EMPLOYMENT RIGHTS
of Sexual Assault Victims

MORE:
- Homeless Persons' Voting Rights
- Benefits for Low-Income Veterans
- Racially Discriminatory Purpose in Housing Cases
- Beyond Intent
- Students' Due Process Rights
- Threat to Enforcement of Safety-Net Programs

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law
Are There Five Votes to Overrule Thiboutot?

The Threat to Enforcement of Federal Medicaid, Housing, Child Welfare, and Other Safety-Net Programs

By Lauren Saunders

[Editor's Note: Lauren Saunders, managing attorney of the Washington, D.C., office of the National Consumer Law Center, wrote this article while she was directing attorney of the Herbert Semmel Federal Rights Project of the National Senior Citizens Law Center. Public interest advocates who are interested in following developments involving Section 1983 and other issues affecting enforcement of federal laws protecting individuals are invited to join the National Senior Citizens Law Center's federal rights listserv, described at www.federalrights.org and www.nsclc.org.]

The Civil Rights Act of 1871 gives individuals a remedy against "deprivations of any rights, privileges, or immunities secured by the Constitution and laws."[1] Now codified at 42 U.S.C. § 1983 and popularly known as "Section 1983," the statute is an important vehicle for enforcing federal statutes as well as the U.S. Constitution. Section 1983 is especially crucial to the enforcement of safety-net statutes. It is the primary, and often the only, vehicle for enforcing state compliance with the Medicaid Act, federal subsidized housing laws, the Food Stamps Act, and the child welfare, child support, foster care, and adoption assistance provisions of Title IV-D of the Social Security Act, among other laws.

In 1980 in Maine v. Thiboutot the U.S. Supreme Court explained the obvious: "the phrase 'and laws,' as used in § 1983, means what it says" and provides a remedy for violations of statutory as well as constitutional rights.[2] Both before and after Thiboutot, Section 1983 has been used to enforce rights in a variety of federal statutes without an explicit right of action.[3]

But sixteen years have passed since the Supreme Court upheld a Section 1983 claim.[4] In each of the last three cases, the Court ruled that the statutory provision at issue could not be enforced through Section 1983.[5] The Court has developed increas-

---

3The Thiboutot opinion lists several earlier cases in which the U.S. Supreme Court decided statutory questions on the merits and Section 1983 provided the exclusive statutory cause of action. See Thiboutot, 448 U.S. at 6.
ingly stringent tests for Section 1983 claims, especially in the most recent case, Gonzaga University v. Doe. 6

With the recent changes on the Supreme Court, advocates are now faced with the serious prospect that the Court may have five votes to overrule Thiboutot—either directly or in effect. This is not merely speculation based on ideology; Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Alito all have specific track records on Section 1983. Even if the Court does not overrule Thiboutot outright, the Court could restrict the Section 1983 requirements so severely that they are impossible to meet—just as it has done with implied causes of action. 7

Thus advocates must use extreme caution before seeking certiorari in a Section 1983 case. Recent successes in appellate courts, which are bound by existing law, should not lull advocates into ignoring the very real threat to Section 1983. A Supreme Court decision overruling Thiboutot would severely affect the enforceability of the Medicaid Act, federal housing and child welfare laws, the Food Stamps Act, and every other statute enforced through Section 1983.

Below, after some background, is an overview of the positions of the five justices whose views pose concern.

**Background**

Ever since the Supreme Court decided Thiboutot in 1980, dissenters on the Court have attempted to undermine it. In the 1981 decision the very next year in Pennhurst State School and Hospital v. Haldeman, Justice Rehnquist’s opinion advised that, in “legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.” 8 Most statutes enforced through Section 1983, such as the Medicaid Act, federal housing laws, and Title IV-D of the Social Security Act, were enacted pursuant to the spending power.

Since Pennhurst, the Supreme Court has decided five Section 1983 cases involving spending clause statutes. In the first two the Court upheld use of Section 1983 to enforce provisions of federal statutes, but in the last three the Court found that the statutes were not enforceable. 9

In the most recent case, the 2002 Gonzaga decision, the Supreme Court quoted the Pennhurst statement above and developed an especially restrictive test for determining whether a statute creates a “right” enforceable through Section 1983. 10 A statute must contain an “unambiguously conferred right” phrased with “explicit rights-creating terms,” and “its text must be ‘phrased in terms of the persons benefited.’” 11 Even conservative Seventh Circuit Judge Frank Easterbrook has quipped about the “[Gonzaga] Court’s oxymoron” of searching for “‘clear and unambiguous terms’ when statutory silence is what poses the question whether a right may be implied.” 12

---


7. Compare Gonzaga, 536 U.S. at 283 (holding that “our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983”), with Correctional Services Corporation v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (Clearinghouse No. 54,279) (decrying the long past “heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition”).


11. Id. at 283–84 (quoting Canon v. University of Chicago, 441 U.S. 677, 692 n.13 (1979) (Clearinghouse No. 21,638)).

12. McCready v. White, 417 F.3d 700, 703 (7th Cir. 2005).
The Gonzaga opinion also found that “our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”13 Although the overlap is not complete, this statement is very troubling given that many years have passed since the Supreme Court stopped implying rights of action.14

Justices Scalia, Thomas, and Kennedy have supported even more drastic theories that would directly prevent any use of Section 1983 to enforce spending clause statutes. Chief Justice Roberts and Justice Alito, both of whom have troubling records in Section 1983 cases, have joined them on the court.

**Justice Scalia**

Justice Scalia believes that the federal government’s ability to cut off a state’s federal funding is the only method of enforcing a spending clause statute that does not contain an explicit right of action or other explicit private remedy. As he summarizes in a Medicaid preemption case in 2003:

> I would reject petitioner’s statutory claim on the ground that the remedy for the State’s failure to comply with the obligations it has agreed to undertake under the Medicaid Act, see Blessing v. Freestone, 520 U.S. 329, 349, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997) (Scalia, J., concurring); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), such an agreement is “in the nature of a contract,” id., at 17, 101 S. Ct., at 1540: The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary. Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and

> when the denial of enforcement is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).15

In his Blessing concurrence, quoted below, Justice Scalia argues that spending clause legislation is simply a contract between the federal government and state or local government, and individuals may not enforce that contract because third-party beneficiary rights did not exist in the nineteenth century, when Section 1983 first gave individuals a federal remedy against states:

> That conclusion [that the plaintiffs could not enforce the child support provision at issue] makes it unnecessary to reach the question whether § 1983 ever authorizes the beneficiaries of a federal-state funding and spending agreement—such as Title IV-D—to bring suit.

As we explained in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), such an agreement is “in the nature of a contract,” id., at 17, 101 S. Ct., at 1540: The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary. Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and

---

13Gonzaga, 536 U.S. at 283.
14See supra note 7.
could not sue upon it; that is to say, if, in the example given above, B broke his promise and did not provide services to C, the only person who could enforce the promise in court was the other party to the contract, A. See 1 W. Story, A Treatise on the Law of Contracts 549–550 (4th ed. 1856). This appears to have been the law at the time § 1983 was enacted. See Brief for Council of State Governments et al. as Amici Curiae 10–11, and n. 6 (citing sources). If so, the ability of persons in respondents’ situation to compel a State to make good on its promise to the Federal Government was not a “right[s] secured by the laws” under § 1983. While it is of course true that newly enacted laws are automatically embraced within § 1983, it does not follow that the question of what rights those new laws (or, for that matter, old laws) secure is to be determined according to modern notions rather than according to the understanding of § 1983 when it was enacted. Allowing third-party beneficiaries of commitments to the Federal Government to sue is certainly a vast expansion.

It must be acknowledged that Wright and Wilder permitted beneficiaries of federal-state contracts to sue under § 1983, but the argument set forth above was not raised. I am not prepared without further consideration to reject the possibility that third-party-beneficiary suits simply do not lie. I join the Court’s opinion because, in ruling against respondents under the Wright/Wilder test, it leaves that possibility open.16

In other words, Justice Scalia claims that statutes such as the Medicaid Act, the Social Security Act, and federal housing statutes are not “laws” within the use of that word in Section 1983 and thus may not be enforced through that provision.

This is a theory that gained special notoriety after the district court in Westside Mothers v. Haveman used it to prohibit use of Section 1983 to enforce the Medicaid Act.17 The court in that case went even further, claiming that spending clause statutes “are not the supreme law of the land” because they are not “laws” that states must follow within the meaning of the supremacy clause.18 Under that theory, even if a spending clause statute contains an explicit or a recognized implied cause of action—such as Title IX of the Education Amendments—it may not be enforced against states, even in purely injunctive actions, under the Ex parte Young exception to sovereign immunity.19

Justice Thomas

Justice Thomas has endorsed the theory of Justice Scalia’s Blessing concurrence:

This contract analogy [of Pennhurst] raises serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise. See Blessing v. Freestone, 520 U.S. 329, 349–350, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997) (Scalia, J., concurring). In contract law, a third party to the contract (as petitioner is here) may only sue for breach if he is the “intended beneficiary” of the contract. See, e.g., Restatement (Second)

---

16Blessing, 520 U.S. at 349–50 (Scalia, J., joined by Kennedy, J., concurring) (emphasis added).


18Westside Mothers, 133 F. Supp. 2d at 561–62.

19Ex parte Young, 209 U.S. 123 (1908).
of Contracts § 304 (1979) (“A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty”). When Congress wishes to allow private parties to sue to enforce federal law, it must clearly express this intent. Under this Court’s precedents, private parties may employ 42 U.S.C. § 1983 or an implied private right of action only if they demonstrate an “unambiguously conferred right.” Gonzaga Univ. v. Doe, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). Petitioner quite obviously cannot satisfy this requirement and therefore arguably is not entitled to bring a pre-emption lawsuit as a third-party beneficiary to the Medicaid contract. Respondents have not advanced this argument in this case. However, were the issue to be raised, I would give careful consideration to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action.20

Chief Justice Roberts

As a lawyer, Roberts has been on the side opposing use of Section 1983 in almost every recent Section 1983 case before the Supreme Court. For a detailed discussion of concerns about Roberts’s views on Section 1983, see Will John Roberts Enforce Federal Laws Protecting Individuals?21

Even more troubling than his record, discussed below, is Roberts’s testimony on Section 1983 in his Supreme Court confirmation hearings. In response to several questions about Section 1983 and Gonzaga, he gave essentially the same answer: “Well, if Congress wants them to sue, all Congress has to do is write one sentence saying individuals harmed by a violation of this statute may bring a right of action in federal court.”22

In response to Sen. Tom Coburn’s question about Gonzaga and how Congress could do better, Roberts replied:

[The Supreme Court was] getting case after case after case. And they finally adopted an approach in the early 1980s that said, look, we’re not going to imply rights of action anymore. Congress, if you want somebody to have a right of action, just say so.

… And after the court developed that jurisprudence in the early 1980s, you know, the hope was—and I think it has been realized to a large extent—that there would be more addressing of that question in Congress, which is where it should be addressed.23

That statement is especially troubling because in Gonzaga the Supreme Court

Justice Kennedy

Justice Kennedy joined Scalia’s Blessing concurrence quoted above.

Also, in Golden State Transit Corporation v. City of Los Angeles he made a gratuitous slap at Thiboutot; in the dissent he commented: “Our cases in recent years have expanded the scope of § 1983 beyond that contemplated by the sponsor of the statute and have identified interests secured by various statutory provisions as well.”24

---

20 Pharmaceutical Research and Manufacturers, 538 U.S. at 683 (Thomas, J., concurring in the judgment) (emphasis added).
23 Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 416 (2005) (Response of Judge John G. Roberts Jr. to question of Sen. Patrick J. Leahy) (S. Hrg. 109-158); see also id. at 248 (Response of Judge John G. Roberts Jr. to question of Sen. Russell D. Feingold (“If Congress had spelled out whether or not a right should be enforceable in court, that is what the determination would be in court.”)).
24 Id. at 294 (Response of Judge John G. Roberts Jr. to question of Sen. Tom Coburn).
said that it was going to use virtually the same test for determining whether a statute may be enforced through Section 1983 and whether it creates an implied right of action. The Supreme Court has not directly said, in Roberts’s words, “we’re not going to imply rights of action anymore,” but that has been the effect of the “tests” that it has developed. Roberts appears to think that Congress would do a better job if it eliminated Section 1983 as well.

Roberts’s record also raises serious concerns. He represented the defendant in Gonzaga, and his brief to the Supreme Court argued:

> Spending Clause legislation[] does not confer on the beneficiaries of funding conditions rights enforceable under § 1983. See Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 561 (E.D. Mich. 2001) (in light of 1871 rule on third-party beneficiaries, “§ 1983 independently creates no right for beneficiaries of federal programs enacted pursuant to the Spending Power to sue” (Medicaid statute)).

In case any doubt existed that Roberts was calling for the overruling of Thiboutot (which also involved a spending clause law), he quoted Justice Powell’s Thiboutot dissent complaining that “the Court ‘ma[de] new law.’”

Roberts also questioned whether “the conditions in Spending Clause legislation qualify as ‘laws’ under § 1983” and quoted an Eighth Circuit concurrence that “Congress may indirectly regulate state conduct by attaching ‘strings’ to grants of money given to state and local governments, but those strings aren’t laws.”

In Wilder v. Virginia Hospital Association Roberts, as deputy solicitor general, argued unsuccessfully that Medicaid rights were not privately enforceable. In Suter v. Artist M. Roberts, as deputy solicitor general, argued successfully that children could not enforce Adoption Assistance and Child Welfare Act provisions requiring states to make reasonable efforts to preserve and reunite the children with their families.

In 1982, when he was working in the U.S. Department of Justice’s Office of Legal Counsel, Roberts commented on a legislative proposal to overturn Thiboutot: “Our legislative proposals could perhaps even be cast as efforts to ‘clarify’ rather than ‘overturn’ that decision.” He discussed Pennhurst and other post-Thiboutot cases that narrowed whether a statute created “rights” within the meaning of Section 1983 and concluded that “I do not, of course, suggest that we rely on this incipient judicial effort to undo the damage created by Thiboutot.”

The strategy that Roberts advised—“clarifying” Thiboutot to death—is exactly what has been happening in the Supreme Court, and he might be disposed to deliver the final blow.

**Justice Alito**

Justice Alito’s record on Section 1983 is sparser than those of the other four justices, but it does raise grounds for serious concern.

---

25Gonzaga, 536 U.S. at 283; see also supra note 7.
26Brief for Petitioners at 42, Gonzaga, 536 U.S. 273 (No. 01-679) (emphasis added).
27Id. (quoting Thiboutot, 448 U.S. at 33 (Powell, J., dissenting)).
28Id. at 42 n.14 (quoting United States v. Morgan, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring)).
29See Wilder, 496 U.S. 498.
30See Suter, 503 U.S. 347.
32Id.
In 2003 Alito joined a Third Circuit decision upholding a Section 1983 claim to enforce the Medicaid Act. But he qualified his vote to reverse the district court; he explained that he was bound by current law that he ominously expected to change:

While the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court. I therefore concur in the Court’s decision.

The district court’s analysis interpreted Gonzaga to prevent use of Section 1983 to enforce any statute written as a set of requirements for state plans—which is how most public benefit statutes, such as the Medicaid Act, Title IV-D of the Social Security Act, and most federal housing laws, are written. That Alito went out of his way to add that concurrence seems completely superfluous and is hard to explain other than as support for the district court’s analysis.

Alito’s record reveals other trouble spots. As a Justice Department lawyer in the 1980s, he urged President Reagan to veto, based on federalism concerns, the Truth in Mileage Act and suggested that President Reagan explain that “[i]t is the states, and not the federal government, that are charged with protecting the health, safety, and welfare of their citizens.”

Others also find that Alito’s Third Circuit opinions have a strong tendency to side with institutions such as state governments over individuals. States, unhappy with Section 1983 lawsuits against their officials, have urged the Supreme Court to find spending clause statutes—such as the one at issue in Thiboutot—unenforceable under Section 1983. Thus advocates have considerable reason to fear that Justice Alito would cast the fifth vote to overrule Thiboutot.

Conclusion

If given the opportunity, the Supreme Court might overrule Thiboutot and eliminate the primary, and often the only, mechanism for enforcing many safety-net statutes. This may not take the form of a direct frontal assault on Thiboutot. As Roberts advised as a Justice Department lawyer, the decision could be “clarified” to the same effect. That is what has happened to the Supreme Court’s tests for discerning implied rights of action—which still are possible in theory, but in reality the Supreme Court has said, in Roberts’s words, “we’re not going to imply rights of action anymore.” Those words are especially chilling after Gonzaga, which began merging the Section 1983 and implied-right-of-action requirements.

The threat to Thiboutot is not a certainty. Chief Justice Roberts’s record is entirely based on his advocacy as a lawyer for clients (whether private or the Reagan administration). Justice Alito’s record on Section 1983 is thin and involves reading between the lines. The dynamics of the new Roberts Court are still developing, and the Court may be more than the sum of its parts. The Court’s first partial term together seems to reveal a trend toward more narrow, unanimous decisions than in the past.

But the very real threat to Thiboutot means that advocates must think carefully before seeking a writ of certiorari in a Section 1983 case. No client has a right to have a case taken to the Supreme Court, and the

---

33 Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004) (Clearinghouse No. 55,662).
34 Id. at 194 (Alito, J., concurring).
outcome of a Supreme Court case affects the entire nation. Any Section 1983 case that reaches the Supreme Court bears the real risk of destroying the primary means of enforcing the Medicaid Act, federal housing laws, the Food Stamps Act, and Title IV-D of the Social Security Act, among other laws.

Before undertaking such a risk, an attorney’s best course is to ensure that there is a reasonable consensus among public interest advocates who rely on Section 1983 to protect their low-income clients that the case is the right one to take to the high court. As with any potential Supreme Court case, consulting with seasoned Supreme Court litigators to determine whether the case stands a reasonable chance with the new Roberts Court is wise. The Supreme Court is unlike any other court, and the small bar of attorneys who regularly practice before it has sharp insight into the Court’s dynamics. The assessment of a case’s prospects before the Court depends on many factors other than an analysis of existing law.

When deciding whether to appeal a case to a court of appeals, an attorney should also consider the bleak prospects of a Section 1983 claim before the Supreme Court. The possibility of making bad law, which should always be a consideration, is ironically greater if the case has a reasonable chance of winning in the court of appeals because the plaintiff will not have control over whether the defendant seeks Supreme Court review. This is not to say that strong cases should not be appealed to the courts of appeal. But the risk that the case could reach the Supreme Court and give the Court an opportunity to overrule *Thiboutot* should be a factor that advocates consider and may tip the balance against appealing more questionable cases.

Moreover, after *Gonzaga*, courts have been much more reluctant to endorse enforcement of statutes through Section 1983, and cases that previously seemed strong now risk making bad law within the circuit. Success at the appellate court level often depends on the panel assigned to the case and on how closely the case is on point with previous Supreme Court decisions. Even some recent successes have been qualified by admonitions:

> The [Supreme] Court’s approach to § 1983 enforcement of federal statutes has been increasingly restrictive; in the end, very few statutes are held to confer rights enforceable under § 1983.... [T]he result we reach in this case is a rarity, particularly after *Gonzaga*.”

Advocates must be smart and strategic about the Section 1983 cases that they appeal, otherwise success will not even be a rarity. The Supreme Court could use the next case to tighten the noose more effectively to kill off the statutory Section 1983 cause of action altogether.

---