

CHAPTER 5 CAUSES OF ACTION

This chapter discusses what plaintiffs must plead and eventually prove to enforce rights created expressly or impliedly by federal law.

I. Suing in Federal Court

To sue in federal court, plaintiffs must advance a legal claim that their legal rights have been violated *and* assert a recognized constitutional or statutory right to redress the violation or both. The federal courts, unlike their state counterparts, are institutions of limited jurisdiction.¹ As a result, a particular plaintiff may have suffered a legal wrong but lack a federal claim; the plaintiff's claim may be cognizable in another forum.

The substantive rights at issue may arise from the federal Constitution, statutes, or regulations. An individual plaintiff's authority to enforce an asserted *statutory* right through litigation—a “private right of action”—may be derived from express language in a statute creating the right, from other federal statutes that provide a vehicle for the enforcement of rights created by the Constitution and laws of the United States, or by implication from the source of the right.

This chapter does not address the panoply of statutes that both create rights and express remedies for violations of those rights.² Instead it analyzes the umbrella statutes that provide the general right to sue for violations of rights arising under other sources of federal law that do not themselves specifically provide the right to sue. This chapter then analyzes causes of actions claimed to arise by implication from other sources of federal law and concludes with a discussion of third-party beneficiary claims.

- The two principal statutes creating general causes of action for the enforcement of rights created by federal law are
- the Reconstruction Civil Rights Acts, particularly Section 1983,³ and
 - the Administrative Procedure Act (APA).⁴

Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law, while other Reconstruction statutes authorize more limited claims against private parties who violate federal rights. The APA authorizes a narrower variety of suits against federal officials and agencies.⁵ Section 1983 litigation has vindicated constitutional and statutory rights in the context of welfare, education, housing, employment, and prison law in litigation against state, county, or municipal officials. The APA has vindicated similar rights by correcting federal agency action or by forcing action to be taken. Private individuals occasionally are involved with either state or federal defendants, and, as state actors, they may be sued as well.

II. Express Causes of Action

The Reconstruction Civil Rights Acts, enacted during the 1860s and 1870s, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in more limited situations, by private parties acting alone.⁶ The most important of these statutes is Section 1983.

¹See Chapter 2, Sections I–V, of this MANUAL.

²Examples of statutes creating express rights and remedies include antidiscrimination statutes, such as 42 U.S.C. §§ 1981 (contracts), 1982 (property), 1985 (conspiracy), 2000d-2 (federally assisted programs), 2000e-5 *et seq.* (employment), and 3612 (housing); the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Education of All Handicapped Children Act of 1975, 20 U.S.C. § 1415(e); the minimum-wage and maximum-hour provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(b); and the Consumer Credit Protection Act provisions, such as 15 U.S.C. §§ 1640 (truth in lending), 1691e (equal credit opportunity), and 1692k (debt collection practices).

³Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981–1988.

⁴Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*

⁵See Section II.B *infra*.

⁶42 U.S.C. §§ 1981–1988. Enacted as part of the Reconstruction Civil Rights Act (42 U.S.C. §§ 1981–1988), Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law, while other Reconstruction statutes authorize more limited claims against private parties violating federal rights.

A. SECTION 1983

Section 1983 creates no substantive rights. Rather it creates a vehicle for enforcing existing federal rights.⁷ The statute provides in pertinent part:

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

The elements of a Section 1983 case are “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” by a “person” acting “under color” of state law.⁸ The “laws” referred to include

- those statutes which confer individual rights on a class of persons that include the plaintiff⁹ and
- regulations which clearly implement the intent of the legislature.¹⁰

Because the purpose of Section 1983 is to vindicate federal rights, a plaintiff suing under the statute is in most circumstances not required to exhaust state procedures or remedies which would be otherwise required before filing suit.¹¹

A Section 1983 complaint filed in federal court must name a defendant who is not immune under the Eleventh Amendment and who is acting under color of state law and must seek relief not barred by the Eleventh Amendment.¹² Suppose that plaintiff establishes a violation of a federal right.¹³ Defendants then may in certain circumstances avoid liability for damages by proving a qualified immunity.¹⁴

1. Finding a Federal Right

By its terms, Section 1983 can be used to remedy the deprivation of “rights” granted to the plaintiff under the Constitution, federal statutes, and regulations implementing these statutes. Constitutional provisions enforceable by a private party under Section 1983 consist of those which create personal rights and either explicitly apply to the states or are held to apply to the states by operation of the Fourteenth Amendment.¹⁵ In contrast to the relatively straightforward expression of individual “rights” protected by the Constitution, the existence of statutorily created “rights” has posed something of a challenge to plaintiffs.

⁷ *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979). Although this MANUAL focuses on federal court practice, Section 1983 suits may also be heard in state court. *Howlett v. Rose*, 496 U.S. 356, 375 (1990); *Martinez v. California*, 444 U.S. 277, 283 n. 7 (1980).

⁸ The Supreme Court held that, in passing Section 1983, Congress did not intend to strip states of sovereign immunity. Hence, while a state is not a “person” for purposes of Section 1983 (*Quern v. Jordan*, 440 U.S. 332, 345 (1979)), local governments—which cannot claim immunity—are. *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

⁹ *Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002), citing *Cannon v. University of Chicago*, 441 U.S. 677, 690, n.13 (1979). The availability of Section 1983 in enforcing a statute was first established in *Maine v. Thiboutot*, 448 U.S. 1 (1980). See also *King v. Smith*, 392 U.S. 309 (1968) (by basing its decision on statutory rather than equal protection grounds, the Supreme Court implied that Section 1983 was a proper vehicle for challenging a state’s violation of a federal statute enacted under the Constitution’s spending clause).

¹⁰ As explained *infra*, the law in this area is somewhat muddy, with a split of opinion among the circuits as to whether and when an enforceable right can be created by a valid regulation.

¹¹ *Felder v. Casey*, 487 U.S. 131 (1988) (state claims statute); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (state administrative proceeding); *McNeese v. Board of Education*, 373 U.S. 668 (1963) (state procedure for challenging school segregation); *Monroe v. Pape*, 365 U.S. 167 (1971) (no need to resort to state causes of action). Although the law seems fairly clear in this area, one consequence of the federal judiciary’s heightened concern for state’s rights has been greater reliance on abstention doctrines to keep from hearing these cases. See, e.g., *31 Foster Children v. Bush*, 329 F.3d 1255, 1274–81 (11th Cir. 2003). See Chapter 2, Section VIII, of this MANUAL for a detailed discussion of abstention.

¹² Chapter 8 of this MANUAL discusses the limitations imposed by the Eleventh Amendment on suits against a state.

¹³ See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976) (allegation that police wrongfully circulated damaging information about plaintiff did not state a Fourteenth Amendment violation and hence did not state a Section 1983 cause of action; plaintiff limited to state law remedies).

¹⁴ Chapter 8 of this MANUAL explores defendants and defenses in Section 1983 litigation.

¹⁵ Constitutional provisions which explicitly create state obligations include the Reconstruction Amendments as well as those expanding the franchise to women and eliminating the poll tax. Portions of the Bill of Rights, which originally applied only to the federal government, now apply to the states by operation of the Fourteenth Amendment’s due process clause. For a list of these amendments, see generally *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968).

Under the separation-of-powers doctrine, only the legislative branch has the power to create statutory causes of action.¹⁶ Hence, the ability of a private party to sue successfully to enforce a statute depends on whether Congress, in enacting the statute, gives the plaintiff a “private right of action.” As noted, these rights are sometimes expressly granted by statute. All other rights are “implied,” and a court’s job is to discern the intent of Congress.¹⁷ The two avenues for enforcing implied rights of action are either to sue directly under the statute or to litigate using the vehicle provided by Section 1983.

In *Cort v. Ash* the U.S. Supreme Court established a four-part test to determine whether Congress intended to imply a right to sue directly under a federal statute.¹⁸ In general, a plaintiff asserting the right is required to show that (1) the plaintiff is a member of the class for whose benefit the statute was enacted, (2) Congress intended to confer a private remedy, (3) a right to sue would be consistent with the statutory purpose, and (4) the cause of action is not one traditionally relegated to the states to a degree that implying a right to sue would be inappropriate. In short, under this avenue, the plaintiff must show that Congress intended to grant both a private right and a private remedy.¹⁹

In the years following *Cort*, the courts became less willing to find rights of action implied directly under a statute, and plaintiffs began turning to Section 1983—the alternative path for enforcing rights created by federal statute. In *Maine v. Thiboutot* decided five years after *Cort*, the Supreme Court held for the first time that Section 1983 could be used to remedy the deprivation of rights created by a federal statute.²⁰ In *Wright v. Roanoke Redevelopment and Housing Authority* the Court later suggested that a regulation promulgated to interpret a federal statute could also be a “law.”²¹ And that law could be enforced under Section 1983.²²

So long as a right is shown to exist, Section 1983 generally provides a remedy: “Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.”²³ However, not every federal law creates a “right” enforceable by a private plaintiff, and as the Supreme Court became increasingly hostile to the use of Section 1983 to enforce federal statutes, a Court majority has continued to narrow its conception of the term. For this reason, one should understand the principal objections raised by the Court to deter the utilization of Section 1983 to enforce federal statutes.

The three-pronged test for finding a right enforceable under Section 1983 was set forth in *Wilder v. Virginia Hospital Association*.²⁴ The test asks whether (1) Congress intended the particular statutory provision to benefit the plaintiff, (2) the provision is too vague or amorphous as to make judicial enforcement difficult or impractical, and (3) whether the statute imposes a binding obligation on the government.²⁵ After these inquiries, a fourth arises: (4) did Congress create a

¹⁶ See *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

¹⁷ In alleging a “right,” plaintiff attorneys should be very specific, taking to heart the Supreme Court’s dictum that “[o]nly when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights.” *Blessing v. Freestone*, 520 U.S. 329, 342 (1997).

¹⁸ *Cort v. Ash*, 422 U.S. 66, 78, 79 (1975). Since *Cort*, the Supreme Court has become more restrictive in finding rights of action implied directly under a statute. See, e.g., *Touche Ross v. Redington*, 442 U.S. 560 (1979); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹⁹ *Sandoval*, 532 U.S. at 286. *Sandoval* and the question of rights implied directly under federal statutes are discussed in more detail below.

²⁰ *Maine v. Thiboutot*, 448 U.S. 1 (1980).

²¹ *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 420, n.3 (1987) (“[T]o us it is clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute.”).

²² In hindsight, however, the *Wright* decision seems to have turned more on the absence of a “comprehensive enforcement mechanism” which would have precluded the applicability of Section 1983 than the ability of a regulation to create “rights.” Not surprisingly, the circuits are split between those which hold that regulations can create rights enforceable under Section 1983 (see, e.g., *Loschivo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994); *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985)) and others which reject this view. *Harris v. James*, 127 F.3d 993, 1007–8, 1009 (11th Cir. 1997); *South Camden Citizens v. New Jersey Department of Environmental Protection*, 274 F.3d 771, 778 (3d Cir. 2001); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 935–36 (9th Cir. 2003)). An extended discussion of this issue follows.

²³ *Gonzaga*, 536 U.S. at 284. Before *Gonzaga*, a plaintiff invoking Section 1983 to enforce a statute could presume that a private right of action existed, with defendants having the burden to disprove the existence of the right. After *Gonzaga*, the burden appears to have shifted to the plaintiff. However, once a right is shown to exist, Section 1983 is presumed to provide a remedy, and defendants still have the burden to prove otherwise. *Id.* n.4.

²⁴ *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990).

²⁵ *Id.* at 509, 512. *Wilder* actually lists these factors in reverse order. However, since *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997), the factor which asks whether the statute benefits the plaintiff has generally been listed first. This is appropriate since it has become the main battleground for the use of Section 1983 to enforce federal statutes. While some courts seem to think that *Gonzaga* has entirely displaced the *Wilder* or *Blessing* inquiry, *Gonzaga* does cite the latter decisions without reservation.

comprehensive mechanism for enforcing the statute implying the denial of a private right of action?²⁶ Each of these prongs emerged from a series of Supreme Court decisions, with the first element undergoing something of a metamorphosis as it rose in importance in comparison to the other prongs of the test. Indeed, resolution of this first inquiry—the extent to which the plaintiff is “benefitted” by the statute—is usually the key to whether Section 1983 can be invoked to enforce a federal statute.

Did Congress intend the law to so directly benefit the plaintiff, such that those in plaintiff’s place are the “unmistakable focus” of the statute? The seesaw battle between shifting Supreme Court majorities over what constitutes an enforceable right led to a greater focus on the relationship between the aim of the statute and its effect on the plaintiff. As formulated by *Wilder*, even if a statute imposes on the state binding obligations capable of judicial enforcement, Section 1983 may not be invoked unless Congress intended the law to directly benefit the plaintiff. However, this only begins the inquiry; a plaintiff must also point to evidence that Congress intended that the plaintiff—and not just the federal government—could sue to enforce the statute.

In the past this prong of the *Wilder* test was thought to have conferred the ability to invoke Section 1983 on any plaintiff who was generally a beneficiary of the statute sought to be enforced, thus making Section 1983 an easier avenue for enforcing a federal right than the implied-right-of-action method announced in *Cort v. Ash*. The erosion of this interpretation was first suggested in *Blessing v. Freestone*, in which the Supreme Court held that a mandate that states receiving federal child-welfare funds “substantially comply” with federal requirements aimed at ensuring timely payment of child support was not “an individual entitlement to services, [but] simply a yardstick for the [federal government] to measure the systemwide performance of the State’s Title IV-D program.”²⁷ As a result, parents who obviously benefitted from the collection of child support were nevertheless unable to enforce the child support statute *as a whole* because the syntax used by Congress in enacting certain state compliance and reporting provisions was seen by the Court as focused more on the government’s interest in recouping public assistance benefits than ensuring a continued income stream to specific families.²⁸

Blessing placed a cloud over the first prong and raised the prospect of denying enforcement rights to some people who had, at first glance, “benefitted” under the statute. Shedding some light on the controversy outside of the Section 1983 arena in *Alexander v. Sandoval*, the Supreme Court placed great emphasis on the language used by Congress:²⁹ “[S]tatutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intention to confer rights on a particular class of persons.’”³⁰ This view was imported into Section 1983 jurisprudence when elements of the implied-right-of-action test were fused with *Wilder*’s “benefits the plaintiffs” test in *Gonzaga University v. Doe*.³¹

In *Gonzaga* the transformation of the “benefits” prong became manifest when the court rejected the notion that Section 1983 could be invoked “so long as the plaintiff falls within the general zone of interest that the statute is intended to protect.” Instead the Supreme Court now requires a showing that “an unambiguously conferred right” exists and is “phrased in terms of the persons benefitted.” “[I]t is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced” under Section 1983.³² Construing whether the Family Educational Rights and Privacy Act (FERPA) conferred a right to sue on students whose privacy had been violated by the unauthorized release of educational records, the *Gonzaga* Court dismissed statutory language which seemingly granted individual students protection from institutional invasions of privacy; the Court essentially held that the statute was addressed more to the entity regulated than to the students benefitted. Several factors were said to suggest that an enforceable right was not conferred.

²⁶*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

²⁷*Blessing*, 520 U.S. at 343.

²⁸ “[T]he lower court’s holding that the [statute as a whole] ‘creates enforceable rights’ paints with too broad a brush. It was incumbent upon respondents to identify with particularity the rights they claimed, since it is impossible to determine whether [the statute], as an undifferentiated whole, gives rise to undefined ‘rights.’ Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights.” *Id.*, 520 U.S. at 342.

²⁹*Alexander v. Sandoval*, 532 U.S. 275 (2001), holding that Title VI “disparate impact” regulations could not create an implied private right of action because the governing statute had been held to prohibit only intentional discrimination

³⁰*Id.* at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

³¹*Gonzaga*, 536 U.S. at 284.

³²*Id.* at 283 (quoting in part *Cannon v. University of Chicago*, 441 U.S. 677, 692 (1979)). Also citing his majority decision in *Cannon*, Justice Stevens’s dissent states: “But the sort of rights-creating language idealized by the Court [in *Gonzaga*] has never been present in our § 1983 cases; rather, such language ordinarily gives rise to an implied cause of action [directly under a statute].” *Id.* at 297.

First, “FERPA’s provisions speak only to the Secretary of Education, directing that ‘no funds shall be made available’ to any ‘educational agency or institution which has a prohibited ‘policy or practice.’”³³ The Court approvingly quoted *Cannon v. University of Chicago*, a non-Section 1983 implied-right-of-action decision which applied the *Cort v. Ash* test:

There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute] with an *unmistakable focus* on the benefitted class, had written it simply as a ban on [certain] conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to . . . institutions engaged in [prohibited] acts.³⁴

Second, because the statute barred the funding of institutions “which have a *policy or practice* of permitting the release of education records,” FERPA was said to “speak only in terms of institutional policy and practice, not individual instances of disclosure.”³⁵ Citing *Blessing*, the Supreme Court found FERPA’s provisions to have an “aggregate” focus . . . not concerned with ‘whether the needs of any particular person have been satisfied,’ . . . and . . . cannot ‘give rise to individual rights.’”³⁶ Conflating the previously separate inquiries under Section 1983 jurisprudence and the *Cort v. Ash* “implied rights” analysis, the Court concluded that “the initial inquiry [in a Section 1983 case]—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied-right-of-action case, the express purpose of which is to determine whether or not a statute ‘confers rights on a particular class of persons.’”³⁷

An “unambiguously conferred right” which is “phrased in terms of the persons benefitted” (rather than in terms of the person or agency regulated) is now a central factor determining a plaintiff’s ability to enforce a federal statute using Section 1983. Reviewing its past cases to illustrate the new standard, the *Gonzaga* Court noted that the rent ceiling provisions of the U.S. Housing Act construed in *Wright*, as well as the reimbursement provisions of the Medicaid Act interpreted in *Wilder*, “explicitly conferred monetary entitlements upon the plaintiffs.”³⁸ After *Gonzaga*, plaintiff must now find a similar or analogous individual “entitlement” expressed in the language of a statute sought to be enforced under Section 1983. The first question a prospective plaintiff must answer is whether those in the plaintiff’s shoes are, in the words of *Cannon*, the “unmistakable focus” of the statute.

For a number of federal programs for low-income people, a strong argument can be made that Congress’ mandates are, in *Gonzaga*’s terms, “phrased in terms of the persons protected.”³⁹ However, since many of these statutes were enacted under the Constitution’s spending clause, specific provisions of the statute are written in a form which directs a federal agency to spend money so long as the state or other recipient complies with Congress’ rules (e.g., “the state’s plan shall provide . . .”). Not surprisingly, government attorneys argued with some success on the focus of such statutory provisions.⁴⁰ Their argument is that such statutory provisions are “focus[ed] on the person regulated rather than the individuals protected” and hence “create ‘no implication of an intention to confer rights on a particular class of per-

³³ *Id.* at 279 (quoting 20 U.S.C. § 1232g(b)(1)).

³⁴ *Id.* at 287 (quoting *Cannon*, 441 U.S. at 691 (emphasis added)).

³⁵ *Id.* at 288 (quoting 20 U.S.C. § 1232g(b)(1) (emphasis added)).

³⁶ *Gonzaga*, 536 U.S. at 288 (quoting *Blessing*, 520 U.S. at 343).

³⁷ *Id.* at 285 (citation omitted).

³⁸ *Id.* at 280.

³⁹ E.g., the Food Stamp Act provides that “households [receiving] benefits under a . . . program that complies with standards established by the Secretary . . . shall be eligible to participate in the food stamp program. Assistance . . . shall be furnished to all eligible households . . .” 7 U.S.C. § 2014(a). Hence specific statutory provisions spelling out eligibility standards presumably create enforceable rights for those who apply and meet the standards. Another example of similar language in the Medicaid Act is the requirement that “[a] State plan for medical assistance must . . . (10) provide . . . for making medical assistance available . . . to . . . all individuals [meeting the following five pages of eligibility criteria.]” 42 U.S.C. § 1396a(a).

⁴⁰ See, e.g., *Banks v. Dallas Housing Authority*, 271 F.3d 605, 609–10 (5th Cir. 2001) (requirement that privately owned Section 8 units be kept in a “decent, safe and sanitary” condition is principally aimed at property owners); *Sabree v. Houston*, 245 F. Supp. 653 (E.D. Penn. 2003), *appeal pending* (Medicaid Act’s mandate that states provide community-based intermediate care facilities for the mentally disabled is more focused on getting states to comply with federal requirements than on a recipient’s right to benefits); *Hill v. San Francisco Housing Authority*, 207 F. Supp. 2d 1021, 1028–29 (N.D. Cal. 2002) (requirement that units be maintained in accord with U.S. Department of Housing and Urban Development (HUD) housing quality standards was directed to public housing authorities and did not create enforceable rights); *Almendares v. Palmer*, 2002 U.S. Dist. LEXIS 23258 (N.D. Ohio Dec. 3, 2002) (requirement that state food stamp agencies provide access for limited-English-proficient applicants and recipients was directed to the state and did not create a right to services for those with limited English proficiency).

sons.”⁴¹ This argument underscores the need to find language in the particular provision sought to be enforced for indicating that Congress “intended to confer individual rights upon a class of beneficiaries.”⁴² The argument also underscores the need to research carefully how that provision has been interpreted, both before and after *Gonzaga*. Given the Supreme Court’s tendency to restrict further the ability of private litigants to enforce federal laws, one should be very leery of the consequences of exploring new ground on this issue.

Is the alleged “right” so vague or amorphous as to make it unenforceable? If the statute is assumed to require a state or local agency to do something, the second issue a prospective plaintiff must ask is whether there exists a standard by which to measure the state or local agency’s compliance with the law.

In *Suter v. Artist M.* the Supreme Court held that a plaintiff could not enforce the requirement, found in the Adoption Assistance and Child Welfare Act, that a state make “reasonable efforts” to avoid the removal of children from their parents’ homes.⁴³ In the Court’s opinion, the statute failed to set forth standards to judge the “reasonableness” of the state’s compliance with the law and was therefore too vague and amorphous to allow judicial enforcement.⁴⁴

By comparison, in the earlier case of *Wright v. Roanoke Redevelopment and Housing Authority*, a claim that an inadequate public housing utility allowance violated rent ceilings imposed by the Brooke Amendment was allowed even though the statute nowhere defined the components of “rent.” In response to arguments that the provision was vague and amorphous, the Supreme Court turned to U.S. Department of Housing and Urban Development (HUD) regulations to fill the gap and noted that HUD had defined “rent” as including a reasonable amount to cover utilities.⁴⁵ Similarly, in *Wilder*, the plaintiffs overcame a “vague and amorphous” argument to their challenge to a state’s failure to provide “reasonable” Medicaid reimbursement rates to providers.⁴⁶ The plaintiffs succeeded because they could point to definitions found elsewhere in the statute as providing a standard for judicial enforcement.⁴⁷

Does the statute create a binding obligation? In *Pennhurst State School and Hospital v. Halderman*, the first decision to limit the use of Section 1983 to enforce a federal statute, the Supreme Court considered the ostensibly “rights-producing” language found in the Developmentally Disabled Assistance and Bill of Rights Act.⁴⁸ The Court ruled that congressional rhetoric about a disabled “bill of rights” found in the statute’s declaration of policy could not create enforceable rights since the law did not tie a state’s receipt of federal funding to the state’s compliance with the purported bill of rights. The statutory language was held to be “hortatory” rather than mandatory. Thus the third question a prospective plaintiff must consider is whether the statute sought to be enforced actually requires the state or local agency to do something.

Does the statute contain a comprehensive enforcement mechanism? If the statute at issue passes muster under the *Wilder* and *Blessing* test, Section 1983 is presumed to provide remedy unless a defendant shows that the enactment contains a “comprehensive enforcement mechanism” whose breadth or scope suggests that Congress viewed that mechanism as the sole means for statutory enforcement. In *Middlesex County Sewerage Authority v. National Sea Clammers Association* environmentalists sought to use Section 1983 to enforce both the Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act by enjoining the dumping of waste in the Atlantic Ocean.⁴⁹ In addition to providing to private parties a limited right to sue, these statutes provided for an elaborate mechanism to address the pollution problem. The Supreme Court pointed to those measures as indicating Congress’ intent to preclude enforcement of the legislation outside the procedures set forth in these laws.

⁴¹ *Gonzaga*, 536 U.S. at 284.

⁴² E.g., in *Bryson v. Shumway*, 308 F.3d 79, 88 (1st Cir. 2002), the court focused on the provision’s reference to “all eligible individuals.” If the language in the specific provision is weak, one can (with some trepidation) turn to Congress’ statement of the purpose for the legislation for language expressly stating the intent to benefit the class and then show that the specific statutory provision sought to be enforced is integrally related to that goal.

⁴³ *Suter v. Artist M.*, 503 U.S. 347, 359–64 (1992).

⁴⁴ Wary of *Suter*’s potential for undermining private enforcement of similar statutes requiring “state plans” to carry out the various subchapters of the Social Security Act, Congress legislatively affirmed that a private right of action could exist to enforce such statutes to the extent that a right to sue existed before *Suter* and limited the latter’s effect only to the specific provision of the Adoption Assistance Act struck down by the court. 42 U.S.C. § 1320a-2 (1994).

⁴⁵ *Wright*, 479 U.S. at 431.

⁴⁶ *Wilder*, 496 U.S. 498.

⁴⁷ A recent example of a “right” which was found to be too vague to be judicially unenforceable is the “decent, safe, and sanitary” public housing ostensible entitlement set forth in 42 U.S.C. § 1437f. See *Banks*, 271 F.3d at 610.

⁴⁸ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

⁴⁹ *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

Following *Sea Clammers*, the Court ruled that the existence of a comprehensive statutory remedy for aggrieved parties could also indicate Congress' intent to preclude any other private remedies (including the invocation of Section 1983), which were based on the same "common nucleus of operative facts" giving rise to the statutory violation. Thus in *Smith v. Robinson* a disabled child who had claimed that he was not receiving an appropriate free education in violation of the Education for All Handicapped Children Act, the Rehabilitation Act, and the Equal Protection Clause won his claim under the Education for All Handicapped Children Act.⁵⁰ He thereafter pointed to his alternative Section 1983 claim to seek attorney fees under 42 U.S.C. § 1988. Holding that the Education for All Handicapped Children Act's "comprehensive scheme" suggested Congress' intent that the Act be the exclusive vehicle for addressing an equal protection constitutional violation which was "virtually identical" to the claim under the Education for All Handicapped Children Act, the Court reasoned that Sections 1983 and 1988 were statutory remedies that Congress could implicitly repeal or replace with an alternate remedy.⁵¹

The existence of developed enforcement mechanisms, however, is not enough to make them "comprehensive." Thus, in *Wright*, discussed earlier, the Court found that stringent federal oversight of public housing authorities, and the federal government's power to cut off funding to noncomplying agencies, did not preclude a Section 1983 remedy. On the one hand, the Court noted that the "[statutory provision] and its legislative history [are] devoid of any express indication that exclusive enforcement authority was vested in HUD." On the other hand, "both congressional and agency actions indicat[e] that enforcement authority is not centralized and that private actions were anticipated."⁵² Moreover, the Court observed, the statutory mandate that housing authorities provide a grievance procedure to tenants and the implementing regulation's provision that the existence of a grievance procedure would not preclude judicial review—each a vehicle for "private enforcement"—suggested Congress' intent to allow tenants to sue.⁵³

Does the enactment of a statute under Congress' spending power undermine the enforceability of the enactment under Section 1983? Another potential barrier to finding a statutory right enforceable under Section 1983 is the argument that since legislation enacted under Congress' spending power, Article I, Section 8, of the Constitution, generally creates only voluntary programs which the states are free to reject, a state's decision to participate in the program results only in contractual obligations which cannot rise to the level of being "the supreme law of the land."⁵⁴ Although the issue has not come before the Supreme Court, two circuit courts of appeal rejected this contention.⁵⁵

In *Westside Mothers v. Haveman*, the earlier of the two decisions, the Sixth Circuit ruled that the obligations of the state under the Medicaid Act were more than a mere contract; the Sixth Circuit quoted *Bennett v. Kentucky Department of Education's* "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing desirable public policy."⁵⁶ Applying the three-prong *Wilder* and *Blessing* test—before the *Gonzaga* decision—the Sixth Circuit found the Medicaid Act provision enforceable under Section 1983.⁵⁷

⁵⁰ *Smith v. Robinson*, 468 U.S. 992 (1984).

⁵¹ *Id.* at 1009–13.

⁵² *Wright*, 479 U.S. at 424–25.

⁵³ *Id.*, 479 U.S. at 426. See also *Wilder*, 496 U.S. at 521–23 (existence of administrative appeal procedures did not foreclose private enforcement); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989) (existence of National Labor Relations Board procedures). Although the *National Sea Clammers* test was not an articulated basis for its decision, the *Gonzaga* Court also pointed to Congress' mandate to the secretary of education to "deal with violations" of Family Educational Rights and Privacy Act (FERPA) through the establishment of a review board and the secretary's subsequent adoption of complaint and investigation procedures as evidence of a "federal review mechanism" which distinguished *Gonzaga* from *Wright*. 503 U.S. at 289–90.

⁵⁴ This contention is based on Justice Scalia's concurring opinion in *Blessing*, 520 U.S. at 349, analogizing the class of persons benefitted by such federal-state cooperative programs to a third-party beneficiary under a contract. See also *Pharmaceutical Research Manufacturers of America v. Walsh*, 123 S. Ct. 1855, 1878 (2003) (Thomas, J., dissenting).

⁵⁵ *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), and *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002), construing the enforceability, by private parties, of the dental care and early and periodic screening, diagnosis, and treatment provisions of the Medicaid Act, respectively.

⁵⁶ *Westside Mothers*, 289 F.3d at 858 (quoting *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 669 (1985)).

⁵⁷ In *Barnes v. Gorman*, 536 U.S. 181 (2002), addressing whether the violation of two spending clause statutes—the Americans with Disabilities Act and the Rehabilitation Act—could give rise to punitive damages, Justice Scalia's opinion denied such relief on the ground that the spending clause statutes were analogous to contracts between the federal government and the state and that punitive damages were not traditionally available in contract action. Nevertheless, responding to the critique of the minority, Justice Scalia grudgingly wrote in footnote 2 that the Court "d[id] no[t] imply ... that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise."

To what degree can a federal regulation create rights enforceable under Section 1983? In *Wright* the Supreme Court ruled that a regulation implementing a rights-creating statute (defining “rent” as including a reasonable amount to cover housing authorities’ tenants utility costs) was a “law” that could be enforced under Section 1983.⁵⁸ In *Wilder* the Court turned to the definition of “reasonable” contained in Medicaid regulations to flesh out the statutory requirement that the “reasonable cost” of services be paid to providers, thereby blunting the argument that the statute was too vague or ambiguous to be enforced.⁵⁹ Drawing on these decisions and the somewhat analogous case of *Golden State Transit Corp. v. City of Los Angeles*, the Court generally believed that binding regulations could themselves create enforceable rights.⁶⁰ Suggesting that the private enforceability of a particular regulation depends on (1) the extent to which the regulation directly implements congressional intent and (2) whether Congress also intended the governing statute to create a “right” enforceable under Section 1983, recent appellate court rulings, however, question this view.

In *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court ruled that “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute.”⁶¹ Under this standard, “a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise, ... but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.”⁶²

Nevertheless, as Justice O’Connor commented in her dissent in *Wright*, “it is necessary to ask whether administrative regulations *alone* could create such a right. This is a troubling issue” Under the separation of powers doctrine, the creation of causes of action is the purview of Congress.⁶³ The seesaw debate in the Supreme Court has been the extent to which the enactment of Section 1983 evidenced the legislature’s intent generally to make actionable any deprivation resulting from the violation of “the constitution and laws.” The Court’s recent decision concerning the Title VI “disparate impact” regulations strongly suggests that private enforceability of federal regulations is directly dependent on congressional intent.

In *Alexander v. Sandoval* the Court considered whether, outside the Section 1983 context, “disparate impact” regulations issued by the federal government to enforce Title VI of the Civil Rights Act could create an implied right of action.⁶⁴ The Court held that they could not, reasoning as follows: (1) one section of the statute had been interpreted as banning only intentional discrimination; (2) a second section of the statute—allowing HUD to issue regulations to carry out the intent of Congress—went beyond the first section and banned “disparate impact” discrimination; hence (3) one could not infer an implied right of action to enforce the regulations even though the Court had earlier upheld the validity of the “disparate impact” regulations.⁶⁵ The Court reasoned that “language in a regulation may invoke a[n implied] private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”⁶⁶

⁵⁸ *Wright*, 479 U.S. at 420 n. 3.

⁵⁹ *Wilder*, 496 U.S. at 498. For a recent example of a court relying on regulations to find that a statute confers an enforceable right, see *Rolland v. Romney*, 318 F.3d 42, 50–51 (1st Cir. 2003) (Medicaid specialized services to mentally disabled nursing home residents).

⁶⁰ *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (holding that “[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision” could give rise to a “right” enforceable under Section 1983).

⁶¹ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 (1984).

⁶² *United States v. Mead*, 533 U.S. 218, 229 (2002).

⁶³ See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

⁶⁴ *Id.* at 275.

⁶⁵ *Id.* at 281, 284–85.

⁶⁶ *Alexander*, 532 U.S. at 291. Hence, while 42 U.S.C. § 2000d (“No person in the United States shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance [on the basis of race, color, or national origin]”) clearly confers a personal right to sue for intentional discrimination, 42 U.S.C. § 2000d-1 (federal agencies authorized “to effectuate [2000d] . . . by issuing rules, regulations, or orders . . .”) speaks only of the powers of agencies. According to *Sandoval*, “[i]t is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.” *Sandoval*, 532 U.S. at 285. This is because, “[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.* at 286–87 (citations omitted).

Sandoval was an implied private-right-of-action decision which essentially explored the contours of the first prong of the *Cort v. Ash* test.⁶⁷ However, the Supreme Court's decision in *Gonzaga* equated that prong with the first element of the *Wilder* and *Blessing* test for determining whether a statute created rights enforceable under Section 1983: "[T]he initial inquiry [in a Section 1983 case]—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied-right-of-action case, the express purpose of which is to determine whether or not a statute confers rights on a particular class of persons."⁶⁸

Not surprisingly, several appellate decisions anticipated the evolution of the Supreme Court majority's thinking on the enforceability of federal regulation, creating a split in circuits. On the one hand,

- the pre-*Sandoval/Gonzaga* decision in *Loschiavo v. City of Dearborn*⁶⁹ and
- the even earlier case of *Samuels v. District of Columbia*⁷⁰

interpreted Section 1983 in an expansive manner, holding that valid regulations were "laws" which could be enforced independent of whether the governing statute had actually addressed the subject of the regulation. Citing *Wright*, the *Loschiavo* court reasoned that since "federal regulations have the force of law, they likewise may create enforceable rights" if the regulations otherwise pass muster under the three-prong *Wilder* and *Blessing* test.

On the other hand, more recent decisions, rejecting the *Loschiavo* analysis, essentially hold that regulations cannot independently create rights and are enforceable under Section 1983 only to the extent that the regulations merely "flesh out" a statutory provision which itself creates the right.⁷¹ Thus, in *Harris v. James*, the Eleventh Circuit found that Medicaid regulations could not create a right to nonemergency transportation absent an explicit provision in the governing statute. Similarly, in *South Camden Citizens v. New Jersey Department of Environmental Protection*, the Third Circuit relied on *Sandoval* to reject the private enforceability of Title VI "disparate impact" regulations under Section 1983. Most recently the Ninth Circuit cited *Gonzaga* to buttress its holding in *Save Our Valley v. Sound Transit* that "disparate impact" regulations could not be enforced under Section 1983. The Ninth Circuit found that the *Wilder* and *Blessing* test need not be invoked in the regulatory context until after the plaintiff had first established that the governing statute had created an enforceable right.⁷²

In light of *Sandoval*, *Gonzaga*, and the recent trend of appellate court decisions, an advocate asserting a regulation-based right can be most confident of standing on firm ground only if the advocate can find that the governing statute, in *Gonzaga's* terms, grants an "unambiguously conferred right" which is "phrased in terms of the persons benefited."

In sum, after *Gonzaga*, a plaintiff seeking to enforce a federal statute using Section 1983 must be able to point to an "unambiguously conferred right" which is "phrased in terms of the persons benefited." However, once this hurdle is overcome, Section 1983 is presumed to provide a remedy, absent a "comprehensive enforcement mechanism" or other evidence to suggest that Congress withdrew this avenue.

2. "Persons" Under Section 1983

A Section 1983 action can be brought only against a person acting "under color of [state] law."⁷³ Liability lies against those "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."⁷⁴ The term "person" was originally thought, in *Monell v. New York City Department of Social*

⁶⁷ E.g., is plaintiff a member of the class benefitted by the statute? See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

⁶⁸ *Gonzaga*, 536 U.S. at 285 (citation omitted).

⁶⁹ *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994). See also *Kansas v. Robinson*, 295 F.3d 1183 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003), upholding the invocation of Section 1983 to enforce the "disparate impact" regulations against an Eleventh Amendment objection but without addressing the issue of the enforceability of federal regulations under Section 1983.

⁷⁰ *Samuels v. District of Columbia*, 770 F.2d 184, 188 (D.C. Cir. 1985).

⁷¹ *Harris v. James*, 127 F.3d 993, 1007–8, 1009 (11th Cir. 1997); *South Camden Citizens v. New Jersey Department of Environmental Protection*, 274 F.3d 771, 778 (3d Cir. 2001); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003).

⁷² The partial dissent in *Save Our Valley* contains an extensive analysis of how regulations can create "rights" and opines that such rights are enforceable under section 1983 if the regulation meets the *Gonzaga* standard of being written in "individually-focused, 'rights-creating language[.]'" 335 F.3d at 963. However, since the Title VI regulations at issue were focused on the person or agency regulated rather than the class benefitted, Judge Marsha S. Berzon believed that no enforceable right had been created.

⁷³ "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of Section 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

⁷⁴ *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (police misconduct). Note that federal officials acting under color of *federal law* are not subject to Section 1983. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

Services, to refer only to real human beings.⁷⁵ The concept was broadened to include cities and local governments whose custom, policy, or practice caused the deprivation.⁷⁶ In any event, when the defendant is a government employee doing the employee's job and acting under apparent government authority, the employee is probably a "state actor."⁷⁷ But when a private actor is involved, as is increasingly the case with the trend toward "privatization" of government services, the waters are somewhat murkier.

Under Color of State Law. State and local officials can interfere with federal rights in two distinct ways. By enforcing state laws or policies that conflict with federal law, state and local officials deprive their victims of federal rights. In such a case, the public officials obviously act under "color of state law."⁷⁸ State and local officials can also interfere with federally protected rights by misusing power entrusted to them under state law. In such a case, the official acts under color of state law only at times when the official is "clothed with the authority of state law."⁷⁹ Thus a sheriff who assaulted his wife did not act under color of state law even though he was a public official; his status as a public official was not the source of his power to act.⁸⁰ In a closer case, the Eleventh Circuit held that a city manager who investigated a citizen by traveling to another state with a city police officer to ask questions of various people did not act as a state actor because his conduct did not require state authority; a private citizen could have undertaken the same activity.⁸¹

Although misuse-of-power cases occasionally present difficult questions, most cases involve defendants who were able to inflict injury only because they were clothed with state authority. In such cases, defendants act under color of state law and may be sued under Section 1983. Moreover, defendants who enforce invalid state laws and regulations *always* act under color of state law.⁸² Thus the color-of-state-law requirement ordinarily poses no problem in litigation against state and local officials or against local governmental entities.

A more difficult question is when a private party is considered to be acting under color of state law so as to be suable under Section 1983.⁸³ Although closely related to the Fourteenth Amendment's state action requirement, Section 1983's color-of-state-law requirement is conceptually distinct. Conduct that is state action under the Fourteenth Amendment is always action under color of state law for purposes of Section 1983.⁸⁴ However, conduct under color of state law may not

⁷⁵ *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

⁷⁶ The issue of what constitutes a "custom, policy or practice" actionable under Section 1983 is discussed below.

⁷⁷ Note, however, that a government employee or subcontractor such as a public defender, whose fundamental loyalties are owed to the criminal defendant and accordingly adverse to the government, is not a "state actor" whose alleged malpractice is actionable under Section 1983 when the employee's or subcontractor's exercise of professional judgment results in a deprivation of constitutional rights. *Polk County v. Dodson*, 454 U.S. 312 (1981). Cf. *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003) (chief public defender is a state actor in devising administrative procedures governing the allocation of lawyer resources to defendants based on results of lie detector tests.) This exception is very narrowly construed. See *West v. Atkins*, 487 U.S. 42 (1988) (a contract prison doctor who owed a professional obligation to his patient did not have interests which were necessarily so adverse to the government as to preclude a Section 1983 claim).

⁷⁸ Where state officials act in violation of federal law, the official is said to have been stripped of official authority for purposes of the Eleventh Amendment by acting illegally but nevertheless considered to be engaged in "state action" for purposes of the Fourteenth Amendment if the action was taken "under color" of the apparent authority conferred by official position. *Home Telephone and Telegraph v. City of Los Angeles*, 227 U.S. 278 (1913).

⁷⁹ *Delcambre v. Delcambre*, 635 F.2d 407, 408 (5th Cir. 1981) (per curiam).

⁸⁰ *Id.*

⁸¹ *Morgan v. Tice*, 862 F.2d 1495 (11th Cir. 1989).

⁸² *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1982). Both an official who misuses power in violation of federal law and an official who enforces a state law violating federal law act under color of law. However, in the first scenario, only the official who misused power, and not the agency which employs her, is liable since state or local governments are liable only if the deprivation is the result of the agency's custom, policy, or practice. *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). In the second situation, state law constitutes the "policy."

⁸³ In *Brentwood Academy v. Tennessee Secondary Schools Athletic Association*, 531 U.S. 288, 295–96 (2001), the Supreme Court acknowledged the elusiveness of a comprehensive rule governing "state action": "From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."

⁸⁴ *Lugar*, 457 U.S. at 930–32, 935.

constitute state action under the Fourteenth Amendment.⁸⁵ Since Section 1983 claims against private actors ordinarily involve a claimed deprivation of a constitutional right flowing from the Fourteenth Amendment, establishing state action under the amendment is almost always necessary to prevail under Section 1983. Thus the focus of this section is Fourteenth Amendment state action cases.

Private Parties as State Actors. Since the early 1970s, the Supreme Court has substantially narrowed the range of private conduct that constitutes state action. In determining whether a private party engaged in “state action,” a court must weigh “whether the claimed . . . deprivation resulted from the exercise of a right or privilege having its source in state authority” and “whether the private party charged with the deprivation could be described in all fairness as a state actor.”⁸⁶ In doing so, a court looks at (1) the extent to which the actor relies on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function, and (3) whether the injury caused was aggravated in a unique way by the incidents of governmental authority.⁸⁷ Since none of these factors is particularly decisive, a review of some obvious pigeonholes seems appropriate. Generally, a deprivation of federal rights by a private party may constitute “state action” if the government (1) delegates its authority to the private actor, (2) participates in joint activity to a degree that the actions of one party can be attributed to the other, (3) creates the legal framework necessary to carry out the private action, (4) compels the private party to act in a certain way, (5) knowingly accepts the benefits of an unconstitutional practice, (6) allows the private entity to carry out a traditional “state function,” or (7) creates a “special relationship” with the plaintiff.

Delegation of a Traditional State Function. Delegation of a state responsibility to a private party can make the party a state actor, particularly if the function delegated is one traditionally performed by the state. This principle is illustrated by *West v. Atkins*.⁸⁸ The case closed the door on an agency’s claim that no state action was involved when the negligence of a private doctor, under contract to provide care for inmates, injured the plaintiff in violation of the prison’s constitutional duty to avoid “deliberate indifference” to the medical needs of those in its custody.⁸⁹

Joint Activity and “Pervasive Entwinement.” Joint activity by a private party and a government agent can also transform the private party into a state actor where the purpose of the collusion is to violate the federal rights of the plaintiff. This was the result in *Addicks v. S. H. Kress Co.*, which involved a conspiracy between a “dime store” and local deputy sheriffs to prevent the integration of a southern lunch counter.⁹⁰ Similarly, in *Dennis v. Sparks*, the Supreme Court held that private parties who conspired with a judge to fix a case acted under color of law.⁹¹ A nominally private entity controlled by the state is also a state actor.⁹²

However, in the absence of a conspiracy or governmental control, the applicability of the joint activity test to find state action is problematic, as illustrated by *National Collegiate Athletic Association v. Tarkanian*.⁹³ A private membership body of public and private colleges regulating intercollegiate athletics, the National Collegiate Athletic Association (NCAA) determined that a member state university had violated NCAA rules and required that the school suspend coach Tarkanian. When the school complied, the coach sued under Section 1983, claiming that his firing violated due process. The Court held that the school, a state actor, and the NCAA, a private party, were not joint participants in the suspension of the coach because the school was free to cancel its agreement with the NCAA, the disciplinary function had not been

⁸⁵ *Id.* at 935 n.18.

⁸⁶ *Lugar*, 457 U.S. at 937. That a court, in *Lugar*, issued a warrant authorizing a private party to attach plaintiff’s property converted the subsequent seizure—alleged to have been without due process—into “state action.”

⁸⁷ *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 624–25 (1991), holding that a private attorney exercising peremptory challenges in a civil jury trial to excuse African Americans from the panel was a “state actor” since the peremptory challenge could exist only in the judicial context.

⁸⁸ *West v. Atkins*, 487 U.S. 42 (1988).

⁸⁹ Another example of delegation is the privatization of the prison system. In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court assumed state action in ruling that private prison guards were not entitled to qualified immunity from liability for their unconstitutional practices.

⁹⁰ *Addicks v. S. H. Kress Co.*, 398 U.S. 144 (1970).

⁹¹ *Dennis v. Sparks*, 449 U.S. 24, 28–29 (1980).

⁹² *Commonwealth of Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957) (private college administered by a city board a “state actor” in refusing to admit African Americans.)

⁹³ *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988).

delegated to the NCAA by the state, and the NCAA was actually acting on behalf of all other NCAA members *against* the efforts of the state to forestall the suspension of its most successful coach.

Nevertheless, in *Brentwood Academy v. Tennessee School Athletic Association*, a case whose facts seem very much to parallel *Tarkanian*, the Court did find state action.⁹⁴ In *Brentwood Academy* a private association which regulated high school sports throughout the state was held to be a state actor in light of the fact that the overwhelming majority of its members were public schools, the association received some public funds from dues and game proceeds, its officers were drawn from public schools, association employees participated in the state retirement fund, and the association was seen to regulate sports activity in lieu of the state board of education. The Court stated that the “nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.”⁹⁵

Governmental Creation of a Legal or Procedural Framework. A private party may be engaged in “state action” if the act which deprived federal rights could not have occurred but for the existence of a governmental framework requiring government approval or action. This category first emerged in *North Georgia Finishing v. Di-Chemical*, where the Supreme Court found state action in a private party’s invocation of a court-ordered attachment having failed to afford due process to the debtor.⁹⁶ Similarly, in *Lugar v. Edmondson Oil Co.*, the Court held that a creditor who invoked prejudgment attachment remedies *requiring* the participation of a court clerk and a sheriff acted under color of state law.⁹⁷ By contrast, in *Flagg Brothers v. Brooks*, involving a prejudgment attachment authorized by state law but *not requiring* the intervention of a court, the Court found no state action.⁹⁸ In *Edmondson v. Leesville Concrete Co.* the Court found that a private attorney using peremptory challenges in a jury trial in a racially biased manner was a “state actor” since his act—use of peremptory challenges—could exist only in the judicial context and with the approval of a state judge.⁹⁹ The rule of these cases is that a private party becomes a state actor if the party uses a state procedure requiring some state intervention.

However, in *American Manufacturers Mutual Insurance Co. v. Sullivan*, the Supreme Court found that a private workers’ compensation insurer, by invoking a state “utilization review” of certain medical costs resulting in the withholding of payments without prior notice to the worker, did not thereby become a state actor.¹⁰⁰ The purpose of a utilization review is to assess the necessity for a particular procedure to determine whether the costs should be borne by the workers’ compensation carrier. In *Sullivan*, even if the state, by providing a utilization review procedure, could be assumed to have “subtly encouraged” insurers to withhold payments pending the review, invocation of the procedure was not required or coerced by the state.

Because of the move toward privatization of formerly state programs, a close look at *Sullivan*’s analysis is warranted. The Court began by identifying the specific conduct complained of—the insurance company’s withholding of payments. It then focused on the state’s role to determine whether “there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the [private party] may be fairly treated as that of the State itself.”¹⁰¹ Having understood that the state’s role was simply to accept the insurer’s request for a utilization review, checking the form for accuracy, and forwarding it to a private panel of health care providers for a decision, the Court ruled against the plaintiffs; the Court described the “State’s decision to allow insurers to withhold payments” as “state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary.”¹⁰²

If the insurer’s decision to withhold payments was not state action, the Court nevertheless recognized that the utilization review panel’s subsequent *affirmative decision* to uphold or reverse the insurance company *would be* state action because the panel possessed authority delegated to it by state statute: “While the decision of a [utilization review organi-

⁹⁴ *Brentwood Academy v. Tennessee School Athletic Association*, 531 U.S. 288 (2001).

⁹⁵ *Id.* at 298.

⁹⁶ *North Georgia Finishing v. Di-Chem Inc.*, 419 U.S. 601 (1975).

⁹⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. at 934, 940–42 (1982). The creditor’s action is not state action if it is contrary to state law. *Id.* at 940.

⁹⁸ *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978).

⁹⁹ *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

¹⁰⁰ *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999).

¹⁰¹ *Id.* at 51–52 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

¹⁰² *Id.* at 53.

zation], like any judicial official, may properly be considered state action, a private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials,' . . . cannot."¹⁰³

In the context of state-mandated procedures or programs carried out by private parties, the distinction between private actions depends on (1) whether the state plays an active role in furthering the act which allegedly caused the deprivation of federal rights and (2) the degree to which the procedure invoked is—like the formal court system in *Edmondson*—a core governmental function or institution.¹⁰⁴ In short, does the state affirmatively further the action or does it merely authorize it, and if the state merely provides a forum, how important is the procedure to the functioning of the state? These cases provide a convenient segue to the next state action test—governmental compulsion.

Governmental Compulsion or Significant Encouragement to Act in a Particular Way. One of the most important Section 1983 issues for legal aid advocates is the degree to which one can imply “state action” from the defendant having received government funding or being extensively regulated by the state. Government regulation generally does not make a state actor of the recipient or the regulated party unless one can show such a close connection between the government and the act complained of that the action taken “may be fairly treated as that of the State itself.”¹⁰⁵ A private landlord participating in the Section 8 program is a “state actor” while taking actions required by federal regulations but is only a private actor if the landlord unilaterally locks out a tenant in violation of those regulations. The act of forcible eviction is analytically an expression of the landlord's private will and not compelled by government fiat.

Several Supreme Court decisions accordingly confirm that, absent delegation, joint activity, or a state-created framework, “state action” is rarely found absent compulsion or significant encouragement from the government on the private entity to act in a particular way. For instance, in *Jackson*, a highly regulated utility was not a state actor when, without prior notice to its customer, it terminated her power for nonpayment of a utility bill. The Court saw no “nexus” between government regulation and the company's action sufficient to implicate due process since the decision to cut off power was prompted by economic concerns and was made by the company with little relation to the fact that its business was highly regulated.¹⁰⁶

A similar conclusion was reached in *Blum v. Yaretsky*, where a nursing home which received Medicaid funding decided to discharge particular patients without giving them a hearing.¹⁰⁷ Since Medicaid regulations did not specifically require any particular level of care, the nursing home's decision could not be imputed to the state. Indirect government involvement resulting from the regulatory requirement that the state be notified of any change did not alter this conclusion. The Court wrote: “A State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹⁰⁸

By the same token, in *San Francisco Arts and Athletics Inc. v. U.S. Olympic Committee*, the Court held that the United States Olympic Committee's refusal to license the use of the word “Olympic” was not state action even though Congress granted it the exclusive right to license the use of the word.¹⁰⁹ Once again the Court, distinguishing authorization from compulsion, found the former insufficient to establish state action.¹¹⁰

Most recently, as discussed above, the Court held in *American Manufacturers* that a private workers' compensation insurer, by invoking a state “utilization review” of certain medical costs resulting in the withholding of payments without prior notice to the worker, did not thereby become a state actor since its actions were not imposed or sanctioned by the state.¹¹¹

¹⁰³ *Id.* at 54 (quoting *Tulsa Professional Collection Service v. Pope*, 485 U.S. 478, 486 (1988)).

¹⁰⁴ *Edmondson*, 500 U.S. at 614.

¹⁰⁵ *Jackson v. Metropolitan Edison*, 419 U.S. 345, 351 (1974).

¹⁰⁶ *Cf. Memphis Light, Gas and Water Division v. Craft*, 419 U.S. 565 (1975), where a municipally owned utility was required to afford customers due process before terminating utilities under a statute requiring utility shutoffs to be only for “cause.”

¹⁰⁷ *Blum v. Yaretsky*, 457 U.S. 991 (1982).

¹⁰⁸ *Id.* at 1004.

¹⁰⁹ *San Francisco Arts and Athletics Inc. v. United States Olympic Committee*, 483 U.S. 522, 542–47 (1987).

¹¹⁰ *Id.* at 546–47. *See also Carlin Communication v. Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291, 1295, 1297 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (finding that a telephone company's decision to terminate an adults-only message service was state action because it was the product of state coercion but holding also that the company's later decision to bar all adult entertainment services was not state action since it was not coerced).

¹¹¹ *American Manufacturers*, 526 U.S. at 53–54.

Nor does governmental funding give rise to “state action” absent state coercion or significant encouragement of the act causing the deprivation. Thus, in *Blum*, the Court rejected the contention that extensive public funding converted the nursing home’s decision to lower the level of care into state action in violation of the Medicaid Act. In essence, there was no cause-and-effect relationship between public funding and the nursing home’s allegedly unlawful act.

This issue was also addressed in *Rendell-Baker v. Kohn*, which involved the termination of teachers and counselors critical of management by a private school primarily dependent on federal funding.¹¹² In order to ensure that school staff met certain minimum requirements, state regulations did require the government to be notified whenever the school hired or dismissed its counseling staff. Nevertheless, the Court found no state action. First, “the decisions to discharge the petitioners were not compelled or even influenced by any state regulation.” Second, the “[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”¹¹³

The “Symbiotic Relationship” Test. The Supreme Court applied several other tests to find state action, although their application now appears limited to the facts presented in the original cases. The first of these is the “symbiotic relationship” test first broached in *Burton v. Wilmington Parking Authority*.¹¹⁴ In *Burton* a city agency leased facilities to a restaurant that engaged in racial discrimination. Because the city gained parking revenue from the restaurant’s operation, and the restaurant gained a good location and tax benefits from the city, the Court held that the restaurant acted under color of state law, and therefore violated the Fourteenth Amendment, when it refused to serve black patrons.¹¹⁵

The Court began narrowing *Burton* in *Moose Lodge No. 107 v. Irvis* and held that the grant of a state liquor license did not convert the discriminatory conduct of the licensee into state action.¹¹⁶ The Court specifically rejected the plaintiff’s claim of a *Burton* symbiotic relationship even though the license was of great value to the licensee and generated revenue for the state.¹¹⁷ The benefit to the state of liquor license revenues was only remotely attributable, if at all, to the private party’s discriminatory conduct.

The Court further constricted *Burton* in *Rendell-Baker v. Kohn*.¹¹⁸ Here the Court held that a private school that depended almost exclusively on government funding, that was extensively regulated, and that contracted with governmental agencies to provide educational services did not act under color of state law when it fired an employee.¹¹⁹ The Court rejected the claim of a symbiotic relationship between the state and the school on the ground that the state neither owned the school property nor benefitted from the firing.¹²⁰

A plaintiff claiming state action on the basis of a “symbiotic relationship” between a private party and state or local government must show that the government derives a financial benefit that can be specifically attributed to the challenged conduct. In *Burton* the benefit to the government was the additional revenue resulting from the increased patronage given to a whites-only restaurant. By contrast, the government received no specific benefit from the club’s discriminatory conduct in *Moose Lodge* or the *Rendell-Baker* school’s decision to fire a schoolteacher. Only the combination of a symbiotic relationship and a specific financial benefit to the government from the conduct at issue creates state action out of private conduct. For these reasons, *Burton* is best regarded as dead law.

¹¹²*Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

¹¹³*Id.*, 457 U.S. at 840–41. To be sure of finding state action in these types of circumstances, advocates should ask whether the private actor is standing in for the government, or involved in what amounts to “joint action,” because it either could not take place without government involvement or is compelled by government policy.

¹¹⁴*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

¹¹⁵*Id.* at 722–26.

¹¹⁶*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–78 (1972).

¹¹⁷*Id.* at 175–77.

¹¹⁸*Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

¹¹⁹*Id.* at 837–43.

¹²⁰*Id.* at 842–43.

The “Public Function” Test. The public-function doctrine is another moribund test for state action and originated with

- *Marsh v. Alabama*¹²¹ and
- the *White Primary Cases*.¹²²

Read broadly, they suggested that certain responsibilities were so quintessentially governmental that private parties who performed them necessarily acted under color of state law. Thus the private landowner who established the company town in *Marsh* performed many of the public functions traditionally associated with local government; like a local government, it could not bar handbilling on its streets.¹²³ In the *White Primary Cases* private organizations that barred black voters from participating in primary elections performed a traditionally public function in holding an election, thereby acting under color of law.¹²⁴

That the public-function doctrine survives in such a broad form is doubtful. In *Hudgens v. National Labor Relations Board* the Supreme Court held that a shopping center was not a First Amendment forum, the Court reasoning that the shopping center was not the functional equivalent of a company town.¹²⁵ In so ruling, the Court overruled *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*.¹²⁶ By rigorously searching for the functional equivalent of a company town, the Court may have confined *Marsh* to its facts; the only contemporary analogue to a company town may be a migrant labor camp. Similarly the *White Primary Cases* rationale probably retains force only because of the constitutionally protected right to vote and the guarantee of a “republican form of government.”¹²⁷

Jackson v. Metropolitan Edison Co. set the doctrinal foundation for further narrowing the public-function doctrine.¹²⁸ Rejecting the claim that the provision of electricity was a public function, the Court held that a public function must be one that traditionally was “the exclusive prerogative of the state.”¹²⁹ The Court has since found the following not to be public functions:

- enforcement of a warehouseman’s lien,¹³⁰
- education of children with special needs,¹³¹
- the operation of a nursing home,¹³²
- control of the word “Olympic,”¹³³ and
- establishment of disciplinary standards for intercollegiate athletics.¹³⁴

The atrophied public-function doctrine now can probably be collapsed within the “delegation of traditional state function” test discussed above.

The “Special Relationship” Test. The “special relationship” test differs somewhat from the previous six methods for finding “state action” by a private party. Unlike the preceding tests, which seek to use Section 1983 to sue *private parties* as state actors, the special relationship test seeks to hold the *government* liable for the acts of a private party. Section 1983 can be

¹²¹*Marsh v. Alabama*, 326 U.S. 501 (1946) (state could not enforce trespass laws to bar Jehovah’s witness from distributing literature in company town).

¹²²*Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932) (collectively the *White Primary Cases*).

¹²³*Marsh*, 326 U.S. at 505–10.

¹²⁴The *White Primary Cases* may be better understood as finding circumstantial evidence of state-sponsored intentional racial discrimination from state regulation of every aspect of primary elections but voter eligibility.

¹²⁵*Hudgens v. National Labor Relations Board*, 424 U.S. 507, 512–21 (1976).

¹²⁶*Id.* at 518, rev’g *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

¹²⁷U.S. Const., amends. XV, XIX, XXIV, XXVI; U.S. Const. art. 4, § 4. See also *Bush v. Gore*, 531 U.S. 98, 104–5 (2000).

¹²⁸*Jackson*, 419 U.S. 345.

¹²⁹*Id.* at 353.

¹³⁰*Flagg Brothers*, 436 U.S. at 155–66.

¹³¹*Rendall-Baker*, 457 U.S. at 837–43.

¹³²*Blum*, 457 U.S. at 1002–12.

¹³³*San Francisco Arts*, 483 U.S. at 542–47.

¹³⁴*Tarkanian*, 488 U.S. at 194.

used to sue a government agency for injuries caused by a nongovernmental third party *if*, as a result of the government’s “special relationship” with the victims, the latter are put in a position severely hampering their ability to protect themselves. Such a relationship most clearly exists when a victim is incarcerated in jail or prison or committed in state institutions.¹³⁵ On occasion such a relationship is found where government action places the plaintiff in such obviously dangerous circumstances as to make the government responsible for the plaintiff’s well-being.¹³⁶

A noncustodial “special relationship” is found only in rare circumstances. Thus, in the case which created this standard, *DeShaney v. Winnebago County Department of Social Services*, the victim was a child who had been reported to the county as having been repeatedly abused by his father, the custodial parent.¹³⁷ Despite these reports and a subsequent investigation, the county did not remove the child from his home. After a severe beating left the child permanently injured, the county was sued by the noncustodial parent, who contended that the failure to take action deprived the child of substantive due process rights. The Court found that, even though the county knew of the potential harm to the victim and continued to monitor his situation, this did not create a “special relationship” with the county sufficient to make the government liable:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.¹³⁸

An arrest, incarceration, involuntary commitment, or a foster care placement resulting from a dependency proceeding would create a “special relationship” necessary to establish liability.

Collectively the modern state action cases suggest the following rules for analyzing whether a private party’s conduct is state action: (1) Performance of a traditional public function delegated by the government is state action. (2) Joint participation with the government may be state action, depending on the degree of government involvement. (3) A private party invoking a necessary legal framework may be engaged in state action. (4) Governmental compulsion or significant governmental encouragement makes private conduct state action, but governmental authorization, regulation, and funding do not. (5) Where the government has a “special relationship” with the plaintiff injured by a private party, the government may be liable for the private party’s actions if the private party failed to comply with a duty of care owed to the plaintiff. Less frequently, state action may be present if (6) the government knowingly accepts the benefits of an unconstitutional practice or (7) the private actor is performing a traditional state function.

When Government Can be a “Person” if the Deprivation of Federal Rights Stems from a Government “Policy.” Legal aid advocates regularly face the problem of individually vindictive or incompetent government workers whose actions deprive clients of the level of public assistance or other benefit to which they are entitled. These actions are often taken by agency employees in violation of that agency’s own stated policies. In such cases, as more fully discussed in Chapter 8 of this MANUAL, only the *employee* is liable in a Section 1983 claim. Even if the employee’s acts result in a violation of federal constitutional, statutory, or regulatory rights, they may not give rise to *agency* liability under Section 1983. *Agency* liability must be founded on a deprivation caused by the institution’s “custom, policy or practice” and not as the result of aberrant behavior by a rogue employee. This rule stems from Section 1983’s role as an exception to the common-law rule that government should be immune from suit.

¹³⁵ See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994) (alluding to government’s affirmative duty to protect those in custody from injury caused by a third party).

¹³⁶ An example of a decision finding such a “special relationship” outside the typical custodial situation is *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). In this case a woman formerly held in custody by a highway patrolman was raped after being released in a high-crime area without a car at 2:30 a.m.

¹³⁷ *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

¹³⁸ *Id.* at 199–200 (citations omitted).

This rule was established by *Monell*.¹³⁹ In holding that a municipality could be a “person” for purposes of Section 1983, *Monell* limited the scope of the agency’s liability only to instances where the deprivation resulted from that agency’s custom, policy, or practice.¹⁴⁰ *Monell* established the principle that government should be liable only for actions for which it is directly responsible. This rule gives a plaintiff two basic options. The plaintiff may sue the defendant employee in the employee’s personal or official capacity, or both. Or, assuming the defendant is not a State and immune under the Eleventh Amendment from suit in federal court, the plaintiff may name as an additional defendant—or even the sole defendant—either the agency itself, or its titular head, who is sued in the titular head’s official capacity.¹⁴¹ Naming the entity or its head is particularly important where injunctive relief is sought binding the entire agency. An order entered against the agency head in the agency head’s official capacity binds any successor officer.

3. Due Process Claims and Section 1983

In relevant part, the Fourteenth Amendment prohibits any state from depriving “any person of life, liberty, or property, without due process of law,” and claims under this provision have been a staple of Section 1983 legal services practice for many years. Procedural due process addresses the right to notice and hearing before (or after) a particular deprivation may take place. Substantive due process confronts governmental deprivation of life, liberty, or property stemming from particularly outrageous governmental actions. The Supreme Court has established a framework for the use of Section 1983 to raise claims founded on alleged deprivations of due process, beginning with an analysis of interests protected by due process.

Establishing a “Property” Interest. In *Board of Regents v. Roth* the Supreme Court defined the property interest protected by the Fourteenth Amendment as a “legitimate claim of entitlement” to the item or benefit in question. Such “entitlements” are “created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”¹⁴²

Plaintiff Roth, a teacher who had lost his job, was held not to have been terminated without due process because, lacking tenure, he “surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require ... giv[ing] him a hearing ...”¹⁴³ In *Perry v. Sinderman* the companion case to *Roth*, the Court stated that an untenured teacher might nevertheless have a property interest if he could show “such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing.”¹⁴⁴ Although “a mere ‘expectancy’” is not protected by due process, the aggrieved party “must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of the ‘policies and practices of the institution.’”¹⁴⁵

Because of Congress’ reluctance to grant federal entitlements as evidenced by the increasing use of “block grant” distribution of federal largess, advocates seeking to establish a property interest in certain federally funded benefits such as Temporary Assistance for Needy Families (TANF) must look for “rules or mutual understandings” under state or local statutes or ordinances under which the client may claim an entitlement protected from deprivation by the federal due

¹³⁹ *Monell*, 436 U.S. at 690–92.

¹⁴⁰ Chapter 8 of this MANUAL discusses municipal or agency liability and the parameters of a “custom, policy, or practice” for purposes of Section 1983.

¹⁴¹ *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against an official but rather in a suit against the official’s office.”).

¹⁴² *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¹⁴³ *Id.* at 578.

¹⁴⁴ *Perry v. Sinderman*, 408 U.S. 593, 602 (1972).

¹⁴⁵ *Id.* at 602–3 (citation omitted). Some cases held that the expectation of receiving a benefit could be a property interest justifying a due process claim when the state deprived the potential plaintiff of a procedure to vindicate that expectation. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a property interest was found in the expectation that the state would have a procedure for determining a plaintiff’s disability discrimination claim. *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982), held that applicants on a Section 8 waiting list had a property interest in the fair operation of a subsidized housing project’s application and tenant selection procedures. *But see, e.g., Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984). *Eidson* does not seem consistent with *Logan v. Zimmerman Brush Co.* Note, however, that in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), the court found that workers’ compensation recipients did not have a property interest in medical expense payments until the reasonableness and necessity of the expense had been established.

process clause. For example, many state Aid to Families with Dependent Children (AFDC) statutes were amended to conform to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Yet, despite the addition of time limits or “welfare to work” requirements, the state statute may still mandate that an applicant receive a given amount of benefits so long as basic eligibility is met, thereby creating a “legitimate claim of entitlement” protected by the due process clause.¹⁴⁶

Establishing a “Liberty” Interest. Outside a custodial setting, deprivation of liberty interests usually present substantive, rather than procedural, due process issues. Such liberty interests were described in *Roth* as follows:

Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.¹⁴⁷

Fundamental liberty interests, however, are limited to those which are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed,” or are “deeply rooted in this Nation’s history and tradition.”¹⁴⁸ Assertions of the liberty interest should not be neglected by legal aid advocates. For example, restrictive housing authority roommate policies which hamper the right to live with relatives can pose a deprivation of a liberty interest.¹⁴⁹

Gauging the Adequacy of the Procedures Used. Procedural due process generally requires that governmental deprivation of life, liberty, or property be accompanied by notice and hearing. Pretermination hearings are required where the threatened property right consists of need-based benefits conferred because the recipient or applicant “may be deprive[d] of the very means by which to live . . .”¹⁵⁰ The test for determining the extent of the procedures required in a given case, including the right to a predeprivation hearing, is to balance three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁵¹

Procedural due process continues to serve as a potential vehicle for remedying action notices that fail to explain adequately the basis for a benefit denial, termination, or suspension or the imposition of sanctions. Clients on the administrative agency treadmill are often faced with hearing officers who fail to take evidence or gather evidence outside hearing through *ex parte* phone calls or who do not adequately explain their reasoning when rendering a decision. In the new world of devolution, health maintenance organizations with Medicaid enrollees may not offer the opportunity for a fair hearing, for example, to contest the denial of a request for a particular procedure or treatment whose only rationale is the financial bottom line.

¹⁴⁶See *State of West Virginia ex rel. K.M. v. West Virginia Department of Health and Human Resources*, 575 S.E.2d 393 (W.Va. 2002); *Weston v. Cassata*, 37 P.3d 469 (Colo. App. 2001).

¹⁴⁷*Roth*, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

¹⁴⁸*Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986), overruled by *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹⁴⁹See *Moore*, 431 U.S. at 503.

¹⁵⁰*Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (Aid to Families with Dependent Children (AFDC) benefits); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (benefits under Aid to the Totally Disabled Program, the California precursor to Supplemental Security Insurance (SSI)).

¹⁵¹*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *City of Los Angeles v. David*, 123 S. Ct. 1895 (2003). Applying this test in the social security context, the *Eldridge* Court ruled that a pretermination hearing was not necessary. First, the private interest in receiving insurance-based benefits (Social Security Disability Insurance) was said to be not as great as the interest in receiving need-based benefits (such as SSI or AFDC). Second, the risk of an erroneous deprivation was allayed by the Social Security Administration’s reliance on objective medical reports and records in determining whether one was no longer disabled, a risk which would not be significantly affected by delaying the termination of benefits until after an administrative hearing had been conducted. Third, given the government’s interest in not paying those who are no longer disabled and the Social Security Administration’s reliance on medical documentation rather than testimony, the Court found that this interest outweighed the benefits of requiring pretermination hearings.

Redressing a Nonsystemic, Random, and Unintentional Deprivation of a Life, Liberty, or Property Interest. With the breadth of the due process clause, any government action which deprives a party of life, liberty, or property is conceivably actionable under Section 1983. The Supreme Court, however, narrowed the ability of plaintiffs to package a tort claim in the trappings of due process. *Parratt v. Taylor* held that a Section 1983 remedy was not available to an inmate who sued a prison for its negligent loss of a hobby kit mailed to him.¹⁵² The Court ruled that the prisoner was not allowed to sue for the deprivation of procedural due process if an alternative postdeprivation state damages remedy sounding in tort was available. Due process was not implicated because the state could not be expected to anticipate a random and unpredictable loss of property.¹⁵³

By contrast, in *Zinermon v. Burch*, involving a plaintiff who had voluntarily committed himself to a state mental institution but later sued arguing that he lacked the capacity to have consented to his commitment, the government's failure to provide a precommitment hearing required by state law, the Court ruled, *is* actionable under Section 1983.¹⁵⁴ Unlike the unpredictable and random loss in *Parratt*, the Court found that depriving the liberty of a person facing commitment was "predictable and systemic" in the sense that the danger of an unwarranted loss of liberty was evident in all cases which posed the potential for commitment. Hence the possibility of postcommitment relief—a tort suit for damages or habeas corpus—was not an adequate postdeprivation remedy which could substitute for the failure to hold a precommitment hearing.

These principles can be applied to a legal services practice. Assume that a tenant has sought your help after having been evicted from her apartment following a nuisance abatement proceeding, notice of which was given only to the building owner and not to the tenants. In response to your due process claim, the city relies on *Parratt* to argue that your client's only remedy is damages and that since no administrative claim was made to the city, the suit should be dismissed. *Zinermon* would come to your rescue since the deprivation of a tenancy without due process is the inevitable and systemic result of a nuisance abatement proceeding in which notice is never given affected tenants. And since the exhaustion of state remedies is not required for Section 1983 claims, this suit, despite the failure to file an administrative claim, should survive even if the action were brought in state court.

Substantive Due Process Claims. The typical substantive due process claim brought under Section 1983 seeks redress for government acts violating "personal immunities" which are "fundamental," that is, "implicit in the concept of ordered liberty."¹⁵⁵ Rights protected at least in part by the due process clause include liberty interests not explicitly set forth in the Constitution; for example,

- the right to privacy¹⁵⁶ and
- the right to live with one's family.

A substantive due process claim may also be based on deprivations caused by the government's failure to train, supervise, or adequately hire its employees. As previously discussed, such claims require a showing that the government's inaction was a custom, policy, or practice and that the government's inaction or inadequate action caused the injuries. Since *City of Canton v. Harris*, involving failure to identify and adequately treat a prisoner's medical condition, the Court has

¹⁵²*Parratt v. Taylor*, 451 U.S. 527 (1981).

¹⁵³The Supreme Court later ruled that Section 1983 was unavailable to redress an intentional property loss framed as a deprivation of due process. *Hudson v. Palmer*, 468 U.S. 517 (1984) (intentional but random destruction of property during prison cell search). Still later the Court held that there could *never* be a negligent random deprivation of due process even if state law provided *no* postdeprivation remedy. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). In these cases injured prisoners were denied a federal remedy even though they could not sue the prison for negligence under state law.

¹⁵⁴*Zinermon v. Burch*, 494 U.S. 113 (1990). *Zinermon* also held that the *Parratt v. Taylor* rule applied to deprivations of liberty as well as property interests but could not be used to bar claims based on the deprivation of other substantive constitutional rights.

¹⁵⁵See *Rochin v. California*, 342 U.S. 165, 169, 175 (1952), the prototypical "police brutality" case in which the violations were said to have "shock[ed] the conscience."

¹⁵⁶See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose to have or not have an abortion); *Moore v. City of East Cleveland*, 431 U.S. at 494 (right to live with family members); *Cruzan v. Director of Missouri Department of Health*, 497 U.S. 261 (1990) (right to refuse medical treatment). This survey by no means exhausts the scope of the interests protected by substantive due process.

basically required a plaintiff to show that the type of incident which resulted in plaintiff's injury was so recurring as to tend to show that the government's inaction was conscious or deliberate, amounting to "deliberate indifference" to the consequences of its inaction.¹⁵⁷

Substantive due process claims involving incarcerated prisoners are often hybrid claims based on both the Fourteenth Amendment and another substantive constitutional right. While *City of Canton v. Harris* was based solely on due process, other cases, particularly those involving injuries to prisoners caused by other prisoners, were couched as a deprivation of the Eighth Amendment bar on cruel and unusual punishment.¹⁵⁸ In both cases, the Supreme Court applied the "deliberate indifference" standard, although the requisite showing of government knowledge of the danger appeared somewhat higher when third-party-caused injuries were involved. Moreover, the Supreme Court recently also applied the "deliberate indifference" standard to cases outside the prison context, involving a public school's failure to do anything to curb student-on-student sexual harassment.¹⁵⁹ Applying the same standard where social service or housing benefits are denied as a result of government's "deliberate indifference" to the consequences of its failure to train or supervise its staff adequately is hardly far-fetched.

B. ADMINISTRATIVE PROCEDURE ACT

Although some federal statutes that create rights include their own mechanisms for judicial review of agency action affecting those rights, most are silent with respect to judicial review.

1. Suit for Judicial Review

In the APA, Congress expressly granted a private right of action to enforce federal rights against federal agencies.¹⁶⁰ Because 5 U.S.C. § 702 creates this right of action, no private right of action against the federal government needs to be implied.

With many exceptions, the APA generally requires federal agencies to act through adjudication or rule making or both. Typical challenges to agency action contend that the agency misinterpreted its governing statute or made erroneous conclusions of law; that the agency's rules or finding of fact were arbitrary or capricious; or that the agency used improper procedures in its decision making. As discussed below, due to the courts' substantial deference to an agency's interpretation of its governing statute and to its findings of fact, procedural challenges to an agency's decision-making process may offer greater prospects for success.¹⁶¹ State APAs similarly should not be overlooked as a potentially powerful tool against actions taken by state governments which adversely affect your clients. However, at least two significant hurdles to judicial review must first be overcome: assertions that agency action is unreviewable and that the challenge was not filed at the appropriate time.

2. Unreviewable Agency Discretion

Although the APA may provide a right to sue, agency action may escape judicial review either under 5 U.S.C. § 701(a)(1) if it is exempted by statute from judicial review or under Section 701(a)(2) if it is committed to agency discretion. Section 701(a)(1) applies when a statute is sufficiently explicit and unequivocal to overcome the general presumption of reviewability first articulated in *Abbott Laboratories v. Gardner*.¹⁶² The First Circuit, for example, recently held that a hospital's challenge to the U.S. Department of Health and Human Services (HHS) secretary's refusal to reclassify it geographically was unreviewable in light of a provision of the Medicare Act that stated, "[T]he decision of the [Administrator] shall be final and shall not be subject to judicial review."¹⁶³ When the extent of preclusion of review is unclear, the

¹⁵⁷ *City of Canton v. Harris*, 489 U.S. 378 (failure to train police officers to identify medical emergencies). See also *Bryan County v. Brown*, 520 U.S. 397 (1997) (liability for failure to hire competent personnel requires a showing of "deliberate indifference" to the consequences in light of the newly hired deputy sheriff's propensity for violence).

¹⁵⁸ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The government's duty extends to preventing custodial mental patients from harming themselves or others. *Youngberg v. Romero*, 457 U.S. 307, 315–16, 319 (1982); *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983).

¹⁵⁹ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

¹⁶⁰ 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof."). The Administrative Procedure Act (APA), and review under the APA, applies only to federal agencies. See, e.g., *Franklin v. Massachusetts*, 506 U.S. 788, 801 (1992) (President is not an agency under the APA); *Regional Management Corp. v. Legal Services Corporation*, 186 F.3d 457, 462 (4th Cir. 1999) (Legal Services Corporation is not an agency).

¹⁶¹ For an excellent discussion of this issue, see Gary E. Smith, *The Quid Pro Quo for Chevron Deference: Enforcing the Public Participation Requirements of the Administrative Procedure Act*, 30 CLEARINGHOUSE REVIEW 1132 (Mar.–Apr. 1997).

¹⁶² *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

¹⁶³ See *Jordan Hospital v. Shalala*, 276 F.3d 72, 75 (1st Cir. 2002) (interpreting 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II)); see also *Briscoe v. Bell*, 432 U.S. 404 (1977); *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001).

Supreme Court tends to interpret the asserted limitation narrowly.¹⁶⁴ This approach is also commonly taken to avoid the very thorny constitutional question presented were a statute interpreted to preclude review of a colorable constitutional claim.¹⁶⁵

Section 701(a)(2), which precludes judicial review “to the extent that . . . agency action is committed to agency discretion by law,” poses a more significant issue in APA litigation. Federal agencies routinely assert the § 701(a)(2) exception, arguing that its seemingly limitless sweep precludes judicial review in all manner of cases. As summarized below, early Supreme Court decisions limited the breadth of Section 701(a)(2), but more recently the trend has moved against the presumption of reviewability.

In *Citizens to Preserve Overton Park Inc. v. Volpe* plaintiffs challenged a U.S. Department of Transportation decision to assist the construction of a highway through a public park as a violation of a federal statute requiring parks to be avoided when “feasible and prudent.”¹⁶⁶ The Transportation Department secretary argued that his decision was not subject to judicial review because the governing statute vested him with broad discretion relating to highway routes. The Supreme Court, rejecting that assertion, held that Section 701(a)(2) was applicable only when there was “clear and convincing evidence” of legislative intent to bar review. Such is the case in those rare instances where “statutes are drawn in such broad terms that in a given case there is no law to apply.”¹⁶⁷ The “feasible and prudent” standard, in the Court’s view, supplies such law.

Heckler v. Chaney elaborated on the “no law to apply” standard.¹⁶⁸ The suit challenged the Food and Drug Administration’s refusal, in violation of the Food, Drug, and Cosmetic Act, to begin enforcement proceedings against the use of unapproved drugs in “lethal injection” executions. *Chaney* thus sought review of an agency’s refusal to take requested enforcement action. The Court stated:

[E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have “no meaningful standard against which to judge the agency’s exercise of discretion.” In such a case, the statute (“law”) can be taken to have “committed” the decision-making to the agency’s judgment absolutely. This construction avoids conflict with the “abuse of discretion” standard of review in § 706—if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for “abuse of discretion.”¹⁶⁹

In applying the “meaningful standards” test to a claim challenging agency inaction, *Chaney* reversed the *Overton Park* presumption of reviewability. *Chaney* established a presumption against judicial review of an agency decision not to take enforcement action and suggested that the presumption could be overcome by a showing that the statute to be enforced specifically directed agency enforcement action.¹⁷⁰

In *Webster v. Doe* an agent who admitted that he was gay sought review of his discharge and asserted that his discharge was contrary to agency regulations, that it was arbitrary and capricious, and that it was unconstitutional.¹⁷¹ Relying on the language of the National Security Act, authorizing the director of the Central Intelligence Agency to fire an employee whenever he “shall deem such termination necessary or advisable in the interests of the United States,” the Court held that the agency action was nonreviewable under the APA. The Court reasoned that the statute empowering the director to make personnel decisions not only provided no judicially manageable standards but also seemed to vest the matter entirely in his discretion.¹⁷²

¹⁶⁴ See *Gutierrez de Martinez v. Lamango*, 515 U.S. 417 (1995); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

¹⁶⁵ *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robinson*, 415 U.S. 361, 366–67 (1974); cf. *Dalton v. Specter*, 511 U.S. 462 (1994) (ultra vires action is not alone unconstitutional). See also cases collected in RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 17.9 at 1320–22 (3d ed. 2002).

¹⁶⁶ *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971).

¹⁶⁷ *Id.* at 410.

¹⁶⁸ *Heckler v. Chaney*, 470 U.S. 821 (1985).

¹⁶⁹ *Chaney*, 470 U.S. at 830. Agency rules subject to notice and comment rule making and having the force and effect of law are generally held to serve as “law to apply,” while policy statements and interpretative rules are not. See PIERCE, *supra* note 165, at 1276–77.

¹⁷⁰ *Chaney*, 470 U.S. at 832–35.

¹⁷¹ *Webster v. Doe*, 486 U.S. 592 (1988).

¹⁷² *Id.* 486 U.S. at 600.

Subsequent cases continued to chip away at the presumption of reviewability.¹⁷³ Yet the cases are very fact-specific, turning on a careful reading of the statute and its purpose. Two cases are illustrative, the first employing the logic of *Overton Park*, and the second following *Chaney*.

In *Beno v. Shalala* a group of AFDC recipients challenged as arbitrary and capricious an HHS grant of a waiver of maintenance-of-effort requirements; the waiver permitted California to embark on an experiment that reduced AFDC benefits.¹⁷⁴ The applicable statute authorized the HHS secretary to grant waivers “to the extent and for the period [the Secretary] find[s] necessary” and for projects which “in the judgment of Secretary [are] likely to assist in promoting the objectives” of the Act.¹⁷⁵ The Ninth Circuit held that the secretary’s decision was reviewable and noted that

- the granting of waivers was not traditionally unreviewable;
- the statute “does not reveal a congressional commitment to the unfettered discretion of the Secretary;”¹⁷⁶ and
- judicial review did not interfere with the statutory scheme.

Despite the language of the statute, the court further held that it contained a meaningful standard for review because the AFDC program’s objectives were specified in the statute.¹⁷⁷ Although not the case in *Beno*, where the Ninth Circuit vacated the waiver and remanded the matter to the HHS secretary for development of the administrative record, reviewability victories are frequently short-lived as the deferential arbitrary and capricious standard makes reversal difficult.

In *American Disabled for Attendant Programs Today v. U.S. Department of Housing and Urban Development* organizations advocating on behalf of the disabled sued HUD under the APA for failing to ensure—in violation of the Fair Housing Act Amendment and Section 504 regulations—that multifamily housing was accessible to the disabled.¹⁷⁸ Plaintiffs alleged that HUD received many complaints of noncompliance but failed to investigate or take enforcement action against violators. Although HUD regulations state that HUD “shall” conduct a prompt investigation upon receipt of a complaint, the Third Circuit held that HUD’s failure to do so was unreviewable and that Congress established no guidelines limiting HUD’s discretion to investigate alleged violations.¹⁷⁹ Despite the mandatory direction in the regulation, the Supreme Court found this case to be controlled by *Chaney*. Again, even if the Court had found HUD’s failure to be reviewable, the general absence of controlling limitations on enforcement actions would have made it very difficult to show that the agency behaved arbitrarily or capriciously. Reviewability is but the first battle in an APA war.

3. Timing

Should an agency decision be reviewable under Section 701, a court may still decline to review it on the ground that agency action is not final, that the plaintiff failed to exhaust administrative remedies, or that the case is not ripe for review. There is considerable overlap among these doctrines.¹⁸⁰ But each is discussed briefly, and separately, below.

Final Agency Action. In the absence of a substantive statute specifying the prerequisites for judicial review, or deeming certain agency action to be final, the APA governs the timing of judicial review.¹⁸¹ Section 704 limits judicial review to final agency action.

The Supreme Court most recently articulated a test for final agency action in *Bennett v. Spear*.¹⁸² There the Court held that finality required satisfaction of two elements: (1) “the action must mark the ‘consummation’ of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature”; and (2) “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”¹⁸³ The first element is satisfied

¹⁷³ *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000); *Your Home Visiting Nurses Services v. Shalala*, 525 U.S. 449 (1999); see also *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (decision to reallocate funds from a lump-sum appropriation is committed to agency discretion).

¹⁷⁴ *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

¹⁷⁵ 42 U.S.C. § 1315 (a).

¹⁷⁶ *Beno*, 30 F.3d at 1067.

¹⁷⁷ *Id.*

¹⁷⁸ *American Disabled for Attendant Programs Today v. U.S. Department of Housing and Urban Development*, 170 F.3d 381 (3d Cir. 1999).

¹⁷⁹ *Id.* at 386.

¹⁸⁰ PIERCE, *supra* note 165, § 15.1 at 965–67.

¹⁸¹ See *U.S. Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

¹⁸² *Bennett v. Spear*, 520 U.S. 154 (1997).

¹⁸³ *Spear*, 520 U.S. at 178 (citations omitted).

when the agency offers its “last word” on the subject, even if that word is expressed less formally than a rule making or adjudication, and is subject to continuing agency review.¹⁸⁴ The second element is not satisfied when the agency action is no more than a nonbinding recommendation.¹⁸⁵

Exhaustion of Administrative Remedies. Common law or statute may require the exhaustion of administrative remedies.¹⁸⁶ Perhaps the leading case discussing the rationale for the common-law exhaustion requirement and its exceptions is *McKart v. United States*.¹⁸⁷ According to the Supreme Court in *McKart*, a Vietnam War draft case, exhaustion serves to permit the agency that is delegated authority by Congress to make findings and conclusions based on its expertise, to develop a full record for future judicial review, to avoid disruption of administrative process, and to reduce judicial appeals.¹⁸⁸ At the same time the Court recognized that the rationale for exhaustion may be outweighed by other considerations.¹⁸⁹ Exhaustion may not be required where it would cause irreparable injury, the agency appears to lack jurisdiction over the matter, agency expertise is not implicated, or exhaustion would be futile.¹⁹⁰

The degree to which exhaustion is required by statute, of course, depends on the terms of the statute. If required by statute, however, exhaustion may not be excused by a court or agency.¹⁹¹ Nevertheless, the Court frequently—but not always consistently—excuses the exhaustion requirement when the plaintiff challenges aspects of the agency’s decision making on constitutional grounds.¹⁹² Nor is exhaustion generally required in Section 1983 cases.¹⁹³ A court may not impose exhaustion requirements beyond that set forth in the statute or agency rule.¹⁹⁴

Ripeness. While ripeness often overlaps with the doctrine of final agency action and exhaustion of administrative remedies, ripeness does have independent significance. Ripeness issues frequently arise when a challenge is made to agency rules before they are enforced and to agency action announced informally.

In *Abbott Laboratories v. Gardner*, a preenforcement review case, the Supreme Court held that ripeness of review was presumed unless Congress specifically provided otherwise.¹⁹⁵ The Court established a two-part ripeness test: “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”¹⁹⁶ *Abbott Laboratories* therefore suggests that, if declining preenforcement review would visit harm upon the plaintiff and if the issue presented is principally a legal one, or one that can be decided without factual development by the agency, the matter is regarded as ripe for review.¹⁹⁷

This relatively forgiving standard was narrowed in a category of cases commonly encountered by legal aid advocates—cases involving challenges to rules governing government benefits. In *Reno v. Catholic Social Services* classes of undocu-

¹⁸⁴ *Fox Television Stations v. Federal Communications Commission*, 280 F.3d 1027, 1038 (D.C. Cir. 2002), modified on reh’g by 293 F.3d 537 (D.C. Cir. 2002).

¹⁸⁵ See *Dalton v. Specter*, 511 U.S. 462, 469–71 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 797–800 (1992).

¹⁸⁶ Examples of such statutes include the Social Security Act, discussed in Chapter 2 of this MANUAL, and 42 U.S.C. § 1997e(a), in the Prison Litigation Reform Act. See *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731 (2001).

¹⁸⁷ *McKart v. United States* 395 U.S. 185 (1969).

¹⁸⁸ *Id.* at 194–95.

¹⁸⁹ See also *McCarthy v. Madigan*, 507 U.S. 140 (1992).

¹⁹⁰ See, e.g., *United States v. Williams*, 514 U.S. 527 (1995) (futility established); *Home Health v. Shalala*, 272 F.3d 554 (8th Cir. 2001) (futility not established); *Shawnee Trail v. U.S. Department of Agriculture*, 222 F.3d 383 (7th Cir. 2002) (futility requires certainty that agency action will be adverse). A form of futility may occur when agency administrative processes cannot provide the relief sought by the petitioner. *Honig v. Doe*, 484 U.S. 305, 327 (1988). This issue has divided the circuits in Individuals with Disabilities Education Act litigation seeking money damages. See *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002), and citations therein.

¹⁹¹ The extent to which 42 U.S.C. §§ 405(g)–(h) require exhaustion of remedies and to which the agency waives the requirement is the subject of several arguably inconsistent decisions by the Supreme Court, most recently *Illinois Council on Long Term Care*, 529 U.S. at 1; see *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Heckler v. Ringer*, 466 U.S. 602 (1984); *Michigan Academy of Family Physicians*, 476 U.S. at 667; *Bowen v. City of New York*, 476 U.S. 467 (1986). The issue is a significant one for legal aid attorneys because it governs when a challenge to rules and actions of the Social Security Administration and the U.S. Department of Health and Human Services may be filed.

¹⁹² *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979).

¹⁹³ See Chapter 3 of this MANUAL.

¹⁹⁴ *Darby v. Cisneros*, 509 U.S. 137 (1993).

¹⁹⁵ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

¹⁹⁶ *Id.* at 149.

¹⁹⁷ See *National Park Hospitality Association v. U.S. Department of the Interior*, 123 S. Ct. 2026 (2003) (applying *Abbott* to find a challenge to an interpretive rule unripe for review); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (challenge to regulation is ripe when there has been some “concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him”).

mented aliens challenged Immigration and Naturalization Service regulations which made it more difficult for them to realize the benefits of an alien legalization statute on the ground that the regulations were inconsistent with the statute.¹⁹⁸ The Court found the challenge distinguishable from *Abbott Laboratories*, in which the plaintiffs were placed in the “immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation.”¹⁹⁹ By contrast, reasoned the Court, the regulations challenged in *Catholic Social Services* limit access to a benefit rather than impose penalties and require the applicant to satisfy requirements other than those challenged.²⁰⁰ As a result, challenges to the regulations would be ripe only if the application for the benefit were formally or informally rejected on grounds contained in the rules at issue. Ripeness was not satisfied even if the invalid regulation deterred application.²⁰¹

The Court also barred preenforcement challenges to rules in cases in which Congress is believed to have supplied sufficient and alternative administrative methods of review. In *Thunder Basin Coal Co. v. Reich* a coal company filed a preenforcement challenge to a mine safety rule which permitted nonemployee union officials to serve as the employees’ representatives in statutorily required mine inspections.²⁰² Although silent on preenforcement claims, the Court held that the detailed and comprehensive administrative review provisions of the Federal Mine Safety and Health Amendments Act suggested that Congress intended to preclude preenforcement challenges. Moreover, that the nature of the claims presented was not “collateral to the administrative review provisions and within the agency’s expertise” supported that conclusion. Noting that the ultimate administrative entity was independent, had exclusive jurisdiction, had decided constitutional claims, and was subject to judicial review in the court of appeals, the Court rejected the company’s assertion that the constitutional nature of its claim required immediate judicial—rather than administrative—review.²⁰³

Courts generally find that challenges to informal agency action, such as the issuance of opinion letters, interpretive rules, policy statements and the like, are not ripe for review. As discussed elsewhere in this chapter, such agency action is commonly not final or binding. Nevertheless, if such action is regarded as final (because, for example, it is issued by the head of the agency), the issue for review involves solely a question of law; alternatively or jointly, if failure to review would result in hardship to the plaintiff, then the particular circumstances presented in the case may suggest ripeness.²⁰⁴

4. Rule Making

The APA prescribes three means for the adoption of agency regulations:

- formal rule making,²⁰⁵
- informal rule making, and
- the issuance of interpretative rules, procedural rules, general statements of policy, and other rules exempted from normal rule-making requirements.

Known as “informal rule making,” the three-step process governing the adoption of legislative rules begins with publication of a notice of proposed rule making in the *Federal Register*. The notice must describe the proposed rule or the subject and issues to be considered and must be sufficient to alert interested parties of the subject matter of the regulations and their probable impact.²⁰⁶ To assure public participation in the process, the notice of proposed rule making must solicit comments. In the second step, the agency receives and considers public comments. The process concludes with publication of final regulations and a basis and purpose statement reviewing the reasons for rule making, the agency’s

¹⁹⁸ *Reno v. Catholic Social Services*, 509 U.S. 43 (1993).

¹⁹⁹ *Id.* at 57.

²⁰⁰ *Id.* at 59.

²⁰¹ For two post-*Catholic Social Services* cases finding ripe challenges to restrictions on government benefits prior to application, see *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996), and *Riva v. Massachusetts*, 61 F.3d 1003 (1st Cir. 1995).

²⁰² *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

²⁰³ Courts entertained constitutional challenges when the claim was collateral to the administrative review process, that process was not suitable for such claims, and preclusion of review would cause irreparable injury. See, e.g., *Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868 (3d Cir. 1996).

²⁰⁴ See *Aviators for Safe and Fairer Regulations v. Federal Aviation Administration*, 221 F.3d 222 (1st Cir. 2000); *Commodity Futures Trading Commission v. Blitz*, 233 F.3d 981 (7th Cir. 2000); *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997).

²⁰⁵ Formal rule making is a procedure that resembles an adjudicatory hearing at which testimony is taken subject to cross-examination. 5 U.S.C. §§ 553(c), 556–557. Formal rule making rarely takes place and never occurs in the context of poverty law issues. For a discussion of formal rule making, see PIERCE, *supra* note 165, § 7.2.

²⁰⁶ 5 U.S.C. § 553(b).

consideration of comments received, and the rationale for the rule adopted.²⁰⁷ The basis and purpose statement must reflect that comments were considered in light of all factors that Congress directed the agency to consider even if ultimately rejected. The result of informal rule making is a set of legislative rules having the force and effect of law.

Whether an agency engages in the three-step process for informal rule making is significant in two respects. First, if the agency issues a legislative rule without engaging in notice and comment rule making, the rule is procedurally invalid. Second, whether the agency adopts a legislative rule through informal rule making, or an interpretative or other rule without informal rule making, has implications for the extent of deference given to the agency interpretation of its governing statute. The dividing line between rules requiring public participation in notice and comment rule making and those not, therefore, is an important but elusive one.

Exemptions from Rule Making. The APA exempts certain rules from notice and comment rule-making requirements.²⁰⁸ The most significant of these exemptions are for interpretative rules and general statements of policy.²⁰⁹ For years, the courts have struggled with distinguishing between legislative rules, which must be promulgated pursuant to notice and comment rule making, and interpretative rules, which are not required to meet notice and comment rule-making requirements. In *American Mining Congress v. Mine Safety and Health Administration* the D.C. Circuit crafted a new test.²¹⁰ The test has since been adopted by six other circuits.²¹¹ Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has “legal effect,” which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency published the rule in the Code of Federal Regulations, (3) whether the agency explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive, rule.²¹²

Interpretive rules generally alert the public to the agency’s interpretation of the ambiguities within the laws and rules that it administers. An agency might dodge the public participation requirements of the APA by issuing general and non-controversial legislative rules and, then, issuing more substantive and potentially controversial interpretations of its vague legislative rules. Courts of appeal have not taken kindly to this approach.²¹³ *American Mining Congress* would regard such efforts as, in effect, amendments to legislative rules and thus themselves legislative. A subsequent D.C. Circuit case, *Paralyzed Veterans of America v. D.C. Arena*, took this point one step further.²¹⁴ When an agency significantly changes its interpretation of a legislative rule, the D.C. Circuit suggested in dicta in *Paralyzed Veterans*, the agency must do so after engaging in notice and comment rule making.²¹⁵ The notion that an agency must adopt a legislative rule to amend an interpretive one opens a potentially important avenue for litigation.

²⁰⁷Courts do not have the authority to require agencies to follow procedures beyond those required under the APA, even when rule making requires resolution of contested issues of fact, absent extremely compelling and so far undefined circumstances. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

²⁰⁸Among these are exemptions for rules relating to “military or foreign affairs” and to matters relating to “agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. § 553(a). The good-cause exception is generally invoked when there is an urgent need to issue a rule (see, e.g., *Hawaii Helicopter Operators Association v. Federal Aviation Administration*, 51 F.3d 212 (9th Cir. 1995) (air safety rule)) and when public notice of a proposed rule may result in economic or other harm. See, e.g., *Reeves v. Simon*, 507 F.2d 455, 458–59 (Temp. Emer. Ct. App. 1975) (finding good cause for regulation prohibiting preferential gasoline sales in light of nationwide shortage).

²⁰⁹5 U.S.C. § 553.

²¹⁰*American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993). The third criterion was abandoned in *Health Insurance Association of America v. Shalala*, 23 F.3d 412 (D.C. Cir. 1994).

²¹¹*Warder v. Shalala*, 149 F.3d 73 (1st Cir. 1998); *Mission Group Kansas v. Riley*, 146 F.3d 775 (10th Cir. 1998); *Appalachian States Low-Level Radioactive Waste Commission v. O’Leary*, 93 F.3d 103 (3d Cir. 1996); *Hactor v. U.S. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995); *New York City Employees’ Retirement System v. Securities and Exchange Commission*, 45 F.3d 7 (2d Cir. 1995).

²¹²*American Mining Congress*, 995 F.2d at 1112.

²¹³See *Mission Group Kansas*, 146 F.3d at 775; *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989). The Supreme Court narrowly upheld interpretive rules in two such challenges. See *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995); *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994).

²¹⁴*Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997).

²¹⁵*Id.* at 586; *Alaska Professional Hunters Association v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

Policy statements are exempted from notice and comment rule making by 5 U.S.C. § 553(b). If an agency statement has binding effect on members of the public, it is a rule subject to notice and comment rule making, more likely to be regarded as ripe for judicial review and given a more deferential standard of substantive review.²¹⁶ The interpretive question is whether or not the agency intended the statement to have a legally binding effect. When the agency issues a statement, but retains discretion to act beyond it, the statement is likely not a rule.²¹⁷

Again, however, the D.C. Circuit appears to have relaxed this “legally binding” test since the circuit offers plaintiffs potentially greater opportunity to challenge policy statements that are “practically binding”:

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes “binding.”²¹⁸

Deference to Agency Interpretation of Statutes. Even if the agency’s rule or statement is promulgated lawfully, it may be challenged on the ground that it exceeds the limits of the agency’s statutory authority or proceeds from a misinterpretation of the statute. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* the Supreme Court articulated the two-step standard by which such claims should be reviewed:²¹⁹

When a court reviews an agency’s construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.²²⁰

In step 1, “the court’s job is to determine whether the scope of ambiguity of the relevant language is sufficiently broad to invalidate the agency’s construction.”²²¹ If the language of the statute cannot bear the construction selected by the agency, the interpretation must be overturned.²²² The Court typically consults dictionaries and prior judicial opinions for guidance on the meaning of statutory language. If the agency interpretation of the statute is supported by the statutory language, in step 2, the court must uphold the interpretation if a reasonable one.²²³ If it is unreasonable, the policy decision implicit in the agency interpretation is arbitrary and capricious and should be struck down.²²⁴ Thus, as Prof. Richard Pierce explains:

²¹⁶ See *Pacific Gas and Electric v. Federal Power Commission*, 506 F.2d 33, 38–39 (D.C. Cir. 1974).

²¹⁷ *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 600–601 (5th Cir. 1995); *Rapp v. Office of Thrift Supervision*, 52 F.3d 1510 (10th Cir. 1995).

²¹⁸ *Appalachian Power Co. v. Environmental Protection Administration*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

²¹⁹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

²²⁰ *Chevron*, 467 U.S. at 842–43. *Chevron* deference is not owed to agencies without rule-making power. *Atchison, Topeka and Santa Fe Railway Co. v. Peña*, 44 F.3d 437, 441 (7th Cir. 1994) (en banc).

²²¹ PIERCE, *supra* note 165, § 3.6 at 169.

²²² A recent case rejecting an agency interpretation on step 1 grounds is *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). See also *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Two recent cases upholding agency interpretations on these grounds are *National Cable Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327 (2002), and *U.S. Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).

²²³ Recent cases so holding include *Barnhart v. Walton*, 535 U.S. 212 (2002); *Securities and Exchange Commission v. Landford*, 535 U.S. 813 (2002); *Verizon Communications v. Federal Communications Commission*, 535 U.S. 467 (2002); *Chevron v. Echazatal*, 536 U.S. 73 (2002).

²²⁴ *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983); see *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002); *Animal Legal Defense Fund v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000); cf. *Strickland v. Commissioner, Maine Department of Human Services*, 48 F.3d 12 (1st Cir. 1995) (upholding the secretary of agriculture’s decision to exclude depreciation from the cost of producing self-employment income because it is not an unreasonable interpretation of the Food Stamp Act).

[A] court's task in applying *Chevron* step two is to determine (1) whether the agency adequately discussed plausible alternatives, (2) whether the agency adequately discussed the relationship between the interpretation and pursuit of the goals of the statute, (3) whether the agency adequately discussed the relationship between the interpretation and the structure of the statute, including the context in which the language appears in the statute, and (4) whether the agency adequately discussed the relationship between the interpretation and any data available with respect to the factual predicates for the interpretation.²²⁵

Recently issued important Court decisions concern the forms of agency interpretation to which the deferential *Chevron* doctrine applies. *Chevron* plainly applies to legislative rules and formal adjudications.²²⁶ Informal announcements (such as opinion letters, policy statements, and interpretive rules) that lack the force and effect of law, the Court held in *Christensen v. Harris County*, are not subject to *Chevron* deference.²²⁷ Instead such interpretations are treated with “respect” only to the extent that they have the “power to persuade.”²²⁸

The scope of *Chevron* was potentially broadened recently in *United States v. Mead*.²²⁹ In *Mead* the Court considered an issue left unanswered in *Harris*—whether to give *Chevron* deference to informal adjudications. The Court noted that *Chevron* deference was owed to formal adjudications and notice and comment rule making but that such deference might also be afforded to less formal modes of interpretation. The Court held that tariff classification ruling letters (at issue in *Mead*), which were not subject to notice and comment rule making, were not entitled to *Chevron* deference because “the terms of the Congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law.”²³⁰ However, *Chevron* deference is owed when “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²³¹ The difficulty in the aftermath of *Mead* is in determining when informal adjudications meet this standard.²³²

Nonetheless *Chevron* and *Mead* suggest an avenue for challenging unpublished agency policies or interpretations. Consider adding an argument that the policy should be struck down as violating the notice and comment requirements of the APA as discussed above. If the defendants argue that the interpretation should be subject to *Mead* or *Chevron* deference, and the court agrees, then the agency interpretation must necessarily be a substantive or legislative rule that should have been promulgated through notice and comment rule making.²³³

²²⁵PIERCE, *supra* note 165, § 3.6 at 172–73. The Court in *Mead v. United States*, 533 U.S. 218 (2001), explained that the carefulness of the agency’s consideration of the interpretive question, its consistency, formality, and persuasiveness and the expertise of the agency are factors in determining the measure of deference owed to an agency interpretation. *Mead*, 533 U.S. at 228.

²²⁶See *Aucielo Iron Workers v. National Labor Relations Board*, 517 U.S. 81 (1996). Generally agency positions adopted for purpose litigation are not accorded deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988).

²²⁷*Christensen v. Harris County*, 529 U.S. 536 (2000).

²²⁸*Skidmore v. Swift and Co.*, 323 U.S. 132 (1944).

²²⁹*United States v. Mead*, 533 U.S. 218, 231–32 (2001).

²³⁰*Id.* at 232–32.

²³¹*Id.* at 226–27.

²³²The Supreme Court’s opinion in *Mead* offers some insight into the nature of the relevant analysis. The Court examined the statute authorizing the tariff rulings (and noted that they were subject to judicial review in the Court of International Trade) and agency practice (rulings were not binding on third parties, generally lacked reasoning, and were issued in vast numbers and by many offices). By contrast, the Court in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), suggested that agency interpretations of its governing statute—interpretations which are not the product of formal adjudication or notice and comment rule making—may be subject to *Chevron* deference, depending on the “interpretive method and nature of the question at issue.” Where, as in *Walton*, the agency has expertise, the issue is interstitial and important to the administration of the program, the program is complex, and the agency studied the issue carefully and consistently, *Chevron* deference is owed. *Mead* and *Walton* cast doubt on the lower deference previously accorded to social security rulings. See *Bunnell v. Sullivan*, 947 F.2d 341, 346 n. 3 (9th Cir. 1991) (en banc).

²³³See *Smith v. Robinson*, 468 U.S. at 1151 (citing *Cervantez v. Sullivan*, 719 F. Supp. 899, 910 (E.D. Cal. 1989), *overruled on other grounds*, 963 F.2d 229 (9th Cir. 1992)).

5. Adjudication

The APA requires federal agencies to employ triallike formal adjudication procedures set forth in 5 U.S.C. §§ 554–557 only when the “adjudication [is] required by statute to be determined on the record after opportunity for agency hearing.”²³⁴ In the relatively rare circumstances in which formal adjudications, or formal rule making, are required, agency finding of fact may be overturned only if unsupported by substantial evidence.²³⁵ The traditional and very deferential formulation of substantial evidence is “such evidence as a reasonable mind might accept as adequate to support a conclusion.”²³⁶ In *Allentown Mack Sales and Service v. National Labor Relations Board*, however, the Supreme Court appeared to impose a significantly more rigorous and less deferential sort of review on findings from a National Labor Relations Board formal adjudication.²³⁷ Such logic might be applied to other formal adjudications, such as social security appeals, although language in *Allentown* suggests that the Court’s approach in *Allentown* is confined to National Labor Relations Board hearings.

For informal adjudications and rule making, agency findings of fact are subject to an arbitrary and capricious standard of review.²³⁸ The Supreme Court recently described that standard of review as “extremely narrow.”²³⁹ But the extent to which it is different, if at all, from the substantial evidence test is unclear.²⁴⁰ The standard formulation is that the court upholds an agency’s findings, unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁴¹ Under this standard, “the [agency] must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.”²⁴² Rescissions of regulations are also subject to the arbitrary and capricious standard of review.

III. Implied Causes of Action

If a federal employee, official, or agency violates your client’s constitutional rights and either judicial review is unavailable under a federal statute, such as the APA or Federal Tort Claims Act, or the statute does not provide an effective remedy, then an implied cause of action may be available.

A. IMPLIED CONSTITUTIONAL CAUSES OF ACTION

The federal cause of action for a violation of a constitutional right is based not on a statutory authorization to sue (express or implied) but rather on a judicially created right to do so. Such an action is often referred to as a “*Bivens* action,” a “cause of action arising directly under the Constitution,” or a “constitutional tort” action.²⁴³ This section discusses the circumstances in which a *Bivens* action may be available.

Bivens actions are never necessary when a statute authorizes the relief sought. Thus *Bivens* actions are never necessary to sue individuals who act under color of state law; Section 1983 authorizes all necessary relief. Because the APA does not authorize damage suits against persons acting under color of federal law, *Bivens* actions may be necessary to support a damage claim against an individual federal actor. However, before pursuing a *Bivens* action, the advocate should investigate whether the Federal Tort Claims Act, the Tucker Act, or some other statute authorizes the claim.

Although the Court has not overruled *Bivens*, it has in recent years consistently refused to extend it to any new causes of action. As made clear in its recent decision in *Correctional Services Corp. v. Malesko*, the Court seems intent on limiting *Bivens* actions to a very narrow range of claims, probably only claims under the Fourth, Fifth, and Eighth Amendments to the U.S. Constitution.²⁴⁴

²³⁴ 5 U.S.C. § 554(a).

²³⁵ *Id.* § 706(2)(E).

²³⁶ *Interstate Commerce Commission v. Louisville and Nashville Railroad*, 227 U.S. 88, 91 (1913).

²³⁷ *Allentown Mack Sales and Service v. National Labor Relations Board*, 522 U.S. 359 (1998).

²³⁸ 5 U.S.C. § 706(2)(A).

²³⁹ *Postal Service v. Gregory*, 534 U.S. 1, 7 (2001).

²⁴⁰ *Bangor Hydro-Electric Co. v. Federal Energy Regulatory Commission*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996), *Aman v. Federal Aviation Administration*, 856 F.2d 946, 950 n.3 (7th Cir. 1983).

²⁴¹ *Duke Energy Trading and Marketing v. Federal Energy Regulatory Commission*, 315 F.3d 377, 380 (D.C. Cir. 2003).

²⁴² *Id.* (quoting *Northern States Power Co. v. Federal Energy Regulatory Commission*, 30 F.3d 177, 180 (D.C. Cir. 1994)).

²⁴³ The term “*Bivens* action” refers to the case in which the Supreme Court first held that the federal courts could create such a cause of action. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁴⁴ *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

1. Constitutional Torts

A *Bivens* action is typically a suit for damages against a defendant who, acting in his or her individual capacity under color of federal law, violated the plaintiff's constitutional rights. A *Bivens* action is a judicially created mechanism to afford redress to plaintiffs who lack a statutory cause of action or an adequate statutory remedy or both. The basic elements of a *Bivens* action appear to be the following:

- (1) the plaintiff has a constitutionally protected right;
- (2) the defendant violated that right;
- (3) the plaintiff lacks a statutory cause of action, or an available statutory cause of action does not provide a meaningful remedy;
- (4) no "special factors" suggest that the court should decline to provide a judicial cause of action and remedy; and
- (5) an appropriate, judicially manageable remedy, that is, money damages, can be imposed.²⁴⁵

Most of the Supreme Court decisions in this area address the third, fourth, and fifth elements. Although the Court has not established a precise, bright-line test for these elements, it has articulated some general principles and limitations.

In *Bivens* the Court implied a damage remedy under the Fourth Amendment against individual federal law enforcement officers who had allegedly arrested Bivens and searched his home without a warrant or probable cause, causing him great mental suffering, humiliation, and embarrassment. At that time, the Federal Tort Claims Act did not provide a remedy.²⁴⁶ The Court created a federal remedy by implication, reasoning that a state court tort claim would not adequately redress the constitutional wrong suffered by Bivens because the state laws of trespass and invasion of privacy were never intended to remedy the harms that result from a federal agent's abuse of authority.²⁴⁷

The Court extended the implied cause of action principle to Fifth Amendment claims in *Davis v. Passman*.²⁴⁸ The plaintiff there alleged that Congressman Passman violated her Fifth Amendment right to equal protection by firing her from her job because he felt it necessary that the position be occupied by a male.²⁴⁹ Because Congress had excluded congressional employees from the reach of Title VII, the Court, reasoning that a damage remedy was judicially manageable, held that Davis could sue directly under the Fifth Amendment.²⁵⁰

In both *Bivens* and *Davis* the plaintiffs had no other available remedy; it was therefore a question of "damages or nothing."²⁵¹ In each case this factor weighed heavily in the Court's decision to imply a cause of action. However, the Court also created a *Bivens* action in at least one case in which plaintiff clearly had a cause of action and remedy under the Federal Tort Claims Act. In *Carlson v. Green* the Court allowed a *Bivens* action under the Eighth Amendment against individual federal prison officials who allegedly failed to give an asthmatic prisoner proper medical attention, a failure resulting in his death.²⁵² The Court decided that a *Bivens* action was available because Congress had explicitly stated its intent to

²⁴⁵The determination that a plaintiff has a *Bivens* cause of action does not necessarily mean that the plaintiff may recover damages in the case. The additional, and distinct, question of whether the defendants are entitled to absolute or qualified immunity must also be adjudicated. Government officials performing discretionary functions are generally granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis is the same under either a *Bivens* or a Section 1983 cause of action. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Graham v. Connor*, 490 U.S. 386, 394 n. 9 (1989); *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986). For a discussion of the circumstances in which government officials sued in their individual capacities are entitled to either absolute or qualified immunity, see Chapter 8 of this MANUAL.

²⁴⁶The Federal Tort Claims Act was amended in 1974 to provide a remedy for intentional torts committed by federal law enforcement officials. *See* 28 U.S.C. § 2680(h).

²⁴⁷*Bivens*, 403 U.S. at 391–92, 394–95.

²⁴⁸*Davis v. Passman*, 442 U.S. 228 (1979).

²⁴⁹*Id.* at 230–31 n.3.

²⁵⁰*Id.* at 245.

²⁵¹*Davis*, 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

²⁵²*Carlson v. Green*, 446 U.S. 14 (1980).

allow both Federal Tort Claims Act and *Bivens* actions.²⁵³ *Carlson* probably marks the high-water mark for the *Bivens* cause of action; the Supreme Court has declined any further invitations to extend *Bivens*.

2. The Court's Refusal to Extend *Bivens* Further

Although *Bivens*, *Davis*, and *Carlson* seemed to suggest that *Bivens* actions would be broadly available to fill gaps in federal damage remedies, more recent cases make clear the Court's reluctance to extend *Bivens* actions beyond the scope of those earlier cases. Thus, when Congress provides a statutory cause of action without expressly indicating its intent to allow *Bivens* actions as well (as was the case in *Carlson*), the Court is unlikely to imply a cause of action.

The Court began to limit *Bivens* in *Bush v. Lucas*, a suit by a NASA employee against his supervisor for damages for emotional distress and mental anguish.²⁵⁴ The employee alleged that he had been demoted and his salary decreased in retaliation for exercising his First Amendment right to speak on a matter of public concern. Although the employee obtained reinstatement and full back pay through the civil service administrative process, that process did not allow damages for emotional distress or mental anguish. Acknowledging that “existing remedies do not provide complete relief for the plaintiff,” the Court nevertheless refused to create a *Bivens* action.²⁵⁵ The Court concluded that the policy question of whether an employee should be permitted to recover damages from an employer was more appropriately left to Congress.²⁵⁶ Because Congress did not provide for individual liability within the existing “elaborate” and “comprehensive” remedial civil service scheme, the Court refused to create an implied right of action:

When Congress provides an alternative remedy, it may, of course, indicate its intent—by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself—that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any “special factors counselling hesitation” before authorizing a new kind of federal litigation.²⁵⁷

Bush treated the existence of a congressionally designed remedial scheme as a “special factor counselling hesitation” in the Court's analysis of whether to imply a constitutional cause of action. This suggests that the more comprehensive the remedial scheme, the less willing the Court is to imply a *Bivens* action. Thus, in *Chappell v. Lucas*, the Court deemed these to be “special factors” militating against an implied right of action:²⁵⁸

- the existence of a separate, congressionally enacted “comprehensive internal justice system to regulate military life”²⁵⁹ and
- “the unique disciplinary structure of the Military Establishment.”²⁶⁰

The Court concluded that enlisted military personnel may not maintain separate *Bivens* actions for damages when they allege that their superior officers violated their constitutional rights to be free from racial discrimination.²⁶¹

²⁵³ *Id.* at 19–21. The Supreme Court relied on language in the Senate report on the 1974 Federal Tort Claims Act Amendments, showing that “Congress views [the Act] and *Bivens* as parallel, complementary causes of action.” The Court also noted that in several respects the *Bivens* remedy was more effective. Unlike a Federal Tort Claims Act suit, a *Bivens* suit allows recovery against individual officers, thus more effectively deterring unconstitutional conduct, allows punitive damages, can be tried before a jury, and is not dependent on “the vagaries” of state tort statutes and doctrines. *Id.* at 19–23. The 1988 amendment to the Act's exclusivity-of-remedy provision, 28 U.S.C. § 2679(b)(1)–(2), makes clear that Congress maintains its position that the Act is not the exclusive remedy for a constitutional tort, and thus Congress declines to overturn *Bivens*, *Carlson*, and *Davis*.

²⁵⁴ *Bush v. Lucas*, 462 U.S. 367 (1983).

²⁵⁵ *Id.* at 388.

²⁵⁶ Deferring to the Congress' greater familiarity with the appropriate remedial scheme as reflected in the long history of legislative management of the civil service system, the Supreme Court took a hands-off approach, even though the Congress had not, as *Carlson v. Green* would have required (see 446 U.S. at 18), stated that Congress considered the statutory civil service remedies to be exclusive, and even though the Court assumed that a *Bivens* action would provide greater relief. See *Bush*, 462 U.S. at 378.

²⁵⁷ *Id.*

²⁵⁸ *Chappell v. Lucas*, 462 U.S. 296 (1983).

²⁵⁹ *Id.* at 302.

²⁶⁰ *Id.* at 304.

²⁶¹ *Id.* at 305.

In 1988 the Court confirmed that it would not create a *Bivens* remedy when Congress provided meaningful remedies unless Congress explicitly preserved that remedy. In *Schweiker v. Chilicky* the Court refused to imply a cause of action under the Fifth Amendment due process clause in favor of social security disability recipients whose benefits had been terminated in a continuing disability review.²⁶² The plaintiffs sued federal and state officials responsible for the continuing disability review; the plaintiffs alleged that the officials terminated the recipients in clear violation of the procedural requirements of the Fifth Amendment. In language that creates a presumption against *Bivens* actions when Congress acts, the Court stated:

In sum, the concept of “special factors counselling hesitation in the absence of affirmative action by Congress” has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.²⁶³

As one court put it, “[i]t may safely be said, therefore, that the dictum of *Carlson v. Green* which urged the creation of constitutional torts unless Congress had provided a remedial scheme equivalent to *Bivens* and had expressly stated that the remedy was exclusive, is not good law.”²⁶⁴

In 2001 the Court decided *Correctional Services Corp. v. Malesko*, which confirmed the Court’s unwillingness to extend *Bivens* and indeed potentially to limit it.²⁶⁵ In *Malesko* the Court used very strong language to reject a *Bivens* suit by a federal inmate against a private corporation that operated his halfway house under contract with the federal Bureau of Prisons. The Court referred to *Bivens* as a “limited holding” and noted that the Court’s exercise in *Bivens* of its authority to imply a constitutional tort had relied heavily on *J.I. Case Co. v. Borak*.²⁶⁶ The Court had “abandoned” and declined to “revert to” *Borak*’s broad language.²⁶⁷ The Court noted that, in the decades subsequent to *Bivens*, the Court had extended its holding only twice and that it had otherwise “consistently refused to extend *Bivens* liability to any new context or new category of defendants.”²⁶⁸

Although strong, the foregoing language could be considered dicta, as the Court went on to emphasize the fact that the defendant was a private corporation, whereas the *Bivens* action had been created to deter misconduct of individual federal officers. The Court compared the case to *Federal Deposit Insurance Corporation v. Meyer*, where it had refused to extend *Bivens* to permit suits against a federal agency even though the agency was otherwise amenable to suit because Congress had waived sovereign immunity.²⁶⁹ Such suits would not deter individual federal officers from committing constitutional violations; this was the core premise of *Bivens*.²⁷⁰ The Court also noted that federal prisoners housed in private facilities actually enjoyed possible alternative remedies (such as tort remedies) unavailable to inmates in government facilities. The Court asserted that a *Bivens* remedy had “never [been] considered a proper vehicle for altering an entity’s policy”; rather “injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally.”²⁷¹

Thus the Court had several bases for distinguishing the *Malesko* facts from the *Bivens* situation and could have reached its conclusion without using any of the strong limiting language quoted above. The Court’s decision to go out of its way to cabin the *Bivens* remedy within very narrow parameters can probably be read therefore as implying a firm lack of willingness to extend *Bivens* to additional constitutional claims.

²⁶² *Schweiker v. Chilicky*, 487 U.S. 412, 423–29 (1988).

²⁶³ *Id.* at 423.

²⁶⁴ *Simpson v. McCarthy*, 741 F. Supp. 95 (W.D. Pa. 1990) (referring to *Carlson*, 446 U.S. at 18).

²⁶⁵ *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

²⁶⁶ *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

²⁶⁷ *Malesko*, 534 U.S. at 67 & n.3 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

²⁶⁸ *Id.* at 68, 70.

²⁶⁹ *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994).

²⁷⁰ *Malesko*, 534 U.S. at 70–71.

²⁷¹ *Id.* at 74.

3. Statutes of Limitation

The Supreme Court has not decided what statute of limitations should govern a *Bivens* action. Some courts reasoned by analogy from Section 1983 actions.²⁷² They held that state personal injury statutes of limitation should govern *Bivens* actions.²⁷³

4. Attorney Fees

There is no statutory authorization for an award of attorney fees to prevailing plaintiffs in *Bivens* actions. By its terms, neither the Civil Rights Attorneys' Fees Awards Act of 1976 nor the Equal Access to Justice Act applies. Thus attorney fees are not recoverable in *Bivens* actions.

5. Extending the *Bivens* Remedy?

The *Bivens* remedy apparently has been extended as far as it is likely to go, at least for the foreseeable future. The Court has implied a cause of action under the Fourth Amendment right to be free from unreasonable searches and seizures, the equal protection component of the Fifth Amendment due process clause, and the Eighth Amendment right to be free from cruel and unusual punishment. Some lower federal courts more than a decade ago implied *Bivens*-type causes of action in appropriate cases under

- the First Amendment²⁷⁴ and
- the Sixth Amendment.²⁷⁵

Whether a court would follow those precedents today, and whether the Supreme Court would uphold such holdings, after *Malesko*, is doubtful.

On the other hand, although the Court has so far declined to extend *Bivens* beyond the Fourth, Fifth, and Eighth Amendments, the Court seems to be still of the view that *Bivens* retains vitality.²⁷⁶ Nor does *Malesko* offer any reason to believe that *Bivens* actions claiming damages for violations of the Fourth, Fifth, and Eighth Amendments may not still be brought against individual federal agents.

B. IMPLIED PRIVATE STATUTORY CAUSES OF ACTION

As previously noted, many specific federal statutes expressly provide a right of action. When an express right specific to a particular statute is unavailable, advocates determine whether a claim may be brought under the general authority of statutes such as the APA or Section 1983. Those statutes, of course, have their limitations, including a failure to extend to private parties who are not state actors. Consequently advocates may need to inquire whether a private right of action may be implied in a particular federal statute. As explained below, such inquiry underwent a significant change as a result of the Supreme Court's decision in *Alexander v. Sandoval*.²⁷⁷

²⁷²See *Wilson v. Garcia*, 471 U.S. 261 (1985) (applying state personal injury statute of limitations to Section 1983 action).

²⁷³*Papa v. United States*, 281 F.3d 1004, 1009 n.11 (9th Cir. 2002); *King v. One Unknown Federal Correctional Officer*, 201 F.3d 910, 913 (7th Cir. 2000); *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647, 653 (2d Cir. 1998); *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995); *Napier v. Thirty or More Unidentified Federal Agents, Employees, or Officers*, 855 F.2d 1080, 1088 n.3 (3d Cir. 1988).

²⁷⁴See, e.g., *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (allegation that Federal Bureau of Investigation agents acted with impermissible motives of curbing plaintiff's protected speech stated claim properly cognizable through *Bivens*-type action under the First Amendment); *Spagnola v. Mathis*, 809 F.2d 16 (D.C. Cir. 1986) (reversing dismissal of *Bivens* claim by federal employee who allegedly suffered harassment by supervisors for exercising his First Amendment rights; and distinguishing *Bush v. Lucas* on grounds that remedial scheme is less comprehensive than that of the Civil Service Reform Act, and remedies are less meaningful).

²⁷⁵See, e.g., *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983) (plaintiff had a *Bivens*-type cause of action against a federal prosecutor who allegedly violated plaintiff's Sixth Amendment rights by denying, knowing his denial to be false, the fact that one of the other grand jury witnesses, who was also represented by plaintiff's attorney, was a government informant), *vacated on rehearing on other grounds*, 712 F.2d 1444 (dismissing action because federal prosecutor enjoyed absolute immunity as a witness).

²⁷⁶See *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (both *Bivens* and Section 1983 allow a plaintiff to seek money damages from government officials who violate plaintiff's Fourth Amendment rights); *McCarthy v. Madigan*, 503 U.S. 140, 152–56 (1992) (upholding plaintiff's *Bivens* claim even though he had failed to exhaust alternative administrative remedies that did not allow for monetary damages).

²⁷⁷*Alexander v. Sandoval*, 532 U.S. 275 (2001).

1. The “Ancien Regime”

To comprehend the extent of the evolution that has taken place, one must understand the development of the implied-right-of-action doctrine during the Warren Court era: “It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose” expressed by a statute.²⁷⁸ The Supreme Court described this approach as the “ancien regime,” which the Court has “sworn off.”²⁷⁹

The Court has since “abandoned” *Borak*.²⁸⁰ In *Cort v. Ash* the Court established explicit criteria for implying a right of action under a federal statute.²⁸¹ *Cort v. Ash* established a four-pronged test: (1) did Congress intend to create a right of action; (2) is plaintiff a member of the group to be specially benefitted by the statute; (3) is an implied right of action consistent with the overall statutory scheme or purpose; and (4) how was the statute enforced in the past and what other enforcement mechanisms are available to plaintiff?²⁸²

As the test was originally formulated, no one prong was determinative. However, subsequent cases emphasized that the first *Cort* factor, congressional intent, is the primary focus of inquiry.²⁸³ Nevertheless, until 2001 many courts continued to consider all four *Cort* factors when determining whether a private right of action can be inferred, although courts frequently addressed the last three *Cort* factors simply in terms of the insight they offered in ascertaining congressional intent.

The decision in *Alexander v. Sandoval* may be interpreted as narrowing the inquiry even further. *Sandoval* seems to say that congressional intent is the only issue, that is, does the statute “display[] an intent to create not just a private right but also a private remedy?”²⁸⁴ That intent is to be determined almost exclusively based on the text and structure of the statute; the Court expressed disdain for the *Borak* approach of inferring remedies that would be necessary to effectuate the congressional purpose.²⁸⁵ Before discussing *Sandoval* in detail, however, we cover the application of the *Cort v. Ash* test to the extent that *Cort* is still viable after *Sandoval*.²⁸⁶

Even under the standard *Cort* analysis, the most accurate indicator of congressional intent has been statutory language creating an express right or duty focused specifically on the benefitted individuals bringing the action.²⁸⁷ If the statute sets out a clear substantive right, notably through such “rights-creating” language, then further affirmative evidence of congressional intent to create a right of action is unnecessary.²⁸⁸ A right to enforce can also be inferred from the language, structure, or circumstances of the enactment.²⁸⁹

In *Merrill Lynch, Pierce, Fenner & Smith v. Curran* the Court made two important points regarding the interplay between judicial implication of private rights of action and legislative intent.²⁹⁰ First, because judicial implication of a right turns on congressional intent, the implication of a right of action does not violate separation of powers.²⁹¹ Second, if the judiciary had already implied a right of action when Congress amended the statute, the relevant inquiry is then whether Congress intended to preserve that remedy.²⁹² The grant of one or more express rights of action in a statute, the Court also stated, does not preclude additional implied rights of action.²⁹³

²⁷⁸ *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

²⁷⁹ *Sandoval*, 532 U.S. at 287.

²⁸⁰ *Id.*

²⁸¹ *Cort v. Ash*, 422 U.S. 66, 78 (1975).

²⁸² *Id.* at 77–85.

²⁸³ See *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11 (1979), and *Cannon v. University of Chicago*, 441 U.S. 677, 690–94 (1979) (finding a basis for an implied cause of action arising from the sex discrimination provisions of Title IX of the Education Amendments of 1972).

²⁸⁴ *Sandoval*, 532 U.S. at 286 (emphasis added).

²⁸⁵ *Id.* at 287–88.

²⁸⁶ *Sandoval* did not explicitly overrule *Cort* and cited it with approval in some places. Thus, as discussed below, whether *Sandoval* will have the effect of virtually overruling *Cort*, or will merely be seen as a gloss on the *Cort* analysis, is not clear.

²⁸⁷ *Cannon*, 441 U.S. at 690 n.13.

²⁸⁸ *Id.* at 690 n.13, 690–94.

²⁸⁹ *Transamerica*, 444 U.S. at 15, 18–19.

²⁹⁰ *Merrill Lynch, Pierce, Fenner and Smith v. Curran*, 456 U.S. 353 (1982).

²⁹¹ *Id.* at 375–76.

²⁹² *Id.* at 379–82.

²⁹³ *Id.* at 380–81. See also *Herman and MacLean v. Huddleston*, 459 U.S. 375 (1983); *Cannon*, 441 U.S. 677.

The second *Cort v. Ash* factor, whether the plaintiff is a member of a group intended to be specially benefitted by the statute, turns on statutory language that identifies the class to be benefitted.²⁹⁴ If a statute focuses on a particular class of persons and directs particular actions for their benefit, rather than merely articulating a generalized ban on proscribed conduct, then the statute may imply a right of action.²⁹⁵ Thus the inquiry into whether Congress intended specially to benefit an identifiable class is itself an inquiry into congressional intent. Indeed, *Transamerica* and *Merrill Lynch* indicate that congressional intent is the primary consideration: if no congressional intent is discernible, then a court may not infer a right of action from the third and fourth *Cort v. Ash* factors.²⁹⁶

Developed in *Herman and MacLean v. Huddleston*, the third *Cort v. Ash* factor—whether a private right of action is consistent with the overall plan or purposes of the statute—is satisfied, the Court held, when the right of action either is necessary to achieve the statutory purpose or at least furthers that purpose.²⁹⁷

The last inquiry looks at two related issues and the light they shed on congressional intent: (1) how the statute has been enforced in the past and (2) other means of enforcement available to plaintiff in the future. First, the court must be satisfied that the remedy sought is not one traditionally relegated to state law. If the federal government has long-standing involvement in the substantive area covered by the federal enactment in question, or if, for example, the enactment was intended to correct state deficiencies, to remedy identified problems or to improve the quality of assistance or services provided by states, then this factor would militate in favor of implying a right of action based on the corrective federal law. Plaintiffs should not be relegated to state-law remedies whose inadequacy prompted the federal legislation in the first place.²⁹⁸

In the second prong of the fourth *Cort* factor, the court considers whether any other statutes provide an express remedy or any agency enforcement mechanism. Relief under some federal statutes is clearly limited to enforcement by federal agencies.²⁹⁹ However, *Cannon* makes clear that an administrative remedy is not exclusive when the injured party cannot participate in the agency enforcement scheme.³⁰⁰ As pointed out in connection with the determination of congressional intent, the availability of other rights of action expressed in a statutory scheme does not preclude implying a right of action from another provision.³⁰¹

2. The Impact of *Wright* and a Comparison Between Section 1983 and Implied Rights of Action

There were a limited number of cases that found implied private rights of action before the 1987 decision in *Wright v. City of Roanoke Redevelopment and Housing Authority*.³⁰² They found implied private rights of action in housing cases.³⁰³ Plaintiffs found broader success, however, in obtaining decisions implying a private right of action based on federal antidiscrimination statutes.³⁰⁴ *Wright* held that the Brooke Amendment to the federal Housing Act gave public housing tenants “rights” to enforce limitations on rent through Section 1983. Although it was a Section 1983 decision, *Wright* also has important ramifications for implied private rights of action.

²⁹⁴*Cannon*, 441 U.S. at 690–94.

²⁹⁵*California v. Sierra Club*, 451 U.S. 287, 294–95 (1981); *Cannon*, 441 U.S. at 690–94.

²⁹⁶*Merrill Lynch*, 453 U.S. at 393–95; *Transamerica*, 444 U.S. at 15–16. See also *Sierra Club*, 451 U.S. at 294–95.

²⁹⁷*Herman and MacLean v. Huddleston*, 459 U.S. 375, 380–87 (1983).

²⁹⁸*Transamerica*, 444 U.S. at 19 n.8.

²⁹⁹See, e.g., *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974) (no private right of action under Federal Trade Commission Act).

³⁰⁰*Cannon*, 441 U.S. at 690–94.

³⁰¹*Id.*

³⁰²*Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).

³⁰³Specific statutes held to be enforceable by a handful of lower courts under an implied-right-of-action theory included *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir. 1982) (Section 8); *Montgomery Improvement Association v. U.S. Department of Housing and Urban Development*, 645 F.2d 291 (5th Cir. 1981) (Community Development Block Grant statute); *Howard v. Pierce*, 738 F.2d 722 (6th Cir. 1984) (Brooke Amendment; federal defendant); *Gonzalez v. St. Margaret’s House Housing Development*, 620 F. Supp. 806 (S.D.N.Y. 1985) (Brooke Amendment); *Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982) (Title VI; federal defendant).

³⁰⁴See, e.g., *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*); *Cannon*, 441 U.S. 677 (Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*); *NAACP v. Medical Center Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794); *Davis v. Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978) (Section 504), *rev’d on other grounds*, 442 U.S. 397 (1979); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285 (2d Cir. 1977) (Section 504).

Wright makes clear that the test for determining whether private parties have an implied private right of action is different from the test for determining whether they have a Section 1983 right of action. Although the defendant must raise the defense of no private right of action, the treatment of that defense varies with whether the plaintiff asserts a right as expressly provided under Section 1983 or as implied directly from a statute. The plaintiff who claims a right of action by implication must affirmatively demonstrate congressional intent to create a right of action. By contrast, defendants asserting no Section 1983 right of action must overcome the presumption of enforceability and have the burden of affirmatively demonstrating congressional intent to preclude enforcement.

The distinction between a Section 1983 action and an implied cause of action on the issue of congressional intent lies in the burden of proof. However, in both types of cases the question of whether Congress intended to create enforceable rights is the same. In *Wright* the Court followed the same approach in *Cannon*.³⁰⁵ The approach was to analyze whether the underlying federal law created substantive rights.³⁰⁶ If the underlying federal law does confer substantive rights on particular program beneficiaries, then, under the *Cannon* presumption, a court should hold that Congress intended to create a private right of action in implied-right-of-action cases.

When Section 1983 is available as a remedy, it is clearly superior to an implied cause of action. Section 1983 authorizes a full panoply of remedies; by contrast, an implied right of action may authorize only limited remedies. For example, a court may conclude that Congress intended private enforcement with respect to only one form of relief.³⁰⁷ Another major advantage of a Section 1983 action is that 42 U.S.C. § 1988, discussed in more detail in Chapter 9 of this MANUAL, authorizes attorney fees.

After *Gonzaga University v. Doe*, the pendulum has swung in the other direction.³⁰⁸ Section 1983 and implied private rights of action may be more similar than prior law had indicated:

As distinguished from the private right of action situation, [p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. . . . Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983. But the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute “confers rights on a particular class of persons.”³⁰⁹

3. The Impact of *Sandoval*: A New Test or a Gloss on the *Cort* Test?

Alexander v. Sandoval involved a challenge to the Alabama Department of Safety’s refusal to administer its driver’s examination in a language other than English.³¹⁰ The plaintiff was a Mexican immigrant who could read road signs but did not have the English skills necessary to take a written examination. She sued, arguing that the driver’s license rule violated the regulations implementing Title VI of the Civil Rights Act of 1964. Title VI forbids discrimination based on race or national origin in any program or activity receiving federal funds. The regulations interpret national origin discrimination to include actions that did not intend to discriminate but had that effect because of factors having a disparate impact such as an individual’s limited ability to speak English.

The Supreme Court in *Sandoval* found it “beyond dispute that private individuals may sue to enforce § 601” of the statute.³¹¹ However, private individuals, the Court held, do not have a private right of action to enforce the “disparate impact” regulations promulgated pursuant to Section 602 of Title VI. The distinction seems to be that the Section 602 regulations prohibit conduct that the statute itself permits:³¹² “Language in a regulation may invoke a private right of

³⁰⁵ *Cannon*, 441 U.S. at 690 n.13.

³⁰⁶ *Wright*, 479 U.S. at 430.

³⁰⁷ See, e.g., *Transamerica*, 444 U.S. at 24 (rescission and restitution, but not damages).

³⁰⁸ *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (finding no right to suit under Section 1983 where plaintiff alleged a violation of FERPA, a federal statute protecting the privacy of educational records).

³⁰⁹ *Gonzaga*, 536 U.S. at 284–85.

³¹⁰ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³¹¹ *Id.* at 280.

³¹² Interestingly, even though a crucial factor in the Court’s analysis was that the regulations exceeded the bounds of their enabling statute by forbidding conduct that the statute permitted, the Supreme Court did not invalidate the Title VI regulations. The Court certainly did raise the question of the validity of the regulations but left resolution of that question for another day. Rather, the Court ruled that no lawsuits may be brought by private individuals to enforce them.

action that Congress through statutory text created, but it may not create a right that Congress has not.”³¹³ In analyzing the implied-right-of-action issue, the Court found the existence or absence of “rights-creating language” to be critical to the inquiry.³¹⁴ Focusing on the four corners of the statute, including its “text and structure,” the Court made clear that the statute must evince a “congressional intent to create new rights.”³¹⁵ In future cases involving regulations, advocates should emphasize *Sandoval’s* language leaving room for the possibility that a regulation “may invoke a private right of action that Congress through statutory text created, [even though] it may not create a right that Congress has not.”³¹⁶

Most commentators seem to agree that *Alexander v. Sandoval* will have a significant effect on the ability of individual plaintiffs to enforce federal statutes against private defendants. At the very least, *Sandoval* is part of a trend in the Supreme Court to limit individuals’ access to the courts to enforce their rights arising under federal law. This trend makes it much more difficult for legal aid lawyers to obtain legal redress for their clients.

Sandoval will have an impact more specifically on the use of Title VI as a vehicle for representing certain legal aid clients. Private enforcement of Title VI against organizations and individuals will be limited to situations where intentional discrimination can be shown. Individuals will no longer be able to enforce the “disparate impact” regulations. Because violations of equal protection and of Title VI itself require proof of discriminatory intent, and proving such intent is quite difficult, the Title VI regulations have been an enormously important weapon in civil rights litigation.³¹⁷ They have been, for example, the primary source of law in actions seeking fair treatment for people with limited proficiency in the English language. Likewise, frequently when legal aid lawyers challenge violations of federal public benefit laws, they join claims that the defendants’ actions also have a disparate impact on racial and national-origin minorities. Thus the Supreme Court’s ruling in *Sandoval* that no lawsuits may be brought by private individuals under the Title VI regulations means that civil rights plaintiffs have lost a key weapon for challenging practices that have a disparate impact on such minorities.

The *Sandoval* decision also means that the only way these presumably valid regulations can be enforced is if the federal funding agency decides to cut off funds to recipients who engage in practices with a racially disparate effect. Aside from the problem of throwing the baby out with the bathwater, this approach relies on the political branches of government rather than the courts and, in particular, relies on proactive steps being taken by federal agencies that are persistently underfunded and understaffed.

4. After *Sandoval*

At a minimum, *Sandoval* solidified the case law that seemed to apply the four-prong *Cort* test merely as variations on the theme of congressional intent:³¹⁸ “*Sandoval* is the culmination of [the post-*Cort*] trend, announcing that ‘statutory intent . . . is determinative.’ The other three *Cort* factors remain relevant only insofar as they provide evidence of Congress’s intent.”³¹⁹ Another interpretation is also possible; *Sandoval* may well have overruled *Cort sub silencio* and replaced the four-prong test with a simple congressional intent test, a test where the statutory text and structure are the “begin[ning]” and “end” of the analysis.³²⁰

³¹³ *Sandoval*, 532 U.S. at 291.

³¹⁴ *Id.* at 288.

³¹⁵ *Id.* at 289.

³¹⁶ *Id.* at 291; see *Chaffin v. Kansas State Fair Board*, 2003 U.S. App. Lexis 22043 (10th Cir. Oct. 28, 2003) (distinguishing *Sandoval* on this basis and permitting enforcement of Americans with Disabilities Act regulations and guidelines through a private action); cf. *Rolland v. Romney*, 318 F.3d 42, 52 (1st Cir. 2003) (relying on same *Sandoval* language and finding private right of action under Section 1983 to enforce regulations interpreting the Nursing Home Reform Amendments, 42 U.S.C. § 1396r, based on “rights-creating language” contained in statute).

³¹⁷ But see *Hodgens v. General Dynamics*, 144 F.3d 151, 166–69 (1st Cir. 1999), for a discussion of various ways one can prove discriminatory intent.

³¹⁸ “Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.” *Sandoval*, 532 U.S. at 287. Although in dicta and although the jurisprudential battle continues to rage on this issue, the majority of the Court appears to have adopted Justice Scalia’s view of statutory construction: that the four corners of the statute are the beginning and the end of the analysis. *Id.* at 288 (“In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text. We therefore begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI.”) (citation omitted).

³¹⁹ *Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002) (internal citation omitted); see *Love v. Delta Air Lines*, 310 F.3d 1347, 1351–52 (11th Cir. 2002); see also *Hallwood Realty Partners L.P. v. Gotham Partners L.P.*, 286 F.3d 613, 619 n.7 (2d Cir. 2002); *Southwest Air Ambulance Inc. v. City of Las Cruces*, 268 F.3d 1162, 1171 (10th Cir. 2001).

³²⁰ *Sandoval*, 532 U.S. at 288.

Emphatically, however, *Sandoval* did not expressly overrule *Cort* and indeed cited it with favor in parts of the opinion. Some courts, even after *Sandoval*, continued to apply the *Cort* four-prong analysis.³²¹ Most did not, however.³²² The full implications of this decision are not yet known.³²³

IV. Third-Party Beneficiary Contract Cause of Action

Privatization is increasingly common in the context of delivering government benefits to the poor. State welfare agencies regularly contract with managed care organizations and other private entities to provide or administer at least some of the state's Medicaid and TANF benefits to eligible recipients. HUD and many state housing finance agencies seek to provide affordable housing by subsidizing the construction, financing, operation, or rental of privately owned buildings in return for the owner's promise to offer some of the units at a price that the poor or near-poor can pay. In these situations and others, the agreement between the government and the private entity is memorialized in a contract between them. Depending on the nature and closeness of the relationship between the government entity and the private actor, the latter may be considered a state actor subject to suit under Section 1983.

In those cases in which a Section 1983 action will not be possible, a cause of action sounding in contract may be available against the private entity on behalf of one's client as the intended third-party beneficiary of discrete provisions of the agreement between the private entity and the government.³²⁴ The core of this claim is that the government and the private party are contracting for the benefit of the low-income individuals for whom the government program was designed and that those individuals may therefore seek to enforce the contract if it is breached.³²⁵ Such claims find considerable support in the Restatement (Second) of Contracts (1981) and the relevant case law, although in the realm of public and subsidized housing the results in the latter are mixed.³²⁶

³²¹ See, e.g., *McDonald v. S. Farm Bureau Life Insurance Co.*, 291 F.3d 718, 723–26 (11th Cir. 2002); *Walls v. Wells Fargo Bank N.A.*, 276 F.3d 502, 508 (9th Cir. 2002) (“While neither the Supreme Court nor our court has abandoned consideration of all the *Cort* factors, including whether the plaintiff is a member of the class for whose benefit the statute was enacted, it is clear that the critical inquiry is whether Congress intended to create a private right of action.”); *Dewakuku v. Martinez*, 271 F.3d 1031, 1038 (Fed. Cir. 2001) (“As guides to discerning Congress’ intent as to an implied private right of action [as required by *Sandoval*], courts generally look to the four factors enunciated by the Supreme Court in *Cort*.”).

³²² See, e.g., *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052–53 (9th Cir. 2003) (applying *Cort*, as limited by *Sandoval* to a congressional intent test; and “declin[ing] to imply a private right of action primarily because Congress has manifested no intent to allow one, and other considerations pertinent to that inquiry do not counsel in favor of doing so”); *Howard v. Coventry Health of Iowa Inc.*, 293 F.3d 442, 444–45 (8th Cir. 2002) (finding no congressional intent to create an implied right of action).

³²³ See, e.g., *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003) (interpreting the combination of *Sandoval* and *Gonzaga* to hold that no agency regulation can independently create rights enforceable through Section 1983).

³²⁴ As with Section 1983 actions, advocates should assume that a court will apply a heightened pleading requirement to third-party beneficiary contract claims. You must plead the specific contract provisions that benefit your client and are not being observed. Before filing suit, you should attempt to acquire a copy of the specific contract at issue, or at least a copy of any model contract upon which it may be based. An undifferentiated reference in the complaint to the entire contract is unlikely to be sufficient.

³²⁵ Such contract actions should not be confused with the analogous but separate claim that one's client is the third-party beneficiary of various provisions of a federal statute, such as the Medicaid Act, enacted pursuant to Congress' spending power under the Commerce Clause. Some courts suggested that such statutes created a relationship between the federal and state governments and akin to a contract. See, e.g., *Pharmaceutical Research and Manufacturers of America v. Walsh*, 123 S. Ct. 1855, 1872–73 (2003) (J. Thomas, concurring).

³²⁶ The mixed results in housing cases are probably explained in part by the fact that numerous public and subsidized housing programs are enacted under a number of different statutes, which result in a wide variety of agreements between governments and private entities. Some housing cases were brought on behalf of tenants while in others the plaintiffs were applicants—a distinction that mattered to some, but not all, courts. Advocates should watch closely for these differences in reviewing these cases. Compare *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 548 (S.D.N.Y. 1995) (allowing tenants to sue as third-party beneficiaries), and *Knapp v. Smiljanic*, 847 F. Supp. 1428, 1433 (W.D. Wis. 1994) (finding third-party standing for a Section 8 applicant), with *Price v. Pierce*, 823 F.2d 1114, 1120–21 (7th Cir. 1987) (denying standing as third-party beneficiaries to housing applicants), and *Aristil v. Housing Authority of Tampa*, 54 F. Supp. 2d 1289, 1295 (M.D. Fla. 1999) (denying standing to Section 8 tenants). See generally Steve Hitov & Gill Deford, *The Impact of Privatization on Litigation*, 35 CLEARINGHOUSE REVIEW 590, 591 n.3 (Jan.–Feb. 2002); Michele E. Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIFORNIA LAW REVIEW 569, 635 (2001) (discussing actions relating to Temporary Assistance for Needy Families litigation).

A. STANDING

The Restatement (Second) of Contracts (1981) is the starting point for considering the viability of any third-party beneficiary cause of action.³²⁷ Section 302 defines all beneficiaries of a contract as being intended or incidental. Only an intended beneficiary has standing to enforce a contract between two other parties. Whether a person is an intended beneficiary, with the resultant right to sue, depends upon the intention of the parties to the contract. That intent may be articulated in the contract itself or discerned or imputed from the statutory context which prompted the contract to be executed.³²⁸

Courts also find intent to benefit a third party when one of the contracting parties owes the third party a preexisting duty. This “duty owed” interpretation arises from the language of Section 302(1)(a) of the Restatement and is a variation on the payment of money (“creditor beneficiary”) principle articulated there. Consequently, in an action under a contract executed in conjunction with a government benefit program, the complaint should allege that the recipient is the intended beneficiary of the contract between the state and the private entity because the state has a preexisting duty to provide coverage to the recipient.³²⁹

When examining the issue of intent, we must distinguish between implied congressional intent to create a cause of action and the implied intent of the parties to a contract to benefit a third party since either element may be sufficient to confer standing on third-party beneficiaries. This distinction is clearly articulated in *Brogdon v. National Healthcare Corp.*, which recognizes that if the privatization contract itself evinces an intent to make a third party an intended beneficiary, the contract can be enforced even if it was executed pursuant to a statute that does not itself contain an implied right to sue.³³⁰ That Congress enacted a program at all can sometimes, as in *Holbrook*, be perceived, however, as evidence of intent that an ensuing contract benefit the third parties eligible for the government program in question, whether or not the contract itself articulates that intent.³³¹

Some contracts between the government and a private entity specifically state that the contract is *not* intended to create rights in third parties. While Section 302 of the Restatement implies that the parties may contract away a third-party beneficiary’s right to enforce the contract, none of the examples presented there addresses contracts entered into for the purpose of implementing or administering statutory benefit programs. In that context, some courts allowed such provisions to defeat third-party beneficiary claims, while others refused to do so.³³²

B. CHOICE OF FORUM AND LAW

Contracts like those being discussed here are usually formed in furtherance of the goals of a federal benefit program. Whether suits seeking to enforce such contracts therefore impart federal question jurisdiction is viewed as a close question by the federal courts. The answer probably depends on the nature of the federal program at issue, with courts being much more likely to find jurisdiction in subsidized housing cases, where HUD is often a defendant, and much less so in actions under programs involving federal-state cost sharing.³³³ Often, however, third-party beneficiary claims are joined with causes of action directly under the substantive federal statute, as with the Food Stamp Program, or under Section 1983, which vests the court with federal question jurisdiction. In such cases, the court may hear the contract claim pur-

³²⁷Not every state has adopted the Restatement, and advocates need to ascertain the status of the law in their state if we assume that a court would decline to apply federal common law.

³²⁸E.g., one court suggested that if Section 8 tenants were not the intended beneficiaries of a contract between HUD and a private landlord, then “the legitimacy of the multibillion dollar Section 8 program is placed in grave doubt.” *Holbrook v. Pitt*, 643 F.2d 1261, 1271 (7th Cir. 1981). A similar conclusion was reached in the Medicaid context. *Smith v. Chattanooga Medical Investors Inc.*, 62 S.W.3d 178, 185–87 (Tenn. Ct. App. 2001). That one of the parties to the contract, although not the one being sued, is a government entity certainly thus does not foreclose an enforcement action against the private entity and may in some circumstances even facilitate it.

³²⁹See *Hitov & Deford*, *supra* note 326, at 592 n.7.

³³⁰*Brogdon v. National Healthcare Corp.*, 103 F. Supp. 2d 1322, 1334 (N.D. Ga. 2000).

³³¹*Holbrook*, 643 F.2d at 1271.

³³²*Compare Aristil*, 54 F. Supp. 2d at 1296 (denying third-party standing based on a “no intent” clause despite other contrary contractual language), and *Velez v. Cisneros*, 850 F. Supp. 1257, 1277 (E.D. Pa. 1994) (enforcing language limiting third-party actions against HUD), with *Ashton v. Pierce*, 716 F.2d 56, 66 (D.C. Cir. 1983) (requiring a clearer expression of intent to limit third-party actions than a mere “no-intent” clause). See also *Hitov & Deford*, *supra* note 326, at 593.

³³³See *Penobscot Nation v. Georgia-Pacific Corporation*, 254 F.3d 317, 321 (1st Cir. 2001), for a full discussion of the considerations relevant to making this determination. See also *Audio Odyssey Ltd. v. United States*, 255 F.3d 512, 520–21 (8th Cir. 2001); *Hitov & Deford*, *supra* note 326, at 595.

suant to the supplemental jurisdiction provisions of 28 U.S.C. § 1367 since the contract claim is against the private entity, not against the state.

A related issue is whether a court should apply the state or federal common law of contracts. In the context of subsidized housing, courts usually applied federal common law because of the perceived value of having a uniform nationwide housing policy.³³⁴ However, because the statutes creating federal-state cost-sharing programs (e.g. Medicaid, TANF, and states' children's health insurance programs) permit state-by-state variation both in their administration and in the nature of the benefits offered, courts in cases involving those programs are more likely to find it appropriate to apply the common law of the state.

C. AVAILABLE RELIEF

A final consideration in third-party beneficiary contract actions is the nature and scope of the relief available.³³⁵ The Restatement addresses the issue of injunctive relief in Sections 357, 365, and 366. While the language of contract law varies somewhat from that of statutory litigation, the Restatement makes clear that both negative and mandatory injunctions (in the form of “forbearance”) are authorized as relief in third-party beneficiary actions. Indeed, litigators familiar with the requirements for obtaining statutory injunctions will find that virtually the same considerations apply in these contract actions.

While *Edelman v. Jordan* and its progeny prohibit a federal court from awarding damages against a state agency that violated a recipient's rights, no such bar normally exists against private entities which contract with the state.³³⁶ In Section 313 the Restatement addresses the availability of damages in third-party beneficiary actions. While the Restatement does not generally support damages to “a member of the public” for breach of a government contract, that rule is not absolute, and its applicability probably depends on whether the plaintiff is merely a member of the public at large, or rather a member of a recognizable subset of the public, such as a tenant of a particular development or a recipient of a particular public benefit. In the latter situation the Restatement seems to support, and certainly does not foreclose, an appropriate award of damages.

³³⁴ See, e.g., *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977); *Price*, 823 F.2d at 1120.

³³⁵ For a full discussion of this issue, see Hitov & Deford, *supra* note 326, at 595–97.

³³⁶ *Edelman v. Jordan*, 415 U.S. 651 (1974).

