Section 1983 and the Private Enforcement of Federal Law

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Under 42 U.S.C. § 1983, any person who is deprived "of any rights, privileges, or immunities secured by the Constitution and laws," by any person acting under color of state law, may bring a private action to seek redress.[1] In *Maine v. Thiboutot*,[2] the Supreme Court held that the phrase "and laws" in section 1983 should be read literally, so as to create a private cause of action against a state official for violation of the federal statute providing for Aid to Families with Dependent Children ("AFDC").[3] A beneficiary of the AFDC program was thus entitled to bring suit in state or federal court to require state compliance with the federal statute, even though that statute was silent on the subject of private enforcement, and even though Congress had authorized the Department of Health and Human Services to enforce the statute against the states.[4]

If applied generally, the result in *Thiboutot* would mean that section 1983 creates a federal cause of action against any state official who has violated any federal law. Such a result would go far toward converting section 1983 into a state counterpart of the Administrative Procedure Act ("APA"),[5] binding state officials to the

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[1] 42 U.S.C. § 1983 (Supp. III 1979) provides in full:

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

[2] 448 U.S. 1 (1980).

[3] 42 U.S.C. §§ 601-660 (1976 & Supp. III 1979).

[4] *Id.* § 604 (1976).

[5] 5 U.S.C. §§ 551-559, 701-706 (1976 & Supp. IV 1980). *See also infra* notes 62-63 and

terms of federal law, and creating a federal judicial remedy for both damages and injunctive relief whenever federal law has been violated.

The decision in *Thiboutot* may raise serious problems in cases in which Congress has imposed duties on the states, but has delegated to a federal agency the authority to enforce those duties against the relevant state officials. In such contexts, recognition of a private cause of action under section 1983 could disrupt the statutory enforcement scheme and undermine the agency's ability to make law and policy. Not merely the welfare statute involved in *Thiboutot,* but an extraordinary number of other enactments in such diverse areas as transportation,[6] endangered species,[7] banking,[8] public highways,[9] and the environment[10] would be affected. Private rights of action could in such contexts prove a useful supplement to agency enforcement efforts, but the Congress that enacted the regulatory scheme may have been unaware of the section 1983 remedy, or may have intended that remedy to be unavailable in the particular circumstances.

The Court responded to these concerns in *Middlesex County Sewerage Authority v. National Sea Clammers Association,*[11] holding that the section 1983 remedy could not be invoked by plaintiffs alleging that state and local officials had violated certain federal environmental statutes. Raising the issue sua sponte, the Court concluded that the creation of comprehensive enforcement mechanisms in the governing substantive statutes[12] made it unlikely that Congress had intended to preserve a cause of action under section 1983.[13] Carried to its logical limit, *Sea Clammers*

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accompanying text.

[6] *See* 49 U.S.C. §§ 1601-1613 (1976 & Supp. III 1979) (Urban Mass Transportation Act of 1964).

[7] *See* 16 U.S.C. §§ 1331-1340 (1976 & Supp. IV 1980) (Wild Free-Roaming Horses and Burros Act); 16 U.S.C. §§ 1361-1407 (1976 & Supp. IV 1980) (Marine Mammal Protection Act).

[8] *See* 12 U.S.C. §§ 85-86 (1976 & Supp. IV 1980) (banking regulation); *see also* First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195 (8th Cir. 1980) (declining to recognize section 1983 remedy), *cert. denied,* 450 U.S. 1042 (1981).

[9] *See* 23 U.S.C. §§ 121, 131 (1976 & Supp. IV 1980) (regulation of interstate highways).

[10] *See* 7 U.S.C. §§ 136-136y (1976 & Supp. IV 1980) (Federal Insecticide, Fungicide, and Rodenticide Act); 16 U.S.C. §§ 1241-1249 (1976 & Supp. IV 1980) (National Trails Systems Act).

[11] 101 S. Ct. 2615 (1981).

[12] Throughout this article the term "substantive statute" refers to the statute creating a right for which section 1983 is supposed to provide a remedy.

[13] 101 S. Ct. at 2626-27.

would lead to a rule that the creation of an explicit enforcement mechanism invariably extinguishes the private right of action under section 1983. Because almost all regulatory statutes contain some kind of enforcement mechanism, such a rule would deprive *Thiboutot* of much importance.

Whether a private right of action is available for statutory violations under section 1983 is a question of enormous practical significance. As a result of the Court's recent decisions restricting judicial "implication" of private causes of action[14] and Congress's frequent silence on the question in the governing substantive statute, section 1983 will often be the only source of a private cause of action to compel state obedience to federal law. This is not, of course, to say that private rights of action are always desirable; such rights may in fact result in largely unproductive litigation that interferes with a more efficient and workable enforcement scheme.[15]

This article offers an approach for determining when, in the absence of a clear statement from Congress, the creation of a statutory enforcement mechanism preempts the usual operation of section 1983. Part I examines the history of section 1983 in order to provide a background to this question. Part II compares section 1983 with implied private rights of action, using insights gained from the context of implied remedies to suggest why and when use of section 1983 might raise troublesome questions of statutory construction. Part III offers an approach, based on the considerations developed in part II, for identifying types of regulatory enforcement schemes that should be understood to preempt the section 1983 remedy.

I. The History of Section 1983

In *Maine v. Thiboutot,* the Court relied in part on the legislative history for the conclusion that section 1983 provides a remedy to redress violations, under color of state law, of all federal laws, not merely laws providing for equal rights. The Court's treatment of the issue was, however, quite cursory,[16] and although

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[14] *See infra* notes 76-78 and accompanying text.

[15] *See infra* notes 91-94 and accompanying text.

[16] The Court referred to the debate on the issue in Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), *see infra* note 17, and noted that there was no "express explanation" for the addition of the phrase "and laws" when Congress enacted the Revised Statutes in 1874. 448 U.S. at 7. The Court also emphasized that Congress's attention was

courts[17] and commentators[18] have devoted much attention to the legislative history of section 1983, there remains considerable dispute about the intended scope of that provision. In the following discussion, which sets out the historical evidence in some detail, I make no claim to special originality, although the account offered here does diverge from previous explanations in a number of par-

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drawn to the new language by Representative William Lawrence, who had read the original and revised versions on the floor of the House after noting that the civil rights provisions showed "verbal modifications bordering on legislation." *Id.* at 7-8 (citing 2 CONG. REC. 825, 827 (1874)).

[17] The Supreme Court treated the issue most fully in Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), particularly in the separate opinions of Justice Powell, *id.* at 623, and of Justice White, *id.* at 646. The explanation offered in this article in some respects parallels that of Justice White. *Chapman* presented the question whether 28 U.S.C. § 1343(3) (now 28 U.S.C. § 1343(a)(3) (Supp. III 1979)), which provides federal jurisdiction over claims of deprivations, under color of state law, of rights secured by equal rights laws, *see infra* note 40, extended jurisdiction to claims based on the Social Security Act, a question the Court answered negatively while reserving judgment of the parallel issue under section 1983. Justice Powell, in a concurring opinion joined by Chief Justice Burger and Justice Rehnquist, expressed the view that the term "laws" in section 1983 included only "laws providing for equal rights." 441 U.S. at 623-24. Justice White, in an opinion concurring in the judgment, concluded that both section 1983 and section 1343(3) comprehended statutory violations. Justice Stewart, in a dissent joined by Justices Brennan and Marshall, concluded that section 1983 was not restricted to the rights included in section 1343(3), but comprehended all statutory rights. *Id.* at 646-49, 672. Note that after the elimination of the jurisdictional amount requirement in federal-question cases in 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369 (1980), the jurisdictional holding of *Chapman* is unimportant in section 1983 actions; a cause of action exists under *Thiboutot*, and under section 1331 there is federal jurisdiction without regard to amount in controversy.

The conclusion in *Thiboutot* conformed to the majority position in the lower federal courts. *See, e.g.*, Tongol v. Usery, 601 F.2d 1091, 1098-1100 (9th Cir. 1979); Chase v. McMasters, 573 F.2d 1011, 1017 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); Blue v. Craig, 505 F.2d 830, 834-36 (4th Cir. 1974); Randall v. Goldmark, 495 F.2d 356, 359 & n.6 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974); Gomez v. Florida State Employment Serv., 417 F.2d 569, 579-80 (5th Cir. 1969); Bomar v. Keyes, 162 F.2d 136, 138-39 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947); Naughton v. Bevilacqua, 458 F. Supp. 610, 615 (D.R.I. 1978), *aff'd*, 605 F.2d 586 (1st Cir. 1979); La Raza Unida v. Volpe, 440 F. Supp. 904, 908-10 (N.D. Cal. 1977). *But see* First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 521-22 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); Wynn v. Indiana State Dep't of Pub. Welfare, 316 F. Supp. 324, 327-34 (N.D. Ind. 1970).

The Supreme Court had previously assumed without deciding that section 1983 provided a remedy for statutory violations. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 675-76 (1974); City of Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966).

[18] *See, e.g.*, Cover, *Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged*, CLEARINGHOUSE REV., Feb.-Mar. 1969, at 5; Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 HARV. C.R.-C.L. L. REV. 1 (1970); Note, *Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 COLUM. L. REV. 1404 (1972); Note, *The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction-Era Civil Rights Acts:* Blue v. Craig, 43 GEO. WASH. L. REV. 1343 (1975); Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285 (1953).

ticulars. The basic purpose of the inquiry is not so much to determine whether *Thiboutot* was rightly decided as to furnish a background against which to examine the question when a statutory enforcement mechanism should be understood to preempt the "and laws" provision of section 1983.

A. Reconstruction-Era Forebears of Section 1983

The historical origins of section 1983 lie in the Civil Rights Act of 1866.[19] Section 1 of that Act, which was hortatory in nature,[20] listed certain rights of all "citizens of every race and color, without regard to any previous condition of slavery," including the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property."[21] Section 2 of the Act was a criminal enforcement provision, making it a misdemeanor for any person to deprive any other person of the rights listed in section 1.[22] Section 3 of the Act granted jurisdiction to both the circuit and the district courts over "all causes, civil and

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[19] Ch. 31, 14 Stat. 27 (1866) (current version of relevant sections noted *infra* notes 21-23).

[20] *But see infra* note 35 (discussing implied private remedies under successor provisions).

[21] Ch. 31, § 1, 14 Stat. 27, 27 (1866) (current version at 42 U.S.C. §§ 1981-1982 (1976)), provided in full:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[22] *Id.* § 2, 14 Stat. at 27 (current version at 18 U.S.C. § 242 (1976)), provided in relevant part:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor.

criminal, affecting persons who are denied" rights listed in section 1.[23]

Congress reenacted sections 1 and 2 of the 1866 Act in substantially identical form as sections 16 and 17 of the Enforcement Act of 1870,[24] and in section 18 incorporated the jurisdictional provisions of the prior Act.[25] Section 6 of the 1870 Act added criminal sanctions for conspiracy to deny any person "any right or privilege granted or secured . . . by the Constitution or laws of the United States."[26]

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[23] *Id.* § 3, 14 Stat. at 27 (current version at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)), provided in relevant part:

> That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act.

[24] Ch. 114, §§ 16-17, 16 Stat. 140, 144 (1870) (current version at 18 U.S.C. § 242 (1976) and 42 U.S.C. §§ 1981-1982 (1976)), provided in relevant part:

> Sec. 16. . . . That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. . . .
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> Sec. 17. . . . That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor.

See also infra note 35.

[25] *Id.* § 18, 16 Stat. at 144 (current version of jurisdictional provision at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)), provided in full:

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

[26] *Id.* § 6, 16 Stat. at 141 (current version at 18 U.S.C § 241 (1976)), provided in relevant part:

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, . . . and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

In the Ku Klux Klan Act of 1871,[27] Congress took an additional step. Departing from its previous criminal enforcement mechanisms, it created a private cause of action for the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States."[28] This provision was, of course, distinct in scope from the 1866 Act in its use of private enforcement and in its generalized formulation of protected rights. Jurisdiction under the 1871 Act was to be governed by section 3 of the 1866 Act, which was incorporated by reference.[29]

Taken as a whole, these three Acts had five primary effects: (1) the recognition of certain enumerated rights; (2) the creation of criminal sanctions for violation of those rights; (3) the creation of criminal sanctions for conspiracy to violate rights secured by the Constitution and federal laws; (4) the creation of a private right of action for violation of rights secured by the Constitution; and (5) the vesting of jurisdiction over civil and criminal actions in all of these cases in the district and circuit courts. There were three different formulations of protected rights in these provisions: the criminal conspiracy provision referred to all constitutional and statutory rights; the private cause of action referred to constitutional rights only; and the basic criminal penalty applied to certain enumerated rights. The inevitable consequence of these disparities was to make the various statutes appear confused and uncoordinated.

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[27] Ch. 22, 17 Stat. 13 (1871) (current version of relevant sections cited *infra* notes 28-29).

[28] *Id.* § 1, 17 Stat. at 13 (current version of the private right of action at 42 U.S.C. § 1983 (Supp. III 1979)), provided in relevant part:

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

[29] *Id.* (current version of jurisdictional provision at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)).

B. The 1874 Revision

Such was the conglomeration of provisions that greeted the commission charged with revising and codifying the United States statutes. Before the revision, which was completed in 1874, those statutes had never been codified in a single place. They consisted instead of a wide variety of laws passed at different times with little coordination or coherence. The revisers' task was to eliminate, so far as possible, the resulting confusion through consolidation and clarification of numerous overlapping and sometimes inconsistent provisions.[30]

The revision of 1874 was accompanied by frequent statements, on the part of the legislators as well as the revisers themselves, to the effect that the revision was intended to clarify, and not to amend, existing law.[31] At the same time, the process of clarification and elimination of incongruities did require the revisers to change existing law in a variety of ways.[32] I defer for the moment the question when, if ever, modifications made by a commission appointed to codify existing law should be given full effect.[33] For pre-

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[30] *See* Act of June 27, 1866, ch. 140, § 2, 14 Stat. 74, 75 ("the commissioners shall bring together all statutes or parts of statutes which, from similarity of subject, ought to be brought together, . . . making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text"); 2 CONG. REC. 4220 (1874) (remarks of Sen. Conkling); *Report of the Commissioners Appointed under Act of June 27, 1866,* S. MISC. DOC. No. 101, 40th Cong., 2d Sess. 1-2 (1868).

[31] *See, e.g.,* 2 CONG. REC. 646 (1874) (remarks of Rep. Poland) (revision "will be an exact transcript, an exact reflex, of the existing statute law of the United States . . . there shall be nothing omitted and nothing changed"); 2 CONG. REC. 4220 (1874) (remarks of Sen. Conkling) ("although phraseology of course has been changed, the aim throughout has been to preserve absolute identity of meaning, not to change the law in any particular, however minute"); *Report of the Commissioners to Revise the Statutes of the United States,* H.R. MISC. DOC. No. 31, 40th Cong., 3d Sess. 2 (1869).

[32] *See* United States v. Price, 383 U.S. 787, 803 (1966) (provision of Revised Statutes imposing criminal penalties for violation of civil rights effected a "substantial change" by including all federal statutory rights notwithstanding "the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance"); United States v. Sischo, 262 U.S. 165, 168-69 (1923) (although revision "is not lightly to be read as making a change," Court found alteration); *Report of the Commissioners to Revise the Statutes of the United States, supra* note 31, at 2; *Report of the Commissioners Appointed Under Act of June 27, 1866, supra* note 30, at 1. *See also* 1 C. BATES, FEDERAL PROCEDURE AT LAW § 630, at 473-74 (1908):

> The original judiciary act, and many other federal statutes, were badly mutilated in the revision . . . . The Revised Statutes of the United States must be treated as a legislative declaration by congress of the statute law . . . , and when the meaning is plain, the courts cannot look to the statutes which have been revised to see if congress has erred in its revision.

[33] *See infra* notes 47-53 and accompanying text.

sent purposes, it will be useful to examine precisely in what ways, if any, the revisers changed the civil rights provisions.

In essence, the revisers retained the three enforcement mechanisms—the private right of action and criminal sanctions for violations and for conspiracies to violate—but unified the definition of protected rights in those provisions, making it conform to that of the prior criminal conspiracy provision.[34] The rights made enforceable were thus those secured by the Constitution and laws of the United States.[35] The revision also collected the accompanying jurisdictional provisions into a single title, organized by courts. The district court provisions referred to the same class of rights specified in the enforcement provisions—constitutional and statutory rights—but the circuit court provision was limited to constitutional rights and those secured by "equal rights" laws.

More specifically, the revisers' work fell into four categories:

First, the private cause of action, which had previously been limited to constitutional violations, was altered to provide a cause of action for deprivation of rights "secured by the Constitution and laws." New section 1979[36] was thus substantially identical to current section 1983.

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[34] The language describing the protected rights is not identical in the three new provisions. For example, REV. STAT. § 5508 (1874) (criminal conspiracy) speaks of "any right or privilege," but REV. STAT. §§ 5510 (criminal violation) and 1979 (private right of action) refer to "any rights, privileges, or immunities." Another difference is that section 5508 speaks of rights secured "by the Constitution *or* laws," whereas sections 5510 and 1979 treat rights secured "by the Constitution *and* laws" (emphasis added). This difference survives in the current statute, except that the criminal violation provision, 18 U.S.C. § 242 (1976), now reads "or," like the criminal conspiracy provision, *id.* § 241; whereas the private action provision, 42 U.S.C. § 1983 (Supp. III 1979), continues to read "and." These minor differences are not, however, material.

[35] The rights specifically enumerated in the 1866 Act are preserved in 42 U.S.C. §§ 1981-1982 (1976). Section 1981, derived from REV. STAT. § 1977 (1874), provides all persons in the jurisdiction of the United States with equal rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." This provision, whose scope is not limited by a requirement of action under color of state law, has been held to be privately enforceable even though it creates no cause of action by its terms. Runyon v. McCrary, 427 U.S. 160 (1976). Section 1982 provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." Derived from REV. STAT. § 1978, this provision is also privately enforceable. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-40 (1969). See also 42 U.S.C. § 1985(3) (Supp. III 1979), creating a private cause of action for conspiracy to deprive any person of "equal protection of the laws" or "equal privileges and immunities under the laws."

[36] REV. STAT. § 1979 (1874) (current version at 42 U.S.C. § 1983 (Supp. III 1979); *see supra* note 1).

Second, the provision making it a misdemeanor to deprive persons of certain statutorily specified rights was significantly modified. New section 5510 provided that it would be a crime to deprive any person, not of those specifically enumerated rights, but of rights, privileges, or immunities "secured or protected by the Constitution and laws of the United States."[37]

Third, in section 5508 of the Revised Statutes, the revisers retained in substantially identical form the provision making it a crime to conspire to deprive any person of constitutional or statutory rights.[38]

Fourth, the various jurisdictional provisions were consolidated and divided into two parts. The provision covering the district courts—section 563(12)—applied to the deprivation under color of state law of rights secured by the Constitution or "of any right secured by any law of the United States."[39] The provision covering the circuit courts—section 629(16)—applied to constitutional rights and "any right secured by any law providing for equal rights."[40]

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[37] *Id.* § 5510 (current version at 18 U.S.C. § 242 (1976)) provided in full:

> Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both.

[38] *Id.* § 5508 (current version at 18 U.S.C. § 241 (1976)) provided in full:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

[39] *Id.* § 563(12) (current version at 28 U.S.C. § 1343(a)(3) (Supp. III 1979)) gave the district courts jurisdiction

> Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

[40] *Id.* § 629(16) gave the circuit courts original jurisdiction

> Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United

The intended consequences of these changes are difficult to discern. Congress's intention to reach all constitutional and statutory violations seems clear in the criminal conspiracy provision, whose substance was not changed in the revision. The difficulty arises in interpreting the three changes from prior law: (1) the expansion in coverage of the criminal provision, which now covered not specifically enumerated rights but instead all rights "protected by the Constitution and laws of the United States"; (2) the expansion in coverage of the private cause of action, formerly covering only constitutional rights, but now encompassing rights "secured by . . . laws" as well; and (3) the expansion and bifurcation of the jurisdictional provisions—the circuit court provision covering constitutional rights and "any right secured by any law providing for equal rights," and the district court provision appearing to cover constitutional and all statutory rights.

The legislative history helps to explain only one of these changes. The circuit court provision, section 629(16), was accompanied in a draft of the revision by a marginal note. In attempting to reconcile the reference to rights secured by the Constitution contained in section 1 of the 1871 Act with the specific enumeration of rights in section 16 of the 1870 Act, the revisers noted that Congress may have intended, in the 1871 Act,

> to provide . . . for all the cases of deprivations mentioned in [section 16 of] the previous act of 1870, and thus actually to supersede the indefinite provisions contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the civil rights act.[41]

States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

In 1911 the circuit courts were abolished, and the new jurisdictional provision covering the district courts tracked the language of section 629(16). Judiciary Act of 1911, ch. 231, § 24, 36 Stat. 1087, 1091. The current version of that provision, 28 U.S.C. § 1343(a)(3) (Supp. III 1979), reads in full:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[41] 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS AP-

This explanation might be interpreted to mean that section 629(16) limited jurisdiction to cases involving constitutional guarantees and the Civil Rights Acts themselves.[42] The explanation, however, is ambiguous because it is unclear how far the revisers intended to expand jurisdiction beyond constitutional deprivations. The revisers' note referred specifically to the Enforcement Act of 1870, but the language of the statute is far broader—including *"any* right secured by *any* law providing for equal rights"—and there is no indication that the 1870 Act was the only statute intended to be comprehended. The revisers themselves were uncertain whether the reference to the Constitution was originally meant to include all laws authorized by the Constitution. The most plausible conclusion is that section 629(16) should be interpreted literally.

Interpretation of sections 5510, 1979, and 563(12) is even more difficult. By their terms, all three provisions covered all constitutional and statutory rights. Those who prefer a narrow reading rely principally on two historical arguments.[43] The first is based on an assumption that the two jurisdictional provisions must be construed alike and that the substantive provisions must follow suit, the term "laws" being a shorthand for laws "providing for equal rights" in all three cases. The second argument is that the revisers should not be understood to have changed prior law.

The premise underlying the first argument is that Congress could not have intended to grant the district courts broader jurisdiction than the circuit courts. The reference to "laws" in section 563(12), which was left unexplained by the revisers, would therefore be understood to conform to section 629(16) and its marginal note. Because section 563(12) is for this reason properly restricted to laws "providing for equal rights" despite its broader language, sections 1979 and 5510 might also be restricted. The broad term "laws" would thus be treated as an inadvertent shorthand for civil rights laws in each case.

These conclusions, however, are not inescapable, for the underlying premise is weak. It is not inconceivable that the revisers meant to accord jurisdiction to the district and circuit courts over somewhat different classes of cases. The two courts served differ-

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POINTED FOR THAT PURPOSE 359 (1872) [hereinafter cited as DRAFT].

[42] *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 633 & n.14 (Powell, J., concurring).

[43] *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 20-22 (1980) (Powell, J., dissenting).

ent functions and could reasonably be given different tasks.[44] Different drafters may have been concerned with the jurisdiction of the two kinds of courts;[45] in any event, the drafters might have had different views on the proper scope of each.[46] If sections 563(12)

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[44] The district courts, for example, had jurisdiction over certain federal crimes, suits for penalties and forfeitures incurred under federal law, suits brought in equity to enforce federal tax liens on real estate, civil admiralty and maritime actions, bankruptcy cases, and suits against consuls or vice-consuls. REV. STAT. § 563 (1874). The circuit courts had jurisdiction over civil suits in which there was diversity of citizenship and the jurisdictional amount requirement was satisfied, suits for the condemnation of property under certain statutes, suits relating to the slave trade, suits arising under federal patent or copyright laws, federal criminal actions, and suits to recover pecuniary forfeitures under any act to enforce the right to vote. *Id.* § 629. The district and circuit courts shared jurisdiction over common law actions in which the United States or its officers were plaintiffs and suits by or against national banks. *Id.* There was thus overlapping but hardly concurrent jurisdiction between the two court systems.

When the revision was completed in 1874, neither court had general federal-question jurisdiction. The circuit courts were given original jurisdiction in federal-question cases in 1875. Act of March 3, 1875, ch. 137, 18 Stat. (pt. 3) 470 (repealed 1911). The district courts retained their original powers.

[45] *See Report of the Commissioners,* S. MISC. DOC. No. 3, 42d Cong., 2d Sess. 1-2 (1871).

[46] In rejecting this position in his concurrence in *Chapman,* Justice Powell invoked a portion of the explanatory note to section 629(16):

> "[I]t can hardly be supposed that Congress designed, not only to open the doors of the *circuit courts* to these parties without reference to the ordinary conditions of citizenship and amount in dispute, but, in their behalf, to convert the *district courts* into courts of general common law and equity jurisdiction. It seems to be a reasonable construction, therefore, that instead of proposing an incidental but complete revolution in the character and function of the *district courts,* as a measure of relief to parties who are elsewhere denied certain rights, Congress intended only to give a remedy in direct redress of that deprivation, and to allow that remedy to be sought in the courts of the United States."

Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 634 (1979) (Powell, J., concurring) (quoting 1 DRAFT, *supra* note 41, at 361) (emphasis added by Justice Powell).

The revisers' comments were directed toward the reference in section 3 of the 1866 Civil Rights Act to actions "affecting persons" who had been denied particular rights. The revisers believed that Congress probably intended to grant jurisdiction over actions brought by persons "deprived" of those rights rather than by persons merely "affected" by such a deprivation. The revision therefore limited the jurisdiction of both district and circuit courts to suits for direct redress of those rights. It is true, as Justice Powell notes, that these remarks show a concern lest federal jurisdiction be too broadly expanded. The revisers' remarks, however, hardly justify the conclusion that they equated the jurisdiction of the district and circuit courts. Indeed, by emphasizing that it would be particularly anomalous to convert the district courts into courts of general jurisdiction, the remarks instead suggest that the revisers understood that the circuit and district courts had jurisdiction over different sorts of matters.

It is true that, before the revision, the circuit and district courts had concurrent jurisdiction in civil rights cases. The question here, however, is whether the revision could reasonably be understood to have granted different jurisdictional powers to the two court systems.

and 629(26) may differ in their reach, sections 5510 and 1979 should also be interpreted in accordance with their terms.

It is perhaps inviting to conclude, with the benefit of hindsight, that section 563(12) should be limited because when the circuit courts were abolished in 1911, the district courts' powers were redefined in terms of prior section 629(16). This subsequent change might suggest that the two provisions were meant to be identical from the outset. It is important to remember, however, that the definition of protected rights in section 563(12) was not an aberration. Sections 1979 and 5510 contained the same broad reference to "laws." More importantly, section 5508, the criminal conspiracy provision, contained the identical description of protected rights both before and after the revision. Even if it were possible to explain the language of sections 1979 and 5510 as a shorthand reference for the rights protected by contemporary section 629(16), the likelier analogy to the broad language of section 5508, which cannot be so explained, makes that possibility remote. There appears to be no sufficient reason to reject the most obvious interpretation: that the three provisions were intended to cover state violation of "laws" generally, and that the Revised Statutes did not contain a critical inadvertent error that was repeated not once, but three times. In short, it is a more natural conclusion that all three provisions covered deprivations of all statutory rights.

The second basis for the view that sections 563(12) and 1979 are limited in scope relies on Congress's intent that the revisers not change existing law. As noted, there were numerous statements on the floor to this effect.[47] Moreover, statutory revisions undertaken by a commission created to compile and organize existing law should not lightly be understood as making major changes. In enacting statutory revisions submitted by such commissions, Congress is entitled to rely on their good faith and should not be forced to read every provision with care.[48] Although the revisers of 1874 changed the law in several ways,[49] a revision of a statute, even if it appears to make a change in its text, should usually be interpreted conformably to preexisting law.[50]

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[47] *See supra* note 31 and accompanying text.

[48] *But see* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (Court will not scrutinize Congress's awareness of details of statute drafted by another body, but will presume Congress intended what it enacted).

[49] *See supra* note 32 and accompanying text.

[50] *See, e.g.*, Fulman v. United States, 434 U.S. 528, 538-39 (1978); Muniz v. Hoffman, 422 U.S. 454, 470-72 (1975); McDonald v. Hovey, 110 U.S. 619, 628-29 (1884) (suggesting

For two reasons, however, the Court was probably correct to reject this approach in the context of section 1983. First, the change in the relevant language was at once conspicuous and unambiguous. The language of section 1979 was altered so as to conform to the prior language of the statute governing criminal conspiracy.[51] The new language was read on the floor of the House during a speech in which it was mentioned that the revisers had made modifications.[52] In such circumstances, it is more plausible to interpret the change as having been intended, for the intention was "clearly expressed" in the language of the statute, and the language was read to Congress.[53]

Second, and perhaps more important, the revision of 1874 was in many respects unique. Unlike more recent revisions, conducted as part of a continuing process of making the laws coherent and accessible, it involved the consolidation and clarification of numerous conflicting and ambiguous provisions. Its purpose was to bring all of these provisions together in a single authoritative volume. In the process, a number of changes were made. If these changes —even when unambiguous—were not given full effect, but instead were parsed by reference to pre-codification law, the principal purpose of the revision would be frustrated. The revision would not be authoritative, but a mere guide to congressional purposes expressed elsewhere, and the previous inconsistencies would be perpetuated.

An interpretation of section 1979 that treats the phrase "and laws" literally is consistent, moreover, with the purposes of the relevant provisions. It is plain that Congress intended to create new enforcement mechanisms to redress state violations of federal law. The experience following the Civil War called for a dramatic expansion in the role of the national government, including the fed-

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adoption of original construction even when changes have been made, unless phraseology is substantially altered).

[51] *See supra* notes 26, 38, and accompanying text.

[52] 2 CONG. REC. 825-28 (1874) (remarks of Rep. Lawrence) (the "revision undoubtedly includes legislation, or rather I might say it has been impossible to avoid it," *id.* at 826; "the purposes of the various civil-rights statutes have been translated into the words of the compiler, and possibly may show verbal modifications bordering on legislation," *id.* at 827). I do not suggest that these statements are conclusive on the matter. They did, however, alert the House to the possibility that substantive changes were made in the revision.

[53] *See* United States v. Ryder, 110 U.S. 729, 740 (1884) (suggesting that a change must be inferred from a revision of laws if the legislative intention is "clearly expressed"); 1 C. BATES, *supra* note 32, § 630, at 474.

eral courts, in regulating the conduct of the states.[54] It is no doubt true that Congress was primarily concerned with providing a remedy for constitutional violations and unlawful invasions of rights protected by civil rights laws. But it is consistent with the historical evidence to understand the underlying purposes as more general than that, reaching all violations of federal law. This conclusion is supported by the fact that the predecessor to section 1983 made laws other than the civil rights laws enforceable against the states at the time of the revision.[55]

C. The Relevance of Subsequent Developments

To be sure, the 1874 Congress did not foresee the enormous explosion in federal legislation that has occurred in the twentieth century. In the late nineteenth century, there was not the sort of pervasive regulation that characterizes the federal statute books today, a fact that may help to explain why the revisers' broadening of what became section 1983 occasioned no real debate. A narrow interpretation of section 1983 might therefore be urged[56] on the dual grounds that the recent expansion was not anticipated and that a private remedy not provided in the substantive statute would disrupt express enforcement mechanisms, thus intruding on state prerogatives by requiring state officials to respond in federal court whenever an illegality has been alleged.[57] This consequence might seem particularly anomalous because it would subject state agencies to private suits seeking compliance with federal law even though federal agencies are immune from such suits.[58]

These objections, however, are unpersuasive. Even if the current regulatory climate makes the use of section 1983 disruptive or unnecessary, it would not be legitimate to ignore the enactment of a federal remedy for state violation of federal laws on the ground that the concerns that originally justified that remedy no longer

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[54] *See* City of Rome v. United States, 446 U.S. 156, 178-80 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976); Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Monroe v. Pape, 365 U.S. 167, 173-74 (1961).

[55] *See, e.g.*, REV. STAT. § 5539 (1874) (regulating treatment of those convicted of federal crimes and held as prisoners in state prisons); *id.* § 2164 (prohibiting unequal state taxes or charges upon immigrants); *id.* § 4237 (prohibiting discriminatory regulations concerning pilotage); *id.* §§ 1977-1978 (civil rights provisions; *see supra* note 35); *id.* § 5243 (regulation of state banks); *id.* § 1636 (requiring state officials to make returns to President); *id.* § 5278 (treatment of state fugitives).

[56] *See* Maine v. Thiboutot, 448 U.S. 1, 22-25 (1980) (Powell, J., dissenting).

[57] *See id.* at 22-23.

[58] *See id.* at 23-24.

apply. The proper remedy for statutory obsolescence of that sort is, at least ordinarily, amendment or repeal; changed circumstances in the form of a subsequent expansion in federal regulation cannot properly be used to override the original intentions of the enacting legislature.[59] And the proper inference to be drawn from disruption of express enforcement mechanisms is not that the "and laws" provision of section 1983 does not exist, but that it has been preempted by Congress under particular schemes.[60]

Moreover, it would hardly be odd for Congress to create a cause of action for state, but not federal, invasion of federal rights; state invasion of such rights was the primary impetus behind section 1983.[61] In addition, the APA is generally understood to create a cause of action in precisely those circumstances in which it is alleged that federal officials have violated federal law, quite apart from whether a private cause of action is created by the governing substantive statute.[62] Even if it were anomalous to have disparate remedies for violations by state and federal officials, then, a natural reading of section 1983 would not have any such anomalous ef-

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[59] This subsequent expansion might be thought to have as little weight in interpreting the prior statute as that of subsequent interpretive statements by the legislature. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979) (later committee report is not competent legislative history); International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977) ("The views of members of a later Congress . . . are entitled to little if any weight. It is the intent of the Congress that enacted [the provision] that controls."). I recognize, however, that difficult jurisprudential issues are raised by the problem of determining what effect should be given to unforeseen changed circumstances in interpreting legislation. *See* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37, col. 1. I do not mean to enter that debate here. Both the terms and the purposes of section 1983 suggest an intention to reach all federal statutory violations; the changed circumstances consist of a subsequent expansion in federal legislation. If that expansion calls for a limitation on the reach of the original statute, the conventional approach is that the remedy should come from Congress, not from a court readjusting the legislation to present circumstances. *But cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (advocating a judicial "second-look" at outdated legislation).

[60] *See infra* notes 96, 98-104, and accompanying text.

[61] *See generally* Monroe v. Pape, 365 U.S. 167, 171-87 (1961).

[62] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979) (recognizing that APA creates cause of action to review agency action); Glacier Park Found. v. Watt, 663 F.2d 882, 885 (9th Cir. 1981) (same); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 465-68 (1970). It has recently been argued that the APA does not create a cause of action to redress unlawful agency action, but merely incorporates the provisions of the relevant substantive statute on the question whether a private cause of action has been created. *See* Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41. This position may have merit as an assessment of the original intent of the APA drafters, but it is inconsistent with current law. If it were correct, courts would be "implying" private causes of action in almost every administrative law case—and without saying so.

fect. After *Thiboutot,* section 1983 and the APA provide remedies that are in many respects parallel, the first applying to the states, the second to the federal government.[63]

Although the historical record is far from unambiguous, the preferable interpretation of section 1983 is thus that "and laws" comprehends all laws, not merely particular kinds of laws.[64] To reach this conclusion is not, however, to say that an express enforcement mechanism in a governing substantive statute should never be taken as exclusive. For example, the section 1983 action could not survive as a means to enforce a statute that explicitly excludes that remedy.[65] The question of when statutes not having any such clear ban implicitly preempt the operation of section 1983 is more difficult. To resolve that issue, it will be useful to examine the Court's approach to private rights of action in the context in which they have heretofore been most pervasive, that of so-called "implied" remedies. In a number of respects, the Court's approach to such remedies affords valuable lessons about the role that private enforcement under section 1983 might play under regulatory schemes.

II. The Decline of the Implied Cause of Action and the Potential Role of Section 1983

The rise and apparent decline of implied causes of action in the federal courts should by now be a familiar story.[66] At common law, private persons injured by violation of state statutes were generally permitted to bring suit in state court to seek redress if they belonged to the class of persons the statute was designed to pro-

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[63] The remedies are not, of course, entirely parallel. The APA does not provide an action in damages, and section 1983 does not authorize the federal courts to review state agency action for arbitrariness. *Compare* 42 U.S.C. § 1983 (Supp. III 1979) *with* 5 U.S.C. § 702 (1976).

[64] One court of appeals has concluded that *Thiboutot* should be limited to "important" rights, such as welfare, and should not be read to allow a section 1983 remedy for all statutory violations. First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195, 197-99 (8th Cir. 1980), *cert. denied,* 450 U.S. 1042 (1981). This construction is not only contrary to the language and history of section 1983, but also is flatly inconsistent with *Thiboutot* itself. In that case, the Court read section 1983 to include violations of all laws, not merely laws protecting rights that a court deems "important." 448 U.S. 1, 6-8 (1980).

[65] *See, e.g.,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 n.5 (1976) (no private damage remedy under section 1983 for violation of public accommodations provisions of Civil Rights Act of 1964, because the 1964 Act explicitly made its injunctive remedy exclusive and legislative history demonstrated Congress's intent to exclude the section 1983 remedy).

[66] For a more detailed treatment, see Stewart & Sunstein, *Public Programs and Private Rights,* 95 Harv. L. Rev. 1193, 1300-07 (1982).

tect.[67] The federal courts, exercising the common law powers recognized in *Swift v. Tyson*,[68] used this rationale to create private rights of action for violations of federal laws.[69] They continued to exercise this authority even after *Erie Railroad v. Tompkins*[70] established that the federal courts have no general power to make law. In the celebrated *Borak*[71] decision in 1964, the Court strongly supported the practice of creating private remedies for federal rights, concluding that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[72] Following the lead of *Borak*, lower federal courts created private remedies under numerous regulatory statutes.[73] Slightly over a decade after *Borak*, in *Cort v. Ash*,[74] the Court reformulated existing law by adopting an open-ended four-factor test for determining whether private rights of action should be created. In that case, the Court concluded that the question should turn on whether the plaintiff was a special beneficiary of the statute, the legislative intent, the consistency of private remedies with the purposes of the statute, and the extent to which the right and remedy were traditionally dealt with by state law.[75] Particularly because it emphasized the consistency of private remedies with judicially conceived statutory purposes, this approach left room for, and perhaps encouraged, an independent judicial evaluation of whether an implied remedy would improve or impair the regulatory scheme.

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[67] *See* RESTATEMENT (SECOND) OF TORTS §§ 286-288 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 192-95 (4th ed. 1971).

[68] 41 U.S. (16 Pet.) 1, 18-19 (1842).

[69] *See, e.g.*, Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916) (railroad employee injured by violation of Safety Appliance Act has implicit right to sue because of common law doctrine).

[70] 304 U.S. 64, 78-80 (1938).

[71] J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

[72] *Id.* at 439.

[73] *See, e.g.*, Local 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1, 11-16 (1st Cir. 1978) (implied private right of action to enforce Urban Mass Transportation Act of 1964); Riggle v. California, 577 F.2d 579, 582-83 (9th Cir. 1978) (implied private right of action to enforce Rivers and Harbors Appropriation Act); Abrahamson v. Fleschner, 568 F.2d 862, 872-76 (6th Cir. 1977) (implied private right of action to enforce Investment Advisers Act of 1940), *cert. denied*, 436 U.S. 905, 913 (1978); New York Stock Exch., Inc. v. Bloom, 562 F.2d 736, 742 (D.C. Cir. 1977) (dictum) (implied private right of action to enforce Banking Act of 1933), *cert. denied*, 435 U.S. 942 (1978); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977) (implied private right of action to enforce Rehabilitation Act of 1973).

[74] 422 U.S. 66 (1975).

[75] *Id.* at 78.

In the last five years, however, the Supreme Court has sharply restricted the availability of private rights of action, effectively abandoning the approach of *Borak* and *Cort*.[76] The Court has instead adopted what amounts to a strong presumption against recognizing private rights of action: unless the language or history of the statute indicates an affirmative intent on the part of Congress to create such rights,[77] the courts will not recognize them. Because the question whether to create a private remedy arises only when Congress is silent, the consequence of this approach will be denial of private rights of action in numerous settings in which they would formerly have been recognized.[78]

Judicial authority and competence to create private rights of action have long been well-established; the state and federal courts have exercised such power for well over half a century. What accounts for the Court's retrenchment? For purposes of the present discussion,[79] a summary statement must suffice. First, the *Erie*[80] decision, and the Rules of Decision Act[81] on which it is based, deny the federal courts general lawmaking authority. Judicial creation of private enforcement rights has increasingly been regarded as a form of lawmaking,[82] and the additional remedy may conflict with the legislature's conception of the right it created. Such private

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[76] The Court occasionally still refers to the *Cort* factors. *See* California v. Sierra Club, 451 U.S. 287, 292-98 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981). The Court, however, has made clear its substantial reformulation of the *Cort* test, indicating that neither an independent judicial determination of the value of private remedies nor reliance on the common law's "statutory tort" approach is appropriate. *See infra* note 77 and accompanying text.

[77] *See* California v. Sierra Club, 451 U.S. 287, 297-98 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-72 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 14-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-70 (1979). The current trend appears to owe a great deal to Justice Powell's forceful (though in my view ultimately unpersuasive, see *infra* note 89) dissenting opinion in Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979).

[78] Even under the Court's current approach, however, Congress's silence does not absolutely bar the inference that a private remedy was intended. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) ("Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment."). When the statute expressly identifies the class of beneficiaries, and confers on them an unambiguous right to be free from injury, a right of action may be available. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

[79] For a more detailed treatment, see Stewart & Sunstein, *supra* note 66, at 1220-29, 1299-1307.

[80] Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

[81] 28 U.S.C. § 1652 (1976).

[82] *See* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting).

remedies may result, for example, in enforcement of a different kind and degree than Congress intended; the substantive and remedial provisions of a statute may represent a legislative compromise that would be undermined if courts were to create private remedies on their own.[83] Indeed, Congress may have been ambivalent about the statutory right and may have wanted it to be enforced only in selected settings—perhaps by an administrative agency subject to formal and informal political pressures, including budgetary constraints.[84]

Moreover, when such an agency has been established, judicially created private rights of action may frustrate statutory purposes by allowing litigants to bypass the administrative process entirely and permitting the nature and extent of enforcement to be dictated by the judiciary. Such circumvention of the administrative regulatory scheme may disrupt the agency's authority to make law and policy—authority that Congress often regards as a critical element in regulation.[85]

Finally, Congress itself has created private rights of action in a variety of circumstances, especially in recent years.[86] Judicial willingness to create such rights may encourage Congress to avoid these difficult questions and to delegate them to the courts. The familiar principle of clear statement in constitutional law counsels courts to avoid interpreting statutes in a way that raises serious

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[83] For an economic argument suggesting how this might be so, see Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

[84] *See* Transamerica Mortgage Advisors, Inc., v. Lewis, 444 U.S. 1, 19-24 (1979) (certain violations of Investment Advisers Act have civil liability consequences, but other violations are merely proscribed); Cannon v. University of Chicago, 441 U.S. 677, 747-49 (1979) (Powell, J., dissenting) (purpose of Title IX of Education Amendments of 1972 to eliminate sex discrimination is moderated by interest in academic freedom); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 380-85 (1978) (separate opinion of White, J.) (private action under Title VI of Civil Rights Act of 1964 would undo procedural preconditions for funding cutoffs; explicit private remedies in Titles III and IV show omission in Title VI was deliberate).

[85] *See, e.g.*, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 461-64 (1974) (private suits for injunctions against discontinuance of passenger rail service would undermine orderly administrative procedures prescribed by Amtrak Act); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997-1002 (D.C. Cir. 1973) (private suits under Federal Trade Commission Act would destroy Commission's discretion to set goals and priorities); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 83-90 (2d Cir. 1972) (private suits under Rivers and Harbors Act would disrupt Attorney General's discretion not to prosecute; *see infra* notes 142-45 and accompanying text).

[86] *See, e.g.*, 16 U.S.C. § 1540g (1976) (Endangered Species Act of 1973); 33 U.S.C. § 1365 (1976) (Federal Water Pollution Control Act) ("FWPCA"); 42 U.S.C. § 4911 (1976) (Noise Control Act of 1972); 42 U.S.C. § 6305 (1976 & Supp. III 1979) (Energy Policy and Conservation Act); 42 U.S.C. § 7604 (Supp. III 1979) (Clean Air Act).

constitutional questions.[87] Although an affirmative grant of power to create private remedies would not be flatly unconstitutional, courts might, following a clear statement version of the doctrine against delegation of legislative authority,[88] decline to recognize private rights of action unless there is clear evidence that Congress wanted them to do so.

Although substantial arguments can be made against the Supreme Court's restrictive approach to implied rights of action,[89] the Court's concern with the separation-of-powers aspects of such implied remedies is at least understandable. And because few statutes create private remedies explicitly, the Court's approach may mean that litigants will generally be unable to seek federal judicial relief when a state or a private party violates federal law.[90] Instead, they will have to rely on the more common statutory enforcement mechanism, an administrative agency, which may be preoccupied with other controversies, unable to afford an effective remedy to the individual claimant, or immune from judicial review. In these circumstances, the question whether a remedy is available under section 1983 assumes immense practical importance.

Recognition of a right of action under section 1983 avoids most of the problems associated with implied causes of action. Most fundamentally, the critical problem—that of judicial authority—disappears. *Erie* is not implicated, for if Congress itself has created the cause of action, it cannot be argued that judicial enforcement is illegitimate judicial lawmaking. At the same time, a section 1983 remedy cannot result in enforcement of a different nature from that desired by Congress, or disrupt a statutory compromise, or cause overenforcement of the law; by hypothesis, section 1983 authorizes the statute to be privately enforced. *Thiboutot* is in no sense inconsistent with the Court's curtailment of

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[87] *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 500-01, 504-07 (1979); Kent v. Dulles, 357 U.S. 116, 128-30 (1958). For discussion, see Friendly, *Felix Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30 (W. Mendelson ed. 1964), *reprinted in* H. FRIENDLY, BENCHMARKS 196 (1967).

[88] *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935).

[89] For an attempt to answer the separation-of-powers argument, see Stewart & Sunstein, *supra* note 66, at 1229-33, 1307-16.

[90] Whether the statutory tort approach may be followed under federal statutes in state courts remains an open question. To the extent that the implication of private remedies is regarded as an issue of congressional intent, the Court's restrictive approach may, under the supremacy clause, be controlling in state courts as well. If, however, state courts are free to use common law powers to create private remedies under federal statutes, the Court's approach is irrelevant.

implied causes of action, but instead confirms the elementary proposition that the courts must recognize and enforce rights of action that Congress has created.

The question therefore arises why it should be troublesome to interpret section 1983 as conferring a right of action allowing private parties to ensure state compliance with federal law. The implied right of action controversy is instructive on this question, for, apart from the issue of judicial authority, it presents reasons why private causes of action may disrupt and unsettle regulatory schemes. Even if section 1983 creates a private right of action to enforce federal rights against the states, those reasons may inform an interpretation of whether section 1983 should be found displaced by particular statutes. The pertinent considerations fall into four categories.[91]

1. *Statutory Integrity.* In designing some statutory programs, Congress carefully designs a particular regulatory enforcement scheme with an intention that it be exclusive. The scheme may represent a compromise that allows no room for a private remedy under section 1983.[92] The statutory right, sanction, and enforcement mechanism may have been considered together and adjusted to one another. In such circumstances, recognition of a cause of action under section 1983 could subvert the regulatory program, producing more enforcement than Congress wanted.

2. *Agency Specialization.* Private rights of action will often require courts to undertake determinations for which they lack the specialized factfinding and policymaking competence of the relevant agency. Forensic techniques are often ill-suited to resolving the sorts of factual issues involved in regulation. Moreover, Congress may have believed that the task of making law and policy, in the form of elaboration of statutory standards, would be best performed by an agency specializing in the subject at hand.[93] Environ-

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[91] Professor Richard Stewart and I have examined some of these factors in the context of implied remedies. *See* Stewart & Sunstein, *supra* note 66, at 1208-10, 1290-1307.

[92] *See* Clark v. Gulf Oil Corp., 570 F.2d 1138, 1144-53 (3d Cir. 1977) (making such an argument against private actions for violation of the Natural Gas Act), *cert. denied*, 436 U.S. 970 (1978); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-97 (D.C. Cir. 1973) (making such an argument in the context of the Federal Trade Commission Act).

[93] *See* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 102 S. Ct. 720, 724, 727 (1982) (NLRB is entrusted by Congress with task of defining when employers are entitled to withdraw from multi-employer bargaining unit); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251-52 (1951) (Federal Power Commission, not the courts, is empowered to develop standards of reasonableness of electric rates); J. FREEDMAN, CRISIS AND LEGITIMACY 44-46 (1978); Stewart, *The Reformation of American Administrative Law,*

mental statutes are an obvious illustration. Courts are not well-equipped to determine when particular substances pose an unreasonable risk to life or health. A private right of action under section 1983, enabling a litigant to circumvent the agency's judgment of "reasonableness" and to obtain a de novo judicial resolution of that issue, could frustrate a major purpose underlying the original creation of the agency.

3. *Agency Centralization and Autonomy.* Decentralized courts are often unable to produce consistency and coordination in the enforcement process. Courts may reach different results under the same statute, making it difficult to assure uniformity and like treatment of the similarly situated. The resulting uncertainty may produce overdeterrence of socially useful activity and impede planning on the part of members of the regulated class. Moreover, courts must decide whatever issues private parties happen to present;[94] the operation of private incentives to litigate may result in ad hoc enforcement, and in areas about which Congress was least concerned. The result could be to sap the strength of the regulatory scheme by diverting it into unintended areas. The courts may, for example, invalidate practices that the federal agency decided to permit, or impose sanctions that are different from those preferred by the agency.

Some of these problems might be alleviated by more precise drafting of the governing substantive statute, but Congress sometimes chooses to create administrative agencies precisely in order to delegate the task of drawing fine details to those with experience in the matter at hand and to ensure its own continuing participation in policymaking in unforeseen areas of the statute's application. Because agencies are centralized and autonomous, they do not to the same degree suffer from the courts' defects in attempting to ensure consistency and coordination: agencies choose their own agenda and speak authoritatively on the issues they decide to address. Private rights of action, permitting circumvention of agency enforcement efforts, could in these circumstances prove disruptive to the intended operation of the regulatory scheme.

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88 HARV. L. REV. 1667, 1677-78 (1975).

[94] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 463-64 (1977) (private suits under Amtrak Act seeking injunctions against discontinuance of passenger rail service would impede agency's duty to prune the least necessary lines). *See also* Climan, *Civil Liability under the Credit-Regulation Provisions of the Securities Exchange Act of 1934*, 63 CORNELL L. REV. 206 (1978) (discussing lack of coherence in judicially created private remedies).

4. *Agency Accountability.* Courts are relatively immune from political pressures. As a consequence, they may enforce a statute in a different degree or manner from that intended by the legislature. Congress or the President may use the appropriations process or other forms of supervision to ensure that the agency does not overenforce a statute, or to indicate that certain kinds of apparent illegalities, and not others, are the intended object of the statutory standard. By contrast, the courts may, for example, literally interpret a statute to reach conduct that Congress did not want to cover, enforcing it against private actors whom Congress intended to immunize from federal supervision. Use of section 1983 to redress statutory violations may in this way diminish political control over the content of regulatory programs.

These factors suggest that judicial enforcement of statutory directives through section 1983 may severely disrupt a regulatory enforcement mechanism. For this reason, it will sometimes be proper to conclude that Congress intended to preempt private enforcement and to rely exclusively on the administrative enforcement scheme. The more difficult task is to determine, in the absence of a clear statement by Congress, what those circumstances are. As part III suggests, the outcome of that determination is closely associated with the considerations identified above.

III. Implicit Preemption of Section 1983

The question whether an explicit statutory enforcement mechanism preempts a section 1983 action must, of course, be treated as one of congressional intent. What makes the problem difficult is the fact that in almost all cases there will be virtually no evidence of such intent. It has only been in unusual circumstances that Congress has explicitly precluded private remedies in designing a regulatory scheme.[95] 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 federal statutory violations. Ignorance of that sort is not, however, usually considered in determining whether a statute's express remedies preempt previous enactments; it is instead assumed that the legislature knew what its previous enactments meant, and that

[95] *See supra* note 65.

it passed subsequent statutes against the background of which those enactments are a portion.[96] This part begins by examining whether this general principle holds in the section 1983 context, and concludes that it does.

Because of the absence of actual congressional intent in cases in which it is alleged that the creation of an express enforcement mechanism should be understood to supplant the section 1983 remedy, the preemption issue must be resolved on some other basis. As in so many other areas of the law, courts might derive or construct legislative "intent" on the basis of a relatively independent, and to some extent artificial, determination of what result Congress would have reached if it had considered the point in light of the policies and principles of the regulatory scheme.

Such an inquiry should not, however, depend on a wholly ad hoc examination of particular statutory schemes, but should instead be guided by an understanding of what sorts of regulatory schemes are likely to be inconsistent with preservation of the section 1983 remedy. Under this approach, the task is one of developing workable standards for categorizing the cases, to aid identification of those contexts in which a private right of action should be regarded as preserved. The second section of this part offers such a categorization.

Inquiries of this sort carry with them a familiar risk of what, in a scheme of separated powers, is often regarded as a usurpation: a judicial assessment of "policies and principles" that diverges from that of the legislature.[97] If this concern is taken seriously, it might be thought preferable to adopt a per se rule for or against preemption of the section 1983 remedy. The final section of this part examines the desirability of adopting either of these strong presumptions. It concludes that neither is appropriate because each sacrifices accuracy in reconstructing legislative intent for ease of application.

A. Section 1983 and Doctrines Against Repeals by Implication

If it could be shown that Congress only recently became aware of the existence of the section 1983 remedy for state violations of

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[96] *See infra* notes 98-99 and accompanying text.

[97] For general discussion of the nature of that risk, see R. UNGER, KNOWLEDGE AND POLITICS 83-100 (1975); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973). For discussion of the value-laden character of the process of interpretation, see Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

federal laws, it might be thought proper to indulge a general presumption that the creation of an explicit enforcement mechanism preempts the section 1983 remedy. Such a rule might accord with the intentions of the Congress that enacted the enforcement scheme at issue, because by hypothesis that Congress did not contemplate enforcement of the statute through a private cause of action. By contrast, an approach that would allow preservation of the section 1983 remedy might appear to run afoul of legislative purposes by allowing private enforcement of regulatory provisions that Congress thought would be enforced only publicly.

In similar areas, however, courts have disfavored repeals of prior statutes by implication.[98] The results in these cases are usually explained on the ground that legislatures are, or should be presumed to be, aware of previous enactments, and that a clear statement of repeal would be expected if a legislature intended to extinguish the prior remedy.[99] By now it is a commonplace that interpretive principles of that sort often amount to uninformative platitudes, providing little service in resolving particular cases and usually countermanded by other principles leading to precisely opposite results.[100] There are, however, good reasons for the doctrine against implied repeals.[101] A fairly powerful showing of contrary

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[98] *See, e.g.,* TVA v. Hill, 437 U.S. 153, 189-93 (1978); Wood v. United States, 41 U.S. (16 Pet.) 342, 362-63 (1842).

[99] *See, e.g.,* TVA v. Hill, 437 U.S. 153, 189-93 (1978); Wood v. United States, 41 U.S. (16 Pet.) 342, 362-63 (1842).

[100] The classic statement is Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395 (1950). It is unfortunate that Professor Llewellyn's insights are sometimes taken to support the more radical view that no rebuttable principle of statutory interpretation can be useful, and that judicial decisions must instead either proceed on a wholly ad hoc basis or be constrained by inflexible rules producing results counter to legislative intent.

[101] It is important to have a presumption of some sort; in the absence of any rule, decision of particular cases would depend on an unconstrained, ad hoc determination of the compatibility of the old and new statutes. A presumption against repeals by implication is preferable to one favoring them for two reasons. First, to favor implied repeals would force the legislature explicitly to preserve preexisting rights and duties in every case. Such a rule would ignore the practical realities of the legislative process by requiring the legislature to have broad and detailed knowledge of the United States Code at every moment lest a new enactment inadvertently abolish previous rights and duties. Second, a presumption of repeal would force litigants to prove in particular cases a congressional desire to preserve existing rights—an almost impossible task. By contrast, the usual presumption against implied repeals leaves room for proof of manifest inconsistency between the new and old enactments—a well-defined inquiry that has proved workable, if difficult, in other areas.

Equally important, statutes enacted by the legislature must be enforced unless a subsequent legislature has in some sense decided that they should not be. When the intent of the subsequent legislature is ambiguous, there is no sufficient basis for the courts to declare the

legislative intent might therefore be required to support the conclusion that the section 1983 remedy has been extinguished by the creation of a particular regulatory scheme.

This conclusion is analogous to that reached in the quite similar area of preemption of common law rights by regulatory systems. The ordinary rule is that, in the absence of compelling evidence, the creation of a regulatory scheme will not be held to preempt common law remedies.[102] Such evidence is limited to explicit statutory history or language on the matter or a showing of manifest inconsistency between the statutory scheme and the preservation of common law rights.[103] The reasons underlying this rule are similar to those underlying the presumption against implied repeals of statutory provisions.[104]

The questions of preemption of common law and section 1983 remedies are closely analogous. In both contexts, the creation of a public regulatory scheme is claimed to have abolished the preexisting private remedy. In both contexts, there is no explicit evidence that the legislature intended to supplant the preexisting remedy. And in both contexts, it is possible to respond that the legislature should be presumed to have been aware of prior remedies, which represent the law and will not be held extinguished absent a persuasive showing of legislative intent.

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prior enactment to have been supplanted. *Cf.* Techt v. Hughes, 229 N.Y. 222, 243, 128 N.E. 185, 192 (Cardozo, J.) (courts should be reluctant to hold treaty terms suspended by later war between the signatories, because when the political branches have not expressed their will, the courts' proper role is "humbler and more cautious"), *cert. denied*, 254 U.S. 643 (1920). (I put to one side problems of determining the "meta-intent" of the legislature that originally enacted the statute, or of deciding what role any such "meta-intent" should play. For discussion of related problems in the context of constitutional interpretation, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *supra* note 97.)

[102] *See, e.g.*, Luedtke v. County of Milwaukee, 371 F. Supp. 1040, 1043-44 (E.D. Wis. 1974), *aff'd in relevant part*, 521 F.2d 387, 390-91 (7th Cir. 1975); Ohio River Sand Co. v. Commonwealth, 467 S.W.2d 347, 349 (Ky. 1971); Marshall v. Consumers Power Co., 65 Mich. App. 237, 244-64, 237 N.W.2d 266, 273-82 (1975); State v. Dairyland Power Coop., 152 Wis. 2d 45, 51-53, 187 N.W.2d 878, 881-82 (1971).

This rule is not always followed in the context of preemption of federal common law, *see* City of Milwaukee v. Illinois, 451 U.S. 304, 312-17 (1981), but any difference in treatment might be attributed to the fact that federal common law sometimes has a weaker claim of legitimacy than do state common law and statutory provisions such as section 1983, *see id.;* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938). See D. CURRIE, FEDERAL COURTS 869-904 (2d ed. 1975), for a general discussion of federal common law.

[103] *See* cases cited *supra* note 102.

[104] *See, e.g.*, State v. Dairyland Power Coop., 52 Wis. 2d 45, 52-53, 187 N.W.2d 878, 881-82 (1971).

There are, however, several possible distinctions between the two contexts. First, state common law remedies are sometimes preserved on grounds of federalism: a federal statute should not lightly be interpreted to extinguish state common law remedies because of their importance to a state's self-governance and ability to protect its own citizens from injury.[105] There is no reason to accord similar deference to section 1983. Indeed, considerations of federalism might be thought to counsel against recognition of the federal cause of action—at least to the extent that recognition of a remedy for state violation of federal laws is thought to intrude unjustifiably on state prerogatives. The courts do not, however, treat the absence of federalism concerns as a reason to abandon the rule that regulatory schemes do not extinguish common law remedies, for they apply that rule even when the regulatory scheme is state rather than federal.[106] Because the courts' approach to the two categories of preemption cases is the same, the federalism ground is not a sufficient reason to treat preemption of section 1983 differently from that of common law remedies.[107]

A second distinction might claim that at least certain common law rights are "liberty" or "property" under the due process clause.[108] Under this view, a legislature may not abolish such rights

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[105] *See* Schwartz v. Texas, 344 U.S. 199, 202-03 (1952); Marshall v. Consumers Power Co., 65 Mich. App. 237, 244-47, 259-64, 237 N.W.2d 266, 273-75, 280-82 (1975).

[106] *See, e.g.*, Ohio River Sand Co. v. Commonwealth, 467 S.W.2d 347, 349 (Ky. 1971) (Kentucky pollution statute does not preempt common law remedy for nuisance); State v. Dairyland Power Coop., 52 Wis. 2d 45, 49-53, 187 N.W.2d 878, 880-82 (1971) (Wisconsin pollution statute does not preempt previous statutory nuisance remedy).

[107] A less plausible distinction might suggest that common law remedies "preexist" the creation of regulatory enforcement schemes in a way that statutory causes of action under section 1983 do not. The common law right contains both right and remedy; the regulatory scheme that is alleged to preempt it is in no sense necessary to its existence. Section 1983, by contrast, is solely remedial, depending for its content on the presence of a regulatory scheme with a substantive legal standard. It might therefore be concluded that a lesser showing would suffice to extinguish the section 1983 remedy, because it was merely an expectancy until the right was created. But this distinction also has limited force. Because section 1983 states in broad and general terms that there will be a privately enforceable federal judicial remedy for violation of federal law, a finding of preemption would actually remove a remedy, not merely fail to grant one. In other words, the fact that section 1983 is solely a remedial statute does not make it materially different from common law remedies for purposes of the preemption inquiry.

[108] *See, e.g.*, White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 275 n.16, 177 N.W.2d 473, 478 n.16 (1970) (questioning whether state could constitutionally eliminate a remedy for damage to property caused by pollution, a common law nuisance); Urie v. Franconia Paper Corp., 107 N.H. 131, 134, 218 A.2d 360, 362 (1966) (same). The principle that common law rights are liberty or property interests within the meaning of the due process clause has a long pedigree. *See* PruneYard Shopping Center v. Robins, 447 U.S.

without a clear showing of necessity or a provision for a reasonable alternative remedy.[109] The inclusion of some common law rights within the due process clause might lead to the conclusion, by an application of the clear statement doctrine,[110] that a statutory enforcement scheme should not be understood to extinguish common law remedies unless it does so expressly. Some courts have adopted precisely this reasoning.[111] A cause of action for statutory violations may seem less likely to be constitutionally compelled, making the clear statement rationale appear absent in the section 1983 context. If it is the clear statement rationale that justifies failure to find preemption of common law rights, there may be no similar barrier to preemption of section 1983.

For three reasons, however, the distinction is a thin one. First, the clear statement rationale is used only sporadically and is not a major reason for the presumption against preemption of common law rights. Second, the proposition that common law rights are liberty or property interests is at least questionable. There is authority to the contrary with respect to at least some common law rights.[112] Third, if there are due process constraints on a legislature's ability to invade common law interests without furnishing some form of remedy, it is not at all clear why there are not similar

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74, 91-95 (1980) (Marshall, J., concurring) ("core" common law rights, such as right to be free of trespass, cannot be abridged without due process, but state law allowing pamphleteers access to shopping center does not reach this core); Ingraham v. Wright, 430 U.S. 651, 672-78 (1977) (recognizing bodily integrity as a liberty interest in part because of its status at common law); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"). *But see* Paul v. Davis, 424 U.S. 693, 710-12 (1976) (although some state-protected rights are liberty or property within the meaning of the due process clause, common law interest in reputation is not such a right).

[109] For discussion, see PruneYard Shopping Center v. Robins, 447 U.S. 74, 91-95 (1980) (Marshall, J., concurring) (state may alter the protection of its common law to a degree, but "core" interests are protected by the due process clause); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 87-93 (1978) (statute limiting liability for nuclear accident satisfies due process because it creates a reasonable substitute for common law tort remedy; Court need not reach issue whether due process would be violated if no such alternative were created); New York Cent. R.R. v. White, 243 U.S. 188, 195-208 (1917) (because workmen's compensation statute altering common law of tort provided a reasonable alternative remedy, Court need not reach issue whether state could constitutionally abrogate common law rule altogether); Stewart & Sunstein, *supra* note 66, at 1250-52, 1307-11.

[110] *See supra* note 87 and accompanying text.

[111] *See, e.g.*, Urie v. Franconia Paper Corp., 107 N.H. 131, 134, 218 A.2d 360, 362 (1966).

[112] *See* Paul v. Davis, 424 U.S. 693, 699-712 (1976) (holding reputation, a core common law interest, not to be constitutionally protected liberty or property). For criticism of this view, see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

constraints on the legislature's ability to foreclose remedies for invasions of statutory rights as well. This is particularly true after the Supreme Court's statutory entitlement decisions, which unambiguously hold that the due process clause imposes barriers to legislative imposition of procedural qualifications on substantive statutory rights.[113] In some circumstances, then, some sort of remedy may be constitutionally required for statutory violations as well.[114]

A third and perhaps most plausible possible distinction is that, because section 1983 has been used to remedy statutory violations only recently, courts should not in this context indulge the usual assumption that the legislature was aware of its previous enactments. Here, at least, courts might abandon that presumption and instead inspect historical circumstances to determine whether there was in fact any such awareness. A particularized inquiry of this sort would be difficult to undertake, but it might be simplified by a presumption that a statutory enforcement scheme is exclusive unless it was created after it had been established that section 1983 provided a remedy for statutory violations.[115] Where that time would be fixed—after *Thiboutot* or some time before—would be a detail.

A preliminary difficulty with this distinction is that it is not a distinction at all. In the context of common law remedies, courts do not inspect the regulatory statute or its history to see whether the legislature was in fact aware of those remedies, but instead presume awareness even if that presumption is contrary to fact. But this response may be too quick. Legislatures may generally be aware of the existence of common law remedies; at least they are more likely to be aware of them than a pre-*Thiboutot* Congress was likely to know of the existence of a statutory remedy under section 1983. The usual presumption of legislative awareness of previous enactments might, in other words, be relaxed in cases in which there is good reason to believe that the presumption is false.

In the context of section 1983, however, this approach would

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[113] *See* Vitek v. Jones, 445 U.S. 480, 488-94 (1980) (state statute creating expectation that prisoners would be transferred to mental hospitals only if adequate treatment in prison was impossible created a liberty interest that could not be abridged without a hearing); Goldberg v. Kelly, 397 U.S. 254, 260-66 (1970) (welfare benefits cannot be terminated without a hearing).

[114] The Supreme Court so held in Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1154-55 (1982); *see generally* Stewart & Sunstein, *supra* note 66, at 1307-16.

[115] The breadth of section 1983 was occasionally recognized before the 1960's, but the principle was not well-established until the 1970's. *See supra* note 17.

be unacceptable. The legislative intent that is relevant for purposes of the section 1983 inquiry is not only that of the Congress that enacted the governing substantive statute, but—when that Congress has not spoken—the intent of the Congress that enacted section 1983 as well. The 1874 Congress accorded to private persons a federal judicial remedy against state officials who have violated federal law. That intent, embodied as it is in law, must be respected unless a subsequent Congress has at least in some sense faced the issue and decided otherwise. This conclusion supplements the claim that Congress should be charged with knowledge of previous laws with the additional observation that such laws must be given effect until they are amended or repealed.

Moreover, a case-by-case inquiry into whether Congress was in fact aware of the existence and meaning of its previous enactments would be extraordinarily difficult or perhaps impossible to undertake. In the ordinary case, in which the legislative history is silent, there are no standards for making that determination. Apart from the difficulty of the task, conventional principles of deference to the sovereign lawmaking body caution against requiring courts to determine whether that body was aware of what its previous enactments meant. Finally, a general rule that Congress will be presumed aware of previous enactments may (though the point should not be exaggerated) have the salutary effect of encouraging Congress to ensure that its laws are internally coherent. Despite the mistakes that such an approach might occasionally introduce, all of these considerations indicate that it is preferable for the courts to disfavor repeal of section 1983 by implication, regardless of whether there was actual awareness of the existence or nature of that remedy. The reasons for the usual preservation of common law remedies after the enactment of regulatory schemes thus apply in the section 1983 context as well.

B. A Categorization

Presumptions of this sort do not, of course, resolve hard cases. As suggested above, it would not do to conclude that the section 1983 remedy should always be preserved in the absence of an express legislative statement to the contrary in the language or history of the statute. Such a rule would allow for disruption and circumvention of regulatory schemes in contexts in which it is reasonable to conclude that those consequences were not desired. But the fact that the presumption against preemption of common law remedies can be rebutted by a showing of necessary inconsis-

tency with the newly-created enforcement scheme[116] suggests a possible resolution of the question of when a section 1983 remedy should be found preempted by such a scheme. Inconsistency of that sort may be apparent in a variety of contexts. For example, some statutes create comprehensive enforcement schemes, complete with their own private causes of action that are subject to special requirements. It would be implausible to suggest that Congress always intended to allow a litigant to invoke section 1983 to enforce such statutes. Nor are cases involving express private causes of action necessarily the only ones in which it is reasonable to conclude that Congress intended to supplant the section 1983 remedy.

An effort is made below at 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.[117] Some of the factors to be discussed are in themselves sufficient to justify a conclusion that the private remedy has been extinguished; others are sufficient if supported by legislative history; and still others are simply entitled to consideration in conjunction with other factors. The foregoing discussion of the circumstances in which private remedies interfere with an enforcement scheme[118] forms the basis for identifying the contexts in

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[116] *See supra* note 103 and accompanying text.

[117] I make no effort to conclude whether the section 1983 remedy is available to enforce particular statutes. That conclusion will depend on an examination of the structure and history of each statute. The goal here is instead to provide a general approach within which the more particularized inquiry can be undertaken.

For purposes of the present discussion, I assume that the federal law at issue in fact creates a right, privilege, or immunity within the meaning of section 1983, and that it is not merely hortatory. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (interpreting the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act to be hortatory); Perry v. Housing Auth., 664 F.2d 1210, 1217-18 (4th Cir. 1981) (denying section 1983 remedy under various housing statutes on the ground that relevant provisions are hortatory); Dopico v. Goldschmidt, 518 F. Supp. 1161, 1177-78 (S.D.N.Y. 1981) (denying section 1983 remedy under Urban Mass Transportation Act and Federal-Aid Highway Act on similar ground). *Cf.* 16 U.S.C. §§ 757a-757g (Supp. IV 1980) (Anadromous Fish Conservation Act) (imposing duties on state apparently without creating rights in individuals).

[118] *See supra* notes 92-94 and accompanying text. In part because of those factors, the question of the continued availability of the section 1983 remedy might profitably be explored as a problem of the unworkability of the common law concept of individual entitlement in the modern public law context. *Cf.* J. VINING, LEGAL IDENTITY (1978) (discussing relationship between common law concept of individual entitlement and standing to secure judicial review of administrative action). *See also* Stewart & Sunstein, *supra* note 66, at

which the section 1983 remedy and a particular regulatory scheme might be found incompatible. These contexts are discussed in declining order of significance.[119]

1. *Statutes That Create Independent Private Causes of Action Against State Officials.* As suggested above, a private remedy under section 1983 should usually be denied when Congress has created an express private cause of action against state officials in the governing substantive statute. If the private cause of action in that statute is substantially identical to the section 1983 remedy, the section 1983 remedy should be presumed to have been supplanted; if a different presumption were indulged, the statutory remedy would be redundant. If, on the other hand, the two are materially different, the statutory remedy should also be presumed to be exclusive. Use of the section 1983 remedy would effectively nullify the conditions imposed on the later remedy.

The first several cases to pose the issue since *Thiboutot* have relied on this reasoning. In *Sea Clammers,*[120] the plaintiffs, alleging that discharges and ocean dumping of sewage had unlawfully damaged fishing grounds, claimed a private right of action under the Federal Water Pollution Control Act ("FWPCA"),[121] the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"),[122] federal common law, and on other grounds.[123] Although none of the parties had invoked section 1983, the Court raised and disposed of it in a single paragraph. The existence of a comprehensive remedial scheme, the Court said, may demonstrate a congressional intent to preclude a cause of action under section 1983. Because the statutes did "provide quite comprehensive en-

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1271-75, 1307-16 (discussion of judicial review of agency inaction and implied rights of action); Stewart, Book Review, 88 YALE L.J. 1559 (1979) (review of LEGAL IDENTITY).

[119] Whether exhaustion of state or federal administrative remedies should be required in section 1983 actions is a question beyond the scope of this article. The current majority view is that exhaustion is never required in section 1983 cases, *see* United States *ex. rel.* Ricketts v. Lightcap, 567 F.2d 1226 (3d Cir. 1977), though the issue is pending before the Supreme Court, *see* Patsy v. Board of Regents, 102 S. Ct. 88 (1981) (granting certiorari). An exhaustion requirement might seem especially useful in section 1983 cases involving federal regulatory schemes, for the issues might, at least in the first instance, best be decided by the relevant agency. The considerations that support exhaustion in the regulatory context, however, tend to support as well the more general proposition that the administrative remedies are exclusive.

[120] Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615 (1981).

[121] 33 U.S.C. § 1365 (1976) (citizen-suit provision).

[122] 33 U.S.C. § 1415(g) (1976) (citizen-suit provision).

[123] *See* 101 S. Ct. at 2619 n.6.

forcement mechanisms," the Court doubted "that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies including the two citizen-suit provisions."[124] The Court so concluded even though broad savings clauses appeared to compel a contrary conclusion.[125]

Lower courts have used similar reasoning in finding the section 1983 action preempted by express private causes of action in the substantive statute at issue.[126] They have also found that implied causes of action preempt section 1983[127]—an equally persuasive result if the implication of the private right of action is justified.

2. *Statutes Involving Open-Ended Substantive Standards.* If the statutory standard is open-ended, there will be special reason to conclude that a section 1983 remedy has been preempted. For example, some statutes furnish a vague or ambiguous "reasonableness" standard for lawful conduct.[128] In such cases, the agency, and not the court, has the primary responsibility to determine the statute's proper reach.[129] As noted earlier, there are two reasons

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[124] *Id.* at 2626.

[125] *See* 33 U.S.C. § 1365(e) (1976) (FWPCA) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."). *See also* 33 U.S.C. § 1415(g)(5) (1976) (similar savings clause in MPRSA). The legislative histories show that both provisions were deliberately broad. *See* S. REP. No. 414, 92d Cong., 1st Sess. 81 (1971) ("it should be noted, however, that the [FWPCA savings clause] would specifically preserve any rights or remedies under any other law"); H.R. REP. No. 911, 92d Cong., 2d Sess. 134 (1972) (same); S. REP. No. 451, 92d Cong., 1st Sess. 24 (1971) (MPRSA does not eliminate "any other right to legal action which is afforded the potential litigant in any other statute or the common law"); H.R. REP. No. 361, 92d Cong., 1st Sess. 23 (1971) (same). *Sea Clammers* may therefore have been wrongly decided. The case is, however, pertinent for purposes of the present discussion insofar as it shows the Court's awareness of the relevance of express private rights of action to the section 1983 question.

[126] *See, e.g.*, Anderson v. Thompson, 658 F.2d 1205, 1214-17 (7th Cir. 1981) (denying a section 1983 remedy because of express remedy under the Education for All Handicapped Children Act; section 1983 remedy would evade limited nature of express private remedy).

[127] *See, e.g.*, Garrity v. Gallen, 522 F. Supp. 171, 203-05 (D.N.H. 1981), discussed *infra* notes 149, 154.

[128] *See, e.g.*, 7 U.S.C. § 136d(b) (1976 & Supp. IV 1980) (Federal Insecticide, Fungicide, and Rodenticide Act) (conduct that "generally causes unreasonable adverse effects on the environment" is unlawful); 15 U.S.C. § 1261 (1976 & Supp. IV 1980) (Federal Hazardous Substances Act) (defining some terms relating to hazardous substances but delegating definition of others to Federal Trade Commission); 15 U.S.C. § 2058(c)(2)(A) (1976) (Consumer Product Safety Act) (agency can take action "reasonably necessary to eliminate or reduce an unreasonable risk of injury"); 16 U.S.C. § 825(a) (1976) (Federal Power Act) (utilities shall make, keep, and preserve accounts and records "necessary or appropriate").

[129] *See* Local 1325, Retail Clerks Int'l Ass'n v. NLRB, 414 F.2d 1194, 1199-1200 (D.C.

why it is usually reasonable to conclude that Congress intended this result. First, the agency may have specialized in the area at hand and thus have particular competence in assessing and weighing the relevant facts and policies.[130] Such specialization, of course, has been one reason for the creation of administrative agencies to supplant courts as institutions for deciding regulatory issues.[131] Second, the agency may be subject to formal and informal political pressures. Such pressures allow politically accountable bodies to influence the agency's implementation of a vague or ambiguous standard.[132]

When the governing substantive standards are vague or ambiguous, recognition of a private cause of action under section 1983 could seriously distort the regulatory system. Courts considering the issue in the first instance may make improper judgments as to the reach of the statutory standard. Judicial review of agency action poses little danger of that sort, for courts must defer to nonarbitrary agency constructions of vague statutory provisions.[133] Even if the court's decision in a section 1983 case is reasonable, the existence of a private cause of action could result in development of two different systems of law under a single statute. The problem could be alleviated by using the doctrine of primary jurisdiction[134] to refer the problem to the agency, but that is a solution whose benefits are usually outweighed by its costs.[135] Similar considera-

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Cir. 1969) (vagueness of statutory standard indicates that Congress intended to give NLRB responsibility to define what collective bargaining units are "appropriate").

[130] Such specialization is a partial reason for the conventional limitations on the scope of judicial review of discretionary agency judgments. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-91 (1951) (reviewing court will set aside NLRB rulings only for insubstantiality of evidence, leaving agency free to exercise its expertise and to choose between equally supportable positions).

[131] See generally Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817 (1977); Stewart, *supra* note 93.

[132] *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 472 (2d ed. 1977); Stewart & Sunstein, *supra* note 66, at 1290-91.

[133] *See* 5 U.S.C. § 706(2) (1976) ("Courts shall set aside agency rulings which are arbitrary, unlawful, beyond their jurisdiction, procedurally insufficient, or unwarranted by the facts.").

[134] *See, e.g.*, United States v. Western Pac. R.R., 352 U.S. 59, 62-70 (1956) (discussing use of primary jurisdiction to allocate issues concerning construction and application of tariff statute between Interstate Commerce Commission and courts); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 439-42 (1907) (ICC's determination of reasonableness of rate schedules binds courts). *See generally* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 992-1012 (1979); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121-51 (1965).

[135] The principal problem is that use of the primary jurisdiction doctrine forces the

tions make agency intervention in the private suit an unattractive solution to the problem.[136]

The fact that a statutory standard is vague or ambiguous will thus support an inference that judicial enforcement at the behest of private litigants was not intended. That inference is not, however, always warranted. In certain cases, usually not involving technical matters, Congress has believed that the courts were competent to determine the reach of an ambiguous statute.[137] To 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,[138] 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.

3. *Statutes That Demand Consistency and Coordination in Enforcement.* Sometimes administrative agencies are accorded enforcement responsibilities in order to promote consistency and coordination in the implementation process.[139] Congress often intends to assure that those who are similarly situated are treated similarly, or that a coherent system of enforcement priorities is formulated and executed by a single body. Regulatory enforcement is a prime example of a "polycentric problem":[140] implementation

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agency to devote its limited resources to problems it has adjudged insufficiently serious to require government intervention. The advantages of public and private enforcement—targeted intervention and public savings—are thus simultaneously lost. *See* Stewart & Sunstein, *supra* note 66, at 1292 n.407 (examining use of primary jurisdiction doctrine in context of implied remedies).

[136] *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999 (D.C. Cir. 1973).

[137] *See, e.g.*, 15 U.S.C. §§ 1-2 (1976) (Sherman Act).

[138] *See, e.g.*, Clark v. Gulf Oil Corp., 570 F.2d 1138, 1147-49 (3d Cir. 1977) (Federal Power Commission has specialized procedures and responsibility to enforce Natural Gas Act), *cert. denied*, 435 U.S. 970 (1978); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 998-99 (D.C. Cir. 1973) (Federal Trade Commission's experience and procedural capacity to resolve trade practice controversies support conclusion that private suits to enforce Federal Trade Commission Act are not allowed); Chesapeake Bay Found. v. Virginia State Water Control Bd., 501 F. Supp. 821, 829 (E.D. Va. 1980) (denying section 1983 remedy to enforce FWPCA in part because of technical nature of issues).

[139] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 463 (1977) (barrage of private lawsuits would undermine orderly discontinuance of rail lines by administrative agency); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 420-23 (1975) (SIPC is proper enforcer of Securities Investor Protection Act of 1970 because it monitors regulated class effectively without the danger of economic collapses and loss of confidence in capital markets that private suits might cause).

[140] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-405

with respect to one category of regulated class members will have a wide variety of consequences for other persons and entities. Enforcement in a particular case may, for example, make it impossible for the agency to redress other, more egregious violations, or may have adverse political consequences that undermine the agency's ability to enforce the law in any comprehensive way. In such circumstances, a decentralized judiciary, responding passively to privately initiated controversies, may deal only with the immediate facts. Judicial enforcement of a statute at the behest of private litigants would for this reason be inconsistent with the regulatory scheme.[141]

The difficult task is to identify the contexts in which consistency and coordination are of special importance. In some cases it will be relatively clear from the structure or history of the statute that Congress intended to concentrate enforcement responsibilities in a particular institution. Even in cases lacking such clear evidence, private actions should be found precluded if it appears that a rational enforcement scheme requires the exercise of prosecutorial discretion.

A good example is *Connecticut Action Now, Inc. v. Roberts Plating Co.*,[142] in which the court refused to create a private cause of action to enforce certain provisions of the Rivers and Harbors Appropriation Act of 1899.[143] The court emphasized that prosecutorial discretion was properly exercised to ensure against overlapping and inconsistent enforcement of the Act and statutes regulating similar conduct.[144] According to the court, enforcement at the behest of a private citizen not charged with general oversight responsibilities would disrupt the efforts of the executive branch to harmonize related statutory provisions.[145] In settings like this, private enforcement under section 1983 would also be irreconcilable with the statutory framework.

Even in cases involving some risk of inconsistency, however, allowance of the section 1983 action may not be irreconcilable with the enforcement scheme. The decision to sacrifice consistency and

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(1978); Stewart & Sunstein, *supra* note 66, at 1269-70.

[141] *Cf.* Blankenship v. Secretary of HEW, 587 F.2d 329, 335-36 (1978) (court is incompetent to impose time limit for processing social security claims because lower tolerance for delay in one area would produce longer delays in other areas).

[142] 457 F.2d 81 (2d Cir. 1972).

[143] 33 U.S.C. §§ 407, 411 (1976).

[144] 457 F.2d at 88.

[145] *Id.*

coordination because of the value of private enforcement is usually regarded as one for Congress and not the courts. The degree of interference will be critical in determining whether the presumption in favor of retention of the section 1983 remedy has been rebutted. If the interference with the regulatory enforcement program is substantial, the section 1983 remedy may reasonably be considered preempted, even in the absence of legislative history on that point. The agency's own views on the matter should ordinarily be of substantial weight, for the agency is apt to have special knowledge of the nature and extent of any such interference.

4. *Statutes in Which There Is Evidence of Legislative Calibration of Sanction to the Expected Enforcement Level.* When a statutory sanction has been calibrated to the probable level of enforcement, additional enforcement in the form of private rights of action could cause overdeterrence of socially useful activity.[146] It may sometimes be possible to rely on such calibration to find preemption of section 1983. That conclusion, however, can be reached only rarely, for such calibration ordinarily does not take place in any systematic way.[147] It is simply unrealistic to suppose that Congress, as a general rule, undertakes any such calibration precisely enough to warrant the conclusion that section 1983 is preempted.

If, however, the legislative history or administrative practice shows an intention to adjust sanctions to enforcement levels, and if it appears that section 1983 was not "counted" in setting those levels, the argument for preemption is complete.[148] In such circumstances, recognition of a private cause of action under section 1983 would disrupt a regulatory compromise.

5. *Statutes in Which Remedies Have Been Created Against the Federal Government to Compel State Conformity with Federal Law.* The argument for preemption is strengthened if the statute provides explicitly or implicitly for a private remedy against the federal government in the event of federal agency inaction. In one case, for example, a court denied a section 1983 remedy to redress state violation of a statute protecting the mentally retarded, reasoning that the plaintiffs could bring suit against the federal government to require it to enforce the statute against the offend-

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[146] *See* Landes & Posner, *supra* note 83.

[147] *See* Stewart & Sunstein, *supra* note 66, at 1290-91.

[148] *Cf.* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997-1001 (D.C. Cir. 1973) (private right of action under Federal Trade Commission Act denied because FTC achieved the level of enforcement intended by Congress).

ing state officials.[149] According to the court, a private remedy against state officials would interfere with federal enforcement efforts and thus disrupt the statutory scheme.[150] This consideration has force whenever Congress has created an express remedy against the federal government to compel it to enforce the substantive statutory standard against the states. The existence of such a remedy provides evidence that Congress intended the executive, and not the courts, to be the primary guarantor of state compliance with federal law.

The availability of this remedy is not conclusive, however, for a remedy against the federal government may serve different interests from one against the states. For example, courts are often reluctant to compel enforcement, deferring to federal inaction as a reasonable allocation of scarce prosecutorial resources even if federal law has been violated.[151] If such deference is due under the governing substantive statute, the argument for finding an implicit repeal of section 1983 is substantially weakened, for the remedy against the federal government will not be a realistic substitute for the section 1983 action. If the federal prosecutor declines to act not because there is compliance with federal law, but because there are insufficient resources to redress all statutory violations, the availability of judicial review of federal agency inaction will in it-

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[149] *See* Garrity v. Gallen, 522 F. Supp. 171, 202-03 (D.N.H. 1981) (denying section 1983 remedy under the Developmentally Disabled Assistance and Bill of Rights Act in part because plaintiffs could require the Secretary of Health and Human Services to perform his statutory duty to withhold funding from noncomplying states).

Congress has sometimes provided express remedies for agency inaction. *See, e.g.*, 7 U.S.C. § 136n (1976) (any person adversely affected by Administrator's decision under Federal Insecticide, Fungicide, and Rodenticide Act not to cancel or suspend registration may appeal to federal district court). In addition, the APA is generally regarded as creating a right to seek judicial oversight of allegedly unlawful agency inaction, *see* 5 U.S.C. § 706(1) (1976) (authorizing courts to "compel agency action unlawfully withheld or unreasonably delayed"), except when the decision is committed to agency discretion by law, *see id.* § 701(a)(2). *See generally* WWHT, Inc. v. FCC, 656 F.2d 807, 814-20 (D.C. Cir. 1981) (denial of petition for FCC rulemaking is subject to judicial review, but standard of review is deferential); National Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1043-53 (D.C. Cir. 1979) (allowing review of SEC failure to promulgate regulations in response to a petition for rulemaking).

[150] 522 F. Supp. at 203. *Cf.* Chesapeake Bay Found. v. Virginia State Water Control Bd., 501 F. Supp. 821, 828-29 (E.D. Va. 1980) (denying section 1983 remedy under certain provisions of FWPCA in part because of availability of remedies against federal government).

[151] For citations and general discussion of the related problem of the relationship between implied causes of action and judicial review of federal agency inaction, see Stewart & Sunstein, *supra* note 66, at 1208-16, 1289-90. *See also* Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1982).

self be an insufficient basis for a conclusion that the section 1983 remedy has been extinguished. Indeed, in such cases a private cause of action would usefully supplement agency enforcement efforts without requiring the court to review the agency's regulatory program.

Even if no such deference is due, the conclusion that section 1983 should be found to be preempted by the alternative remedy against the federal government may be implausible. There is no necessary inconsistency between the two remedies. When the agency considers whether to enforce the law in a particular instance, its task is to view the matter with a broad perspective, examining the seriousness of the violation in relation to all other violations; and a court asked to review such a determination is required to put itself in the agency's place, adopting the same broad focus. A remedy against the federal government to compel enforcement against the states is therefore most appropriate if the goal is review of the agency's general enforcement practices. By contrast, a private right of action against the state allows exclusive focus on the merits of the individual claim, permitting the court to avoid reviewing the agency's enforcement scheme. Congress may well have intended to allow the private litigant to choose either route. Indeed, Congress has explicitly so concluded in a variety of contexts.[152]

Like most reasoning based on the theory that *expressio unius est exclusio alterius,* then, a conclusion that a provision for a private remedy against the federal government excludes the preexisting section 1983 remedy against the state will sometimes be incorrect. If, however, the history or structure of the statute indicates that Congress treated the remedy against the federal government as the exclusive method of private enforcement, the section 1983 remedy should be held preempted.

6. *Statutes in Which Informal Methods of Enforcement Were Intended as the Exclusive Route.* In some statutes, Congress has made plain that informal methods of enforcement, such as negotiation, are preferred to litigation as a means of implementing a statutory standard.[153] Statutes that provide for federal monitoring

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[152] *See, e.g.,* 16 U.S.C. § 1540(g) (1976) (Endangered Species Act of 1973); 33 U.S.C. § 1365 (1976) (FWPCA); 42 U.S.C. § 4911 (1976) (Noise Control Act of 1972); 42 U.S.C. § 6305 (1976 & Supp. III 1979) (Energy Policy and Conservation Act); 42 U.S.C. § 7604 (Supp. III 1979) (Clean Air Act).

[153] The informality of the enforcement scheme might also prompt the conclusion that the statute created no rights, but was merely hortatory. *See supra* note 117. I am concerned

of state compliance with the law, such as federal oversight of state implementation of the Developmentally Disabled Assistance and Bill of Rights Act,[154] are likely to be of this type. Under such laws, enforcement is supposed to take the form of a continuous process of dialogue and accommodation on the part of the regulatory agency and the regulated states; the rigid and formal route of litigation is intended to be used, if at all, as a last resort. It is a reasonable inference that, in these contexts, Congress intended to preempt a judicial remedy under section 1983.

That informal means were contemplated does not, however, always dispose of the issue. Congress may not have intended those means to be exclusive, for a formal remedy may co-exist with an informal one. In each case, then, it will be necessary to focus on the nature of the particular scheme and the possibility that informal means were intended to be the sole method of implementing the statute. The legislative history will be critical on this point. Explicit evidence of legislative hostility to enforcement through litigation will justify the conclusion that the section 1983 remedy has been preempted. If there is no such evidence, the fact that informal means of enforcement were contemplated is generally not, without more, sufficient reason to overcome the presumption against implicit repeal.

7. *Statutes Protecting Collective Interests.* The fact that the interest protected by the governing substantive statute is collective in nature may support an inference that the section 1983 remedy has been preempted. Collective benefits are more often, and sometimes more appropriately, protected through public enforcement mechanisms than through private remedies.[155] An obvious example

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here, however, only with statutes that do create enforceable rights.

[154] *See* Garrity v. Gallen, 522 F. Supp. 171, 202 (D.N.H. 1981) (denying a section 1983 remedy under the Developmentally Disabled Assistance and Bill of Rights Act in part on the ground that the administrative agency was intended to have "the flexibility to implement an ongoing review process and . . . in effect to engage in continuing dialogue with the states, issuing directives to them and listening to their complaints regarding the feasibility of lack thereof of any of the agency regulations").

Certain cooperative state-federal programs are possible other examples. *See, e.g.,* 16 U.S.C. § 567b (1976) (cooperative management of state forests). *See also* Cannon v. University of Chicago, 441 U.S. 677, 719-24, 728-29 (1979) (White, J., dissenting) (characterizing Title VI of the Civil Rights Act of 1964 as favoring informal agency resolution of alleged violations when no state action is involved).

[155] The class action device may to a substantial degree increase the usefulness of private litigation in protecting collective interests, *see* Note, *The Cost-Internalization Case for Class Actions,* 21 STAN. L. REV. 383 (1969), but transactions-cost barriers to the use of that device make it at best an incomplete solution. *See generally* Dam, *Class Actions: Efficiency,*

of such a collective interest is clean air. Regulatory beneficiaries may prefer different kinds and amounts of enforcement, possibly leading to overenforcement by those who want more than most. On the other hand, free-rider effects may decrease private incentives to redress injurious conduct. When the benefit is inescapably joint, Congress sometimes disfavors private remedies because enforcement at the request of one beneficiary necessarily affects others, and possibly in undesirable ways. A public enforcement mechanism, capable of taking into account the interests of all affected parties, is thus preferable, and may be distorted if additional private enforcement is permitted.

Private enforcement of statutes protecting collective interests is not, however, always excluded. A legislature could reasonably conclude that even in the context of collective interests, private litigation is a useful supplement to a public enforcement scheme. Congress has occasionally so concluded.[156] The fact that a statute protects collective interests is not, therefore, in itself sufficient to justify a conclusion that the section 1983 remedy is extinguished, but may strengthen an inference that Congress intended the public enforcement scheme to be exclusive.

C. Per Se Rules

Under the approach suggested above, it would be presumed that the creation of an enforcement scheme in the governing substantive statute does not preempt the usual operation of section 1983. That presumption could, however, be rebutted by statutory language or history on the point or by a showing that the regulatory enforcement scheme and a private cause of action are necessarily inconsistent. The seven listed categories provide general examples, probably not exhaustive, of contexts in which it is plausible to argue that there is such inconsistency.[157]

Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47 (1975).

[156] *See supra* note 152. Sometimes Congress goes further and actually encourages private enforcement. A good example is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), which authorizes attorney's fees awards to prevailing parties in certain civil rights cases. A major purpose of the statute was to encourage private enforcement of collective benefits by removing the burden on those who perform a public service as "private attorneys general." *See* H.R. REP. No. 1558, 94th Cong., 2d Sess. 2 (1976); S. REP. No. 1011, 94th Cong., 2d Sess. 3-5 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5910-12.

[157] The considerations underlying the categories suggest the possibility that section 1983 should be found implicitly preempted insofar as it creates a damage remedy, but not insofar as it creates a remedy for injunctive relief, or vice versa. In some cases, a damage

Such an approach carries with it the familiar hazards that accompany multifactor balancing tests. The factors do not furnish crisp or certain rules for decision; they are subject to manipulation. They provide guidelines, but no more; they generally do not offer standards by which one can say whether a judicial decision was definitely right or definitely wrong. The process of attempting to fit together the section 1983 remedy with a statutory enforcement scheme may seem so discretionary, and so inevitably ad hoc, that the preferable solution would be to adopt a per se rule in either direction. Such a solution would decrease uncertainty, give a clear signal to Congress for the future, and reduce the supposed dangers posed by judicial policymaking.

This is a criticism with some force, and it can be met only by pointing out the inferiority of the suggested alternatives. For the same reasons that courts sometimes refuse to create private rights of action, adoption of a per se rule in favor of the continued availability of the section 1983 remedy in the face of a regulatory enforcement scheme would be unacceptable. Such a presumption could frustrate the statutory plan by leading to disruption of regulatory enforcement mechanisms; overenforcement of the law; inconsistency and confusion; resolution of politically sensitive, technically complex issues by politically unaccountable, generalist judges; and potential liability for engaging in conduct that Congress did not intend to make unlawful. Either under particular statutes or as a general rule, it is difficult to believe that such an approach would accord with the purposes underlying section 1983 and the governing substantive statutes. And general assertions of the desirability of a judicial forum for claims of state violation of federal law[158] fail to meet these objections.

Nor would it be preferable to conclude that the creation of an enforcement mechanism in the governing statute justifies a per se rule against the recognition of a section 1983 remedy. If such a rule

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remedy may be wholly irreconcilable with a regulatory scheme, whereas an injunctive remedy would be a useful complement. *Cf.* Butz v. Economou, 438 U.S. 478, 523-24 (1978) (Rehnquist, J., dissenting) (construing federal officials' immunity as a bar to damages but not to injunctive remedy is an appropriate balance of competing interests); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 n.5 (1976) (Congress clearly intended to exclude damages remedy but to allow injunctive relief for violations of Public Accommodations Act). A general discussion of how this possibility should be evaluated in particular cases is beyond the scope of the present discussion. For analysis of some related issues, *see* Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980); Stewart & Sunstein, *supra* note 66, at 1296-1300.

[158] *See The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 227-31 (1980).

were adopted without strong assurance that it represented what Congress actually would have intended, it would undo the presumption against preemption established above. Because such a per se rule would not duplicate Congress's likely intent but instead provide administrative ease, there is reason to suspect that it is not a sufficiently accurate reconstruction to overcome the presumption. The fact that it is easy to imagine situations in which the regulatory enforcement scheme might supplement rather than supplant the section 1983 remedy reinforces these doubts. Moreover, a per se rule in favor of preemption would ignore the intent of the drafters of section 1983. At the same time, it might produce underenforcement of unlawful activity, sanction conduct that Congress intended to prevent, and cause an increase in the pressures on already overloaded federal enforcement schemes. Here too, such a rule might promote administrative ease, but would do violence to the purposes underlying the relevant statutes.

Each of the three possible solutions is thus accompanied by significant dangers and disadvantages. Per se rules are unacceptable because they increase certainty at the cost of fidelity to statutory purposes. By contrast, the approach suggested above is most likely to harmonize the purposes underlying the substantive statute and section 1983 and to lead to the result that Congress would have reached had it addressed the matter. Moreover, the approach conforms to that adopted by courts in analogous areas of the law.[159] Finally, both the Supreme Court in *Sea Clammers* and the lower courts in post-*Thiboutot* decisions[160] have adopted a similar approach with which the guidelines suggested above are quite compatible.

Conclusion

The historical evidence suggests that the Congress that enacted the predecessor to section 1983 furnished a private cause of action to redress federal statutory violations by state officials. To construe section 1983 in that fashion is in no sense inconsistent with the Court's recent retrenchment in the area of implied causes of action. That retrenchment does not depend on a judicial determination of the undesirability of private rights of action, but instead on a conviction that the issue is one for legislative and not

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[159] *See supra* notes 98-115 and accompanying text.

[160] *See supra* notes 120-27 and accompanying text.

judicial resolution. This consideration is inapplicable if section 1983 authorizes the suit, for the problem of judicial authority disappears. It is Congress, and not the courts, that has created the private cause of action.

Ordinarily Congress should be presumed aware of the section 1983 remedy when it imposes statutory duties on the states. As in the context of preemption of common law remedies, the mere creation of a regulatory scheme should not serve to extinguish preexisting private remedies. At the same time, section 1983 should not be held available regardless of the nature or extent of the enforcement scheme created in the governing statute by Congress. In some contexts, that enforcement scheme and a private right of action will be manifestly inconsistent with one another, and the proper inference will be that the enforcement scheme is exclusive, notwithstanding the absence of any explicit statement to that effect in the language or history of the statute.

The difficulty lies in the identification of those contexts. For that purpose, it will generally not be useful to rely on or to attempt to derive some actual congressional intent with respect to the continued availability of a cause of action under section 1983. Per se rules are unacceptable because they ignore statutory goals. On the other hand, an unstructured judicial inquiry into the value of a section 1983 remedy would reintroduce the vices of freewheeling judicial "implication" of private rights of action.

The task, therefore, is to identify and categorize the potential cases—to determine what sorts of regulatory enforcement schemes are likely to be inconsistent with the existence of a statutory cause of action under section 1983. The effort at categorization undertaken here has pointed to seven contexts in which the operation of section 1983 might plausibly be regarded as extinguished. Under this approach, a determination whether preemption has occurred will call for 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. Such an assessment, however, is no usurpation of legislative prerogatives, but instead represents the most fruitful method of harmonizing section 1983 and the relevant substantive statute.