DePaul University
University Libraries

DePaul Law Review

Volume 30
Issue 3 *Spring 1981*

Article 5

The Application of Seciton 1983 to the Violation of Federal Statutory Rights - Maine v. Thiboutot

Owen M. Field

NOTES

THE APPLICATION OF SECTION 1983 TO THE VIOLATION OF FEDERAL STATUTORY RIGHTS—*MAINE V. THIBOUTOT*

Most challenges to state welfare practices based on alleged conflict with the Social Security Act have been brought under 42 U.S.C. § 1983,[1] which provides a cause of action for deprivation under color of state law of "any rights, privileges, or immunities secured by the Constitution and laws." Initially, courts interpreted section 1983 to be applicable only to violations of constitutional rights guaranteed by the fourteenth amendment.[2] This strict construction was subsequently relaxed when actions brought under section 1983 alleging both constitutional and statutory violations were decided strictly on statutory grounds.[3] The rationale employed in these decisions was that the constitutional claim provided the federal court with the power to hear the state law claim under the court's pendent jurisdiction.[4] The

---

1. Note, *The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction-Era Civil Rights Acts: Blue v. Craig*, 43 GEO. WASH. L. REV. 1343, 1345 (1975) [hereinafter cited as *Federal Hearing*]. Section 1983 of Title 42 provides:

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

42 U.S.C. § 1983 (Supp. III 1979) (emphasis added).

2. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970) (plaintiff must show that defendant deprived him of a constitutional right); Monroe v. Pape, 365 U.S. 167, 171 (1961) (plain purpose of § 1983 is to enforce the fourteenth amendment). *See generally Federal Hearing*, *supra* note 1, at 1347-48. The original 1871 enactment which became § 1983 was explicitly limited to protecting constitutional rights. *See* note 53 *infra*.

3. *See, e.g.*, Yovakim v. Miller, 425 U.S. 231, 236 (1976) (per curiam) (allegations of denial of constitutional right and statutory right under the Social Security Act requires that statutory issue be decided first); Shea v. Vialpando, 416 U.S. 251, 257-58 (1974) (in § 1983 action, where violations of fourteenth amendment and Social Security Act are alleged, and statutory claim is dispositive, the constitutional issue need not be addressed); Hagans v. Lavine, 415 U.S. 528, 543 (1974) (where constitutional issue and statutory claim are brought in federal court, the statutory claim is addressed first and the constitutional issue is not reached if the statutory claim is dispositive).

4. Pendent jurisdiction is the power exercised by a federal court to hear a state law claim. When a state law claim and a substantial federal claim arise from common operative facts, pendent jurisdiction can be used to hear both claims in one proceeding. United Mineworkers v. Gibbs, 383 U.S. 715, 725 (1966) (federal district court has jurisdiction to hear action brought for alleged violations of federal labor law and state law). Exercise of pendent jurisdiction is within the sound discretion of the court. The advantages of pendent jurisdiction are economy of judicial resources, convenience, and fairness to the litigants. Hagans v. Lavine, 415 U.S. 528, 546 (1974); United Mineworkers v. Gibbs, 383 U.S. 715, 726 (1966). *See generally* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962).

judicial policy was that a decision grounded in statutory law was preferable to one based on constitutional law.[5]

Recently, in *Maine v. Thiboutot*,[6] the United States Supreme Court for the first time definitively held that a section 1983 claim can be based solely on the state violation of a federal statutory right.[7] Furthermore, the *Thiboutot* Court held that a state can be ordered to pay the plaintiff's costs of enforcing a federal statutory right because the Civil Rights Attorney's Fees Awards Act of 1976[8] provides that the prevailing party in a section 1983 action can be awarded attorney's fees.[9]

Although pendent jurisdiction will allow a federal court to hear a state law claim that is part of an action brought under § 1983, there must also be a federal jurisdictional basis for the § 1983 action itself. Federal jurisdiction for § 1983 actions is generally based on 28 U.S.C. § 1343 (1976). *Federal Hearing*, *supra* note 1, at 1344-45. This jurisdictional statute provides that district courts have original jurisdiction of a civil action intended, in part, to redress deprivations of rights provided by the Constitution, federal laws providing for equal rights, or federal laws providing for the protection of civil rights, including the right to vote. 28 U.S.C. §§ 1343(3)-1343(4) (1976). In Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), the United States Supreme Court held that an action brought under § 1983 that merely alleged that state welfare regulations conflicted with the Social Security Act was not an action for which §§ 1343(3) or 1343(4) conferred federal jurisdiction. *Id.* at 611-15. *See* notes 21 & 79 and accompanying text *infra*.

5. Hagans v. Lavine, 415 U.S. 528, 547 (1974); Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (decision based on constitutional grounds is to be written as narrowly as possible but, if it can be decided on statutory grounds, the constitutional issue should be avoided); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909) (issue is to be decided by the construction of a state statute rather than on constitutional grounds whenever possible).

6. 448 U.S. 1 (1980). Justice Brennan delivered the opinion of the Court. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, filed a dissenting opinion.

7. 448 U.S. at 4. Prior to *Thiboutot*, lower courts were divided as to whether § 1983 applied only when deprivation of a constitutional right was alleged. Some courts had expressly held that a deprivation of a constitutional right was a necessary element of maintaining an action under § 1983. *See, e.g.*, Oldham v. Ehrlich, 617 F.2d 163, 167 (8th Cir. 1980); Randall v. Goldmark, 495 F.2d 356, 358 (1st Cir.) (per curiam), *cert. denied*, 419 U.S. 879 (1974); McCall v. Shapiro, 416 F.2d 246, 250 (2d Cir. 1969); Cooper v. Morin, 91 Misc. 2d 302, 306, 398 N.Y.S.2d 36, 46 (1977), *aff'd as modified*, 49 N.Y.2d 69, 424 N.Y.S.2d 168 (1979); Lange v. Nature Conservancy, Inc., 24 Wash. App. 416, 421, 601 P.2d 963, 966 (1979). Several other courts, on the other hand, had held that § 1983 extended coverage to deprivations of federal statutory rights. *See, e.g.*, Louise B. v. Coluatti, 606 F.2d 392, 399 (3d Cir. 1979); Togol v. Usery, 601 F.2d 1091, 1099 (9th Cir. 1979); Blue v. Craig, 505 F.2d 830, 835 (4th Cir. 1974); Gomez v. Florida State Employment Serv., 417 F.2d 569, 579 (5th Cir. 1969); Bomar v. Keyes, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

8. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, amended 42 U.S.C. § 1988 to provide:

> In *any action* or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in a civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976) (emphasis added).

9. 448 U.S. at 9. On the same day as *Thiboutot*, the Court decided Maher v. Gagne, 448 U.S. 122 (1980), holding that a § 1983 claim arising out of a state's violation of the Social

The *Thiboutot* Court provided no new bases for its position in spite of the case's uniqueness and far-reaching impact. An analysis of the Court's rationale shows that it was based primarily on the questionable plain meaning of section 1983. Further support was garnered from the ambiguity of the legislative history of section 1983 and the dicta of prior distinguishable decisions. This Note suggests, however, that the Court could have reached the same, but a stronger, conclusion if it had examined current public policy enunciated by Congress.

FACTS AND PROCEDURAL HISTORY

Lionel and Joline Thiboutot received Aid to Families with Dependent Children (AFDC)[10] benefits from the Maine Department of Human Services.[11] The Thiboutot family included eight children. Four of the children were from their marriage, one was hers from a prior marriage, and three were his from a prior marriage.[12] In accordance with its own regulation,[13] Maine computed Lionel Thiboutot's available income to determine the amount of AFDC benefits allowable for his three children and refused to deduct his expenses in support of the four children of his current marriage, despite his legal obligation to support them.

After exhausting the state administrative remedies, which resulted in a final adverse decision by the commissioner of the Maine Department of Human Services, the Thiboutots sought judicial review in a Maine Superior Court, naming the state and commissioner as defendants.[14] The Thiboutot's amended complaint, brought under 42 U.S.C. § 1983, alleged that the defendants, by enforcing the state regulation, had violated the Social Security Act, of which AFDC is part, and applicable federal regulations.[15] Class relief was also sought.[16]

Security Act justifies an award of attorney's fees to the prevailing party. In contrast to *Thiboutot*, the plaintiff in *Gagne* brought the action in federal court and also alleged a violation of the fourteenth amendment. 448 U.S. at 125. The specific issue before the Court in *Gagne* was whether attorney's fees could be awarded against state officials to a plaintiff who prevailed as the result of a consent decree, without a determination that any constitutional rights had been violated. 448 U.S. at 124.

10. Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-610 (1976), formerly titled Aid to Dependent Children (ADC), is a federal program within the Social Security Act, Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397f (1976 & Supp. III 1979)), for appropriating federal funds for each participating state so that the state can furnish financial aid to needy dependent children and the parents or relatives with whom they live. The express purposes of the legislation are to encourage the care of dependent children in the homes of their parents or relatives, to maintain and strengthen family life, and to aid parents or relatives to attain or retain self-support. 42 U.S.C. § 601 (1976).

11. Thiboutot v. State, 405 A.2d 230, 232 (Me. 1979).

12. *Id.*

13. 448 U.S. at 3.

14. 405 A.2d at 232.

15. *Id.* The primary federal regulation involved was 45 C.F.R. § 233.20(a)(3)(ii)(D) (1980), which defines available income and resources of AFDC recipients.

16. 405 A.2d at 232.

The trial court entered judgment on the merits for the Thiboutots and enjoined the state from enforcing the challenged state regulation.[17] The court also ordered the adoption of new regulations, notification to class members of the new regulations, payment of retroactive AFDC benefits to the Thiboutots, and payment of prospective AFDC benefits to eligible members of the class. Payment of retroactive AFDC benefits to the class and an award of attorney's fees to the Thiboutots, however, were denied.[18] The Thiboutots appealed these two aspects of the judgment to the Supreme Judicial Court of Maine.[19]

The state supreme court held that recovery of retroactive benefits by class members was not warranted.[20] The court held, however, that section 1983 does provide a remedy, cognizable in state court, for deprivation of AFDC benefits even though such benefits are not of a constitutional dimension.[21] The court also stated that section 1988, which provides for an award of

---

17. *Id.*

18. *Id.*

19. *Id.* The defendants complied with the order and did not cross-appeal. *Id.*

20. *Id.* at 232-33. The Supreme Judicial Court of Maine held in Drake v. Smith, 390 A.2d 541 (Me. 1978), that sovereign immunity prohibits a retroactive award of AFDC benefits to a class unless the state has consented to be sued. The state court in *Thiboutot* found no express consent in state law or regulations to be sued for retroactive AFDC benefits and no waiver of sovereign immunity in either the state welfare regulations or the state's failure to appeal the award of retroactive AFDC benefits to the Thiboutots. 405 A.2d at 233-35.

21. 405 A.2d at 236. The court noted that Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), could arguably be read to preclude a § 1983 action absent a constitutional basis. Based on its reading of *Chapman* as holding only that 28 U.S.C. §§ 1343(3)-1343(4) deny federal jurisdiction over a § 1983 claim alleging merely a conflict between a state welfare regulation and the Social Security Act, and its notation that the *Chapman* Court was widely divided on the scope of § 1983, the Maine court held that no definitive answer had yet been provided by the Supreme Court. 405 A.2d at 235-36. *Accord*, Holley v. Lavine, 605 F.2d 638, 646-47 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980). The *Chapman* majority opinion, delivered by Justice Stevens and joined by Chief Justice Burger and Justices Blackmun, Powell and Rehnquist, took no position on the scope of § 1983, relying merely upon its procedural character. 441 U.S. at 617. In a concurring opinion, three of these justices stated that § 1983 provides no cause of action absent a deprivation of a constitutional right or a statutory right that guarantees equal rights because § 1983 is historically limited by 28 U.S.C. § 1343(3). *Id.* at 625-40 (Burger, C.J., and Powell and Rehnquist, JJ., concurring). The four remaining Justices stated that § 1983 does provide a cause of action for state violations of the Social Security Act. *Id.* at 670-72 (White, J., concurring in judgment); *id.* at 672-75 (Stewart, Brennan, and Marshall, JJ., dissenting).

There is authority, however, for the proposition that a statute that is intended to provide a minimum level of subsistence does secure equal rights and, therefore, is of a constitutional dimension. *See* Gomez v. Florida State Employment Serv., 417 F.2d 569, 579 (5th Cir. 1969) (state's denial of benefit of wages provided by federal statute to migratory farm workers is deprivation of a civil right for which § 1983 provides a remedy). *Cf.* Lynch v. Household Fin. Corp., 405 U.S. 538, 552-56 (1972) (state's allowance of pre-judicial garnishment of savings account is deprivation of basic civil right for which § 1983 provides a remedy); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (welfare recipients are entitled to procedural due process before termination of benefits). *Contra*, Chapman v. Houston Welfare Rights Org., 441 U.S. at 621; Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976) (welfare benefits are not a fundamental right and there is no constitutional obligation to provide a minimum level of support). *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

attorney's fees to a prevailing party in a section 1983 action, is applicable to the states.[22] Since the lower court failed to explain whether an award of attorney's fees was denied because section 1988 was inapplicable or because fees were not justified, the supreme court remanded for reconsideration of this issue.[23] The United States Supreme Court granted the defendants' writ of certiorari[24] and affirmed the decision of the Supreme Judicial Court of Maine.[25]

COURT'S RATIONALE

The Court specifically addressed two issues.[26] The first was whether the scope of section 1983 includes claims based solely on violations of federal statutory law.[27] The second issue, if such claims were maintainable under section 1983, was whether attorney's fees may be awarded to the prevailing party pursuant to section 1988.[28] The Court concluded that both issues must be answered affirmatively.

The Court provided one dispositive and two supportive bases in determining that a violation of federal statutory law, absent any constitutional claim, is encompassed by section 1983. The Court first stated that the plain meaning of the phrase "any rights . . . secured by the Constitution and laws" within section 1983 does not limit the statute's application to those laws dealing exclusively with constitutional rights. Noting that section 1983 does not qualify those laws embraced by the phrase "and laws," the Court ruled that the statutory language clearly includes within its coverage a claim that a state violated the Social Security Act.[29]

---

22. 405 A.2d at 237-39.

23. *Id.* at 239-40.

24. 444 U.S. 1042 (1980).

25. 448 U.S. at 4.

26. *Id.* at 3. The defendants raised a third issue, arguing that state courts do not have jurisdiction to hear § 1983 claims. The Court dismissed this argument, stating that Martinez v. California, 444 U.S. 277, 283 n.7 (1980), held that a state court was not prohibited from hearing § 1983 actions. 448 U.S. at 3 n.1. *See* Aldinger v. Howard, 427 U.S. 1, 36 n.17 (1976) (Brennan, Marshall, and Blackmun, JJ., dissenting) (joinder of county in § 1983 action results in a state law claim not within federal diversity jurisdiction and, thereby, implies § 1983 action is cognizable in state court); Terry v. Kolski, 78 Wis. 2d 475, 490-94, 254 N.W.2d 704, 709-11 (1977) (action brought under § 1983 by prisoner for violation of constitutional rights by county police officer can be heard by state court because jurisdiction is not exclusively reserved by federal courts). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & SOC. ORD. 557, 575-76. Judge Aldisert not only accepted that state courts have concurrent jurisdiction of § 1983 claims, but stated that, with the expansion of § 1983, the state courts should be relied upon to ease the burden of these actions on the federal courts. *Id.* at 573.

27. 448 U.S. at 3.

28. *Id.*

29. *Id.* at 4. The dissent, on the other hand, asserted that the meaning of the language is not plain, clear, and unambiguous. *Id.* at 13 n.1 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting). *See* note 50 and accompanying text *infra*.

As support for its interpretation of the statute's plain meaning, the Court found in its prior decisions a second basis for applying section 1983 to purely federal statutory violations.[30] Dictum in several cases indicated that section 1983 was available to remedy violations of federal statutory rights.[31] Furthermore, several section 1983 cases involving the Social Security Act, while raising constitutional issues, were decided solely on statutory grounds.[32]

The final supportive basis for the Court's determination that the scope of section 1983 included violations of merely federal statutory law was its interpretation of the statute's legislative history.[33] The Court first found that the legislative history of section 1983 and its predecessor statutes provided no definitive answer regarding the meaning of "and laws."[34] Second, the Court stated that nothing in the legislative history indicated that the plain meaning of "and laws" was not meant.[35] Finally, the majority viewed congressional silence in the wake of the Court's prior decisions as an acceptance of the Court's implicit expansion of the scope of section 1983 in past decisions. In the opinion of the Court, if "and laws" is to be qualified in any way, it is the responsibility of Congress to do so.[36]

Having decided that section 1983 provides a remedy for a violation of a federal statutory right, the *Thiboutot* Court easily resolved the issue of whether section 1988 authorizes an award of attorney's fees to the prevailing party in such an action. Again, the plain meaning of the statutory language was examined first.[37] Section 1988 provides that "*any* action . . . to enforce section[s] . . . 1983" enables a court, in its discretion, to award attorney's

---

30. *Id.* at 4. The Court intimated that a holding based on the plain meaning of § 1983 is sufficient because the statutory language is unambiguous. Prior decisions, however, were cited as precedential support for its interpretation of the breadth of § 1983. *Id.*

31. *Id.* at 4-5. *See, e.g.*, Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 700-01 (1978) ("[section] 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"); Edelman v. Jordan, 415 U.S. 651, 675 (1974) ("*Rosado v. Wyman*, 397 U.S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States"); Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972) ("the [predecessor to § 1983] was enlarged to provide protection for rights, privileges, or immunities secured by federal law. . . ."); Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966) ("[state] officers may be made to respond in damages not only for violations of rights conferred by federal equal rights laws, but of violations of other federal constitutional and statutory rights as well"); Hague v. CIO, 307 U.S. 496, 525-26 (1939) ("[the predecessor to § 1983] was extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution"). The *Thiboutot* dissenters refused to accept these cases as authority that § 1983 provides a remedy for violations of federal statutory rights. 448 U.S. at 26-29 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting). *See* notes 68-70 and accompanying text *infra*.

32. 448 U.S. at 6. *See* notes 3-5 and accompanying text *supra*.

33. 448 U.S. at 7-8.

34. *Id.* at 7. *See* notes 61-63 and accompanying text *infra*.

35. 448 U.S. at 8.

36. *Id. Cf.* TVA v. Hill, 437 U.S. 153, 194 (1978) (courts are only to determine a statute's meaning and constitutionality, not the wisdom with which it was passed).

37. 448 U.S. at 9.

fees to the prevailing party.[38] Thus, once a claim is determined to be legitimately brought under section 1983, attorney's fees can be awarded. The Court also noted that the legislative history of section 1988 is consistent with the statute's plain meaning.[39] It cited statements by sponsors of the Civil Rights Attorney's Fees Awards Act that indicated the statute should apply to suits arising out of violations of federal statutory rights, as well as constitutional rights.[40] Accordingly, the majority had no doubts that Congress enacted the Civil Rights Attorney's Fees Awards Act knowing that it would apply to statutory section 1983 claims.[41]

ANALYSIS

That section 1988 allows a court discretion to award attorney's fees in any legitimate section 1983 action cannot be seriously disputed.[42] The primary issue in *Thiboutot*, therefore, centered on whether a state's alleged violation of a federal statute, absent a related constitutional question, was legitimately brought under section 1983.[43] The Court offered three justifications for an affirmative resolution of this issue. Analysis of these rationales shows that they are not sufficient to support the Court's expansion of section 1983 to include purely statutorily-based actions. The majority's expansive interpretation of section 1983 could have been justified by the Congress' public policy declarations regarding section 1983 articulated during the enactment of the Civil Rights Attorney's Fees Awards Act. Unfortunately, the Court did not look to this current expression of legislative intent. By passing the Civil Rights Attorney's Fees Awards Act, Congress intended to broaden the remedy available under section 1983, which Congress explicitly viewed as providing a remedy for violations of federal statutory law.[44]

---

38. *Id.* (emphasis added).

39. *Id.*

40. *Id.* at 9-10. *See* note 73 *infra.*

41. 448 U.S. at 10. Whereas the majority stated that the meaning of § 1983 was clear and plain, and that the statute's legislative history and case law interpretation did not indicate any meaning to the contrary, the dissent's basic premise was that the statute's meaning was not clear and plain on its face. *Id.* at 12 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting). Because the statutory language needed interpretation, the legislative history was analyzed. Unlike the majority, the dissent stated that the legislative history necessitated limiting the scope of § 1983 to deprivations of constitutional rights or rights guaranteed by statutes providing for equal rights. *Id.* at 14-19. The dissent concluded that although the Civil Rights Attorney's Fees Awards Act applies to all § 1983 actions, the Thiboutot's claim was not properly within the scope of § 1983 and, therefore, attorney's fees could not be awarded. *Id.* at 24.

42. The dissent's only argument against the majority's bare holding that an award of attorney's fees under § 1988 is possible for any legitimate § 1983 action was that the legislative history that the majority cited was not sufficient to support the consequences of *Thiboutot*. *Id.* at 25 n.14. *See* note 73 *infra.*

43. 448 U.S. at 3.

44. *See* notes 73 & 95 and accompanying text *infra.*

Critique of the Thiboutot *Decision*

The Court reasoned that the plain meaning of "any rights . . . secured by the Constitution and laws" includes purely statutory violations because the phrase is not qualified to limit section 1983 to a specific subset of laws, such as laws providing for equal rights.[45] In fact, the majority stated that on the basis of this language alone, the Thiboutot's claim was encompassed by section 1983.[46]

Reliance on a statute's plain meaning is intellectually unsatisfying. The plain meaning rule of statutory construction states that when a statute's language is clear and unambiguous, a court need not look any further to construe it if this interpretation is not absurd or wholly impracticable.[47] Use of the plain meaning rule, however, implicitly denies that words are inherently unclear or can change meaning over time.[48] Furthermore, it can act as a talisman to avoid establishing the legislative intent behind the passage of a statute.[49] In *Thiboutot*, these consequences are evident. As the dissent noted, the phrase "any rights . . . secured by the Constitution and laws" can easily be interpreted to have a plain meaning other than the one ascribed to it by the majority. The use of the conjunctive "and" instead of the disjunctive "or" could indicate that a right must also be secured by the Constitution to be within the purview of section 1983.[50] Given this ambiguity in the language, the Court's reliance on the plain meaning rule was inappropriate.

---

45. 448 U.S. at 4. Section 1983 does not, for example, read "any rights . . . secured by the Constitution and laws providing for equal rights." *Cf.* 28 U.S.C. § 1343(3) (1976) (district court has original jurisdiction of any civil action alleging deprivation of "any right . . . secured by the Constitution . . . or by any Act of Congress providing for equal rights. . . ."). Section 1983 is not a law that provides for equal rights. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979).

46. 448 U.S. at 4. "[T]he plain language of the statute *undoubtedly* embraces respondents' claim that petitioners violated the Social Security Act." *Id.* (emphasis added).

47. *See, e.g.*, United States v. Oregon, 366 U.S. 643, 648 (1961) (federal statute providing that personal property of veteran without will or legal heirs who dies in veterans' hospital vests in federal government is clear and unequivocal, making analysis of legislative history unnecessary); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) (no need to resort to legislative history because act allowing supervisory employees to join union is unambiguous); Caminetti v. United States, 242 U.S. 470, 490 (1917) (statutory language of Mann Act is clear and unambiguous, thereby making further inquiry of legislative intent unnecessary). *See generally* 2A SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. C. Sands 1973) [hereinafter cited as SUTHERLAND].

Even if the language is clear, however, consideration of the legislative history is not precluded by any rule of law. Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976).

48. Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAY. L. REV. 31, 32-33 (1979) [hereinafter cited as Merz]; Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1315 (1975) [hereinafter cited as Murphy].

49. Murphy, *supra* note 48, at 1315-16.

50. 448 U.S. at 13 n.1 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting). The dissent did not believe that, based on legislative history, the majority's construction should be this restrictive. Because the language was subject to more than one meaning, legislative history was a necessary aid to interpretation. *Id.*

Under these circumstances, the origins of the statute—the legislative intent as determined through legislative materials—should have been examined in order to aid in its construction.[51] Rather than relying on legislative history as an aid to the interpretation to be given section 1983, however, the majority merely used the legislative history as support for its previously determined conclusion based on the plain meaning rule. The majority simply stated that the inconclusiveness of the statute's history did not warrant an interpretation other than the plain meaning as the majority interpreted it.[52] Even though the majority was not justified in relying on the plain meaning rule, it was correct in its conclusion that the legislative history of section 1983 was not dispositive of the focal issue in *Thiboutot*.

The evolution of 42 U.S.C. § 1983 began with the passage of the Civil Rights Act of 1871,[53] popularly known as the Ku Klux Klan Act.[54] The rights secured under this legislation were the same rights guaranteed by the fourteenth amendment. As with the current section 1983, the Ku Klux Klan Act created no substantive rights.[55] In 1866, Congress authorized the revision of all federal statutes then in effect.[56] Among the duties with which the Revision Commission was charged was "omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text."[57] Passed before the revision had been completed, the Ku Klux

---

51. *Id.* at 13-14. *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 549 (1972) (both statutory language and legislative history must be considered when interpreting § 1983); United States v. Dickerson, 310 U.S. 554, 562 (1940) (because language of military reenlistment statute can be reasonably interpreted in differing ways, legislative materials are to be considered in spite of their possible ambiguity). *See also* Merz, *supra* note 48, at 39-40; Murphy, *supra* note 48, at 1314-17.

52. 448 U.S. at 7-8. *Cf.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 610 (1979) (legislative history of § 1983 and § 1343 does not provide definitive answer to the interpretation of their relationship).

53. Entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," § 1 provided:

> 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 . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . .

Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (revised by Rev. Stat. § 1979 (1878)).

54. Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1, 4 (1970) [hereinafter cited as Herzer]. The congressional debates over its enactment are collected at 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 597-653 (B. Schwartz ed. 1970).

55. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979). *See also* Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged*, 2 CLEARINGHOUSE REV.5, 7 (1969) [hereinafter cited as Cover]; Herzer, *supra* note 54, at 5.

56. Act of June 27, 1866, ch. 140, 14 Stat. 74-75.

57. *Id.* § 2.

Klan Act was also revised but remained virtually identical to its predecessor except for the insertion of the phrase "and laws."[58] The current codification is substantively identical to the revised version.[59] In its report, the Revision Commission did not explain the absence of an annotation accompanying the revised statute to clarify the addition of "and laws."[60] Thus, in interpreting the legislative intent in adding "and laws," the *Thiboutot* Court was reduced to determining why the commission omitted an annotation. Two interpretations of this omission have been postulated. One is that Congress accepted this change intending that "and laws," by its plain meaning, would broaden the scope of section 1983.[61] A contrary position is that Congress meant no substantive change. Under this latter view, the addition of "and laws" was meant only to ensure that section 1983 extended coverage to federal statutes providing for equal rights.[62] In short, as the Court noted, these conflicting views[63] militate against any assertion that the legislative history is dispositive.[64]

---

58. The revised version provided:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

Rev. Stat. § 1979 (1878) (emphasis added).

59. 42 U.S.C. § 1983 (Supp. III 1979). The last sentence in the current codification was added by Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284, to insure that citizens of the District of Columbia have rights equal to those of citizens in states and territories. H.R. REP. No. 96-548, 96th Cong., 1st Sess. 1, *reprinted in*, [1979] 3 U.S. CODE CONG. & AD. NEWS 2609. *See* note 1 *supra*. The Supreme Court had held in District of Columbia v. Carter, 409 U.S. 418 (1973), that the District of Columbia was not a "State or Territory" within the meaning of § 1983.

60. Congress, when it created the Revision Commission, directed that changes and corrections made by the Commission were to be annotated. Act of June 27, 1866, ch. 140, § 3, 14 Stat. 75. No such annotation accompanied § 1979 of the Revised Statutes.

61. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 669 (1979) (White, J., concurring in judgment).

62. 448 U.S. at 16 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 630 (1979)(Burger, C.J., and Powell & Rehnquist, JJ., concurring). *Cf.* Monroe v. Pape, 365 U.S. 167, 212 n.18 (1961) (Frankfurter, J., dissenting). An extreme application of this view was made in Wynn v. Indiana State Dep't of Pub. Welfare, 316 F. Supp. 324 (N.D. Ind. 1970). The *Wynn* court held that only the legislative history of the original 1871 enactment should be considered, thus ignoring the revision entirely. *Id.* at 328.

63. For further discussion of the evolution of § 1983 and the interpretation of "and laws," see Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972). *See also* Cover, *supra* note 55, at 7, 24-25; Herzer, *supra* note 54, at 4-9; Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404, 1417-19 (1972); Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 109-15 (1967); Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1287 (1953); Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U. L. REV. 839, 840-43 (1964). These commentators have focused on interpreting § 1983 in light of its historical confluence with the jurisdictional

The Court further endeavored to blunt criticism of its reliance on the plain meaning rule by attempting to draw a strong line of precedential support for *Thiboutot*.[65] Statements were found in opinions indicating that statutory rights fall within the purview of section 1983.[66] The Court also pointed to its decisions interpreting the interplay of section 1983 and the Social Security Act that allowed the actions to be decided solely on statutory grounds even though deprivations of constitutional rights were also alleged.[67] Contrary to the majority's assertion, *Thiboutot* truly marks a departure from these prior decisions in two fundamental ways. The first is that, while in some cases dictum appears to state definitively that section 1983 applies to an alleged violation of only a federal statutory right,[68] cases not cited by the majority specifically stated that the Court had not yet decided that question.[69] The second problem is that these statements were made merely as dicta without any significant exposition of their basis or analysis of their import.[70] Thus,

---

statute, 28 U.S.C. § 1343(3). In essence, the question they addressed was whether the phrase "deprivation of any rights . . . secured by the Constitution and laws" in § 1983 is limited by the phrase "deprivation . . . of any right . . . secured by the Constitution . . . or by any Act of Congress providing for equal rights" in § 1343(3). The concern was not only to ferret out the legislative intent in the discrepancy of the wording in order to determine the scope of § 1983, but also to determine whether federal jurisdiction would be available depending on what the scope of § 1983 was found to be. In *Thiboutot*, the issue of the availability of federal jurisdiction was not relevant because the action was brought in state court. *See* note 21 and accompanying text *supra*.

64. 448 U.S. at 7.

65. *Id.* at 4-5.

66. *Id. See* note 31 *supra*.

67. 448 U.S. at 5-6. *See* note 3 *supra*.

68. *See* note 31 *supra*.

69. The Court had opportunities to decide squarely whether the scope of § 1983 includes claims based solely on an alleged conflict of state law with federal law, but expressly reserved the question. *See* Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979) (college not required by federal law to take affirmative action in admitting handicapped applicant who does not qualify for admission); Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) (reserved question of whether § 1983 can be used to vindicate statutory right provided by Social Security Act); King v. Smith, 392 U.S. 309, 312 n.3 (1968) (reserved question of whether claim can be brought under § 1983 solely on grounds that state welfare law conflicts with federal welfare law). Both *Hagans* and *King*, however, were brought in federal courts and alleged deprivations of constitutional rights as well as statutory rights. Thus, it was not necessary for the Court to decide whether only allegations of deprivations of statutory rights were sufficient for bringing the § 1983 actions. The constitutional claims provided the jurisdictional base. 448 U.S. at 6. In *Davis*, the Court decided the case on the merits, making it unnecessary to decide whether § 1983 provided a separate cause of action. 442 U.S. at 404 n.5.

70. 448 U.S. at 31 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting). The dissent focused on the statements in Greenwood v. Peacock, 384 U.S. 808 (1966), and Edelman v. Jordan, 415 U.S. 651 (1974), that the majority cited as precedent for its decision. *See* note 31 and accompanying text *supra*. *Greenwood* cited only § 1983 itself and Monroe v. Pape, 365 U.S. 167 (1961), which was decided on constitutional rather than statutory grounds. The dictum from *Edelman* relied upon by the majority was a statement interpreting Rosado v. Wyman, 397 U.S. 397 (1970), which erroneously labeled *Rosado* as a § 1983 case. As the dissenters in *Thiboutot* pointed out, § 1983 was not expressly addressed in *Rosado*. 448 U.S. at 30. (Burger, C.J., and Powell & Rehnquist, JJ., dissenting).

by relying only upon the dubious plain meaning of section 1983, bolstered minimally by the ambiguity of the statute's legislative history and cursory dicta in prior decisions, the Court failed to adequately support its decision.

Alternative Basis for the Thiboutot *Decision*

Rather than "almost casually"[71] holding as it did, the Court had sufficient basis in public policy for holding that the scope of section 1983 extends to violations of federal statutory rights. The Court should have relied on the recent statement of congressional policy regarding the interpretation of section 1983. This policy is reflected in the legislative history of the Civil Rights Attorney's Fees Awards Act. Although a subsequent legislative construction of a statute is not binding on a court, it is a valuable aid in resolving doubts in the interpretation of a statute.[72]

The congressional proponents of the Civil Rights Attorney's Fees Awards Act unequivocally stated that the Act provided an additional remedy for violations of federal statutory rights, as well as deprivations of constitutional rights under section 1983.[73] The readily apparent legislative intent was to enable an award of attorney's fees to the prevailing party in a section 1983 action involving only a federal statutory claim. Thus, it would have been both incongruous and contrary to legislative intent for the *Thiboutot* Court to have asserted, as the dissent did, that section 1983 is inapplicable to a federal statutory claim. The *Thiboutot* Court failed to rely on this legislative

---

71. 448 U.S. at 11 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting).

72. *See* Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (unanimous decision) (views of subsequent Congresses are accorded significant weight in determining power of Secretary of Commerce to permanently release trade restrictions on vessels when intent of enacting Congress is unclear); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275-85 (1974) (clarification of prior labor statute by a subsequent Congress' legislation is given significant weight in determining basic policy questions); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969) (subsequent legislation regarding political equal time provisions that clarifies intent of prior related statute is to be given great weight in construing the prior statute). *Cf.* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979) (observations of later Congress will not override clear intent of enacting Congress). *See generally* SUTHERLAND, *supra* note 47, § 49.11.

73. Sponsors in both the House of Representatives and the Senate believed the Act should apply to violations of rights provided by federal statutory law. "Section 1983 protects civil and constitutional rights from abridgement [sic] by state and local officials. . . . Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights." 122 CONG. REC. 35122 (1976) (remarks of Rep. Drinan). "This legislation [Civil Rights Attorney's Fees Awards Act] is intended to cover cases based on both constitutional and statutory rights, including supremacy clause cases. See 42 U.S.C. § 1983." 122 CONG. REC. 33315 (1976) (remarks of Sen. Abourezk). The Senate report on the Civil Rights Attorney's Fees Awards Act stated that the legislation is intended to award attorney's fees in cases brought under § 1983, a statute for "redressing violations of the Federal Constitution *or laws* by officials sworn to uphold the laws." S. REP. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5911 (emphasis added) [hereinafter cited as S. REP.]. *See also* Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977) (Congress clearly intended the Civil Rights Attorney's Fees Awards Act to apply to statutory claims brought under § 1983), *cert. denied*, 438 U.S. 916 (1978).

history in interpreting section 1983, using it instead only as support for the Court's reading of the plain meaning of the Civil Rights Attorney's Fees Awards Act.[74] The Court's failure to highlight this current congressional intent and formulation of public policy regarding section 1983 placed the Court in the less tenable position of relying on historical ambiguity and congressional silence as interpretive tools of legislative intent.

In view of the Court's prior restrictive Social Security Act and section 1983 decisions, the *Thiboutot* decision, if not the Court's specific method of reaching it, is necessary to preserve the individual's ability to seek redress for state violations of the federal AFDC program. The Civil Rights Attorney's Fees Awards Act was intended, in part, to encourage the vindication of federal statutory rights[75] by private litigants.[76] Under prior Supreme Court decisions, no private right of action against a state exists under the Social Security Act, thereby necessitating the use of section 1983 by a AFDC recipient who sought to conform a state welfare program with federal law.[77] Federal jurisdiction, however, does not exist for the usual Social Security Act case brought under section 1983 because of the minimal amount of money involved[78] or the lack of a constitutional claim.[79] Moreover, even if the action were maintainable in federal court, an award of retroactive AFDC benefits, a desired and just remedy for one whose benefits were erroneously denied, cannot be obtained in federal court.[80] The Thiboutots prevailed on the merits in state court, but a different interpretation of section 1983 in *Thiboutot* would have denied them the legislatively intended remedy of an award of attorney's fees for statutorily based section 1983 actions[81] in state court. Such a decision, when combined with the virtual foreclosure of AFDC cases in federal court, would have prevented any private enforcement of

---

74. 448 U.S. at 9-10. *See* notes 39-41 and accompanying text *supra*.

75. *See* note 73 *supra*.

76. *See* note 95 and accompanying text *infra*.

77. 448 U.S. at 3.

78. 28 U.S.C. § 1331(a) (Supp. III 1979) (federal jurisdiction requires amount in controversy of $10,000). *See Federal Hearing*, *supra* note 1, at 1344-45. Subsequent to the *Thiboutot* decision, the jurisdictional amount was eliminated from § 1331 by the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369.

79. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611-15 (1979); Oldham v. Ehrlich, 617 F.2d 163, 166 (8th Cir. 1980) (under *Chapman*, mere inconsistency of state welfare regulation with Social Security Act does not invoke a constitutional right within the meaning of 28 U.S.C. § 1343); McManama v. Lukhard, 616 F.2d 727, 728-29 (4th Cir. 1980) (*Chapman* precluded argument that 28 U.S.C. § 1343(3) provides federal jurisdiction when merely a conflict between a state regulation and federal law is asserted).

80. Edelman v. Jordan, 415 U.S. 651, 668-74 (1974). In *Edelman*, the Court held that the eleventh amendment prohibits an award of retroactive welfare benefits against a state. *Id.* Justice Rehnquist, writing for the majority, likened such an award to damages. *Id.* at 668. *Cf.* Quern v. Jordan, 440 U.S. 332, 342-45 (1979) (§ 1983 does not abrogate states' sovereign immunity under eleventh amendment). *See generally* Note, *The Outlook for Welfare Litigation in The Federal Courts: Hagans v. Lavine & Edelman v. Jordan*, 60 CORNELL L. REV. 897, 903-06 (1975).

81. *See* note 73 *supra*.

state compliance with federal law, the very policy Congress wanted to encourage by enacting the Civil Rights Attorney's Fees Awards Act.[82]

IMPACT OF THE *THIBOUTOT* DECISION

Beyond the immediate impact of providing a remedy for the Thiboutots, the most tangible result of the *Thiboutot* decision, is the enlarged category of section 1983 actions and the resulting awards of attorney's fees under section 1988. Potentially, any federal statute which cooperatively involves a state can now give rise to a claim under section 1983 whenever a violation of the statute by the state is alleged.[83] Furthermore, a prevailing claimant in such an action may then be awarded attorney's fees from the state under section 1988. Consequently, plaintiffs may begin to append section 1983 claims to complaints merely to recover attorney's fees.[84] The *Thiboutot* dissenters feared the erosion of the protection provided to the states by the "American Rule"[85] of attorney's fees awards[86] and, consequently, a weakening of state treasuries.[87]

---

82. *See* note 95 and accompanying text *infra*.

83. 448 U.S. at 22 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting). A partial list of statutes that may now give rise to § 1983 actions is provided in an appendix to the dissent in *Thiboutot*. *Id.* at 34-37. Dictim in two post-*Thiboutot* decisions has indicated that § 1983 is not available to a plaintiff when a federal statute provides an exclusive remedy. Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615, 2626 (1981); Pennjurst State School and Hosp. v. Halderman, 101 S. Ct. 1531, 1545 (1981).

84. Both the defendants and dissenters in *Thiboutot* believed the plaintiffs had done just that. *Id.* at 24 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting); Brief for Petitioner at 17-18. The express use of § 1983, however, may not even be necessary in order to recover attorney's fees under § 1988. For example, the court in La Raza Unida v. Volpe, 440 F. Supp. 904 (N.D. Cal. 1977), held that § 1983 need not even be pleaded in order to award attorney's fees under § 1988. A judicial finding that the state had deprived the plaintiff of rights, privileges, or immunities secured by federal laws is sufficient to imply a § 1983 action and, thereby, make possible an award of attorney's fees under § 1988. *Id.* at 907-08. *Cf.* Williams v. Miller, 620 F.2d 199 (8th Cir. 1980) (case remanded for consideration of award of attorney's fees under § 1988 even though prevailing plaintiff failed to mention § 1988 in application for attorney's fees).

85. The general rule in the United States is that a prevailing litigant must bear his own attorney's fees. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (prevailing party in federal litigation brought to prevent issuance of permits for construction of pipeline is not entitled to recover attorney's fees absent statutory authorization). *See generally* D. DOBBS, LAW OF REMEDIES 194-200 (1973). One judically created exception to the "American Rule" has been to award attorney's fees to a prevailing party whose litigation vindicated important public rights or furthered the public interest. *See, e.g.*, Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1975) (vindication of first and fourteenth amendment rights in action brought under § 1983 is a public benefit warranting award of attorney's fees against state officials); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (per curiam) (prevailing plaintiff in racial discrimination action brought under § 1982 is entitled to award of attorney's fees for vindicating public right); United Steelworkers v. Butler Mfg. Co., 439 F.2d 1110 (8th Cir. 1971) (union's suit on breach of contract warrants award of attorney's fees because it enforced national labor policy). This exception was precluded after *Alyeska*. 421 U.S. at 263-64. The Civil Rights

The damage to the state fisc, however, does have checks. Although an award of attorney's fees generally is to be made to the prevailing party unless such an award would be unjust,[88] the award is discretionary both as to amount and as to whether a party is considered to have prevailed.[89] Courts have developed criteria for determining a reasonable attorney's fee.[90] For example, some courts have limited the fees recoverable to the time actually

---

Attorney's Fees Awards Act was enacted in large part to reinstate the exception statutorily. S. REP., *supra* note 73, at 1, 4, 6, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908-09, 5911, 5913. Subsequent court decisions have followed this expression of legislative intent. *See, e.g.*, Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 36 (2d Cir. 1978); White v. Beal, 447 F. Supp. 788, 792-93 (E.D. Pa. 1978); La Raza Unida v. Volpe, 440 F. Supp. 904, 907 (N.D. Cal. 1977).

86. 448 U.S. at 24 (Burger, C.J., and Powell & Rehnquist, JJ., dissenting).

87. *Id.* This objection was implicitly rejected in Hutto v. Finney, 437 U.S. 678 (1978), when the Court stated that "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against government officials or entities." *Id.* at 694 (quoting H.R. REP. No. 94-1558, 94th Cong., 1st Sess. 7 (1976)).

88. S. REP., *supra* note 73, at 4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5912, *quoting* Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam). This legislative intent has been followed in subsequent decisions. *See, e.g.*, Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d, 34, 37-38; Rheuark v. Shaw, 477 F. Supp. 897, 919 (N.D. Tex. 1979). Awards of attorney's fees are not necessarily limited to prevailing plaintiffs. Awards to prevailing defendants have been made where the § 1983 claim was frivolous. *See, e.g.*, Church of Scientology v. Cazares, 638 F.2d 1272, 1290 (5th Cir. 1981) (despite sustaining plaintiff's complaint for over two years and novelty of legal issues); Kane v. City of New York, 468 F. Supp. 586, 592-593 (S.D.N.Y. 1979) (persistent bringing of meritless civil rights actions); Goff v. Texas Instruments, Inc., 429 F. Supp. 973, 976 (N.D. Tex. 1977) (no contention of state action in § 1983 action brought against private corporation). *Cf.* Hughes v. Rowe, 101 S. Ct. 173, 178-79 (1980) (per curiam) (prevailing defendant in action brought under § 1983 may be awarded attorney's fees if suit was "frivolous, unreasonable, or without foundation even though not brought in subjective bad faith"). There is nothing in *Thiboutot* to indicate that such awards are precluded. Congressional proponents of the Civil Rights Attorney's Fees Awards Act even argued that it was intended, in part, to prevent frivolous law suits. 122 CONG. REC. 31832 (1976) (remarks of Sen. Abourezk and Sen. Hathaway).

89. *See, e.g.*, Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978) (determination of whether requested attorney's fees are reasonable is within the trial court's discretion); Tobeluk v. Lind, 589 P.2d 873, 879-80 (Ala. 1979) (court retains its discretion in determining whether a party has prevailed within meaning of § 1988).

90. The final report on the Civil Rights Attorney's Fee Awards Act endorsed the standards applied in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). S. REP., *supra* note 73, at 5916, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5913. Relevant factors are as follows: (1) time and labor required; (2) novelty and difficulty of issue involved; (3) legal skill required; (4) preclusion of other employment due to acceptance of case; (5) customary fee in the community; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or situation; (8) amount of money involved and results obtained; (9) attorney's reputation, experience, and ability; (10) undesirability of the case; (11) nature and length of professional relationship with client; and (12) awards in similar cases. *See also* Muscare v. Quinn, 614 F.2d 577, 579 (7th Cir. 1980); King v. Greenblatt, 560 F.2d 1024, 1026-27 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Rainey v. Jackson State College, 551 F.2d 672, 676 (5th Cir. 1977).

spent on issues which were not frivolous,[91] on which the plaintiff prevailed,[92] and for which time records could be presented.[93] Also, the possibility of greater financial liability may act as an inducement to the states to make a greater effort to meet the requirements of federal laws and regulations.[94]

Furthermore, the very purpose of the Civil Rights Attorney's Fees Awards Act is to encourage private enforcement of rights.[95] The potential for abuse[96] must be tolerated to promote what Congress has deemed the greater public good of private enforcement of rights. Finally, although states are no longer protected by the "American Rule" in section 1983 actions, the potential liability for attorney's fees in statutorily-based section 1983 actions is "no startling new remedy"[97] and is not unique to section 1983 actions. Numerous legislative enactments provide for an award of attorney's fees to the prevailing party in actions that Congress has determined warrant such awards.[98] This legislative decision weakens the "American Rule" no more than any of these other statutes that provide attorney's fees.

---

91. Northcross v. Board of Educ., 611 F.2d 624, 636-37 (6th Cir. 1979) (hours expended by attorneys of prevailing plaintiffs in school desegregation suit may be reduced by amount of time spent in duplicative or frivolous claims), *cert. denied*, 447 U.S. 911 (1981). Merely because research on a particular issue was unproductive, however, does not necessitate a reduction in hours claimed. *Id.* at 636.

92. Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978) (attorneys of prisoners who prevailed on library access issue must divide time attributable to that issue from time expended on other issues). *But see* Crain v. City of Mountain Home, 611 F.2d 726, 729 n.7 (8th Cir. 1979) (award of attorney's fees under § 1988 should not be limited to hours spent on issues on which plaintiff prevails).

93. Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918, 929 (S.D.N.Y. 1979) (to determine reasonable hourly rate in award of attorney's fees under § 1988, the court must be given time logs or affidavits of hours spent, identifying attorneys and activities).

94. *Cf.* Keyes v. School Dist. No. 1, 439 F. Supp. 393, 401 (D. Colo. 1977) (availability of attorney's fees award encouraged law suit, without which school desegregation would not have been achieved).

95. S. REP., *supra* note 73, at 2, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5910. Congress deemed awards of attorney's fees an "essential" element in the private citizens' quest to vindicate their rights and to enforce congressional policy. *Id.*

96. *See* notes 84 & 88 and accompanying text *supra*.

97. S. REP., *supra* note 73, at 6, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5913.

98. Congress has enacted over ninety such statutes. SUBCOMM. ON CONSTITUTIONAL RIGHTS, U.S. SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS CONCERNING THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S. 2278) 303-13 (Comm. Print 1976). *See also* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. at 260 n.33; 122 CONG. REC. 35123 (1976) (comments of Rep. Drinan). One of the most commonly used statutes that provides for awards of attorney's fees is part of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241. It provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ." 42 U.S.C. § 2000e-5(k) (1976). In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (unanimous decision) (Brennan & Stevens, JJ., concurring separately), the Court held that an action brought under the Civil Rights Act of 1964 for sex discrimination was enforceable against a state. *Id.* at 456-57. Given the express congressional authority for awards of attorney's fees in the Act, a state may also be required to pay the attorney's fees of the prevailing plaintiff. *Id.* at 457.

Clearly, as a result of *Thiboutot*, deprivation of a constitutional right or an equal right provided statutorily by Congress is no longer a prerequisite for a valid section 1983 claim. Although the Court, prior to *Thiboutot*, had recognized that the two allegations necessary for stating a claim under section 1983 were a deprivation of a federal right and a deprivation of that right under color of state law,[99] it was unclear whether all federal statutory rights constituted such federal rights within the meaning of section 1983. The decisions of lower courts on this issue were far from uniform.[100] Thus, the Court's clearly articulated result in *Thiboutot* should provide, at last, the needed national uniformity in actions involving federal statutory rights.

CONCLUSION

The impact of *Maine v. Thiboutot* is clear and substantial. A state's violation of a federal, and purely statutory, right will give rise to a claim under section 1983. The prevailing party may be awarded attorney's fees. All programs administered by states under federal guidelines are now potential bases for section 1983 actions if a state violates a federal law or regulation. Although the Court's result is clear, its rationale is weak because it relied on the arguable plain meaning of section 1983, on the confusion surrounding legislative history, and on dicta. A clear pronouncement of public policy for allowing such actions, as set forth in the legislative history of the Civil Rights Attorney's Fees Awards Act, while not changing the immediate result, would have buttressed the opinion against future assaults on the individual's attempts to survive in the welfare state.

Owen M. Field

---

99. Gomez v. Toledo, 446 U.S. 635, 640 (1980) (unanimous decision) (Rehnquist, J., concurring) (defendant in § 1983 action who may have qualified immunity must plead good faith as affirmative defense); Monroe v. Pape, 365 U.S. 167, 171 (1961).

100. *See* note 7 *supra*.