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WHITHER *THIBOUTOT*? SECTION 1983, PRIVATE ENFORCEMENT, AND THE DAMAGES DILEMMA

George D. Brown*

If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress.—
Justice John Paul Stevens**

The Supreme Court's decision in *Maine v. Thiboutot*¹ appeared to signal a major breakthrough for plaintiffs seeking private enforcement of federal statutory law.² The Court held that the reference to "laws" in section 1983 of Title 42 of the United States Code³ encompassed all federal statutes, not merely those protecting civil rights.⁴ For plaintiffs suing defendants who had acted "under color of state law," *Thiboutot* promised three significant advantages: avoidance of a right of action hurdle at a time when the Supreme Court's approach to inferring private rights to sue under federal statutes was taking a restrictive turn;⁵ the availability of attorney's fees if they prevailed;⁶ and, potentially, damages.⁷ The area in which *Thiboutot* seemed

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** *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3253 (1983) (Stevens, J., dissenting).

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

2. See, e.g., *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 230-31 (1980).

3. Section 1983 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 be deprived 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.

42 U.S.C. § 1983 (Supp. V 1981).

4. *Thiboutot*, 448 U.S. at 4. Although the precise issue before the Court was the availability of attorney's fees, such an award could only be made if the plaintiffs had sued under § 1983. Thus, the construction of the term "laws" in § 1983 is not dictum.

5. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (Court refused to infer private right of action under the statute). *Transamerica* exemplifies the more restrictive approach which has emerged since *Cort v. Ash*, 422 U.S. 66 (1975). *Cort* could be read as consistent with the federal common law approach of earlier cases such as *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). The more recent cases, however, treat the issue of implication of rights of action as a matter of statutory construction, in which legislative intent is paramount. See Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984); see also Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981).

6. Under 42 U.S.C. § 1988 (Supp. V 1981), attorney's fees are awarded to the prevailing party. See, e.g., *Maher v. Gagne*, 448 U.S. 122 (1980) (awarding attorney's fees in action based on Social Security Act violations).

7. Under 42 U.S.C. § 1983 (Supp. V 1981), any person who has violated another's federal constitutional rights "shall be liable." This seems to be a clear reference to a damages remedy.

destined to have the greatest impact was that of federal grant programs under which states and localities receive federal funding.⁸ Third-party enforcement of such programs, already a burgeoning area of litigation,⁹ apparently was due for an explosion.

Yet within a year of this landmark decision, there were strong signs, ominous to some,¹⁰ that the Supreme Court, having given with one hand, would take away with the other.¹¹ Dicta in *Pennhurst State School and Hospital v. Halderman*,¹² and the holding in *Middlesex County Sewerage Authority v. National Sea Clammers Association*¹³ indicated that with respect to the fundamental issue of the existence of a cause of action, recourse to section 1983 could be precluded by the existence of an alternative enforcement scheme. Any such exception might leave the section 1983 plaintiff only slightly better off than a litigant asking a court to infer a right to sue from a federal statute. Indeed, the two cases can be read for the proposition that the same analysis is to be applied to claims of an implied right as to claims of an express right under section 1983.¹⁴ Further ground for such suspicion is the fact that the authors of the two opinions, Justices Powell and Rehnquist, seemed to go out of their way to reach the section 1983 issue.¹⁵ Both had dissented in *Thiboutot* itself,¹⁶ and both appear to have reservations about private enforcement of federal law generally.¹⁷

Since 1981, the Supreme Court has offered little guidance as to the status and continuing vitality of *Thiboutot*.¹⁸ The Court's recent decision in *Guard-*

8. See *The Supreme Court, 1979 Term*, *supra* note 2, at 227-28; see also *Thiboutot*, 448 U.S. at 34-37 (Powell, J., dissenting). There are three general types of federal grants: categorical grants, block grants and revenue sharing. Categorical grants limit the use of funds to specified activities. Block grants define a broader subject matter within which the grantee may exercise considerable discretion in allocating the funds. Revenue sharing places few restrictions on the use of the funds, thereby maximizing grantee discretion. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 5-9 (1977). Federal grants to states and localities totalled \$94.7 billion in fiscal year 1981, as compared with \$10 billion in 1960. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT, 1984, at 4-16 (1983).

9. See R. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS § 8:37 (1982).

10. See, e.g., Wartelle and Loudon, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 489 (1982).

11. *Municipal Liability under 42 U.S.C. 1983: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 405 (1981) (statement of Prof. Leon Friedman) [hereinafter cited as *Municipal Liability Hearings*].

12. 451 U.S. 1, 28 (1981).

13. 453 U.S. 1, 18-19 (1981).

14. See *infra* text accompanying notes 77-108 and accompanying text.

15. For example, in *Sea Clammers*, the parties never raised the issue of the availability of a § 1983 right of action.

16. *Thiboutot*, 448 U.S. at 11 (Powell, J., dissenting).

17. See, e.g., Howard, *The States and the Supreme Court*, 31 CATH. U.L. REV. 375, 424 (1982).

18. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3226 n.3 (1983) (Powell, J., concurring). In *Cuyler v. Adams*, 449 U.S. 433 (1981), a 1981 case decided prior to *Pennhurst* and *Sea Clammers*, the Court reaffirmed its *Thiboutot* construction of § 1983.

ians Association v. Civil Service Commission,¹⁹ however, makes further inroads on *Thiboutot* by curtailing, if not eliminating, damages as a remedy for violation of federal grant conditions.²⁰ It has been left to the lower courts to harmonize the *Thiboutot-Pennhurst-Sea Clammers* triad. The result has been a crazy quilt of inconsistent decisions in which one can find support for virtually any proposition about statutory claims under section 1983. Particularly vexatious for the lower courts have been cases in which the plaintiff asserts an express right of action based on section 1983 while simultaneously asking the court to recognize an implied right of action from the underlying statute. Some courts read *Pennhurst* and *Sea Clammers* as essentially merging the analyses.²¹ Other courts read *Thiboutot* as creating a presumption that permits a plaintiff to enforce a statute via section 1983 in cases in which an attempt to infer a right to sue under that statute would be unsuccessful.²² Such an analysis treats the express section 1983 right of action as hierarchically superior, or preferred, vis-a-vis an implied right.²³ A surprising number of courts have reached the diametrically opposite result, holding that the availability of an implied right of action operates to preclude section 1983.²⁴ In sum, it seems fair to say that the state of the law in this area is anything but settled. It is clear, however, that what some hailed as "the promise of *Thiboutot*"²⁵ has been sharply curtailed.

Whatever its status in the courts may be, *Thiboutot* is alive and well in the law reviews. A band of defenders has leapt into the fray.²⁶ Much of

19. 103 S. Ct. 3221 (1983).

20. *Id.* at 3232 n.23.

21. See, e.g., *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983); *Uniformed Firefighters Ass'n Local 94 v. City of New York*, 676 F.2d 20 (2d Cir. 1982); *Members, Bridgeport Hous. Auth. Police v. City of Bridgeport*, 564 F. Supp. 2 (D. Conn. 1982); *Moxley v. Vernot*, 555 F. Supp. 554 (S.D. Ohio 1982).

22. See, e.g., *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983) (dictum); *Balf Co. v. Gaitor*, 534 F. Supp. 600 (D. Conn. 1982); *Ryans v. New Jersey Comm'n for the Blind and Visually Impaired*, 542 F. Supp. 841 (D.N.J. 1982); cf. *Rollison v. Biggs*, 567 F. Supp. 964, 971 n.11 (D. Del. 1983). For a discussion of these cases, see *infra* note 138.

23. Note, *Implied Private Rights of Action and Section 1983: Congressional Intent Through a Glass Darkly*, 23 B.C.L. REV. 1439, 1456 (1982) [hereinafter cited as Note, *Implied Rights and Section 1983*].

24. See, e.g., *Longoria v. Harris*, 554 F. Supp. 102 (S.D. Tex. 1982); *Flavin v. Connecticut State Bd. of Educ.*, 553 F. Supp. 827 (D. Conn. 1982); *Manecke v. School Bd.*, 553 F. Supp. 787 (M.D. Fla. 1982); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982); *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981).

25. *The Supreme Court, 1979 Term, supra* note 2, at 230.

26. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982); Wartelle and Loudon, *supra* note 10; Note, *Implied Rights and Section 1983, supra* note 23; Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183 (1982) [hereinafter cited as Note, *Preclusion of Section 1983*]; see also Note, *The Section 1983 Remedy and Purely Statutory Federal Rights: Ryans v. New Jersey Commission for the Blind and Visually Impaired*, 1983 B.Y.U. L. REV. 465 [hereinafter cited as Note, *The Section 1983 Remedy*]. It should be noted that the author of Note, *The Section 1983 Remedy*, appears somewhat ambivalent towards *Thiboutot*. See Note, *The Section 1983 Remedy, supra*, at 481-82.

the writing has a good guy-bad guy theme: the regressive wing of the Supreme Court is out to eviscerate one of the liberal wing's greatest triumphs.²⁷ *Thiboutot's* defenders, however, face a major problem. No one contends that the decision means literally what it says—that section 1983 authorizes private enforcement of *all* federal statutes. In some cases, section 1983 actions would undercut the goals of the Congress which enacted the underlying statute sought to be enforced. The admitted problem of identifying those cases elicits a two-part response. The first part is easy: after *Thiboutot* there is a presumption that section 1983 is available. The second part is not so easy: a principled and workable approach must be developed to determine when the presumption is rebutted.

This article examines and evaluates the attempts by courts and commentators to work with, and reconcile, the *Thiboutot-Pennhurst-Sea Clammers* triad. The analysis focuses on litigation under federal grant programs, the area which has generated most of the cases in which *Thiboutot* problems arise and the area which presents the most difficult questions of the limits of federal power. An immediate conclusion is that the way in which one approaches the reconciliation of these precedents depends greatly on whether or not one thinks *Thiboutot* was correctly decided. Thus, at the risk of retracing old ground, Section I of the article begins with a reexamination of *Thiboutot* and an analysis of the weaknesses of the Court's opinion. Section II considers whether *Pennhurst* and *Sea Clammers* should be read as necessary limitations on *Thiboutot* or whether they virtually eviscerate that decision. Section III examines in detail the various attempts by lower courts to harmonize the triad.

As noted, those who do accept *Thiboutot* are forced to develop a framework for determining when a section 1983 action is unavailable. The difficulties inherent in any such inquiry are compounded by the fact that neither the Congress that enacted section 1983 nor, in most cases, the Congress that enacted the underlying statute was aware of the problem of reconciling alternative enforcement mechanisms. Accordingly, Section IV of this article examines the various rebuttal mechanisms proffered and concludes that each has serious flaws.

Section V then turns to the question of how those who, like the author, think *Thiboutot* was wrongly decided, might find in the subsequent cases eroding principles to mitigate the impact of its holding. One approach is to treat *Pennhurst* and *Sea Clammers* as merging the section 1983 and implied right inquiries, thus depriving *Thiboutot* of much of its force.²⁸ Although the arguments in favor of such a merger are appealing, it poses problems of authority. Initially, there is the question of the lower courts' ability to treat a major recent Supreme Court precedent as overruled sub silentio. Far more serious is the question of any court's authority to read

27. See, e.g., Wartelle and Loudon, *supra* note 10; Note, *Implied Rights and Section 1983*, *supra* note 23.

28. See *infra* notes 220-31 and accompanying text.

the words "and laws" out of section 1983. After analyzing these questions, the article recommends reconsideration and adoption of the position taken by Justice Powell in his *Thiboutot* dissent: private enforcement of federal statutes under section 1983 should be limited to laws that protect equal rights as that term has traditionally been understood. This reading gives force to section 1983, avoids the potentially devastating impacts of *Thiboutot* on federal grant programs,²⁹ and leaves the question of private enforcement primarily in the hands of the Congress that enacts the underlying statute, where it ought to be.³⁰

Whatever approach is taken to private enforcement under section 1983, there remains the difficult, and increasingly litigated question of whether courts may award damages for improper administration of federal grant programs.³¹ Section 1983 specifically provides that anyone who violates federally secured rights "shall be liable" to the injured party. Grant disputes are fertile ground for damage claims.³² Yet even in the camp of defenders of *Thiboutot*'s plain meaning approach, there is recognition that damage awards may be inappropriate in the context of some federal programs.³³ If one focuses on grant programs, serious issues involving what might be termed "grant policy" emerge; damage awards may drain resources away from the very area they were meant to aid, and the potential for unpredictable liabilities might deter participation in grant programs. On a more fundamental level there may be significant constitutional problems, given the Supreme Court's insistence that there are limitations on Congress's ability to impose obligations under the spending power.³⁴ In analyzing the damages issue in Section VI, the article devotes considerable attention to the recent case of *Guardians Association v. Civil Service Commission*.³⁵ *Guardians* appears to hold that damages are unavailable, at least for unintentional violations of conditions attached to federal grant programs.³⁶ In addition to its significance

29. See R. CAPPALLI, *supra* note 9, at § 8:47.

30. Even under Justice Powell's reading of § 1983 there would remain the problem of whether the existence of specific enforcement provisions in the underlying statute precludes § 1983 actions. See *infra* notes 232-41 and accompanying text.

31. See, e.g., *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982) (private cause of action for damages is available under Rehabilitation Act although not available under Education for All Handicapped Children Act); *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) (Education Amendments of 1972 do not implicitly provide damages as a remedy for an individual wronged by conduct which violated those amendments), *cert. denied*, 456 U.S. 937 (1982); *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981) (same).

32. There are more than 700 federal aid programs. Furthermore, 112,000 promissory grant agreements are signed annually. The standards to implement these programs and grants can be used to evaluate the legality of a state or local official's conduct. Thus, numerous possibilities for damage claims are available. See Cappalli, *Federal Grants and the New Statutory Tort: State and Local Officials Beware!*, 12 URB. LAW. 445, 446 (1980).

33. See Sunstein, *supra* note 26, at 436 n.157. Professor Sunstein does not appear to address grant programs specifically in making this suggestion.

34. *Pennhurst*, 451 U.S. at 17 n.13.

35. 103 S. Ct. 3221 (1983).

36. *Id.* at 3235.

as the first Supreme Court case directly addressing grants and damages, *Guardians* is noteworthy for its heavy reliance on *Pennhurst*. As developed below,³⁷ *Guardians* transposes a mode of analysis utilized in *Pennhurst* to determine the existence of federal rights, into an analysis to determine the nature and extent of remedies. The implications for section 1983 litigation are far-reaching, indeed.

The article ends, in Section VII, with an inquiry into whether Congress should act to clarify the availability of section 1983. Congress might well pass legislation changing the "and laws" language to something such as "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States."³⁸ Such an amendment would overturn *Thiboutot* and, in theory, end the confusion that the case has generated.

There are, however, major political obstacles in the way of any legislative proposal perceived as cutting back on civil rights. Moreover, the amendment might create uncertainties of its own, such as the availability of any right of action to bring the traditional welfare case. Perhaps the best argument against such an across-the-board statute is the fact that the courts themselves have already acted to minimize problems created by *Thiboutot*. Accepting this argument does not mean that the basic decision about private enforcement of complex modern day federal laws ought to lie either with the courts or with the Congress that enacted section 1983. Current and future Congresses should address the issue directly. Grant programs, for example, are usually authorized for periods of several years. During reauthorization, or any other period of reexamination, the desirability of private enforcement ought to be considered. The down side of this approach is that in the interim the lower courts will have to continue to struggle with *Thiboutot* unless, of course, the Supreme Court overrules it.

I. *THIBOUTOT*—RIGHT OR WRONG?

One reason for *Thiboutot*'s uncertain status as a precedent may be the decidedly slipshod quality of the opinion itself. Even defenders of the result agree that Justice Brennan could, and should, have argued the case for a broad reaching of "and laws" far more persuasively than he did.³⁹ Given the importance of the issue and the magnitude of his decision, it is surprising that Justice Brennan authored a rather casual opinion which treated the matter as easily resolved.⁴⁰

Thiboutot began as a challenge to Maine's administration of a federally funded welfare program.⁴¹ The plaintiffs secured a judgment in their favor

37. See *infra* notes 242-91 and accompanying text.

38. See S. 584, 97th Cong., 1st Sess. (1981), reprinted in *Municipal Liability Hearings*, *supra* note 11, at 3.

39. See, e.g., Wartelle and Loudon, *supra* note 10, at 515.

40. *Thiboutot*, 448 U.S. at 12 (Powell, J., dissenting).

41. *Id.* at 2-3.

on the ground that the state was violating the applicable federal statute.⁴² The issue before the Supreme Court was whether they were entitled to an award under the Civil Rights Attorney's Fees Awards Act of 1976.⁴³ That statute authorizes fee awards in specified classes of cases, including any action or proceeding to enforce section 1983. Thus, the Court had to decide whether the original welfare challenge could be characterized as a section 1983 suit. Resolution of this issue turned on whether section 1983's reference to "laws" embraces all federal statutes that create rights, privileges, or immunities, or whether it should be limited to laws protecting civil or equal rights. The majority opted for the broader meaning.⁴⁴

Justice Brennan, writing for the majority, placed primary emphasis on "the plain language" of the statute.⁴⁵ He noted that Congress had not qualified the phrase "and laws," and he stated the question before the Court as whether "the phrase 'and laws' . . . means what it says, or whether it should be limited to some subset of laws."⁴⁶ Justice Powell, however, in his dissenting opinion, was on solid ground when emphasizing that even in the context of Reconstruction era legislation, plain meaning is "too simplistic a guide to the construction of § 1983."⁴⁷ A good example of the Court's rejection of a plain meaning approach is the doctrine of immunity for state and local officials sued under section 1983. The doctrine began in *Tenney v. Brandhove*,⁴⁸ which involved state legislators and has been extended to judicial and quasi-judicial officials.⁴⁹ Most recently, the doctrine has been applied to police officers who have testified in judicial proceedings.⁵⁰ In all these cases, the defendants were within the literal language of section 1983, but the Court declared itself bound to consider "the role played by history and policy in determining whether § 1983 incorporates a particular common law immunity."⁵¹

Apart from the plain meaning approach, Justice Brennan buttressed his analysis by referring to precedent. The Court, in *Edelman v. Jordan*,⁵² had interpreted *Rosado v. Wyman*⁵³ as holding that "suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social

42. *Id.* at 3.

43. *Id.* at 4.

44. *Id.* at 6-8.

45. *Id.* at 4.

46. *Id.*

47. *Id.* at 14 (Powell, J., dissenting). Justice Powell dissented, joined by Chief Justice Burger and Justice Rehnquist. Based on legislative history and a concern for federal intrusion into state and local affairs, Justice Powell would have limited "and laws" to those protecting civil or equal rights. *Id.* at 11 (Powell J., dissenting).

48. 341 U.S. 367 (1951).

49. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967).

50. *Briscoe v. Lahue*, 103 S. Ct. 1108 (1983).

51. *Id.* at 1133 (Blackmun, J., dissenting).

52. 415 U.S. 651 (1974).

53. 397 U.S. 397 (1970).

Security Act on the part of participating States.”⁵⁴ The precedential support, however, was not as clear as Justice Brennan suggested. On the same day it delivered the *Edelman* dictum, the Court in *Hagans v. Lavine*⁵⁵ left open the question of the source of a welfare plaintiff’s cause of action. Certainly the lower courts were divided over the availability of section 1983 to enforce statutory claims.⁵⁶ It also should be noted that many lower courts and, presumably, litigants were simply unaware of any such possibility. In fact, the years immediately preceding *Thiboutot* witnessed an extensive body of cases in which third parties sought to enforce federal grant conditions through rights of action implied from the grant statutes themselves.⁵⁷ If what Justice Brennan terms as the Court’s “many pronouncements on the scope of § 1983”⁵⁸ were as clear as he said, it is hard to understand why so few courts got the message.

In arriving at his broad construction of “and laws,” Justice Brennan chose not to rely on the legislative history of section 1983. Describing this history as “scanty,” he stated that “[o]ne conclusion which emerges clearly is that the legislative history does not permit a definitive answer.”⁵⁹ To some extent, this reluctance to rely on legislative history is understandable. Those members of the Court who have undertaken the inquiry have reached sharply differing conclusions.⁶⁰ The confusion stems from the fact that section 1983’s predecessor provided jurisdiction and a remedy for the deprivation of constitutional rights.⁶¹ The 1874 revision split the jurisdictional and remedial provisions,⁶² and the words “and laws” were added to what is now section 1983.⁶³ The district courts’ jurisdiction extended to claims involving constitutional and statutory rights, while that of the circuit courts was limited to constitutional claims and claims to vindicate “any right secured by any law providing for equal rights.”⁶⁴ Justice Powell has argued that Congress was concerned only with “federal legislation providing specifically for equality of rights. . . .”⁶⁵ On the other hand, the generalized reference to “laws” certainly will bear a broader meaning.

54. *Edelman*, 415 U.S. at 675.

55. 415 U.S. 528, 533 n.5 (1974).

56. See, e.g., Note, *The Section 1983 Remedy*, *supra* note 26, at 466 n.9 (citing cases with opposing holdings on the availability of § 1983 remedy).

57. See R. CAPPALLI, *supra* note 9, at § 8:37.

58. *Thiboutot*, 448 U.S. at 8.

59. *Id.* at 7.

60. Compare *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 623 (1979) (Powell, J., concurring) with *id.* at 646 (White, J., concurring).

61. *Id.* at 650-52 (White, J., concurring).

62. *Id.* at 653 (White, J., concurring).

63. *Id.* at 624 (Powell, J., concurring).

64. *Thiboutot*, 448 U.S. at 6-8. Section 1983 began as section 1 of the Civil Rights Act of 1871, which provided jurisdiction and a remedy for violations of the Constitution only. A provision for statutory violations was added during the 1874 revision. The question which the legislative history leaves unresolved is whether the reference to laws in the 1874 predecessor of section 1983 was only a shorthand reference to civil rights laws or whether Congress knew the difference and attached importance to it. See Sunstein, *supra* note 26, at 398-409.

65. 448 U.S. at 16 (Powell, J., dissenting).

Rather than simply allude to this standoff, Justice Brennan might well have elaborated on the underlying purpose of section 1983: to provide additional protection from abuses by state and local officials when those abuses took the form of violations of federal rights.⁶⁶ Indeed, it is upon just such an interpretation of the statute that *Thiboutot*'s defenders place their primary reliance. As one commentator states, "[*Thiboutot*'s] extension of section 1983 to the protection of federal statutory rights, though of recent vintage, is nevertheless consonant with the philosophy, underlying the post-Civil War enactments, of judicial oversight and close scrutiny of the conduct of state officials."⁶⁷

A partial response is that in 1874, Congress could not have foreseen the vastly different legal landscape created, for example, by the complex sets of conditions and assurances in a modern federal grant program. The first Morrill Act was a tentative step toward a federal grant system,⁶⁸ but there were grave doubts as to how much authority over domestic matters the spending power conferred on Congress.⁶⁹ Those who defend *Thiboutot* by arguing that there are simply *more* federal laws today than a century ago⁷⁰ miss the point. The federal laws which section 1983 plaintiffs today seek to enforce are so qualitatively *different* from those laws known to the Reconstruction Congress that it requires some stretch of the imagination to say that what is involved are the kinds of "state violations of federal rights"⁷¹ that the drafters of section 1983 sought to remedy.

Still, the argument based on underlying statutory purpose has considerable force. One way to counter it is to invoke policy arguments as suggested by Justice Powell, who criticized the majority for showing "little consideration of the consequences of its judgment."⁷² Defenders of *Thiboutot* may attempt to prevent consideration of any such arguments on the ground that Congress has already spoken, and that therefore a court lacks authority to entertain policy considerations.⁷³ Such considerations should not, however, be out of bounds, as the Court has often engaged in a highly policy oriented construction of section 1983.⁷⁴ Moreover, it is not only the intent of the 1874 Congress that is at issue in this debate. Also to be considered are the many Congresses which enacted the hundreds of grant and other programs that are now subject to broad scale private enforcement under *Thiboutot*.

66. *Id.* at 5. Justice Brennan alludes to this rationale but does not utilize it as the principal underpinning of his decision.

67. Note, *Preclusion of Section 1983*, *supra* note 26, at 1195.

68. See R. CAPPALLI, *supra* note 9, at § 1:20.

69. See Brown, *New Federalism, Old Federalism, and the Fiscal Constitution*, 68 A.B.A. J. 946 (1982).

70. See Sunstein, *supra* note 26, at 409.

71. Note, *Preclusion of Section 1983*, *supra* note 26, at 1194.

72. 448 U.S. at 12 (Powell, J., dissenting).

73. See Sunstein, *supra* note 26, at 410.

74. See, e.g., *Owen v. City of Independence*, 445 U.S. 622 (1980) (Court relied heavily on tort law policies concerning the fairness of allocating costs stemming from constitutional violations by local officials).

In the grant context, one authority has asserted that extensive litigation could have "devastating" consequences for the operation of the grant system.⁷⁵ For example, awards of damages and/or attorney's fees may divert public resources away from the very programmatic needs which Congress intended to see addressed. Moreover, the prospect of being a frequent defendant on a somewhat unpredictable basis might well deter states and local governments from participating at all in a wide range of grant programs. Justice Powell surely is correct in stating that extensive private enforcement of grant programs under section 1983 "creates a major new intrusion into state sovereignty under our federal system."⁷⁶

If neither language, precedent, nor history is persuasive, and policy considerations suggest a result other than the plain meaning holding of *Thiboutot*, there is much to be said for Justice Powell's position that the words "and laws" should be limited to traditional civil rights protection. He offered a reading which was consistent with the intent of the 1874 Congress, which took into consideration the vast changes in the nature of federal laws on the books today, and which largely avoided the problems of collision between section 1983 and alternative modes of enforcement of federal laws. The majority, however, would not accept Justice Powell's position and insisted upon an unduly broad reading of the statute. Thus, some limiting efforts such as those undertaken in *Pennhurst* and *Sea Clammers* were inevitable. The twofold question that these cases pose is what approach to limiting *Thiboutot* the Court did in fact propose, and, whether the decisions are simply faithful attempts to keep *Thiboutot* within reasonable bounds or whether they amount to overruling a recent precedent sub silentio.

II. *PENNHURST* AND *SEA CLAMMERS*—CALIBRATION OR EVISCERATION?

A. *Pennhurst*

The holding in *Pennhurst* did not address the ability of private plaintiffs to enforce federally created rights, but addressed whether any such rights in fact existed. At issue were conditions in a state-run hospital for the care and treatment of the mentally retarded. Plaintiff residents had sought relief from the present operation of the hospital under a number of theories based both on federal and state law. The circuit court affirmed a judgment in plaintiffs' favor⁷⁷ on the ground that the case presented a clear violation of the "bill of rights" section of the Developmentally Disabled Assistance and Bill of Rights Act.⁷⁸ On appeal, a majority of the Supreme Court held that this particular section of the statute was essentially precatory, and was not enforceable as would be a specific condition of a federal grant program. The Court reasoned that because grant conditions impose financial obliga-

75. See R. CAPPALLI, *supra* note 9, at § 8:47.

76. *Thiboutot*, 448 U.S. at 33 (Powell, J., dissenting).

77. *Halderman v. Pennhurst State School and Hosp.*, 612 F.2d 84 (3d Cir. 1979) (en banc).

78. 42 U.S.C. § 6010 (1976 & Supp. III 1979).

tions on states, Congress must "speak with a clear voice" to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."⁷⁹ The bill of rights section of the Act simply did not satisfy this stringent test for when a statute enacted under the spending clause creates enforceable rights in third party beneficiaries.

The opinion might well have stopped there. There also was the possibility, however, that the plaintiffs could sue to compel compliance with those conditions that were contained in the Act. In dictum, Justice Rehnquist addressed several questions that the lower courts would have to consider in dealing with any such suit. He first noted that plaintiffs might sue under an implied right theory, but stated that in federal grant programs "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the state."⁸⁰ This statement is rather remarkable because it would virtually wipe out the doctrine of implied rights of action, at least in the context of grant cases. All grant statutes contain a grantor remedy of the sort to which Justice Rehnquist referred. In any event, Justice Rehnquist went on to discuss, at some length, the possible bearing of *Thiboutot* on plaintiffs' ability to sue under section 1983. He identified two exceptions to the broad *Thiboutot* principle: first, situations in which the claims asserted by plaintiffs cannot be deemed "a 'right secured' by the laws of the United States within the meaning of § 1983"; and, second, situations in which the "governing statute provides an exclusive remedy for violations of its terms."⁸¹ This second exception seems a reasonable qualification of *Thiboutot*, at least when stated in general terms. Justice Rehnquist, however, went on to suggest that the previously mentioned remedy on the part of the grantor to terminate funds might well be exclusive, thus precluding resort to section 1983.⁸² If this suggestion were taken at face value, it would have the twofold effect of merging the section 1983 and implied right inquiries and of making it virtually impossible for a grant plaintiff ever to succeed on either theory.⁸³

Justice White dissented on the merits, arguing that the obligations in the bill of rights section of the Act were quite clear and should be enforceable.⁸⁴ He then addressed the issue of the availability of section 1983, as construed in *Thiboutot*, to resolve any cause of action difficulties that the plaintiff might have. He read *Thiboutot* as creating "a presumption that a federal statute creating federal rights may be enforced in a section 1983 action."⁸⁵

79. *Pennhurst*, 451 U.S. at 17.

80. *Id.* at 28.

81. *Id.*

82. *Id.*

83. Indeed, welfare plaintiffs such as those in *Thiboutot* would seemingly be barred from federal court. The State of Massachusetts recently advanced this argument in a welfare case, but the United States Court of Appeals for the First Circuit gave the attempt short shrift. See *Lynch v. Dukakis*, 719 F.2d 504, 509-12 (1st Cir. 1983).

84. *Pennhurst*, 451 U.S. at 36-51 (White, J., dissenting).

85. *Id.* at 51 (White J., dissenting).

Also addressing the issue of what circumstances might rebut the presumption, he noted that Congress could preclude resort to section 1983 by indicating that the remedy in the governing statute is exclusive. His general test for any such exception was that section 1983 would be available for the enforcement of statutory rights "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention."⁸⁶

In the *Pennhurst* case itself, Justice White had no difficulty determining that grantor remedies were insufficient to overcome the *Thiboutot* presumption. Thus, his opinion recognizes that *Pennhurst* could vitiate the thrust of section 1983 as construed in *Thiboutot*. Justice White concluded that there is "no indication that Congress intended the funds cutoff . . . to be the sole remedy for correcting violations. . . ."⁸⁷ He also found support for this position from the legislative history and from a section of the Act unaddressed by Justice Rehnquist, which required states to provide administrative and judicial means for individuals to assert violations of the Act.⁸⁸

The bearing of *Pennhurst* on the *Thiboutot* interpretation of section 1983 is far from clear. Perhaps most significant is the fact that the majority simply failed to address the presumption analysis that Justice White put forward as the logical way of applying section 1983 to the cause of action question in a particular case. Of course, its failure to respond to the argument does not necessarily mean that the majority was rejecting the framework that Justice White suggested. Nonetheless, the absence in *Pennhurst* of any presumption analysis, and the apparent merging of the section 1983 and implied right inquiries left serious doubt as to the continuing validity of *Thiboutot*, despite the fact that Justice Rehnquist had apparently cited it with approval.⁸⁹ In any event, the uncertainties created by *Pennhurst* might have been minimized by the fact that the relevant statements were dicta. Shortly thereafter, however, the holding in *Sea Clammers* appeared to signal that the Court in *Pennhurst* had meant what it said.

B. Sea Clammers

Unlike *Pennhurst*, the principal issue in *Sea Clammers* was the ability of private plaintiffs to get into a federal court to enforce federal statutes. In *Sea Clammers*, an organization of fishermen challenged the manner in which state and local authorities were permitting the discharge of pollutants which seriously harmed the growth of fish in New York harbor and the Hudson River. The bulk of the Supreme Court's opinion concerned whether plaintiffs could sue for damages under the Federal Water Pollution Control Act⁹⁰

86. *Id.* at 51-52 (White, J., dissenting).

87. *Id.* at 52 (White, J., dissenting).

88. *Id.* at 52-53 (White, J., dissenting) (citing H.R. REP. NO. 473, 94th Cong., 1st Sess. 42 (1975)).

89. *Id.* at 28.

90. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V (1981)). Hereinafter, this statute will be cited as "FWPCA." Section 1365(a) allows a citizen

or the Marine Protection, Research, and Sanctuaries Act of 1972.⁹¹ Both statutes contain specific "citizen suit" provisions, as well as extensive administrative remedies.⁹² Justice Powell, writing for the Court, inquired first as to the availability of an implied right of action under these two statutes. He stressed the "unusually elaborate enforcement provisions"⁹³ contained in the statutes and concluded that they were a strong indication that Congress intended to preclude any other form of private enforcement under the Act. There is also in his opinion a strong element of the *inclusio unius* approach.⁹⁴

Although the parties had not argued the issue, Justice Powell also considered whether plaintiffs might find in section 1983, as construed in *Thiboutot*, an "express congressional authorization of private suits under these Acts."⁹⁵ In resolving this issue, he employed essentially the same analysis which he had used in finding no implied cause of action: the comprehensiveness of the remedial devices provided by the Acts evidenced Congress's intent to preclude alternative forms of private enforcement, including actions under section 1983.⁹⁶ As Justice Powell stated, "It is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions."⁹⁷

Justice Stevens, joined by Justice Blackmun, dissented with respect to the section 1983 holding.⁹⁸ He utilized a presumption analysis similar to that advocated by Justice White in his *Pennhurst* dissent and concluded that the mere existence of a comprehensive remedial scheme is not by itself enough to demonstrate that Congress intended to withdraw the express right of action conferred by section 1983.⁹⁹ His analysis, however, is somewhat am-

to bring suit against anyone allegedly in violation of a standard or limitation under the Act. *Id.* § 1365(a).

91. The Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1976 & Supp. V 1981). Hereinafter, this statute will be cited as "MPRSA." Section 1415(g) allows a citizen to bring suit against anyone allegedly in violation of a prohibition, limitation, criterion, or permit under the Act. *Id.* § 1415(g).

92. The typical citizen suit provision contains a requirement of prior notice to the federal agency administering the statute and limits the relief available. Injunctive relief rather than damages is the norm.

93. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 12-13 (1981).

94. The *Sea Clammers* Court illustrated its application of the *inclusio unius* approach by stating that "in view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA." *Id.* at 14-15 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).

95. *Id.* at 19 (emphasis in original).

96. *Id.* at 19-21.

97. *Id.* at 20.

98. *Id.* at 27 (Stevens, J., dissenting).

99. *Id.* at 27-28 (Stevens, J., dissenting). Justice Stevens identified two flaws in the majority's reasoning. First, the question should be whether Congress intended to withdraw the § 1983 remedy, not whether Congress intended to preserve it. *Id.* at 27 (Stevens, J., dissenting).

biguous as to just how much Congress would have to do in order to demonstrate any such intent. The key to Justice Stevens's willingness to find for the plaintiffs in the *Sea Clammers* context appears to be the existence of a savings clause in both statutes at issue.¹⁰⁰ Absent such a savings clause, it is not clear how Justice Stevens would have resolved the section 1983 aspect of the case, given the fact that he agreed with the majority as to the implied right of action issue.¹⁰¹

Sea Clammers lends itself to two contrasting interpretations. Under an optimistic reading, from the point of view of prospective plaintiffs, it is possible to view the case as simply one of the relatively few instances when Congress's action clearly must be interpreted to cut off the availability of any section 1983 cause of action. Justice Powell did treat section 1983 as an alternative means of finding a cause of action and noted that if section 1983 were available it "would obviate the need to consider whether Congress intended to authorize private suits to enforce . . . federal statutes."¹⁰² On the other hand, as in *Pennhurst*, there is the strong suggestion that implied right analysis and section 1983 analysis are essentially similar; thus, in applying either analysis, a court should focus on the same factors. In particular, the *inclusio unius* approach could eliminate the plaintiff's claim under either theory. Moreover, there is an ambiguity in Justice Powell's reference to whether Congress intended to foreclose private enforcement, or whether Congress intended to preserve the section 1983 right of action.¹⁰³ Perhaps most disturbing to those who would preserve *Thiboutot* is Justice Powell's failure to directly address the presumption analysis developed at some length by Justice Stevens in his dissent.¹⁰⁴ In an oblique footnote, Justice Powell said only "we do not suggest that the burden is on a plaintiff to demonstrate congressional intent to preserve § 1983 remedies."¹⁰⁵

The presumption issue is of great practical significance. Under current approaches to implied right of action claims, it would appear that the defendant wins if the plaintiff fails to convince the court that Congress intended to allow private enforcement under the statute in question.¹⁰⁶ The defendant

Second, Justice Stevens believed that the language of the statutes explicitly indicated Congress's intention not to withdraw a remedy under § 1983. *Id.* at 28 (Stevens, J., dissenting).

100. *Id.* at 29-30 (Stevens, J., dissenting) (citing FWPCA, 33 U.S.C. § 1365(e), and MPRSA, 33 U.S.C. § 1415(g)(5)). The purpose of a savings clause is to demonstrate that in passing a particular statute that contains specified remedies, Congress did not intend to preempt plaintiffs from seeking relief under other laws, federal or state. Justice Stevens took the position that § 1983 was a separate law of the sort envisioned by the savings clauses in the two statutes before the Court.

101. *Id.* at 25 (Stevens, J., dissenting).

102. *Id.* at 19.

103. *Id.*

104. *Id.* at 27 n.11 (Stevens, J., dissenting) (burden should be on defendant to show that Congress intended to exclude § 1983 remedy, rather than on the plaintiff to show that Congress intended the remedy to be available).

105. *Id.* at 20 n.31.

106. See, e.g., *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981). This point, however, is not always clear from federal court opinions addressing implied

need not go so far as to show that Congress specifically addressed the issue and determined that private causes of action should not be implied from the statute. However, if the *Thiboutot* presumption analysis advocated by Justices White and Stevens is applicable, the defendant will have to make just such a showing. The significance of the two different approaches is that legislative history and other aids to statutory construction will, in most cases, be entirely silent as to the matter. Thus, the burden of proof requirement will be dispositive of whether a cause of action exists. In this respect, the fact that Justice Powell had such a clear opportunity to address the validity of presumption analysis, yet chose not to do so, may well support a narrower interpretation of the *Sea Clammers* decision.

Whatever one thinks of *Thiboutot*, the Supreme Court is surely open to criticism for the very uncertain guidance which *Pennhurst* and *Sea Clammers* furnish for courts and litigants attempting to determine when the section 1983 remedy, ostensibly made available by *Thiboutot*, has been withdrawn. One approach is to focus on the *Pennhurst* dictum, and to conclude that section 1983 is never available when an implied right of action would not also be found. Nevertheless, it is possible to emphasize the positive reading of *Sea Clammers*, especially the focus on very elaborate remedial schemes that include private judicial enforcement. Both decisions seem to cite *Thiboutot* as good law. Thus, some form of presumption analysis may be valid, despite the Court's failure to confer specific approval upon that approach.

In sum, it is difficult to determine just how far the Supreme Court has cut back on the expansive thrust of *Thiboutot*. Given the numerous warning signals contained in the two subsequent decisions,¹⁰⁷ however, plus other factors, such as the identity and views of the Justices who wrote them, it is tempting to conclude that *Thiboutot* has virtually been overruled sub silentio. The Supreme Court certainly has the authority to do this. Indeed, such a process may have taken place with respect to *National League of Cities v. Usery*,¹⁰⁸ as Justice Stevens has recently suggested.¹⁰⁹ The problem for the lower courts, however, is that they do not have the authority to overrule Supreme Court precedent. Therefore, until the High Court has spoken, they must treat *Thiboutot* as good law, all the while attempting to bring to bear the obvious qualification which flows from *Pennhurst* and *Sea Clammers*. Not surprisingly, lower courts have found this a difficult task and have reached sharply conflicting results.

rights issues. Some decisions state that there is no indication as to whether Congress intended to create a private right of action, while other decisions state that analysis reveals that Congress never intended to create such a right. Compare *Northwest Airlines, supra*, with *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981). Nevertheless, it would seem that the plaintiff must demonstrate that he is authorized to bring suit. See *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983).

107. See *supra* notes 77-105 and accompanying text.

108. 426 U.S. 833 (1976).

109. *Equal Employment Opportunity Comm'n v. Wyoming*, 103 S. Ct. 1054, 1067 (1983) (Stevens, J., concurring).

III. THE LOWER COURTS—CONFUSION IN, CONFUSION OUT

Post-*Thiboutot* attempts to utilize section 1983 have arisen in the context of a number of federal grant programs. In one class of cases the lower courts have achieved relatively uniform results. These cases arise under statutes that contain explicit provisions for judicial enforcement against the specific defendant before the court. Following *Sea Clammers*, most lower courts have concluded that this is the paradigmatic situation in which section 1983 is not independently available. The source of most of this litigation is the Education for All Handicapped Children Act.¹¹⁰ The Act grants funds to states to support the education of handicapped children. A state which agrees to participate must provide all children with a "free appropriate public education."¹¹¹ This requirement has generated a substantial volume of suits initiated by parents who believe their handicapped children are not receiving educational treatment that meets the statutorily imposed standard.

The leading case on the possible recourse to section 1983 in such suits is the Seventh Circuit's decision in *Anderson v. Thompson*.¹¹² The principal issue in *Anderson* was the availability of damages for improper placement of a child covered by the Act.¹¹³ The Act provides for private judicial enforcement and authorizes "such relief as the court determines is appropriate."¹¹⁴ The Seventh Circuit first concluded that "absent exceptional circumstances," it would be inconsistent with congressional intent to award damages under the statute.¹¹⁵ The court noted, among other factors, the effect which a damage remedy would have on educational financing.¹¹⁶ Alternatively, the plaintiffs argued that they had an express right of action to enforce the Act under section 1983 as interpreted in *Thiboutot*. In rejecting this argument, the Seventh Circuit relied primarily on the *Pennhurst* dictum and on cases such as *Brown v. General Service Administration*¹¹⁷ and *Great*

110. Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, 1405, 1406, 1411-1420 (1982). Hereinafter, this statute will be cited as "EAHCA."

111. *Id.* § 1412(1).

112. 658 F.2d 1205 (7th Cir. 1981).

113. *Id.* at 1206. Plaintiffs, parents of a child needing special education, sought review of the state superintendent's evaluation and recommendation of their child's educational needs. Contending that their daughter belonged in a special private school, the plaintiffs sought damages for tuition, court costs, and attorney's fees. *Id.* at 1207.

114. EAHCA, 20 U.S.C. § 1415(e)(2). A parent or guardian who has a complaint about the state's educational evaluation or placement of the handicapped child may request an impartial hearing from the state or local educational agency. *Id.* § 1415(b)(2). Any party may appeal the result of the hearing to a reviewing officer, who then makes an independent decision. *Id.* § 1415(c). An aggrieved party may then appeal the decision of the reviewing officer by bringing an action in state or federal court. *Id.* § 1415(e)(2).

115. *Anderson*, 658 F.2d at 1217. Exceptional circumstances arise when the state school does not provide for the child's physical health or when the state demonstrates bad faith by failing to follow statutory procedures. *Id.* at 1213-14.

116. *Id.* at 1212.

117. 425 U.S. 820 (1976).

American Federal Savings and Loan Association v. Novotny,¹¹⁸ in which elaborate administrative and judicial enforcement schemes had been held to preclude relief under other theories.¹¹⁹ The *Anderson* court concluded that whenever section 1983 relief would be inconsistent with an extensive statutory scheme, the *Pennhurst* exception comes into play.¹²⁰

The result in *Anderson* is not surprising; it seems on all fours with the factual situation before the Court in *Sea Clammers*, and the overwhelming trend in EAHCA cases has been to follow the *Anderson* result.¹²¹ The same result has been reached under the General Revenue Sharing Act, another program with elaborate remedial schemes including judicial remedies.¹²² Far more difficult, however, have been cases in which the remedial scheme in the underlying statute is sufficiently circumscribed that a plaintiff might plausibly argue either an implied right of action to enforce the statute or an express right of action under section 1983. Not surprisingly, plaintiffs do argue both grounds in such cases, and the attempt to answer these arguments after the *Thiboutot-Pennhurst-Sea Clammers* triad has led the lower courts in a variety of directions.

A. Merging the Two Inquiries¹²³

In a number of cases, the courts appear to have reached the conclusion that the two inquiries are essentially the same.¹²⁴ A good example is the

118. 442 U.S. 366 (1979).

119. *Novotny*, 442 U.S. at 373, 378 (unimpaired effectiveness can be attributed to Title VII's comprehensive plan of administrative and judicial remedies only by holding that Title VII violations cannot be the basis for a cause of action under 42 U.S.C. § 1985(3)); *Brown*, 425 U.S. at 828-29 (Congress intended an express right of action under Title VII to be an exclusive, preemptive judicial remedy).

120. *Anderson*, 658 F.2d at 1215-16; see also *Adickes v. Kress & Co.*, 398 U.S. 144, 150 n.5 (1970) (plaintiff's cause of action, violation of Public Accommodations Act, 42 U.S.C. § 2000(a), cannot serve as a basis for damages under § 1983 because injunctive relief is an exclusive means of enforcing rights under the Act).

121. See, e.g., *Flavin v. Connecticut State Bd. of Educ.*, 553 F. Supp. 827, 832 (D. Conn. 1982) (allowing § 1983 suit based on violation of EAHCA would be inconsistent with detailed, comprehensive remedial scheme of EAHCA); *Calhoun v. Illinois State Bd. of Educ.*, 550 F. Supp. 796, 804 (N.D. Ill. 1982) (exclusive judicial remedy under EAHCA § 1415 barred recovery of damages or attorney's fees under § 1983 for alleged violations of EAHCA); *Noe v. Ambach*, 542 F. Supp. 70, 73 (S.D.N.Y. 1982) (suit brought under § 1983 would be entirely redundant of EAHCA's express authorization of private right of action); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460, 495 (S.D. Tex. 1982) (comprehensive remedial scheme of EAHCA implies legislative intent to provide exclusive remedy, thus barring action under § 1983 to enforce rights created by EAHCA); see also *infra* notes 150-58 and accompanying text.

122. See, e.g., *Meyerson v. Arizona*, 507 F. Supp. 859, 864 (D. Ariz. 1981), *aff'd on other grounds*, 709 F.2d 1235, 1239 (9th Cir. 1983).

123. See *infra* notes 220-31 and accompanying text.

124. See, e.g., *infra* notes 125-30 (discussing *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983)); see also *Uniformed Firefighters Ass'n Local 94 v. City of New York*, 676 F.2d 20, 22 (2d Cir. 1982) (Congress intended exclusive administrative remedies under CETA, 29 U.S.C.

recent Seventh Circuit decision in *Polchowski v. Gorris*.¹²⁵ The plaintiff asserted that the defendant police chief had released statistical and criminal history information in violation of the Justice System Improvement Act of 1979.¹²⁶ The Act contained no provision for private enforcement against state and local officials who violate it. Thus, the plaintiff attempted to base a damages claim on section 1983 as interpreted in *Thiboutot*. In addressing this issue, the court stated that "the inquiry resembles the analysis used to determine whether a private cause of action may be implied from an enactment of Congress. . . . In either instance, a party must demonstrate that Congress intended to create a right which may be privately enforced."¹²⁷ The court noted the two exceptions to *Thiboutot* established in *Pennhurst* and *Sea Clammers* and found that the Act's prohibition of disclosure of information clearly created rights for the benefit of an identifiable class of persons, presumably including the plaintiff. Violations of the Act, however, can be enforced against federal officials through the Privacy Act of 1974,¹²⁸ even though the Privacy Act does not permit suits against nonfederal officials under circumstances such as those in *Polchowski*. The court also noted that the original version of the bill had contained remedies for improper disclosure by state and local officials.¹²⁹ Thus, the court held that independent enforcement under section 1983 had been precluded by Congress. When the plaintiff attempted belatedly to argue, in the alternative, for an implied cause of action, the court dismissed any such possibility as having been disposed of by its section 1983 analysis.¹³⁰ It is true that the *Polchowski* court was not presented with the circumstance in which Congress simply failed to address the issue of private enforcement, a situation in which a different analysis might govern the implied right and section 1983 questions. Nonetheless, the casualness with which the court equated the two issues is

§§ 801-966, thereby precluding private right of action and barring § 1983 suit); *Members, Bridgeport Hous. Auth. Police v. City of Bridgeport*, 564 F. Supp. 2, 6 (D. Conn. 1982) (Model Cities Act, 42 U.S.C. §§ 3301-3374, having implied private right of action, lacks sufficiently comprehensive remedial scheme to preclude § 1983 suit); *Moxley v. Vernot*, 555 F. Supp. 554, 559-60 (S.D. Ohio 1982) (because private cause of action does not exist under Rehabilitation Act of 1973, 29 U.S.C. § 793, plaintiff may not maintain cause of action under § 1983).

125. 714 F.2d 749 (7th Cir. 1983).

126. 42 U.S.C. § 3789(g) (Supp. V 1981). Section 3789(g) provides that criminal history information may not be used or revealed for other than research or statistical purposes. The information is also immune from process and is inadmissible as evidence in any proceeding. *Id.* § 3789(g)(a). Procedures must be designed to assure currency, privacy and security of information. *Id.* § 3789(g)(b).

127. 714 F.2d at 751.

128. *Id.* at 752 (Privacy Act of 1974, 5 U.S.C. § 552(a) (1982), provides comprehensive private remedies against agencies of the federal government for unwarranted disclosures of personal information).

129. *Id.* The provisions for remedies against state authorities were deleted because of the uncertainty of their effect and the lack of information for devising an appropriate remedy. *Id.* (citing S. REP. NO. 1183, 93d Cong., 2d Sess. 19 (1974)).

130. *Id.* at 752 n.5.

typical of other decisions since 1981, which appear to merge the two inquiries.¹³¹

At least two courts have engaged in what might be termed *de facto* merger.¹³² In such cases, the courts recognize explicitly that the section 1983 and implied right inquiries are different, but proceed to resolve them by relying on the same aspects of the statutory scheme. A good example is the Ninth Circuit decision in *Meyerson v. State of Arizona*.¹³³ In *Meyerson*, a handicapped professor, alleging handicapped-based discrimination by an institution receiving federal funds, sought relief under several federal statutes. One of the statutes at issue was section 503 of the Rehabilitation Act of 1973.¹³⁴ A prior holding in the same circuit had established that section 503 does not give rise to a private right of action.¹³⁵ Nonetheless, plaintiff attempted to assert section 503 claims under section 1983 as interpreted in *Thiboutot*. The court of appeals recognized that the implied right and section 1983 inquiries are different, notably in the allocation of the burden of proof.¹³⁶ It found the exclusive remedy exception to *Thiboutot* applicable since in its earlier decision on the implied right issue it had concluded that "a private right of action under section 503 would be inconsistent with the administrative scheme provided by Congress."¹³⁷ For the court, inconsistency was inconsistency, regardless of which basis the plaintiff invoked for his right of action. The net effect of the decision was that the same remedial structure (which, it should be noted, was administrative only) was found to preclude private enforcement of the underlying statute under either theory.

B. Making the Presumption Dispositive

A number of courts, building on the dissents by Justices Stevens and White in *Sea Clammers* and *Pennhurst*, respectively, have applied a presumption analysis that permits a plaintiff to go forward on an express right of action

131. See cases cited *supra* note 124.

132. *Crawford v. Janklow*, 710 F.2d 1321, 1326 (8th Cir. 1983) (factors that show an implied private right of action "suggest that the Low-Income Home Energy Assistance Act [of 1981, 42 U.S.C. §§ 8621-8629 (Supp. V 1981)] created substantial rights for section 1983 purposes"); *Meyerson v. Arizona*, 709 F.2d 1235, 1240 (9th Cir. 1983) ("Congress intended to foreclose private actions under section 503 [of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. V 1981)], whether they are brought directly under section 503 or indirectly under section 1983.").

133. 709 F.2d 1235 (9th Cir. 1983).

134. 29 U.S.C. § 793 (1976 & Supp. V 1981).

135. See *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 178 (1982).

136. 709 F.2d at 1239-40 n.3 ("The burden is on the plaintiff to show that Congress intended to create a private cause of action when it enacted a particular statute. On the other hand, the burden is not on the plaintiff to demonstrate congressional intent to preserve section 1983 remedies.").

137. *Id.* at 1239 (referring to its holding in *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 178 (1982)).

basis under section 1983 in circumstances that would not permit finding an implied right of action.¹³⁸ The leading case is *Ryans v. New Jersey Commission for the Blind*.¹³⁹ The plaintiff complained of denials by defendants of rehabilitative services and benefits to which he was entitled under Title I of the Rehabilitation Act of 1973.¹⁴⁰ Title I contains no provision for private judicial enforcement, although a 1978 amendment to the original Act added limited administrative procedures through which handicapped individuals can seek review of determinations affecting them.¹⁴¹ The court first addressed the possible existence of an implied private right of action under the Act. It utilized the four-factor test of *Cort v. Ash*¹⁴² and relied extensively on legislative history in concluding that Congress did not intend to create any such right.¹⁴³ In stressing that one version of the 1978 amendments provided for judicial review of administrative proceedings, the *Ryans* court concluded that the resultant version was a clear compromise limiting any private enforcement to the administrative realm.¹⁴⁴

The court then turned to the possibility of an express right of action under section 1983. Unlike the circuit court in *Polchowski* it recognized the analytical difference between the two forms of inquiry, characterizing them as "similar, but not identical."¹⁴⁵ In particular, the court read *Sea Clammers* as establishing that "the court must presume a section 1983 right of action to exist unless there is evidence in the underlying statute which suggests an intent on the part of Congress to *foreclose* such an action."¹⁴⁶ This

138. *Boatowner and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) (plaintiff must prove congressional intent to create private right of action when suing directly under the federal statute but not when suing under § 1983; presumption that federal statute may be enforced through § 1983 action is rebuttable by evidence of congressional intent to preclude private means of enforcement) (dictum); *Ryans v. New Jersey Comm'n for the Blind and Visually Impaired*, 542 F. Supp. 841, 846 (D.N.J. 1982) (even though no implied right of action exists under a statute, "the court must presume that a § 1983 right of action exists unless there is evidence in the underlying statute which suggests an intent on the part of Congress to *foreclose* such an action") (emphasis in original); *Balf Co. v. Gaitor*, 534 F. Supp. 600, 604-05 (D. Conn. 1982) (plaintiff in a § 1983 action is required only to demonstrate that he has suffered an injury by the administration of a joint federal-state cooperative program and that he was an intended beneficiary of that program); cf. *Rollison v. Biggs*, 567 F. Supp. 964, 970 (D. Del. 1983) (EAHCA would be enforceable under § 1983 if not for comprehensive remedial scheme that indicates congressional intent to preclude § 1983 right of action).

139. 542 F. Supp. 841 (D.N.J. 1982).

140. 29 U.S.C. §§ 720-750 (1976 & Supp. V 1981). The plaintiff contended that his rights under § 723 had been violated. 542 F. Supp. at 844. That section provides that a handicapped person must be supplied with any goods or services necessary to render the person employable. 29 U.S.C. § 723.

141. *Ryans*, 542 F. Supp. at 845. The 1978 amendment added subsection § 722(d), Pub. L. No. 95-602 § 103(2), 92 Stat. 2955, 2959-60 (1978), which established limited administrative review.

142. See 542 F. Supp. at 844-46 (citing *Cort*, 422 U.S. 66 (1975)).

143. *Id.*

144. *Id.* at 845-46.

145. *Id.* at 848.

146. *Id.* (emphasis in original).

reasoning led to the possibility that a plaintiff might lose on the implied right issue but win with respect to the availability of section 1983.

Somewhat surprisingly, the *Ryans* court concluded that Congress had not intended to preclude private enforcement via section 1983. Even though it had earlier suggested that the only conclusion to be drawn from the legislative history was that a compromise had been struck which excluded judicial enforcement, the court stated somewhat elliptically that "the conference committee might equally well have chosen not to include a remedy in [the Act] because it *assumed* that a § 1983 action was already available and would suffice."¹⁴⁷ The court drew an important distinction from *Sea Clammers* in which the underlying statute contained private enforcement provisions, noting that resort to section 1983 in such a circumstance might result in circumvention of any procedural limits attached to the explicit private causes of action.¹⁴⁸ Because Title I contained no private cause of action at all, allowing enforcement via section 1983 could not conflict with any other judicial remedy.¹⁴⁹ Apart from the dubious reasoning in its discussion of the legislative history, the *Ryans* court's application of the presumption analysis appears faithful to the broad reading of *Thiboutot* as well as to the method for applying it which Justices Stevens and White recommended.

C. Implied Rights of Action as Precluding Section 1983

A number of courts have reached a conclusion that seems diametrically opposed to the presumption analysis of *Ryans* and similar cases. These decisions have held that when a court can validly infer a private right of action for injunctive relief from the underlying federal statute, enforceability under section 1983 is precluded in accordance with the exclusive remedy exception developed in *Pennhurst* and *Sea Clammers*.¹⁵⁰ A good example is *Ruth Anne M. v. Alvin Independent School District*,¹⁵¹ which addressed the availability

147. *Id.* (emphasis added).

148. *Id.*

149. *Id.* (because a plaintiff would first have to exhaust the statutory administrative remedies, a § 1983 remedy would be complementary rather than inconsistent).

150. See *Longoria v. Harris*, 554 F. Supp. 102, 107 (S.D. Tex. 1982) (implied right of action for equitable relief under § 504 of Rehabilitation Act of 1973 precludes action for damages under § 1983); *Flavin v. Connecticut State Bd. of Educ.*, 553 F. Supp. 827, 831 (D. Conn. 1982) (the comprehensive remedial framework provided by 20 U.S.C. § 1400 is exclusive and precludes a right of action under § 504 and § 1983); *Manecke v. School Bd.*, 553 F. Supp. 787, 791 (M.D. Fla. 1982) (court's ruling that § 504 only provides equitable relief would be circumvented by concluding that damage claims are allowable under § 1983); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460, 476 (S.D. Tex. 1982) ("supplemental damage remedy afforded by section 1983 would threaten to eviscerate the congressional objectives underlying section 504" of the Rehabilitation Act of 1973, under which courts have found an implied right of action solely for equitable relief); *Garrity v. Gallen*, 522 F. Supp. 171, 203 (D.N.H. 1981) (plaintiffs were precluded from bringing a § 1983 action against state officials because the right to compel Secretary of Health & Human Services to perform mandatory statutory duties is an exclusive remedy implied under the Developmentally Disabled Assistance and Bill of Rights Act).

151. 532 F. Supp. 460 (S.D. Tex. 1982).

of damages in a controversy surrounding the placement of a handicapped child. Apart from remedies under the Education for All Handicapped Children Act, the plaintiffs sought relief under section 504 of the Rehabilitation Act of 1973.¹⁵² The court engaged in an extensive analysis of the availability of an implied right and concluded that given precedents such as *Cannon v. University of Chicago*,¹⁵³ as well as the legislative history, Congress must have envisaged the availability of some private judicial enforcement.

The court balked, however, at including a damage remedy within that enforcement, despite the plaintiff's invocation of the familiar statement in *Bell v. Hood* that

when federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.¹⁵⁴

The *Ruth Anne* court recognized that damages would further the vindication of section 504 rights. It stressed, however, that awarding damages might well be inconsistent with the congressional provision of funds for the program in question, because any award would constitute a drain on the funds. The court also noted that the availability of damages unpredictable in amount could be a major disincentive to participation in any federal grant program governed by section 504.¹⁵⁵ The plaintiff argued that regardless of the result of implied right analysis, section 1983 under *Thiboutot* clearly presented a

152. Section 504 of the Rehabilitation Act provides in pertinent part:

No otherwise qualified handicapped individual in the United States . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794 (1976 & Supp. V 1981).

153. 441 U.S. 677 (1979). The plaintiff, an unsuccessful medical school applicant, brought an action against two medical schools under § 901 of Title IX, 20 U.S.C. § 1681 (1982), alleging sex discrimination. Section 901 provides, in pertinent part, "No person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." *Id.* The *Cannon* Court applied the four-part test set out in *Cort v. Ash*, 422 U.S. 66 (1975), and concluded that an implied private cause of action existed under § 901. 441 U.S. at 709. In response to the University's argument that Title IX's express remedy, the cutoff of federal funds, foreclosed an implied private remedy, the Court stated:

The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. Rather, the Court has generally avoided this type of "excursion into extrapolation of legislative intent," unless there is other, more convincing, evidence that Congress meant to exclude the remedy.

Id. at 711 (citation omitted).

154. *Ruth Anne*, 532 F. Supp. at 470 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

155. *Id.* at 472-73.

cause of action with an express panoply of remedies, including damages. The court did not undertake the herculean task of arguing that the plain language of section 1983 does not include the availability of damages as a remedy. Rather, it concluded that under *Pennhurst* and *Sea Clammers*, the finding of legislative intent to create a limited private right of action showed, at the same time, congressional intent to preclude any action under section 1983.¹⁵⁶

The court's conclusion with respect to the availability of section 1983 is remarkable in several respects. Analytically, it would seem that the express section 1983 cause of action takes precedence over any potential implied right to sue. Moreover, a fundamental assumption of the exclusive remedy exception to the *Thiboutot* principle is that Congress has spoken with respect to the nature and types of remedies to be available for the enforcement of a particular statute. In the section 504 context Congress had indicated nothing at all about private judicial remedies. Yet the *Ruth Anne* court was able to infer, from silence, an intent to create and also an intent to limit remedies, thereby precluding actions under section 1983.¹⁵⁷ This conclusion rests on double conjecture by the court, because Congress had addressed neither the existence of private judicial relief, nor its possible relationship to relief under section 1983. Apart from possible doubts about the validity of *Thiboutot* itself, the court was obviously swayed by the grave questions which would be raised by awarding damages for violations of conditions attached to federal grant programs. A number of other district courts have followed the example set in *Ruth Anne*, and have ruled that once an implied cause of action for injunctive relief has been found in a federal grant statute, section 1983 is inapplicable.¹⁵⁸

In sum, the pattern of case law discussed above is clearly an unruly one, manifesting the many different pressures that the *Thiboutot-Pennhurst-Sea Clammers* triad exerts on the federal judiciary when considering federal statutes that do not deal with the issue of private enforcement. The question arises whether such confusion is inevitable, or whether a coherent, unifying principle can be developed that will both bring clarity to the area and save *Thiboutot*. It is into this breach that numerous commentators have flung themselves. Again, not surprisingly, the answers differ widely.

IV. SAVING THIBOUTOT—THE LAW REVIEWS TO THE RESCUE

One thing which is clear from the judicial developments since 1981 is that *Pennhurst* and *Sea Clammers* have cut back considerably on the apparent

156. *Id.* at 475. The court first found the implied private remedy under § 504 to be limited to equitable relief. Because § 1983 relief is not so limited, the court concluded that allowing a damage remedy under § 1983 "would threaten to eviscerate the congressional objectives underlying section 504." *Id.*

157. *Id.*

158. See cases cited *supra* note 150.

sweep of the *Thiboutot* decision.¹⁵⁹ A number of commentators have sought to prevent this "evisceration"¹⁶⁰ and have focused their attacks on the apparent tendency in the two later cases to assimilate, if not to merge altogether, the implied right and section 1983 inquiries. Two principal arguments against such merging have been put forward. The first is that because section 1983 represents direct congressional authorization, any questions as to the power of the federal courts to act in a common law capacity which are present in the implied right context become irrelevant.¹⁶¹ The second argument is that section 1983 suits are fundamentally different from implied causes of action in that the former deal with a discrete and limited number of defendants—state and local officials—and that it is entirely consistent with national policy to favor federal court action against such defendants.¹⁶² Thus, defenders of *Thiboutot* raise the question of whether the methodology found in *Pennhurst* and *Sea Clammers* can and should be modified.¹⁶³

The arguments in favor of merging the two inquiries are discussed at some length in Section V of this article.¹⁶⁴ It must be pointed out, however, that the notion that issues of judicial authority simply disappear after *Thiboutot* is not quite as straightforward as suggested. To say that post-*Thiboutot* courts are merely carrying out the will of the 1874 Congress is stretching a bit. At least one commentator has noted that "Section 1983 . . . seems to have become a judicially created remedy much like the implied right of action, and it would seem logical that the analysis of whether a section 1983 remedy exists should be similar to the analysis used to determine whether an implied right of action exists."¹⁶⁵ It must also be remembered that at issue is the authority of the court vis-a-vis the authority of the Congress that enacted the underlying statute.

Of somewhat greater force is the argument that because state and local defendants stand on a sufficiently different footing from other defendants, the 1983 analysis should be totally divorced from implied right analysis. A principal purpose of section 1983 was to provide a federal forum for abuses by state and local officials.¹⁶⁶ The question remains whether extensive judicial

159. The *Ruth Anne* group of cases is probably the most dramatic example of this process of cutting back. See cases cited *supra* note 150.

160. See, e.g., Note, *Preclusion of Section 1983*, *supra* note 26, at 1189 ("Indiscriminate comprehensiveness test could seal off access to the supplemental federal remedies. . . . In section 1983 actions, intemperate application would render the statutory reference of section 1983 without effect and eviscerate the *Thiboutot* decision.").

161. See Wartelle and Loudon, *supra* note 10, at 537.

162. *Id.* at 537-38.

163. See *id.* at 540 (test should be whether "plaintiff's injury fall[s] within the zone of interest the statute is designed to protect"); see also Note, *Implied Rights and Section 1983*, *supra* note 23, at 1469 (Court should assume that the scope of § 1983 has not been foreclosed by the unexpressed intent of Congress).

164. See *infra* notes 220-31 and accompanying text.

165. See Note, *The Section 1983 Remedy*, *supra* note 26, at 477.

166. See, e.g., Wartelle and Loudon, *supra* note 10, at 519 ("it is hardly implausible that the Forty-third Congress should have meant what it said when it created expansive federal liability for violation, under color of state law, of federal statutes"); Note, *Preclusion of Sec-*

oversight of state and local officials in, for example, the operation of federal grant programs is so clearly desirable as not to warrant debate. Paul Wartelle and Jeffrey Hadley Lauden appear to think so. They argue that considerations of national uniformity as well as the inadequacies of federal administrative oversight require broad supervision by the federal courts.¹⁶⁷ As they put it, "There is an unavoidable tension built into the basic structure of the joint state-federal program—a tension between the desirability of local decision making and the need for national uniformity—that can *only* be effectively managed through judicial oversight."¹⁶⁸

The desirability of such an expansive federal role, however, is far from clear. Wartelle and Lauden present the matter as if the federal interests come into play on only one side of the equation, the side favoring the availability of the federal courts.¹⁶⁹ Are there not federalism interests, in the broadest sense, which argue against any such facile conclusion? It is certainly arguable that the value of a decentralized system, which relies heavily on subnational units to perform basic tasks, can be seriously eroded if the citizens of those units feel that in the event of a disagreement between themselves and their governments, the federal courts should be the first, and preferred, avenue of recourse. In the grant context, such an approach can only serve to enhance the already one-sided, centralist character of most of the grant programs now in place. On a more specific level, it is important to point out again the negative consequences of extensive judicial involvement in grant programs. Damages awards and attorney's fees, for example, may deplete funds from the very purposes which the program was meant to serve. There is the realistic possibility that, at least in the case of marginal programs, governments will decline to participate if they see serious, and unpredictable, costs. Additionally, extensive judicial involvement blurs matters of accountability.¹⁷⁰ The debate over judicial involvement in grant programs has recently begun to heat up¹⁷¹ and it is clear that the issue is not as one-sided as the defenders of *Thiboutot* contend.

tion 1983, *supra* note 26, at 1194-95. (Congress "interpose[d] the federal courts between the states and the people, as guardians of the people's federal rights'") (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

167. Wartelle and Loudon, *supra* note 10, at 538-40.

168. *Id.* at 540 (emphasis added).

169. See *id.* at 538-40; see also Bator, *Some Thoughts on Applied Federalism*, 6 HARV. J.L. & PUB. POL'Y 51, 55 (1982) ("We have come to think, in these confrontations between state and local authority on the one hand and individuals on the other, that the Constitution is on only one side of the case.").

170. See Brown, *The Courts and Grant Reform: A Time for Action*, 7 INTERGOVERNMENTAL PERSPECTIVE 6, 14 (1981). If the federal courts join the federal grantor agencies as significant participants in the operation of grant programs, it will become increasingly difficult for citizens of grantee jurisdictions to determine who is running a particular program. On the general problem of accountability in federal grant programs, see ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS IN BRIEF—THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH 24-26 (1980).

171. Brown, *supra* note 170, at 11; see, e.g., R. CAPPALLI, *supra* note 9, at §§ 8:37, 8:47; Note, *Preclusion of Section 1983*, *supra* note 23.

A. *A Presumption Rebutted by Legislative "Intent" or "Clear Expression"*

The important question is the extent to which defenders of *Thiboutot* who view *Pennhurst* and *Sea Clammers* as incorrect limitations on that decision have come forward with a viable alternative. Wartelle and Loudén argue that the burden of displacing section 1983 should be on the defendant, "unless there is clear evidence that Congress intended to withdraw it."¹⁷² They appear to accept the exclusive remedy doctrine enunciated in *Sea Clammers*, although they state that Justice Stevens, who dissented, was correct in that case. The relevant quote from his dissent is as follows: "A defendant may carry this burden by identifying express statutory language or legislative history revealing Congress's intent to foreclose the § 1983 remedy, or by establishing that Congress intended that the remedies provided in the substantive statute itself be exclusive."¹⁷³ Neither Wartelle and Loudén nor Justice Stevens, however, cites a single instance of a specific statute which would do this. As developed below,¹⁷⁴ any test which calls for "clear evidence" or something similar will prove to be meaningless because evidence will almost never exist. This may not bother Wartelle and Loudén. They accuse the Court of having "stacked the deck against private litigants and Congress" in *Pennhurst* and *Sea Clammers*¹⁷⁵ and apparently conclude that the way to prevent the evisceration of *Thiboutot* is to eviscerate *Pennhurst* and *Sea Clammers*.

A student commentator who seems somewhat less enthusiastic about *Thiboutot*, and sees less of a difference between implied right and section 1983 analyses,¹⁷⁶ nonetheless suggests a similar approach. According to this commentator, the keystone should be legislative intent, as in the implied right cases, and a presumption should be employed which the defendant might rebut by evidence such as legislative history.¹⁷⁷ This commentator at least gives a specific example of how to apply his approach: the statute involved in the *Ryans* case.¹⁷⁸ He concludes, however, that *Ryans* was wrongly decided and that the same analysis which precluded an implied right of action should have served to prevent an action under section 1983 as well. After all, Congress had considered, and rejected, a judicial review amendment to Title I of the Act in question. The commentator states that "[t]hese indications of congressional intent not to allow a judicial remedy under Title I, as well as the detailed administrative remedy, would be sufficient under the proposed approach to show that Congress intended to preclude a section 1983

172. Wartelle and Loudén, *supra* note 10, at 543.

173. *Sea Clammers*, 453 U.S. at 27 n.11 (Stevens, J., dissenting).

174. See *infra* notes 182-85 and accompanying text.

175. Wartelle and Loudén, *supra* note 10, at 535.

176. See Note, *The Section 1983 Remedy*, *supra* note 26, at 481-82 (noting arguments for and against the *Thiboutot* decision and suggesting clarification by Congress of § 1983's scope).

177. *Id.* at 476-77.

178. *Id.* at 469-71 (discussing *Ryans v. New Jersey Comm'n for the Blind and Visually Impaired*, 542 F. Supp. 841 (D.N.J. 1982)).

remedy under Title I.”¹⁷⁹ Once again, the problem is that specific evidence denying¹⁸⁰ a section 1983 remedy will almost never be found. Thus the author, after some initial hesitation, is forced to fall back on such concepts as “comprehensive enforcement scheme,” “inconsistency” between section 1983 and the statutory scheme, and “legislative history.”¹⁸¹ It is far from clear whether, and to what extent, this approach marks any departure from *Sea Clammers*.

Another student commentator starts from the proposition that *Sea Clammers* wrongly merged the two inquiries.¹⁸² Contrary to the preceding analysis, he argues that rules developed in the context of implied rights are simply irrelevant to the section 1983 inquiry. With regard to a situation such as that present in *Sea Clammers*, he argues that it is not unreasonable to conclude that

Congress, in providing remedial schemes replete with administrative proceedings and citizen suit provisions within the substantive statute, also might have concluded that private access to the federal forum is necessary to serve as a further check on the state participants in joint federal-state regulatory endeavors, federal actors already being under sufficient executive and legislative control.¹⁸³

The proposed solution is an approach requiring considerably more evidence of preclusion than is the case with implied right analysis. The author recommends a criterion of a “clear expression of congressional intent to withdraw the remedy.”¹⁸⁴ Once again, it is hard to tell where this expression would be found, although we know that a comprehensive remedial scheme is not necessarily enough. A requirement of “clear expression” sounds even tougher to satisfy than “clear evidence.” In practice, however, they would probably always produce the same result: nullification of *Pennhurst* and *Sea Clammers*. At least this commentator admits that as his goal.¹⁸⁵

It seems apparent that whatever the merits of their views of *Pennhurst* and *Sea Clammers*, the authors discussed in the preceding paragraphs have failed to come up with an alternative approach which harmonizes the *Thiboutot-Pennhurst-Sea Clammers* triad. This failure is probably traceable to the major problem inherent in trying to make *Thiboutot* workable. The Congress that enacted the underlying statute was almost certainly unaware of the possibility of section 1983 enforcement. It is illogical, therefore, to expect Congress to have stated, either in the statute or in the legislative history, anything with respect to whether section 1983 is to apply. In these circumstances, then, turning to the implied right inquiry is not as indefensible as some authors suggest, because it is the only extant mode of analysis

179. *Id.* at 480.

180. *Id.* at 479 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

181. *Id.* at 482.

182. Note, *Implied Rights and Section 1983*, *supra* note 23, at 1441, 1469.

183. *Id.* at 1469.

184. *Id.* at 1470.

185. *Id.* at 1468-70 (suggesting a congressional, rather than judicial, solution).

for dealing with this phenomenon of statutes that are silent as to alternative methods of enforcement. The rejection by these authors of any analogy to implied rights analysis is probably traceable to the Court's current approach to implied rights.¹⁸⁶

It might be argued that this problem is only a transitory phenomenon, applicable to statutes enacted prior to the 1980 *Thiboutot* decision. As noted, grant statutes are usually authorized for a limited period of time.¹⁸⁷ Any Congress, therefore, that reenacted a grant statute after 1980 should be presumed to have known what the law is under *Thiboutot* and, consequently, failure to indicate a desire to preclude section 1983 will leave the presumption intact. Once again, the inherently fictional nature of *Thiboutot* rears its head. What about Congresses that enact statutes after the decisions in *Pennhurst* and *Sea Clammers*? Those Congresses might well have assumed that (1) the Supreme Court had merged the section 1983 and implied right analyses, (2) under current approaches to the latter, an implied right of action will rarely be found, and thus (3) Congress simply need not worry about enforcement of a sort different from that for which it provided in the statute. In other words, trying to impute knowledge of the law to Congress will not work in a circumstance such as this where the law is unknowable by anyone. Because of the deficiencies inherent in any effort to rehabilitate *Thiboutot* by considering legislative intent, some commentators have taken the logical step of urging inquiries that go beyond traditional means of attempting to discern the intent of the Congress that enacted the underlying statute.

B. Beyond Legislative Intent

Perhaps the most ambitious undertaking in this direction is Professor Cass Sunstein's analysis of when private enforcement under section 1983 is available.¹⁸⁸ He recognizes the core of the problem as

the fact that in almost all cases there will be virtually no evidence of [congressional] intent. It has only been in unusual circumstances that Congress has explicitly precluded private remedies in designing a regulatory scheme. It has also been rare that the issue has been addressed in the legislative history. The question of the continued availability of section 1983 is almost invariably one to which Congress devoted little or no thought, for Congress has not as an institution generally been aware that section 1983 creates a remedy for all statutory violations.¹⁸⁹

Sunstein advocates a process of "resconstructing legislative intent,"¹⁹⁰ which

186. See Wartelle and Loudon, *supra* note 10, at 536 ("the Court has become quite frank in its hostility toward private implied rights of action to enforce federal statutes").

187. The 1976 renewal of general revenue sharing generated substantial debate over the operation of that program. Opponents extracted substantial modification as the price for an additional renewal. See generally Brown, *Beyond the New Federalism—Revenue Sharing in Perspective*, 15 HARV. J. ON LEGIS. 1 (1977).

188. Sunstein, *supra* note 26.

189. *Id.* at 418.

190. *Id.* at 436.

involves "a relatively independent judicial assessment of the likelihood that the statutory enforcement mechanism and the section 1983 remedy can be coordinated into a workable regulatory scheme."¹⁹¹ The task for the courts is described in general terms as "identifying those contexts in which the presumption in favor of the continued availability of the section 1983 remedy should be regarded as rebutted because of manifest inconsistency between the statutory enforcement scheme and a private cause of action."¹⁹² His use of the phrase "manifest inconsistency" suggests a burden which the defendant would almost never succeed in carrying. At another point, however, Sunstein offers a somewhat less rigorous statement of his general approach: identifying "what sorts of regulatory schemes are likely to be inconsistent with preservation of the section 1983 remedy."¹⁹³

Thus, it is somewhat unclear at the outset exactly how much of a showing Sunstein would require the section 1983 defendant to make. In any event, Sunstein discusses a number of statutory "contexts" in which "the section 1983 remedy and a particular regulatory scheme might be found incompatible."¹⁹⁴ These contexts, in descending order of significance, are as follows:

- (1) "statutes that create independent private causes of action against state officials";¹⁹⁵
- (2) "statutes involving open-ended substantive standards";¹⁹⁶
- (3) "statutes that demand consistency and coordination in enforcement";¹⁹⁷
- (4) "statutes in which there is evidence of legislative calibration of sanction to the expected enforcement level";¹⁹⁸
- (5) "statutes in which remedies have been created against the federal government to compel state conformity with federal law";¹⁹⁹
- (6) "statutes in which informal methods of enforcement were intended as the exclusive route";²⁰⁰
- (7) "statutes protecting collective interests."²⁰¹

Sunstein certainly succeeds in giving judges a far more expansive menu from which to choose than do those commentators who limit the inquiry to legislative history, clear statements, or other indications of intent. There are, however, serious problems with the approach he advocates. It is highly likely that any attempt by the courts to follow the Sunstein approach would lead to contradictory and highly divergent results. One reason for this predic-

191. *Id.* at 439.

192. *Id.* at 426.

193. *Id.* at 419.

194. *Id.* at 426-27.

195. *Id.* at 427-28.

196. *Id.* at 428-30.

197. *Id.* at 430-32.

198. *Id.* at 432.

199. *Id.* at 432-34.

200. *Id.* at 434-35.

201. *Id.* at 435-36.

tion is the vagueness and tentativeness with which Sunstein puts forward his own criteria.²⁰² In developing five of the seven contexts, he states that legislative history may be an important element in analyzing the context,²⁰³ even though the entire approach is predicated on the fact that any such history is highly unlikely to be found. For example, in discussing the second context—"statutes involving open-ended substantive standards"—Sunstein states:

[T]o resolve the preemption issue, the legislative history may often be useful. If the history shows an intent to entrust regulatory decisions to a specialized or technically sophisticated body, private enforcement in the federal courts should not be permitted. If, on the other hand, there is no evidence of such a congressional concern, the fact that the statutory standard is vague or ambiguous may not by itself be sufficient to show preemption.²⁰⁴

This seems to be a somewhat roundabout way of saying that the context approach may or may not be helpful. This pattern of qualifying the relevance of any particular context is, however, repeated throughout Sunstein's analysis.²⁰⁵

Courts would almost certainly disagree over when the various contexts are present. A good example is the fifth context—"statutes in which remedies have been created against the federal government to compel state conformity with federal law." As an example of such a statute, Sunstein cites with approval the district court decision in *Garrity v. Gallen*.²⁰⁶ At issue in *Garrity* was the plaintiff's ability to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act against state officials. In a noteworthy opinion, the district court found an implied private right of action against the Secretary of Health and Human Services.²⁰⁷ This conclusion is a departure from traditional private rights analysis, which focuses on the plaintiff's ability to sue the *nonfederal* defendants for improper administration of a federal statute. In cases such as *Cannon v. University of Chicago*,²⁰⁸ the courts have stressed that the plaintiff must have an individualized remedy against the grantee in order to secure any benefit from winning the lawsuit. In this respect, the *Garrity* decision seems something of an aberration. Moreover, the act in question certainly does not seem to fit within the category of "statutes in which remedies have been *created* against the federal government."

With respect to his first context—"statutes that create independent private

202. In fairness, it should be noted that Professor Sunstein limits his goal to providing a general approach. *Id.* at 426 n.117.

203. *Id.* at 427-36.

204. *Id.* at 430.

205. *Id.* at 432, 434, 435, and 436.

206. 522 F. Supp. 171 (D.N.H. 1981).

207. *Id.* at 201-02.

208. 441 U.S. 677 (1979). *Cannon* involved alleged sex-based discrimination against the plaintiff by a university receiving federal funds. The Court reasoned that an across-the-board cutoff of federal funds might not benefit the plaintiff, who sought admission to the school. The Court, therefore, allowed her to sue the university directly for approximate relief.

causes of action against state officials"—Sunstein also expresses agreement with the notion that finding an implied private cause of action would preempt section 1983.²⁰⁹ The only case he cites is *Garrity*, which is hardly on point because the implied right that the *Garrity* court found was against federal officials. As discussed earlier, there are numerous cases that reach such a result, but they seem inconsistent with the very notion of private enforcement under section 1983 as interpreted in *Thiboutot*.²¹⁰ Because section 1983 plaintiffs benefit from the presumption, one would think that it would come first and that the implied right becomes superfluous. The notion that implication of a right not expressly found in a statute can somehow preclude the express right provided by section 1983 runs counter to the spirit of *Thiboutot* to such an extent that it may be a tacit admission that the case simply was wrong. For present purposes, it is important to note that the concept of "statutes that create independent private causes of action against state officials" is open to widely diverging interpretations.

Indeed, the Sunstein approach invites courts to engage in a relatively freewheeling, common-law approach to private enforcement of federal law of the very sort that the Supreme Court has essentially rejected in the context of implied rights. Yet Sunstein purports to oppose "an unstructured judicial inquiry into the value of a section 1983 remedy."²¹¹ Furthermore, he argues that there is absolutely no question of judicial authority in this area because the problem of authority disappears given the existence of section 1983.²¹² In effect, he reads this portion of section 1983 as if it said "and laws except those with whose remedial scheme enforcement under this section might be found incompatible." It does appear to be a bit attenuated to suggest that the 1874 Congress conferred any such blanket authorization for the federal courts to roam within the statutory framework of the 1980's. In any event, even if Sunstein is right, his reconstruction of the statute is one more bit of evidence that section 1983 really does not mean what it says after all.

Another commentator, building on the *Bivens* doctrine,²¹³ has recommended an alternative inquiry, modifying the comprehensiveness test applied in *Sea Clammers* by focusing on "the statute's effectiveness in vindicating the rights of the individual plaintiffs."²¹⁴ Although the commentator does not appear willing to set himself entirely adrift from congressional intent,²¹⁵ his pro-

209. Sunstein, *supra* note 26, at 428.

210. See *supra* notes 150-58 and accompanying text.

211. Sunstein, *supra* note 26, at 439. Such an inquiry, according to Sunstein, "would reintroduce the vices of freewheeling judicial implication of private rights of action." *Id.*

212. *Id.* at 415.

213. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that petitioner's complaint alleging illegal search by federal narcotics agents states cause of action under fourth amendment, for which damages are recoverable upon proof of injuries resulting from its violation).

214. Note, *Preclusion of Section 1983*, *supra* note 26, at 1200.

215. See *id.* at 1199, 1200. But see *id.* at 1202 (focus should be on statutory terms, rather than on legislative history, to determine rights granted by statute).

posed approach has the advantage, like Professor Sunstein's, of moving the inquiry away from the fruitless search for rare or nonexistent evidence of any such intent. There may be, however, a doctrinal problem in drawing a close analogy between section 1983 and *Bivens*. In *Davis v. Passman*,²¹⁶ Justice Brennan sharply rebuked the lower court for applying principles of statutory construction to the development of *Bivens* remedies.²¹⁷

Far more serious is the question of the workability of any test based on the adequacy of remedies provided for in the underlying statute. The author calls for "a sensitive inquiry into the nature of the remedy accorded."²¹⁸ The outcomes of such inquiries surely would vary widely. For example, the commentator treats *Sea Clammers* as correctly decided, because independent private enforcement under section 1983 would have allowed circumvention of the procedures governing the citizens suit provisions available to the plaintiffs.²¹⁹ Yet, if the focus is truly on the vindication of rights, a strong argument can be made that the unavailability of damages in citizens suits demands the availability of section 1983. Thus the "effectiveness" test turns out not to be very effective at all. Perhaps it is just another foredoomed attempt to discern legislative intent.

In sum, with the exception of Professor Sunstein's analysis, the result of most of the approaches discussed in this Section would be to nullify the affect of *Pennhurst* and *Sea Clammers* and substitute something very similar to Justice Stevens's dissent in the latter case. What is involved, then, is not harmonization of the three cases but rather an evisceration of the latter two. On the other hand, Professor Sunstein does strive for a middle ground that would put realistic limitations on *Thiboutot*, clearly the intent of the majority in the successor cases. His approach, however, presents such serious problems of its own that there may be substantial reasons for not adopting it. Perhaps the lesson to be derived from studying the proffered approaches is that the three cases simply cannot live in harmony, and that all efforts based on the assumption that *Thiboutot* was correctly decided are doomed to failure, at least if they give anything more than lip service to the decisions in *Pennhurst* and *Sea Clammers*. This being the case, it might be useful to consider developing approaches to the problem based on the premise that *Thiboutot* was wrongly decided.

V. IF *THIBOUTOT* WAS WRONG

A. Merging Section 1983 and Implied Rights Analysis

As noted, a number of lower courts, perhaps out of resistance to the broad implications of *Thiboutot*, have read *Pennhurst* and *Sea Clammers* as essen-

216. 442 U.S. 228 (1979).

217. *Id.* at 242.

218. Note, *Preclusion of Section 1983*, *supra* note 26, at 1200.

219. *Id.*

tially merging the section 1983 and implied right inquiries.²²⁰ An initial question is whether such a restrictive reading of Supreme Court precedent is a proper activity for the lower federal courts. The answer would appear to be yes, given the obvious intent of the majority in the two later cases to cut back on the *Thiboutot* holding and the strong suggestion that the two inquiries were similar. Just last term, Justice Powell gave further impetus to the merger argument. In a concurring opinion in *Guardians Association v. Civil Service Commission*,²²¹ he said with respect to private enforcement of Title VI of the Civil Rights Act of 1964 that "Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under section 1983."²²² There is, however, a nagging uncertainty given Justice Powell's phrasing of the issue in terms of an affirmative showing of congressional intent. This leaves open the question of what a court should do if it concludes that Congress simply failed to address the issue. The Supreme Court has not given clear guidance, even in the field of implied rights of action itself. At times, the Court has stated that its reason for denying a private right of action is that Congress did not intend such enforcement,²²³ and at other times the Court states that there is simply no indication that Congress did so intend.²²⁴

The more important question is whether the two inquiries should be similar. It is plausible that in each case, a court considers how private enforcement fits with the overall scheme and purpose of the underlying statute.²²⁵ It might be objected that the Supreme Court has made implied right analysis a very difficult task by focusing on legislative intent generally and as evinced in remedial schemes particularly. This objection is really a shorthand way of saying that merging the two inquiries deprives *Thiboutot* of much of its force. If, however, *Thiboutot* was wrongly decided, section 1983 should not be permitted to serve as an end run around difficult issues of statutory construction. If the real battleground is implied rights, the issues ought to be debated there.

The merger approach is quite close to overruling *Thiboutot* sub silentio. Perhaps it can be justified as making the best of a bad job, a task necessitated by the decision itself. This approach does, for example, leave intact the ability of the welfare plaintiffs to sue, even if it is not entirely clear whether their cause of action is implied from the underlying statute or furnished by sec-

220. See *supra* notes 123-37 and accompanying text.

221. 103 S. Ct. 3221 (1983).

222. *Id.* at 3236 n.3 (Powell, J., concurring).

223. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981).

224. *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981).

225. For example, in the context of determining the availability of *implied* rights of action, Professor Sunstein has advocated criteria somewhat similar to his contexts for determining the availability of § 1983. See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1321 (1982).

tion 1983 through interpretations that may or may not have been correct but are now accepted by virtue of their long standing.²²⁶

Nonetheless, there are serious problems with the merger approach. The first, discussed above,²²⁷ is the argument that the two inquiries are fundamentally different given the potential breadth of implied rights of action as opposed to the specific focus of section 1983 on a particular class of defendants—state and local officials. Indeed, it has been contended that section 1983 should serve as an analogue at the state and local level to the Administrative Procedure Act (APA) at the federal level.²²⁸ The serious federalism objections to such arguments already have been noted.²²⁹ Moreover, the APA analogy is manifestly false. At the federal level, the political branches would serve as the only check over the administrative agencies, absent judicial review. In the context of federal grant programs, however, the grantor agency is itself an entity, one of whose principal functions is to oversee the operations of the state and local grantees. Thus, the need for an across-the-board subnational analogue to the APA is far from obvious.

Somewhat more serious is the question of what a court is to do with the section 1983 claim when it concludes that a private right of action should be implied from the underlying statute. Excluding section 1983 in such a case seems to run counter to the preferred status of an express cause of action.²³⁰ But if section 1983 is used concurrently, damages and attorney's fees may be assessed as additional burdens on the grantee defendant, substantially altering the rules of the game. Again, the inherent weakness of the *Thiboutot* construction makes a satisfactory answer impossible.

Perhaps the major problem with the merger approach is that it comes close to reading "and laws" out of the statute. Even if *Thiboutot* was wrongly decided, the language in the statute must mean something, unless one is prepared to adopt Professor Guido Calabresi's doctrine of judicial alteration of obsolete statutes.²³¹

B. Justice Powell's *Thiboutot* Dissent Revisited

We come, in part by a process of elimination, to Justice Powell's dissent in *Thiboutot* itself. He argued that the reference to "and laws" in section 1983 is nothing more "than a shorthand reference to equal rights legislation

226. Cf. *Blue Chip Stamps v. Manor Drug Store*, 421 U.S. 723, 754 (1975) (noting long-standing judicial acceptance of a particular construction of the Securities Act of 1934 as well as Congress's failure to reject it).

227. See *supra* notes 162-70 and accompanying text.

228. See Sunstein, *supra* note 26, at 394-95, 432-33.

229. See *supra* notes 167-71 and accompanying text.

230. See *supra* notes 150-58 and accompanying text.

231. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Professor Calabresi argues that courts should play an active role in nullifying or altering statutes that are obsolete or no longer in harmony with prevailing legal concepts. For a critique of Calabresi's thesis, see Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126 (1982).

enacted by Congress."²³² It is important not to lose sight of the fact that Justice Powell's position has substantial merits of its own, totally apart from the serious problems of any competing approaches. His reading makes the phrase "and laws" mean something. A presumption in favor of civil rights plaintiffs is entirely faithful to the intent of the 1874 Congress. Of course, the lower courts could not render any such reinterpretation of *Thiboutot*. It could come, absent congressional action, only from the Supreme Court itself.²³³

Even if Justice Powell's interpretation is accepted as the way out of the *Thiboutot* thicket, two serious problems remain. The first problem is determining what will rebut the section 1983 presumption. There may be some statutes with regard to which private enforcement of civil rights provisions under section 1983 would run counter to the intent of Congress.²³⁴ In the specific contexts of civil rights there is nothing wrong with putting a heavier burden on defendants, given the intent and focus of the Congress which enacted section 1983. Thus, one might accept a generalized approach such as that formulated by Justice White in *Pennhurst*: the presumption prevails "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a section 1983 action is inconsistent with congressional intent."²³⁵ Under such an approach the defendant in a civil rights case will rarely prevail. In particular, under *Rosado v. Wyman*, the existence of administrative remedies will not suffice to prevent enforcement under section 1983.²³⁶ Nor should the existence of some judicial enforcement suffice, such as the provision in the 1981 block grants for referral by the grantor agency of civil rights matters to the Attorney General for a possible suit.²³⁷

The more serious problem which flows from an acceptance of Justice Powell's position is the availability of damages in federal grant litigation, because damages are explicitly available under section 1983. As we have seen, a number of lower courts have shown a marked resistance to acceptance of a section 1983 cause of action, precisely because such acceptance would involve the award of damages for violation of a federal grant condition.²³⁸

232. *Thiboutot*, 448 U.S. 1, 12 (1980) (Powell, J., dissenting).

233. There is precedent for overruling the Court's prior construction of § 1983. In *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), the Court held that municipalities are "persons" within the meaning of § 1983. This ruling overturned the contrary interpretation advanced in *Monroe v. Pape*, 365 U.S. 167 (1961). *Monell*, however, was based on a reexamination of the legislative history of the Civil Rights Act of 1871, the predecessor of § 1983. Any such reexamination will be of little assistance in the *Thiboutot* context.

234. See *Adickes v. Kress & Co.*, 398 U.S. 144, 162-69 (1970).

235. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 51-52 (White, J., dissenting) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 672 (1979) (White, J., concurring)).

236. *Rosado v. Wyman*, 397 U.S. 397, 405-07 (1970).

237. See, e.g., 42 U.S.C.A. § 300w-7 (West 1982) (Preventive Health and Health Services Block Grant).

238. See *supra* notes 150-58 and accompanying text.

These decisions are part of a larger body of cases considering the issue of the availability of damages for violations of federal grant conditions, apart from whether or not section 1983 is involved. The overwhelming majority of federal courts have ruled that damages are an inappropriate remedy in the grant context.²³⁹ Yet how does one get around the problem that section 1983 seems to mean what it says without any possible limiting construction? The Supreme Court may be in the process of fashioning a way out of this dilemma by developing a doctrine that damages are not in fact available for violations of a federal grant statute. Justice Rehnquist hinted at such an approach in the advisory portion of his *Pennhurst* opinion.²⁴⁰ Of much greater significance is the extensive treatment of the issue, and the possible adumbration of such a doctrine, by Justice White in the Court's opinion in *Guardians Association v. Civil Service Commission*²⁴¹ decided at the end of the 1983 term.

VI. GRANTS AND DAMAGES: GUIDANCE FROM *GUARDIANS*

The many lower court decisions that have grappled with the propriety of awarding damages for violations of federal grants have rested their analyses on such grounds as the eleventh amendment,²⁴² a discerned intent of Congress to preclude such relief,²⁴³ and a conclusion that damage awards would be inconsistent with the policies underlying a particular program and might deter participation.²⁴⁴ Although a number of Supreme Court decisions have addressed the remedial issues in grant litigation, these cases dealt only with the availability and extent of equitable relief.²⁴⁵ In *Guardians Association v. Civil Service Commission*,²⁴⁶ Justice White provided the first solid doctrinal footing for the proposition that damages are not available to third parties asserting violations of federal grant conditions. The case is of particular significance because it relies heavily on the holding in *Pennhurst* and transposes the *Pennhurst* clear statement principle from the area of rights contained in grant statutes to that of remedies for their violation.

Guardians involved a challenge by minority police officers to the administration of certain examinations used for entry level positions, and also

239. See, e.g., *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981); *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981).

240. See 451 U.S. 5, 29-30 (1981).

241. 103 S. Ct. 3221 (1983).

242. See, e.g., *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983).

243. See, e.g., *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982); see also *supra* note 150 and accompanying text.

244. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 262 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983).

245. See, e.g., *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 715-16 (1979); *Rosado v. Wyman*, 397 U.S. 397, 420 (1970).

246. 103 S. Ct. 3221 (1983).

to the subsequent consequences when officers hired on the basis of these examinations were laid off.²⁴⁷ The district court ultimately concluded that even though only some members of the class were entitled to relief under Title VII of the Civil Rights Act of 1964, Title VI of the same act was also available and provided remedies that were otherwise unavailable.²⁴⁸ While the Second Circuit agreed with the relief granted under Title VII, it unanimously reversed the decision in the plaintiffs' favor to the extent that it rested on Title VI. The majority concluded that Title VI should be enforced by an intent rather than an impact standard and that the lower court was in error in believing that proof of discriminatory impact could suffice.²⁴⁹ Judge Meskill joined in the judgment on the alternative ground that the remedies sought were essentially compensatory in nature, and that any award resembling damages was not available in a private suit to enforce Title VI.²⁵⁰

The disposition of *Guardians* by the Supreme Court is somewhat muddled. Justice White, joined by Justices Brennan, Marshall, Blackmun, and Stevens would uphold administrative regulations incorporating a disparate impact standard.²⁵¹ Nevertheless, Justice White calculated that five members of the Court agreed, on alternative grounds, that the judgment below should be sustained. Two members of the Court (Justices White and Rehnquist) would not grant damages relief in a Title VI action; two more members of the Court (Chief Justice Burger and Justice Powell) would not permit any private action to enforce Title VI; and one member (Justice O'Connor) would deny any relief absent a showing of discriminatory intent; therefore, it followed that there were five votes to affirm the judgment.²⁵²

The Court's opinion consists of the one written by Justice White and joined only by Justice Rehnquist. With respect to the availability of damages, Justice White relied primarily on the analysis of spending power legislation which the Court set forth in *Pennhurst*. He stressed that "the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt," and in doing so, "the grantee will have in mind what its obligations will be."²⁵³ In his view, if later additional conditions, unknown at the time of the agreement, were to be sprung on a grantee in a private suit for damages the grantee might "terminate its receipt of federal money rather than assume the *unanticipated* burdens."²⁵⁴ Justice White also drew to some extent on the earlier decision in *Rosado v. Wyman*,²⁵⁵ which held that in an injunctive proceeding, the grantee must be given an either-or choice of complying with the conditions

247. *Id.* at 3223-25.

248. 466 F. Supp. 1273, 1280-87 (S.D.N.Y. 1979).

249. 633 F.2d 232, 270, 272 (2d Cir. 1980).

250. *Id.* at 254-63.

251. 103 S. Ct. at 3235 n.27.

252. *Id.*

253. *Id.* at 3229.

254. *Id.* (emphasis added).

255. 397 U.S. 397, 420 (1970).

or opting out of the program. Taken together, *Rosado* and *Pennhurst* established what Justice White labeled the "*Pennhurst* presumption"²⁵⁶—"remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance."²⁵⁷ Justice White also relied on general notions of grant policy, particularly the notion that damages awards might dissuade potential participants,²⁵⁸ but he left open the issue of intentional violations.

Justice White's analysis of the remedial issues in a suit to enforce Title VI provoked vigorous dissents from Justices Marshall and Stevens. Justice Marshall began by invoking the well-settled principle established by *Bell v. Hood*²⁵⁹ that when legal rights have been invaded "federal courts may use any available remedy to make good the wrong done."²⁶⁰ He also disagreed with Justice White on the bearing of grant policy on the issue, arguing that private retrospective relief is a necessary supplement to the administrative cutoff remedy, the latter being so draconian that it will be rarely used.²⁶¹ Perhaps most important is his direct challenge to Justice White on the bearing of *Pennhurst* on the matter. He first noted that any discussion in *Pennhurst* of remedies was purely dicta and did not address the issue of retrospective relief.²⁶² He then argued that even if *Pennhurst* is applicable, it cuts the other way since the grantee knew its obligations under Title VI.²⁶³ Drawing directly on *Pennhurst*, Justice Marshall offered the following alternative to Justice White's formulation: "Having benefitted from federal financial assistance conditioned on an obligation not to discriminate, recipients of federal aid must be held to their part of the bargain."²⁶⁴

Justice Stevens's dissent echoed a number of the themes stressed by Justice Marshall. He characterized Justice White's analysis as a serious distortion of the *Pennhurst* opinion "which concerned the existence or non-existence of statutory rights, not remedies."²⁶⁵ The main thrust of Justice Stevens's argument is that this was a classic case for the application of *Thiboutot*. The plaintiffs had sought relief under section 1983 and "our past decisions . . . establish that section 1983 provides a damages remedy."²⁶⁶ The issue of damages in a case such as *Guardians* had been squarely resolved by *Thiboutot*; thus, for Justice Stevens, policy arguments are now irrelevant and should be addressed to Congress rather than to the Court.

256. 103 S. Ct. at 3231.

257. *Id.* at 3229.

258. *Id.* at 3232.

259. 327 U.S. 678 (1946).

260. *Guardians*, 103 S. Ct. at 3244 (Marshall, J., dissenting) (quoting *Bell*, 327 U.S. at 684).

261. *Id.* at 3245 (Marshall, J., dissenting).

262. *Id.* at 3246 n.21 (Marshall, J., dissenting).

263. *Id.* at 3247-49 (Marshall, J., dissenting).

264. *Id.* at 3248 (Marshall, J., dissenting).

265. *Id.* at 3250 (Stevens, J., dissenting).

266. *Id.* at 3251 (Stevens, J., dissenting).

The fact that Justice White would take the position he did in *Guardians* is not without irony. He dissented vigorously in *Pennhurst* on the merits, expressed doubt as to the clear statement rationale itself,²⁶⁷ and argued that section 1983 was directly applicable, given the holding in *Thiboutot*.²⁶⁸ Indeed, he joined in the *Thiboutot* majority and had vigorously advocated the rule of that case in the antecedent decision of *Chapman v. Houston Welfare Rights Organization*.²⁶⁹ Yet in *Guardians* he dismisses, in a footnote, the argument that the availability of section 1983 could make any difference with respect to remedies,²⁷⁰ and seems to regard the entire issue as one to be governed primarily by judicially formulated rules rather than the plain meaning of any particular statute.²⁷¹

The central question which *Guardians* raises is whether its apparent holding that damages are not available, at least for unintentional violations of federal grant programs, will become settled law, even in those instances of intentional violations. At the moment, the issue of damages must be viewed as an open question.²⁷² Only two members of the Court addressed it at all. Moreover, the obvious conflict with *Thiboutot*'s concept of plain meaning is hard to ignore, as Justice Stevens pointed out. Some pre-*Guardians* commentators have taken it as a given that after *Thiboutot*, damages are available in the grant context.²⁷³

The White opinion in *Guardians* suggests several grounds for a generalized non-damages rule, absent the rare case in which congressional intent as to the matter is discernible.²⁷⁴ The most obvious class of cases in which damages are not available is those governed by the eleventh amendment.²⁷⁵ It is true that there are some problems in applying eleventh amendment principles, such as identifying whether the defendant is in fact classifiable as part of "the state,"²⁷⁶ and whether the particular relief sought can accurately be characterized as damages.²⁷⁷ The most obvious limitation on the eleventh

267. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 37-42 (1981) (White, J., dissenting).

268. *Id.* at 51-53 (White, J., dissenting).

269. 441 U.S. 600, 646-72 (1979) (White, J., concurring).

270. 103 S. Ct. at 3232 n.23.

271. *Id.* at 3229.

272. In *Consolidated Rail Corp. v. Darrone*, decided on February 28, 1984, the Supreme Court held that a plaintiff who alleges intentional employment discrimination may bring an equitable action for back pay under § 504. The Court, however, did not determine "the extent to which money damages are available under § 504." *Consolidated Rail*, 52 U.S.L.W. 4301, 4303 (1984).

273. See Note, *Preclusion of Section 1983*, *supra* note 26; see also *The Supreme Court, 1979 Term*, *supra* note 2.

274. Justice White admitted that he was dealing with an area in which the general rule would favor the availability of damages. Thus, the nondamages approach is characterized as an exception. 103 S. Ct. at 3228. Nonetheless, it may well become a general principle in its own right.

275. See *Edelman v. Jordan*, 415 U.S. 651 (1974).

276. See *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351, 356-57 (7th Cir. 1983).

277. 103 S. Ct. at 3233-34.

amendment's applicability to the issue is that the overwhelming number of cases are likely to arise against substate units, such as county and local governments, which simply do not benefit from any eleventh amendment immunity at all.²⁷⁸

Alternatively, one might ground a non-damages rule on general principles of what might be called grant policy. The issues of diversion of funds from achievement of program goals and the discouragement of potential grantees have been noted. As Professor Richard Cappalli puts it in his recent landmark study of federal grants:

Private suits must be evaluated in a larger context which accounts for the total public effort involved. This broader view incorporates the premise that public programs of the type receiving federal financial aid do not achieve perfect justice. Too many years of too little funding supports that premise. Rather, the programs distribute limited resources as a limited solution to a limited part of the problem held by a limited sector of the problem population. These programs seek rough justice—no matter what they may purport to do in their noble statements of purpose. It is consistent with that limited mission to call upon the federal administrator to ferret out and remedy only the more pervasive illegalities. And, consonant with that view, it may often be improper for courts to . . . attempt specific justice, particularly if judicial relief includes damage awards. Whenever a program pays damages to an individual, it is less able to afford benefits or services to another needy individual.²⁷⁹

Even if grant policy arguments have the better side of the argument over the considerations put forward by Justice Marshall in his *Guardians* dissent, there remains the serious issue of judicial authority even to entertain them. If *Thiboutot* is still good law, and means what it says, then plaintiffs such as those in *Guardians* are entitled to sue under section 1983 and are also entitled to any relief which section 1983 provides—including damages.

Pennhurst may well be the strongest foundation for a non-damages rule, as Justice White clearly intimated. It should be noted, however, that the remedial discussion in *Pennhurst* itself did not rely on the basic *Pennhurst* clear statement principle, enunciated in the merits portion of the opinion.²⁸⁰ The problem with basing remedial conclusions on what the grantee knew is that a somewhat fictional inquiry is involved. Certainly the grantee knew it was bound to observe the conditions during the entire time that it was getting funds. Does the *Pennhurst*-based approach allow it to retroactively unbind itself without giving the money back? For that matter, just how much can the grantee be deemed to know about remedies? Justice White suggests that it knows only that it might be sued by the federal government.²⁸¹ Surely one could take the argument a step further and say that the grantee knew about the applicability of section 1983 as interpreted in *Thiboutot*. Thus, it not only knew its obligations but was aware of the remedial consequences as well.

278. See, e.g., *Moor v. County of Alameda*, 411 U.S. 693 (1973).

279. R. CAPPALLI, *supra* note 9, at § 8:37.

280. See 451 U.S. at 27-30.

281. See 103 S. Ct. at 3232 n.24.

At this point, a serious element of circularity creeps in. Take the issue of implied rights of action to enforce grant statutes, for example. Since the statute says nothing about any such private enforcement, the grantee could possibly argue that under *Pennhurst* principles, implied rights are unavailable as a general proposition.²⁸² Alternatively, of course, one can counter that the grantee is aware of generally applicable principles of law including that of the doctrine of implied rights of action. Therefore, what the grantee knew may prove too much, or too little.

Perhaps an alternative reading of *Guardians* is required to sustain any non-damages principle. This reading would begin with a recognition that in *Pennhurst* itself there are suggestions that Congress's power under the spending clause is limited in ways which exercises of other powers may not be.²⁸³ Thus, the close doctrinal link with *National League of Cities v. Usery*²⁸⁴ takes on great significance. The argument might be developed along the following lines.

Through the spending power, Congress exercises national authority in subject matter areas that may be beyond the reach of its coercive powers, or which traditionally have been regarded as state and local functions.²⁸⁵ Grant conditions can impair the independence and sovereignty of state and local governments, especially if they impose "massive financial obligations"²⁸⁶ which limit the ability of state and local governments to direct their own source revenue toward locally desired uses. Precluding damage awards thus serves two goals consistent with the view of federalism enunciated in *National League of Cities*; it prevents grant conditions from becoming the equivalent of binding federal norms²⁸⁷ and it minimizes the risk of large drains on state and local treasuries.²⁸⁸

If accepted, this logic would appear applicable to intentional violations of grant conditions as well as unintentional violations, an issue left open

282. See R. CAPPALLI, *supra* note 9, at § 8:40.

283. 451 U.S. at 17 n.13.

284. 426 U.S. 833 (1976).

285. See generally Susskind, *Revenue Sharing and the Lessons of the New Federalism*, 8 URB. L. ANN. 33, 42-51 (1974).

286. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

287. If damages were available, congressional exercises of the spending power would thus be the basis for a federally created body of tort law. It is not necessarily the case, however, that grant conditions are enacted only under the spending power. Some forms of discrimination by state and local grantees would be subject to congressional action under the fourteenth amendment. Development of the *Pennhurst* presumption will require a principled approach to the question of what power or powers Congress has utilized in enacting a particular program. In *Pennhurst*, Justice Rehnquist suggested the additional presumption that grant programs are enacted pursuant to the spending power unless Congress states otherwise. See *id.* at 16-17. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), however, Chief Justice Burger stated that Congress had exercised "an amalgam of its specifically delegated powers" in attaching a minority set-aside condition to a public works grant program. *Id.* at 473. |

288. The Court has intimated concern over such risks in other contexts. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (Court should not "second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients").

in *Guardians*. *Pennhurst* consequently may become one of the major federalism precedents of the Burger Court. What Justice Rehnquist was really saying is not that spending power issues are different because of what the grantee might or might not expect, but because exercises of the spending power must be tightly scrutinized and circumscribed to prevent it from swallowing up the independence of the subnational units. A rule against awarding damages for breach of grant conditions is a logical outcome of this approach.

The analysis offered above goes far beyond what Justice White said in *Guardians*. Perhaps it can be viewed as one example of the adumbration by the Supreme Court of principles of grant law.²⁸⁹ It is consistent, moreover, with arguments against broad recourse to the spending powers that have been voiced since the beginning of the republic.²⁹⁰ Yet it is less of a denial of national authority than the argument advanced vigorously by state and local governments after *National League of Cities* that grant conditions could themselves violate principles of state sovereignty by being overly intrusive. To the dismay of many proponents of federalism, the courts have rejected all such contentions.²⁹¹

The non-damages rule appears as a middle ground. It keeps alive the notion that *National League of Cities* does impose some limits on uses of the spending power.²⁹² It can be seen, in terms of grant policy, as a good attempt at balancing—preserving some form of private relief, while avoiding the unpredictability and potentially serious consequences of damages. One cannot refrain from noting also that it is yet another proof that section 1983, *Thiboutot* notwithstanding, does not mean what it says.

It is clear that the law with respect to this issue is in a state of development and will take a good deal of time to sort itself out. For example, despite the analysis advanced above, Justice White might agree with an award of damages in a case of intentional violations of grant conditions. Nevertheless, it is not clear where his analysis would go if the conditions involved matters other than discrimination. This uncertainty is one more example of the legacy of *Thiboutot*: an extensive period during which the courts thrash around and reach inconsistent results, with no clear guide given the status of precedent. The question arises, perhaps inevitably, whether Congress should step in.

289. For a discussion of the concept of grant law as a separate field, see Brown, *Federalism from the "Grant Law" Perspective*, 15 URB. LAW. IX (1983). Whatever the status of grant law as a field, it is clear that the damages holding in *Guardians* is a development of potentially great doctrinal and practical significance. The *Harvard Law Review*, however, apparently disagrees. A recent commentary on *Guardians* devotes only one paragraph to the damages component. Note, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 245-46 (1983).

290. See R. CAPPALLI, *supra* note 9, at § 10:01.

291. See *id.* at § 10:13. See generally Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

292. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, 179-81 (2d ed. 1983).

VII. SHOULD CONGRESS STEP IN?

Given the current state of affairs, Congress might find it desirable to clarify the area. One option would be a statute such as that proposed by Senator Orrin Hatch in 1981, inserting in lieu of "and laws" in section 1983 the following: "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States."²⁹³ Any such legislation is liable to encounter immediate opposition on the ground that it is a serious restriction of federal rights. Indeed, Senator Hatch found this out when he held hearings on his own proposal.²⁹⁴

There is perhaps a more serious political objection to attempting to push any such corrective legislation. There are a number of section 1983-related issues about which people on both sides of the spectrum feel strongly. Restricting a bill to only one issue, the overturning of *Thiboutot*, would be highly unlikely. On one side, there are those who might wish to overturn Supreme Court precedents on such issues as municipal liability²⁹⁵ and exhaustion of remedies.²⁹⁶ The issue of attorney's fees under section 1983 also has excited considerable interest.²⁹⁷ On the other side, there are many strong defenders of section 1983 who feel that its scope has been seriously cut back, primarily through the *Younger* doctrine and its extensions. As they did during the 1970's—via a bill numbered S. 1983—members of Congress who take this view would be certain to attempt to address the issues of importance to them.²⁹⁸ Although one author has suggested some possibility of compromise,²⁹⁹ it seems more likely that precisely the opposite would occur. Thus, the fate of corrective legislation would be dubious at best.

Moreover, there is the question of whether a single bill could deal adequately with all the issues raised by *Thiboutot* and its progeny. One issue is that of unintended consequences. Although it appears that those who favored Senator Hatch's bill did not wish to overturn the cases permitting welfare plaintiffs to sue,³⁰⁰ any amendment which limited section 1983 to equal rights might have such a consequence. Presumably, legislative history adequately constructed could cure the problem, but it certainly would need

293. S. 584, 97th Cong., 1st Sess. (1981), reprinted in *Municipal Liability Hearings*, *supra* note 11, at 3.

294. See, e.g., *id.* at 44-48 (statement of Steven H. Steinglass).

295. See *id.* at 1-2 (opening statement of Senator Orrin Hatch).

296. See, e.g., S. 3018, 97th Cong., 2d Sess., Part D (1982) (imposing general exhaustion requirement).

297. *Municipal Liability Hearings*, *supra* note 11, at 98-103 (statement on behalf of the National Institute of Municipal Law Officers).

298. See, e.g., Howard, *The States and the Supreme Court*, 31 CATH. U.L. REV. 375, 382-83 (1982).

299. Sagazi-Nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 ST. LOUIS U.L.J. 373, 403-05 (1983).

300. See *Municipal Liability Hearings*, *supra* note 11, at 24-25 (statement of Professor Charles Abernathy).

to be addressed. There is also the issue of damages discussed in Section VI. The courts appear to have embarked on an interesting and promising doctrinal path in the *Guardians* case. A reenactment of section 1983 in its present form, including the availability of damages, would either end the development of post-*Guardians* law, or perhaps produce a confrontation as to whether such a statute encounters constitutional difficulties in the context of grant cases. At the moment, the "*Pennhurst*" presumption," as elaborated in *Guardians*, avoids the necessity of facing any such constitutional questions.

Finally, the question arises whether there remains any need for Congress to step in, at least in an across-the-board fashion. Senator Hatch's bill appears to have been prompted by concerns, similar to those stated by Justice Powell in his *Thiboutot* dissent, that the expanded reading of section 1983 would have a sudden, widespread impact. Clearly, *Pennhurst* and *Sea Clammers* have blunted a substantial amount of this impact. In fact, this point was made in 1981 by witnesses before Senator Hatch's Subcommittee.³⁰¹ Nonetheless, it must be remembered that what the Supreme Court has done is to substitute one set of problems for another. Instead of an overly expansive, and potentially harmful, construction of section 1983, what we now have is rampant uncertainty as to when it is available for federal statutory claimants and what remedies are triggered when it is available. The courts are grappling with these issues, but it obviously will take them a long time to resolve them. Definitive resolution can, and should, come from Congress. The resolution, however, should not be attempted in any single piece of legislation. Rather, the individual Committees which consider the reauthorization or other amendment of federal grant programs should direct their attention to the entire issue of private enforcement of grant conditions, rather than leave it in limbo as has been the practice in the past. If Congress undertakes this task seriously, *Thiboutot* may prove to have been a useful catalyst. If not, given the obvious weaknesses of the decision, we are condemned to a long period of uncertainty and inconsistent results.

VIII. CONCLUSION

Perhaps the lesson of *Thiboutot* is that bad decisions make hard law. After *Pennhurst* and *Sea Clammers* imposed limitations on the broad sweep of *Thiboutot*, the courts and litigants have faced the impossible task of discerning what those limitations are and how to work with them. In addition, the issue of the availability of damages is surfacing as a major question, given the recent opinion in *Guardians*. Defenders of *Thiboutot* can argue persuasively that the words "and laws" have to mean something. The problem is that the Supreme Court's decision to apply, in a cursory fashion, a plain meaning approach to an exceedingly complex area was doomed from the start, as Justice Powell predicted. The honest thing to do is to admit the mistake and start over. Commentators, in particular, might follow the High Court's lead and attempt to give *Thiboutot* a decent burial, rather than attempt to breathe new life into an unworkable doctrine.

301. See, e.g., *id.* at 404-05 (statement of Professor Leon Friedman).