

Making the Old Federalism Work:

Section 1983 and the Rights of Grant-in-Aid Beneficiaries

In 1980, the Supreme Court held for the first time that 42 U.S.C. § 1983¹ provides a cause of action for deprivations of federal statutory rights.² Because the Court had previously held only that section 1983 embraced constitutional claims,³ this holding appeared to expand dramatically the scope of section 1983. In particular, it appeared that section 1983 might provide a universal private right of action for enforcing the conditions imposed upon states by federal grant-in-aid programs⁴—a right of action that courts had granted only sporadically before.

Two subsequent decisions, however, suggest that section 1983 may extend less broadly. In these decisions, the Court precluded section 1983 claims when the underlying statute does not confer substantive rights⁵ and when it provides an exclusive remedy for their violation.⁶ The Court has also suggested that some individual interests in state compliance with a grant condition may be insufficient to make that condition a “right secured” under section 1983.⁷ Although the scope of these qualifications remains largely uncertain, they severely threaten the usefulness of section 1983 in enforcing grant conditions.

This Note argues that section 1983 should be available as a mechanism for ensuring that states administer grant programs in conformity with federal requirements. In many cases, alternative means of enforcing grant conditions are inadequate to protect either the rights of grant beneficiaries or the interests of the federal government in state compliance. Because the

1. 42 U.S.C. § 1983 (1976 & Supp. V 1981) provides in pertinent part:

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.

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

3. Although the Court had suggested in dictum that § 1983 might embrace statutory claims, *Edelman v. Jordan*, 415 U.S. 651, 675 (1974), and had decided statutory claims brought pendent to constitutional claims under § 1983, *see infra* p. 1004, it had never decided whether suits challenging state action because of its inconsistency with federal statutory law could be brought under § 1983.

4. Claims alleging the violation of federal grant conditions by state officials fulfill the elements of a § 1983 claim. These are that plaintiffs have “been deprived of a right ‘secured by the Constitution and the laws’ of the United States,” and that the defendant acted under “color of any [state] statute.” *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978) (quoting 42 U.S.C. § 1983).

5. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 18-27 (1981).

6. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981).

7. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

history and purposes of section 1983 evince a congressional intent to protect federal rights of the kind at stake in grant programs, this Note argues that any judicially imposed limitations on that cause of action should be construed narrowly. It concludes by proposing rules to govern the application of section 1983 to grant claims.

I. The Rights of Grant-in-Aid Beneficiaries

To understand the importance of the Court's recent section 1983 decisions, it is essential to explore the nature of grant-in-aid programs and the private rights they establish, as well as the Court's treatment of private enforcement efforts prior to 1980. Before that time, private parties who could benefit from grant conditions had only limited means by which to secure them. Courts generally viewed grant beneficiaries as powerless in relation to the enforcement of their statutorily defined rights.

A. *The Nature of Grants-in-Aid*

Grants create a relationship of "cooperative federalism."⁸ The national government retains substantial control over the aided programs, but state and local governments bear responsibility for directly shaping and administering those programs.⁹ Congress employs grant programs when it believes that benefits and services can be better provided through state and local governments than through direct federal intervention.¹⁰ Because the goals underlying such arrangements would be defeated were Congress to abdicate control over program expenditures, courts have long upheld Congress' power to attach conditions to these funds.¹¹

8. R. LEACH, *AMERICAN FEDERALISM* 14 (1970).

9. Grants often involve all levels of government in providing services. In order to achieve uniform national program standards as well as to assume part of the financial burden, Congress provides funds to assist the states in carrying out programs within the bounds established by federal law. This has been termed a "marble cake" model of federalism, M. GRODZENS, *THE AMERICAN SYSTEM* 8 (1966), in which "no important function of government is the exclusive province of one of the levels," Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1184 (1977).

10. R. CAPPALLI, *RIGHTS AND REMEDIES UNDER FEDERAL GRANTS* 35 (1979). Cappalli identifies five reasons why Congress has created grant-in-aid programs in such great number, rather than providing benefits and services directly: (1) in many areas, federal administrative machinery would duplicate state or local agencies already providing comparable services; (2) direct federal administration may foster local jealousy and hostility, while grants-in-aid to state and local governments may encourage support for federal intervention; (3) matching grants may be particularly useful for drawing upon local government revenues to serve federal priorities; (4) grants-in-aid can improve state and local government administration by conditioning the grant of federal funds on compliance with management directives; and (5) grants-in-aid may avoid federalism problems by respecting state and local autonomy while allowing the national government to set policy priorities. *Id.*

11. The Constitution empowers Congress to expend funds in order to "provide for the . . . general Welfare." U.S. CONST. art. I, § 8, cl. 1. Congress' power to condition funds is limited, in theory, by the requirements that funding restrictions provide for the "general welfare" and be reasonably related to the purposes of the program itself. *United States v. Butler*, 297 U.S. 1, 66, 69 (1936). In practice, these requirements have rarely invalidated grant conditions. The Court has held that Con-

Although grant conditions primarily define the relationship between state and federal agencies, they also create expectations for private parties about how services or benefits will be provided. Congress, of course, can change the requirements conditioning state participation in a grant program or change the services the program provides,¹² and states may reject federal funding if they do not want to accept the accompanying obligations.¹³ Within the terms of the federal-state funding agreements, however, private parties must receive benefits or services in the manner established by the funding statute. The Court has recognized that grants, by imposing obligations on both federal and state governments,¹⁴ create for individuals a “legitimate claim of entitlement” to grant benefits.¹⁵ Thus, public grant conditions translate into the language of individual rights.

B. *Judicially Created Means of Enforcing Grant Conditions*

As a rule, grant statutes provide little guidance on how private parties can enforce “entitlements.” Seldom does Congress explicitly authorize suits by beneficiaries against either the grantee or the federal grantor.¹⁶ In

gress can impose at least as many duties on the states through the spending power as it can through its regulatory powers, and thus it may “further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative objectives.” *Fullilove v. Klutznick*, 448 U.S. 448, 474-75 (1980).

12. *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (finding no constitutional limitations on congressional power to change entitlements).

13. *E.g.*, *Quern v. Mandley*, 436 U.S. 725, 735 (1978) (states not required to participate in federal welfare programs); *James v. Valtierra*, 402 U.S. 137, 140 (1971) (local governments not required to accept funds under Housing Act of 1937); *see Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (state may escape conditions by “simple expedient of not yielding”). *But see Note, Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 *YALE L.J.* 1694, 1712-16 (1981) (arguing that even when state participation is voluntary, grant conditions should not be allowed to influence state decisionmaking on matters of exclusive state responsibility).

14. Grant legislation uniformly obligates both the federal agency entrusted with carrying out the law and the state or local grant recipient to abide by articulated standards, and to implement rules, regulations, and guidelines in conformity with the statute. *See, e.g.*, 42 U.S.C. § 6008 (1976) (imposing such requirements in context of Developmentally Disabled Assistance and Bill of Rights Act); 20 U.S.C. § 2731 (Supp. V 1981) (same under Education Amendments of 1978); 42 U.S.C. § 602 (1976 & Supp. V 1981) (same under Aid to Families with Dependent Children Act).

15. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Court distinguished between a mere “unilateral expectation” of a benefit and a “legitimate claim of entitlement” to it. The latter must be derived from “rules or understandings that secure” the benefit to the intended beneficiary. *Id.* Grant-in-aid laws governing the provision of benefits accomplish nothing if they do not “secure” those benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 261-62, 262 n.8 (1970) (welfare benefits are matter of statutory entitlement for those qualified to receive them). *See generally Reich, The New Property*, 73 *YALE L.J.* 733 (1964) (increasing dependence on government largess requires new concept of property rights in government support).

16. Grant statutes sometimes contain “citizen-suit” provisions imposing particular substantive and procedural requirements for bringing private suits. *See, e.g.*, 33 U.S.C. § 1365 (1982) (Federal Water Pollution Control Act); 42 U.S.C. § 7604 (Supp. V 1981) (Clean Air Act); 33 U.S.C. § 1415(g) (1982) (Marine Protection Research and Sanctuaries Act of 1972). Other grant statutes allow private parties more limited means of asserting rights to benefits. *See Education for All Handicapped Children Act* § 615(e), 20 U.S.C. § 415(e) (1982) (authorizing appeal to federal district courts of state agency decisions concerning provision of free appropriate education to handicapped children).

the absence of express private rights of action, courts have sometimes fashioned remedies on the basis of three different theories. First, and most significant, courts have implied a private right of action in the substantive statute itself on the ground that Congress intended to provide a remedy that it neglected to write into the statute.¹⁷ Second, courts have sometimes treated grants as contracts between the federal and state governments and permitted certain private parties to enforce their rights as third-party beneficiaries.¹⁸ Finally, courts have occasionally allowed statutory claims pendent to colorable constitutional claims to be brought under section 1983.¹⁹

These judicially created remedies, however, have not helped private plaintiffs a great deal. For one thing, courts have not always recognized private rights of action.²⁰ And when they have, they have severely restricted the kinds of plaintiffs who can assert such rights,²¹ the kinds of statutory provisions such plaintiffs can enforce,²² and the kinds of relief

17. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

18. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *Holbrook v. Pitt*, 643 F.2d 1261, 1270-71 (7th Cir. 1981); *Local Div. No. 714 v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978); *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). In general, a third-party beneficiary may enforce contractual duties when two conditions are met: the beneficiary's right to performance is "appropriate to effectuate the intention of the parties" and the circumstances "indicate that the promisee intend[ed] to give the beneficiary the benefit of the promised performance." *RESTATEMENT (SECOND) OF CONTRACTS* § 302 (1981); see 2 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* §§ 356, 356A (1959).

19. *Hagans v. Lavine*, 415 U.S. 528 (1974); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

20. For example, in *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court adopted a four-part inquiry for deciding whether a private right of action should be implied from a statute. Four members of the Court recently criticized the test in these terms:

Surely it cannot be seriously argued that a mechanical application of the *Cort* analysis lends "predictability" to implied right of action jurisprudence: including today's decision, five of the last six statutory implied-right-of-action cases in which we have reviewed analysis by the Courts of Appeals after *Cort* resulted in reversal of erroneous Court of Appeals decisions. While this may be predictability of a sort, it is not the sort which the Court in *Cort v. Ash*, *supra*, or in any other case seeking to afford guidance to statutory construction intended.

California v. Sierra Club, 451 U.S. 287, 302-03 (1981) (Rehnquist, J., dissenting) (citations omitted).

21. Under the *Cort* test, *supra* note 20, only a plaintiff "of the class for whose especial benefit the statute was enacted" could assert any implied private right of action. *Cort*, 422 U.S. at 78.

22. For example, the courts' restrictive reading of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1982), has led to inconsistencies in private enforcement. Section 503 of the Act, 29 U.S.C. § 793, requires that certain federal contractors take affirmative action to employ and advance in employment qualified handicapped individuals. Section 504, 29 U.S.C. § 794, prohibits discrimination on the basis of handicap in programs receiving federal financial assistance. A majority of the circuits has found that § 504 creates a private right of action. See *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1377 (10th Cir. 1981). But see *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir.) (no private right of action), cert. denied, 449 U.S. 892 (1980). The Supreme Court has indicated that it agrees with the majority view. See *Campbell v. Kruse*, 434 U.S. 808 (1977). On the other hand, the courts have unanimously held that § 503 does not create a private right of action. See, e.g., *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), cert. denied, 449 U.S. 889 (1981); Note, *Private Rights of Action for Handicapped Persons Under Section 503 of the Rehabilitation Act*, 13 VAL. U.L. REV. 453, 476-92 (1979).

available.²³ The courts have also applied strictly the requirements for enforcement of statutory provisions by third-party beneficiaries.²⁴ Furthermore, a plaintiff cannot always manage to bring colorable constitutional claims along with statutory ones. As a result, individuals have been able to obtain only sporadic and inadequate enforcement of grant conditions through such means.

C. Section 1983 and Grant Claims

It was against this background that the Court decided *Maine v. Thiboutot*.²⁵ In that case, the Court allowed private welfare recipients to bring suit under section 1983 to challenge a denial by state officials of federal social security benefits.²⁶ Although the Court asserted that it was merely stating explicitly what it had established *sub silentio* in prior opinions,²⁷ it held for the first time that section 1983 “means what it says” and provides a private cause of action for violation of federal statutory law by state and local officials.²⁸ The Court avoided saying, however, that section 1983 provided a remedy for the violation of all federal statutes.²⁹

One year after *Thiboutot* was decided, the Court retreated from any such broad theory. In *Pennhurst State School & Hospital v. Halderman*,³⁰ the Court considered whether the Bill of Rights section of the Developmentally Disabled Assistance and Bill of Rights Act (DDA Act)³¹ created substantive rights enforceable by mentally retarded individuals housed in state institutions.³² The Court decided it did not. It viewed the DDA Act

23. See *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 24 (1979) (private suit under Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (1982), may seek to void investment advisers contract, but no other relief available).

24. See, e.g., *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37 (1977); *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208-09 (9th Cir. 1979).

25. 448 U.S. 1 (1980).

26. 42 U.S.C. § 602(a)(7) (1976 & Supp. V 1981).

27. *Thiboutot*, 448 U.S. at 4.

28. *Id.* Justice Brennan, for the majority, wrote:

The question before us is whether the phrase “and laws,” as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.

Id.

29. The Court held only that § 1983 “undoubtedly embraces the respondents’ claim” in the case before it. *Id.* It did not explicitly state that § 1983 would be available for all statutory claims. The holding has, however, been so interpreted. See *id.* at 11 (Powell, J., dissenting); Comment, *Statutorily Based Federal Rights: A New Role for Section 1983*, 14 J. MAR. L. REV. 547, 551 (1981).

30. 451 U.S. 1 (1981).

31. Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-6107 (1976 & Supp. V 1981).

32. The DDA Act aids states in caring for the developmentally disabled. States electing to participate in the grant program must submit a plan to the Secretary of the Department of Health and Human Services in order to receive federal funds. 42 U.S.C. § 6063(a) (1976 & Supp. V 1981). After

as a "mere federal-state funding statute,"³³ intended to encourage, but not to coerce, the states to develop certain programs.³⁴ The Court balked at the idea of imposing affirmative obligations on the states in the context of a "cooperative program of shared responsibilit[ies]."³⁵ If Congress wants a grant program to create substantive rights, the Court held, Congress must clearly state that those rights are a condition of the statutory "contract."³⁶

The Court did acknowledge, however, that the DDA Act imposed some obligations upon states. In particular, it found that the DDA Act required states to submit assurances that they would administer state programs so as to protect the rights of those defined by the Act as "developmentally disabled."³⁷ The Court nevertheless raised, without answering, the question of whether an individual's "interest" in these assurances constituted a "right secured" by federal law and enforceable by means of section 1983.³⁸

Later that year, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,³⁹ the Court retreated still further from *Thiboutot*. In this case, the Court considered whether an express remedial provision in a statute could preclude a section 1983 cause of action.⁴⁰ The Court found that by providing "unusually elaborate enforcement provisions, conferring authority to sue . . . both on government officials and

the Secretary has approved it, the states receive funds that must be spent in accordance with the plan and the requirements of the statute. *Id.* § 6062(a). The DDA Act requires, in particular, that the state have "in effect for each developmentally disabled person who receives services from or under the program a habilitation plan." *Id.* § 6011(a). In addition, the Act's "bill of rights" provision requires that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . be designed to maximize the developmental potential of the person and . . . be provided in the setting that is least restrictive of the person's liberty." *Id.* § 6010(2). At issue in *Pennhurst* was whether providing "appropriate treatment" in the "least restrictive environment" constituted a right enforceable against the states. *See* 451 U.S. at 2.

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

34. *Id.* The Court drew an analogy between grant-in-aid programs enacted pursuant to the spending power and contracts: "[I]n return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 17 (emphasis added).

35. *Id.* at 22 (quoting *Harris v. McRae*, 448 U.S. 297, 309 (1980)).

36. *Id.* at 17. The voluntary nature of the grant relationship requires that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" so that states may "exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*

37. 42 U.S.C. §§ 6011(a), 6063(b)(5)(c) (1976 & Supp. V 1981).

38. *Pennhurst*, 451 U.S. at 28.

39. 453 U.S. 1 (1981).

40. In *Sea Clammers*, respondents had brought suit against various federal and state entities and officials alleging damage to fishing grounds caused by discharges and ocean dumping of sewerage and other waste. They sought injunctive and declaratory relief and compensatory and punitive damages under the federal common law of nuisance, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981), and the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434, 33 U.S.C. §§ 1401-1444 (1976). The Court noted that, although the parties had not suggested it, "there remains a possible alternative source of express congressional authorization of private suits under the[se] Acts"—that is, § 1983. *Sea Clammers*, 453 U.S. at 19.

private citizens,”⁴¹ Congress had foreclosed a section 1983 action under the two acts at issue. To the Court, these enforcement provisions meant that “Congress provided precisely the remedies it considered appropriate.”⁴² Because the Court found that the statutory remedies excluded private suits under section 1983,⁴³ it did not reach the question of whether the acts created enforceable substantive rights.

These cases leave two important questions unanswered. First, what must the nature of one’s “interest” in the enforcement of a grant condition be in order to bring suit under section 1983?⁴⁴ Second, under what circumstances will a grant statute’s express remedy preclude section 1983 relief?⁴⁵ Although the Court decided to preclude section 1983 claims in *Sea Clammers*, it left open in *Pennhurst* the question of whether the DDA Act’s own enforcement remedy, withdrawal of federal funds, excluded section 1983 claims.

II. The Broad Scope of Section 1983

The Supreme Court has discerned in section 1983 a broad intent to restructure federal-state relations. Such intent supports not only the statute’s expanded application to a wide range of constitutional claims, but also its use in protecting the federal rights at stake in grant programs. In *Pennhurst* and *Sea Clammers*, however, the Court held that when Congress creates these rights, it may intend that they not be strictly enforceable or that they be enforceable through only certain means. Thus, only by exploring the Court’s two unanswered questions is it possible to determine the scope of section 1983 in enforcing grant conditions.

A. *Evolution of the Section 1983 Remedy*

Section 1983 was originally enacted as part of the Civil Rights Act of 1871,⁴⁶ a congressional response to the failure of Southern states to suppress Ku Klux Klan violence against blacks during the Reconstruction

41. *Sea Clammers*, 453 U.S. at 13.

42. *Id.* The Court reasoned that “[w]hen the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.” *Id.* at 20.

43. *Id.* at 21. One member of the Court found, however, that because both of the statutes at issue contained a savings clause preserving enforcement rights under other statutes, it was “remarkable” that the Court could discern a congressional intent to withdraw § 1983 coverage. *Id.* at 30 (Stevens, J., dissenting). Because the environmental statutes were enacted on behalf of the general public and not for the protection of a special class, Stevens accepted the majority’s holding that Congress had created no new private damages remedy under § 1983. *Id.* at 32-33.

44. *See supra* p. 1006.

45. *See Maine v. Thiboutot*, 448 U.S. 1, 22 n.11 (1980) (Powell, J., dissenting) (“the only exception [to the application of § 1983 in the statutory context] will be in cases where the governing statute provides an exclusive remedy for violations of its terms”).

46. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

period.⁴⁷ Although its immediate aim was narrow, Congress framed the statute in general terms, providing a federal cause of action for the deprivation, under color of state law, of "any rights . . . secured by the Constitution and laws" of the United States.⁴⁸

Although the Court construed section 1983 narrowly at first,⁴⁹ it has since expanded the section's scope beyond the particular problem it was designed to correct.⁵⁰ The Court has declared that section 1983 engendered a "vast transformation" of earlier concepts of federalism⁵¹ and was evidence of Congress' intent to "interpose the federal courts between the States and the people, as guardians of the people's federal rights."⁵²

Developments in judicial doctrine over the past twenty years have provided further reason for reading section 1983 expansively. First, as the Court gave new life and content to the due process and equal protection clauses,⁵³ it extended section 1983 to provide a remedy for deprivation of those rights, even when the issues raised did not fall within the statute's traditional "civil rights" focus.⁵⁴ Second, it treated more actions as "under color of" state law⁵⁵ for purposes of section 1983. Third, it narrowed the

47. See Note, *supra* note 9, at 1153-56.

48. 42 U.S.C. § 1983 (1976 & Supp. V 1981); see *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("[A]lthough [§ 1983] was enacted because of the conditions that existed in the South at that time, it is cast in general language . . .").

49. Despite its broad language and purpose, § 1983 was initially given extremely limited application; it was primarily confined to deprivations of voting rights, and even that use was largely ineffective. See Note, *supra* note 9, at 1161 n.139, 1167-69.

50. In *Thiboutot* the Court acknowledged that the legislative history of the provision is somewhat ambiguous. *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980). Nonetheless, the Court has, over time, broadened the scope of § 1983. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 87-92 (1973) (citing wide sweep of claims covered by § 1983); Note, *supra* note 9, at 1167-75.

51. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (legislative history of § 1983 "makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights"); see *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) (debates surrounding enactment of Civil Rights Act of 1871 show that strong motive for passage was congressional concern that state courts inadequately protected federal rights).

52. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

53. On the expansion of the due process clause, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-9 (1978); on the expansion of equal protection, see Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969). The Court has also held that many of the provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment, and thus are now applicable to the states. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

54. For expanded applications of the due process clause, see, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (university tenure decision); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (state replevin law); *Bell v. Burson*, 402 U.S. 535 (1971) (revocation of driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits). For expanded applications of the equal protection clause, see, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (dual residency requirement); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy); *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative apportionment); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (education).

55. Section 1983 applies to deprivations of rights "under color of" state law, regulation or practice. See *supra* note 1. Initially, the courts interpreted that phrase to cover only actions within a state officer's legal authority. Thus, § 1983 applied only if the state law providing the officer's authority itself violated the federal Constitution. See *Nixon v. Herndon*, 273 U.S. 536 (1927). In *United States v. Classic*, 313 U.S. 299 (1941), however, a criminal case, the Court expanded the coverage of the

immunities available to both state agencies and officials as a defense to liability under section 1983.⁵⁶ Thus, the Court's conception of the remedial purposes of section 1983 has provided a basis for extending it beyond its initially limited application.

These jurisprudential developments were themselves the product of changing perceptions of the government's role in relation to its citizens. Two changes have been particularly influential. First, the federal government has moved beyond the role of passively protecting a small set of individual rights through the courts. Instead, Congress has used its regulatory and spending powers to create and effectuate new individual rights.⁵⁷ Grants-in-aid have been, of course, one of its most important tools. Second, demands for governmental accountability have become increasingly strident, and new mechanisms have been developed to control abuses of governmental power.⁵⁸ In response to these trends, the courts have broadened section 1983's protection against state deprivations of federally guaranteed rights.⁵⁹ Both these policies apply with equal force to federal rights created by grant legislation.

B. *Defining the Contours of Section 1983 in the Grant Context*

This is not to suggest that section 1983 should be available to any plaintiff who seeks to enforce any grant condition. Rather, as the Court itself has suggested, some limitations must exist along two dimensions: Standards must be developed to identify those plaintiffs who may utilize section 1983 to enforce a given grant provision and to determine which grant provisions may be enforced by means of section 1983 litigation.

"under color" requirement to actions involving abuse of legal authority. That principle was extended to civil claims under § 1983 in *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

56. Under § 1983, the Court has allowed plaintiffs to bring damage actions against state officials subject to a qualified "good faith" immunity. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). Further, the Court has held that prospective relief is permissible even when it may have a significant effect on state treasuries. *Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974). The Court has even withdrawn the good faith immunity to § 1983 suit once available to municipalities. *Owen v. City of Independence*, 445 U.S. 622 (1980); see *Greenhouse, After 111 Years, Federal Rights Law Faces Grilling*, N.Y. Times, Mar. 7, 1982, at E2, col. 1 (describing congressional move to restore municipal "good faith" defense).

57. *E.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000 (1976 & Supp. V 1981); Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973a-1973p (1976 & Supp. V 1981) (as amended); Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1453 (1982). See Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971) (discussing congressional power to define and enforce constitutional rights).

58. See Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281 (1980) (discussing existing and proposed mechanisms for challenging official abuse).

59. One federal judge has argued that § 1983 requires even more radical restructuring if it is to serve as an effective deterrent to unlawful action by state officials. See Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978).

1. *Identifying the Appropriate Section 1983 Plaintiff*

In addition to limiting the rights created by grant statutes, the Court in *Pennhurst* raised an elusive question: When is a particular plaintiff's interest in enforcing a grant condition sufficient for that condition to become a "right secured" to him or her within the meaning of section 1983?⁶⁰ As thus formulated, this question raised concerns traditionally discussed under the doctrine of standing.⁶¹ In this context, the Court has read the "case or controversy" clause of Article III of the Constitution⁶² to require, at minimum, a showing of "distinct and palpable injury" and some causal relationship between the defendant's illegal act and that injury.⁶³ Thus, to satisfy the Article III standing requirement in a section 1983 claim, a private party must show that a statute creates a right and that a state has violated this right, thereby injuring the individual.

In certain circumstances, the Court has imposed prudential limits that are even more demanding than those imposed by Article III.⁶⁴ The Court has, for example, imposed prudential standing restrictions in cases in which the asserted harm is shared nearly equally by most citizens.⁶⁵ In such "public" disputes, the Court has used standing to determine whether the provision on which the claim rests allows judicial review for the class of persons in plaintiff's position.⁶⁶ In this sense, standing doctrine closely resembles the doctrine of implied private rights of action.⁶⁷ In implied

60. See *supra* pp. 1006-07.

61. The standing doctrine limits the right to bring suit in federal courts. A party has standing to sue if he has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); see *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("[S]tanding 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 limits on federal-court jurisdiction."); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 156 (2d ed. 1973) (standing concerns whether plaintiff has "sufficient personal interest" to warrant relief if he establishes illegality alleged and doctrine is thus "inextricably bound up with the whole law of rights and remedies").

62. U.S. CONST., art. III, § 2, cl. 2.

63. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978).

64. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982).

65. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974); *United States v. Richardson*, 418 U.S. 166, 176-77 (1974); *Ex Parte Levitt*, 302 U.S. 633, 634 (1937).

66. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

67. In deciding whether to imply a private cause of action, courts apply the four-factor test articulated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine the "ultimate issue" of whether Congress intended to create a private right of action. See *California v. Sierra Club*, 451 U.S. 287 (1981). The "threshold" inquiry is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. *Cannon v. University of Chicago*, 441 U.S. 677, 689-94 (1979). The Court's standing inquiry in public disputes—whether the statutory provision on which plaintiffs rely creates a right to judicial review for a certain class of persons—focuses on the same point.

private action cases, courts have effectively prevented private parties from enforcing statutory provisions, the violation of which caused them injury, if those statutes create duties not for particular groups, but for the benefit of the public at large.⁶⁸

It would be inappropriate, however, to apply these prudential requirements to suits brought under section 1983. Section 1983 provides an express private right to judicial review of state action. Having demonstrated that a funding statute creates enforceable “rights,”⁶⁹ a plaintiff should not also be required to show that Congress enacted the statute or imposed the grant conditions in order to benefit a small group of which he or she is a member. That test, which may be useful in limiting judicially created remedies, is inappropriate when suit is brought under an express statutory remedy, like section 1983, containing its own cause of action requirements.⁷⁰ In short, the congressionally defined elements of a section 1983 action—the violation of federal rights under color of state law—should not be constricted by extra-constitutional standing requirements.

2. *The Presumption in Favor of Enforcement Through Section 1983*

Courts usually permit private enforcement of grant conditions when they find in the grant statute a legislative intent to permit such enforcement.⁷¹ Without evidence of such intent, courts typically refuse to imply private remedies.⁷² Thus, statutory silence creates a presumption against private enforcement.⁷³

The limitation on the courts’ remedial power rests on the theory that

68. See, e.g., *California v. Sierra Club*, 451 U.S. 287, 292-94 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 690-91 (1979).

69. See *supra* p. 1003.

70. Indeed, it would be difficult, if not impossible, to determine for whom Congress enacted a grant statute in many cases. Grants-in-aid are designed to benefit individuals, states and localities, and to promote the general welfare. Grants must provide for the general welfare in order to serve as a legitimate exercise of the spending power. See *supra* note 11.

71. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 689, 709 (1979) (implying private right of action under statute aiming to benefit clearly identifiable group); *Rosado v. Wyman*, 397 U.S. 397, 420 (1970) (implying private right of action because Congress unlikely to have intended to provide no effective remedy to those directly affected by grant program); *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981) (tenants of housing subsidized by Department of Housing and Urban Development (HUD) had enforceable third-party beneficiary rights under statute authorizing HUD to make subsidy payments to landlord).

72. See *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

73. See generally Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333, 1386 (1980) (arguing that implied private right of action cases illustrate judicial restraint except in compelling circumstances); Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 51 (1979) (noting that Court has placed burden on Congress to express clearly its intent to provide private right of action); Note, *Implied Causes of Action: A New Analytical Framework*, 14 J. MAR. L. REV. 141, 166-67 (1980) (concluding that recent implied right of action doctrine restrains judiciary in filling gaps left by legislature).

Congress itself should specify remedies when it creates rights and not leave to the courts the task of matching rights and remedies in a piecemeal fashion.⁷⁴ This theory changes the long-prevailing presumption that remedies follow rights⁷⁵ into the new presumption that silence rules out judicially created private enforcement mechanisms. This new presumption, however, should not affect section 1983 analysis. This section provides for private enforcement on its face, and, as an express remedy, should overcome any presumption created by silence in the underlying substantive statute.⁷⁶

The broad availability of section 1983 as a remedial device, however, raises the many concerns that have prompted the Court's recent search for doctrines to confine it. This search is premature, for it is possible to address these concerns without limiting the scope of the statute.

III. Section 1983 and the Grant Enforcement Scheme

Some courts have reasoned that applying section 1983 to grant claims disrupts the enforcement procedures established by Congress in the grant statutes themselves.⁷⁷ There are two typical remedial provisions in such statutes. One empowers the federal agency that administers the grant to terminate or reduce funding if states fail to comply with grant conditions.⁷⁸ The other specifies judicial review procedures for private parties

74. *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring); *id.* at 749 (Powell, J., dissenting); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979).

75. See, e.g., *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Kendall v. United States*, 27 U.S. (12 Pet.) 524, 624 (1838) ("monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."). See generally Note, *Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme*, 1980 DUKE L.J. 928 (discussing presumption that statutory rights should be enforceable).

76. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 27 n.11 (1981) (Stevens, J., dissenting); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (*Thiboutot* held that "§ 1983 provides a cause of action for state deprivations of 'rights secured' by 'the laws' of the United States").

77. See *Anderson v. Thompson*, 658 F.2d 1205, 1216-17 (7th Cir. 1981) (enforcement of Education for All Handicapped Children Act); *Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd.*, 501 F. Supp. 821, 828-29 (E.D. Va. 1980) (enforcement of Federal Water Pollution Control Act).

78. Almost all grant statutes allow the federal agency administering the program to terminate or reduce federal funds if the grantee fails to comply with the funding conditions. The statute usually provides the state agency with notice and an opportunity for a hearing prior to terminating its funds. See, e.g., Rehabilitation Act of 1973 § 101(c), 29 U.S.C. § 721(c) (1982); Comprehensive Employment and Training Act of 1973 § 108, 29 U.S.C. § 818 (1976); Public Health Service Act § 315(c)(3), 42 U.S.C. § 247(c)(3) (1976 & Supp. V 1981). Some statutes bar cutting off a state's funding as long as the state makes good-faith efforts to comply with the grant conditions. See 42 U.S.C. § 604(c) (1976 & Supp. V 1981) (Aid to Families with Dependent Children). Recently Congress has also provided for federal recovery of illegal grant expenditures as a further penalty for

to enforce grant conditions.⁷⁹ The issue is whether Congress intended these statutory remedial provisions to be exclusive, and, therefore, whether section 1983 should be precluded as a means of enforcement.

A. Federal Agency Enforcement

The traditional arguments for relying exclusively upon federal agencies to ensure state compliance with grant conditions is that these agencies have expertise in the subject matter of the grant programs and are able to apply uniform standards.⁸⁰ Certain practical obstacles, however, prevent federal agencies from adequately overseeing grant programs. The number, complexity, and size of the programs make effective monitoring difficult.⁸¹ Furthermore, when an agency discovers noncompliance, it may be reluctant to cut off or reduce funding lest it jeopardize state participation in the grant program.⁸² As a result, federal agencies often engage in protracted negotiations to avoid funding sanctions and seldom actually enforce funding conditions.⁸³

noncompliance. See 16 U.S.C. § 1456a(b)(6) (1982) (Coastal Zone Management Act).

79. See *supra* note 16.

80. See *Rosado v. Wyman*, 414 F.2d 170, 178 (2d Cir. 1969) (finding HEW far better equipped than courts to review alleged inconsistency between complex state statutory scheme and federal statute because of its acknowledged expertise in field), *rev'd on other grounds*, 397 U.S. 397 (1970). Some grant statutes, however, lack explicit agency enforcement provisions. Compare Federal Aid Highway Act of 1973, 23 U.S.C. §§ 101-407 (1982) and Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); National School Lunch Act of 1946, 42 U.S.C. §§ 1751-1769a (1976 & Supp. V 1981) with statutes cited *supra* note 78. In the absence of any express enforcement mechanism, the administering agency is usually permitted to develop "reasonable" procedures. For a discussion of agency noncompliance hearings, see R. CAPPALLI, *supra* note 10, at 244-71.

81. See R. CAPPALLI, *supra* note 10, at 65 (finding important conditions ignored because of huge volume of grants and contracts).

82. Cutting off funding is too drastic a remedy to be frequently employed. See *id.* at 90-94; Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 620 (1972); Wilcox, *The Function and Nature of Grants*, 22 AD. L. REV. 125, 131 (1970); Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967); see also *Rosado v. Wyman*, 397 U.S. 397, 426 (1970) (Douglas, J., concurring) (finding HEW reluctant to cut off funds to noncomplying states); *United States v. Frazer*, 317 F. Supp. 1079, 1083 (M.D. Ala. 1970) (arguing cutoff would punish beneficiaries rather than enforce grant conditions), *modified sub nom. NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). In contrast, specific performance of grant conditions may be available through a § 1983 suit, at least within the term of the congressional appropriation. Compare *United States v. City of Chicago*, 549 F.2d 415, 440-41 (7th Cir.) (court not limited to prohibiting action in violation of statute, but may also require affirmative action to assure compliance with grant conditions), *cert. denied*, 434 U.S. 875 (1977) and *United States v. Frazer*, 317 F. Supp. at 1083 (United States may seek judicial enforcement of terms and conditions of grants of federal property; administrative remedy of termination of assistance is not exclusive) with *PAAC v. Rizzo*, 502 F.2d 306, 314-15 (3d Cir. 1974) (federal requirements in grant statutes binding on question of eligibility, but not substantively binding on grantee), *cert. denied*, 419 U.S. 1108 (1975). In general, courts have substantial flexibility in the relief they afford and can avoid imposing drastic sanctions against state grantees, while preserving for private parties the benefits of the grant program. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 54 (White, J., dissenting) (citing approach taken in *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970)).

83. See Note, *supra* note 82, at 91.

In the face of the growing number and complexity of federal grant programs, any federal agency expertise provides limited safeguards. Federal agencies often cannot determine accurately whether a state has complied with grant terms.⁸⁴ Private parties from whom the agency could easily obtain information about the program may be entirely excluded from the agency compliance proceedings.⁸⁵ Even when individuals do register their complaints, so long as state performance appears adequate on report forms,⁸⁶ the monitoring agency may believe the problem is limited and non-systemic.⁸⁷

In addition, federal agency enforcement proceedings may prejudice the interests of states. Entrusting the resolution of conflicting federal and state interpretations of the grant statute to the federal agency makes the agency both arbiter and participant in the same proceeding. Federal courts, on the other hand, are "relatively more expert" than agencies in interpreting federal law,⁸⁸ have discretion to weigh the state's reading of grant requirements as well as to solicit the views of the federal agency, and are thus more likely to reach an unbiased decision.⁸⁹

Private enforcement of grant conditions through section 1983 supplements federal agency enforcement.⁹⁰ Nothing suggests, moreover, that private enforcement would undermine either the agencies' expertise or their ability to apply uniform standards. Section 1983 enforcement would also

84. See R. CAPPALLI, *supra* note 10, at 81; Tomlinson & Mashaw, *supra* note 82, at 619-30.

85. See *Cannon v. University of Chicago*, 441 U.S. 677, 706-08 n.41 (1979) (complaint procedure adopted by HEW in Title IX cases makes no provision for complainants to participate in investigation or enforcement proceedings). In general, private parties have no formal means by which they can bring their complaints before a federal agency. Note, *supra* note 82, at 90-91.

One theoretically useful vehicle for private instigation of agency action suits, § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982), has proved of little practical effect. Although courts have on rare occasions ordered agencies to initiate enforcement proceedings, see *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc), agency failure to enforce is generally unreviewable, see, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967); *Moog Indus. v. FTC*, 355 U.S. 411, 413-14 (1958); *FTC v. Klesner*, 280 U.S. 19, 25 (1929). Moreover, judicial review of such failure may be limited to the reasons the agency offers for its refusal to act. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *DeVito v. Schultz*, 300 F. Supp. 381 (D.D.C. 1969).

86. See R. CAPPALLI, *supra* note 10, at 65-66. In monitoring grantees, it is standard practice to rely on their good faith reporting. Those states conscious of their own noncompliance are often able to prepare reports that on their face do not reveal any deficiency; required reports do not comprehensively disclose program conditions.

87. See *id.* at 66-67.

88. *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (quoting *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting)).

89. Courts should elicit the federal agency's opinion in interpreting the federal law in question, *Rosado v. Wyman*, 397 U.S. 397, 406-07 (1970), and have often directly and indirectly considered the federal agency's interpretation of the statute at issue. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 n.18, 50 n.15 (1981) (White, J., dissenting); *Cannon v. University of Chicago*, 441 U.S. 677, 708 n.42 (1979); *Lau v. Nichols*, 414 U.S. 563 (1974).

90. Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 708 n.42 (1979) ("HEW's enforcement capabilities under Title IX are especially limited in precisely those areas where private suits can be most effective.").

not disrupt the goals and programs of federal agencies as much as private actions to force agencies to supervise grant programs.⁹¹

B. *Express Judicial Remedies*

Whether section 1983 enforcement disrupts an express private remedy is a more difficult question. Whenever Congress expressly provides an avenue for judicial review, it can be argued that it intends that remedy to be exclusive. This argument rests upon the presumption of exclusivity encapsulated in the maxim *expressio unius est exclusio alterius*.⁹² Thus, courts generally refuse to imply a private right of action when the underlying substantive statute itself contains an express remedial provision, regardless of whether this provision provides adequate relief.⁹³ The presumption may be overcome, however, when there is evidence of legislative intent to provide an additional private remedy,⁹⁴ for then it is clear that Congress intended to provide more than a single remedy. Because section 1983 is such an express remedy, it should not be presumptively precluded by alternative express statutory judicial remedies in the grant context.⁹⁵

This is not to say that application of section 1983 is never barred by a statutory scheme. However, because section 1983 overcomes the presumption of the statute's remedial exclusivity, the burden should fall on the party asserting the preclusive effect of a statute's remedial provisions to show that Congress in fact intended to withhold section 1983 relief.

That burden could be met in two circumstances: (1) when the statute contains a statement expressly excluding section 1983 or private rights of

91. *Cf. id.* at 707 n.41 (alternative to agency enforcement, suit under Administrative Procedure Act to compel agency to investigate and cut off funds, is more disruptive of HEW's efforts to allocate enforcement resources than private suit against recipient would be).

92. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (quoting *Botany Mills v. United States*, 278 U.S. 282, 289 (1929)).

93. *See, e.g.,* *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (express private rights of action in some sections of Securities Exchange Act of 1934 preclude implication of private rights of action under some other sections); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 420-21 (1975) (provision for enforcement by congressionally-created corporate entity incompatible with implied right of action); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (public cause of action created by Rail Passenger Service Act of 1970 is exclusive means of enforcement).

94. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (general principle that when legislation expressly provides particular remedy courts should not imply another "must yield to clear contrary evidence of legislative intent").

95. At least one lower court has gone so far as to find the cause of action under § 1983 to be excluded by an implied private right of action in a grant statute. *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981). Implied remedies should never be allowed to preclude § 1983 actions. Because Congress has created an express vehicle for challenging violations of a federal statute in § 1983, that remedy should be available in the first instance, making resort to an implied private right of action unnecessary.

action in general,⁹⁶ or (2) when the statute provides for judicial review but restricts the private relief available.⁹⁷ In the first case, congressional intent is clear. In the second, the court may infer that Congress considered private judicial relief in drafting the statute, but chose a particular remedial scheme for the law in question.⁹⁸ These circumscribed remedies, moreover, often conflict directly with the requirements imposed by section 1983. In such cases, the courts should hold plaintiffs to the more stringent requirements of the specific statutory scheme.⁹⁹ In cases where no conflict arises between the statutory scheme and section 1983, however, there is no reason for courts to infer exclusivity.¹⁰⁰

96. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-51 n.5 (1970) ("very doubtful" whether § 1983 relief available when statute provided that injunction was "exclusive means of enforcing the rights based on this title").

97. The adequacy of the review provided must, of course, be assessed before precluding a cause of action under § 1983. In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981), for example, the Court stated that

when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. . . . It is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies including the two citizen-suit provisions.

Accord *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976) (balance, completeness, and structural integrity of § 717 of Civil Rights Act of 1964 make it exclusive judicial remedy for claims of discrimination in federal employment); *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973) (specific remedy of habeas corpus is appropriate remedy and must override general terms of § 1983); *cf.* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979) (granting relief under § 1985 would impair effectiveness of Title VII's specific private remedy).

98. See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (entirely appropriate for Congress, in creating statutory rights, to determine who may enforce them and in what manner). Congress may, of course, preserve other remedies even when creating specific private suit provisions. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 n.31, 27-31 (1981) (Stevens, J. dissenting) (arguing that savings clause provisions provided expression of congressional intent to preserve availability of § 1983 remedies).

99. *Cf.* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-76 (1979) (holding § 1985 unavailable to plaintiffs who would otherwise "avoid most if not all of these detailed and specific provisions of the law [of Title VII]"); *Brown v. General Servs. Admin.*, 425 U.S. 820, 833 (1976) (precluding action under § 1983 because § 717 of the Civil Rights Act of 1964, "with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible").

100. Compare *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) with *Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1426 (1984). The Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1232, 1401-1453 (1982), at issue in both cases, provides an avenue of judicial review for plaintiffs who have satisfied certain procedural prerequisites. After finding that Congress had not made damages available under the EAHCA, the *Anderson* court held that plaintiffs could not circumvent the statute's restrictions by resort to § 1983. The court reasoned that to allow plaintiffs to elect a § 1983 remedy, thereby obtaining damages, would impair the effectiveness of the EAHCA's carefully constructed enforcement system. *Anderson*, 658 F.2d at 1213.

In *Quackenbush*, however, the Second Circuit found that the judicial remedy provided by the EAHCA was exclusive only for purposes of reviewing final administrative decisions about the placement of handicapped children. It held that defendants who had prevented plaintiffs from exhausting the procedural requirements of the statute could not assert the unavailability of § 1983 relief. If plaintiffs had no meaningful recourse to the statutory remedy, then they must have access to § 1983 and the relief provided by that statute.

For different analysis of preemption of a § 1983 claim by a statutory remedial scheme, see Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

C. *Infringement of State Autonomy*

Justice Powell has expressed the fear that applying section 1983 broadly will disrupt the relationship between federal and state agencies in administering grant programs.¹⁰¹ He has warned that the *Thiboutot* decision will burden federal courts with cases harassing state and local officials responsible for implementing federal assistance programs.¹⁰² In addition, he fears that federal courts will use section 1983 to gain “unprecedented ‘authority’” over state actions¹⁰³ and interfere with the states’ judicial and administrative remedial processes.

1. *Burden on State Administration*

Specifically, concerns have been raised that allowing individuals to hold state and local officials liable under section 1983 for violations of federal grant requirements would unfairly impose upon the states full liability for the deprivation of rights in programs established as joint federal-state ventures.¹⁰⁴ It should be noted, however, that section 1983 imposes no greater obligations on states than are contained in the grant statute itself. By accepting funds, states also accept the accompanying statutory requirements. In injunctive suits against state officials under section 1983, private parties ask no more than to insure that those requirements are met;¹⁰⁵ in damage actions, they seek compensation for injury caused by the illegal actions of state officers, where those actions lie outside the scope of the “good faith” immunity from liability.¹⁰⁶

101. *Maine v. Thiboutot*, 448 U.S. 1, 22-23 (1980) (Powell, J., dissenting).

102. *Id.* at 23. After noting that the United States Code contains “literally hundreds of cooperative regulatory and social welfare enactments,” Justice Powell found that “those who might benefit from these grants now will be potential § 1983 plaintiffs.” *Id.* at 22-23.

103. *Id.* at 23-35.

104. *Id.* at 23-24. Congress may vary the amount of responsibility it places on states in administering grant programs. Compare 20 U.S.C. § 1413 (1982) (state bears full responsibility for developing plan to assist handicapped children) with 42 U.S.C. § 622 (1976 & Supp. V 1981) (federal and state agencies jointly develop plan for child welfare services). The allocation of responsibility in a particular case could well determine a court’s assessment of liability for noncompliance and affect the relief it provides.

105. Concerns about judicial interference with state autonomy loom largest where a court determines that an injunction is necessary to bring about systemic relief in a § 1983 case. It was relief of this sort that the lower courts had determined to be necessary in *Pennhurst*. In such cases, the court’s duty is only to insure that the minimal requirements of the law are met. *Cf.* *Wyatt v. Stickney*, 344 F. Supp. 373, 376 (M.D. Ala. 1972) (prescribing minimum “medical and Constitutional” standards of treatment for civilly committed mental patients), *enforcing* 334 F. Supp. 1341 (M.D. Ala. 1971), *aff’d in part, rev’d in part, decision reserved in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *see also* *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 54 (1981) (White, J., dissenting) (arguing that appropriate procedure once liability under § 1983 was determined would be for court to announce what state must do to comply with DDA Act and then allow appropriate period for state to decide whether to comply with conditions set by court or to give up federal funding).

106. *See supra* note 56.

2. *Conflict with State Judicial Remedies*

Some states provide for judicial review in state courts of state agency decisions.¹⁰⁷ These state review provisions, however, do not bar section 1983 claims. The Court has repeatedly held that plaintiffs need not exhaust state judicial remedies before asserting section 1983 claims in federal court.¹⁰⁸ The fundamental purpose of section 1983, it has recognized, is to provide individuals with a supplemental remedy for violation of their federal rights.¹⁰⁹

Policy considerations support this scheme. First, federal courts are better equipped to resolve federal statutory claims. Federal judges are more familiar with federal law and are more likely to be insulated from political pressures.¹¹⁰ Second, federal courts are more likely to apply federal law to the states uniformly.¹¹¹ Finally, to the extent that state court judgments are binding in subsequent federal litigation, exhaustion of state judicial remedies might preclude meaningful federal judicial review.¹¹²

3. *Interference with State Administrative Remedies*

States often establish administrative procedures for handling grievances or investigating allegations of noncompliance either in response to specific federal statutory directives,¹¹³ federal administrative regulations,¹¹⁴ constitutional due process requirements,¹¹⁵ or practical necessity.

Section 1983, however, does not require exhausting these state administrative remedies before suit in federal court.¹¹⁶ Congress, the Court has found, intended not to require exhaustion in order to create an effective supplemental remedy.¹¹⁷

107. See, e.g., N.Y. APA §§ 100-307 (McKinney Supp. 1980); CONN. GEN. STAT. §§ 4-166 to -189 (1981).

108. This principle was first established in *Monroe v. Pape*, 365 U.S. 167 (1961).

109. *Id.* at 183.

110. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

111. See Herzer, *Federal Jurisdiction over Statutorily-Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1, 10 (1970).

112. As a general rule, the principles of res judicata and collateral estoppel apply to § 1983 claims relitigated in federal court except when state law does not provide fair procedures or the state court fails even to acknowledge the principle on which the litigant based its claim. *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892, 896-98 (1984); *Allen v. McCurry*, 449 U.S. 90, 101, 105 (1980).

113. See, e.g., Rehabilitation Act of 1973, 29 U.S.C. § 722(a) (1982); Aid and Services to Needy Families with Children, 42 U.S.C. § 602(a)(4) (1976); Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6012 (1976 & Supp. V 1981).

114. See, e.g., 40 C.F.R. § 35.939 (1983) (requiring establishment of procedure for resolving protests over use of environmental grant funds); 7 C.F.R. § 246.24, 42 Fed. Reg. 43,223 (1977) (establishing procedure for special supplemental food program).

115. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

116. *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

117. *Id.* at 502-12 (reviewing legislative history of § 1983). Prior to this decision, courts had sometimes performed the task of evaluating the adequacy of state processes before determining

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Several policies counsel against an absolute exhaustion requirement. First, most state administrative processes are inherently defective in that they cannot generate a uniform or binding body of law establishing the rights of grant beneficiaries in particular programs.¹¹⁸ Second, administrative relief may be so limited in scope that some valid claims are effectively without remedy.¹¹⁹ Even when administrative procedures can address a particular grievance, they are in most cases incapable of effecting systemic reform.¹²⁰ Third, it is unlikely that agency administrators considering a claim will be able to provide independent judgments when parties challenge the policies their own agency has adopted.¹²¹

Where Congress requires states to establish administrative procedures to adjudicate claims, it may also choose to require exhaustion of those procedures. Any such requirement should not be lightly adopted, however, and must respect the purposes of section 1983. A plaintiff should be compelled to exhaust administrative procedures only where such procedures are fully capable of providing the relief sought by his claim. The defendant arguing exhaustion should bear the burden of demonstrating that state administrative remedies are indeed adequate. Furthermore, even when the court determines that state procedures are satisfactory as an initial matter, it should retain jurisdiction over the section 1983 claim pending the outcome of the administrative procedures.¹²² In this way, a court can make

whether exhaustion should be required in a § 1983 suit. *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973); *McNeese v. Board of Educ. for Community Unit School Dist. 187*, 373 U.S. 668, 674-75 (1963); *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969).

118. See Note, *supra* note 82, at 94 (most fundamental inadequacy of the state fair hearing procedure is that it generates no uniform and binding body of law).

119. In most states, agencies are either unwilling or ineffective forums for adjudicating challenges to state regulations or regulatory practices. They are best equipped to hear claims involving application of state or federal law to a particular plaintiff. Furthermore, although state agencies can usually take some corrective measures, they may not be able to grant injunctions, declaratory relief, or damages.

120. This incapacity flows from the administrative agencies' inability to produce a uniform body of law, and their severely limited ability to grant relief.

121. See Note, *supra* note 82, at 92. Some state agencies have held that they have no power to decide the legality of state regulatory provisions. In those states which consider such challenges, it seems difficult to obtain effective adjudication on the merits, since "[t]he persons responsible for the final decision in a fair hearing are generally the persons who have promulgated the regulations under attack." *Id.*

122. By keeping a § 1983 claim on its docket pending exhaustion of administrative or similar remedies, a court can exert pressure upon the state administrative process and ensure that it is efficient as well as effective. Furthermore, when a court retains a § 1983 case pending exhaustion, the plaintiffs may be able to collect attorney's fees for the state administrative action. See *Maher v. Gagne*, 448 U.S. 122, 128-29 (1980) (attorney's fees available under 42 U.S.C. § 1988 in a § 1983 case involving statutory violations, even though respondent prevailed through settlement rather than through litigation); cf. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (award of fees for attorney's efforts in state administrative proceeding that must be pursued under Title VII prior to filing charge with EEOC). But see *Tatro v. Texas*, 516 F. Supp. 968, 984 (N.D. Tex. 1981) (plaintiff may not obtain attorney's fees when the court determines that § 1983 cause of action basically redundant to private cause of action provided by statute's remedial scheme).

certain that the state has adequately considered the claim, and can also provide additional relief if necessary. Retaining jurisdiction would fully protect the rights of grant beneficiaries while providing scope for the operation of state administrative remedies.¹²³

D. *Burden on the Federal Courts*

Finally, concerns have been voiced about how applying section 1983 to claims under grant-in-aid statutes might increase the caseload of the federal courts.¹²⁴ Without question, the expansion of the scope of section 1983 has increased federal court litigation over the past two decades,¹²⁵ and extending section 1983 to grant claims might indeed increase the courts' caseload even further. Caseload, however, is small reason to deny grant beneficiaries the same protection afforded other holders of federal rights. The federal courts should not evade their duty to vindicate endangered federal rights merely because their dockets are overloaded. That failure would "implicitly express a value judgment on the comparative importance of classes of legally protected interests."¹²⁶ The proper way to ease the federal docket lies in proper court administration, not in discriminating among federally-protected rights.

Conclusion

Courts should give full scope to the individual rights created by Congress in grant-in-aid legislation, and section 1983 should be broadly available to remedy state noncompliance with federal grant conditions. So long as a party meets the injury-in-fact test for standing, no more demanding a test of the plaintiff's "interest" in the enforcement of grant conditions should be imposed. The presumption in favor of the application of section 1983 should be overcome only where a party clearly shows that Congress intended to exclude it from a particular remedial scheme. This requirement might be satisfied under one of two conditions: (1) where the grant-

123. Congress has recently adopted this type of exhaustion requirement in § 1983 suits brought by state prisoners. The Civil Rights for Institutionalized Persons Act of 1980, 42 U.S.C. § 1997 (Supp. V 1981) requires that prisoners, who constitute a significant proportion of all § 1983 claimants, exhaust administrative procedures if exhaustion "would be appropriate and in the interest of justice." The Attorney General of the United States must have certified or the court itself have determined that the procedures meet certain standards specified by the statute. *Id.* § 1997a(b)(2). The court must retain the case on its docket during administrative review, which may take no longer than 90 days, *id.* § 1997e(a)(1).

124. *Maine v. Thiboutot*, 448 U.S. 1, 23 (1980) (Powell, J., dissenting).

125. See H. FRIENDLY, *supra* note 50, at 87-90; Note, *supra* note 9, at 1172. The size of this possible increase is unclear. Even if the number of § 1983 grant claims could be determined, some would presumably be brought under different legal theories, see *supra* p. 1004, were § 1983 unavailable.

126. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

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in-aid statute expressly provides an exclusive remedy for its violation, or
(2) where the statute provides for more restricted judicial review of the individual's claim.