

## SECTION 1983 AND PREEMPTION: ALTERNATIVE MEANS OF COURT ACCESS FOR SAFETY NET STATUTES

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*While prior scholarship has noted changes in § 1983 jurisprudence, this article demonstrates that the current state of the law reflects the transformation of dissents, particularly the dissent written by Justice O'Connor in 1987, into a majority opinion in 2002. The hostility of several Justices to § 1983 can be traced to the policy arguments advanced by Justice Rehnquist in his dissents from the 1970s. The 35 years of acrimony over § 1983 contrast sharply with the harmony with which the Court has approached federal preemption, which has been acknowledged by numerous Justices, including Rehnquist and Kennedy, as a viable alternative to litigating under § 1983. Post-2002 cases from Courts of Appeals have embraced preemption as a vehicle for reaching the merits in safety net cases, including cases in which § 1983 does not provide a cause of action. This article also critiques the separate opinions of Justices Scalia and Thomas which have sought to limit the use of preemption to serve the interests of business and deny low-income individuals the full protection of federal law.*

Over the vociferous dissent of Associate Justice Powell, joined by Chief Justice Burger and Associate Justice Rehnquist, the Supreme Court held in 1980 that individuals may enforce safety net<sup>1</sup> and other federal

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1. Safety net statutes provide financial support, such as direct income payments, payment for medical care, or subsidies for housing, to people whose income is below specified eligibility criteria. These programs are funded by a combination of state and federal funds. See William P. Gunnar, *The Fundamental Law that Shapes the United States Health Care System: Is Universal Health Care Realistic Within the Established Paradigm*, 15 ANNALS HEALTH L. 151, 174 (2006); Bert B. Lockwood, Jr., *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 WM. & MARY BILL RTS. J. 1, 3 n.3 (1993).

statutes when stating a cause of action under 42 U.S.C. § 1983,<sup>2</sup> a provision originally enacted in the Klu Klux Klan Act of 1871.<sup>3</sup> Passed in the wake of the Civil War in the days of Reconstruction, § 1983 enables individuals to obtain injunctive and declaratory relief from the federal courts against state officials who violate federal rights when administering federal programs.<sup>4</sup> This statutory provision is an extremely powerful litigation tool, both because it confers significant power upon the federal judiciary to oversee State action and because it is paired with another federal statutory provision conferring attorneys' fees.<sup>5</sup>

In 2002, Chief Justice Rehnquist convinced a majority of the Court to join him in altering the course of § 1983 jurisprudence. While not directly overruling two decades of precedent, the opinion written by Rehnquist in *Gonzaga University v. Doe*<sup>6</sup> on behalf of five Justices sharply curtailed the availability of a cause of action under § 1983 by creating arduous technical roadblocks. Although *Gonzaga* did not involve a safety net statute, its repercussions have been felt in the dismissal of numerous § 1983 cases involving Medicaid, housing statutes, protections for foster children, and other federal benefits. Statutory provisions phrased in terms of the clear rights of individuals have continued to be enforced via § 1983 after *Gonzaga*. Yet, provisions framed as general instructions to states, including some that had been enforced by lower courts prior to *Gonzaga*, have been overwhelmingly been deemed unenforceable via § 1983 under *Gonzaga's* reasoning.

One month prior to the *Gonzaga* decision, in *Verizon Maryland Inc. v.*

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2. 42 U.S.C. § 1983 states: "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 . . . ."

3. *Maine v. Thiboutot*, 448 U.S. 1 (1980). See Sasha Samberg-Champio, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1841 (2003); Cass E. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 398-400 (1982).

4. See TIMOTHY STOLZFUS JOST, *DISENTITLEMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE* 92 (2003). Damages against the state, such as retroactive welfare benefits, are barred by sovereign immunity. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). Local governments may be sued for damages as well as injunctive relief under § 1983. *Monell v. Dept. of Social Services of City of NY*, 436 U.S. 658, 690 (1978). Section 1983 also provides a basis for suits against federal, state, and local officials in their individual capacities, though they may be protected by either absolute or qualified immunity. *Hafer v. Melo*, 502 U.S. 21, 28-29 (1991).

5. 42 U.S.C. § 1988. *Thiboutot*, 448 U.S. at 9.

6. *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

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*Public Service Commission*,<sup>7</sup> a telecommunications suit challenging a state commission order as preempted by federal law, the Supreme Court unanimously held<sup>8</sup> that it was unnecessary to determine whether the federal statute allegedly violated by State regulatory action provides a cause of action.<sup>9</sup> The Court concluded that the corporate plaintiff's claim of federal preemption of the State administrative decision fell within the ambit of the federal question jurisdiction statute, 28 U.S.C. § 1331,<sup>10</sup> another statute passed in the aftermath of the Civil War.<sup>11</sup> The Court asserted that as long as the preemption claim was not frivolous and the cause of action was "arguable," the case could proceed for a determination whether state action conflicted with federal law and was therefore preempted pursuant to the Supremacy Clause of the Constitution.<sup>12</sup> The Court's stringent requirements for a cause of action under § 1983 in *Gonzaga* contrast sharply with the Court's holding in *Verizon* that the preemption claim is reviewable irrespective of whether the substantive federal statute at issue creates a cause of action.

These two statutes, §§ 1983 and 1331, are not parallel provisions. Section 1983 confers a cause of action and various remedies, including attorneys' fees. In contrast, section 1331 concerns only federal courts' jurisdiction and does not confer a right to sue on any specific individual. Section 1331 does not create any remedies and thus does not bestow attorneys' fees on the victorious party.<sup>13</sup> As a result, preemption is less likely than § 1983 to encourage frivolous litigation, which has clearly been

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7. *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002).

8. Because the concurring opinions did not address the issue of the cause of action under the Supremacy Clause, the decision of the Court was unanimous on that issue.

9. *Verizon Maryland Inc.*, 535 U.S. at 642-43.

10. *Id.* at 643.

11. Michael G. Collins, "Economic Rights," *Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L. J. 1493, 1497 (1989) (citing Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470).

12. *Verizon Maryland Inc.* 535 U.S. at 643-44.

13. See *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006) (noting that plaintiff's "right to bring an action seeking declaratory and injunctive relief from municipal regulation on the ground that federal law preempts that regulation is undisputed," but holding that there is no statutory right of action under § 1983 and therefore no fee award); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir. 1987) ("preemption of state law under the Supremacy Clause-being grounded not on individual rights but instead on considerations of power-will not support an action under § 1983, and will not, therefore, support a claim for attorneys' fees under § 1988"); *Qwest Commc'ns Corp. v. City of Greensboro*, 440 F. Supp. 2d 480, 485 (M.D.N.C. 2006) ("the practical effect of a finding ... that Plaintiff has a private right of action under [a federal statute] that is in turn enforceable through section 1983, is that Plaintiff may be able to recover attorneys fees, whereas a finding of preemption alone will not allow for recovery of attorneys fees").

a concern of numerous Justices in the context of § 1983 cases.<sup>14</sup>

Following these 2002 Supreme Court decisions, several courts of appeals have held that preemption provides an alternative means of obtaining review of state laws that conflict with federal safety net statutes when plaintiffs cannot meet the requirements imposed by *Gonzaga*.<sup>15</sup> Some circuits have followed *Verizon*'s lead and reached the merits of preemption claims without addressing whether the statute allegedly violated by State action confers a cause of action.<sup>16</sup> Other courts, following the suggestion of scholars, read into Supreme Court jurisprudence an implied cause of action derived from the Supremacy Clause.<sup>17</sup> This article seeks to clarify the jurisprudential development of the § 1983 and preemption doctrines as they have been applied to the enforcement of safety net statutes.

This article will also address a serious challenge to the use of preemption to enforce safety net statutes, suggested in the concurring opinions of Justices Scalia and Thomas. These two Justices have argued that an exception to the preemption doctrine should be carved out for Spending Clause statutes.<sup>18</sup> As discussed below, the Scalia/Thomas approach has no basis in the Constitution and would require outright reversal of substantial precedents. The Scalia/Thomas attack on the ability of the disadvantaged to access the courts clearly conflicts with the fundamental democratic principle that all citizens are entitled to justice in

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14. See, e.g., *Thiboutot*, 448 U.S. at 23 (Powell, J., dissenting).

15. See *infra*. There are three types of preemption: express, field, and conflict preemption. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). Express preemption arises when Congress specifically states its intent to preempt state law, while field preemption arises where a federal regulatory scheme is so comprehensive that it is deemed to preempt any state law on the same subject. Courts distinguish between two subsets of conflict preemption: state law is preempted either because it is impossible to comply with both state and federal law, or because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). These categories, however, "are not rigidly distinct." *Crosby*, 530 U.S. at 372 n. 6. Most safety net programs operate as joint federal-state operations, in which state regulation and decision making are required, subject to specific requirements. Therefore, preemption in the context of safety net statutes can best be understood as impossibility preemption, because a state law or policy contradicts a clear federal command to the state. See Lauren Saunders, *Pre-emption as an Alternative to Section 1983*, 38 CLEARINGHOUSE REV. 705 (Mar.-Apr. 2005). By contrast, preemption claims asserted by businesses are typically based on express, field, or obstacle preemption.

16. *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

17. *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005). See also *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004).

18. *Pharm. Research & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644, 674-683 (2003).

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**I: INTRODUCTION: THE ORIGINS AND DEVELOPMENT OF THE LEGAL REQUIREMENT FOR A CAUSE OF ACTION**

This brief preliminary discussion of the meaning of a “cause of action”<sup>19</sup> provides the framework for the ensuing detailed analysis of an explicit cause of action under § 1983 and an implicit cause of action under the Supremacy Clause.

The requirement for a “cause of action” has its roots in the common law of England that was adopted into American jurisprudence when the Constitution was ratified.<sup>20</sup> As one scholar explains,

At that time, a plaintiff had a cause of action at law or in equity only if judicial relief was available through a particular form of proceeding. Each form of proceeding carried with it unique procedural incidents, a particular form of relief, and specific forms of judgment and execution.<sup>21</sup>

In order to obtain relief in the Nineteenth Century, a party had to plead and prove a cause of action by demonstrating “the facts that entitled one to judicial relief through an established form of proceeding” either at law or in equity.<sup>22</sup>

In the earliest American cases invoking federal question jurisdiction to resolve disputes regarding federal statutes, “litigants pleaded causes of action—such as trespass, detinue, ejectment, and conversion—that were familiar to the common law and for which federal law was not the source.”<sup>23</sup> In the late 1800s and early 1900s, state courts also treated violations of federal statutes as negligence, under the common law cause of action for negligence, rather than under any cause of action contained in the statute.<sup>24</sup> These cases “stressed the close relation[ship] between rights and remedies.”<sup>25</sup>

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19. Black’s Law Dictionary defines a cause of action as “[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.” BLACK’S LAW DICTIONARY (8th ed. 2004).

20. Anthony J. Belia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784 (2004).

21. *Id.*

22. *Id.* at 785.

23. Collins, *supra* note 11, at 1511.

24. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 75-6 (2001).

25. *Id.*

The forms of proceeding were abolished with the adoption of the Federal Rules of Civil Procedure in 1938. Part of the impetus for the revision was that the forms of proceedings were inadequate to provide remedies to injured parties.<sup>26</sup> The federal rules purposely omitted the term “cause of action” and substituted the concept of the “claim.” Nevertheless, courts have continued to require plaintiffs to demonstrate causes of action.<sup>27</sup> The current concept of a cause of action requires the plaintiff to prove entitlement to relief, but the precise contours of the relief do not have to be specified to demonstrate a cause of action.<sup>28</sup> In other words, the plaintiff must demonstrate individual entitlement to enforce a particular legal duty and therefore to obtain any applicable remedies.<sup>29</sup>

In *Davis v. Passman*, Justice Brennan set forth an exposition of jurisdiction, standing, cause of action, and remedies:

Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction; *cause of action* is 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; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the “preconditions” for such equitable remedies.<sup>30</sup>

In *Davis*, the Court held that there is an implied cause of action in the Constitution to enforce constitutional rights, with jurisdiction conferred by

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26. Belia, *supra* n. 20, at 793, 797. After the enactment of the federal rules, the principle of standing became separate from the cause of action. *Id.* at 826.

27. *Id.* at 778. See, e.g., Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 25, 45-46 (discussing *Wilkie v. Robbins*, 127 S.Ct. 2588, 2601 (2007) in which the Supreme Court rejected the argument that “the importance of constitutional rights justified implying a cause of action directly from the Constitution”).

28. Belia, *supra* note 20, at 798.

29. See John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L. J. 2513, 2520-21 (1998) (“In order to prevail in a coercive proceeding the plaintiff must demonstrate both that the defendant’s conduct was wrongful (inconsistent with a duty resting on the defendant) and that the plaintiff is within the category of persons entitled to judicial relief because of the wrongful conduct.”).

30. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (citations omitted).

the federal question statute.<sup>31</sup> Dissenting in *Davis*, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, agreed that “private causes of action may be inferred from provisions of the Constitution,” but argued that principles of separation of powers counseled against the implication of a cause of action in that particular case.<sup>32</sup> One scholar noted that jurisdiction under the federal question statute based on an implied cause of action in the Constitution has “never generated much controversy.”<sup>33</sup>

In contrast to the receptivity to implying a cause of action in the Constitution, in recent years the Supreme Court has frequently been unwilling to imply rights of action in federal statutes. The Court set forth a four-prong test for finding an implied cause of action in a statute in *Cort v. Ash* in 1975. The test asks whether 1) the plaintiff is in the class for whose *especial* benefit the statute was enacted; 2) there is any indication of legislative intent, explicit or implicit, either to deny or to create a private right to enforce; 3) a private right to enforce would be consistent with the underlying purpose of the statute; and 4) the cause of action is traditionally in the purview of state law, such that a federal right to enforce would be inappropriate.<sup>34</sup> *Cort v. Ash* was a unanimous decision written by Justice Brennan, reflecting the widespread recognition that Congress did not intend for all laws to be privately enforceable. The third and fourth prongs of the *Cort* test required a balancing of the statutory purpose of providing rights and benefits to individuals with the traditional rights of states.

However, beginning with two cases in 1979,<sup>35</sup> the Court has focused primarily on the second prong: evidence of congressional intent to create a private right. In essence, the test has become an evidential question of congressional intent to establish a private right of action in a law in which, by definition, Congress has not provided an express private right of action.<sup>36</sup> As a result of the Court’s constrictive interpretation of implied private rights of action in statutes, “no right of action also means no right and no remedy.”<sup>37</sup> One scholar has observed that “the scope of implied causes of action has been so restricted that private suits to enforce federal funding conditions based on the existence of an implied cause of action have essentially been foreclosed.”<sup>38</sup> Thus, for safety net statutes without an

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31. *Davis*, 442 U.S. at 241-43; Collins, *supra* note 11, at 1510.

32. *Davis*, 442 U.S. at 252 (Powell, J., dissenting).

33. Collins, *supra* note 11, at 1510.

34. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

35. *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19-20 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 570 (1979).

36. Zeigler, *supra* note 24, at 88.

37. *Id.* at 91.

38. Lisa E. Key, *Private Enforcement of Federal Funding Conditions under 1983: the*

explicit private right of action, enforcement hinges on a cause of action either implied via the Supremacy Clause of the Constitution or explicitly conferred by § 1983.

## II. SUPREME COURT JURISPRUDENCE

The juxtaposition of § 1983 cases with contemporaneous preemption cases involving the enforcement of federal law against states provides important insights into both lines of court-access cases. The contentiousness of the Supreme Court's § 1983 decisions over the past 35 years stands in sharp contrast to the broad consensus reached in Supremacy Clause cases regarding the availability of judicial review. This article emphasizes several points that have not been highlighted in prior scholarship.

First, many commentators have portrayed Supreme Court § 1983 jurisprudence as a coherent, though changing, approach.<sup>39</sup> However, since the early 1970's, the Justices have been divided into two camps with sharply conflicting visions of § 1983. The Supreme Court's holdings in § 1983 cases are best explicated as a political battle between "conservative" and "liberal" factions of judges.<sup>40</sup> The liberals prevailed until the early 1990's, when the conservatives garnered a majority. The recent decisions reached by the conservative majority are directly related to the dissents in earlier § 1983 decisions in which the liberals had prevailed.

Second, there were two distinct phases to the conservative position on the § 1983 cause of action. Initially, from 1972 to the early 1980's, conservative Justices explicitly objected to a cause of action under § 1983 to enforce federal statutes on policy grounds, arguing that the availability of judicial review would lead to the harassment of states. Then, beginning in 1987, the conservative Justices framed the issue in abstract legal requirements, ignoring or deemphasizing the policy implications of their rejection of a private cause of action. The earlier cases are important for clarifying the policy implications of the later technical justifications of the

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*Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 286 (1996).

39. See, e.g., Brian J. Dunne, *Enforcement of the Medicaid Act Under 42 USC § 1983 After Gonzaga University v. Doe: The "Dispassionate Lens" Examined*, 74 U. CHI. L. REV. 991, 996-99 (2007); Kenneth R. Wiggins, *Medicaid and the Enforceable Right to Receive Medical Assistance: The Need for a Definition of "Medical Assistance,"* 47 WM. & MARY L. REV. 1487, 1492-95 (2006).

40. In this article, I use the terms "conservative" and "liberal" simply to distinguish two groups of Justices who frequently voted together in civil rights and safety net cases. There is certainly room for debate concerning whether these are the most accurate labels for the judicial alliances, but that issue is beyond the scope of this paper.

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Third, the § 1983 cases contain extensive discussion of the ramifications of the ability of the federal government' to terminate funding to non-compliant state actors. These analyses are highly relevant to the arguments being advanced currently by Justices Scalia and Thomas in the preemption context. The reasoning of the Court in the § 1983 cases provides a strong precedential basis for rejecting their arguments.

**A. EARLY ENFORCEMENT OF SAFETY NET STATUTES THROUGH THE 1970'S**

Important safety net statutes were passed in the 1930's, including the Social Security Act of 1935, which created the federal welfare program, Aid to Families with Dependent Children (AFDC), and the United States Housing Act of 1937, which established federal subsidized housing.<sup>41</sup> Enacted pursuant to the Spending Clause of the Constitution, these laws bestow federal funds in exchange for state administration of benefits in conformance with federal mandates. While these statutes confer significant rights on low-income individuals, most safety net statutes do not contain an express private right of action for beneficiaries to enforce the rights contained in those laws.<sup>42</sup>

The Supreme Court did not address whether there was a cause of action for individuals to enforce safety net laws until the late 1960's. In the mid-1960's, Congress allocated federal funds to create the legal services program.<sup>43</sup> Empowered by lawyers who did not charge for their services, low-income beneficiaries filed numerous cases alleging that states' laws and regulations conflicted with federal safety net statutes.<sup>44</sup>

The Supreme Court decided its first welfare case in 1968, and for the next four years beneficiaries were highly successful on the merits in numerous welfare rights cases at the high court.<sup>45</sup> These cases were also notable for establishing access to the courts for these claims. In the early

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41. Social Security Act of 1935, 49 Stat. 620, as amended, 42 U.S.C. §§ 301- 1394; United States Housing Act of 1937, 88 Stat. 653, 42 U.S.C. § 1401 *et seq.*

42. 42 U.S.C. §§ 301- 1394; 42 U.S.C. § 1401 *et seq.*, National Housing Act 12 U.S.C. § 1701 *et seq.*; Medicare 42 U.S.C. § 1395; Medicaid 42 U.S.C. § 1396.

43. Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1673-74 & n.24 (1995); Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 373-74 (1998).

44. R. Shep Melnick, BETWEEN THE LINES; INTERPRETING WELFARE RIGHTS 83 (1994); Samberg-Champio, *supra* note 3, at 1843 n.27.

45. Melnick, *supra* note 44, at 83, 110.

period of 1968-1972, the Supreme Court resolutely held, , often with unanimity, that welfare beneficiaries had the legal right to obtain federal judicial relief when states violated the directives of federal law.<sup>47</sup>

The early Supreme Court welfare cases approached the court access issues broadly, without parsing the details of jurisdiction and cause of action. The high court's first welfare case, *King v. Smith*, involved both a constitutional challenge under the Equal Protection Clause and a statutory challenge under the Social Security Act. The unanimous Court decision summarily stated in a footnote that there was jurisdiction under 28 U.S.C. § 1343 — the federal question jurisdiction statute for equal protection laws — and that relief was sought under 42 U.S.C. § 1983. In ruling for the plaintiffs on the merits, the Court explained in the final footnote: "There is of course no question . . . that any state law or regulation inconsistent with . . . federal terms and conditions is to that extent invalid."<sup>48</sup> The Court ignored the lower court's reasoning based on the Constitution and decided the case, as urged by the plaintiff's attorneys, on the more widely applicable ground that the state regulation was in conflict with the Social Security Act.<sup>49</sup> Still, the Court limited the expansive jurisdictional approach in an earlier footnote, indicating that the Justices "intimate no views as to whether and under what circumstances suits challenging state [welfare] provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts."<sup>50</sup> Thus, the constitutional claim was the jurisdictional hook that enabled the statutory claim to go forward.

The question of court access for a challenge to state law based purely on statutory grounds was argued again to the Supreme Court two years later in *Rosado v. Wyman*.<sup>51</sup> This case was originally framed with a constitutional claim, but the constitutional issue became moot, leaving only the statutory claim. Once again, the Court declined to answer the question, holding that since the district court had expended considerable effort before the constitutional claim became moot, that court had pendent jurisdiction to decide the statutory claim. Repeating the same phrase used two years earlier, the Court chose to "intimate no view as to whether" the statutory claim could have been heard if the district court had not "invested substantial time" in the resolution of the constitutional claim.<sup>52</sup> The Court

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47. Jost, *supra* note 4, at 91-92.

48. *King v. Smith*, 392 U.S. 309, 333 n.34 (1968).

49. Melnick, *supra* note 44, at 86.

50. *King*, 392 U.S. at 313 n.3.

51. *Rosado v. Wyman*, 397 U.S. 397 (1970).

52. *Id.* at 404 n.4.

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also declined to address whether there was general federal question jurisdiction under 28 U.S.C. § 1331, which contained at that time a \$10,000 amount-in-controversy requirement, or under 28 U.S.C. § 1343, which applied to laws addressing equal rights with no amount-in-controversy prerequisite.<sup>53</sup>

Although *Rosado* was subsequently characterized in *Edelman v. Jordan* (authored by Associate Justice Rehnquist) as a § 1983 case,<sup>54</sup> the Supreme Court's *Rosado* decision did not even mention § 1983. The district court found both pendent jurisdiction and federal question jurisdiction under § 1331, reasoning that the loss of life and health in the event of the termination of benefits could amount to more than \$10,000. The district court, like the Supreme Court, declined to reach the issue of jurisdiction under § 1343, which the plaintiffs alleged conferred jurisdiction when "read with" 42 U.S.C. § 1983.<sup>55</sup> While the Second Circuit Court of Appeals expressly rejected a cause of action under § 1983,<sup>56</sup> the Supreme Court's reversal of the Second Circuit did not discuss § 1983. Therefore, later characterizations of the Supreme Court's decision in *Rosado* as involving a determination regarding § 1983 are simply inaccurate.

Unlike the unanimous decision in *King v. Smith*, *Rosado* drew a dissent by Justice Black, joined by Chief Justice Burger. The dissent argued that jurisdiction was premature, because when the district court invalidated the state law, the federal agency was in the midst of reviewing the state law to reach an agency determination whether the state law conflicted with the federal statute. The dissent suggested that since "the courts are overrun with litigants in every subject," jurisdiction should have been postponed in the interest of "judicial economy" and in conformance with the "enforcement scheme" in the welfare statute. The dissent offered no citations to support its position.<sup>57</sup>

The majority responded that "formal doctrines of administrative law do not preclude federal jurisdiction," because the case did not involve review of an administrative agency order.<sup>58</sup> In addition, the majority focused on the inability of the beneficiary to initiate or participate in a federal agency review of the conformance of state law with federal requirements. The Court explained that if the federal agency found a state

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53. *Id.* at 405 n.7.

54. *Edelman v. Jordan*, 415 U.S. 651, 675 (1974).

55. *Rosado v. Wyman*, 304 F. Supp. 1356, 1362-64 (E.D.N.Y. 1969).

56. *Rosado v. Wyman*, 414 F.2d 170, 177-78 (2d Cir. 1969); cf. *id.* at 183 (Feinberg, J. dissenting).

57. *Wyman*, 397 U.S. at 434-45.

58. *Id.* at 406.

law incompatible with federal law, the federal government had the power to decrease federal funds to the state, either partially or the total federal grant. The state had a right to notice, hearing, and judicial review of the cut-off of funds, but the beneficiaries had no role at all in the process. The Court stated: “Whether [the federal agency] could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims.”<sup>59</sup>

In a third case in the early days of welfare rights cases, *Townsend v. Swank*, the Court noted that the district court had found a cause of action under § 1983 and that the lower court’s ruling on that issue had not been appealed. The Court stated:

*King v. Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance, under federal [welfare] standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.<sup>60</sup>

Chief Justice Burger, writing alone, concurred in the result, agreeing on the merits that the state had failed to “adhere[] to the provisions” of the Social Security Act.<sup>61</sup>

The honeymoon period of welfare litigation ended in 1972, when Associate Justice Rehnquist joined the Court and began to protest against access to the courts for public interest cases.<sup>62</sup> In several civil rights and safety net cases, he urged the Court to reject federal jurisdiction and summarily dismiss constitutional claims. Because he was arguing against the Court’s own precedent, he largely relied upon policy arguments that civil rights and safety net cases against state governments are deleterious

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59. *Id.* at 406 n.8.

60. *Townsend v. Swank*, 404 U.S. 282, 286 (1971). Chief Justice Burger concurred in the opinion.

61. *Id.* at 292 (Burger, C.J., concurring).

62. Professor Melnick identifies the years 1968 to 1972 as a phase in which the Court was highly favorable to welfare cases. He claims that this period “corresponds roughly” to the timeframe in which Earl Warren was Chief Justice of the Court. Melnick, *supra* note 44, at 110. However, Chief Justice Warren was on the Court for only a year after *King v. Smith* was decided in 1968. By mid-1969, Warren Burger took over the reigns of the Court, and presided over numerous favorable welfare rights decisions from 1969 to 1972. Therefore, the swing in the Court’s approach to welfare cases in 1972 cannot be attributed solely to the change in the Chief Justice. I believe that it is more accurate to credit the forceful dissents of Justice Rehnquist with changing the direction of the Court. Justice Rehnquist, along with Justice Powell, joined the Court in 1972.

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and frivolous. He formulated his policy arguments in various public interest cases, including but not limited to cases involving § 1983.

In the 1974 case of *Hagans v. Levine*, Justice Rehnquist authored a dissent, joined by Chief Justice Burger and Justice Powell, protesting the Court's holding that 28 U.S.C. § 1343 conferred jurisdiction to decide whether a New York welfare regulation conflicted with the federal Social Security Act, as a claim pendent to an equal protection challenge. In *Hagans*, the Court once again declined to address the question whether § 1983 "authorizes suits to vindicate rights under the 'laws' of the United States as well as under the Constitution."<sup>63</sup> Justice Rehnquist denounced the Court's reliance on pendent jurisdiction. Rehnquist argued that § 1343, which applies to civil rights laws, does not confer jurisdiction to address whether non-civil rights laws are invalid under the Supremacy Clause as in conflict with federal law. Importantly, he stated that federal question jurisdiction under § 1331 would provide an avenue into federal court to address whether state law conflicted with federal law. He noted that § 1331 had a \$10,000 amount in controversy provision and suggested that most welfare cases would find the monetary requirement "impossible to meet."<sup>64</sup>

Emphasizing policy concerns, Rehnquist asserted, without any citation, that due to favorable treatment of welfare rights cases by the Supreme Court, "the lower federal courts have been confronted by a massive influx of cases challenging state welfare regulations."<sup>65</sup> Rehnquist then argued that pendent jurisdiction should be denied in *Hagans*, based on his perception that the constitutional claim was not meritorious.<sup>66</sup>

Dissenting four years later in a civil rights case concerning governmental immunity, *Butz v. Economou*, Rehnquist sounded the same themes. This time, he provided a citation for his assertion that lawsuits had increased and stressed the importance of the policy implications of increased litigation. He stated:

My biggest concern, however, is not with the illogic or impracticality of today's decision, but rather with the potential for disruption of Government that it invites. The steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the

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63. *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974).

64. *Id.* at 553 (Rehnquist, J., dissenting). In *Rosado*, the district court held that the denial of welfare benefits could have a negative impact on health or even life, at a cost far greater than \$10,000. *Rosado v. Wyman*, 304 F. Supp. 1356, 1362-64 (E.D.N.Y. 1969).

65. *Hagans*, 415 U.S. at 552.

66. *Id.*

most casual observer. From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113. See Director of the Administrative Office of the United States Courts Ann.Rep. 189, Table 11 (1977); Ann.Rep. 173, Table 17 (1976).<sup>67</sup>

Rehnquist once again disparaged the constitutional claims, in this case arising under the First Amendment and Due Process Clause of the Fourteenth Amendment.<sup>68</sup>

Rehnquist's argument in dissent in *Hagans* that § 1343 did not confer jurisdiction over purely statutory claims in welfare cases garnered a slim majority of the Court in 1979, with Justice Stevens, the newest member of the Court, writing the opinion. The decision in *Chapman v. Houston Welfare Rights Organization*<sup>69</sup> begins with an analysis of the rights conferred by the Supremacy Clause. Justice Stevens stated that even though the Supremacy Clause "is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause."<sup>70</sup> However, the Court held that § 1343 conferred jurisdiction to address only federal statutes concerning equal rights, and the Court concluded that the welfare statute was not an equal rights statute. The Court next addressed the claimants' argument that since § 1983 provided a cause of action for all laws and § 1983 had a "common origin" with § 1343 in the Civil Rights Act of 1871, it followed either that § 1343 should be read broadly to encompass all laws or that § 1983 itself should be interpreted as a civil rights statute satisfying the prerequisites of § 1343. Justice Stevens rejected the claimants' arguments, holding that the legislative history supported "a more limited construction."<sup>71</sup> The Court held that § 1343 should be interpreted literally to reach only civil rights laws and that the "procedural character" of § 1983 provided only a cause of action, not jurisdiction.<sup>72</sup>

Justice White concurred, and Justice Powell wrote a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, responding to White's concurrence. Both concurring opinions addressed the question,

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67. *Butz v. Economou*, 438 U.S. 478, 526 (1978) (Rehnquist, J. dissenting). Justice Rehnquist's dissent was joined by Chief Justice Burger and Justices Stewart and Stevens.

68. *Id.* at 527. The claims are described on p. 483.

69. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

70. *Id.* at 613.

71. *Id.* at 616.

72. *Id.* at 617.

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not reached by Stevens, whether § 1983 provided a cause of action for purely statutory violations in the absence of any constitutional claims. Justice White, reviewing the legislative history in detail, concluded that § 1983 did provide such a cause of action for solely statutory claims. Justice Powell, in an even lengthier exposition of the legislative history, argued that the phrase “and laws” in § 1983 really meant only civil rights laws. While Powell began his opinion claiming to agree with the majority opinion and to rebut White’s arguments, Powell wrote a derisive footnote emphasizing that the concurring Justices did “not necessarily agree with every observation in the Court’s opinion concerning the history of the post-Civil War civil rights legislation.”<sup>73</sup>

Justice Stewart dissented, joined by Justices Brennan and Marshall, arguing that §§ 1983 and 1343 were complementary, and because there was a cause of action under § 1983, there was jurisdiction under § 1343. The dissent also pointed out that § 1331 confers jurisdiction if the \$10,000 amount-in-controversy is met.<sup>74</sup> Yet, there was some disunity even within the dissent, as Justices Brennan and Marshall declined to join a footnote in Stewart’s opinion.<sup>75</sup> Thus, the Court had lost the unanimity of the early days of welfare rights cases. After *Chapman* explicitly held that 28 U.S.C. § 1343 applied only to “civil rights” laws, the battleground was set for the fight over whether § 1983 provided a cause of action for purely statutory claims under safety net statutes.

**B. THE EXPANSION OF § 1983 IN THE 1980’S**

In 1980, the year after *Chapman*, the Supreme Court plunged head-on into the question that the Justices had dodged for a dozen years. By a vote of 6:3, the Court held in *Maine v. Thiboutot* that § 1983 provides a cause of action for purely statutory claims regarding welfare benefits which do not involve any allegation of constitutional violations.<sup>76</sup> The majority opinion, by Justice Brennan, concluded that the plain meaning of the term “and laws” could not fairly be limited to civil rights laws. Brennan further argued that numerous cases already “resolved” the question by “suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.”<sup>77</sup> Brennan cited, among others, *King v. Smith*, *Townsend v. Swank*, and the inaccurate characterization of *Rosado* as a § 1983 case in the *Edelman* opinion written

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73. *Id.* at 623 n.1.

74. *Id.* at 675.

75. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 672 (1979).

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

77. *Id.* at 4.

by Rehnquist.<sup>78</sup> Brennan briefly alluded to the vast recitations of legislative history in the various *Chapman* opinions, concluding that the argument that Congress did not intend such an interpretation “can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983.”<sup>79</sup>

Justice Powell wrote a dissent joined by Chief Justice Burger and Justice Rehnquist, expanding upon his lengthy recitation of legislative history in *Chapman* and then dismissing prior statements of the Court regarding § 1983 (such as the inaccurate characterization of *Rosado* in *Edelman*) as dicta. The dissent reiterated the policy arguments that Justice Rehnquist had been advancing against the existence of public interest cases, citing Rehnquist’s recitation of the increase in public interest cases in *Butz v. Economou*.<sup>80</sup> The dissent noted that there are “literally hundreds” of federal laws enforced by states, and provided an appendix listing 28 statutes that could give rise to § 1983 actions.<sup>81</sup> Powell lamented: “No one can predict the extent to which litigation arising from today’s decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial.”<sup>82</sup> He concluded that there “is no probative evidence that Congress intended to authorize the pervasive judicial oversight of state officials that will flow from the Court’s construction of § 1983.”<sup>83</sup>

Congress did not restrict the reach of § 1983 in response to the Supreme Court’s decision in *Maine v. Thiboutot*. On the contrary, in December 1980, a few months after *Thiboutot*, Congress removed the \$10,000 amount-in-controversy requirement for federal question jurisdiction under 28 U.S.C. § 1331, thereby expanding court access for low-income people challenging restrictions on federal benefits.<sup>84</sup> Later in the decade, there were three congressional attempts to reverse *Thiboutot*, contained in bills to restrict the phrase “laws” to those laws “providing for civil rights,” but all three attempts failed.<sup>85</sup>

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78. See the discussion of *Edelman v. Jordan*, *supra*, note 4.

79. *Maine*, 448 U.S. at 8.

80. *Id.* at 27 n.18 (Powell, J., dissenting).

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

82. *Id.* at 23 (Powell, J., dissenting).

83. *Id.* at 32 (Powell, J., dissenting).

84. Pub. L. No. 96-486, 94 Stat. 2369 (1980). The House Report on the amendment has strong language about court access and helping the poor vindicate their rights, but it does not address *Thiboutot* or § 1983. H.R. Rep. No. 96-1461, at 2 (1980) reprinted in 1980 U.S.C.C.A.N. 5063.

85. Key, *supra* note 38, at 351.

Nevertheless, Justice Rehnquist was far from beaten in his fight to restrict access to the courts for public interest cases. In 1981, in two decisions, the Court chipped away at the broad right to obtain relief under § 1983.<sup>86</sup> First, Rehnquist authored *Pennhurst State School and Hospital v. Halderman*,<sup>87</sup> a 6:3 opinion over the dissent of Justices White, Brennan, and Marshall, in which he drew upon language from Powell's *Thiboutot* dissent. Rehnquist cited Powell's dissent for the proposition that § 1983 does not provide a cause of action if the governing statute provides an exclusive remedy for violations of its terms.<sup>88</sup> *Pennhurst* held that congressional findings indicating only a "preference" did not confer individual rights enforceable under § 1983.<sup>89</sup> Then a few months later, Justice Powell authored *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, over the dissent of Justices Stevens and Blackmun, holding that a federal statute could not be enforced via § 1983, because the comprehensive remedial scheme foreclosed a § 1983 remedy.<sup>90</sup>

In 1986, the Court the political makeup of the court began a shift to the right with the elevation of Rehnquist to the position of Chief Justice and the appointment of Justice Scalia as well as the replacement of Justice Stewart by Justice O'Connor in 1981. Even so, in 1987 Rehnquist was in dissent in the significant § 1983 case of *Wright v. City of Roanoke Redevelopment & Housing*.<sup>91</sup> The decision, written by Justice White, further expanded the § 1983 remedy in the context of the enforcement of a utility allowance schedule as part of rent for public housing. First, limiting the scope of *Sea Clammers*, the Court held that neither the availability of a state administrative grievance process nor the authority of the federal government to cut off federal funds indicated a congressional intent to foreclose a § 1983 remedy.<sup>92</sup> The Court noted the absence of any procedure that would enable tenants to compel the federal agency to review the state agency's compliance with federal mandates and concluded that Congress did not intend to foreclose § 1983 relief.<sup>93</sup> Second, pushing back against *Pennhurst*, the Court held that the requirement of a "reasonable" utility allowance was not too "vague and amorphous" to confer an enforceable

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86. *See id.* at 324.

87. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

88. *Id.* at 27.

89. *Id.* at 19.

90. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). *See also* *Smith v. Robinson*, 468 U.S. 992 (1984).

91. *Wright v. City of Roanoke Redevelopment & Housing*, 479 U.S. 418 (1987).

92. *Id.* at 427-28.

93. *Id.* at 426. The Court cited *Rosado* which had reached the same conclusion. *Id.* at 428 (citing *Rosado*, 397 U.S. at 420).

right under § 1983.<sup>94</sup>

Justice O'Connor wrote a dissent joined by Chief Justice Rehnquist and Justices Powell and Scalia. Her dissent omitted the policy arguments previously advanced by Rehnquist and Powell, which had protested against the proliferation of public interest cases. Indeed, from that point on, the conservative Justices' arguments against a cause of action under § 1983 no longer highlighted policy concerns.

Instead, the *Wright* dissent utilized a technical, procedural approach, suggesting that the analysis of a private cause of action under § 1983 is similar to the inquiry regarding an implied private right of action.<sup>95</sup> O'Connor noted that the analysis in § 1983 cases includes a determination whether the statute creates a federal right in favor of the plaintiff — which is the first prong of the *Cort v. Ash* test for an implied private right of action.<sup>96</sup> Then, citing *Sea Clammers*, she framed the issue in the context of § 1983 in a manner similar to the second prong of the *Cort* test, specifically, a determination of “congressional intent to create enforceable rights.”<sup>97</sup> O'Connor's characterization of *Sea Clammers* differs notably from the *Wright* majority's description of *Sea Clammers* as a case in which Congress intended to foreclose a § 1983 remedy.<sup>98</sup>

O'Connor shifted the inquiry from proof of congressional exclusion of a § 1983 remedy to proof of congressional intent to permit enforcement, thereby formulating the test in a manner similar to the second prong of *Cort*, which had been responsible for foreclosing implied private rights of action. The second prong of *Cort* asks whether there is evidence of congressional intent to create a private right in a statute that is devoid of one. While the inquiry into whether Congress intended to create “enforceable” rights under § 1983 is not identical to the question whether Congress sought to permit a private right of action, the focus in both queries is on additional evidence, in the language of the statute, that Congress anticipated private enforcement. Given the Supreme Court's numerous holdings in the 1960s, 1970s, and 1980s that safety net statutes could be enforced by beneficiaries, Congress would have expected private enforcement of these statutes, and would have not known that additional language was needed to render the statute privately enforceable. As a result, the analysis suggested by O'Connor — looking for explicit determinants of enforceability — was unlikely to find any such evidence,

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94. *Wright*, 479 U.S. at 431.

95. *Id.* at 432-33 (citing *Cort v. Ash*, 422 U.S. 66 (1975)).

96. *Id.*

97. *Id.* at 433.

98. *Id.* at 423.

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and thus was more likely to result in the conclusion that a statute is unenforceable.

Moreover, instead of evaluating the statute as a whole, the dissent assessed congressional intent by focusing narrowly on the specific provision at issue. O'Connor analyzed the statute and legislative history only as it related to utilities, instead of either individuals' specific right to rent or the Housing Act as a whole. The dissent concluded that there was not sufficient indication in the statute, legislative history, or regulations that "Congress intended that utilities be included within the statutory entitlement."<sup>99</sup> The majority responded that "the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute."<sup>100</sup>

O'Connor's groundbreaking dissent recast the conservative approach to § 1983. No longer seeking to deny court access on policy grounds, O'Connor instead introduced the argument that an explicit cause of action under § 1983 was conceptually similar to an implied private right of action. While O'Connor's analysis was silent on the policy implications of her technical arguments, the clear result of her reasoning was to heighten the likelihood that federal courts would deny access when states violate individual rights contained in safety net statutes.

In contrast to the contentiousness of the Court's § 1983 decisions, the Justices unanimously agreed in the year 1983, in *Shaw v. Delta Air Lines*,<sup>101</sup> that the federal question statute, 28 U.S.C. § 1331, enables individuals to obtain court access to resolve whether state laws conflict with federal statutes. In a case involving a challenge by employers to a state law mandating sick leave benefits for pregnant women as preempted by federal law, the Court relegated the jurisdictional issue to a footnote and declared that the resolution was obvious. Citing *Ex Parte Young*<sup>102</sup> and other cases, the Court asserted:

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a

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99. *Id.* at 434. The dissent advocated that judicial review focus on the statutory language and legislative history and suggested, without deciding, that mere regulatory language would be insufficient to prove enforceability under § 1983. *Id.* at 433, 437-38.

100. *Wright v. City of Roanoke Redevelopment & Housing*, 479 U.S. 418, 420 n.3 (1987).

101. *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

102. *Ex Parte Young*, 209 U.S. 123, 160-162 (1908).

federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.<sup>103</sup>

Although the Court held that injunctive relief is available via a preemption claim, civil rights and poverty law advocates continued to primarily rely upon § 1983, which authorizes an award of attorneys' fees.<sup>104</sup>

In 1988, Justice Kennedy replaced Justice Powell, and in 1989, the Court issued an important decision, *Golden State Transit Corp. v. City of Los Angeles*, regarding the interplay between § 1983 and preemption under the Supremacy Clause.<sup>105</sup> Justice Stevens wrote the majority opinion, concerning whether the National Labor Relations Act creates enforceable rights under § 1983. Justice Kennedy wrote the dissent, joined by Chief Justice Rehnquist and Justice O'Connor.<sup>106</sup>

Stevens began by asserting that § 1983 should be broadly construed, and the burden is therefore on the defendant to prove that Congress intended to foreclose the § 1983 remedy.<sup>107</sup> The opinion noted that because the Supremacy Clause only secures rights contained in other federal laws, not every instance in which a federal law preempts state regulatory authority will confer "a federal right of action pursuant to § 1983."<sup>108</sup> Still, preemption by a federal statute "does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy."<sup>109</sup>

Turning to the labor statute, and specifically to the plaintiffs' allegation that Los Angeles had violated the employer's rights under federal law by withholding the renewal of a taxicab franchise pending resolution of a labor dispute, Stevens concluded that there was no comprehensive enforcement scheme, because the statute did not provide any remedy to address "state interference with federally protected labor rights."<sup>110</sup> The

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103. *Shaw*, 463 U.S. at 96 n.14 (citation omitted).

104. See Rochelle Bobroff and Jane Perkins, *Recent Developments in Court Access for Medicaid and Medicare Cases*, 42 CLEARINGHOUSE REV. 246, 249 (Sept.-Oct. 2008); Collins, *supra* note 11, at 1493-94; Samberg-Champio, *supra* note 3, at 1838; See also Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 533 (1982) (noting that statistical information gathered by the Administrative Office of the United States is often misinterpreted as measuring the number of § 1983 cases when in fact the figures reflect all civil rights cases brought under § 1983 as well as other statutes).

105. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103 (1989).

106. Curiously, even though Justice Scalia joined O'Connor's dissent in *Wright*, he joined the majority in *Golden State*.

107. *Golden State*, 493 U.S. at 105-7.

108. *Id.* at 108.

109. *Id.*

110. *Id.* at 108-9.

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Court set forth three factors to determine whether the statute conferred rights enforceable under § 1983: (1) whether the statute created obligations or merely expressed preferences; (2) whether the interest asserted by the plaintiff was too “vague and amorphous” to be enforced; and (3) whether the provision was intended to benefit the plaintiff.<sup>111</sup> In concluding that the employer was the intended beneficiary of the statute, Stevens conceded that there was no specific provision establishing these rights but insisted that the “language, structure and history” of the statute accomplished this end.<sup>112</sup>

The Court stated:

A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute’s language and structure is as much a “direct violation” of a right as is the violation of a right that is clearly set forth in the text of the statute.<sup>113</sup>

Stevens’ approach was in sharp contrast to the methodology advocated by Justice O’Connor in her dissent in *Wright*.

Justice Kennedy began his dissent by noting that he “agree[d] with much of the majority’s discussion” of § 1983, but disagreed with the conclusion that § 1983 provided a remedy against the government for intrusion in a labor dispute.<sup>114</sup> He did not address the standards for an implied right of action. He noted that the Court’s earlier decision in *Golden State* (which he had joined) ruled that the city’s actions were preempted by federal law.<sup>115</sup> He characterized this preemptive effect as the employer’s immunity from the city’s interference in its labor dispute. He would have held that the preemptive effect of the NLRA did not *secure* this immunity, as required to obtain damages under § 1983.<sup>116</sup>

Significantly, Kennedy emphasized that § 1983 does not provide “exclusive relief,” but rather, “plaintiffs may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes.”<sup>117</sup> The Justice explained:

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111. *Id.* at 106.

112. *Id.* at 111.

113. *Golden State Transit Corp. v. City of L.A.* 493 U.S. 103,112 (1989).

114. *Id.* at 113 (Kennedy, J., dissenting).

115. *Id.* at 113, 119 (citing *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, (1986)).

116. *Id.* at 117.

117. *Id.* at 119 (citing federal question jurisdiction 28 U.S.C. § 1331, declaratory judgments statutes, 28 U.S.C. §§ 2201, 2202).

From the earliest cases interpreting our constitutional law to the most recent ones, we have acknowledged that a private party can assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States. The injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system.<sup>118</sup>

Thus, even though he disagreed with the majority's conclusion regarding the damages remedy under § 1983, he supported court access to resolve the preemption issue under federal question jurisdiction. His primary concern was that § 1983 provides damages against local governments, which he did not believe were warranted under the facts of the case,<sup>119</sup> but he clearly expressed approval for an action via preemption for declaratory and injunctive relief.

### C. THE CONSERVATIVE OFFENSIVE AND RETREAT OF THE 1990'S

The nineties began with a significant case holding that § 1983 confers a cause of action in the context of Medicaid. Yet, after the replacement of Justice Brennan in 1990 and Justice Marshall in 1991 by more conservative Justices, the Court held that portions of a federal adoption law were not enforceable under § 1983.

Justices Brennan and Marshall's final Supreme Court case applying § 1983 was *Wilder v. Virginia Hospital Association*.<sup>120</sup> The case concerned enforcement of the Medicaid statute by health care providers. The providers alleged that the rates set by the state of Virginia were not "reasonable" as required by the Medicaid law. Justice Brennan wrote the majority opinion joined by Justices White, Marshall, Blackmun and Stevens, while Chief Justice Rehnquist wrote the dissent joined by Justices O'Connor, Scalia, and Kennedy.

Brennan began his analysis by protesting against the approach suggested by Justice O'Connor's dissent in *Wright*. In a footnote, Brennan stated that the standards for an implied private right of action do not apply to the analysis of a cause of action under § 1983, because § 1983 is an express, not implied, congressional authorization of suits.<sup>121</sup> The *Wilder* opinion reiterated that the § 1983 cause of action is precluded only when

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118. *Id.* at 113-14 (citations omitted).

119. *Golden State Transit Corp. v. City of L.A.* 493 U.S. 103, 113-14 (1989).

120. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990).

121. *Id.* at 508 n.9.

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Congress affirmatively withdraws the remedy.

Brennan applied a broad standard in determining whether the statutory requirement for reasonable rates was enforceable by the providers. He noted that the law was clearly intended to benefit the providers, and contained the mandatory (rather than precatory) term “must.”<sup>122</sup> The state argued that the providers were entitled only to the procedures by which the state assured the federal government that its rates were reasonable and not to rates that actually were reasonable. Brennan rejected this argument, finding that an entitlement only to state procedures would render the statute “essentially meaningless” and a “dead letter.”<sup>123</sup> He stated: “It would make little sense for Congress to require a State to make findings without requiring those findings to be correct.”<sup>124</sup> Brennan contended that the legislative history supported his interpretation of congressional intent.<sup>125</sup> Brennan readily found that the requirement of reasonable rates was not “vague and amorphous,” even though the state had substantial discretion in setting the rate.<sup>126</sup> He explained:

While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act. Although some knowledge of the hospital industry might be required to evaluate a State’s findings with respect to the reasonableness of its rates, such an inquiry is well within the competence of the Judiciary.<sup>127</sup>

Brennan further concluded that the administrative appeal scheme of the Medicaid Act did not preclude a § 1983 claim. The authority of the federal government to cut off federal funds did not foreclose reliance on § 1983, because the law did not provide “any mechanism for individuals to bring problems to the attention of” the federal government.<sup>128</sup> Brennan set forth legislative history of the Medicaid statute from the 1970s, wherein Congress initially passed and then repealed a provision requiring states to waive sovereign immunity in return for Medicaid funds. In passing the waiver requirement, Congress expressed its belief that “enforcement-noncompliance procedures instituted by the Secretary” were “insufficient to deal with the problem of outright noncompliance.”<sup>129</sup> Then in repealing the

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122. *Id.* at 510, 512.

123. *Id.* at 514.

124. *Id.*

125. *Id.* at 515-18.

126. *Wilder*, 496 U.S. at 499.

127. *Id.* at 519-20.

128. *Id.* at 522 (citing *Wright*, 479 U.S. at 428; *Rosado*, 397 U.S. at 420-23).

129. *Id.* at 517 (citing H.R.Rep. No. 94-1122, at 4 (1976)).

provision, Congress explained that the repeal should not be “interpreted as placing constraints on the rights of the parties involved to seek such prospective, injunctive relief.”<sup>130</sup> Brennan concluded that the legislative history made it plain that both Congress and the states understood the Medicaid Act to be enforceable by providers in suits against the states.<sup>131</sup>

Rehnquist’s *Wilder* dissent contended that before *Maine v. Thiboutot*, a federal statute could be enforced only by demonstrating that there was an implied private right of action.<sup>132</sup> This characterization is simply inaccurate. Indeed, neither O’Connor’s *Wright* dissent nor Rehnquist’s *Wilder* dissent cites any pre-*Thiboutot* § 1983 case equating the § 1983 analysis with the test for an implied private right of action, precisely because there is no such case.<sup>133</sup> Instead, as demonstrated, *supra*, for a dozen years before *Thiboutot*, claims to enforce federal safety net statutes under § 1983 were permitted when accompanying a constitutional claim.<sup>134</sup>

Rehnquist acknowledged *Thiboutot*’s holding that § 1983 “supplies the remedy for vindication of [federal] rights arising from federal statutes.”<sup>135</sup> As a result, Rehnquist explained, the only part of the *Cort v. Ash* test which is applicable to a § 1983 cause of action is the first prong, *i.e.*, whether the statute creates a federal right in favor of the plaintiff. Yet, in Rehnquist’s formulation, merely benefitting the plaintiff was not sufficient. Citing O’Connor’s *Wright* dissent, he asserted that “the language used by Congress must confer identifiable enforceable rights.”<sup>136</sup> Thus, his formulation of the inquiry in a § 1983 case, like the *Wright* dissent, focused on whether Congress intended the statute to be “enforceable.” This is similar to the second prong of the *Cort* test, which asks whether there is a demonstration of congressional intent that the language be enforced. So, even though Rehnquist acknowledged that an explicit right of action under § 1983 need not meet the second prong of *Cort*, he nevertheless framed the § 1983 inquiry in a manner analogous to the second prong of *Cort*.

Scrutinizing the text of the statute for a demonstration of

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130. *Id.* at 517-18 (citing S.Rep. No. 94-1240, at 4, U.S.Code Cong. & Admin.News 1976, p. 5651).

131. *Id.* at 518.

132. *Wilder*, 496 U.S. at 525 (Rehnquist, C.J., dissenting).

133. *See De La Cruz v. Tormey*, 582 F.2d 45, 60 (9th Cir. 1978) (analyzing pre-*Thiboutot* cases and holding that statutory claim under Title IX under § 1983 is permissible even though no implied private right of action).

134. *See* section IIA, *supra* (discussing pre-*Thiboutot* Supreme Court cases).

135. *Wilder*, 496 U.S. at 525-26. (Rehnquist, C.J., dissenting).

136. *Id.* (citing *Wright*, 479 U.S. at 432-33 (O’Connor, J., dissenting)).

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enforceability, Rehnquist noted that the requirement of reasonable rates in the Medicaid law was part of a list of requirements for state plans. Rehnquist concluded that the structure of the statute, and specifically the placement of rights in the context of a state plan, establishes obligations on the states without conferring enforceable rights on providers.<sup>137</sup> Alternatively, the dissent suggested that because the rights arose in the context of state plan requirements, providers were only entitled to the state's compliance with the procedures set forth in the law for making assurances to the federal government concerning reasonable rates in the state plan, not to rates that were actually reasonable.<sup>138</sup> This focus on the placement of the individual rights in the format of a list of state plan requirements was a new technical roadblock introduced into § 1983 jurisprudence in the *Wilder* dissent.

Two years later, Rehnquist was in the majority, transforming his *Wilder* dissent into law in *Suter v. Artist M.*<sup>139</sup> With Justice Thomas replacing Justice Marshall and Justice Souter replacing Justice Brennan, Rehnquist garnered seven votes to support his restrictive interpretation of § 1983. Only Justices Blackmun and Stevens dissented. *Suter* concerned the enforcement of the requirement in the Adoption Assistance and Child Welfare Act ("Adoption Assistance Act") that the state engage in reasonable efforts to prevent removal of children from their homes and to facilitate reunification where a removal had occurred.

Even though the *Suter* majority followed the conservative dissent in *Wilder*, the Court purported to distinguish the liberal decisions in *Wilder*, *Wright*, and *Thiboutot* without overruling them. Rehnquist contrasted the statutory mandate for reasonable rates in *Wilder* and *Wright*, with the requirement of reasonable efforts in *Suter*. He asserted that in the earlier cases, "the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates."<sup>140</sup> In contrast, he concluded, the Adoption Assistance Act contained no statutory guidance regarding how reasonable efforts should be measured, but rather left considerable discretion to the states.<sup>141</sup>

The *Suter* decision ignored the three-part test for evaluating enforceability from *Golden State*. Instead, the opinion followed the *Wilder* dissent by focusing on whether the structure of the statute evinced enforceability. The Adoption Assistance Act's mandate for the state to

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137. *Id.* at 527.

138. *Id.* at 527-28.

139. *Suter v. Artist M.*, 503 U.S. 347 (1992).

140. *Id.* at 359 (citing *Wilder*, 496 U.S. at 519, n. 17).

141. *Id.* at 362.

engage in reasonable efforts was located in a list of specifications for the state plan. Rehnquist concluded that because the “generalized duty on the State” was contained in a list of state plan requirements, the law did “not unambiguously confer an enforceable right upon the Act’s beneficiaries.”<sup>142</sup> Thus, under Rehnquist’s approach, the mere placement of a right in the context of a list of state plan requirements defeated a cause of action under § 1983. Rehnquist noted that the federal government could reduce or eliminate payments to the state if the state failed to comply with its state plan; thus he asserted that the absence of private enforcement would not render the statute “a dead letter.”<sup>143</sup>

The Court then turned to the plaintiffs’ claim that the Adoption Assistance Act contains an implied private right of action and quickly rejected that claim, based on the earlier analysis under § 1983. Rehnquist stated: “the most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs. As discussed above, we think that Congress did not intend to create a private remedy for enforcement of the ‘reasonable efforts’ clause.”<sup>144</sup> Thus, in *Suter*, Rehnquist subtly conflated the § 1983 analysis with the second prong of *Cort*, focusing on evidence of congressional intent to render the Social Security Act enforceable rather than asking whether Congress had rejected the explicit right of action under § 1983.

In dissent, Justice Blackmun protested that the majority opinion in *Suter* comported with the dissent in *Wilder* and ignored the methodology for analyzing claims under § 1983 set forth in the majority opinion in *Wilder*.<sup>145</sup> He harkened back to *Golden State’s* “three-part test” for determining whether a statute created enforceable rights, and complained that the majority had failed to “mention—much less apply—this firmly established analytic framework.”<sup>146</sup> He would have held that under the approach of the majority opinion in *Wilder*, “the Adoption [Assistance] Act’s ‘reasonable efforts’ clause establishes . . . right[s] enforceable under § 1983.”<sup>147</sup>

The *Suter* Court’s holding that a provision contained in a state plan

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142. *Id.* at 363. Because the Court found that the beneficiaries did not have enforceable rights, the Court did not reach the question of whether the Adoption Act contained a comprehensive enforcement scheme that would preclude additional private remedies under § 1983. *Id.* at 361 n.11.

143. *Id.* at 360-61.

144. *Id.* at 364 (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979)).

145. *Suter v. Artist M*, 503 U.S. 347, 373 (1992) (Blackmun, J., dissenting).

146. *Id.* at 366.

147. *Id.* at 368.

was not enforceable by beneficiaries “had potentially far-reaching ramifications” to preclude suits under § 1983 for safety net statutes, because many rights in the Social Security Act are phrased in terms of requirements for state plans.<sup>148</sup> *Suter’s* adoption of the reasoning of the *Wright* and *Wilder* dissents reflects the changes in the membership in the Court, and is best understood as a technical rationale for the conservative policy objective espoused by Rehnquist in *Hagans*, *Economou*, and *Thiboutot*: limiting court access for suits against the states by low-income and disadvantaged individuals.

Congress responded to the *Suter* decision on October 20, 1994, just weeks before an election that would transfer control from the Democrats to the Republicans.<sup>149</sup> In legislation dubbed the “*Suter* fix,” Congress amended the Social Security Act, in which the Adoption Assistance Act, the Medicaid Act, and numerous other safety net provisions are located, by adding two identical provisions addressing *Suter*.<sup>150</sup> The *Suter* fix states:

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.<sup>151</sup>

While the intent of the drafters of the *Suter* fix was to overrule the reasoning of *Suter*,<sup>152</sup> the law’s explicit acceptance of the holding in *Suter* limited its impact. The statutory fix has been criticized as “very poorly drafted,”<sup>153</sup> “confusing,”<sup>154</sup> and “not [written] in the clearest of

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148. Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 38 CLEARINGHOUSE REV. 720, 726 (Mar-Apr. 2005).

149. Improving America’s Schools Act of 1994, Pub. L. No. 103-382, Title V, § 555(a), 108 Stat. 4057 (1994).

150. 42 U.S.C. §§ 1320a-2, 1320a-10 (2000).

151. *Id.*

152. Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Roundtable Dialogue*, 19 TOURO L. REV. 625, 665-66 (2003).

153. Timothy Stoltzfos Jost, *Health Care Rationing in the Courts: A Comparative Study*, 21 HASTINGS INTL. & COMP. L. REV. 639, 698 (1998).

154. Brian D. Ledahl, *Congress Overruling the Courts: Legislative Changes to the Scope of*

language.”<sup>155</sup>

In 1997, in the next major Supreme Court § 1983 case involving the Social Security Act, the Court ignored the *Suter* fix but retreated from *Suter*'s approach. Justice O'Connor wrote the unanimous Court opinion in *Blessing v. Freestone*,<sup>156</sup> involving whether mothers of children entitled to child support services could enforce the requirement that the state be in “substantial compliance” with federal requirements under the Child Support provisions of the Social Security Act. The opinion not only failed to mention the enactment of the *Suter* fix legislation,<sup>157</sup> but also abandoned *Suter*'s focus on the unenforceability of rights contained in a list of state plan requirements. *Blessing* similarly withdrew from *Suter*'s suggestion (originally formulated in O'Connor's *Wright* dissent) that the analysis of a § 1983 claim is similar to the test for an implied right of action.

One of the provisions at issue in *Blessing* is entitled “State plan for child and spousal support,” and it includes a list of state plan requirements for child support enforcement services.<sup>158</sup> While the Court discussed the issue of the statutory staffing requirement, the Court never pointed out that the staffing requirement is located in a list of state plan requirements.<sup>159</sup> The absence of any discussion of the location of individual rights in state plan requirements suggests that the Court was well aware of the *Suter* fix, even if it chose not to discuss it.

Rather than follow *Suter*'s emphasis on the placement of individual rights in a list of state plan requirements, the *Blessing* opinion reiterated the three-part test for determining the enforceability of a provision under § 1983 that had been followed in *Golden State*, *Wright* and *Wilder*<sup>160</sup> – with a twist. The *Blessing* opinion criticized the court of appeals for evaluating enforceability of the statute as a whole, and emphasized that the claims of enforceable rights had to be “broken down into manageable analytic bites.”<sup>161</sup> Even though the Court cited the liberal majority opinions in *Wright* and *Wilder* with favor,<sup>162</sup> *Blessing*'s emphasis on narrowly defined rights is reminiscent of O'Connor's dissent in *Wright*, which criticized the

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Section 1983, 29 COLUM. J.L. SOC. PROBS. 411, 412, 434 (1996).

155. Samberg-Champion, *supra* note 3, at 1851.

156. *Blessing v. Freestone*, 520 U.S. 329 (1997).

157. See Martin A. Schwartz, *Section 1983 Supreme Court Review October 1996 Term*, 575 P.L.I./LIT 7, 11 (1997).

158. 42 U.S.C. § 654 (2000 & Supp. 2001-2005).

159. *Blessing*, 520 U.S. at 345.

160. *Id.* at 340-41.

161. *Id.* at 342.

162. *Id.* at 342-43.

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majority for evaluating rights based on the statute as a whole.<sup>163</sup>

Evaluating the child support statute, *Blessing* held that the statutory requirement of “substantial compliance” was a yardstick for system-wide, aggregate performance.<sup>164</sup> If the state did not achieve substantial compliance of approximately 75%, the federal government could conduct additional audits and reduce the state’s welfare grant by up to 5%. The Court concluded that the statute did not permit the federal government to order the provision of services to any specific individual, and thus, that the statute’s “substantial compliance” requirement did not give rise to individual rights.<sup>165</sup> The Court similarly decided that the requirement of sufficient staff did not give rise to enforceable individual rights.<sup>166</sup> Nonetheless, rather than dismiss the complaint, the Court remanded the case to “manageably break[] down the complaint into specific allegations . . . to determine whether any specific claim asserts an individual federal right.”<sup>167</sup>

The Court then turned to the allegation that the remedial scheme in the statute precluded recourse to § 1983. The Court cited favorably *Golden State, Wright, and Wilder* for the proposition that the existence of administrative remedies does not defeat the cause of action under § 1983.<sup>168</sup> The Court noted that there was no private remedy in the statute, and the federal government’s oversight was limited to auditing and cutting funds. Counsel for the federal government suggested at oral argument that as a party to a contract with the state, the federal government could sue the state for specific performance. The Court held that even if this were true, “no private actor would have standing to force the Secretary to bring suit for specific performance, . . . therefore, . . . the Secretary’s oversight powers are not comprehensive enough to close the door on § 1983 liability.”<sup>169</sup>

Justice Scalia wrote a concurring opinion joined by Justice Kennedy. Scalia noted that *Pennhurst* had analogized Spending Clause statutes to contracts, in that the federal government confers funds in exchange for the state’s promise to implement a federal-state program in accordance with federal law.<sup>170</sup> Scalia was intrigued by an argument – suggested in an

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163. See *supra*, note 95, discussing O’Connor’s emphasis in the *Wright* dissent on individual rights to utilities instead of individuals’ rights under the Housing Act as a whole.

164. *Blessing*, 520 U.S. at 343-44.

165. *Id.* at 344.

166. *Id.* at 345.

167. *Id.* at 346.

168. *Id.* at 347-48.

169. *Id.* at 348.

170. *Blessing*, 520 U.S. at 349 (Scalia, J. concurring) (citing *Pennhurst State Sch. & Hosp. v.*

amicus brief by the Council of State Governments – that at the time § 1983 was enacted, a third-party beneficiary could not sue upon a contract. Therefore, the brief suggested, recipients who reap the benefits of the federal-state contract have no rights secured by the laws under § 1983. Scalia acknowledged that such an approach would require overruling *Wright* and *Wilder*, but he joined the Court’s opinion because it “leaves that possibility open.”<sup>171</sup> Scalia’s concurrence questioned “whether § 1983 ever authorizes the beneficiaries of a federal-state funding and spending agreement. . .to bring suit.”<sup>172</sup> In doing so, Scalia suggested a new, insurmountable procedural hurdles to bar enforcement of safety net statutes via § 1983.

Nevertheless, the majority opinion in *Blessing* amounted to a substantial retreat from the approach to § 1983 in *Suter*. While *Suter* cited and followed the *Wilder* dissent, requiring evidence of congressional intent to create enforceable rights, *Blessing* followed the methodology set forth in the *Wilder* majority opinion, reiterating the *Golden State* three-prong approach to determining whether a statute creates enforceable rights. Thus, at the end of the century, § 1983 remained a viable means of enforcing safety net statutes.

#### D. THE CRITICAL YEAR: 2002 AND AFTERWARD

In 2002, Congress had been in Republican control for six years, and a conservative Republican president had been in office for two years. A reduction of the availability of court access under § 1983 was unlikely to trigger a congressional response akin to the *Suter* fix which had been passed in the days when Democrats dominated the legislative and executive branches.

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Halderman, 451 U.S. 1, 17 (1981)).

171. *Id.* at 350. Scalia noted that the amicus’s argument was not raised in *Wright* and *Wilder* and suggested that overruling those cases could be justified by the new argument. *Id.* Scalia’s conclusion is contrary to established principles of *stare decisis*, which have “special force in the area of statutory interpretation.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Traditional justifications for overruling statutory precedents include: intervening changes in either statutory or case law that undermine the precedent; “inherent confusion created by an unworkable decision”; and obstruction of “important objectives embodied in other laws.” *Id.* at 173-74. The mere assertion of a new line of reasoning is not among these. Indeed, the Court has recently stated expressly that an argument that is “apparent” in previous cases but not explicitly addressed is not a sufficient reason to deviate from precedent. *CBOCS West v. Humphries*, 128 S.Ct. 1951, 1959 (2008). Moreover, the Court has seen added strength in *stare decisis* where Congress either does not act over several years or amends the law in a way consistent with the precedent. *E.g.*, *Shepard v. U.S.*, 544 U.S. 13, 23 (2005); *California v. F.E.R.C.*, 495 U.S. 490, 499 (1990).

172. *Blessing*, 520 U.S. at 349-50.

Five years after *Blessing*, in *Gonzaga University v. Doe*,<sup>173</sup> the conservative Justices of the Supreme Court limited the scope of § 1983. While *Gonzaga* quoted at length from *Suter* with favor,<sup>174</sup> *Gonzaga* did not resurrect *Suter*'s focus on the placement of rights in a list of state plans. Instead, *Gonzaga* returned to the approach of O'Connor's *Wright* dissent – requiring a demonstration of congressional intent to create enforceable rights. This method treats the explicit cause of action in § 1983 similarly to the second prong of the test for an implied right of action. Nevertheless, the Court did not overrule *Thibotout*, *Wright* or *Wilder*.

Chief Justice Rehnquist wrote the *Gonzaga* majority opinion. The case involved violations of student privacy under the Family Educational Rights and Privacy Act (FERPA). The decision acknowledged that *Wilder* conflicted with *Suter* regarding whether implied private right of action cases were relevant to a determination whether a statute creates rights enforceable by § 1983.<sup>175</sup> The opinion further suggested that there was “confusion” among lower courts regarding whether a plaintiff who was within the general zone of interest of a statute could enforce it via § 1983, based on the three “factors” of *Blessing*'s analysis of enforceability. The Court stated:

We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of “rights, privileges, or immunities secured by the Constitution and laws” of the United States. Accordingly, it is *rights*, not the broader or vaguer “benefits” or “interests,” that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.<sup>176</sup>

Rehnquist acknowledged that *Wilder* held that the inquiry for an implied private right of action differs from the analysis of enforcement via § 1983. However, he stated that the two lines of inquiry “overlap in one meaningful respect – in either case we must first determine whether Congress *intended to create a federal right*.”<sup>177</sup> Rehnquist described the inquiry as an analysis whether the statute contains “explicit rights-creating

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173. *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

174. *Id.* at 281.

175. *Id.* at 283.

176. *Id.*

177. *Id.*

terms.”<sup>178</sup> This focus on congressional intent to create an enforceable right is similar, though not identical, to the second prong of *Cort*, which asks whether Congress intended to create a private right of action.

Turning to FERPA, Rehnquist concluded that the statute did not contain “the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.”<sup>179</sup> The Court found that the statute had an aggregate focus, requiring only substantial compliance, and did not confer individual rights enforceable under § 1983. The Court further stated that the existence of a federal administrative review process “buttressed” the conclusion that Congress did not intend to create enforceable rights, without reaching the issue whether the remedial scheme was sufficiently comprehensive to preclude review under § 1983.<sup>180</sup>

Justices Breyer and Souter concurred in the judgment, but did not join the Court’s opinion. Breyer specifically rejected “the majority’s presumption that a right is conferred only if set forth ‘unambiguously’ in the statute’s ‘text and structure.’”<sup>181</sup> He suggested that this presumption would “in effect, predetermine the outcome,” improperly leading courts to conclude that Congress did not intend enforcement under § 1983.<sup>182</sup> Still, the concurrence agreed with the majority that numerous provisions suggested that Congress intended national, federal enforcement and not individual enforcement of FERPA.<sup>183</sup> Breyer further noted that “[m]uch of the statute’s key language is broad and nonspecific.”<sup>184</sup> As a result, Breyer concluded, the statute indicated that Congress intended a federal agency to utilize its expertise to interpret the broad language, in order to achieve “uniformity” and to “avoid the comparative risk of inconsistent interpretations and misincentives [sic] that can arise out of an occasional inappropriate application of the statute in a private action.”<sup>185</sup>

Justice Stevens dissented, joined by Justice Ginsburg. Stevens mourned the *sub silentio* overruling of *Wright* and *Wilder*, believing that the importing of the implied private right of action analysis effectively destroyed the earlier decisions.<sup>186</sup> Indeed, *Gonzaga* was the triumph of the

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178. *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002).

179. *Id.* at 287 (citing *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001); *Cannon v. University of Chicago*, 441 U.S. 677, 690, n. 1 (1979)).

180. *Id.* at 289-90 n.8.

181. *Id.* at 291 (Breyer, J., concurring) (citing *id.* at 280, 288).

182. *Id.*

183. *Id.* at 291.

184. *Gonzaga University*, 536 U.S. at 292.

185. *Id.*

186. *Id.* at 300-02 (Stevens, J., dissenting).

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policy perspective that Rehnquist had espoused in dissent in the 1970's and 1980's, embodying the objective of denial of court access for beneficiaries' suits against states. Still, *Gonzaga* did not explicitly overrule the earlier § 1983 decisions. While the Court highlighted similarities with the *Cort* test, *Gonzaga* did not import the second prong of *Cort* wholesale, but rather reformulated it as a focus on congressional intent to create enforceable rights. As a result, as discussed *infra* in Part III, the availability of § 1983 in safety net cases was constrained but not eliminated.

In startling contrast to the *Gonzaga* decision, in *Verizon Maryland Inc. v. Public Service Commission*, decided one month earlier, the Court unanimously reached the merits of a preemption claim while “express[ing] no opinion” whether there was a private cause of action to enforce the federal telecommunications law.<sup>187</sup> The state argued that there was no private cause of action in the statute, and therefore, no jurisdiction for the suit. Justice Scalia, writing for the Court, responded:

We need express no opinion on the premise of this argument. “It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’ statutory or constitutional *power* to adjudicate the case.”<sup>188</sup>

Consequently, the Court summarily dismissed the argument that the lack of a cause of action could affect the federal judicial power to adjudicate the plaintiff’s preemption claim.

The Court found that nothing in the Telecommunications Act “purports to strip [federal question] jurisdiction.”<sup>189</sup> The *Verizon* decision acknowledged that the elimination of federal district court review under § 1331 would not eradicate all court review under the telecom statute. Still, the Court concluded that federal question jurisdiction existed, because the law “does not distinctively limit the substantive relief available.”<sup>190</sup> Scalia concluded: “In sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies.”<sup>191</sup> It is noteworthy that the Court’s emphasis upon the absence of evidence that Congress intended to foreclose judicial review entirely reverses the increasingly stringent

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187. *Verizon Md., Inc. v. Public Serv. Comm. of Md.*, 535 U.S. 635, 642 (2002).

188. *Id.* at 642-43 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998)).

189. *Id.* at 643.

190. *Id.* at 644.

191. *Id.*

restrictions placed upon suits brought under § 1983.

The Court stated that as long as the plaintiff's preemption claim is not frivolous, the district court has federal question jurisdiction to determine whether a state regulation is preempted by federal law, pursuant to the Supremacy Clause.<sup>192</sup> *Verizon's* holding, that the existence of a statutory cause of action was not relevant to court access, differs markedly from the holding in *Gonzaga*, that the failure to meet the elaborate requirements of proof of a cause of action dooms the lawsuit.

The result in *Verizon* – that the telecom company could pursue its attack upon state regulation in the absence of a showing that Congress had affirmatively intended to preclude such a process – was all the more striking for the circumstances of the case. *Verizon* initiated the state regulatory process of which the company now sought to complain, but had become dubious about its prospect for success when it lost before the state regulatory agency and then a state intermediate appellate court. *Verizon's* suit in a federal district court to assert a belated preemption claim effectively aborted a settled state administrative process to which the company had acceded at the outset.

The *Verizon* Court's failure to address the source of the cause of action in the context of preemption was not an anomaly. Professor Sloss noted that in all nine cases between October 1996 and June 2003 involving federal preemption claims by private parties seeking declaratory or injunctive relief, "the Supreme Court reached the merits of plaintiffs' claims without considering whether the allegedly preemptive federal statute accorded plaintiffs a private right of action."<sup>193</sup> Moreover, the Court has never expressly stated that there is an implied cause of action in the Supremacy Clause to determine whether state laws are preempted by federal law.<sup>194</sup> While Professor Sloss concluded that the Supreme Court "cannot continue to duck this issue,"<sup>195</sup> the Court in *Verizon* rejected the need for a statutory cause of action without pointing to any alternative cause of action.

It seems unlikely that the Justices are unaware of the murkiness on this subject. It is more likely that at least some of the Justices do not want to acknowledge an implied cause of action in the Supremacy Clause, because they do not want to encourage suits by individuals against the

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192. *Id.* at 643-44.

193. David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 366-67 (2004).

194. *Id.* at 360.

195. *Id.*

government. The Court has recently made clear its unwillingness to imply private rights of action in statutes and its hostility to the express cause of action in § 1983. The flippant dismissal of the issue of a cause of action in *Verizon* suggests that the Court is not eager to recognize the Supremacy Clause as the source of an implied cause of action, preferring to validate federal question jurisdiction without resolution of the cause of action issue.

In two subsequent Medicaid decisions, the Court majority reached the merits of preemption questions with no discussion of the existence of the cause of action. In the first case, *Pharmaceutical Research & Manufacturers of America v. Walsh*,<sup>196</sup> the cause of action was addressed in the concurrence of Justice Thomas,<sup>197</sup> but not mentioned in the four opinions of the eight other Justices. The case concerned whether Maine's prescription drug law was preempted by the federal Medicaid statute. While the Justices were deeply divided on the merits of the preemption claim, seven Justices rejected the approach of the concurrences of Justices Thomas and Scalia, both of whom challenged the validity of the preemption claim. In so doing, seven Justices "assum[ed] sub silentio that the plaintiff had a right of action for its claim that the Medicaid statute preempted state law."<sup>198</sup>

In the second Medicaid case, *Arkansas Dept. of Health & Human Services v. Ahlborn*,<sup>199</sup> the Court unanimously held that state law conflicted with Medicaid law and was therefore unenforceable. *Ahlborn* contains no discussion whatsoever of a cause of action or jurisdiction; it reaches the merits of the preemption claim without even mentioning the Supremacy Clause. Yet, the issue of federal jurisdiction was not absent from the minds of the Justices. In oral argument, Chief Justice Roberts asked: "why was there Federal jurisdiction in this case in the first place?"<sup>200</sup> Plaintiff's counsel responded that "the Federal question involved the preemption issue as to whether the State statute had been preempted." Justice Ginsburg chimed in that plaintiff sought a declaration that the state "statute was unconstitutional because it conflicted with the federal statute."<sup>201</sup> Perhaps satisfied by the substantial precedent underpinning preemption claims, the Court's decision altogether ignored the basis for federal jurisdiction in the case. *PhRMA v. Walsh* and *Ahlborn* demonstrate both the willingness of

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196. *Pharm. Research & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644 (2003).

197. The concurrences of Justices Thomas and Scalia are discussed in detail, *infra*, in section IV.

198. Sloss, *supra* note 193, at 374.

199. *Ark. Dept. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006).

200. See Transcript of Oral Argument at 50, *Ahlborn*, 547 U.S. 268 (No. 04-1506), available at [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/04-1506.pdf](http://www.supremecourt.us/oral_arguments/argument_transcripts/04-1506.pdf).

201. *Id.* at 50-51.

the Court to address preemption of state laws by federal safety net statutes and the reluctance of the Court to conclusively resolve the issue of the cause of action in such cases.

### III. COURT OF APPEALS IMPLEMENTATION OF *GONZAGA* AND *VERIZON* IN SAFETY NET CASES

#### A. STATUTES ENFORCEABLE UNDER SECTION 1983 ONLY IF PHRASED IN TERMS OF RIGHTS OF INDIVIDUALS

*Gonzaga* clearly discouraged lower courts from finding a cause of action under § 1983. While the Court did not overrule any of the prior § 1983 decisions, the Court distinguished *Wright* and *Wilder* from “more recent decisions [that] have rejected attempts to infer enforceable rights from Spending Clause statutes.”<sup>202</sup> Lower courts implementing *Gonzaga* have carefully scrutinized statutory provisions for congressional intent to permit enforcement. As a result, numerous provisions in Spending Clause statutes that had been found enforceable prior to *Gonzaga* have been held to be unenforceable following *Gonzaga*. Nevertheless, even with *Gonzaga*'s rigorous standard, many provisions in safety net statutes have been held enforceable.

There has been widespread agreement among the courts of appeals regarding the impact of *Gonzaga* on the enforceability of safety net statutes under § 1983.<sup>203</sup> Every circuit court implementing *Gonzaga* has sought to reconcile *Gonzaga* with the Supreme Court's prior § 1983 cases. No circuit court has followed the lament of Justice Stevens' dissent and treated *Wright* and *Wilder* as overruled *sub silentio*.

Several trends have emerged in court of appeals cases following *Gonzaga*. The circuit courts have been willing to permit § 1983 enforcement of statutory provisions that contain the word “individuals,” “person,” “family,” or comparable language in setting forth a specific right. However, provisions that are not framed in terms of individuals have been found unenforceable. Courts of appeals have denied court access to enforce

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202. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280-81 (2002).

203. There have been numerous district court decisions interpreting *Gonzaga*, most comporting with the approach of the circuit courts. A few district court cases have broadly interpreted *Gonzaga* to thoroughly preclude enforcement via § 1983. Some of these overzealous cases were reversed by courts of appeals. *See, e.g.*, *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006), *aff'g in part and rev'g in part*, 368 F. Supp. 2d 740 (E.D. Mich. 2005); *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), *rev'g*, 245 F. Supp. 2d (E.D. Pa. 2003). While not all aberrant district court cases have been reversed, *see, e.g.*, *M.A.C. v. Betit*, 284 F. Supp. 2d 1298 (D. Utah 2003), these stray district court decisions are far overshadowed by the consensus in the circuit courts.

provisions that are phrased exclusively in terms of the obligations of a government agency, following the majority *Gonzaga* opinion. Circuit courts have also been unwilling to permit enforcement of provisions that contain broad directives, in keeping with Justice Breyer's *Gonzaga* concurrence.<sup>204</sup>

A wide range of Medicaid provisions utilizing the word "individuals" have been found enforceable after *Gonzaga*. Courts have permitted enforcement of provisions that require states to make Medicaid available to "all individuals" and require that Medicaid be provided "with reasonable promptness to all eligible individuals."<sup>205</sup> Provisions requiring notice to "individuals" have also fared well, including both notice of services to children<sup>206</sup> and notice to older persons and people with disabilities regarding options for non-institutional care.<sup>207</sup> While not every circuit has reviewed each provision, there has been unanimous agreement among courts of appeals in the context of post-*Gonzaga* Medicaid cases that provisions phrased in terms of the rights of "individuals" are enforceable.

However, circuit courts have generally rejected the enforceability of Medicaid provisions that contain broad directives, including several provisions that had been deemed enforceable prior to *Gonzaga*. For example, the Medicaid statute's equal access provision does not contain the term "individuals," but rather requires states to ensure that payments to medical providers are "consistent with efficiency, economy, and quality of care."<sup>208</sup> Prior to *Gonzaga*, courts had uniformly found this provision to be

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204. Some broadly worded provisions, such as the requirement to administer Medicaid in "the best interests of recipients" had been found unenforceable prior to *Gonzaga* as "insufficiently specific to confer any particular right upon the plaintiffs." *Harris v. James*, 127 F.3d 993, 1010 (11th Cir. 1997) (rejecting private right of action to enforce 42 U.S.C. § 1396a(a)(19)). After *Gonzaga*, not only were such provisions found unenforceable, *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003), but also provisions which had been previously been held enforceable were no longer enforced.

205. *Westside Mothers v. Olszewski*, 454 F.3d 532, 539 (6th Cir. 2006) (citing 42 U.S.C. §1396(a)(8)); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006); *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004); *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *Pediatric Specialty Care v. Ark. Dept. of Human Services*, 293 F.3d 472 (8th Cir. 2002); *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002). The Tenth Circuit assumed without deciding that these provisions are enforceable. *Oklahoma Chapter of Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1212 (10th Cir. 2007); *Mandy R. ex. rel Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1143 (7th Cir. 2006). The Second Circuit upheld the enforceability of a provision regarding the entitlement of the "family" to services. *Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004).

206. *Westside Mothers v. Olszewski*, 454 F.3d at 536.

207. *Ball v. Rodgers*, 492 F.3d 1094, 1107-8 (9th Cir. 2007).

208. 42 U.S.C. § 1396a(a)(30)(A) requires that states:

provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the [state Medicaid] plan ... as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that

enforceable by beneficiaries, and some circuits had held that medical providers could enforce the statute as well.<sup>209</sup> Following *Gonzaga*, four circuits concluded that the equal access provision could no longer be enforced via § 1983.<sup>210</sup> For example, the Ninth Circuit quoted at length from both the *Gonzaga* majority opinion and Breyer's concurrence in reaching its conclusion that the "broad" language of the equal access provision does not "put a State on notice that Medicaid recipients or providers are able to compel state action under § 1983."<sup>211</sup>

The Eighth Circuit is the only court of appeals to reach the opposite conclusion regarding the enforceability of the equal access provision under § 1983. Yet, the Eighth Circuit stated that its conclusion was determined, at least in part, by the law of the case doctrine and the principle of *stare decisis*, since the issue had been addressed in that same case in an opinion filed just before *Gonzaga* was decided but issued days after.<sup>212</sup> Other decisions by the Eighth Circuit comported with the approach of sister circuits in denying the enforceability of claims under broadly worded provisions.

Indeed, in another Medicaid case involving a broadly worded

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payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]

209. See, e.g., *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000) (allowing enforcement by beneficiaries but not providers); *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842 (3d Cir. 1999); *Visiting Nurse Ass'n v. Bullen*, 93 F.3d 997 (1st Cir. 1996); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026 (7th Cir. 1996) (allowing enforcement by providers); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*; *Smith Indus. Med. Sys., Inc. v. Kernats*, 522 U.S. 1044 (1998) (allowing enforcement by providers); *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993) (allowing enforcement by beneficiaries and providers).

210. See *Okla. Chapter of Am. Acad. of Pediatrics*, 472 F.3d 1208 (10th Cir. 2007); *Mandy R. ex. rel Mr. & Mrs. R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *Sanchez ex. rel Hoebel v. Johnson*, 416 F.3d 1051 (9th Cir. 2005); *Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50 (1st Cir. 2004).

211. *Sanchez ex. rel Hoebel*, 416 F.3d at 1060. While the court did not cite any cases for this specific proposition, the court's focus on notice to the states is an expansion of the Supreme Court's holding in *Pennhurst* that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In a more recent formulation of this principle, the Supreme Court stated, "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304, 126 S. Ct. 2455, 2463 (2006).

212. *Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1014-16 (8th Cir. 2006) (holding *Gonzaga* was not an "intervening" decision justifying departure from circuit precedent, but also distinguishing *Gonzaga*), *cert. granted* and case dismissed as moot sub. nom. *Selig v. Pediatric Specialty Care, Inc.*, 127 S.Ct. 3000 (2007).

provision, the Eighth Circuit's analysis of *Gonzaga* fell in line with other court of appeals decisions. In *Lankford v. Sherman*,<sup>213</sup> the Eighth Circuit reviewed the enforceability under § 1983 of the Medicaid statute's requirement that states apply "reasonable standards. . . for determining eligibility for and the extent of medical assistance."<sup>214</sup> First, the court noted that the reasonable standards provision lacks "any reference to 'individuals.'"<sup>215</sup> Next, the court concluded: "As the statute sets forth only broad, general goals, which the states have broad discretion to implement, this court holds that plaintiffs do not have a private right of action to enforce Medicaid's reasonable-standards provision under section 1983."<sup>216</sup> Even though the reasonable standards provision was uniformly found to be enforceable under § 1983 prior to *Gonzaga*,<sup>217</sup> the Eighth Circuit's rejection of its enforceability post-*Gonzaga* comported with the analysis and result reached by the Ninth Circuit, the only other circuit to address the provision's enforceability in the aftermath of *Gonzaga*.<sup>218</sup> The Eighth Circuit decision evaluating the enforceability of the reasonable standards provision via § 1983 suggests that its opinion concerning equal access was an anomaly based upon the law of that case.<sup>219</sup>

The Eighth Circuit similarly rejected the enforceability of the time deadlines for disbursing child support funds to families pursuant to the child support provisions of the Social Security Act.<sup>220</sup> The applicable provision required the state to distribute child support funds to the "family," and the court held that this "reflects some congressional intent to benefit custodial parents."<sup>221</sup> Nevertheless, the plaintiffs sought to enforce strict compliance

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213. *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006).

214. 42 U.S.C.A. § 1396a(a)(17).

215. *Lankford*, 451 F.3d at 509.

216. *Id.*

217. See *Markva v. Haveman*, 168 F. Supp. 2d 695 (E.D. Mich. 2001), *aff'd*, 317 F.3d 547 (6th Cir. 2003); *Bryson v. Shumway*, 177 F. Supp. 2d 78 (D.N.H. 2001), *rev'd on other grounds*, 308 F.3d 79 (1st Cir. 2002); *Pretera Ctr. For Mental Health Servs., Inc. v. Lawton*, 111 F. Supp. 2d 768 (S.D. W. Va. 2000) (holding provision enforceable by beneficiaries but not providers); *William T. v. Taylor*, 465 F. Supp. 2d 1267 (N.D. Ga. 2000); *Smith v. Palmer*, 24 F. Supp. 2d 955 (N.D. Iowa 1998).

218. *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006). See also *Sanders v. Kan. Dep't of Social & Rehab. Servs.*, 317 F. Supp. 2d 1233 (D. Kan. 2004).

219. Yet, since the Eighth Circuit's holding regarding equal access remains binding precedent in the Eighth Circuit and in stark contrast with other circuits, this issue has been the subject of two petitions for certiorari before the Supreme Court. *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, (5th Cir. 2007), *cert. petition filed*, No. 07-1160 (Mar. 10, 2008); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), *vacated in part on other grounds sub nom.*, *Selig v. Pediatric Specialty Care, Inc.*, 127 S. Ct. 3000 (2007).

220. *Walters v. Weiss*, 392 F.3d 306 (8th Cir. 2004).

221. *Id.* at 313 (citing 42 U.S.C. § 657(a)).

with specific details in the lengthy statute, and the court found no “individual right to distribution in strict compliance with its terms.”<sup>222</sup>

While the Eighth Circuit quoted *Blessing* at length and cited *Gonzaga* only in reference to the district court’s opinion,<sup>223</sup> the Sixth Circuit relied heavily upon *Gonzaga* in reaching the same result regarding the child support enforcement provision.<sup>224</sup> The Sixth Circuit emphasized that *Gonzaga* “clarified” that a mere intent to benefit the plaintiff in the statute cannot be enforced under § 1983; rather, only specific rights conferred by the statute were enforceable.<sup>225</sup> The provision requiring the state to distribute funds within two days does not refer to individuals. The Sixth Circuit concluded that the law is phrased as “a clear instruction to the States, not a grant of rights to individuals.”<sup>226</sup> The Eleventh Circuit likewise held that the statutory provisions setting forth “the procedures by which states must distribute child support funds” had an aggregate or system-wide focus that did “not contain rights-creating language” as required by *Gonzaga*.<sup>227</sup>

Similarly, in the context of post-*Gonzaga* housing cases, the circuit courts have conducted an exacting review of the statutory language. In a case involving a claim for damages against a city under the Lead-Based Paint Poisoning Prevention Act (LBPPPA) and the US Housing Act, the Sixth Circuit stated:

[T]he *Gonzaga* decision has altered the landscape of § 1983 claims. The courts of this circuit have continued to apply the three-factor *Blessing* test, albeit acknowledging that *Gonzaga* clarified application of the first “benefit” factor and underscored that the central focus of this factor should be on whether the statutory provision contains “rights-creating” language critical to showing the requisite congressional intent to create new rights.<sup>228</sup>

The applicable LBPPPA provisions focused on the duties of the federal

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222. *Id.*

223. *Id.* at 310-11.

224. *Hughlett v. Romer-Sensky*, 497 F.3d 557 (6th Cir. 2006).

225. *Id.* at 562.

226. *Id.* at 564.

227. *Arrington v. Helms*, 438 F.3d 1336, 1346 (11th Cir. 2006). The Eleventh Circuit also held that the definitional provisions of the Adoption Assistance Act did not confer enforceable rights. 31 *Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), *cert. denied*, 540 U.S. 984 (2003). However, arguably this was not due to *Gonzaga*, since two district courts had reached the same conclusion prior to *Gonzaga*. *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 490 (D.N.J. 2000); *B.H. v. Johnson*, 715 F. Supp. 1387, 1401 (N.D. Ill. 1989).

228. *Johnson v. City of Detroit*, 446 F.3d 614, 621 (6th Cir. 2006).

government, *e.g.*, to establish procedures to eliminate the hazards of lead-based paint poisoning. The Sixth Circuit summarily rejected the conclusion of the Third Circuit in a 1997 case that LBPPPA was enforceable under § 1983, noting that the earlier decision did not contain the rigorous analysis required by *Gonzaga*.<sup>229</sup> Rejecting enforceability under § 1983, the Sixth Circuit held that LBPPPA “has an aggregate focus, it speaks in terms of institutional policy and procedure, and fails to confer the sort of individual entitlement that is enforceable under § 1983.”<sup>230</sup> The court also rejected enforcement of provisions of the US Housing Act that were worded in terms of “broad policy statements regarding the federal government’s goals.”<sup>231</sup>

The Ninth Circuit’s assessment of *Gonzaga* in the housing context has been comparable. In a case involving the Housing and Community Development Act, the Ninth Circuit stated: “to create enforceable rights the language of the statute must focus on individual entitlement to benefits rather than the aggregate or systemwide policies and practices of a regulated entity.”<sup>232</sup> The court carefully parsed the numerous statutory provisions at issue regarding housing relocation assistance, finding some enforceable but not others. The court upheld the enforceability of statutory language requiring the provision of “reasonable benefits to any person involuntarily and permanently displaced,” finding that this language “evinces a clear intent to create a federal right.”<sup>233</sup> Yet, the court held that other relevant provisions were not enforceable, because they were directed to government agencies and private developers and were “phrased in aggregate terms, without reference to individual displaced persons.”<sup>234</sup>

While declaring that after *Gonzaga*, the judicial determination that a provision is enforceable under § 1983 will be “a rarity,” the Fifth Circuit nevertheless upheld the enforceability of a provision of the US Housing Act similar to the one at issue in *Wright*.<sup>235</sup> Like *Wright*, the case involved the calculation of the amount of a family’s utility allowance by public housing authorities. In part, the court based its holding on *Gonzaga*’s explicit approval of the result in *Wright*. Still, the court maintained that its result

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229. *Id.* at 624 (citing *Davis v. Phila. Hous. Auth.*, 121 F.3d 92 (3d Cir. 1997)).

230. *Id.* at 624.

231. *Id.* at 626. Both the Sixth Circuit and the Fourth Circuit had found these provisions to be unenforceable even before *Gonzaga*. *Howard v. Pierce*, 738 F.2d 722, 727 n.9 (6th Cir. 1984); *Perry v. Hous. Auth. of Charleston*, 664 F.2d 1210, 1213 (4th Cir. 1981).

232. *Price v. City of Stockton*, 390 F.3d 1105, 1110 (9th Cir. 2004).

233. *Id.* at 1111, discussing 42 U.S.C. § 5304(k).

234. *Id.* at 1113, discussing 42 U.S.C. § 5304(d)(2)(A)(i) and (ii).

235. *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 360 (5th Cir. 2006), *cert denied*, 127 S. Ct. 136 (2006).

was consistent with *Gonzaga's* requirement that statutory language be phrased in terms of the person benefitted. The court noted that the applicable provision mandated a “monthly assistance payment for a family,” and the court highlighted the statutory use of the word “family” in finding the provision to be enforceable.<sup>236</sup>

Particularly in housing cases, advocates have argued that statutes are enforceable based on individually focused rights specified in implementing regulations. Prior to *Gonzaga*, there was a split among the circuits regarding whether a cause of action under § 1983 could be based on regulatory language.<sup>237</sup> In the aftermath of *Gonzaga*, circuit courts have uniformly held that a cause of action under § 1983 must be based on rights-creating language in the statute and cannot be founded solely on regulatory provisions. This result has followed from *Gonzaga's* exhortation to use implied private right of action cases as a guide.

Although *Gonzaga* did not address claims based solely on regulations, this issue was discussed in 2001, in the implied private right of action case, *Alexander v. Sandoval*. The five conservative Justices held in *Sandoval* that an implied private right of action could not be conferred by federal regulations that extended discrimination claims beyond the directive in the statute.<sup>238</sup> Rehnquist's majority opinion in *Gonzaga* cited *Alexander v. Sandoval* five times.<sup>239</sup>

Reading *Gonzaga* and *Sandoval* together, numerous courts of appeals have concluded that housing regulations cannot provide a foundation for a cause of action under § 1983. The Sixth Circuit has overruled its own pre-*Gonzaga* cases that permitted enforcement of regulations, concluding that it “is no longer viable” to bring a § 1983 claim based solely on federal regulations.<sup>240</sup> The Ninth Circuit stated two years after *Gonzaga* that it “is now well settled that regulations alone cannot create rights enforceable through either an implied right of action or § 1983.”<sup>241</sup> The Ninth Circuit

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236. *Id.* at 363 (quoting 42 U.S.C. § 1437f(o)(2)).

237. The Sixth and DC circuits had held prior to *Gonzaga* that federal regulations could create enforceable rights under § 1983. *Levin v. Childers*, 101 F.3d 44, 47 (6th Cir. 1996); *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994); *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985). Three other circuits had held that regulations alone could not be enforced via § 1983 prior to *Gonzaga*. *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 274 F.3d 771, 784, (3d Cir. 2001); *Harris v. James*, 127 F.3d 993, 1008 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987).

238. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

239. *Gonzaga*, 536 U.S. at 284, 286, 287.

240. *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006).

241. *Price v. City of Stockton*, 390 F.3d 1105, 1112 n.6 (9th Cir. 2003). *See also* *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003).

noted that if a right is conferred through the statute, then the regulations are relevant to the scope of the right conferred by Congress.<sup>242</sup> While some court of appeals judges have argued in dissent that the rejection of a § 1983 cause of action based on regulations is unwarranted,<sup>243</sup> that view has not garnered a majority of any post-*Gonzaga* court of appeals decision.

One additional issue not yet definitively resolved is whether *Gonzaga*'s stringent requirements for rights-creating statutory language apply to statutes that are not enacted under the Spending Clause of the Constitution. Both the Ninth and the Tenth Circuit have assumed that *Gonzaga* applies beyond the confines of Spending Clause statutes without ruling directly on the issue,<sup>244</sup> but one Ninth Circuit judge has argued to the contrary.<sup>245</sup>

#### B. BROAD SAFETY NET STATUTES AND REGULATIONS ENFORCEABLE IN POST-VERIZON PREEMPTION CASES

While there have been far fewer federal court of appeals cases involving safety net statutes based on preemption under the Supremacy Clause, there has been complete agreement that this is a viable avenue for enforcing safety net statutes against states. The courts of appeals have uniformly held that when proceeding under the Supremacy Clause to enforce a safety net statute, plaintiffs need not meet the requirements for a cause of action set forth in *Gonzaga*. These court of appeals decisions rely primarily upon *Verizon, Walsh, Golden State, and Shaw*. Further support may be found in the dissenting opinions of then-Associate Justice Rehnquist in *Hagans* and Justice Kennedy in *Golden State*, both of which suggest that preemption claims under federal question jurisdiction are a viable alternative to § 1983.<sup>246</sup>

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242. *Id.*

243. *Johnson*, 446 F.3d at 630 (Boyce, J., dissenting); *Save Our Valley*, 335 F.3d at 952 (Berzon, J., dissenting). See also William A. Liess, *A Call for Doctrinal Consistency in the Adjudication of § 1983 Claims Based on Violations of Federal Regulations*, 38 RUTGERS L.J. 947, 975 (2007) ("It is difficult to comprehend how a regulation could have the full force and effect of law as though written in a statute, yet that law is somehow insufficient to establish a right under § 1983.").

244. *Day v. Apoliona*, 496 F.3d 1027, 1037 n.12 (9th Cir. 2007); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1265 n.2 (10th Cir. 2004). See also *Paralyzed Veterans of Am. v. McPherson*, 2006 WL 3462780 at \*7 (N.D. Cal. 2006) (holding that *Gonzaga* applies to statute that is not a Spending Clause statute).

245. *Save Our Valley*, 335 F.3d at 961 n.13 (Berzon, J., dissenting) (suggesting that *Gonzaga* "seems to be confined to Spending Clause statutes").

246. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting); *Hagans v. Lavine*, 415 U.S. 528, 553 (1974) (Rehnquist, J., dissenting). See the discussion of these opinions, *supra* at 25.

As noted *supra*, the Eighth Circuit held post-*Gonzaga* in *Lankford v. Sherman* that the Medicaid reasonable standards requirement did not provide a cause of action under § 1983.<sup>247</sup> In the same case, the court of appeals held that this provision could be enforced under the Supremacy Clause with a preemption claim. The Eighth Circuit explained: “Preemption claims are analyzed under a different test than § 1983 claims, affording plaintiffs an alternative theory for relief when a state law conflicts with a federal statute or regulation.”<sup>248</sup> The court, quoting at length from *Golden State*, contrasted § 1983, which provides a cause of action to address a deprivation of rights, privileges and immunities, with preemption, which “concerns the federal structure of the nation rather than the securing of rights, privileges and immunities to individuals.”<sup>249</sup> The court noted that Congress had not entirely preempted state regulation in the field of Medicaid, but only to the extent that state regulation conflicted with the Medicaid law, including its purposes and objectives.<sup>250</sup> The court observed: “While Medicaid is a system of cooperative federalism, the same analysis applies; once the state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements.”<sup>251</sup> Then the court proceeded to the merits, not only analyzing the federal statute but also considering the preemptive effect of federal regulations and the goals of the Medicaid program.<sup>252</sup> The court concluded that state law was preempted by the Medicaid statute’s reasonable standards provision as well as by the implementing federal regulations and the statutory purpose, so that the plaintiffs had a high likelihood of success on the merits of their motion for a preliminary injunction.<sup>253</sup>

Thus, by proceeding under the Supremacy Clause despite suffering defeat under § 1983, plaintiffs were able to enforce a broadly worded provision of the Medicaid statute, the federal regulations and the overarching goals of the Medicaid program. Even though the Eighth Circuit carefully reviewed the requirements for a cause of action under § 1983, the court did not address the existence of a cause of action to determine whether state law was preempted by federal law. The court did not cite *Verizon*, but nevertheless followed the paradigm of *Verizon* by reaching the merits of a preemption challenge without addressing the

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247. See *supra* at part III:A.

248. *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006).

249. *Id.*

250. *Id.* at 510.

251. *Id.*

252. *Id.* at 510-11.

253. *Id.* at 513.

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**Section 1983 and Preemption**

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validity of the cause of action.

Health care providers have been denied court access for numerous claims under § 1983 after *Gonzaga* tightened the focus on Congressional intent to benefit the plaintiff. Most federal legislation is designed to benefit recipients, conferring only an incidental benefit on the providers who serve them. Yet in *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, family planning clinics successfully surmounted this procedural hurdle by bringing a claim under the Supremacy Clause rather than under § 1983.<sup>254</sup> The clinics alleged that a state law imposing additional eligibility requirements for federal funds on abortion providers was preempted by Title X of the Social Security Act.<sup>255</sup>

The Fifth Circuit held that for a preemption claim, providers did not need to “meet the requirements for an action under § 1983, as recently enunciated in *Gonzaga*.”<sup>256</sup> The defendant argued that for a claim proceeding under federal question jurisdiction, plaintiffs should have to establish a right or duty owed to them. Rejecting that argument, the Fifth Circuit quoted *Verizon* and then relied on *PhRMA v. Walsh*<sup>257</sup> for the proposition that *Verizon* was applicable in the context of Spending Clause statutes. The court stated that *PhRMA v. Walsh* “implicitly rejected the contention that asserting the preemptive force of federal Spending Clause legislation is itself no claim,” because seven Justices rejected the two concurring Justices’ suggestion that “no claim was stated.”<sup>258</sup>

The Fifth Circuit explained that *Verizon* “explicitly held that there was jurisdiction to entertain the preemption claim, and implicitly accepted that the plaintiffs had a right of action to bring such a claim.”<sup>259</sup> Noting that in its previous precedent, the Fifth Circuit had not resolved whether there was a cause of action in the Supremacy Clause, the court held that there was an implied cause of action under the Supremacy Clause to bring a preemption action.<sup>260</sup> In a footnote, the court suggested as an alternative theory that the Declaratory Judgment Act was “[a]nother possible source” of a cause of action for a preemption claim.<sup>261</sup>

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254. *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005).

255. *Id.* at 328.

256. *Id.* at 335.

257. *Pharm. Research & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644 (2003).

258. *Planned Parenthood of Houston*, 403 F.3d at 331-32.

259. *Id.* at 333.

260. *Id.* In *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 75 n.8 (1st Cir. 2004), the First Circuit, holding that plaintiffs may invoke federal question jurisdiction by asserting a claim of preemption even absent an explicit statutory cause of action, cited a treatise suggesting there is an implied right of action in the Supremacy Clause.

261. *Planned Parenthood of Houston*, 403 F.3d at 334 n.47. One scholar has observed that

Providers were similarly victorious in reaching the merits of their preemption claim in a post-*Verizon* Medicaid case before the D.C. Circuit. In a footnote, the court summarily rejected the state's argument that there was no private right of action to reach the preemption claim that state law conflicted with the federal Medicaid statute. The DC Circuit, like the Fifth Circuit, viewed the Supreme Court's decision in *PhRMA v. Walsh* as *sub silentio* permitting suits to determine the preemptive effect of federal Spending Clause statutes.<sup>262</sup>

Just recently, a panel of the Ninth Circuit provided the most thorough discussion to date of the availability of the Supremacy Clause in the context of Medicaid claims.<sup>263</sup> Plaintiffs alleged that the slashing of reimbursement rates for pharmacies, hospitals and other medical providers violated the equal access provision,<sup>264</sup> which the Ninth Circuit had previously held is not enforceable under § 1983.<sup>265</sup> In its recent decision, the Ninth Circuit held that the equal access provision could be enforced through a Supremacy Clause claim. The court stated, "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met. . ."<sup>266</sup> The court explained that under Ninth Circuit precedent, as well as case law from other circuits, no explicit statutory cause of action is needed to bring a preemption claim for declaratory and injunctive relief against a state.<sup>267</sup> Then the court explicitly rejected the argument that claims under Spending Clause statutes should be treated differently than other preemption claims, characterizing the state's position as advocating "a fundamental change in Supremacy Clause jurisprudence."<sup>268</sup> The Ninth Circuit agreed with the Fifth and DC Circuits' view that in *PhRMA v. Walsh*, seven Justices *sub silentio* held that "a private party seeking to enjoin implementation of a state law allegedly preempted by the federal Medicaid Act may bring suit for injunctive relief directly under the Supremacy Clause."<sup>269</sup> The court concluded that its holding was simply a reaffirmation of "over a century's

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were the Supreme Court to hold that the DJA creates a private cause of action for preemption claims, the practical result would be the same as an explicit holding that the Supremacy Clause creates an implied right of action for preemption claims. In either case, plaintiffs would not need "to establish a private right of action under the preemptive federal statute or under § 1983." Sloss, *supra* note 193, at 418.

262. *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004).

263. *Indep. Living Ctr. of S. Cal. Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008).

264. 42 U.S.C. § 1396a(a)(30)(A) (2008).

265. *Sanchez ex rel. Hoebel v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005).

266. *Shewry*, 543 F.3d at 1055.

267. *Id.* at 1057-59.

268. *Id.* at 1058.

269. *Id.* at 1061.

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worth of precedent.”<sup>270</sup>

In these Spending Clause cases, as well as numerous cases from other contexts, the courts of appeals have been unanimous in accepting that the *Gonzaga* requirements for a cause of action are inapplicable to a preemption claim.<sup>271</sup> Indeed, a panel of the Tenth Circuit recently retracted an apparent suggestion to the contrary. In a suit seeking to enjoin in-state tuition for undocumented immigrant students at state schools, the court noted that the distinction between enforcing substantive rights in a statute and obtaining injunctive relief based on the preemptive effect of federal law “might well dissolve upon close inspection.”<sup>272</sup> In subsequently denying rehearing, however, the panel wrote an additional opinion to emphasize that “a federal law need not include a private right of action in order to support *federal question jurisdiction* when a party pursues a preemption claim arising under the Supremacy Clause.”<sup>273</sup> While one district court opinion in a Medicaid case reached a contrary result, holding that the *Gonzaga* requirements applied to a preemption claim, that opinion was reversed, albeit on other grounds.<sup>274</sup>

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270. *Id.* at 1066.

271. *See* Ill. Ass’n of Mortgage Brokers v. Office of Banks & Real Estate, 308 F.3d 762, 765 (7th Cir. 2002) (holding that whether the Home Ownership and Equity Protection Act created enforceable rights under *Gonzaga* was irrelevant because there was federal question jurisdiction to address whether the federal law preempted state regulations); St. Thomas–St. James Hotel & Tourism Ass’n Inc. v. Gov’t of U.S. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000) (holding that federal question jurisdiction to address preemption is valid “even when the federal law secures no individual substantive rights for the party arguing preemption.”). *See also* Air Transport Ass’n of Am., Inc. v. Cuomo, 520 F.3d 218, 221 (2d Cir. 2008) (“[t]he distinction between a statutory claim and a Supremacy Clause claim... is important and is not a trifling formalism”); Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005) (treating § 1983 and preemption claims separately).

272. *Day v. Bond*, 500 F.3d 1127, 1136 n.6 (10th Cir. 2007). Another confusing, though not inaccurate, presentation of the issue was set forth in *New West v. City of Joliet*, 491 F.3d 717 (7th Cir. 2007). Therein the Seventh Circuit stated that preemption claims could be affirmatively litigated under § 1983, which is accurate. Yet, in support the court cited *Verizon*, in which a preemption claim was litigated under federal question jurisdiction without any claim under § 1983. *Id.* at 719. The court’s citation simply fails to acknowledge that the *Verizon* decision proceeded to the merits of the preemption question utilizing federal question jurisdiction, without requiring a cause of action under § 1983.

273. *Day v. Bond*, 511 F.3d 1030, 1034 (10th Cir. 2007). The court explained that the confusion had arisen from its analysis of standing. Since the plaintiffs did not allege any injury other than the denial of their statutory rights, the court had analyzed whether the plaintiffs had a private right under the applicable statute. The court concluded that under the *Gonzaga* standard, the plaintiffs did not have a private right of action and therefore did not have standing. Yet, in its denial of rehearing, the panel clarified that the *Gonzaga* test was inapplicable to a determination of federal question jurisdiction. *Id.*

274. *Equal Access for El Paso, Inc. v. Hawkins*, 428 F.Supp.2d 585 (W.D. Tex. 2006), *reversed*, 509 F.3d 697 (5th Cir. 2007), *cert. denied* 129 S. Ct. 34 (2008), *on remand*, No. 08-50144, 2009 WL 638521, at \*5 (5th Cir. Mar. 13, 2009) (no Supremacy Clause violation). One

Although these victories under the Supremacy Clause mitigate the effects of *Gonzaga*, it is important to bear in mind that the § 1983 remedy conferred more extensive relief than preemption.<sup>275</sup> For instance, in a post-*Verizon* telecommunications case, the Tenth Circuit held that the telecommunications service provider did not have a cause of action under § 1983 but could enforce the telecommunications law against a New Mexico city via a preemption claim. Without the § 1983 claim, the provider's claims for attorneys fees under 42 U.S.C. § 1988 were summarily dismissed.<sup>276</sup>

Also, it remains an open question whether the scope of coverage under preemption will be as broad as under § 1983, particularly with regard to unwritten policies and practices not sanctioned by state laws, such as delays in compliance with federal timeframes. Professor Sloss notes that if only legislative enactments can be preempted (as distinguished from unwritten policies), this “creates perverse incentives for states to de-codify laws.”<sup>277</sup>

Indeed, this is what happened in the district court case of *James v. Richman*.<sup>278</sup> The state initially indicated that the plaintiff was denied Medicaid benefits under the express provision of a state statute. When the plaintiff challenged the state law as preempted by federal Medicaid law, then the state agency “expressly disavowed any reliance” on the state law in continuing to deny benefits.<sup>279</sup> The district court nevertheless held that the agency's interpretation of federal Medicaid law in denying benefits “presents a federal question” for which the court had federal question

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commentator was thoroughly discouraged by the Texas district court decision in *El Paso* and the lack of a final decision in the Eighth Circuit's remand in *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006), fearing that Supremacy Clause claims might not succeed for enforcing the Medicaid statute. Julia Gilmore Gaughan, *Institutionalization as Discrimination: How Medicaid Waivers, the ADA, and § 1983 Fail*, 56 U. KAN. L. REV. 405, 431-32 (2008). Gaughan fails to recognize that on remand, the district court in *Lankford* awarded actual relief to the plaintiffs under the Medicaid statute. *Lankford v. Sherman*, 2007 WL 689749 (W.D. Mo. Mar. 2, 2007). Moreover, by looking at Spending Clause statutes as a whole, not merely focusing on Medicaid, the viability of Supremacy Clause claims becomes clear.

275. In *Golden State Transit Corp.*, 493 U.S. 103, a suit against a municipality, the plaintiffs obtained damages by proceeding under § 1983, while such damages could not have been obtained under a preemption claim. See *supra* text accompanying note 107.

276. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1275 (10th Cir. 2004). In *Qwest*, the court rejected defendants' argument that *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), discussed *supra* text accompanying note 101, applied only when there is complete field preemption of any state regulation. *Id.* at 1264.

277. Sloss, *supra* note 193 at 360.

278. *James ex rel. James v. Richman*, 465 F.Supp.2d 395 (M.D. Pa. 2006), *aff'd*, 547 F.3d 214 (3d Cir. 2008).

279. *Id.* at 401.

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jurisdiction.<sup>280</sup> The district court concluded that the state's denial of Medicaid conflicted with federal law.<sup>281</sup> The Third Circuit affirmed on the merits, treating the case as one arising under § 1983.<sup>282</sup> The court did not address whether the case could have proceeded solely as a preemption claim, saying simply that the Supremacy Clause claim had not been raised on appeal.<sup>283</sup>

In *Verizon* as well as other Supreme Court cases, the Court has permitted a challenge to state agency orders, similar to the review of the denial of Medicaid benefits in *James*.<sup>284</sup> Following *Verizon*, courts of appeals have interpreted the scope of preemption broadly in the context of telecommunications law. The Eighth Circuit permitted a preemption challenge to a state agency's "directive short of an order," in a case in which the federal question focused on the interpretation of a federal agency ruling by the state agency.<sup>285</sup> Similarly, the Tenth Circuit held that federal question jurisdiction is proper whenever a state commission makes a "determination" under the federal telecommunications statute.<sup>286</sup> Logically, the same results should apply to cases involving Spending Clause statutes.

#### **IV. THE SCALIA/THOMAS *PHRMA V. WALSH* CONCURRENCES DEFY LOGIC, PRECEDENT, AND JUSTICE IN ADVOCATING THE DENIAL OF COURT ACCESS**

While the courts of appeals have uniformly applied *Verizon* in Spending Clause cases, circuit court judges have noted that Justices Scalia and Thomas advocated dismissal of preemption claims brought under Spending Clause statutes in the Medicaid case *PhRMA v. Walsh*.<sup>287</sup> For instance, Judge Higginbotham of the Fifth Circuit stated that the Scalia/Thomas "arguments have great purchase, . . . however, their persuasive force is wasted on the inferior courts. Rather, they must persuade at least three other Justices."<sup>288</sup>

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280. *Id.*

281. *Id.* at 406-7.

282. *James v. Richman*, 547 F.3d 214, 218 (3d Cir. 2008).

283. *Id.* at 217 n.1.

284. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 648 (2002), *reversing in part sub nom. Verizon Md., Inc. v. Global Naps*, 377 F.3d 355 (4th Cir. 2004); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 51 (2003); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238-39 (1967). *See also* *Saunders*, *supra* note 14, at 710-11.

285. *Rural Iowa Indep. Tel. Ass'n v. Iowa Utils. Bd.*, 362 F.3d 1027, 1029 (8th Cir. 2004).

286. *Qwest Corp. v. Pub. Util. Comm'n of Colo.*, 479 F.3d 1184, 1191 (10th Cir. 2007) (citing *Sw. Bell Tel. Co. v. Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000)).

287. *Pharm. Research & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644, 674-683 (2003).

288. *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 332 n.34 (5th Cir. 2005). *See also* *PhRMA v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004).

In *PhRMA*, Justices Scalia and Thomas promoted the approach espoused in conservative legal scholarship that Spending Clause statutes are to be treated differently from other laws.<sup>289</sup> This argument is based on the contract analogy introduced in *Pennhurst* suggesting that Spending Clause statutes function in a manner similar to contracts between the federal and state governments in that federal funds are conditioned on compliance with federal mandates.<sup>290</sup>

Justice Thomas characterized Spending Clause laws as creating contracts between the state and federal governments, citing the contract analogy from *Pennhurst* and Scalia's concurrence in *Blessing*.<sup>291</sup> Thomas relegated the medical providers to the role of third-party beneficiaries of the federal/state contract. Just as Scalia had questioned in *Blessing* whether the third-party beneficiary analogy might defeat a cause of action under § 1983,<sup>292</sup> Thomas questioned in *Walsh* whether preemption claims were valid to enforce Spending Clause statutes under this analysis. Thomas suggested, although he did not explicitly conclude, that plaintiffs might have to meet the *Gonzaga* requirements for a cause of action in order to bring a claim under the Supremacy Clause for Spending Clause statutes. He stated:

Under this Court's precedents, private parties may employ 42 U.S.C. § 1983 or an implied private right of action only if they demonstrate an "unambiguously conferred right." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Petitioner quite obviously cannot satisfy this requirement and therefore arguably is not entitled to bring a preemption lawsuit as a third-party beneficiary to the Medicaid contract. Respondents have not advanced this argument in this case. However,

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289. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 69-72 (1994) (suggesting that Spending Clause obligations come from contracts and are "no more attributable to any 'legislative,' 'regulatory,' or 'governing' power than are the obligations between private persons arising from agreements between them."). See also Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POL'Y 895, 915-16 (2002); William H. Pryor Jr., *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361, 372 (2001-2002). One district court adhered to the view that Spending Clause statutes are contractual in nature, resulting in dismissal of Medicaid claims under § 1983, *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 557 (E.D. Mich. 2001) *rev'd*, 289 F.3d 852 (6th Cir. 2002), but the Sixth Circuit completely rejected this aspect of the decision and emphasized that the Medicaid statute had the full force and effect of federal law, *Westside Mothers v. Haveman*, 289 F.3d 852, 858-59 (6th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002).

289. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

290. *Id.*

291. *PhRMA v. Walsh*, 538 U.S. at 682-83 (Thomas, J., concurring) (citing *Pennhurst*, 451 U.S. at 17); *Blessing v. Freestone*, 520 U.S. 329, 349-50 (1997) (Scalia, J., concurring). See *supra* text accompanying note 172 (discussing Scalia's concurrence in *Blessing*).

292. *Blessing*, 520 U.S. at 349-50.

were the issue to be raised, I would give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action.<sup>293</sup>

Thomas's argument has no basis in the text of the Constitution.<sup>294</sup> The Supremacy Clause applies to all federal statutes; nothing in the text of the Constitution limits the scope of the Supremacy Clause for statutes enacted under the Spending Clause. Like all other statutes, laws enacted pursuant to Congress's power under the Spending Clause are "supreme federal law" that trump state and local laws.<sup>295</sup> Justice Scalia's historical assertions about nineteenth century contract law are not only questionable, but also they are irrelevant to preemption claims. Preemption is not based on assent to contract terms but rather on the states' affirmation of a Constitution making federal law supreme.<sup>296</sup>

Numerous scholars, as well as Appellate Courts, have pointed out that the applicable cause of action to bring preemption claims is implied in the Supremacy Clause, just as causes of action are implied to enforce other constitutional provisions.<sup>297</sup> As a result, no additional cause of action is needed in any statute, no matter whether its source of congressional authority is the Spending Clause, the Commerce Clause, or any other Clause.

*Pennhurst* used the contract analogy in concluding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."<sup>298</sup> This principle has been extended to apply to questions of statutory interpretation that affect the amount of the state's financial responsibilities, so that a State must have "clear notice regarding the

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293. *PhRMA v. Walsh*, 538 U.S. at 683 (Thomas, J., concurring).

294. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L. J. 345, 392-93 (2008).

295. Sloss, *supra* note 193, at 426.

296. *Id.* (In response to Scalia's concurrence, and the subsequent district court opinion in *Westside Mothers v. Haveman*, the parties in *Gonzaga* sharply contested the historical accuracy of Scalia's arguments. Compare Brief for Petitioners at 40, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679) (supporting Scalia's view), and Reply Brief for Petitioners at 16-18, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679). (same), with Brief for United States as Amicus Curiae in Support of Petitioners at 20-23, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679). (contesting Scalia's view), and Brief for Respondents at 48, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679) (same). The historical question may be impossible to answer definitively. Samberg-Champio, *supra* note 3, at 1852 n.87.)

297. Sloss, *supra* note 193, at 363 n.36; Collins, *supra* note 11, at 1510; *Planned Parenthood of Houston & Southeast Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005); *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004).

298. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

liability” imposed by the statute.<sup>299</sup> However, as Scalia has written, “[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available.”<sup>300</sup> The judicial declaration that a violation of federal law is preempted and an injunction against such a violation is a traditional remedy, and notice of this remedy was provided when states ratified the Constitution.

The analogy of Spending Clause statutes to contract law is simply a “metaphor.”<sup>301</sup> As Scalia has stated: “We do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.”<sup>302</sup> Whether or not suits under Spending Clause statutes are properly analogized to the common law of contracts for one purpose or another, the applicability and enforcement of the Supremacy Clause as a specific mandate of the Constitution when federal and state law come into conflict should prevail.

The extension of the contract metaphor to defeat preemption claims under Spending Clause statutes is more of a political than a constitutional doctrine, having the effect of barring court access for low-income and disadvantaged individuals. To permit businesses, but not disadvantaged individuals, to enforce federal law is fundamentally unjust and inequitable and wholly unmoored from any legal principle.

Justice Scalia did not join Justice Thomas’s *Walsh* concurrence, but rather wrote separately. Scalia argued that the remedy for a violation of the Medicaid Act is the termination of federal funds by the federal government.<sup>303</sup> His discussion is brief and does not draw out the implications of his assertions. He cites his *Blessing* concurrence which questioned whether § 1983 claims are barred, based on a third-party

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299. *Arlington Cent. Sch. Dist. Bd of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 2459 (2006). One scholar argues that *Arlington* was a vast expansion of the contract analogy, reversing precedent that had relied upon the vote of Justice O’Connor and utilizing the approach of Kennedy’s dissent in *Davis v. Monroe Board of Educ.*, 526 U.S. 629 (1999). Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 470 (2008).

300. *Barnes v. Gorman*, 536 U.S. 161, 187 (2002).

301. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007); Jonathan Lave, Maggie Sklar & Avra van der Zee, *Decisions by the District Court and Eleventh Circuit in Sheely v. MRI Radiology Network, P.A., and the Implication for Disabled Americans’ Ability to Receive Emotional Damages Under the Rehabilitation Act and the Americans with Disabilities Act*, 4 SETON HALL CIRCUIT REV. 1, 19 (2007).

302. *Barnes*, 536 U.S. at 188 n.2.

303. *Pharm. Research & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644, 675 (2003) (Scalia, J., concurring).

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beneficiary analogy.<sup>304</sup> His *Walsh* concurrence suggests that in his view, neither the § 1983 remedy nor the Supremacy Clause may be invoked to challenge alleged state violations of federal law in Spending Clause cases.

In his *Blessing* concurrence, Justice Scalia acknowledged that his approach would require overruling *Wright* and *Wilder*.<sup>305</sup> In *Walsh*, Justice Scalia completely ignored the considerable precedent that has rejected his approach in § 1983 cases. Justice O'Connor's majority opinion in *Blessing* noted that because beneficiaries do not have standing to compel the federal government to take action against the state, the powers of the federal government to take administration action against the state do not preclude other federal remedies.<sup>306</sup> Scalia's *Walsh* approach would even require overruling *Gonzaga*, which permitted the § 1983 remedy if the specific statutory provision contains rights-creating language. *Wright*, *Wilder*, and *Rosado* also specifically considered and rejected his reasoning.<sup>307</sup> Scalia's approach would further contradict his own prior rulings limiting the application of the Court's contract analogy for Spending Clause cases.<sup>308</sup>

Justice Scalia asserted that beneficiaries and providers could "obtain relief" by petitioning the federal government for the complete termination of Medicaid funds and seeking judicial relief if the federal government's decision was arbitrary and capricious in violation of the APA.<sup>309</sup> No beneficiary or provider would benefit from the total termination of federal funds to the state. The practical effect of Scalia's approach is to close the courthouse door in the face of low-income and disadvantaged individuals

Like Justice Thomas, Justice Scalia's suggestion of denying review of state violations of Spending Clause statutes has no basis in the Constitution. Scalia's approach of denying court access to enforce safety net statutes is, like Justice Thomas's, fundamentally unjust and inequitable. While these Justices dress their arguments in abstract legal terminology and do not acknowledge their policy goal of denying court access, their approach flies in the face of precedent for the apparent political objective of denying court access to low-income and disadvantaged individuals.

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304. *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring).

305. *Id.* at 350.

306. *Id.* at 348.

307. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 522 (1990); *Wright v. City of Roanoke Redev. & Hous.*, 479 U.S. 418, 427-8 (1987); *Rosado v. Wyman*, 397 U.S. 397, 406 (1970). *See supra* section II (discussing the above cases).

308. *Barnes*, 536 U.S. at 187-88.

309. *Pharm. Research & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644, 675 (2003).

## V. SUPREME COURT THREAT AND HOPE

There is no doubt that the Supreme Court has become considerably more conservative with the appointment of Chief Justice Roberts and Justice Alito.<sup>310</sup> It is unlikely that the Roberts Court will reverse the procedural roadblocks to § 1983 established in *Gonzaga*, given that John Roberts was the attorney representing Gonzaga University and arguing for the result adopted by the Court.<sup>311</sup> Indeed, some advocates have expressed concern that the Roberts Court might overrule *Thiboutot*.<sup>312</sup> This is a serious threat to court access to enforce numerous safety net provisions. An overturning of *Thiboutot* would mark a dramatic curtailment of rights.

Nevertheless, it is realistic to hope that even the conservative Roberts Court will uphold the validity of preemption claims to enforce safety net statutes. While the *PhARMA v. Walsh* concurrences of Justices Scalia and Thomas are ominous, there are grounds for believing that these Justices will remain a minority of two on this issue. Based on the votes in *PhARMA*, it is uncontroversial to count on the votes of Justices Stevens, Souter, Ginsberg, and Breyer. Thus, the likely outcome lies with Chief Justice Roberts and Justices Kennedy and Alito.<sup>313</sup>

Justice Kennedy stated in his dissent in *Golden State* that a preemption action would provide a viable alternative means for court access, when the criteria for a cause of action under § 1983 are not met.<sup>314</sup> In that opinion, he concluded that the § 1983 prerequisites do not apply to a case invoking federal question jurisdiction to address a preemption issue.

Although Justice Kennedy joined Justice Scalia's concurrence in *Blessing*, questioning whether § 1983 ever authorizes suits under Spending Clause statutes,<sup>315</sup> this concurrence did not address preemption claims at all. It is of potentially greater significance that Kennedy did *not* join either

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310. Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1 (2006); Rochelle Bobroff, *The Early Roberts Court Attacks Congress's Power to Protect Civil Rights*, 30 N.C. CENT. L.J. 231 (2008).

311. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 275 (2002). See also Lazarus, *supra* note 310, at 13 n.45.

312. See, Lauren Saunders, *Are There Five Votes to Overrule Thiboutot?*, 40 CLEARINGHOUSE REV. 5-6 (Sept-Oct 2006). See also Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 452 (Dec. 2008) (*Wilder* "risks being overturned by a Court that is interested in limiting section 1983 causes of action and in limiting the scope of conditions on Spending Clause legislation.").

313. Of course, any of the present Justices could leave the Court and be replaced by a future appointment.

314. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting).

315. *Blessing v. Freestone*, 520 U.S. 329, 349-50 (1997) (Scalia, J., concurring).

Justice Scalia or Justice Thomas's concurrences in *PhARMA v. Walsh*. By joining Justice O'Connor's *Walsh* dissent, which addressed the merits of the claim, Kennedy indicated his agreement that preemption claims present an appropriate means of enforcing federal safety net statutes — such as Medicaid — against inconsistent state laws.

In two cases arising in other contexts, Kennedy wrote separately from his conservative colleagues to set forth his view of the balance of power between the state and federal branches of government. In *U.S. v. Lopez*,<sup>316</sup> a case invalidating the Guns-Free School Zones Act as exceeding congressional power under the Commerce Clause, Kennedy joined the majority opinion by Rehnquist, which held that the possession of a gun in a school zone did not “substantially affect any sort of interstate commerce.”<sup>317</sup> Kennedy authored a concurrence, joined by O'Connor,<sup>318</sup> highlighting the constitutional role of both Congress and the federal judiciary in acting as a check on the power of state government. He noted that “it is axiomatic that Congress does have substantial discretion and control over” the balance between national and state power.<sup>319</sup> Then turning to the role of the judiciary, he explained that “this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as . . . the whole jurisprudence of preemption.”<sup>320</sup> This reveals Kennedy's receptivity to utilizing preemption to uphold federal laws that constrict the power of states. In addition, Kennedy cautioned that the “inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”<sup>321</sup> Possibly, Kennedy might be sympathetic to well-stated arguments that in the absence of preemption as a means of enforcing safety net statutes, neither the state nor the federal branch of government would be answerable to citizens for violations of federal law.<sup>322</sup>

Kennedy further expressed his individual views about the importance of the supremacy of federal power in his concurrence in *U.S. Term Limits*,

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316. *U.S. v. Lopez*, 514 U.S. 549 (1995).

317. *Id.* at 567. See Charles Fried, *Forward: Revolutions*, 109 Harv. L. Rev. 13, 41 (1995).

318. See Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 791-2 (1996) (influence of O'Connor on the concurrence, specifically the discussion of the “liberty-enhancing nature of federalism”).

319. *Id.* at 577 (Kennedy, J., concurring).

320. *Id.* at 578.

321. *Id.* at 577.

322. The argument would be, as stated by the *Wright* opinion written by O'Connor, that “no private actor would have standing to force the Secretary to bring suit for specific performance,” *Blessing*, 520 U.S. at 348, and no beneficiary would benefit from total termination of federal funding.

*Inc. v. Thornton*,<sup>323</sup> a case concerning state-imposed term limits on federal congressional offices. Kennedy was the swing vote, joining the opinion written by Stevens for the liberal bloc, instead of the opinion written by Justice Thomas on behalf of the conservative bloc. In his individual concurrence, Kennedy stated:

The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States. . . . That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.<sup>324</sup>

In *Term Limits*, Kennedy demonstrated his willingness to part company with his conservative colleagues to stop states from interfering with federal power.<sup>325</sup> His concurrences in *Term Limits* and *Lopez* as well as his *Golden State* dissent could be important precedent in a future case concerning preemption for a safety net statute.

Justice Alito has not yet voted in any case, during his brief Supreme Court tenure to date, involving preemption by Spending Clause statutes. However, he did do so in a decision during his tenure on the Third Circuit, and here the signs are distinctly encouraging. In *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, then-Judge Alito authored an opinion for the court of appeals holding that state law mandating confidentiality was preempted by a federal Spending Clause statute regarding disclosure of records to a public interest advocacy organization.<sup>326</sup> The case concerned a suit by an advocacy organization to obtain a peer-review report as authorized by the Protection and Advocacy for Mentally Ill Individuals Act (PAMII).<sup>327</sup> PAMII provides federal funding to states to pay for independent organizations that monitor and protect the rights of mentally ill individuals. Pennsylvania Protection and Advocacy Inc. (PPAI) is an organization established under this federal Spending Clause statute.

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323. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

324. *Id.* at 841.

325. See Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 103 (1995) (“To the [liberal] majority, judicial intervention is needed to protect the federal government from the states; to the [conservative] dissent, it is needed to protect the states from the federal government. Justice Kennedy alone would intervene to protect each side from encroachment by the other.”).

326. *Pa. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000).

327. Pub.L. No. 99-319, 100 Stat. 478 (codified at 42 U.S.C. §§ 10801-10905).

In *Houstoun*, the state denied PPAI's request for a peer-review report relating to the death of a mental patient in the state's care. The district court noted that there was federal question jurisdiction over the matter.<sup>328</sup> The Third Circuit did not address either jurisdiction or the applicable cause of action.

The state relied upon a federal regulation providing that state laws requiring confidential treatment for records produced by peer review committees were not preempted. Judge Alito wrote that the federal regulation "does not represent a reasonable interpretation of the statute, and we must therefore reject it."<sup>329</sup> Requiring the state to turn over the report to PPAI, Alito wrote that "PAMII preempts any state law that gives a healthcare facility the right to withhold such records."<sup>330</sup> Alito cited two Supreme Court cases in which the Court had noted that a state law in conflict with federal law would be preempted, while holding that the state laws at issue did not conflict with federal law and therefore were not preempted.<sup>331</sup> Because *Houstoun* predated *PhRMA*, Alito did not have occasion to consider the arguments in Scalia/Thomas's *PhRMA* concurrences. Nevertheless, Alito's unqualified holding in *Houstoun* that state law was preempted by a federal Spending Clause statute suggests that he is not predisposed to reject preemption challenges to safety net statutes.<sup>332</sup>

Chief Justice Roberts did not participate in any preemption case involving a Spending Clause statute during his brief tenure on the D.C. Circuit. In the context of a business challenge to a federal order in a case involving an express private right of action, then-Judge Roberts authored an opinion stating, in regard to the validity of the federal decision, that preemption and the Supremacy Clause "operate to prevent the states from taking regulatory action in derogation of federal regulatory objectives."<sup>333</sup> In that case, Roberts acknowledged that preemption applies not only to state

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328. Pa. Prot. & Advocacy, Inc. v. Houstoun, 1999 WL 1045152 at \*1 (E.D. Pa. 1999). There is a private cause of action for the advocacy organization to bring suit under PAMII, 42 U.S.C. § 10807. Neither the district court nor the circuit court addressed this basis for suit.

329. Pa. Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423, 427 (3d Cir. 2000).

330. *Id.* at 428.

331. *Id.* (citing Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Com'n, 461 U.S. 190, 204 (1983); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

332. In contrast, as a Third Circuit judge, Alito qualified his vote to reverse the district court's dismissal of a § 1983 claim, stating: "While the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court. I therefore concur in the Court's decision." Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 194 (3d Cir. 2004) (Alito, concurring).

333. *Midwestern ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004).

statutes but also to state regulatory action. The opinion also recognizes that even the objectives of federal regulations can preempt state conduct.<sup>334</sup> In another decision joined and quite possibly written by Judge Roberts,<sup>335</sup> the court of appeals held a D.C. law preempted by a federal law that does not contain an express private right of action, but rather provides for enforcement by the federal and local governments instead of private parties.<sup>336</sup>

These opinions by Kennedy, Alito, and Roberts suggest that these Justices will be willing to reach the merits of a preemption challenge arising under a safety net statute.

## VI. CONCLUSION

It remains to be seen whether *Thiboutot* will survive to celebrate its 30<sup>th</sup> birthday. Even if *Thiboutot* is not expressly overruled, the case law of the 1980's and 1990's — establishing the availability of the § 1983 remedy for Spending Clause statutes — has been dramatically curtailed. Indeed, Chief Justice Roberts has publicly stated that *Wilder* was “limited to its facts” by *Gonzaga*.<sup>337</sup> Even though preemption claims present a viable alternative approach to obtain injunctive and declaratory relief, these remedies do not fully replace relief under § 1983.

Justice Powell argued in his *Thiboutot* dissent that Congress did not intend § 1983 to provide court access to enforce safety net statutes. Justice Roberts, in his confirmation hearings, similarly maintained that any denial of court access should be laid at the feet of Congress for failing to specify its intent to permit enforcement.<sup>338</sup> Following enactment of the *Suter* fix in 1995, legislators reasonably could have believed that their bill clarified their approval of the pre-*Suter* decisions in *Wright* and *Wilder*. Yet, the *Gonzaga* decision in 2002 put the ball back in the lap of Congress.

Section 1983 was enacted during Reconstruction, a time of congressional dedication to improving the lives of disadvantaged

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334. *Id.*

335. The decision is per curiam, with a member of the panel concurring. Therefore, either Judge Roberts or the other, non-concurring judge would have written the opinion.

336. *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (per curiam), involving the Federal Railroad Safety Act, 49 U.S.C. § 20107 (preemption provision with no cause of action) and 49 U.S.C. §§ 20111-13 (providing for enforcement by the federal and state governments but not by private parties).

337. Adam Liptak, *Appellate Argument: An Artist's View*, N.Y. TIMES, April 22, 2008, available at: <http://www.nytimes.com/2008/04/22/us/22bar.html?scp=1&sq=roberts+columbia+mo>.

338. Lazarus, *supra* note 310, at 17.

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individuals. It may take a similar overarching effort to restore the enforceability of broadly worded provisions in safety net statutes under § 1983. Solutions could include strengthening the language of § 1983 itself or adding private rights of action, one by one, to the myriad Spending Clause statutes impacted by *Gonzaga*. Legislators need to take care not to repeat the mistake of the hastily and poorly drafted *Suter* fix. The Roberts Court has narrowly construed legislative fixes, disregarding legislative history for Spending Clause statutes.<sup>339</sup> To be effective, any legislative action on § 1983 must make it unmistakably clear in the statutory text that Congress intends the rights conferred in safety net statutes to be enforceable by beneficiaries.

Nevertheless, many provisions in safety net statutes remain enforceable under § 1983, such as those focusing on the rights of individuals. *Thibotout*, *Wilder* and *Wright* remain good law and are being followed by lower courts. Preemption under the Supremacy Clause provides an alternative enforcement mechanism, including within its ambit less particularized provisions. The Supreme Court's jurisprudence has clearly established that preemption is a viable means for enforcement of federal law, including safety net statutes, against states.

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339. Bobroff, *supra* note 310, at 109-10.