboutot*). The Court also remanded with instructions to consider whether or not an actual violation had occurred and the scope of any remedy. *Id.* at 28-30. The Court further instructed the court of appeal to reconsider plaintiffs' state law claim, federal constitutional claims, and claims under the federal Rehabilitation Act. *Id.* at 30-31.

¹⁸⁴ "(I)s the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?" *Cort*, 422 U.S. at 78 (emphasis supplied).

¹⁸⁵ See 451 U.S. at 28 & 30.

more a question of *who* may enforce, a substantive right can be seen as the *what* they may enforce. Asking what may be enforced seems to be the only valid parallel between implied private rights of action and section 1983 actions. Certainly inquiry as to Congress' constitutional ability to impose obligations and analysis of the express language to see if obligations actually are imposed seems to be a proper function of the Court. On another level, however, the difference between a private right of action and a substantive right in ultimate effect is not clear, as the absence of a substantive right automatically precludes a private right of action. Moreover, a private right of action is meaningless without a substantive right to enforce (unless the statute provides for some other class to enforce plaintiff's substantive rights).

Under the *Pennhurst* holdings, the questions are basically the same regardless of whether the plaintiff seeks a remedy via section 1983 or an implied private right of action. In both situations the question is whether there is a substantive right and whether Congress intends to foreclose private actions. By imposing the additional test of whether Congress has the clear intent to exercise its power to create a substantive right, *Pennhurst* placed further limitations on any court seeking to infer a private right of action or recognize section 1983 as an express right of action. Moreover, the same rules of statutory construction which have negated private rights of action were now open to bar section 1983 from serving as an automatic right of action.

2. *Sea Clammers*

Two months after *Pennhurst*, the Court, in *Middlesex County Sewerage Authority v. National Sea Clammers*,¹⁸⁶ addressed more federal claims arising under complex cooperative statutes which regulated ocean pollution.¹⁸⁷ Justice Powell, speaking for a seven member majority, held that no private right of action could be inferred from the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA").¹⁸⁸ The plaintiffs, an organization whose members harvest fish and shellfish and one individual member, sought relief from the alleged damage to fishing grounds caused by discharges and ocean dumping of sewage.¹⁸⁹ The defendants, various governmental entities and officials from New York, New Jersey, and the federal government, had allegedly violated provisions of the statutes — the federal defendants by permitting the state defendants to dump in excess of federal limits and the state defendants by violating the terms of federal permits.¹⁹⁰ The plaintiffs sought injunctive and declaratory relief as well as 500 million dollars in compensatory and punitive

¹⁸⁶ 453 U.S. 1 (1981).

¹⁸⁷ The Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (1976) (amended 1977), and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.* (1976) (amended 1977).

¹⁸⁸ 453 U.S. at 18.

¹⁸⁹ *Id.* at 4-5.

¹⁹⁰ *Id.* at 12.

damages, basing their claims, *inter alia*, on an implied private right of action theory and on a federal common law nuisance theory.¹⁹¹

The district court granted summary judgment to the defendants; finding that private individuals could not bring a common law nuisance suit and holding that the "citizen suit" provisions contained in the statute,¹⁹² which required sixty days notice and had not been complied with, precluded a right of action.¹⁹³ The Court of Appeals for the Third Circuit reversed the findings of the district court, holding instead that the existence of a "savings clause"¹⁹⁴ and an application of the *Cort* progeny indicated an implied private right of action.¹⁹⁵

The Supreme Court, noting that the intent of the legislature was the crux of the implied rights inquiry,¹⁹⁶ found that the comprehensive enforcement provisions of the two acts compelled a finding that Congress did not intend additional remedies.¹⁹⁷ Justice Powell, writing for the majority, found that the savings clause did not "preserve" an implied action, as it could not have been intended to save rights under the Act itself,¹⁹⁸ especially an implied action, in light of the enforcement scheme already provided.¹⁹⁹ Citing *Cort*, Justice Powell examined the legislative history of FWPCA and MPRSA and, again, found the requisite Congressional intent to create a private right of action missing.²⁰⁰ As to the plaintiffs' nuisance claim, the Court found that the statutes had fully preempted the federal common law of nuisance in the area of ocean pollution.²⁰¹

Interestingly, the Court gratuitously raised section 1983 as "a possible alternative source of *express* congressional authorization of private suits"²⁰² to enforce the Acts against the defendant municipal governmental entities. If sec-

¹⁹¹ *Id.* at 5 & n.6.

¹⁹² 33 U.S.C. § 1365(b)(1) (1976) and 33 U.S.C. § 1415 (g)(2)(A) (1976) state that no suit can be brought prior to sixty days after notice to the Environmental Protection Agency, the State, and any alleged violator.

¹⁹³ *Sea Clammers*, 453 U.S. at 5-7.

¹⁹⁴ 33 U.S.C. § 1365(e) (1976) which states: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the [EPA] or State agency)."

¹⁹⁵ *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1226-31 (1980).

¹⁹⁶ *Sea Clammers*, 453 U.S. at 13.

¹⁹⁷ *Id.* at 14-15.

¹⁹⁸ *Id.* at 15. Although the savings clause did not say that it would only save "other" remedies, Powell inferred this limitation from the legislative history. *See id.* at 16-17 & n.26.

¹⁹⁹ *Id.* at 17.

²⁰⁰ *Id.* at 17-18. In dissent, Justice Stevens urged a return to the early common-law analysis of *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916), preferring a presumption in favor of any especial class to the intent analysis. *Id.* at 23-24 (Stevens, J., with Blackmun, J., concurring in the judgment in part and dissenting in part). Noting that legislative history is unlikely to reveal an intent to authorize that which it specifically failed to mention, Stevens thus saw the developing intent analysis as a further restriction on the availability of private remedies. *Id.* at 25.

²⁰¹ *Id.* at 21-22.

²⁰² *Id.* at 19 (emphasis by the Court).

tion 1983 provided the cause of action, the *Sea Clammers* Court recognized, there would have been no need for the foregoing implied right of action analysis.²⁰³ Citing the *Pennhurst* advisory instructions as "exceptions" to the general availability of section 1983 to remedy statutory violations, the Court held that a section 1983 remedy was foreclosed.²⁰⁴ To reach this result, Justice Powell tacitly modified the prong of the *Pennhurst* test which asked whether the substantive statute provides the exclusive remedy (to which the savings clause would have suggested a contrary answer) to the broader question of whether Congress, by enacting the statute, had foreclosed private enforcement.²⁰⁵ To answer the latter question, the Court then used the same remedial-intent analysis of the implied right of action cases and held that in light of the comprehensive remedies already provided, Congress did not intend any private rights of action.²⁰⁶ As to the savings clause, the Court found that this provision was evidence of "Congress' intent to allow further enforcement of antipollution standards arising under *other* statutes or state common law."²⁰⁷ Thus, since section 1983's substantive content is dependent entirely on the statute whose violation a section 1983 plaintiff seeks to redress, section 1983, while providing a remedy, contained no "rights" preservable by the savings clause.²⁰⁸ With section 1983 foreclosed, the Court found it unnecessary to consider the other *Pennhurst* hurdle: whether the Acts created any substantive rights within the meaning of section 1983.²⁰⁹

Justice Stevens, in a separate opinion, noted the Court's evolving restriction of implied rights of action²¹⁰ and disputed the section 1983 analysis.²¹¹ The issue, he stated, should not be the intent of Congress to *preserve* a section 1983 right of action, but rather the intent of Congress to *withdraw* section 1983.²¹² Under the Court's analysis, Stevens claimed, the burden was impermissibly shifted to the plaintiff to show Congress intended section 1983 to be applicable to the specific statutory violation at issue.²¹³ Instead, as section 1983 expressly provides a private remedy applicable any time a violation of a federal statute is alleged, he felt that the burden should be placed on the defendant to make out the exception.²¹⁴ Moreover, in Stevens' view, even if the comprehensiveness of the remedy created a presumption of exclusivity, it should be rebuttable by ex-

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 20-21.

²⁰⁷ *Id.* at 20 n.31 (emphasis supplied by the Court).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 19.

²¹⁰ *Id.* at 24-25 (Stevens, J., with Blackmun, J., concurring in the judgment in part and dissenting in part).

²¹¹ *Id.* at 26-31 (Stevens, J., separate opinion).

²¹² *Id.* at 27 (Stevens, J., separate opinion).

²¹³ *Id.* at 27 n.11 (Stevens, J., separate opinion) (rebutted by Justice Powell, *id.* at 20 n.31).

²¹⁴ *Id.*

press language elsewhere in the statute or clear references in the legislative history.²¹⁵ Finding express language in the savings clause and clear references in the history, Stevens concluded that the Court had not uncovered "a clear congressional mandate" to preclude a section 1983 right of action.²¹⁶ In effect, Stevens was arguing for a presumption in favor of the availability of a section 1983 action and a requirement that a strong showing be made that Congress intended to remove the statute in issue from the section 1983 sphere of operation. In sum, rather than treat section 1983 actions as on par or equivalent to implied rights of action as the majority does, Stevens seems to urge a more liberal judicial approach to determinations of the applicability in section 1983 actions.

Thus, in *Sea Clammers*, the application of section 1983 to federal statutory violations which was initiated by *Thiboutot*, and which had raised such concern for Justice Powell, was, under Justice Powell's direction, narrowly constrained. The analysis applied to inferring a private right of action, therefore, is now wedded to the section 1983 analysis. The availability of section 1983, an express right of action, is now dependent on the "intent" of Congress to exclude it and all private actions. This concentration on the legislative intent evinces the Court's reluctance to create new rights, actions, or remedies on the federal level without a strong indication of legislative design.

The line between statutory construction and judicial legislation is not always clear. The thorny problem of determining the practical meaning and application of modern federal legislation without engaging in judicial legislation is the task of a judiciary whose business is "to fashion remedies for wrongs."²¹⁷ Despite the difficulty of the task, however, the propriety of analyzing in a parallel fashion whether a statute falls within the sweep of section 1983 and whether a statute implies a private right of action can still be questioned. In other words, the question is whether the rules of statutory construction used to divine congressional intent in the implied right of action cases should be used to negate a purely legislative cause of action. The standard which requires the courts to ask whether Congress intended to preserve or foreclose a private action and then to seek its answer by judicially-created rules of construction designed to avoid the inference of a private right is, it will be argued, inappropriate to a section 1983 action.

II. ANALYSIS

A. *The Process of Finding Intent*

Thiboutot's expansive interpretation of section 1983 to include statutory rights violations necessarily overlapped with the implied private rights analysis

²¹⁵ *Id.* at 28.

²¹⁶ *Id.* at 30-31 (Stevens, J., separate opinion) (citing *Carlson v. Green*, 446 U.S. 14, 23 (1980)).

²¹⁷ *Id.* at 24 (Stevens, J., separate opinion).

as each looks to a statute for the existence of a substantive right upon which a claim for relief might be brought. It is not surprising then, that the Court, in developing a method of analysis for the availability of section 1983 actions, has adopted an analysis parallel to the private right of action analysis. Thus, in both situations the Court asks essentially the same questions: whether Congress intended to create substantive rights and whether it intended to include or exclude a private action for their enforcement. The Court's repeated return to Congressional intent as the central issue in right of action cases necessitates examining what is meant by Congressional intent and what standard is to be applied when seeking to interpret it. This section explores the meaning of Congressional intent in order to shed further light on the hurdles facing the private plaintiff seeking to redress a statutory violation.

Where there is no express provision for a private remedy in a statute, there are at least three possibilities as to what Congress intended. It must have either (1) intended a private remedy, (2) intended that there be no private remedy, or (3) not contemplated the issue at all.²¹⁸ A fourth and possibly more realistic alternative is that different members of Congress felt differently about the propriety of granting a private right of action. Thus, the statute can be considered a political compromise serving contradictory purposes and containing ambiguous wording orchestrated to avoid the appearance of offense. Within such a statute, there is also the possibility that various factions have left in place vague language which they hope will be construed by the judiciary in their favor. With these possibilities in mind, the task of the Court is indeed a difficult one. There are several, not entirely separable, problems facing a court seeking the intent of Congress. First, how do the courts uncover congressional intent? Second, and especially pertinent when it is difficult to glean any clear legislative intent, what are the underlying values that determine the role of the Court in such inquiries? Third, just how much evidence of intent will satisfy the Court that Congress intended a certain result?

The methodology of the Court's intent inquiry has been fairly straightforward. To find the intent to allow or deny a private right to sue, the Court has looked, first, to the plain language of the statute.²¹⁹ Second, the Court has examined the statute's structure and the relationship of the statute's various provisions.²²⁰ Finally, the purposes stated in the statute's title, preamble, or expressly or implicitly contained in the legislative history have been assessed.²²¹ More recently, after examining the express remedial structure of the act in question, the Court has applied rules of statutory construction to reach an end result. Rules of statutory construction are not, however, realistically reflective of congressional intent as shown by the Court's refusal to infer a private

²¹⁸ RESTATEMENT (SECOND) OF TORTS, § 874A, comment c (1979) (Tort Liability for Violation of Legislative Provision).

²¹⁹ See, e.g., *Cannon*, 441 U.S. 677, 689.

²²⁰ See, e.g., *Touche Ross*, 442 U.S. 560, 571-72.

²²¹ See, e.g., *Cort*, 422 U.S. 66, 84.

remedy when it finds remedies are expressly provided,²²² elaborately provided,²²³ and *not* provided at all.²²⁴ The rules, as presently applied by the Court, more often than not preclude a private right of action.

Underlying the apparently mechanical methodology employed in discerning congressional intent is a broader problem which influences the choice of methods as well as the outcome of the Courts' search for intent. The problem arises when the Court's scrutiny shades from a search for literal intent to "figurative" intent: a retrospective filling in by the Court of how the enacting Congress would have dealt with the particular problem at hand had it considered it, or a search for policies behind the statute which would be served by a private cause of action.²²⁵ It is at this point that the judicial search for congressional intent requires the Court to make policy decisions and value judgments regarding the statute at issue.²²⁶

The extent to which the Court will make these policy decisions and value judgments depends on their own perceived role vis-a-vis the legislature, the states, and the injured parties. In defining this role, typical concerns voiced by the Court in the past have included the scope of the federal courts' jurisdiction,²²⁷ the balance of powers between the legislative and judicial branches,²²⁸ the sheer bulk and quality of federal legislation,²²⁹ and the balance between state and federal government.²³⁰ Striking a balance among these often competing, constantly shifting considerations is no easy task. The intent analysis itself is an attempt to defer any resolution of these issues to Congress. Yet this deference is a value judgment in itself for it manifests an attitude of judicial restraint which sees the federal lawmaking power as vested in the

²²² *Transamerica*, 444 U.S. at 20.

²²³ *Sea Clammers*, 453 U.S. at 14.

²²⁴ *California v. Sierra Club*, 451 U.S. at 296 & 298.

²²⁵ See RESTATEMENT (SECOND) OF TORTS, § 874A, comment d (1979).

²²⁶ *Id.*

This process [of divining intent] requires policy decisions by the court, and it should be aware of them and face them candidly. In these cases, it is the court itself that is according the civil remedy to the injured party. The action is in furtherance of the purpose of the legislation and is stimulated by it, but what is involved is judicial rather than legislative modification of the existing law. The court is not required to provide the civil remedy, and yet judicial tradition gives it the authority to do this under appropriate circumstances.

Id. at 303.

²²⁷ See, e.g., *Chapman*, 441 U.S. at 645 (Powell, J., concurring) ("If § 1983 provides a private cause of action for the infringement, under color of state law, of any federal right, then virtually every [joint federal-state] program, together with the state officials who administer it, becomes subject to judicial oversight at the behest of a single citizen, even if such a dramatic expansion of federal-court jurisdiction never would have been countenanced when these programs were adopted.").

²²⁸ *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981) (federal lawmaking vested in the legislative — not the judicial — branch of government).

²²⁹ *Sea Clammers*, 453 U.S. at 24-25 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁰ *Cort v. Ash*, 422 U.S. at 78.

legislative, not the judicial branch of government.²³¹ This restrictive position stands in marked contrast to the earlier, more activist view that the federal court's power to infer a private remedy is concomitant with the authority reserved by judicial tradition, i.e. the authority to choose among traditional judicial remedies to further substantive policies embodied in an act of law.²³² Alternatively, the remedial power also could be seen as a necessary corollary to the fashioning of federal law when federal rights are involved.²³³ Thus, where the intent of Congress is not clear, these conflicting judicial values and policies necessarily affect whether or not a private right of action can and will be "found."

One way of fixing or limiting the influx of judicial value judgments in the Court's examination of congressional intent is to set a standard. The quantum of intent necessary to find a right of action has not been stated by the Court. At present, the Court seeks to discern a direction, either favoring or countering a private right of action.²³⁴ But there have been alternatives proposed. Justice Powell, in his dissent in *Cannon*, urged that there be "most compelling evidence" before a court could find that Congress intended a private right of action.²³⁵ Justice Stevens, in his dissent and concurrence in *Sea Clammers*, urged that a "clear congressional mandate" to preclude section 1983 be made out before a court could find that Congress had intended to withdraw section 1983 from providing a remedy for the statute in issue.²³⁶ Lastly, in a related analysis, Justice Rehnquist applied a standard of clear expression to the history and language of an act in order to discern whether Congress intended to create *substantive* rights under the spending power.²³⁷ The aim of these proposed higher threshold requirements is to place a burden on Congress to provide explicitly for private rights of action. The effect is that a greater showing would be required before the will of Congress would be perceived by the courts.

Certainly, by demanding a higher threshold showing of intent, a greater burden is placed on Congress to provide a right of action and the Court is prevented thereby from engaging in judicial legislation. Yet, even without a higher threshold requirement, the Court has had little trouble denying a private right of action by the use of rigid statutory construction rules and the

²³¹ *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981).

²³² See RESTATEMENT (SECOND) OF TORTS, § 874A, comment d at 303 (1979). The judicial power to fashion remedies was certainly a factor in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Here, the Court inferred a remedy against a federal officer for an unreasonable search and seizure in violation of the fourth amendment. *Id.* at 391 & 397. In a concurring opinion, Justice Harlan noted the existence of the Court's power, *id.* at 402 & n.4, and analogized the Court's inference of a right of action from a constitutional provision to what was liberally done in the cases which had inferred a private right from a statute. *Id.*

²³³ *Borak*, 377 U.S. at 434.

²³⁴ See *supra* text subsequent note 79.

²³⁵ *Cannon*, 441 U.S. at 749 (Powell, J., dissenting).

²³⁶ *Sea Clammers*, 453 U.S. at 31 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁷ *Pennhurst*, 451 U.S. at 24.

acceptance of a relatively small quantum of negative intent to tip the balance. But, the various devices used by the Court to discern congressional intent should not obscure the fact that real choices are being made by the judiciary whenever the express language is not dispositive. The sheer number of concurrences and dissents which manifest a reading of the intent of Congress at variance with the majority's reading would itself suggest the unreliability of the particular intent analysis — whether based on a multi-factor approach, a simple presumption, or rules of statutory construction.

By imposing a higher threshold requirement, although in itself a fairly arbitrary decision, the Court would at least send a strong signal to Congress to be more explicit in the area of private rights of action to enforce congressionally created federal rights. In addition, such a move would restrain judicial activism. Alternatively, one could argue in favor of leaving the requirements where they stand but eliminating the rules of statutory construction which, rather than aiding the Court, appear arbitrary in operation and predetermine the result. Whatever the shortcomings of the Court's present intent analysis, it has been applied to section 1983 actions with similar, predictable results. Whether this should obtain or not remains to be discussed.

B. *Applying the Intent Analysis to Section 1983.*

Little attention was placed by the *Pennhurst* and *Sea Clammers* opinions on the role of section 1983 in federal law: its purposes, its intended relationship to other laws, and its function as a right of action. Both *Pennhurst* and *Sea Clammers* required section 1983 actions based on statutory violations to conform to the Court's pre-existing analysis for implied private rights of action based on statutory violations. Thus, the potential paradox implicit in the possibility that a plaintiff might be found to have a right of action via section 1983 but be denied a private right of action was avoided by an analysis inclusive of both potential rights of action. But the paradox disappears when one considers that section 1983 has as its purpose the provision of a federal forum to protect federal rights from abuse by state actors. A sense of conflict, however, is more acute when the plaintiff seeks relief from both federal *and* state actors either by section 1983 or by private right of action. In this situation, the possibility of finding no implied right of action available against the federal actors but a section 1983 action available against the state actors would render the state actors the obvious and preferred target, and, to some, a victim of such disparate treatment.²³⁸

The solution to this dilemma rightfully belongs in Congress, not the courts. By enacting section 1983, Congress created a generic right of action for deprivations of federal rights under color of state law. Ostensibly, it is within

²³⁸ An additional factor supporting the preference of a state actor as a defendant is that the state actor, unlike federal actors, can be made to pay attorney's fees to the successful § 1983 plaintiff. See Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976 & Supp. III).

Congress' power to create a federal counterpart to "section 1983" which vindicates deprivations caused by actors under color of federal law. Further, section 1983 is a legislative, express cause of action, not a judicial remedy. Any decision to deny a cause of action contrary to its terms should be premised on a legislative directive of similarly clear expression. A substantive statute's preclusion of the section 1983 cause of action should not be found without express direction and should not be judicially inferred by the use of rules of statutory construction previously developed by the courts to limit their own creativity. In light of the deterrent purposes behind section 1983, a plaintiff should not be automatically precluded from a court's scrutiny of the merits behind the defendant's alleged abuse of plaintiff's statutory rights. Nor does it seem unreasonable that Congress, in providing remedial schemes replete with administrative proceedings and citizen suit provisions within the substantive statute, also might have concluded that private access to the federal forum is necessary to serve as a further check on the state participants in joint federal-state regulatory endeavors, federal actors already being under sufficient executive and legislative control. Further, the feared financial exposure of local government units is more appropriately a question of the type of relief accorded — e.g. injunctive or damages — not the threshold right to relief.²³⁹

To this end a test of clear expression is endorsed. Although it is relevant to examine whether Congress had intended to preclude a section 1983 action, the scrutiny for such a search should be more restricted than with implied rights. As suggested by Justice Stevens in *Sea Clammers*, a strong presumption should exist that the scope of section 1983 *includes* the statute in issue unless by "express statutory language or clear reference"²⁴⁰ there appears, in the substantive statute, a "clear congressional mandate to withdraw the section 1983 remedy."²⁴¹ A comprehensive scheme of other remedies in the substantive statute does not necessarily weigh against a finding that section 1983 has not been foreclosed, and should not be conclusive absent further congressional statement. If the *Thiboutot* recognition of section 1983's applicability to federal statutes is to be retained, the Court should leave to Congress the task of solving the various federalism and balance of power issues and assume that the scope of section 1983 has not been foreclosed by the unexpressed *intent* of Congress. To do otherwise, would denigrate the purposes of section 1983, narrow the section's scope and leave its application to statutory violations subject to the very same judicial speculation the Court has sought so assiduously to avoid in the past.

²³⁹ Cf. case cited *supra* note 124.

²⁴⁰ *Sea Clammers*, 433 U.S. at 30 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴¹ *Id.* at 31. (Stevens, J., concurring in the judgment in part and dissenting in part).

CONCLUSION

The currently articulated principles governing the Court's search for an implied private right of action pivot on the *intent* of Congress to create substantive rights and to provide or deny a private action for their enforcement. Although pointing to the express language, the legislative history, and the remedial structure of the act in issue, the Court has repeatedly approached the problem of congressional intent with rules of statutory construction. As currently applied by the Court, these rules predetermine the result and nearly always lead to a finding that a private right of action is barred. In those situations where section 1983 would be potentially available as an alternative private right of action, the Court has imposed the implied private rights analysis on any decision as to whether section 1983 might also provide a remedy. Asking whether Congress intended to exclude or include a private right of action, however, should not be the same as asking whether Congress intended to foreclose a section 1983 right of action. Unlike the judicially inferred "implied" right of action, section 1983 is an express statutory cause of action which seeks to provide a remedy for the infringements of rights secured by federal statutes or the Constitution. Further, section 1983 serves to deter abuses of power by those acting under color of state law, compensates the injured, and provides a federal forum to hear their claims. For these reasons, section 1983 should be presumed to be applicable if the plaintiff comes within its terms unless a clear expression of congressional intent to withdraw the remedy can be made out from the sued upon statute. Such a test seeks to firmly place the burden of withdrawing section 1983 into the hands of the legislature and out of the Court's since the all too malleable intent analysis is highly susceptible to the importation of judicial values and speculation.

DOUGLAS W. JESSOP