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Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism

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A major vehicle for litigation in the federal courts over the past twenty years has been 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

As conventionally interpreted, section 1983 confers two important advantages on plaintiffs who can invoke its provisions: it creates a cause of action for damages[2] and, in conjunction with a complementary statute, it authorizes a court to award successful plaintiffs attorney's fees.[3] A plaintiff can only bring a lawsuit under section 1983, however, if her "right[ ] . . . secured by the Constitution and laws" has been violated by a person acting under color of state law. In three recent cases, *Golden State Transit Corp. v. City of Los Angeles,*[4] *Wilder v. Virginia Hospital Assn.,*[5] and *Dennis v. Higgins,*[6] the Supreme Court reformulated its test for when a law creates a "right," and therefore when section 1983 is available. In *Golden State Transit,* the Court decided that the National Labor Relations Act (NLRA), by preempting state regulation of collective bargaining between employers and unions, conferred on the bargaining parties a federal "right" to be free from governmental interference in the bargaining process.[7] In *Wilder,* the Court held that certain Medicaid provisions of the Social Security Act created "rights" in health care providers to enforce "reasonable" rates of reimbursement by participating states.[8] In *Dennis,* the Court held that the dormant Commerce Clause, which prohibits state regulations that discriminate against interstate commerce, created a "right"

1. 42 U.S.C. § 1983 (1988).

2. *See* Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overruling *Monroe* only "insofar as it holds that local governments are wholly immune from suit under § 1983").

3. *See* 42 U.S.C. § 1988 (1988).

4. 493 U.S. 103 (1989).

5. 110 S. Ct. 2510 (1990).

6. 111 S. Ct. 865 (1991).

7. 493 U.S. at 109-12.

8. 110 S. Ct. at 2525.

in businesses to be free from such regulations.[9]

The issue of whether a statute creates a right has arisen frequently[10] since the Court held in *Maine v. Thiboutot*[11] that any federal law, not simply a civil rights law or constitutional provision, can create rights enforceable through section 1983. Unless every plaintiff may enforce all federal laws, a judge interpreting section 1983 must distinguish those laws that create rights from those which do not. Before *Golden State Transit* and *Wilder,* however, the Court had only rarely and superficially discussed how it determines whether a statute creates a right within the meaning of section 1983 — despite the importance of this question to lower courts facing a multitude of suits claiming various rights.[12] *Thiboutot* did not articulate a standard for determining when a statute creates a right, and until *Golden State Transit,* subsequent cases failed to clarify the issue.[13]

If a statutory claim does not fall under section 1983, a plaintiff must establish an "implied right of action" under the statute to obtain either injunctive or compensatory relief. In marked contrast to its failure to define "rights" in *Thiboutot,* the Court, in a series of cases around the time *Thiboutot* was decided, frequently addressed the question of when federal statutes create implied rights of action.[14] The implied right of action test provided that a plaintiff could enforce a federal statute if the statute created a right for the plaintiff, and if Congress intended that right to be enforceable in a lawsuit. In *Golden State Transit* and *Wilder,* the Court explicitly employed the first aspect of the implied right of action analysis — the existence of a right — to establish a test for rights within the meaning of section 1983. It held that the existence of a right within the meaning of section 1983 creates a presumption that that right is enforceable through a private remedy.[15]

This Note criticizes the Court's current reconciliation of the implied right of action and section 1983 inquiries, and argues that the availability of lawsuits under section 1983 should be the same as under an implied right of action test. Part I, by offering a working definition of rights, suggests an approach to identifying statutorily created rights.

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9. 111 S. Ct. at 870-72.

10. *See, e.g.,* Wright v. Roanoake Redevelopment & Hous. Auth., 479 U.S. 418 (1987); Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1 (1981); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981); *see also* cases cited *infra* notes 163-64, 170.

11. 448 U.S. 1 (1980).

12. Section 1983 cases are a major source of federal civil rights litigation; one study estimated that "constitutional torts," of which § 1983 cases comprise the greatest proportion, account for approximately half of all civil rights claims. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation,* 72 CORNELL L. REV. 641, 669 (1987).

13. *See infra* notes 149-70 and accompanying text.

14. *See infra* notes 67-83 and accompanying text.

15. *See infra* notes 175, 191-92 and accompanying text.

Part II discusses the evolution of the Court's implied right of action jurisprudence, and explores several explanations for the Court's hesitancy to create implied rights of action. Part III examines the influence of the Court's implied right of action test on its jurisprudence of rights under section 1983. Part IV applies these arguments to criticize Professor Henry Monaghan's recent examination of the jurisprudence of rights in *Wilder* and *Golden State Transit.*

This Note concludes that the Court's treatment of section 1983 has been inconsistent with its approach to implied rights of action. The Court has been far more permissive in allowing private enforcement of statutes where section 1983 applies, basing its distinction on the explicit authorization of private actions contained in section 1983.[16] This Note argues, however, that a federal statute should create the same principal rights and remedies regardless of whether section 1983 applies. Because section 1983 conditions a cause of action on the existence of rights in the plaintiff, a cause of action should exist under section 1983 if and only if the relevant statute would create an implied right of action. As a matter of sound jurisprudence, the inquiry as to whether a plaintiff has a right and whether he can bring a lawsuit must be one and the same.

I. Defining Rights: Realist Advice

A. *Rights and Remedies*

By conditioning a plaintiff's cause of action on violation of his rights, section 1983 raises a fundamental question: What is a right? While defining rights is an impossibly complex task for a student Note,[17] any interpretation of section 1983 demands at least a working definition. Section I.A summarizes the arguments of Realist legal philosophy, which establish that a plaintiff's rights are always coextensive with the remedies she can obtain from the officials of the state. Section I.B relates the Realist notion of rights to the concepts of separated powers and judicial review.[18]

Section 1983's reference to rights is obviously limited to legal rights, as opposed to moral rights, and any definition of legal rights must first explore that difference. One of the primary aspects of the Realist movement was its demand that moral and legal rights be kept rigidly distinct. As Justice Holmes explained in *The Path of the Law:*

> The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get

16. *Wilder,* 110 S. Ct. at 2517 n.9.

17. *Cf.* 4 Roscoe Pound, Jurisprudence 56 (1959) ("There is no more ambiguous word in legal and juristic literature than the word right.").

18. The later parts of this Note apply these Realist insights to the issue of statutorily created rights and rights within the meaning of section 1983.

> the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But . . . a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.[19]

Holmes' understanding of rights may be illustrated by basic contract law, which demonstrates the difference between moral rights and legal rights in the context of promises. For example, assume *B* wishes to sell his farm, and *A* desires to purchase it. Any number of moral obligations may prompt *B* to make the sale to *A:* *A* may be a relative or close friend, *B* may owe her a great debt of gratitude for past favors. Yet *A* only has a legal *right* to *B*'s performance when *B*'s action becomes mandatory, that is, where *B* has made a promise supported by consideration and binds himself to the contract. If *B* makes a promise but does *not* receive consideration from *A, B* may still have a moral duty to keep the promise, and *A* may correspondingly have a moral right to the land. As long as *B* receives no consideration, however, his promise creates no legal liability.[20]

Even if *A* and *B* form a contract, numerous provisions of contract law dealing with remedies may limit *A*'s ability to compel *B*'s performance. For example, if *A* and *B*'s contract were for goods, not land, *A* might not be able to compel specific performance and acquire the actual goods; she may have to accept compensation in damages should *B* breach the contract.[21] Another of the achievements of the Realist movement was to demonstrate that in this circumstance, the gap between what *A* has contracted for and the remedy she can obtain in court should be conceived as a difference in *A*'s rights, not simply as a difference in remedies. The identification of rights and remedies was directly linked to the conceptual separation of law and morality. Because morality is different from legality, the Realists argued, any discourse concerning whether a legal right exists must focus not on the moral relations between individuals that underlie a legal dispute, but on the manner and extent to which the law has recognized these moral interests.

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19. O.W. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 458 (1897).

20. The above account of rights would be incomplete if it simply required *B*'s action to be mandatory in a general sense. The mere fact that one person's action is mandatory does not give all other people a right to that action. *B*'s selling the farm is made mandatory by her promise for consideration, but only with respect to *A,* the promisee. *C,* who is not a party to the contract, generally has no right to *B*'s performance. *C* may, of course, have an interest in *B*'s performance — for example, he may sell farm tools and have special contacts with *A.* Yet if the contract was not made expressly for *C*'s benefit, he has no right to enforce it. In common law, as in statutory law, the question of whether a person has a right is indistinguishable from the question of whether he has standing to enforce an obligation. *See infra* notes 108-09 and accompanying text.

21. *See* LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 271-72 (4th ed. 1981); *see also* U.C.C. § 2-716 (1990).

Karl Llewellyn summed up the Realist position in *Bramble Bush.* Llewellyn wrote: "The cynic . . . says: a right is best measured by effects in life. Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."[22] Llewellyn's point was that where an individual cannot obtain real relief on the basis of a law, that law cannot create rights for him.[23]

Llewellyn's argument that rights are identical with remedies derived its force from his focus on the role that the state[24] — through the courts — plays in the maintenance of systems of private rights. A Realist would point out that a conception of rights that only describes legal relations between two parties is incomplete; the transaction between *A* and *B* also creates a legal relationship between *A* and the state, which is obligated to enforce the contract. By committing itself to enforce the contracts made between parties, the state creates a legal right to such enforcement. Conversely, if *A* cannot enforce her claim through state coercion, her right would recede to the status of an interest or moral right.[25]

Once all legal rights are traced to the state, the identification of rights with remedies becomes persuasive. If the state gives with one hand — that is, creates a right — but takes away with the other — by withholding from the rightholder any remedy — the state has in reality created no right at all. The statement that *A* has a right to the farm presupposes the existence of a coercive regime of remedies by which the state enforces contracts. *A*'s legal right against *B* consists in the state's obligation to afford *A* due process of law by enforcing her contract.

The identity of rights with remedies is thus intimately connected with a notion that there are no truly private legal rights.[26] A scheme of private rights differs from other rights only in that some antecedent public act — for example, the state's recognition of a cause of action to enforce contracts — gives private parties the authority to create legal relationships.[27] Because every legal right depends on state interven-

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22. KARL N. LLEWELLYN, BRAMBLE BUSH 94 (1960).

23. *See* Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step,* 30 COLUM. L. REV. 431 (1930); GEORGE C. CHRISTIE, JURISPRUDENCE 790 (1973) ("[T]he legal realists quite rightly castigated as just plain nonsense" the notion of " 'rights without remedies.' ").

24. *State* is used in this discussion in the abstract sense of political entity, not in the context of American federalism.

25. *See, e.g.,* O.W. HOLMES, JR., THE COMMON LAW 214 (1881) ("Just so far as the aid of the public force is given a man, he has a legal right . . . .").

26. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1195, 1308-12 (1982); *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law,* 88 COLUM. L. REV. 1432, 1437 & n.21 (1988) (noting that an array of common law "private" rights constitutes a regulatory system, in which the state is a participant through its court-ordered enforcement of the "natural" distributional scheme).

27. *See* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN

tion, an individual's real rights rest in the ability to obtain enforcement of duties which the state has either prescribed directly, or allowed individuals to impose on themselves through private agreements.[28]

B. *Rights, the Rule of Law, and Judicial Review*

Realism's argument that moral rights differ from legal rights, coupled with its insistence that what the state *does* about a dispute determines the rights of the parties, raises a disturbing question: Can the state's action — that is, what it *does* — ever violate a person's legal rights? Intuition suggests that if actual practices determine legal rights, the state's deviation from a well-established practice ought to be defined as a violation of rights, not an alteration of them. Indeed, the legal rights of the parties in the above example could not be explained fully without referring to some *obligation* of the state to adhere to the past practice of enforcing contracts. For the Realist, the *legal* rights of private parties depend paradoxically on the *moral* obligations of the state.[29]

Realism notoriously ignored this consequence of its initial insights and fell into excessive emphasis on the law as a prediction of what the state's officials, especially judges, would do *in fact,* regardless of legal obligations.[30] Legal philosophers reacted to this Realist error by redefining law not as consisting of the raw actions of state officials, but their rule-directed actions. Although this question of legal philosophy remains open, in other than very extreme circumstances a state's arbitrary and unjust actions are still considered "legal." Yet the notion of the rule of law, and of a well-developed legal system, requires that a state's officials consider its laws morally binding.[31] The state must keep its promises, decide like cases alike, and conform to its own laws; when faced with extreme deviations from the rule of law, the citizen may lose her obligation to treat the state's directives as law.[32] The basic Realist point remains: to assess legal rights, one must inquire

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THE MAKING AND APPLICATION OF LAW 145-46 (tent. ed. 1958); H.L.A. HART, THE CONCEPT OF LAW 27-28 (1961) (discussing laws that confer "legal powers" upon individuals to "create . . . structures of rights and duties within the coercive framework of the law").

The characterization of these private lawmaking capacities as involving rights blurs the traditional distinction between rights and powers, the latter being defined as "a legally recognized or conferred capacity of creating, divesting, or altering rights, powers, and privileges and so of creating duties and liabilities." 4 POUND, *supra* note 17, at 93.

28. *Cf.* 4 POUND, *supra* note 17, at 43 (noting that historically, actions of courts gave rise to the concept of causes of action, which in turn created the notion of duty, and finally "a correlative right was found by jurists behind the duty"); *see also* Llewellyn, *supra* note 23, at 435-38 (same).

29. *See* Lon L. Fuller, *Reason and Fiat,* 59 HARV. L. REV. 376, 386-89 (1946).

30. *See, e.g.,* CHRISTIE, *supra* note 23, at 785-87.

31. HART, *supra* note 27, at 132-37 (stating that in legal systems, individuals "continuously express in normative terms their shared acceptance of the law as a guide to conduct").

32. *See* LON L. FULLER, THE MORALITY OF LAW 38-44, 122-23 (rev. ed. 1969) (discussing degrees of "legality)

into what the lawmaking organs of the state have resolved to do about a dispute, not into the parties' relative moral merits. Yet the state's decision takes the form of a rule, from which it cannot deviate arbitrarily.

The commitment to the rule of law in the modern American constitutional design is reflected in an institutional division of labor designed to avoid the failure of the state to fulfill its moral obligation to obey its own laws. The legislative, executive and judicial branches are conceptually all part of one state. The institution of judicial review, however, sets the judiciary apart from the state and ensures that where the legislative and executive branches have made laws, an independent judiciary is available to enforce them.[33] The judicial process enables litigants to ensure that the state's moral obligation to obey its laws is enforced by the state itself.

The practice of judicial review in the American legal system, in statutory and administrative as well as constitutional cases, was established by *Marbury v. Madison.*[34] In *Marbury,* the plaintiff William Marbury sued to compel Secretary of State James Madison to deliver the plaintiff's commission as a federal judge. In assessing the merits of Marbury's claim, Justice Marshall rejected an analogy to property law that would have required that the commission be delivered before Marbury's right to it could vest. Instead, Marshall established a test for determining whether a policymaking body's official action had created a right: he argued that because the policymaker had performed its last discretionary act, it had formed a legal commitment to act that the judiciary could enforce.[35] Marshall argued that because Marbury had a right to his commission, the rule of law would be undermined unless he could sue for its delivery: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[36]

The decision in *Marbury* is often associated with the maxim *ubi ius, ibi remedium,*[37] "wherever there is a right, there is a remedy."[38]

33. *See id.* at 81-82.

34. 5 U.S. (1 Cranch) 137 (1803).

35. The conclusion that this right necessitated a cause of action, and that a court of competent jurisdiction would have the power to award relief, led Marshall to the more famous conclusion that the statute creating original jurisdiction in the Supreme Court was unconstitutional. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 6-8.

36. 5 U.S. (1 Cranch) at 163.

37. *See, e.g.,* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts,* 71 CORNELL L. REV. 501 (1986).

38. Marshall stated the maxim in English, noting that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." 5 U.S. (1 Cranch) at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400 n.3 (Harlan, J., concurring).

In stressing the congruence between rights and remedies, Marshall expressed in a different context the Realist insight that deprivation of a remedy is deprivation of a right. Both the Realists and Marshall urged that the existence of a right turns on the real behavior of state officials. In the case of the Realists, the rights at issue were generally common law, judicially created rights; the Realist's point was that judicial acknowledgement of abstract "rights" that parties could not enforce in court was nonsense. In *Marbury,* Justice Marshall argued that it was equally irrational to suppose that the executive was acting through law in appointing Marbury, if courts could not hold the executive to conform to such law.[39]

In sum, the Realist theory of the relationship between law and morality establishes that the actions of the state taken pursuant to legal rules determine legal rights. It forecloses any attempt to argue that a right exists even though the state does not provide a legal remedy. A *moral* right may exist even if a legal remedy does not accompany it, but a legal right cannot so exist, because it is identical with a legal remedy.

C. *Rejecting Any Distinction Between Rights and Remedies*

Even if the separation between moral and legal rights is accepted, however, one might still argue against the complete identity between legal rights and remedies. This section extends the basic Realist thesis to reject other possible attempts to distinguish rights and remedies. One conventional view is that rights and remedies are linked, but are not identical. This argument may take two forms. First, rights may be characterized as stemming from the general standards imposed by a state, whereas remedies involve a court's or an agency's discretionary implementation of those standards. Similarly, one might argue that rights can be located in a statute's purposes or aims, and that remedies are the implementation of these purposes by a court. This second point corresponds to a jurisdictional allocation: legislatures create rights, through laws; but courts provide remedies consisting of various means of enforcement.

With respect to the first distinction, the Realist would accept the characterization of statutory standards, so long as they were enforceable, as rights. To the extent a law grants discretion to an official, however, the range of remedies ceases to be constrained by rights; the notion of discretion implies that the parties have no legal claim to a decision either one way or another.[40] Before President Adams exer-

39. *Cf.* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 199-200 (10th ed. 1959) (stating that "there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced," and that "the statesmen of America have shown unrivaled skill in providing means for giving legal security to the rights declared by American constitutions").

40. *See* HART, *supra* note 27, at 121-32. *But see* RONALD DWORKIN, TAKING RIGHTS SERI-

cised his discretion to appoint Marbury, Marbury had no right to a commission; after that discretion had been exercised, he did. In accordance with the demand of the rule of law that like cases be decided alike, a judgment as to what is reasonable in one case may bind a future judgment of reasonableness in a similar case. Yet when a court or agency makes a discretionary judgment with respect to an open-ended standard, it is more properly conceived of as making rights, not exercising a constrained remedial authority.

Similarly, for the Realist the purposes motivating a statute are like the moral rights underlying legal disputes between private parties;[41] purposes by themselves do not create legal rights. One may agree that "statutory language cannot be intelligently interpreted in isolation from the background understandings from which it arises"[42] without conceding that because legal rights are always defined by texts, the purpose of a law is itself a law, or that parties have legal rights that the purposes of statutes be fulfilled. Even though "[t]he demarcation between 'statutory interpretation' . . . on the one hand, and judge-made law on the other, is not a sharp line,"[43] they do differ.[44] Perhaps the best evidence for this distinction between interpreting law and making it is that courts themselves frequently distinguish statutory interpretation from implementing statutory purposes by making new law.[45]

One can likewise insist on a distinction between the purpose of a statute and the rights it creates, and yet accept that a statute might create rights by endorsing certain goals. For example, a statute creat-

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OUSLY 31-39 (1977) (arguing that application of principles is not properly described as "discretionary").

41. *See supra* notes 19-20 and accompanying text.

42. Stewart & Sunstein, *supra* note 26, at 1229 (footnote omitted).

43. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988) [hereinafter HART & WECHSLER].

44. *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective,* 83 NW. U. L. REV. 761, 769-70 (1989); Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg,* 83 NW. U. L. REV. 853, 856-58 (1989); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation,* 87 MICH. L. REV. 20, 60 (1988) ("Nautical interpretation" approach "does not ask the interpreter to undertake the legislative task of devising public policy."); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?,* 78 MICH. L. REV. 311, 331-36 (1980) (The distinction between common law and statutory interpretation "is entirely one of degree," but this does not "deny any meaningful distinction between statutory interpretation and common law adjudication."); *cf.* RONALD DWORKIN, LAW'S EMPIRE 404-07 (1986) ("The law we have, the actual concrete law for us, is fixed by inclusive integrity": "inclusive integrity" in part "define[s] [a judge's] powers against those of other institutions and officers."). Even an advocate of candid judicial lawmaking such as Professor William Eskridge apparently sees a distinction between interpreting and making law; he has argued that "moderate contextualism does not assert that the interpreter is entirely unconstrained," and that "[i]n most cases . . . the text and the interpretive history of the statute will provide relatively determinate answers, or at least narrow the range of permissible debate." William N. Eskridge, Jr., *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479, 1510-11 (1987) (footnote omitted).

45. *See, e.g.,* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 n.4 (1971) (Harlan, J., concurring).

ing an administrative agency might require that the rules an agency promulgates address certain basic goals, yet leave the agency with significant discretion as to how to implement those goals. Such a statute still constrains discretion, and thus creates legal rights to some degree: if the agency wholly ignores the statutorily endorsed goals, an individual may obtain judicial relief against the agency action.[46] In other words, the statutory purpose in this circumstance actually creates a right of access to an agency willing to use its discretion to serve the statute's goals.[47] The basic Realist point remains intact — the agency's good faith pursuit of the statute's goals, rather than the goals themselves, constitutes the rights created by the statute.

II. IMPLIED RIGHTS OF ACTION

This Part applies the Realist identity between rights and remedies to critique the Court's implied right of action jurisprudence. Section II.A examines the relationship between implied rights of action and common law adjudication. Section II.B describes the Court's early approach to implied rights of action, in which the Court endorsed the use of implied rights of action to supplement statutory rights. Section II.C discusses the Court's retreat from its expansive approach to implied rights of action, beginning with the influential case *Cort v. Ash.*[48] It then recounts the transition from *Cort* to the current doctrine, which disallows implied rights of action unless Congress specifically intends that they be provided. The section argues that this jurisprudence of statutory rights erroneously separates rights and remedies.

Section II.D argues that the theory behind the congressional intent test undermines the notions of judicial review that have prevailed since *Marbury v. Madison.* Finally, section II.E offers an alternative explanation for the Court's retreat from implied rights of action that is consistent with a Realist theory of rights. It draws an analogy to the law of standing to argue that the Court justifiably places a heavy burden on a plaintiff seeking to establish a cause of action for damages.[49]

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46. These ideas are expressed in familiar doctrines of administrative law. The nondelegation doctrine affirms that a statute may grant an agency broad discretion, so long as "it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion," and "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring). The notion of "hard look" judicial review of discretionary administrative decisions in turn establishes that an agency's regulations may be overturned where the agency "entirely fail[s] to consider an important aspect of the problem." Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

47. Professor Philip Soper has advocated a similar characterization of the limits of the "legal" authority of the state; Soper argues that the directives of the state are legal so long as the officials responsible for them are acting in *good faith* pursuit of the interests of the community. *See* PHILIP SOPER, A THEORY OF LAW 80-83, 117-22 (1984).

48. 422 U.S. 66 (1975).

49. This Part faces an inescapable problem of terminology. As this Note has argued in Part

A. *State and Federal Contexts*

Implied rights of action are a familiar feature of state tort law. In a negligence action, for example, safety statutes such as speed limits create implied rights of action by serving as the standard of care. Although phrased differently, judicial application of the statute in a tort claim is functionally the same as establishing a right of action for damages under the statute itself. In both cases, violation of the statute alone suffices to establish liability.[50]

The substitution of the standard of care terminology for that of implied rights, however, emphasizes that application of the statute to create a damage remedy may have nothing to do with rights per se: the rule of law may not require it. Instead, application of a statute to provide a standard of care often results from a judicial policy choice to make law through common law adjudication. The legislature, for example, may have decided to deter risky activity by making speeders criminally liable. Courts with the authority to assess reasonable care in negligence claims may decide that the legislative purpose could best be furthered by making speeders civilly liable as well, thus increasing the level of deterrence.[51] The rule of law does not mandate such a choice: the state may not have to award damages to those injured by violation of the statute, only to criminally prosecute offenders. Yet in its common law capacity, the court may determine that such a policy is desirable.

The earliest Supreme Court case approving an implied right of action closely resembled the application of a statute as a standard of care in a negligence action.[52] In *Texas & Pacific Railway Co. v. Rigsby*,[53] the plaintiff was injured when a defective ladder caused him to fall off a boxcar. The ladder violated the Federal Safety Appliance Act be-

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I, rights and remedies are identical. The vast majority of the language used by the Court in its implied right of action cases, however, separates the two notions. Although this Part will argue that such separation is erroneous, it is impossible to discuss the cases without adopting their terminology. Thus, this Part seeks initially to discuss the implied right of action cases in their own terms, yet then establish that the separation of rights and remedies is illogical and obscures the real issues behind the implied right of action cases.

50. *See, e.g.*, Martin v. Herzog, 126 N.E. 814 (N.Y. 1920); RESTATEMENT (SECOND) OF TORTS § 874A (1977); *see also* Johnson v. Clark, 418 N.W.2d 466, 468 (Mich. Ct. App. 1987) (stating that use of a statute that does not create an implied right of action for damages to establish duty in a negligence case is "trying to do indirectly what [plaintiff] may not do directly."); *see generally* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 62-75 (4th ed. 1987). Professor Foy points out that the usual application of a statute as the standard of care within a negligence action is backwards: originally, the statute provided the cause of action itself. Only in the nineteenth century did an action on the statute become confused with an application of the statute as standard of care. Foy, *supra* note 37, at 540-46.

51. *See* Stewart & Sunstein, *supra* note 26, at 1296-307.

52. *See* Paul Wartelle & Jeffrey H. Louden, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 492-93 (1982).

53. 241 U.S. 33 (1916), *overruled by* Cort v. Ash, 422 U.S. 66 (1975).

cause the boxcar did not have "secure grab-irons or handholds."[54] The Court found that the statute created a federal cause of action for the plaintiff, reasoning that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ."[55]

In areas regulated by the states, both courts and legislatures exercise policymaking authority.[56] In the federal arena, however, the federal courts possess a much more restricted authority to make common law. When a federal court faces a lawsuit based on a federal statute, it cannot simply apply the statute as the standard of care within a more general form of action such as tort, because these causes of action are the province of state law. After the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins,*[57] therefore, the viability of decisions such as *Rigsby* was questionable to the extent the decisions depended on a federal common law of tort.[58]

B. *Rights with Added Remedies: The Expansive Approach*

Implied rights of action survived *Erie* because the federal courts continued to exercise a different sort of common law power. Instead of applying a statute within a preexisting form of action, the Court interpreted the statute and fashioned remedies designed to further the statute's *purpose.* The principal example of this approach was *J.I. Case Co. v. Borak.*[59] In *Borak,* the plaintiff was a stockholder in a corporation that had merged on the basis of a deceptive proxy solicitation. The plaintiff argued that the proxy solicitation violated the Securities Exchange Act, and should therefore render the defendant liable for the resulting damages. The Court upheld the implied cause of action, stating that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[60]

In 1971, the Court established a complement to *Borak* in the constitutional context in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[61] In *Bivens,* the Court inferred a cause of action for damages directly from the Fourth Amendment's guarantee of free-

54. 241 U.S. at 37.

55. 241 U.S. at 39.

56. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law,* 99 HARV. L. REV. 881, 898 (1986); Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action,* 94 YALE L.J. 1144, 1147 (1985).

57. 304 U.S. 64 (1938).

58. Stewart & Sunstein, *supra* note 26, at 1223-25; *see also* Cannon v. University of Chicago, 441 U.S. 677, 742-47 (1979) (Powell, J., dissenting).

59. 377 U.S. 426 (1964).

60. 377 U.S. at 433.

61. 403 U.S. 388 (1971).

dom from unreasonable searches and seizures. The majority opinion cited *Borak* and relied upon the Court's general authority to enforce legal rights "through a particular remedial mechanism normally available in the federal courts."[62]

Justice Harlan's concurring opinion in *Bivens* discussed in greater detail the source of the Court's authority to create remedies. Harlan argued that "the presence of a substantive right derived from federal law"[63] justified the Court's use of remedial power. Contrary to the Realist thesis, the Court found substantive rights not merely in the explicit directives of the Constitution, but also in the policy underlying the directive: "The notion of 'implying' a remedy, therefore, as applied to cases like *Borak,* can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law."[64]

When Justice Harlan used the terms *substantive right* and *substantive social policy* he did not mean that the damage action created in *Bivens* could only be justified by being necessary to preserve the plaintiff's Fourth Amendment rights.[65] Instead, Harlan relied on evidence of "substantive social policy" to impose some limit to the Court's use of discretion to enforce constitutional provisions. He acknowledged that the Court was making law,[66] but implied that courts' discretionary power would not intrude on legislative prerogatives because courts would apply only traditionally available remedies and only to further a substantive social policy. In this sense, the field of traditionally available remedies served for Harlan the same function as does the common law negligence action for a state court using a statute as a standard of care: it circumscribed a general area of judicial responsibility in which the courts could further the policies embodied in statutes.

C. *Rights Without Remedies: The Restrictive Approach*

1. Cort v. Ash: *The Beginning of the End*

The Court did not long favor the liberal approach to creation of implied rights of action. In 1975, the Court ushered in a new test for determining whether implied rights of action existed. In *Cort v. Ash,*[67] the plaintiff claimed that the corporation in which he held stock had

62. 403 U.S. at 397.

63. 403 U.S. at 400 (Harlan, J., concurring).

64. 403 U.S. at 403 n.4 (Harlan, J., concurring) (citation omitted).

65. This was the view of both the Second Circuit and the government; the majority and Justice Harlan rejected the argument. 403 U.S. at 397 (majority opinion); 403 U.S. at 406-07 (Harlan, J., concurring).

66. 403 U.S. at 402-03 n.4, 405 n.6, 407 (Harlan, J., concurring).

67. 422 U.S. 66 (1975).

engaged in illegal political activity. The director of the corporation had included a politically oriented mailing with the stockholders' dividend checks, allegedly in violation of a federal criminal statute forbidding corporations from making contributions to federal election campaigns. The Court held that the statute did not imply a right of action for damages. Justice Brennan's majority opinion created a new four-part test for the creation of implied rights of action:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[68]

The plaintiff failed even the first element of this test, since the Court found that the statute was not enacted for the "especial benefit" of corporations' shareholders; their protection was "at best a secondary concern" of the statute.[69] From a Realist perspective, however, the remarkable aspect of *Cort* was that, had the plaintiff met the first part of the test, the Court would have proceeded with the other three parts, especially the element of congressional intent.[70] *Cort* implied that the mere existence of a right was not enough to enable the plaintiff to sue, and that courts would not enforce rights absent congressional intent to create a remedy. The Realist theory of rights and remedies establishes that to speak of a legal right without a remedy is nonsense: the state's ultimate actions, through rules, measure the limits of both. Either the congressional intent test or the especial benefit test may have made sense by itself, but when the Court split the difference by using both tests, it reintroduced a concept the Realists had banished from legal theory: the unenforceable right.

2. *The Ascendancy of the Congressional Intent Test*

The extent to which the Court had accepted the idea of unenforceable rights became evident in *Davis v. Passman,*[71] another constitutional implied right of action case, decided eight years after *Bivens.* The plaintiff, a woman fired from her job on a Congressman's staff, brought an action against him under the Fifth Amendment. The Court found a cause of action, justifying its decision in part on the Court's special responsibility for enforcing the Bill of Rights. How-

68. 422 U.S. at 78 (citations omitted).

69. 422 U.S. at 81.

70. *See* Foy, *supra* note 37, at 564-65.

71. 442 U.S. 228 (1979).

ever, the Court distinguished a plaintiff's rights under a statute from the plaintiff's ability to enforce the statute:

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions or other public causes of action[ ].[72]

Implied right of action doctrine after *Cort* and *Davis* thus incorporates the notion that courts can restrict remedies without impairing rights. The Court should have recognized that statutory rights are not "embedded" in complex regulatory schemes, that regulatory schemes — the mechanisms available for real, substantive relief — are themselves rights, and that the limitations on those schemes also limit the rights those schemes create.[73] As *Davis* demonstrates, however, the Court instead chose to engage in a discourse about whether rights were enforceable.

In a series of statutory implied right of action cases after *Cort,* the congressional intent branch of the *Cort* inquiry increasingly displaced the competing notion that rights could be enforced without specific congressional intent. Although the Court continued to apply *Cort,* it began to focus exclusively on the factor of congressional intent regarding remedies. In *Cannon v. University of Chicago,*[74] the Court characterized the question of whether an implied remedy was available as one of "statutory construction," concerning whether "Congress intended to make a remedy available to a special class of litigants."[75] *Cannon* upheld the cause of action, over a strong dissent from Justice Powell.

Justice Powell's reluctance to enforce congressional purposes became more influential, and the Court further restricted implied rights of action in subsequent cases. *Touche Ross & Co. v. Redington*[76] held that section 17(a) of the Securities Exchange Act of 1934 did not create an implied right of action against an accountant for improper auditing of financial records which the Act required to be disclosed. In rejecting the plaintiff's claim, Justice Rehnquist's opinion for the Court demonstrated his belief that even the mixed approach of *Cort* improperly favored implied rights of action. He argued that although *Cort* required a four-factor test, "the Court did not decide that each of

72. 442 U.S. at 241 (citations omitted).

73. *See infra* notes 177-90 and accompanying text.

74. 441 U.S. 677 (1979).

75. 441 U.S. at 688.

76. 442 U.S. 560 (1979).

these factors is entitled to equal weight."[77] "The central inquiry," as Justice Rehnquist reformulated the test, was "whether Congress intended to create, either expressly or by implication, a private cause of action."[78]

Touche Ross effectively shifted the Court's emphasis away from the notion that the existence of a statutory right necessitated some form of action to enforce that right. Whether a right existed or not, *Touche Ross* dictated that congressional intent would control an individual's ability to bring a lawsuit. Thus, although Justice Brennan concurred in the holding of *Touche Ross,* his separate opinion argued that the statute "clearly [did] not 'create a federal right in favor of the plaintiff.' "[79]

California v. Sierra Club,[80] decided two years later, returned to the *Cort* test. In *Sierra Club,* the Court refused to find an implied right of action under the Rivers and Harbors Appropriation Act. The Court of Appeals had determined that the plaintiffs met the especial benefit test of *Cort* because Congress had enacted the RHAA for the benefit of those who would suffer "special injury" from unauthorized obstruction of a navigable waterway. Justice White, reversing the Court of Appeals, stated that such a view made the "especial benefit" requirement meaningless. He then recharacterized the issue: "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries."[81] Justice White's opinion held on the first element of *Cort:* it focused on intent to benefit the plaintiffs, not on congressional concern for the mechanics of lawsuits.[82] As long as the intent to benefit the plaintiff was clear enough, the ability to sue on the statute would follow.[83]

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77. *Touche Ross,* 442 U.S. at 575.

78. 442 U.S. at 575.

79. *Touche Ross,* 442 U.S. at 579-80 (Brennan, J., concurring) (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979) [hereinafter *TAMA*], followed immediately after *Touche Ross* and solidified its holding. Citing *Cannon* and *Touche Ross,* Justice Stewart stated that "what must ultimately be determined" in an implied right of action test "is whether Congress intended to create the private remedy asserted." *TAMA,* 444 U.S. at 15-16. The *TAMA* and *Touche Ross* approach was echoed in the next term by Universities Research Assn. v. Coutu, 450 U.S. 754 (1981).

80. 451 U.S. 287 (1981).

81. *Sierra Club,* 451 U.S. at 294 (citation omitted).

82. Needless to say, the four Justices who concurred only in the judgment argued that Justice White had placed "somewhat more emphasis on Cort v. Ash" than was appropriate in light of *Touche Ross. Sierra Club,* 451 U.S. at 302 (Rehnquist, J., concurring).

83. Somewhat evasively, Justice White professed to accept that the focus of the implied right of action test was whether Congress "intended to create a private right of action," *Sierra Club,* 451 U.S. at 293, but then argued that this intent was assessed through the *Cort* factors, the most prominent of which was the intent to benefit the plaintiff! Universities Research Assn. v. Coutu, 450 U.S. 754, 770 (1981), had offered the same convoluted approach to *Cort,* but focused on specific intent to provide for private lawsuits. *Coutu's* handling of *Cort* was duplicated in Texas Indus. v. Radcliff Materials, 451 U.S. 630, 639 (1981).

The approach of the *Sierra Club* Court is an isolated exception. While never overruled, *Cort* has become obsolete as the Court has focused exclusively on congressional intent to create judicial remedies. *Thompson v. Thompson*[84] demonstrates the extent to which the congressional intent approach has become dominant. *Thompson* held that the Parental Kidnapping Prevention Act,[85] which required states to afford full faith and credit to a valid child custody determination of another state, did not create a private cause of action in federal court to determine which of two conflicting state decrees was valid. The majority stated that a focus on congressional intent "does not mean that we require evidence that Members of Congress . . . actually had in mind the creation of a private cause of action."[86] This view prompted Justice Scalia to argue, with Justice O'Connor's endorsement, that such a statement was inaccurate in that "we effectively overruled the *Cort v. Ash* analysis in *Touche Ross* . . . ."[87]

Thompson was apparently a clear case, with no dissenters. Yet even the suggestion that the Court could allow a private cause of action without its having been actually in the mind of the legislature drew objections from two members of the Court. The line of cases since *Touche Ross,* then, demonstrates that the Court has abandoned the notion that a plaintiff can be entitled to a judicial remedy simply by having a right. The legislature must also specifically intend that the right be accompanied by a remedy to be enforceable in court.

D. *Theoretical Implications of the Congressional Intent Test*

As formulated in *Cort,* the test for implied rights of action seemed to embrace nonsensical notions; the need for legislative intent that rights be enforceable, and the concomitant notion of unenforceable rights, directly contradicts sound Realist concepts of rights. This section reexamines the elements of *Cort* to demonstrate that the especial benefit test and the inquiry into congressional intent stem from two competing, irreconcilable concepts of the conditions under which a court may enforce the law. The especial benefit test maintains the traditional prerogative of the judiciary to enforce rights without congressional authorization. The congressional intent test, on the other hand, would take away from the judiciary its role as enforcer of the rule of law. Either the congressional intent or the rights element of *Cort* eventually had to predominate, because in mixing the two elements, *Cort* embraced a contradiction.

One can draw an analogy between the dispute over the creation of

84. 484 U.S. 174 (1988).

85. 28 U.S.C. § 1738A (1988).

86. *Thompson,* 484 U.S. at 179.

87. *Thompson,* 484 U.S. at 189 (Scalia, J., concurring). Citing Justice Scalia's reasoning, Justice O'Connor also concurred separately. 484 U.S. at 188 (O'Connor, J., concurring).

implied rights of action and the choice between two possible standards for determining whether an enforceable contract exists. Requiring that Congress intend to allow parties to bring lawsuits to enforce their rights is like requiring that, in addition to intending to make a contract, parties to a contract also intend to allow themselves to be sued.[88] One might argue that a party should not be legally liable under a contract unless the party signs a statement specifically affirming his intent to submit possible disputes to the jurisdiction of a court. The more plausible argument, however, is that the availability of court enforcement is so implicit in the notion of contractual right as to obviate any need for such a specific clause. As with any legal right, a contractual right as a matter of legal terminology implies the availability of court procedures to enforce the right.[89]

Under the first element of *Cort,* Congress creates rights for a party when it enacts a law for the especial benefit of that party.[90] As in *Marbury v. Madison,*[91] the especial benefit element of *Cort* determines whether the relevant statute establishes a commitment by the state to the plaintiff. Courts can imply a right of action, because a legal commitment to certain beneficiaries of the law — and the likelihood of justifiable reliance on that law by its beneficiaries — can be inherent in the relationship of the law to the social problem the legislature intended it to address. In turn, the notion of judicial review originating in *Marbury* suggests that if a right exists, a remedy must be available. Without a judicial remedy a putative right is unenforceable, and therefore not a right at all; in such a case the state undermines the rule of law by failing to keep its commitments. If rights are really to exist, a remedy must be available regardless of whether Congress "intended" that the rightholder be able to enforce her right.

In contrast, the intent branch of the *Cort* inquiry rejects the notion that rights of action can be implied at all. It posits that a lawsuit may be brought only when Congress intends that a specific party be able to enforce a specific statutory interest. The status of the party as a member of a general class Congress intended to benefit is irrelevant to this

88. The former doctrine that gave special status to sealed documents provides an example of this reasoning; the seal alerted the parties to the legal consequences of their statements. *See* FULLER & EISENBERG, *supra* note 21, at 15-17.

89. The "implied" view of the creation of rights becomes superfluous in the face of clear indications of intent in either direction. If Congress authorizes certain parties to bring lawsuits as private attorneys general, it is unnecessary to inquire, as *Cort* does, whether the statute also creates rights. Similarly, if Congress has explicitly precluded private enforcement, it has clearly limited any substantive right which would otherwise exist.

90. In light of this Note's earlier discussion of the implicit role of the state in all private rights, the wording of this first element of the *Cort* test is revealing. Although a private right of action purports to define the legal relations between two private parties, in fact the test is whether the *state* has passed a law for the benefit of the plaintiff. *See supra* notes 24-28 and accompanying text.

91. 5 U.S. (1 Cranch) 137 (1803); *see supra* notes 34-39 and accompanying text.

inquiry. Obviously, such requirements for greater specificity must stop somewhere: not even the harshest critics of implied rights of action would suggest that Congress must, for example, denote the authorized enforcers of a statute by name and address. Nonetheless, the intent branch of *Cort* requires that before a court can enforce a law, Congress must explicitly consider and approve the court's doing so.[92]

Taken to its logical conclusion, the congressional intent test would seriously undermine the role of the judiciary in enforcing the rule of law as that role was established by *Marbury v. Madison.* This is evident when one imagines how the congressional intent test would have affected *Marbury* itself. The relevant "statute" was the appointment of Marbury by former President Adams, and the especial benefit to Marbury was quite clear, as Marbury was specifically named in the commission. Justice Marshall found that the rule of law demanded a private cause of action. If he had relied solely on the congressional intent test, however, Justice Marshall would have inquired whether President Adams specifically intended — and just forgot to mention — that Marbury would be entitled to a private judicial remedy to compel the delivery of the commission.

At its farthest extreme, then, the intent branch of the *Cort* inquiry reverses *Marbury*'s traditional presumption that the courts will be available to uphold the rule of law and that legal rights will be enforceable as a matter of course. Instead, the legislature that passes a law must also intend that the law be enforceable, as if a law has no inherent enforceability merely because it is law. The intent of Congress is highly relevant to the question of whether Congress has created a right, just as the intent of the parties is crucial to the question of whether they have formed a contract, but the first element of the *Cort* test already captures this aspect of congressional intent. To demand that a statute satisfy the additional element of intent, and require that the legislature specify the conditions under which a statute can be enforced, is tantamount to removing the judiciary's power to enforce legislative commitments on the judiciary's own authority.

E. *Explaining the Retreat from Implied Rights of Action*

1. *The Rejection of Common Law Power*

However extreme the theory behind the congressional intent test might be, a closer examination of the implied right of action cases reveals that nothing so grand as the rule of law itself is really at issue in the Court's retreat from implied rights of action. Instead, what emerges from an analysis of these cases is that the restriction on im-

92. Given Congress' control over the jurisdiction of the federal courts, one may argue that a statute should not be enforceable in court unless it evidences specific congressional intent to extend jurisdiction. The alternative, more traditional rule requires that so long as a general provision authorizes jurisdiction, a court does have the power to enforce the law.

plied rights of action is aimed at curtailing the court's common law role in making law, not its role in enforcing it.

The vast majority of implied right of action cases decided by the Court in the period between *Cort* and *Thompson* concerned not just any remedy, but causes of action for damages. Unlike Marbury in *Marbury v. Madison,* the plaintiffs in these cases were usually not requesting official compliance with the law. They were requesting monetary compensation for past violations of the law. The damages they requested were not necessary to uphold the rule of law, but were elaborations on the scheme of deterrence established by Congress.

The decision whether to augment a statutory scheme by providing new remedies involves a number of policy considerations.[93] The justification for courts' creation of implied rights of action, therefore, depends not on notions of fairness and the rule of law, but on a higher-order policy choice regarding the distribution of authority among institutions. A court may create damage remedies on a common law basis, as a means of making law; state courts do so regularly. As discussed in section II.A, however, the common law powers of a federal court are different from those of state courts. When the Court incrementally ruled out the creation of damage actions based on federal statutes it was rejecting the proposition that federal courts possessed the discretionary policymaking authority to supplement a statutory scheme by creating damage remedies.

In this respect, *Cort*'s short-lived four-part test was also aimed, like Justice Harlan's notion of "traditionally available remedies,"[94] at carving out an area of common law authority in which federal courts could create new rights based on general statutory purposes. The *Cort* test did not really determine whether Congress had created a right. Instead, it set forth an institutional theory that a federal court could appropriately make law when a damage remedy would further a statute's purpose, when the Court could discern some congressional intent, and when the area was not reserved to state law. At the same time, however, *Cort* was vulnerable to changing theories of institutional competence. The current Supreme Court has resolved the debate over judicial lawmaking in favor of declining to exercise the discretionary authority *Cort* sought to preserve.[95]

2. *Damage Remedies and the Rule of Law*

The rejection of a common law role in creating damage remedies, however, need not imply a wholesale rejection of the courts' power to administer such remedies where they are necessary to uphold the rule

93. Stewart & Sunstein, *supra* note 26, at 1296-300.

94. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 403 n.4 (1971) (Harlan, J., concurring).

95. *See* Louise Weinberg, *Federal Common Law,* 83 NW. U. L. REV. 805, 807-09 (1989).

of law. Just as there is a difference between bald policymaking and statutory interpretation, there is also a difference between the creation of a damages remedy as a matter of policy, and as a matter of fairness. An entitlement conveyed by a law is meaningless unless accompanied by some means to compensate the plaintiff for deprivation of that entitlement. Thus, just as a right to injunctive relief can arise without explicit legislative intent, in the manner contemplated by *Marbury,* so too can a right to damages arise without explicit legislative intent.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,*[96] the Court demonstrated that its willingness to create damage remedies to preserve rights has survived the curtailment of implied rights of action. The plaintiffs in *McKesson* were wholesale liquor distributors who had been subjected to a discriminatory liquor tax that violated the Commerce Clause. Florida law had required that the plaintiffs pay the tax before they could challenge it through litigation; thus, after the tax was declared unconstitutional, the plaintiffs sought compensatory relief.[97] Characterizing the question as whether, under such circumstances, "prospective relief, by itself, exhausts the requirements of federal law," the Court answered no.[98] It held that where prepayment of a tax is required, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."[99]

Perhaps the restrictive attitude toward implied rights of action evident in *Thompson v. Thompson*[100] has foreclosed the creation of similar damage remedies outside the constitutional context. Nonetheless, the Court would appear to lack a clear justification for such a distinction: the duty of the judiciary to enforce the rule of law extends not only to constitutional but also to statutory rights. Indeed, since in the statutory context the legislature retains the ability to remove the substantive basis for the right of action by changing the law, judicial authority to enforce statutory rights is far less problematic than the unreviewable power to enforce the Constitution.[101] Moreover, statutory and constitutional rights cannot be completely separated, because a flagrant disregard by the state of its statutory obligations to a plaintiff often amounts to a deprivation of due process.[102]

Even if damage actions to uphold statutory rights remain a viable possibility, however, two factors are likely to make the courts more reluctant to find that due process or the rule of law necessitates a cause

96. 110 S. Ct. 2238 (1990).

97. *See* 110 S. Ct. at 2251.

98. 110 S. Ct. at 2247.

99. 110 S. Ct. at 2247.

100. 484 U.S. 174 (1988); *see supra* notes 84-87 and accompanying text.

101. Foy, *supra* note 37, at 579-81.

102. *See* Smith v. Robinson, 468 U.S. 992, 1014 n.17 (1984).

of action for damages than they are to find similar entitlements to prospective relief. First, a statutory right entitling the plaintiff to both injunctive relief and damages is simply a more valuable right; a plaintiff is always in a better position when she can secure both future compliance and compensation for past wrongs. A statute can reasonably entitle a plaintiff to prospective relief, yet not provide for retroactive compensation. Similarly, a right to damages might be required for egregious or bad faith violations of a statute, but not for ordinary noncompliance.[103]

Second, granting a damages remedy may require resolution of a wider range of issues than granting injunctive relief. Especially where rights of uncertain economic value are involved, a damages remedy may require the courts to make policy by setting the level of damages and therefore creating corresponding levels of deterrence. Even where a statute requires some right to damages, a court may seek legislative input as to the range of damage remedies. The difficult determination of monetary equivalents might legitimately be reserved to the legislature, and the courts might step in only where the alternative would be legislative inaction and the complete absence of a damages remedy.[104]

For either reason, the courts would likely require a strong showing of statutory entitlement to justify a cause of action for damages. The series of cases from *Cort* to *Thompson* leaves open the possibility that courts will create damage actions where necessary to uphold the rule of law, but will apply a higher standard to test whether due process requires *monetary compensation,* as opposed to prospective relief. If rights and remedies are identical, court must ask what rights — prospective, compensatory, or otherwise — the statute creates, not merely whether a statute creates rights in the abstract.

3. *Implied Rights of Action and Standing*

This section applies the rationalization of the Court's implied right of action cases developed in the previous section, by comparing the Court's jurisprudence of implied rights of action with a closely related doctrine, the doctrine of standing. The Court's series of implied right of action cases has been paralleled by a development in the doctrine of standing to force official compliance with the Constitution and laws

103. *See, e.g.,* Anderson v. Thompson, 658 F.2d 1205, 1214 (7th Cir. 1981) (finding that a damage remedy was not intended absent exceptional circumstances, such as bad faith); Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141, 147 (2d Cir. 1983), *cert. denied,* 465 U.S. 1071 (1984) (finding that Congress intended some relief for harm caused by school official misconduct); *see also* Guardians Assn. v. Civil Serv. Commn., 463 U.S. 582, 597-98 (1983) (White, J.) (denying compensatory relief for unintentional statutory violation); *cf.* Zinermon v. Burch, 110 S. Ct. 975, 982-86 (1990) (discussing test for determining inadequacy of state tort remedy necessary to establish deprivation of due process).

104. *See* Bush v. Lucas, 462 U.S. 367, 378 (1983).

under the Administrative Procedure Act (APA).[105] The APA provides for judicial review of administrative action, upon demand by appropriate beneficiaries of regulatory schemes. The section authorizing judicial review states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[106]

Where a plaintiff may invoke a statute or regulation to determine the outcome of judicial review of agency action (or inaction[107]), that statute or regulation has, in functional terms, created a private right.[108] Thus, although the APA is phrased in terms of "standing" to receive "judicial review," it has been recognized that a test for standing collapses into an inquiry into the existence of a cause of action for injunctive relief against the agency. The determination as to the plaintiff's standing amounts to a preliminary assessment of the merits of the plaintiff's claim.[109]

In fact, the APA language contains a phrase resembling the test for the existence of a right in *Cort v. Ash:* it makes those who have suffered "legal wrong" eligible to sue. The modern interpretation of the APA has not developed around this term, however. Courts have instead relied on the "adversely affected or aggrieved" justification for standing. In *Association of Data Processing Service Organizations v. Camp,*[110] the Court rejected the argument that absent an explicit statutory authorization of standing for those "aggrieved by agency action," a plaintiff must show a "legal wrong" to establish standing. In place of a "legal wrong" test, *Data Processing* set forth a three-part test for standing. The Court first noted that the "cases" and "controversies" provision of Article III required that the plaintiff demonstrate an "injury in fact." Second, in order to meet the "aggrieved" requirement of the APA, the plaintiff had to be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Finally, Congress must not have foreclosed the possibility of judicial review based on the pertinent statute.[111]

In a 1987 decision, *Clarke v. Securities Industry Assn.,*[112] the Court recharacterized the holding and rationale of *Data Processing.* Justice

105. 5 U.S.C. §§ 551-59, 701-06 (1988).

106. 5 U.S.C. § 702 (1988).

107. *See* Stewart & Sunstein, *supra* note 26, at 1208-16, 1267-89 (discussing "rights of initiation" to force agency action).

108. See *supra* notes 21-28 and accompanying text.

109. William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 234-39 (1988); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425, 427-29 (1974).

110. 397 U.S. 150 (1970).

111. 397 U.S. at 152-56.

112. 479 U.S. 388 (1987).

White's opinion stated that the "adversely affected or aggrieved" language could have been read as an injury in fact requirement, but that the *Data Processing* Court had been uncomfortable with the proposition that "Congress actually intended to extend standing to all those suffering injury in fact." He then characterized the "arguably within the zone of interests" test as a "gloss on the meaning of § 702."[113] The gloss was necessary, Justice White argued, because reading the "adversely affected or aggrieved" language as establishing an injury in fact standard would have made the grant of standing unacceptably broad.[114]

By using the zone of interests test as a gloss on section 702, however, the Court has essentially revived the "legal wrong" standard of section 702 in a liberalized form. Just as *Cort v. Ash* used the especial benefit test to determine whether the statute created a right, *Clarke* and *Data Processing* use the zone of interests test to insert a "legal wrong" requirement into the injury in fact test.[115] In both cases, the relevant statute requires some course of action from the defendant (in standing cases an agency, in implied rights of action a private party), but the courts are unwilling to have this law enforced by anyone who might desire to bring a lawsuit. The zone of interest and especial benefit tests limit the class of potential plaintiffs to those whom the statute was genuinely intended to protect.[116] *Cort* characterized the especial benefit test as determining whether the statute created a right in the plaintiff.[117] Simply as a matter of plain meaning, a violated right should be identical with a legal wrong.[118]

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113. 479 U.S. at 395-96.

114. 479 U.S. at 395-96.

115. *See* Fletcher, *supra* note 109, at 234-39. As Fletcher argues, the zone of interests test amounts to a preliminary assessment of whether the plaintiff's legal rights have been violated. Obviously, where a plaintiff's legal rights have been violated, one can just as readily say that the plaintiff has suffered legal wrong.

116. As Professor Fletcher points out, the Court has used "injury in fact" to perform this screening function, even though in reality, anyone who desires to bring a lawsuit is injured in fact by not being able to bring it. Although speaking in terms of injury in fact, the Court has really been concerned with injury in law—that is, those kinds of injury recognized by the law as important enough to be the subject of a lawsuit. *Id.* at 229-34; *cf.* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 915, 965 (1988) (The "crucial threshold question" determining whether an Article III "case" exists is "whether the substantive law creates rights or interests that are assertable by a particular plaintiff.").

Similarly, Professor Monaghan compares the APA standing inquiry with the inquiry as to the existence of a right within the meaning of section 1983. He states that

> [t]he section 702 litigant must still show that she is adversely affected "within the meaning of the relevant statute," a requirement that, after *Lujan*, seems identical to the Court's insistence in *Golden State* that the section 1983 plaintiff must establish that she is more than simply an "incidental" beneficiary of a federal statute.

Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA,* 91 COLUM. L. REV. 233, 258 (1991).

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

118. The Court's rejection of the "legal wrong" language in *Data Processing* was apparently attributable to the narrow interpretation the Court had previously imposed on the doctrine.

The *Clarke* Court noted this parallel with implied right of action doctrine. Instead of regarding the two tests as equivalent, however, the *Clarke* opinion purported to illustrate the leniency of the zone of interests test established in *Data Processing* by contrasting it with the *Cort* test.[119] The Court stated that when applying the "threshold burden" — the first element of the *Cort* test — to an implied right of action, *Cort* was "clearly requiring more" than would be required by the zone of interest test.[120]

One reason a court might require "more" from a plaintiff seeking to establish a claim against a federal agency, as opposed to a claim against a private party, relates to the nature of the defendant. A private litigant's suit against an agency may reflect a private right of action which has simply been channeled through an agency. A successful suit against an agency may result in the agency's granting relief to the plaintiff that resembles that granted by a court at the end of a successful implied right of action case.[121] Situations in which a statute will justify a court in ordering an agency to take action, however, are relatively rare.[122] The greater range of responses available to the agency in ordinary cases justifies a looser test for a right of action against an agency than one against a private party.[123]

The difference between administrative and private defendants, however, does not fully explain the *Clarke* requirement that a plaintiff show "more" to establish a private right of action than to establish standing. In some cases, standing to challenge agency action does approximate the effects of a private right of action. Aside from the private right of initiation just mentioned, standing may also approximate a private right of action when the agency action being challenged takes a highly specific form. For example, in *Clarke* the Court found the plaintiffs to have standing to challenge the Comptroller of the Currency's decision to grant to two national banks a license permitting them to establish or purchase discount brokerage subsidiaries.[124] Since the brokerages had to be licensed to operate and the plaintiffs could challenge the decision to grant the license, the plaintiffs effectively had a private right of action to prevent the brokerages from

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Clarke v. Securities Indus. Assn., 479 U.S. 388, 394-95 (1987); *see also* JOSEPH VINING, LEGAL IDENTITY 39-45 (1978) (explaining doctrinal implications of "legal interest" test).

119. Clarke v. Securities Indus. Assn., 479 U.S. 388, 399-400 & n.16 (1987). *Clarke* also reiterated a view previously discussed in the context of the implied right of action cases, that the right of judicial review ultimately depends on whether Congress intended to permit the suit. 479 U.S. at 399.

120. 479 U.S. at 401 n.16.

121. Such action through an agency is referred to as a "private right of initiation." *See* Stewart & Sunstein, *supra* note 26, at 1208-12, 1267-89.

122. *See id.* at 1205-06, 1267-71; *see also* Heckler v. Chaney, 470 U.S. 821, 832-35 (1985).

123. *See* VINING, *supra* note 118, at 107-09.

124. 479 U.S. at 403.

operating — a claim that ultimately failed.[125] Indeed, in some cases the asserted private right of action has resembled standing so closely that the court has regarded the two terms as virtually interchangeable.[126]

Another difference between the private lawsuit and administrative contexts is therefore needed to explain *Clarke*'s requirement for "more" to establish a private right of action than to show standing. This difference lies in the fact that most private rights of action request retroactive relief in the form of damages.[127] Where a suit requests only prospective relief, the difference between the private lawsuit and standing contexts may be fairly small, because in order for the statute to create a right to judicial relief, it must restrict agency discretion. This restriction on discretion may suffice to establish either a right of initiation, through judicial review of agency inaction, or a private right of action, through direct resort to the courts.[128]

Clarke's demand that a plaintiff show "more" to establish an implied right of action, therefore, is also attributable to the justifiably more stringent requirements governing a claim that goes beyond prospective relief and seeks damages. The Court has at times assumed a cause of action for prospective relief, without even going through an implied right of action analysis.[129] Yet damages are different. Because a right to damages is a more valuable entitlement, a greater degree of legislative commitment to the plaintiff should be necessary to establish that right. The cases restricting implied rights of action can thus be interpreted not as undermining the authority of the courts to enforce the rule of law, but as requiring a greater showing to justify damage awards than would be required to attain standing in an action for prospective relief.

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125. 479 U.S. at 409.

126. *See* National R.R. Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453, 455-56 (1974).

127. *See* VINING, *supra* note 118, at 107 (stating that unlike actions for prospective relief, implied damage actions raise "problems peculiar to the restructuring of the past").

Just as this Note went to print, the Court declined an opportunity to endorse this reasoning in Franklin v. Gwinnett County Pub. Sch., 60 U.S.L.W. 4167 (U.S., Feb. 26, 1992). *Franklin* holds that the implied right of action created by Cannon v. University of Chicago, 441 U.S. 677 (1979), *see supra* notes 74-75; *infra* notes 130-44 and accompanying text, extends to compensatory as well as injunctive relief. 60 U.S.L.W. at 4172. Justice White's opinion states that once an implied cause of action exists, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 60 U.S.L.W. at 4169. Nonetheless, because *Franklin* involved extreme, intentional discrimination — sexual harassment and coercive intercourse — the Court may have relied on the previously discussed distinction between intentional and unintentional violations. 60 U.S.L.W. at 4168; *see supra* note 103 and accompanying text. Moreover, there was clear evidence in *Franklin* that Congress had contemplated the availability of compensatory relief by abrogating state immunity from actions based on the statute involved. 60 U.S.L.W. at 4171.

128. *See* Stewart & Sunstein, *supra* note 26, at 1312-14, 1321.

129. *See infra* notes 218-19.

4. *Separation of Powers: Justice Powell's Dissent in* Cannon

The Court's opinions rarely explored any other basis for its curtailment of implied rights of action, aside from opposition to discretionary enforcement and the aversion to damage remedies in particular. One exception came in Justice Powell's dissent in *Cannon v. University of Chicago.*[130] This section addresses Justice Powell's arguments and concludes that they fail to provide any independent grounds for not enforcing statutory rights.

In *Cannon,* Justice Powell argued that implied rights of action had jurisdictional significance:

> By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation" . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction.[131]

Taken on its face, Justice Powell's argument makes the questionable suggestion that there can be no general federal question jurisdiction. Instead, each statute is taken as implicitly conveying jurisdiction to the federal courts in order to allow them to hear a claim based on the statute. Surely, however, the courts in *Cannon* and the other implied right of action cases already had jurisdiction over the cases simply because the plaintiffs based their claim on a federal right; "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."[132]

What Justice Powell meant was that a grant of jurisdiction conveys authority to enforce law, not to make it;[133] he was concerned about judicial policymaking in the absence of congressional approval.[134] The availability of private actions can entail substantial social costs, both in the government's direct expenses of administering the statute, and in the disruption of the regulated activity.[135] Justice Powell argued that

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130. 441 U.S. 677 (1979).

131. 441 U.S. at 746 (Powell, J., dissenting) (citing American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951)).

132. Bell v. Hood, 327 U.S. 678, 682 (1946). One of Justice Powell's defenders has argued that if general federal question jurisdiction justifies federal courts in inferring rights of action, "there would be a private right of action under *every* federal statute, because bringing an action for violation of the statute would raise a federal question. . . ." Mark D. Loftis, Note, *Implied Rights of Private Action Under Federal Statutes: The Continuing Influence of Justice Powell's* Cannon *Dissent,* 5 J.L. & POL. 349, 366 (1989). The fallacy of this argument can be seen by comparing it with the situation in a state court. A state court has general jurisdiction over all legal claims. Yet obviously not every state statute creates an implied right of action!

133. *See* Stewart & Sunstein, *supra* note 26, at 1225-26; *see also* Weinberg, *supra* note 95, at 832 n.156; Monaghan, *supra* note 116, at 238, 240-44.

134. *See* HART & WECHSLER, *supra* note 43, at 948.

135. Stewart & Sunstein, *supra* note 26, at 1296-1300 (stating, for example, that "[r]emedial injunctions . . . pose serious dangers of overdeterrence"); Tamar Frankel, *Implied Rights of Action,* 67 VA. L. REV. 553, 572-78 (1981) (arguing that private securities fraud actions create

courts must decline to imply causes of action absent explicit authorization to do so because otherwise the political branches would abdicate their duty to address these social costs to the courts. Legislatures would pass a statute, but leave the intended level of enforcement of the statute indeterminate. The difficult policy choices surrounding private enforcement of the statute would be passed to the courts, instead of keeping them in the political branches.[136] Justice Powell argued that a requirement of specific intent to create a cause of action would force Congress to deal up front with the social consequences of private enforcement of legislative mandates.

However powerful Justice Powell's objections to judicial policymaking may be, they offer no reason to oppose a court's *nondiscretionary* enforcement of a statute it interprets as creating rights. True, where Congress has established a remedial scheme, access to that remedial scheme may fix the limit of the rights created.[137] Where the terms of a statute clearly commit the state to act for the benefit of the plaintiff, however, some level of enforcement is necessary simply as a matter of fairness and the rule of law.[138]

The facts of *Cannon* itself suggest that the majority of the Court believed that the private remedy created there was compelled as a matter of fairness, and did not depend on the Court's exercising policymaking power. *Cannon* involved a private right of action based on Title IX of the Education Amendments of 1972, which directly forbids gender discrimination by educational institutions: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[139]

Justice Powell's opinion implied that despite the declarative language of the statute, the Court should not hold the legislature to its word by finding a private right of action. He argued that "[a]t least in the view of Congress, the fund-termination power conferred on HEW is adequate to ensure that discrimination in federally funded colleges and universities will not be countenanced."[140] Yet the plain language of the statute left Justice Powell's objections vulnerable to the majority's argument that the statute created a right to be free from discrimi-

unpredictable risks and create overenforcement of securities laws); George D. Brown, *Of Activism and* Erie *— The Implication Doctrine's Implications for the Nature and Role of the Federal Courts,* 69 IOWA L. REV. 617, 645 (1984) (arguing that "in the context of grant-in-aid programs private damages actions may seriously diminish grantee resources and detract from the overall achievement of program goals").

136. *Cannon,* 441 U.S. at 743-48 (Powell, J., dissenting).

137. *See infra* notes 177-90 and accompanying text.

138. *See supra* notes 31-39 and accompanying text.

139. 20 U.S.C. § 1681(a) (1988).

140. 441 U.S. at 748-49 (Powell, J., dissenting).

nation, not a right to petition an administrative agency to stop funding the discriminatory activity.[141] Despite Justice Powell's objections to judicial policymaking, the Court seemed to conclude that if it did not create an implied right of action it would fail to enforce the statute:

> The language in these statutes — which expressly identifies the class Congress intended to benefit — contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort* . . . and other laws enacted for the protection of the general public. There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.[142]

Where a private right of action is necessary to effectuate a right, Justice Powell's separation of powers concerns are inapposite. If a court enforces compliance with the clear requirement of a statute, the court does not bear the responsibility for the social consequences of enforcement; it has the traditional defense that it is simply enforcing the law as it has been written.[143] As argued in section II.D, the ability to maintain the rule of law by enforcing the commitments of the state expressed in law is essential to the traditional power of judicial review.[144]

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The Court's rejection of the especial benefit element of the *Cort* test in the implied right of action cases dealing with damage remedies can thus be explained without resorting to a theory of judicial review that undermines *Marbury v. Madison.* The Court was not refusing to enforce the statutes in question but was instead refusing to create rights to compensatory relief. Yet the Court could have — and should have — reached its results without falling into a discourse of unenforceable rights. As the next section demonstrates, when the Court was faced with the same jurisprudential issues in the context of a statute that spoke explicitly in terms of rights, the Court's earlier vocabulary began to create a good deal of confusion.

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141. Justice White argued, however, that Congress had indeed intended only to create a right of access to administrative proceedings. *See* 441 U.S. at 729 (White, J., dissenting) (arguing that Congress "rel[ied] on the authority of the Federal Government to enforce the terms under which federal assistance would be provided").

142. 441 U.S. at 690-93 (footnote omitted). The *Cannon* Court did proceed to apply the other elements of *Cort;* in contrast, this Note would have subsumed the other elements of *Cort* into one inquiry as to whether the statute had truly created a right. *See infra* notes 177-90 and accompanying text.

143. *Cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST 8-9 (1980) (summarizing "interpretivist" argument that when the judge enforces the language of the Constitution, "the judges do not check the people, the Constitution does").

144. *See also supra* notes 33-39 and accompanying text.

III. SECTION 1983: A NEW SOURCE OF RIGHTS OF ACTION?

This Part discusses the Court's jurisprudence of rights in cases where section 1983 applies. Section III.A describes the Court's holding that section 1983 creates a remedy for the deprivation of any federal statutory right and discusses the early difficulty in the application of section 1983's "rights" language. Section III.B discusses the Court's integration of the *Cort v. Ash* implied right of action analysis with its test for the existence of a right under section 1983. Elaborating on the identity between rights and remedies established earlier, section III.B further argues that the Court's current doctrine that section 1983 creates a presumption that rights will be enforced repeats the mistake of *Cort* in accepting the notion of unenforceable rights. Section III.C argues that the conventional interpretation of section 1983 as creating a damages remedy should be rejected in favor of an interpretation that reads the term *rights* in section 1983 to require a preexisting implied statutory right to damages relief before section 1983 may be invoked.

A. Maine v. Thiboutot *and the Protection of Statutory Rights*

During the same period in which the Court restricted implied rights of action under federal statutes against private parties, it expanded the availability of causes of action against state officials based on the same statutes. Beginning with *Maine v. Thiboutot,*[145] the Court began to hold that even though a particular statute would not give rise to an implied right of action, the statute might create rights sufficient to enable the plaintiff to bring a lawsuit under section 1983. In *Thiboutot,* the plaintiffs had successfully challenged a welfare benefits regulation adopted by the State of Maine; they sought to invoke section 1988 to recover attorney fees for the proceeding.[146] *Thiboutot* first explicitly recognized that the rights referred to in section 1983 could arise from any federal statute, not just the Constitution and civil rights laws.[147] The decision followed an exhaustive debate over the peculiar legislative history of the "and laws" language that had taken place in *Chapman v. Houston Welfare Rights Organization.*[148] Perhaps because of this focus on the "and laws" debate, the *Thiboutot* opinion overlooked the question as to when a law creates rights cognizable under section 1983.[149]

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145. 448 U.S. 1 (1980).

146. 448 U.S. at 2-3; *see supra* note 3 and accompanying text.

147. 448 U.S. at 5-8.

148. 441 U.S. 600 (1979).

149. *Thiboutot* generated a great deal of comment addressing the relationship between § 1983 and the implied cause of action. Little of it discussed the question of whether the statutes involved created rights. *See* George D. Brown, *Whither* Thiboutot? *Section 1983, Private Enforcement, and the Damages Dilemma,* 33 DEPAUL L. REV. 31 (1983); Owen M. Field, Note, *The Application of Section 1983 to the Violation of Federal Statutory Rights* — Maine v.

In the term following *Thiboutot,* the Court did confront, in a limited manner, the issue of how statutes create rights. In *Pennhurst State School & Hospital v. Halderman,*[150] the Court held that a "bill of rights" provision contained in a cooperative funding program for the developmentally disabled did not create a right sufficient to give rise to a cause of action under section 1983. The Court stated that only a clear, mandatory provision, backed by sanctions for noncompliance, could create rights.[151]

Pennhurst's holding that only a clear statutory mandate could create "substantive rights"[152] clarified the section 1983 inquiry somewhat. Yet in light of this Note's earlier discussion of standing, it is clear that *Pennhurst* only provided half of a two-part test. Where a plaintiff claims that a statute has given her rights it is insufficient to ask whether the statute's provisions are mandatory or enforceable. One must also ask the question of standing: *With respect to whom* is the statute "mandatory" — that is, *who* can enforce it?[153]

Although *Pennhurst* did not address this "standing" aspect of the rights question, it did indicate in dictum that even if a right did exist, no remedy would be available under section 1983 if "the express remedy contained in [the statute] is exclusive."[154] This alternative challenge to the availability of the section 1983 remedy became the focus in the next section 1983 case, as a comprehensive enforcement scheme was found to exist in *Middlesex County Sewerage Authority v. National Sea Clammers Association.*[155] In *Sea Clammers,* the Court rejected the plaintiff's contentions that the Federal Water Pollution Control Act created an implied right of action under the *Cort* test.[156] Although the issue had not been briefed, the Court then addressed the possibility that a cause of action would exist under section 1983.[157] The Court concluded that the private enforcement provisions of the Act evidenced a congressional intent to deny private enforcement under section 1983.[158] Justice Powell's opinion reasoned that because

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Thiboutot, 30 DEPAUL L. REV. 651 (1981); Douglas W. Jessop, Note, *Implied Private Rights of Action and Section 1983: Congressional Intent Through a Glass Darkly,* 23 B.C. L. REV. 1439 (1982); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law,* 49 U. CHI. L. REV. 394 (1982); Paul Wartelle & Jeffrey H. Louden, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy,* 9 HASTINGS CONST. L.Q. 487 (1982).

150. 451 U.S. 1 (1981).

151. 451 U.S. at 15-18.

152. 451 U.S. at 28 n.21.

153. *See supra* notes 20, 108-09 and accompanying text.

154. 451 U.S. at 28.

155. 453 U.S. 1 (1981).

156. 453 U.S. at 18.

157. 453 U.S. at 19.

158. The FWPCA provided for citizen suits enabling private citizens to obtain injunctive relief against violations of the Act. The citizen suit provisions, however, required plaintiffs to give notice to the Environmental Protection Agency, the state, and the defendants before bring-

Congress itself has authorized lawsuits under section 1983, "separation of powers concerns are not present in a § 1983 case," and that courts did not need to look for specific indications of congressional intent.[159] Instead, section 1983's "express congressional authorization" gave rise to a presumption that Congress intended private enforcement; this presumption could be overcome only by the presence of a comprehensive enforcement scheme. Although the *Sea Clammers* Court indicated that rights should be easier to enforce through section 1983 than through implied rights of action, it shifted the Court's focus away from the basic question regarding the test for the existence of section 1983 rights.

Because of the lack of attention given to the issue by the Supreme Court in *Thiboutot, Pennhurst,* and *Sea Clammers,* the lower courts were left to determine which statutes would be read as creating rights enforceable under section 1983. It was obvious that implied rights of action and section 1983 rights were related, but it was unclear how to reconcile them. The result, in the words of one commentator, was a "crazy quilt of inconsistent decisions in which one can find support for virtually any proposition about statutory claims under section 1983."[160]

Over the past several years, however, a consensus has begun to emerge regarding the interaction of implied rights of action and section 1983. Relying on the first element of *Cort v. Ash,* the courts have considered as creating rights those statutes that make directives intended for the especial benefit of the plaintiff. The effect of *Thiboutot,* where the right concerned is one violated under color of state law, has been to reinstate the especial benefit element of the *Cort* implied right of action test.

The Ninth Circuit Court of Appeals was the first circuit to approach the question of rights of action under section 1983 by asking whether the federal statute involved creates rights within the meaning of *Cort.* In *Boatowners and Tenants Assn. v. Port of Seattle,*[161] the plaintiffs were an association of pleasure craft owners who sued the city of Seattle for imposing unreasonable rates for moorage at the city's harbor, contrary to the provisions of the River and Harbor Improvements Act.[162] The court held that "at least the existence of a federal right found under the analysis of the first factor in *Cort* . . . is required in order to support a section 1983 action," arguing that only

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ing suit. The plaintiffs sought to use the implied right of action device to circumvent these requirements. *See* 33 U.S.C. § 1365 (1988).

159. *Sea Clammers,* 453 U.S. at 20-21; *see also* Wilder v. Virginia Hosp. Assn., 110 S. Ct. 2510, 2517 n.9 (1990) (discussing *Sea Clammers*).

160. Brown, *supra* note 149, at 33.

161. 716 F.2d 669 (9th Cir. 1983).

162. 33 U.S.C. §§ 540-633 (1988).

if such a right existed would there be a presumption of enforceability under section 1983.[163]

B. *Rights and Statutory Schemes: Rebutting the Section 1983 "Presumption"*

The Ninth Circuit analysis[164] was taken up in the October 1989 term by *Golden State Transit Corp. v. City of Los Angeles,*[165] and *Wilder v. Virginia Hospital Assn.,*[166] as these cases at last squarely addressed the issue of when a statute creates a right. In *Golden State Transit,* the Court held that the preemptive effect of the National Labor Relations Act created a right in the plaintiff taxicab company to be free from interference by the City of Los Angeles in the company's collective bargaining with its employees.[167] The majority opinion first acknowledged that a plaintiff cannot sue a state actor under section 1983 for just any failure to comply with federal law. Justice Stevens began his analysis by noting that "[s]ection 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law";[168] this language was repeated in *Wilder.*[169] Justice Stevens then stated that in determining what statutes create rights under section 1983, the Court looks to the rights that may exist under the first element of the *Cort* test.

Without explicitly saying so, Justice Stevens rejected some earlier views of the *Thiboutot* doctrine that had stated that section 1983 establishes a cause of action against any state official who violated any fed-

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163. 716 F.2d at 673. Subsequent cases have adhered to this approach; *see* Clallam County v. Washington State Dept. of Transp., 849 F.2d 424 (9th Cir. 1988), *cert. denied,* 488 U.S. 1008 (1989); White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987); Coos Bay Care Ctr. v. Oregon Dept. of Human Resources, 803 F.2d 1060 (9th Cir. 1986), *vacated as moot,* 484 U.S. 806 (1987); Keaukaha-Panaewa Community Assn. v. Hawaiian Homes Commn., 739 F.2d 1467 (9th Cir. 1984).

164. Other courts have adopted the Ninth Circuit rule as well. *See* Victorian v. Miller, 813 F.2d 718, 720-21 (5th Cir. 1987) (en banc) (citing *Cannon* instead of *Cort*); New York Airlines v. Dukes County, 623 F. Supp. 1435, 1444-46 (D. Mass. 1985); Balf Co. v. Gaitor, 534 F. Supp. 600, 604 (D. Conn. 1982). *But see* First Natl. Bank of Omaha v. Marquette Natl. Bank, 636 F.2d 195, 198 (8th Cir. 1980), *cert. denied,* 450 U.S. 1042 (1981) (limiting § 1983 to claims "in the nature of the rights protected by the Civil Rights Act"); Yapalater v. Bates, 494 F. Supp. 1349, 1358 (S.D.N.Y. 1980), *affd.,* 644 F.2d 131 (2d Cir. 1981), *cert. denied,* 455 U.S. 908 (1982) (§ 1983 suit creates remedy where injury "flows from a state's violation of governing federal law").

165. 493 U.S. 103 (1989).

166. 110 S. Ct. 2510 (1990).

167. 493 U.S. at 108-13. In an earlier ruling on the same dispute, the Court had established that the NLRA, by occupying the field of labor relations, had preempted state regulation that would interfere with the collective bargaining process between a union and an employer. *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986). The case discussed in this Note involved the attempt by the company to invoke § 1983 to obtain compensatory relief. 493 U.S. at 105.

168. *Golden State Transit,* 493 U.S. at 106.

169. *Wilder,* 110 S. Ct. at 2517.

eral statute — seemingly whether the statute secured a right for the plaintiff or not. Again, because *Thiboutot* had avoided the issue, earlier cases tended to equate violations of federal law with violations of plaintiff's rights.[170] *Golden State Transit* clarified the existence of a threshold requirement that a federal statute first create rights before it becomes enforceable under section 1983. Even if a statute makes the clear command required by *Pennhurst* rather than a hortatory statement, unless this command is clearly for the benefit of the plaintiff in question, no right of action arises.

In *Wilder,* the plaintiffs based their section 1983 claim on the Boren Amendment to the Social Security Act, which governs the rates of reimbursement that states participating in the Medicaid program must pay to health care providers.[171] As originally enacted, the statute governing reimbursement rates had required that health care providers receive "the 'reasonable cost' of hospital services actually provided, measured according to standards adopted by the Secretary [of Health and Human Services]."[172] In an attempt to allow states greater flexibility in establishing rates of reimbursement, Congress adopted the Boren Amendment, amending the reimbursement provisions to require that the State use reimbursement rates "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities . . . ."[173] The *Wilder* Court held that this language created a "right," and that health care providers could seek enforcement of "reasonable and adequate" rates of reimbursement in court through section 1983.[174]

The *Wilder* opinion reiterated the rule expressed in previous cases that if a right exists under the *Cort* test, section 1983 creates a pre-

170. Several opinions seemingly ignored the requirement that the relevant statute first create a right before giving rise to a cause of action under § 1983. *See* Wright v. City of Roanoake Redev. & Hous. Auth., 479 U.S. 418, 423 (1987) (*Thiboutot* "held that § 1983 was available to enforce violations of federal statutes by agents of the State."); Samuels v. District of Columbia, 770 F.2d 184, 194 (D.C. Cir. 1985) ("Section 1983 . . . creates an *express* federal cause of action against state officials for violations of federal law . . . ."); Lynch v. Dukakis, 719 F.2d 504, 510 (1st Cir. 1983) (broad reading of *Thiboutot* that § 1983 "provides a remedy for violations by state officers of *any* federal law" is limited by *Sea Clammers* doctrine of intent to preclude enforcement). In effect, these courts spoke as if § 1983 created standing to challenge any state official's violation of any federal law. Regarding the conduct of federal officials, the Supreme Court's "zone of interest" test was fashioned specifically to avoid such an expansive grant of standing under the APA. *See supra* notes 112-14 and accompanying text.

Thus, when he invoked the *Cort* test, Justice Stevens drew on Justice O'Connor's *dissenting* characterization of the § 1983 test in *Wright. Golden State Transit,* 493 U.S. at 106. The court has in effect rejected the view expressed in Arnon D. Siegel, Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights,* 97 YALE L.J. 1827, 1836-37 (1988), that all statutory commands create rights for all plaintiffs.

171. *See* 42 U.S.C. § 1396a(a)(13)(A) (1988).

172. 110 S. Ct. at 2515 (quoting Pub. L. 89-97, § 1902(13)(B), 79 Stat. 346).

173. 42 U.S.C. § 1396a(a)(13)(A) (1988).

174. 110 S. Ct. at 2525.

sumption that the plaintiff may bring a lawsuit to enforce this right. However, the defendant can rebut this presumption with a showing that Congress intended to preclude section 1983 enforcement by enacting its own comprehensive regulatory scheme.[175] If the defendant cannot rebut this presumption, the plaintiff can maintain an action. Thus, the Court has treated section 1983 as requiring a compromise between the rigid requirements of the congressional intent test established by *Touche Ross & Co. v. Redington,*[176] on the one hand, and the liberal remedial doctrine originally indicated by the *Thiboutot* decision on the other.

The Court continues to embrace a contradiction, however, by acknowledging the possibility that a statute will create a right, but that the presence of a comprehensive enforcement scheme will render this right unenforceable.[177] This two-step analysis is unnecessary and could be subsumed entirely within the inquiry as to exactly what rights a statute and its accompanying administrative scheme have created. The Court should simply adopt the view that to the extent Congress designs administrative machinery to leave discretion in the hands of an administrative agency, it creates no rights enforceable outside the administrative context.

This notion of rights is illustrated by the statutory scheme of remedies accompanying the Education for All Handicapped Children Act (EAHCA).[178] The EAHCA enacts a purportedly substantive standard: it entitles all handicapped children to a "free appropriate public education" (FAPE).[179] The Act requires that each handicapped child receive an "individualized education plan" (IEP) that will develop his or her educational potential.[180] In interpreting these open-ended terms, the Supreme Court has been very hesitant to specify any substantive standards that the EAHCA might impose, arguing that the primary goal of the EAHCA is to give handicapped students access to a set of procedures designed to address their needs.[181] As the Court interprets the EAHCA, instead of setting any fixed standard, "the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education . . . ."[182] The EAHCA relies on a procedural machinery that employs teachers, school administrators, administrative review

175. 110 S. Ct. at 2523.

176. 442 U.S. 560 (1979); *see supra* notes 77-79 and accompanying text.

177. Because as a doctrinal matter the "preclusion" of the section 1983 remedy constitutes the implied repeal of a statute, one commentator has questioned the soundness of the *Sea Clammers* test. *See* Sunstein, *supra* note 149, at 418-21.

178. 20 U.S.C. § 1400-1485 (1988).

179. 20 U.S.C. § 1412(1) (1988).

180. 20 U.S.C. §§ 1401(18) and (19) (1988).

181. Board of Educ. v. Rowley, 458 U.S. 176, 189-90, 204-08 (1982).

182. 458 U.S. at 195.

boards, and ultimately the courts, to ensure a meaningful implementation of the FAPE standard.

The Act, therefore, does not confer a right to a fixed standard of education, but instead confers a right of access to a procedural machinery through which the IEP is determined. Because Congress designed the EAHCA from the first to give the plaintiff a right of access to a procedural machinery with no guarantee of outcome, it created only a limited right. That right consists of the requirement that those who administer the EAHCA direct their efforts toward certain broad statutory goals and comply with the restrictions of certain minimum procedural requirements. In sum, the "remedies" created by the EAHCA are really "rights"; the provisions for enforcement of the rights in question actually measure the rights created.[183]

The limited right conferred by the EAHCA, however, gives students an associated right to good faith efforts on the part of the various officials who determine the IEP, meaning attention to whatever substantive goals the act establishes.[184] This right has not depended on any affirmative indication of an intent to create lawsuits. Thus, courts have recognized that although no fixed substantive requirement may be enforced, a wholesale failure to comply with the procedures required by the EAHCA may constitute a per se violation of the Act, which may give rise to a claim for damages.[185]

The Court has at times acknowledged a similar line of reasoning in its implied right of action cases. For example, in *T.I.M.E. Inc. v. United States,*[186] the Court held that the Motor Carrier Act[187] did not create an implied right of action to recover charges paid by a shipper to a carrier under an unreasonable rate filed with the Interstate Commerce Commission. Although the Motor Carrier Act imposed a "duty" on interstate motor carriers to "establish, observe, and enforce just and reasonable rates," and declared "unjust and unreasonable charge[s]" to be "unlawful," the Court held that parties could not en-

183. Stewart & Sunstein, *supra* note 26, at 1221 ("[A]s both an analytical and a practical matter, the procedures for implementing a regulatory program cannot be separated from its substance.").

184. *See* Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141, 148 (2d Cir. 1983); Anderson v. Thompson, 658 F.2d 1205, 1214 (7th. Cir. 1981).

185. Jackson v. Franklin County Sch. Bd., 806 F.2d 623, 628-32 (5th Cir. 1986); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985). There is currently a debate over whether a failure to comply with the procedural requirements of the EAHCA renders the resulting IEP per se substantively inadequate. *See* Doe v. Alabama State Dept. of Educ., 915 F.2d 651, 662-63 nn.11-12 (11th Cir. 1990); Muth v. Central Bucks Sch. Dist., 839 F.2d 113, 127 (3d Cir. 1988), *revd. on other grounds,* Dellmuth v. Muth, 491 U.S. 223 (1989). Whereas violations of the substantive provisions of the EAHCA do not create a right of action for damages, however, violations of procedural requirements have been held to create damage liability. Evans v. District No. 17, 841 F.2d 824, 828 (8th Cir. 1988); *Jackson,* 806 F.2d at 631-32.

186. 359 U.S. 464 (1959).

187. 49 U.S.C. §§ 301-327 (1940) (repealed 1978).

force this duty in court.[188] "[L]anguage of this sort in a statute which entrusts rate regulation to an administrative agency," the Court stated, "in itself creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right.' "[189] The Court further held that the right of access to the administrative procedures created by the Motor Carrier Act displaced previously existing common law rights, due to the fact that Congress had "apparently sought to strike a balance between the interests of the shipper and those of the carrier, and that the statute cut significantly into preexisting rights of the carrier . . . ."[190]

Finding that a comprehensive administrative scheme "precludes" private enforcement, then, is simply another way of saying that a statutory scheme has created only a limited right, and that some areas have been reserved for administrative discretion. The "presumption" in favor of private enforcement created by section 1983 should be an empty one; any limit imposed on private enforcement by an administrative scheme limits the right itself. When the Court assesses whether a statute creates rights, it should link rights and remedies by taking into account the entire enforcement scheme associated with the statute.

The actual treatment of the presumption by the Court confirms this view, and indicates that the Court itself regards the presumption and rebuttal test essentially as a formality. In the years since *Sea Clammers* the Court has not articulated the force of the presumption in favor of private enforcement supplied by section 1983. In the *Wilder* case, the Court reiterated that " ' "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federally secured right.' "[191] Aside from the requirement that the defendant show "by express provision or other specific evidence"[192] that private enforcement was foreclosed, the Court gave no indication of what *lightly* means.[193] The strength of the

188. 359 U.S. at 469 (quoting 49 U.S.C. §§ 316 (b) and (d) (1988)).

189. 359 U.S. at 469 (quoting Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951)).

190. 359 U.S. at 479.

191. Wilder v. Virginia Hosp. Assn., 110 S. Ct. 2510, 2523 (1990) (quoting *Wright,* 479 U.S. at 423-24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984))).

192. *Wilder,* 110 S. Ct. 2523 (quoting *Wright,* 479 U.S. at 423).

193. Indeed, the Court continues to rely on a flawed precedent to support the very existence of the presumption. *Wilder* quoted *Wright* for its point regarding § 1983's "presumption." 479 U.S. at 423-24 (1987). *Wright* in turn had quoted *Smith v. Robinson.* 468 U.S. 992 (1984). The *Smith* Court, however, had refused to "lightly conclude" that Congress "intended to preclude reliance on section 1983 as a remedy *for a substantial equal protection claim*" — that is, a right created by the Fourteenth Amendment, rather than a statutory right. *Smith,* 468 U.S. at 1012 (emphasis added). The issue of whether the statute in question had foreclosed private enforcement under § 1983 was not even presented in *Smith,* and the *Smith* Court noted that the circuits generally agreed that Congress *had* foreclosed enforcement of the statutory right through § 1983. *Smith,* 468 U.S. at 1008 n.11.

presumption supplied by section 1983 would therefore seem to turn on the individual Justice's views of implied rights of action. In fact, after *Sea Clammers* some observers felt that Justice Powell had simply merged the implied right of action and section 1983 inquiries, and certainly Justice Powell's opinion gave no guidance as to the force of the presumption.[194]

Scholarly analyses of the section 1983 "presumption" also seem to indicate that the ultimate determination as to private enforcement is no different under section 1983 than under the implied right of action test. For example, in a 1982 article[195] Professor Cass Sunstein proposed that a statute creating a federal right also create a cause of action under section 1983 unless there is a showing of "manifest inconsistency between the statutory enforcement scheme and a private cause of action."[196] One example of such "manifest inconsistency" would be a situation in which "Congress intended to concentrate enforcement responsibilities in a particular institution."[197] No doubt these and other considerations Sunstein listed are useful for determining whether a private right of action has been created, but their application to the specific language of section 1983 seems questionable. Sunstein's list in fact resembles a set of considerations proposed in an earlier article on implied rights of action.[198] Yet in the area of implied rights of action, no presumption exists that needs to be "refuted" if a court is to deny a cause of action. Like Justice Powell, Sunstein seems to believe that private enforcement under section 1983 should be coextensive with implied rights of action, but while Justice Powell dislikes implied rights of action, Sunstein favors them. Yet both have a point, which can be justified by applying the insights gained in Part II's discussion of implied rights of action to the definition of the term *rights* in section 1983.

C. *Merging Implied Rights of Action and Section 1983*

1. *Reading "Rights" Realistically*

The Realist thesis demonstrates that the true measure of rights is the actual conduct of the state through remedies. Applied to implied rights of action, the Realist thesis refutes the notion that the rights a statute creates can differ from the remedies that the judiciary affords to plaintiffs in its role as upholder of the rule of law. Some statutes or constitutional provisions may create rights to compensatory relief for their violation. Other statutes or constitutional provisions, however,

194. Brown, *supra* note 149, at 42-46.

195. Sunstein, *supra* note 149.

196. *Id.* at 426.

197. *Id.* at 431.

198. Stewart & Sunstein, *supra* note 26, at 1289-94, 1321.

may commit the state to affording only prospective relief, in which case a court will not recognize a cause of action for damages, unless the court exercises common law authority to create new rights. Other statutes may create rights by entitling plaintiffs to access to administrative schemes with no guarantee of outcome.

The impossibility of separating rights from remedies compels the conclusion that a statute or constitutional provision only creates rights if a plaintiff can enforce that law in court. Therefore, section 1983's "presumption" should be replaced with a simpler test: a statute should create rights for purposes of section 1983 if and only if that statute would also create an implied right of action.

The uncertain quality of the presumption created by recent interpretations of section 1983 resulted from a semantic trap the Court laid for itself in the retreat from implied rights of action. As the Court cut back on implied rights of action, it distinguished rights and remedies and engaged in the anomalous discourse of "unenforceable rights." Yet in the context of section 1983, the statute specifically uses the language of rights, and guarantees the existence of rights of action to enforce them. The issue of private enforcement of a statute therefore turns on a single question: Does the statute create rights?

In *Wilder* and *Golden State Transit,* the Court began to incorporate this insight by focusing its section 1983 inquiry on the issue of whether the relevant statute or constitutional provision created rights. The most recent section 1983 rights case, *Dennis v. Higgins,*[199] moved even further in a Realist direction. In *Dennis,* the Court held that the dormant Commerce Clause's prohibition against state regulations that discriminate against interstate commerce creates rights enforceable under section 1983. The availability of an injunctive *remedy* under the dormant Commerce Clause was established long before *Dennis.*[200] In a Realist manner, the Court relied on its previous recognition of a dormant Commerce Clause *remedy* to establish the existence of a section 1983 *right;* it noted that "individuals injured by state action that violates [the dormant] Commerce Clause may sue and obtain injunctive and declaratory relief."[201] As in *Golden State Transit,* because the Court had long held that plaintiffs could sue under the dormant Commerce Clause, the inference that the dormant Commerce Clause created rights was irresistible.

Nonetheless, the Court has thus far passed up the opportunity to take the next logical step and purge its section 1983 jurisprudence of oddities such as "unenforceable rights" or "rights without remedies." The recent refocusing of section 1983 jurisprudence on the term *rights* offers the Court an opportunity to eliminate the untenable distinction

199. 111 S. Ct. 865 (1991).

200. *See, e.g.,* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

201. 111 S. Ct. at 870.

between rights and remedies and to read section 1983 realistically. A cause of action should exist under section 1983 if and only if an implied right of action would exist under the relevant statute.

Moreover, this identity between implied rights of action and section 1983 should extend to the specific relief requested: if a statute would not create an implied right of action for damages, section 1983 should not provide a damage remedy either. Section 1983's requirement that the plaintiff be deprived of a right should be read to require an external source of authority, beyond section 1983 itself, for the existence of a right to be compensated in damages. The Court should apply only the "especial benefit" branch of the *Cort* inquiry to the issue of whether a right exists, and if a right exists, a remedy should follow as it did in *Marbury.*[202]

The doctrine that section 1983 *does* create a damage remedy where one would not otherwise exist, of course, is well established. Nonetheless, this rule may have only resulted from the paucity of discourse as to the meaning of the term *right* in section 1983. Courts have accepted the term *right* in section 1983 uncritically, despite the recognition in other contexts that "[t]here is no more ambiguous word in legal and juristic literature."[203] As this Note has demonstrated, the creation of a damage remedy in the context of implied rights of action has little to do with "rights" per se, but is simply an exercise of common law power. A statute might create "rights" to prospective relief, but not to compensatory remedies. Under this same logic, a statute that does not create a "right" sufficient to imply a damage remedy ought not create a "right" to receive damages under section 1983 either.

2. *Restricting Damage Remedies Under Section 1983*

Currently, a number of doctrines already limit the effect that section 1983 has on creating monetary liability for the deprivation of federal rights. First, the Eleventh Amendment generally protects states from the imposition of monetary liability in the federal courts, and the Supreme Court has held that section 1983 did not abrogate the states' Eleventh Amendment immunity.[204] Second, in *Will v. Michigan Department of State Police,* the Supreme Court held that states themselves are not "persons" within the meaning of section 1983 and

202. The argument that injunctive relief should be no more readily available under section 1983 than it would be outside the section 1983 context is a relatively uncontroversial one. The section 1983 cases recently before the Court have not been concerned with the existence of a section 1983 remedy where no other exists. Indeed a number of recent section 1983 cases have been primarily driven by the plaintiffs' attempts to invoke section 1983 to obtain an award of attorney fees under 42 U.S.C. § 1988, in contexts where the availability of other remedies is well established. *See, e.g.,* Smith v. Robinson, 468 U.S. 992 (1984); Dennis v. Higgins, 111 S. Ct. 865, 867-68 (1991); Siegel, *supra* note 170, at 1844-45.

203. 4 POUND, *supra* note 17, § 118, at 56.

204. Quern v. Jordan, 440 U.S. 332, 340-41 (1979).

therefore are not subject to section 1983 liability.[205] Third, state officials are protected from liability by either absolute or qualified immunity.[206] Finally, the liability of municipalities and other local governments has been limited by the requirement that the deprivation of rights must have resulted from the execution of an official policy, or have been "visited pursuant to governmental 'custom.' "[207]

Under the current reading of section 1983, unless an immunity doctrine applies, the damage remedy must be available where a right has been violated, regardless of the merits of the underlying statutory claim. The all-or-nothing nature of section 1983 prevents the courts from holding, as they sometimes have in the implied right of action context, that a statute requires one remedy but not another.[208] Much of the doctrinal complexity of section 1983 immunity cases results from judicial attempts to avoid the force of section 1983's supposedly unequivocal requirement that damages be awarded as compensation for statutory violations. As Professor Christina Whitman had stated, "Although the effect of these doctrines in some cases has been to dispose of section 1983 actions altogether, the opinions suggest that it is the damage remedy that often is most troubling to the courts."[209]

Several members of the Court have at times attempted to restrict the creation of section 1983 damage remedies, but their failure to adopt a Realist interpretation of the term *rights* frustrates their efforts to ground their opposition to damage remedies in the language of section 1983 itself. As a result, the effort to restrict monetary compensation produces inconsistent and spurious arguments about the existence of rights. *Golden State Transit Corp. v. City of Los Angeles*[210] demonstrated that some Justices, while asking whether section 1983 creates rights, really have in mind the issue of damage relief. Dissenting from the Court's recognition of a section 1983 cause of action, Justice Kennedy maintained that other remedies existed, so that "§ 1983 does not provide the exclusive relief that the federal courts have to offer."[211] The previous opinion of the Court in the same litigation, Justice Kennedy argued, had recognized a different remedy: "Our omission of any discussion of § 1983," Justice Kennedy stated, "perhaps stemmed

205. 491 U.S. 58, 71 (1989).

206. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974); HART & WECHSLER, *supra* note 43, at 1292-303.

207. Monell v. Dept. of Social Servs., 436 U.S. 658, 690-91 (1978); *see also* City of Canton v. Harris, 489 U.S. 378 (1989).

208. *Cf.* PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 126-28 (1988) (noting that "questions concerning the nature and scope of the compensatory objective in various contexts . . . have largely been avoided by the recognition of official immunities and by other limitations on damage actions under section 1983").

209. Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42 (1980).

210. 493 U.S. 102 (1989).

211. *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting).

from a recognition that plaintiffs may vindicate Machinists preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes."[212]

Justice Kennedy appears to argue that the mere existence of federal court jurisdiction over preemption claims gives the plaintiff a federal remedy. Yet this is surely incorrect.[213] Even if the plaintiff establishes jurisdiction over the asserted claim, she must still demonstrate the existence of a claim upon which relief may be granted. In addition, the Declaratory Judgment Act Justice Kennedy mentioned[214] only gives the court the power to determine "rights and other legal relations."[215] Thus, unless the preemptive effect of the statute in question in *Golden State Transit* had created rights, no relief would have been available under the declaratory judgment statute either.

In an analogous context, the Court has discussed the availability of injunctive relief precisely in terms of rights. In *Shaw v. Delta Air Lines,*[216] the Court upheld the jurisdiction of the federal courts over a declaratory action to enjoin enforcement of state regulations that were allegedly preempted by ERISA. The Court noted:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex parte Young, 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.[217]

As in *Ex Parte Young* itself, whenever a court provides relief on the basis of a federal statute or constitutional provision, it necessarily decides that the plaintiff has both a right and a cause of action under that law.[218] In order to make a reasonable argument that relief was available independently of section 1983, then, Justice Kennedy must

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212. 493 U.S. at 119 (Kennedy, J., dissenting) (citations omitted).

213. This would call into question the well-established doctrine that the jurisdiction of federal courts to determine the merits of a claim is broader than the power to grant relief where a valid claim is asserted. *See* Bell v. Hood, 327 U.S. 678 (1946); Monaghan, *supra* note 116, at 238, 240-41.

214. 28 U.S.C. §§ 2201, 2202 (1988).

215. 28 U.S.C. § 2201(a) (1988).

216. 463 U.S. 85 (1983).

217. 463 U.S. at 96 n.14.

218. *See* HART & WECHSLER, *supra* note 43, at 1181; Monaghan, *supra* note 116, at 241. Indeed, past reliance on general jurisdictional provisions to resolve hard-to-classify cases in the manner advocated by Justice Kennedy forced the Court to recognize the existence of a cause of action under § 1983 in Maine v. Thiboutot, 448 U.S. 1 (1980). In his *Thiboutot* opinion, Justice Brennan noted that because statutory claims had been decided on the merits under the court's pendent jurisdiction, "§ 1983 was necessarily the exclusive statutory cause of action because . . . the SSA affords no private right of action against a State." *Thiboutot,* 448 U.S. at 6. Relief could

have assumed that the preemptive effect of the NLRA created a cause of action.[219] Yet this implied the anomalous conclusion that the preemptive effect of the NLRA created a federal right, unless one was speaking in terms of rights under section 1983. The real debate in *Golden State Transit* was not over whether the preemptive effect of the NLRA created any rights at all, but whether it created a right to *damages* that went beyond the established right to prospective relief. Justice Kennedy must have felt that the policy concerns underlying the preemption doctrine did not warrant a damage remedy. Yet the current failure to link the rights a statute creates with the remedies it would independently authorize prevented Justice Kennedy from grounding his view in the language of section 1983.

Interpreting section 1983 in the manner proposed here would not eliminate damage remedies for violations of statutory and constitutional rights; it would simply restrict them to the extent their implementation is discretionary and not required by the rule of law. Courts may still create damage remedies in appropriate circumstances.[220] Indeed, the federal courts have enforced damage remedies independently of section 1983 in the past. In 1978, in *Monell v. Department of Social Services,*[221] the Supreme Court did away with the immunity of municipalities from lawsuits under section 1983 — an immunity that had been established by *Monroe v. Pape.*[222] In the years between the Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[223] and the decision in *Monell,* the lower courts had engaged in a debate over whether a municipality was directly liable under the Fourteenth Amendment for the violations of constitutional rights that were not redressable under section 1983.

On the eve of the *Monell* decision, the majority of the circuits con-

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not issue simply from jurisdictional statutes; a right had to exist, and that right was therefore redressable through § 1983.

219. Monaghan, *supra* note 116, at 241. Professor Monaghan argues that "Kennedy's assertion that a remedy other than relief under section 1983 would be available seems unjustified," and that "surely Justice Kennedy did not assume that the *Golden State* plaintiffs had an implied right of action under the NLRA." *Id.* at 240-41 & n.55. Given the existence of precedent supporting the availability of relief in a case not involving section 1983, *see* New York Tel. Co. v. New York Labor Dept., 440 U.S. 519 (1979), and Justice Kennedy's reliance on this case, 493 U.S. at 119, neither of Professor Monaghan's statements seems justifiable. Despite the Court's failure to articulate the implied right of action analysis in *New York Tel. Co.,* noted by Monaghan, *supra* note 116, at 238, it would hardly be the first time the Court effectively created an implied right of action while explicitly relying only on a jurisdictional provision. *See supra* note 218; Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983,* 77 GEO. L.J. 1493, 1507-33 (1989); *see also* Siegel, *supra* note 170, at 1843 ("In practice . . . section 1983 injunctions will make little difference. Without section 1983, a supremacy clause plaintiff typically sues for a declaratory judgment . . . . Injunctions usually follow as a matter of course.").

220. *See supra* notes 96-104 and accompanying text.

221. 436 U.S. 658 (1978).

222. 365 U.S. 167 (1961).

223. 403 U.S. 388 (1971). *See supra* notes 61-65 and accompanying text (discussing *Bivens*).

sidering the question had found a cause of action against a municipality directly under the Fourteenth Amendment.[224] Just as the trend among the circuits was becoming clear, the Court's decision in *Monell* made section 1983 applicable to municipalities. Eliminating the automatic availability of damage remedies under section 1983 would renew the debates conducted in these pre-*Monell* cases. It would shift the focus away from all-or-nothing issues regarding immunity and require the court to enforce damage remedies only when such remedies are demanded as a matter of fairness and the rule of law.

IV. Defending a Reinterpretation of Section 1983

This Part discusses two possible challenges to this Note's proposed reinterpretation of section 1983. Section IV.A responds to an analysis of *Wilder* and *Golden State Transit*'s jurisprudence of rights that was set forth in a recent article by Professor Henry Monaghan, in which Professor Monaghan argues for a distinction between "primary" and "remedial" law.[225] Section IV.A argues that Professor Monaghan's characterization of section 1983 as expanding the judiciary's power to protect rights is inconsistent with *Marbury v. Madison*'s concept of judicial review, that Supreme Court precedent has ruled out Monaghan's association of section 1983 rights with "primary law," and that the Realist notion of rights refutes any distinction between "primary" and "remedial" law. Section IV.B confronts the objection that the interpretation of section 1983 suggested by this Note would render section 1983 meaningless. Section IV.B establishes that an interpretation of section 1983 which links the definition of rights with the test for implied rights of action best accommodates the language and history of section 1983 with a modern jurisprudence of rights.

A. *Rejecting the Distinction Between "Primary" and "Remedial" Law*

1. *Competing Visions of Rights: The "Hohfeldian Gap" and* Marbury v. Madison

In a recent article[226] Professor Monaghan has recapitulated the new doctrine established by *Wilder* and *Golden State Transit.* Monaghan essentially agrees with the position adopted in *Wilder* and *Golden State Transit* that although federal courts may possess limited

224. *See* Turpin v. Mailet, 579 F.2d 152, 168 (2d Cir. 1978) (en banc); Gagliardi v. Flint, 564 F.2d 112, 119-26 (3d Cir. 1977) (Gibbons, J., concurring); Owen v. City of Independence, 560 F.2d 925, 933 (8th Cir. 1977); Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975); Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 577 (7th Cir. 1975); Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975).

225. Monaghan, *supra* note 116. The "primary" and "remedial" terminology is taken from Professors Hart and Sacks. *See* HART & SACKS, *supra* note 27.

226. Monaghan, *supra* note 116.

authority to create implied rights of action, section 1983 expands this remedial authority in the context of claims against state actors for the deprivation of federal rights.[227] Monaghan argues that "an important distinction exists between primary and remedial law."[228] He defines primary law (and, derivatively, primary rights) as "the 'authoritative directive arrangements' — or more simply, the legal rules — that govern persons independently of litigation."[229] Remedial rights connote the "right of action" or court remedy that implements primary rights.[230] Monaghan argues that "*Golden State* closes any Hohfeldian[231] gap between primary federal statutory rights and section 1983 rights of action,"[232] because both *Golden State Transit* and *Wilder* "shore up"[233] the presumption established in *Smith v. Robinson*[234] against the displacement of a section 1983 cause of action by a comprehensive administrative scheme.[235]

It should be obvious that Monaghan's vocabulary of "primary" and "remedial" law simply restates the erroneous distinction between rights and remedies, and preserves the inconsistent notions of rights which have plagued the Court's jurisprudence since *Cort v. Ash.* In order to demonstrate the failure of the "primary" and "remedial" terminology to transcend the contradictions of *Cort,* one need only focus on a fundamental question that Monaghan fails to address: Does the rule of law require enforcement of "primary rights"? If the answer to this question is yes, then Monaghan's statement that "the existence of a primary right entails no necessary conclusion that the right holder can sue" and the corresponding implication that a statute like section 1983 is necessary to fix this state of affairs are deeply disturbing. Contrary to *Marbury v. Madison,* plaintiffs cannot sue to maintain the rule of law even in a court of competent jurisdiction, unless Congress so provides; we are thus at a loss to explain why a court of proper jurisdiction can compel compliance with primary law where section 1983 does *not* apply. If congressional authorization — apart from creation of jurisdiction — were necessary to allow courts to enforce the law, would the judiciary necessarily have the authority to close the gap between primary and remedial rights in constitutional actions against

227. *Id.* at 250-52.

228. *Id.* at 249.

229. *Id.* (quoting HART & SACKS, *supra* note 27, at 142).

230. *Id.* at 251.

231. This refers to the Realist legal theorist Wesley N. Hohfeld, who advocated an analytical scheme that broke down the term *rights* into more elemental concepts. For an explanation of Hohfeldian terminology, see Arthur L. Corbin, *Legal Analysis and Terminology,* 29 YALE L.J. 163 (1919).

232. Monaghan, *supra* note 116, at 248 (footnote added).

233. *Id.* at 247-48.

234. 468 U.S. 992 (1984). *But see supra* note 193.

235. *See supra* notes 175, 191-93 and accompanying text.

federal officials? Or similar actions based on statutes? Or in actions not against state actors?

2. *Primary Rights as Statutory "Goals"*

If judicial power to enforce a primary right is not necessitated by the rule of law — which is Professor Monaghan's more likely meaning — then primary rights are really goals; they are aims to which the state is not committed. Taking "primary rights" to mean "statutory purposes," then Monaghan's suggestion that section 1983 creates a right of action to enforce primary rights makes sense. In his view, section 1983 gives plaintiffs access to federal courts and allows the courts to create remedial rights to enforce statutory purposes.

This interpretation, however, creates its own problems. First, the Court rejected a similar reading of section 1983 in *Pennhurst State School and Hospital v. Halderman.*[236] Justice Rehnquist's opinion for the court reasoned that even in the context of section 1983, a right required a clear command, not the presence of a statutory goal. The plaintiffs in *Pennhurst* sought to base a section 1983 right on a legislative "finding" in a funding statute that "[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities."[237] The Court noted that " 'Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions.' "[238] Justice Rehnquist concluded that the "findings" upon which the plaintiffs argued for the existence of a section 1983 "right" were laws of this type, and "represent[ed] general statements of federal policy, not newly created legal duties."[239]

Such "general statements of federal policy" may closely approximate Professors Hart and Sacks' notion of a primary right relied upon by Professor Monaghan. Hart and Sacks define a primary right as follows: "Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions.*"[240] It cannot be doubted that the drafters of the "bill of rights" provision in *Pennhurst* hoped that the directives issued in that legislation would benefit the handicapped. Yet Justice Rehnquist's

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236. 451 U.S. 1 (1981); *see supra* notes 150-54 and accompanying text.

237. 451 U.S. at 13 (quoting 42 U.S.C. § 6010 (1979) (current version at 42 U.S.C. § 6009 (1988))).

238. 451 U.S. at 19 (quoting Rosado v. Wyman, 397 U.S. 397, 413 (1970)).

239. 451 U.S. at 23.

240. HART & SACKS, *supra* note 27, at 135.

point was that no section 1983 rights had been created because no command or commitment had actualized the drafters purpose.

Pennhurst illustrates the jurisprudential flaw in referring to statutory hopes as rights at all. A statute may have both very broad and very specific goals. As discussed in Part I, it can be conceded that a statute must always be interpreted in the context of its purposes, without admitting that the purpose of a law and the law itself are identical.[241] In effect, interpreting section 1983 to refer to primary rights would return the Court to the common law policymaking role it declined in the context of implied rights of action. An obligation newly imposed by a court in a common law adjudication is almost by definition not an obligation based on rights: it is a new obligation created in the context of the very litigation in which it is enforced.[242]

3. *The Inevitability of Realism*

Obviously, if section 1983 confronts the courts with an unambiguous commission to resume their previous common law role of making discretionary judgments and elaborating private rights under statutes, then the courts should comply. Likewise, if section 1983 clearly instructs the courts to administer damage remedies for violations of statutory interests, the courts must do so. Yet section 1983 speaks only of "rights"; nothing in its language suggests that it is intended to track Hart and Sacks' distinction between primary and remedial law, and to convey a more extensive authority to fashion remedies than judges would have in other areas of the law.

Moreover, even if one attempted to adopt the categories of primary and remedial rights Monaghan suggested, they would likely become blurred.[243] For example, Monaghan defined primary law as rules that "govern persons independently of litigation."[244] Yet the creation of a cause of action for damages in one lawsuit — seemingly a matter of

241. *See supra* notes 42-45 and accompanying text.

242. Indeed, Hart and Sacks' own discussion of the distinction between primary and remedial rights illustrates the untenability of the notion of primary rights. For example, Hart and Sacks characterize remedial law as extremely fact-specific and difficult to predict:

> The difficulty and complexity of the general law lie largely on its remedial side. But remedial problems turn characteristically on their special facts. It is not usually important to be able to anticipate their details. When they do present themselves, there is commonly time to study and reflect about them. The kind of law which lawyers need to carry in their heads is predominantly primary law. With remedial law, what they need predominantly is skill and insight.

HART & SACKS, *supra* note 27, at 138.

An issue that turns on the facts, where "skill and insight" are the predominant requirements, is generally one in which the rights of the parties simply are not fixed. *See supra* note 40 and accompanying text.

243. Witness the creeping Realism, for example, in Professor Monaghan's admission that "[i]n reality . . . the existence of the primary right generally presupposes some remedy against the duty holder for breach of duty." Monaghan, *supra* note 116, at 252 n.123.

244. *Id.* at 249.

remedial law —deters negligent behavior and promotes cost avoidance techniques that reach beyond the case at hand. If a cause of action for damages thus "govern[s] persons independently of litigation" it could reasonably be classified as a primary right. Even if section 1983 guarantees a cause of action to enforce primary rights, then, a statute would have to create a cause of action for damages before it created the primary right necessary to invoke section 1983.[245]

The principal objection to a reading of section 1983 that accepts the distinction between primary and remedial rights, however, is exactly the same Realist argument that was made long ago with respect to private law: rights and remedies are identical, and the attempt to distinguish them is illogical and almost nonsensical. As *Marbury v. Madison* similarly reasoned, courts possess the power to grant remedial rights to enforce primary rights as long as they have jurisdiction, but only because affording "remedial" rights only maintains an entitlement created by a "primary" right. Like Legal Realism, the *Marbury* philosophy that a right must be accompanied by a remedy to maintain the rule of law is at war with the attempt to draw a distinction between rights and remedies, or between primary and remedial rights.

B. *Reading Section 1983 Realistically*

As noted in Part III, an interpretation of section 1983 that would deny it any independent remedy-creating effect would be a drastic departure from current doctrine. The Supreme Court currently presumes that a private right of action exists under section 1983, because Congress, in legislating against the background of section 1983, is presumed to intend a private remedy. The intent of the 1871 Congress, which enacted a remedy for violations of federal rights, is imputed to the present Congress, which has created a right without considering remedies. This Note has argued that because rights and remedies are identical, the Court should abandon the section 1983 presumption, and recognize that an entitlement to private enforcement is logically coextensive with the existence of rights. Moreover, this Note has argued that section 1983 should not automatically create a damage remedy, but should apply only where a damage remedy would otherwise exist.

The previous sections of this Note have argued for this interpretation solely on the basis of the modern meaning of the term *right.* The present section attempts to reconcile this approach with the historical context of section 1983 and the intent of its drafters. It argues that although this Note's proposed interpretation may seem to render section 1983 a nullity, it in fact gives effect to section 1983 in several ways. Moreover, this section concludes, this Note's proposed inter-

245. Indeed, if one admits the existence of two kinds of rights, there is no reason § 1983 could not be read to refer to remedial rights.

pretation best accommodates the intended effect of section 1983 with the changes in legal doctrine that have occurred since the statute's passage.

Even if section 1983 did not make injunctive or damages relief available where it would not otherwise exist, section 1983 might still have a number of effects. In order to understand these purposes, some historical background is needed. After the Civil War, Congress enacted the Civil Rights Act of 1866,[246] designed to protect the civil rights of the newly freed slaves. The Fourteenth Amendment was passed in part to quiet those who doubted Congress' power to enact such legislation.[247] Subsequently, Congress reenacted the provisions of the 1866 Act that created criminal liability for civil rights violations as portions of the Civil Rights Act of 1870 (known as the Force Act).[248] In 1871, Congress enacted the Ku Klux Klan Act,[249] which contained the precursor of the modern section 1983. The Klan Act was largely concerned with conferring broad-ranging power upon the President to combat Klan activities.[250] However, the act also created in more general terms a civil liability provision to supplement the criminal prohibitions of the 1870 Act.[251] The statute upon which the modern section 1983 is based did not contain the "and laws" language and read as follows:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the [1866 Act]; and the other remedial laws of the United States which are in their nature applicable in such cases.[252]

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246. Ch. 31, 14 Stat. 27 (1866).

247. *See Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1143-44 (1977) [hereinafter *Developments*].

248. Ch. 114, §§ 16-18, 16 Stat. 140, 144 (1870). Section 1 of the Civil Rights Act protected a number of civil rights; its provisions were reenacted by the 1870 Civil Rights Act and survive today at 42 U.S.C. §§ 1981 and 1982. *See* Sunstein, *supra* note 149, at 398-99; *see generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (discussing legislative history of 1866 Act).

249. Ch. 22, 17 Stat. 13 (1871).

250. *Developments*, *supra* note 247, at 1153-54.

251. *See* Sunstein, *supra* note 149, at 398-400; *see also Developments*, *supra* note 247, at 1155 (stating that in the debates over the 1871 Act, the precursor to section 1983 "caused the least concern, as it only added civil remedies to the criminal penalties established by the 1866 Civil Rights Act").

252. Ch. 22 § 1, 17 Stat. 13, 13 (1871).

One might suggest that Congress intended section 1983's "shall be liable" and "any such law . . . notwithstanding" language to foreclose the possibility that state officials enforcing laws in violation of the Fourteenth Amendment and the civil rights laws might benefit from state sovereign immunity to prosecution. Even before Reconstruction, a state official could not assert reliance on an unconstitutional state law — that is, one that conflicted with a law enacted pursuant to a federal power — as a defense to a civil lawsuit.[253] Yet immediately after the Civil War, the extent to which the states remained sovereign in the field of civil rights was highly uncertain. Within a few years of its enactment, the Supreme Court conservatively interpreted the entire scheme of federal rights to preserve in large part the exclusive authority of state governments over civil rights.[254] It may be that as the federal government entered the traditionally state-ruled province of civil rights, Congress felt it necessary to reiterate that reliance on a conflicting state law would not immunize the state official.[255]

Another effect of section 1983 was to transfer previously existing remedies from state courts to federal courts.[256] Congress enacted section 1983 before general federal question jurisdiction existed. If the cause of action had not been accompanied by a provision for federal jurisdiction, lawsuits to enforce the new federally conferred rights would have had to be brought in state court.[257] Indeed, section 1983 and its jurisdictional provision were once different clauses of one section in the statute.[258] Thus, reading section 1983 as merely giving federal courts jurisdiction over claims that would have existed anyway does only a small disservice to the statute, because that was a large part of its purpose.

Even aside from its preservation of these other effects of section 1983, an interpretation of the "rights" language as authorizing only

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253. *See* Collins, *supra* note 219, at 1510-11.

254. *See Developments, supra* note 247, at 1141-46, 1156-61.

255. For an argument that section 1983 was intended to override immunity of state officials, see Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 771-81 (1987). Around the time of Reconstruction, the law of immunity was undergoing a slow transition from a rule under which governmental officials were held liable for unconstitutional or illegal acts to a tendency to impute the immunity of the sovereign to the acts of the official. *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 COLO. L. REV. 1, 21-28, 41-55 (1972).

256. *See* Monroe v. Pape, 365 U.S. 167, 174-80 (1961):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

365 U.S. at 180. *See also* Whitman, *supra* note 209, at 12-14, 21-25 (discussing justifications for section 1983's provision of a "supplementary" federal remedy and federal forum).

257. *See* HART & WECHSLER, *supra* note 43, at 960-62; Collins, *supra* note 219, at 1526-29.

258. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-09 (1979); *supra* note 252 and accompanying text (quoting original language).

those lawsuits that would exist under an implied cause of action test may be entirely appropriate, given the changes in the jurisprudence of implied causes of action that have taken place since Reconstruction. Even immediately after Reconstruction and the advent of general federal question jurisdiction, "the modern idea of a truly federal implied constitutional action had yet to materialize."[259] As Professor Michael Collins explains, when plaintiffs sought to vindicate a federal right in court, "[j]ust as before the Civil War, litigants pleaded causes of action — such as trespass, detinue, ejectment, or conversion — that were familiar to the common law and for which federal law was not the source"; then "in response to the officer's anticipated defense to the state law cause of action that his actions were authorized by state statute, plaintiffs would urge the unconstitutionality of that statute."[260]

With the case of *Ex Parte Young,*[261] however, the Court endorsed a truly federal cause of action — based directly on the Fourteenth Amendment.[262] *Young* "suggests that the Court was starting to conceive of the right to relief in . . . officer actions as flowing less from the proof of a familiar common law injury than from the Constitution itself."[263] Realistically, if a federal statute only nullifies a possible defense to a common law cause of action, then to some extent the common law, not the statute, creates the right at issue.[264] Before *Young,* then, federal statutes largely did not create rights, in the sense of claims for relief upon which a lawsuit could be based in the first instance. Statutory "rights" depended for their enforcement on the vagaries of common law litigation.

Early on, the Court demonstrated that it would read rights in section 1983 to mean only those federal interests that were directly enforceable in federal actions. In *Carter v. Greenhow,*[265] the plaintiff invoked section 1983 to recover property that a Virginia tax collector had removed from the plaintiff's residence after the plaintiff sought to pay his taxes with bond coupons.[266] The Court found that no cause of action existed under section 1983. It held that the Contracts Clause,

259. Collins, *supra* note 219, at 1544 n.264.

260. *Id.* at 1511-12 (citing Henry M. Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 523-25 (1954)).

261. 209 U.S. 123 (1908).

262. *See* HART & WECHSLER, *supra* note 43, at 1181.

263. Collins, *supra* note 219, at 1513.

264. Only after Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), did American jurisprudence begin to trace rigorously the source of rights to the federal or state sovereign. Before *Erie,* the federal statute was used as a statutory standard of care to determine the outcome of a common law cause of action. *See* Collins, *supra* note 219, at 1525, 1532-33.

265. 114 U.S. 317 (1885).

266. *Carter* was one of the *Virginia Coupon Cases,* 114 U.S. 269 (1885), in which taxpayers attempted to pay their taxes to the state of Virginia with the interest coupons from state-issued bonds. The plaintiffs argued that the Virginia statute that repudiated a prior statute that authorized the state to accept the coupons as payment violated the Contracts Clause.

> so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally. It forbids the passage by the State of laws such as are described. If any such are nevertheless passed by the legislature of the State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen in this case to be rights of contract which he holds under the laws of Virginia.[267]

Carter established that section 1983 did not eliminate the jurisprudential scheme by which federal rights were protected in state-law causes of action, and it acknowledged in essentially modern terms that the limitations on a plaintiff's ability to enforce the Contracts Clause must be seen as limits on the actual rights created by that clause. Realism, as well as post-*Erie* jurisprudence, demands that a right be traced to the sovereign that provides the remedy. Because state-law causes of action partly defined the conditions under which litigants could obtain relief, *Carter* recognized that the plaintiff had not asserted a purely federal right. *Carter* involved only a right that existed prior to Reconstruction, however, and it left open the question of how to treat the civil rights created during and after Reconstruction. They, as well, could have been incorporated into common law actions, to nullify affirmative defenses based on state authority. Under the logic of *Carter,* then, the Reconstruction statutes would not have created rights enforceable under section 1983, because they would have depended for their protection on an underlying common law claim.[268]

The language of the Reconstruction statutes and constitutional amendments, however, suggested that the federal government had "committed itself to protecting citizens against state and private individuals," and "created a national citizenship independent of that con-

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267. 114 U.S. at 322.

268. Professor Collins has persuasively argued that the early court interpretations of § 1983 limited its reach by construing those rights that were protected in the traditional, common law, manner as not "secured by the Constitution and laws" within the meaning of § 1983. *See* Collins, *supra* note 219, at 1502-06. This Note offers similar arguments, but contends as a matter of jurisprudence that a "right" not made "secure" through a remedy does not exist. In light of *Erie* and the achievements of the Realists, if a statute does not create a claim for relief in the first instance, it should be interpreted as not creating any federal right. Under this Note's interpretation, Collins errs (as did Justice Kennedy in his dissent in Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989), *see supra* notes 218-19 and accompanying text) in arguing that some constitutional provisions may serve as the basis for a claim "directly under the general federal question statute" and yet not create rights within the meaning of § 1983. *See* Collins, *supra* note 219, at 1548-51.

ferred by the states."[269] The rights for which section 1983 was the intended litigation vehicle represented obligations of the federal government alone. In the wake of Reconstruction, the Court proved notoriously conservative in interpreting the substantive provisions that could underlie section 1983 claims.[270] Yet the basic message of section 1983 was left intact: The federal commitments to individual rights with which section 1983 was associated would *not* be enforced through state courts in a common law form of action. They would be enforced directly.[271] One might say that section 1983 did not so much *create* a right of action as *rebut* the traditional inference that federal statutes did *not* create a right of action against state officials, but were instead incorporated into a common law action.

As an assessment of bare legislative intent, the argument that section 1983 only preserved civil liability that would otherwise exist is obviously wrong. The drafters of section 1983 certainly *thought* they were creating civil liability. Yet the attempt to construe section 1983 to effectuate the intent of its drafters has almost certainly failed. When the Court extended section 1983 to apply beyond civil rights laws to any federal law it used the plain language argument to justify an interpretation that clearly went beyond what the framers of section 1983 envisioned.[272] As a matter of sound jurisprudence, an attempt to give effect to the term *rights* in the statute, coupled with the Realist thesis, inevitably forces the conclusion that the remedies implicit in statutes circumscribe the limits of the rights they create.

One persuasive piece of evidence for the thesis that section 1983 rights tend to arise only from statutes that create implied rights of action anyway lies in the development of the Court's jurisprudence under the other Reconstruction statutes that section 1983 was intended to enforce. In *Jones v. Alfred H. Mayer Co.*,[273] the Court construed 42 U.S.C. § 1982, descended from section 1 of the 1866 Civil

269. *Developments, supra* note 247, at 1142, 1145.

270. *See id.* at 1156-61.

271. Collins, *supra* note 219, at 1504-06; *see also* Monroe v. Pape, 365 U.S. 167, 250-51 (1960) (Frankfurter, J., dissenting), *overruled by* Monell v. Dept. of Social Servs., 436 U.S. 658 (1978).

272. *See* Collins, *supra* note 219, at 1553. Even Professor Sunstein, who argues in favor of the *Thiboutot* decision, admits that, "[t]o be sure, the 1874 Congress did not foresee the enormous explosion in federal legislation that has occurred in the twentieth century." Sunstein, *supra* note 149, at 409. His argument in favor of *Thiboutot* relies on section 1983's more general purposes:

> It is no doubt true that Congress was primarily concerned with providing a remedy for constitutional violations and unlawful invasions of rights protected by civil rights laws. But it is consistent with the historical evidence to understand the underlying purposes as more general than that, reaching all violations of federal law.

Id. There is always a strong argument for giving a statute its literal meaning. Yet if literal interpretation may be used to expand section 1983, surely it can be used as well to contract it, by limiting § 1983's provisions to those laws that truly create rights.

273. 392 U.S. 409 (1968).

Rights Act,[274] to authorize a private cause of action against private racial discrimination in the sale or rental of property. The Court stated that "[t]he fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy."[275] Similarly, in *Johnson v. Railway Express Agency,*[276] the Court held that 42 U.S.C. § 1981, also descended from the 1866 Act, "affords a federal remedy against discrimination in private employment on the basis of race."[277] It concluded that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."[278] The treatment of sections 1981 and 1982 as creating civil remedies of their own force — when section 1983 obviously was once thought necessary to achieve this result — vividly demonstrates the extent to which a jurisprudence of implied rights of action has displaced section 1983's role in providing remedies. In a world where direct private enforcement of federal law is routinely available, section 1983's "rights" language should be interpreted to cover only those statutory commitments that are sufficiently firm to authorize private enforcement of their own accord.

CONCLUSION

A. *An Analogy*

As a closing defense of this Note's interpretation of section 1983's "rights" language, it is worth recalling that a similar argument has occasionally been made with respect to the APA's judicial review provision. From the time of the APA's enactment up to the present, some commentators have maintained that the APA only organizes those remedies that would already exist by virtue of the statute in question.[279] Under this view, the APA creates no remedies, because viola-

274. *See supra* note 248.

275. 392 U.S. at 414 n.13.

276. 421 U.S. 454 (1975).

277. 421 U.S. at 460.

278. 421 U.S. at 460.

279. *See* David P. Currie, *Misunderstanding Standing,* 1981 SUP. CT. REV. 41, 43-44; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 SUFFOLK U. L. REV. 881, 887 (1983); S. Walter Shine, *Administrative Procedure Act: Judicial Review "Hotchpot"?,* 36 GEO. L.J. 16 (1947); *see also* Fletcher, *supra* note 109, at 255-64. Fletcher argued that in an inquiry regarding standing under the APA, "[t]he touchstone is that anyone whom a 'relevant statute' considers to be adversely affected or aggrieved by agency action has standing to seek review of the action under that statute." *Id.* at 255. If this is so, the APA adds nothing to the standing inquiry which is not already implicit in the statute itself.

Just after the APA was enacted in 1947 one author stated flatly that "[t]he whole problem of the scope of judicial review of administrative action has been extensively analyzed and a reading of the legislative history seems to demonstrate that the Act fails to make any substantive change." Shine, *supra,* at 29 (citation omitted).

tions of statutes that, pre-APA, would not have created remedies for the plaintiff, will also not amount to a legal wrong suffered by the plaintiff.

This line of argument was rejected by the Court in *Association of Data Processing Service Organizations v. Camp.*[280] Moreover, in a recent opinion by Justice Scalia, the Court acknowledged that it was too late in the day to consider a return to a "legal wrong" standard for judicial review.[281] Yet as this Note demonstrated in Part III, the Court has essentially maintained the legal wrong standard through a "zone of interests" test that is closely related to the *Cort v. Ash* test for the existence of a legal right.

Thus, despite its departure from the "legal wrong" standard, the Court has incorporated some Realist insights into its interpretation of the APA. As Professor William Fletcher has written:

> [W]hether the term "standing" is employed, as in *Clarke;* "implied cause of action," as in *Cannon*; "right of action," as in Louisiana; or "legal right," as in the common law examples, the important point to notice is that the question of whether plaintiff "stands" in a position to enforce the defendant's duty is part of the merits of plaintiff's claim. It is the sort of claim that can be tested in federal district courts under a rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, or the sort of issue that is determined in the federal courts of appeals in deciding whether section 10(a) of the Administrative Procedure Act gives plaintiff the right to seek judicial review of administrative action. And it is the sort of claim whose contours are determined by looking to the substantive law upon which the plaintiff relies.[282]

Professor Fletcher could just as easily have added "right secured by the Constitution and laws" to his list of inquiries that must be determined according to the "substantive law" involved. He omits mention, however, of the difference discussed above: in the APA and section 1983 contexts, statutory language authorizes a cause of action where a plaintiff has suffered legal wrong or a violation of rights. If the statutory authorization of lawsuits in the context of the APA and of section 1983 has any effect, the inquiries regarding private enforcement under the remedial statute and directly under the statute itself should not be so similar. This Note has attempted to demonstrate, however, that the explicit authorization of a cause of action in section 1983 — and by similar logic under the APA — should not expand the scope of judicial authority beyond that which is already inherent in the traditional judicial role of enforcing the law. Because the language of section 1983 refers the judge back to a right that a policymaking body

280. 397 U.S. 150 (1970); *see also* Scalia, *supra* note 279, at 888-89; *supra* notes 110-11 and accompanying text.

281. Lujan v. National Wildlife Fedn., 110 S. Ct. 3177, 3186 (1990).

282. Fletcher, *supra* note 109, at 239 (citation omitted).

other than the court has enacted, the judge's authority to fashion remedies remains the same.

A realistic view of rights requires the courts to distinguish between the enforcement of legal rights and the making of policy, and section 1983 instructs courts only to enforce rights. Section 1983 should continue to apply where the plaintiff has a right — which means that it applies where the plaintiff has a legal basis for relief that is external to section 1983 itself. It may be that the Court will generate a term like *zone of interests,* and incorporate Realist insights into the reading of section 1983 without explicitly endorsing a Realist jurisprudence that lays bare the separation of powers questions behind the doctrine. Yet it would greatly clarify the jurisprudence of rights under section 1983 simply to acknowledge that rights and remedies are one and the same.

B. *Summary*

The implied right of action cases reflected a controversy over the very authority of the judiciary to enforce the rule of law. One side held that the legislature creates rights, but that *Marbury v. Madison* provides courts an independent power to enforce rights. The other side contended that the judicial consequences of a statutory right were wholly within the power of the legislature and that, *Marbury* notwithstanding, a right did not create a remedy unless Congress so intended. *Cort v. Ash* attempted to join these fundamentally irreconcilable views, with predictably incoherent results.

At the same time, however, the implied right of action cases were really concerned with a less radical theory that continued the Court's rejection of a common law role for the federal courts. Most of the implied right of action cases concerned damage remedies, in which the case for *Marbury* enforcement of rights was far weaker than in requests for prospective relief. Although implied rights of action might have been justified as an exercise of common law policymaking, the Court was understandably reluctant to take this course.

Even though *Cort*'s doctrine of implied rights of action died, its inconsistencies survive in the body of section 1983 jurisprudence. When the new approach to section 1983 created in *Maine v. Thiboutot* forced the Court actually to construe the statutory term *right,* the confusion created by *Cort* was replicated. The Court has recently acknowledged in *Wilder v. Virginia Hospital Assn., Golden State Transit v. City of Los Angeles,* and *Dennis v. Higgins* that the primary issue in a section 1983 claim is whether the relevant statute creates a right. This new focus moves the Court closer to dispelling the misconceptions created by *Cort.*

The long-established role of the judiciary as the guarantor of the rule of law in our constitutional structure must include the authority to enforce legal rights. By the same token, however, a statute such as

section 1983, which conditions the authority to bring a lawsuit on the existence of a right, cannot expand the authority of the judiciary beyond what already exists. In *Wilder, Golden State Transit,* and *Dennis,* the Court has begun to act on this logic in the context of claims for injunctive relief by requiring a plaintiff claiming a section 1983 right to establish a statutory claim upon which the plaintiff would be able to sue independent of section 1983.

A realistic view of the identity between rights and remedies indicates that this same approach may also be extended to the use of section 1983 to expand damage remedies. If the augmentation of statutory schemes through implied rights of action is rejected as unacceptable common law policymaking outside the context of section 1983, it should be no less so where section 1983 applies. Thus, the implied right of action and section 1983 tests should be the same. Both should recognize that the question is simply whether the statute at issue creates a right, understanding that the rights found will as a matter of definition be accompanied with a remedy. The Court can then begin to articulate a consistent theory of how Congress creates rights.