Clearinghouse Review

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Three articles on human rights as a framework for advocacy

• In the September–October 2011 Special Issue •

All articles on the human rights prism in poverty law

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Federal safety-net and civil rights statutes confer numerous individual rights, including the rights to obtain timely determinations of eligibility, to receive notices and services, and to be free from discrimination. Yet, under the mantle of implementing the will of Congress which bestowed these many rights, a hostile majority of the U.S. Supreme Court has devised numerous legal doctrines to prevent individuals from enforcing their legal rights in court. The Supreme Court’s dismissal of these rights can certainly be characterized as disrespecting the will of Congress. But, unless Congress responds with new legislation, the Court’s decision is the final word. Advocates need to be cognizant that the rights they see on the pages of federal statute books (or on their computer legal research screens) may be unenforceable. Or perhaps there could be a strategy for getting around the Court’s hostility to enforcement of rights. But one may need to employ this strategy in drafting the complaint or be barred from using it.

Here I introduce the myriad ways of framing a claim to bring suit to vindicate individual rights in light of recent Supreme Court jurisprudence. To begin with, there could be an express statutory provision, known as a private right of action, that empowers individuals to bring suit in federal court. The right to sue could be in the statute that confers the substantive right or it could be in a totally separate law. If no such express right is available, there might be an implied private statutory right of action. For cases involving a conflict between a state and federal law, the supremacy clause of the U.S. Constitution provides an implied right to bring a preemption claim. These three means of accessing the courts—express statutory right of action, implied statutory right of action, and implied constitutional right of action—could be utilized to enforce

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1See, e.g., my The Early Roberts Court Attacks Congress’s Power to Protect Civil Rights, 30 NORTH CAROLINA CENTRAL LAW JOURNAL 231 (2008) [hereinafter Early Roberts Court]; Merrell Dow Pharmaceuticals Incorporated v. Thompson, 478 U.S. 804, 812 n.9 (1986) (“it would flout congressional intent to provide a private federal remedy for the violation of the federal statute”).


3Many federal laws contain procedures for administrative appeals of harmful decisions and denials of rights—for instance, state fair hearings for a denial of Medicaid benefits. These procedures are usually set forth in state statutes or regulations and have not been affected by the U.S. Supreme Court’s recent jurisprudence restricting the enforcement of rights. Fair hearings are very useful for obtaining individual relief but are unlikely to produce systemic change (see Harper Jean Tobin & Rochelle Bobroff, The Continuing Viability of Medicaid Rights After the Deficit Reduction Act of 2005, 118 YALE LAW JOURNAL Pocket Part 147, 149 (2009)).

4For extensive information about the issues addressed here, see FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS (Jeffrey S. Gutman ed., Sargent Shriver National Center on Poverty Law 2d ed. 2004 (2010 update)), www.federalpracticemual.org/ [hereinafter FEDERAL PRACTICE MANUAL].
federal regulations. Some of these claims under federal law may also be brought in state court.

Many suits to enforce federal safety-net and civil rights statutes are brought against states which administer federal benefit programs, hire numerous employees, and spend federal monies for education, transportation, and so on. States are protected from being sued by the Eleventh Amendment of the U.S. Constitution. While suits against states are limited by state sovereign immunity, exceptions to this immunity can be accessed only if the federal or state complaint is worded in accordance with Supreme Court directives.

Federal law may be enforced with state-law claims. By utilizing a third-party-beneficiary claim under state law, advocates in some circumstances have enforced federal statutes against private parties who administer federal programs. State consumer protection statutes and common-law claims can also be utilized in some instances. But state-law claims could be preempted by federal law. Thus many considerations have to be taken into account when crafting litigation to enforce individual rights in the early twenty-first century.

I. Causes of Action

The requirement for a cause of action derives from the common law imported from Great Britain.5 When the federal rules of civil procedure were enacted in 1938, the drafters attempted to eliminate the requirement for a cause of action and to replace it with claims pleading. Undeterred, courts continue to require plain-tiffs to demonstrate that they have a cause of action, meaning an entitlement to bring suit to enforce a specific legal duty.6

A. Express Statutory Right to Sue

An express right of action may be conferred by the statute which contains the substantive right, for example, to receive benefits or to be free from discrimination. Or an express right could be contained in a totally separate statute. A cause of action to sue states and localities that violate federal rights is conferred by 42 U.S.C. § 1983, while the Administrative Procedure Act provides a basis for suit against federal agencies.

Causes of Action in the Statute. The strongest basis for bringing suit is an express provision in the safety-net or civil rights statute specifically empowering aggrieved individuals to sue in federal court. An express right of action may address exhaustion of administrative remedies, statutes of limitations, parties to be sued, venue, injunctive relief, damages, attorney fees, costs, and appeal rights.7 When suing under an express right, the scope of remedies is defined by the statutory provision.

42 U.S.C. § 1983. While many civil rights statutes have express private rights of action, most safety-net laws do not. Advocates have utilized 42 U.S.C. § 1983 as a basis for suits to enforce safety-net statutes, such as Medicaid and the U.S. Housing Act.8 Originally part of the Ku Klux Klan Act of 1871, Section 1983 enables individuals to sue state and local governments to remedy the deprivation of rights secured by the Constitution and federal laws.9 In 1980, over a century af-

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8Price v. City of Stockton, 390 F.3d 1105 (9th Cir. 2004); Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004); See federal PraCtiCe maNual, supra note 4, ch. 5 (Causes of Action).

942 U.S.C. § 1983 states: “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” (see Jane Perkins, Using Section 1983 to Enforce Federal Laws, 38 CleariNGHouse review 720, 721 (March–April 2005)).
ter the law’s passage, the Supreme Court held that Section 1983 provided a cause of action to enforce all federal statutes, not just civil rights laws. Conservative justices dissented, objecting on policy grounds that litigation to enforce federal laws would “harass state and local officials.” Nevertheless, the majority of the Court held that Section 1983 provided an express cause of action to remedy the deprivation of rights under all federal laws.

The Supreme Court established a three-part test for determining whether a statutory provision conferred a federal right enforceable via Section 1983:

- First, Congress must have intended that the provision in question benefit the plaintiff.
- Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.
- Third, the statute must unambiguously impose a binding obligation on the States.

The Supreme Court held that a “comprehensive enforcement scheme,” such as an express right of action in the statute, “is incompatible with individual enforcement under § 1983.” Under this standard, many safety-net provisions were found enforceable since the statutory provisions were clearly intended to benefit recipients, the provisions were not too vague to be enforced, and the provisions utilized words such as “shall” which imposed binding obligations. Moreover, the availability of administrative hearings and federal oversight did not bar individual enforcement under Section 1983 for statutes such as Medicaid.

One strong advantage of a cause of action under Section 1983 is the availability of attorney fees through the companion statute, 42 U.S.C. § 1988. Since the restriction on legal services lawyers seeking attorney fees was lifted in 2009, legal services lawyers may currently seek fees under Section 1988 for claims brought under Section 1983. Moreover, Section 1983 provides damages as a remedy for suits against local governments. And exhaustion of administrative remedies is not required for a claim under Section 1983.

However, in the 2002 case Gonzaga v. Doe, five conservative justices imposed a more difficult standard for utilizing Section 1983. Abandoning policy arguments about insulating state officials from suit, the justices constructed a new analytical hurdle for claims under Section 1983. The Supreme Court demanded proof that Congress intended the specific provision at issue to be enforceable under Section 1983’s express right of action. Purporting to clarify prior decisions, the Court restricted the use of Section 1983 to statutory provisions which contain “explicit rights-creating” language, that is, “phrased in terms of the person benefited.” The examples given by the Court

11Id. at 23 (Powell, J., dissenting); see Section 1983 and Preemption, supra note 5, at 42.
14See, e.g., Wright v. City of Roanoke Redevelopment and Housing, 479 U.S. 418 (1987); Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998); Victorian v. Miller, 813 F.2d 718 (5th Cir. 1987).
15Wilder, 496 U.S. at 522.
16See my Legal Services Attorney Fees Are Obtainable in Pending Cases, 44 CLEARINGHOUSE REVIEW 157 (July–August 2010).
17Monell v. Department of Social Services of New York, 436 U.S. 658, 690 (1978). States are insulated from damages by sovereign immunity. Section 1983 also provides a basis for suits against federal, state, and local officials in their individual capacities, although they may be protected by either absolute or qualified immunity (Hafer v. Melo, 502 U.S. 21, 28–29 (1991)).
20Id. at 284.
were the antidiscrimination provisions of Title VI and Title IX which state that “[n]o person in the United States shall … be subjected to discrimination.” The Court’s justification for imposing this heightened burden for the Section 1983 cause of action was its conclusion, previously espoused only in dissent in Section 1983 cases, that the express cause of action in Section 1983 is similar to an implied statutory right of action. While the Court likened the test for an enforceable “right” under Section 1983 to the test for an implied right of action, the Court acknowledged that Section 1983 provides a remedy for the violation of enforceable rights.

Safety-net statutes are generally structured as federal requirements to be followed by state governments. For instance, the Medicaid statute imposes requirements upon the states in a list of specifications for the state plan. Some federal requirements are broadly worded, such as the requirement to administer the Medicaid program utilizing “reasonable standards.” Even though such broad directives were generally found enforceable prior to Gonzaga, courts after Gonzaga have refused to permit enforcement of broadly worded provisions under Section 1983. The Social Security Act contains an express provision indicating that the recitation of individual rights in a list of state-plan requirements does not bar enforcement under Section 1983. Other safety-net statutes do not have comparable provisions. Thus, in a case under the U.S. Housing Act, based on the “overall structure of the statute” in which tenants’ rights were contained in a list of requirements for federal approval of a demolition application, the Fifth Circuit refused under Section 1983 to permit enforcement of notice and relocation rights. Nevertheless, Section 1983 remains a viable means of enforcing federal law for those provisions—such as the reasonable-promptness provision in Medicaid—that meet the heightened requirements of Gonzaga.

Administrative Procedure Act. The Administrative Procedure Act provides an express right of action to sue federal officials for declaratory and injunctive relief when a federal agency violates individual federal rights. Claims typically made under the Act include the allegation that the agency misinterpreted a statute or made erroneous conclusions of law, that the agency’s rules or findings of fact were arbitrary or capricious, or that the agency used improper procedures in its decision making. Some agency decisions may not be reviewable under the Act. These include instances when a statute exempts an agency action from judicial review, when the individual has not exhausted administrative remedies, or when the individual is not an “adversary” of the agency.
istrative remedies. Moreover, due to the highly deferential standard applied by courts in evaluating agency action, claims under the Act can be difficult to win on the merits.

B. Implied Statutory Rights of Action

In several cases in the 1960s the Supreme Court held that there was an implied cause of action to enforce statutory rights, such as permitting actions for damages, even though the statutes did not specify any remedy. But in 1975 the Court unanimously decided to limit implied statutory rights of action and established a four-part test: (1) Is the plaintiff in the class for whose special benefit the statute was enacted? (2) Is there any indication of legislative intent, explicit or implicit, to deny or to create a private right to enforce? (3) Would a private right to enforce be consistent with the underlying purpose of the statute? And (4) is the cause of action traditionally in the purview of state law such that a federal right to enforce would be inappropriate?

In 1979 the Supreme Court held that Title IX of the Education Amendments of 1972 met that test. But the Court, in an opinion by Justice Stevens, expressed its displeasure with implied statutory private rights of action. The Court stated, "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." A few months later the Court sharply narrowed the availability of an implied private right of action in two cases. The Court focused its inquiry on the second prong: evidence of congressional intent to permit private enforcement and create a private remedy. Since the statutes at issue in those cases did not contain specific statutory language establishing a right to sue and obtain relief, the Court held that there was no implied right of action.

In numerous subsequent cases the Supreme Court refused to permit enforcement of rights through an implied statutory cause of action. The Court has not overruled its earlier decisions that statutes, including Title VI of the Civil Rights Act and Title IX, contain an implied right of action, and indeed the Court has continued to recognize an implied cause of action for those statutes. But, for other statutes, the test for an implied right of action is very difficult to meet. One must prove that Congress intended not only a private right but also a private remedy in a statute that, by definition, does not contain an express right of action. Thus the Court starts with the Gonzaga test of whether there is an explicit right-creating language and then adds the further step of seeking evidence that Congress intended to create a private remedy.

35 Cort v. Ash, 422 U.S. 66 (1975); see FEDERAL PRACTICE MANUAL, supra note 4, ch. 5 (Causes of Action).
37 Id. at 717.
Nevertheless, the present test for an implied right of action is not insurmountable. Recently the Seventh Circuit held that the text and structure of the Protection and Advocacy for Individuals with Mental Illness Act demonstrated congressional intent to permit Protection and Advocacy organizations to sue states to obtain medical records in order to investigate abuse and neglect. For a few statutes, an implied private right of action continues to provide an avenue for enforcing individual rights.

C. Implied Constitutional Rights of Action

The Supreme Court has established that there is an implied cause of action in the Constitution to enforce constitutional rights. Recently, in a case seeking damages, the Court limited implied constitutional causes of action and stated that “implied causes of action are disfavored.” Still, the Court continues to uphold the availability of injunctive and equitable relief under an implied constitutional cause of action.

The supremacy clause of the Constitution provides that federal law preempts contrary state laws. The Supreme Court has never specified that the supremacy clause provides a cause of action for a preemption claim. However, several federal circuits and leading federal law manuals have done so. Other federal courts of appeals have not identified the supremacy clause as the source of the cause of action for a preemption claim but have overtly held that a statutory cause of action is not needed for a preemption claim. The Supreme Court has consistently reached the merits of preemption claims and dismissed arguments that the preemption claim could not be brought because the statute lacked a cause of action. Some federal circuits have taken this approach as well; they reached the merits of preemption claims without addressing the requirement of a cause of action. To date, no federal court of appeals has held that a statutory cause of action is needed for a preemption claim, although the issue has been brought to the attention of the Supreme Court in multiple petitions for certiorari filed by the State of California and supported by twenty-two other state governments.

Preemption provides a limited remedy, specifically a declaration that the conflicting state law or action is void and an injunction prohibiting enforcement.
of the void state law. Attorney fees and damages are not accessible with a pre-emption claim. Nevertheless, a pre-emption claim will in some instances provide the only means to relief.

Advocates accustomed to framing their claims under Section 1983 need to adjust terminology in bringing a preemption suit. Rather than alleging that a state is violating federal rights, the complaint must allege that the state law or action conflicts with federal law. Instead of seeking an injunction enforcing federal law, the complaint must seek an injunction invalidating the state law or action. If the preemption terminology is not utilized, one risks the dismissal of the claim because preemption does not confer substantive rights.

D. Enforcement of Federal Regulations

The Supreme Court has repeatedly held that federal regulations have the full force of law and preempt conflicting state action in the same manner as federal statutes. Yet the Court reached a different conclusion in the context of an implied statutory right of action. There the Court held that federal regulations which extend beyond statutory rights may not be enforced under an implied right of action. The Court has not addressed the enforcement of regulations under Section 1983. However, several federal circuits have held that, under Supreme Court jurisprudence, if there is no cause of action under the applicable statute, then regulations cannot confer a cause of action under Section 1983. There is a circuit split regarding whether regulations which flesh out a statute may be enforceable under an express right of action. Thus the enforcement of regulations under both express and implied rights of action has been limited in recent years, though not for preemption claims.

E. Suing in State Court

In some instances advocates may prefer to bring suit in state court, perhaps due to favorable state-court rules regarding attorney fees or on account of particularly sympathetic state-court judges. In accordance with principles of federalism and the supremacy clause, state courts have a responsibility along with the federal courts to enforce federal law, albeit with consideration for their own rules of procedure. A nonpreempted rule of procedure of the state court, if fashioned with neutrality and a lack of discrimination toward federal law, could preclude implementation of a federal law. Even then, such evasion of a federal cause of action on state procedural grounds might still be impermissible if application of the state rule “burdens the exercise of the federal right.”

State courts are generally assumed to exercise concurrent jurisdiction over federal causes of action. The Supreme Court has noted two exceptions to this

52Section 1983 and Preemption, supra note 5, at 29.
56Johnson v. City of Detroit, 446 F.3d 614, 628–29 (6th Cir. 2006); Price v. City of Stockton, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004).
57Compare American Association of People with Disabilities v. Harris, 605 F.3d 1124 (11th Cir. 2010), Lonberg v. City of Riverside, 571 F.3d 846 (9th Cir. 2009), cert. denied, 131 S. Ct 78 (2010), with Chaffin v. Kansas State Fair Board, 348 F.3d 850 (10th Cir. 2003).
60Felder, 487 U.S. at 141.
general rule. First, Congress may indicate that federal courts have exclusive jurisdiction over a particular statute or field of law. Second, a state court may not have the inherent subject-matter competency to hear a federal claim. Otherwise state courts must entertain claims under federal law.

II. State Sovereign Immunity

The Supreme Court has restricted suits against states not only by limiting court access under Section 1983 and implied statutory rights of action but also by amplying states’ immunity from suit. The Court’s dismissal of suits against states is ostensibly based on the Eleventh Amendment of the Constitution, but the Court has admitted that its formulation of state sovereign immunity cannot be grounded in the text of the Constitution. Instead the Court’s vision of sovereign immunity is based upon the justices’ perceptions of “fundamental postulates implicit in the constitutional design.”

Applying these implicit postulates to civil rights statutes, the Supreme Court invalidated express private rights of action of older persons and people with disabilities to sue states for damages in suits alleging employment discrimination. The Court found that employment discrimination based on age and disability was “rational” and concluded that a damages remedy was not “proportional” to the firing of older persons and people with disabilities. Therefore the Court invalidated the abrogation of state sovereign immunity for damages claims under the Age Discrimination in Employment Act and the employment provisions of the Americans with Disabilities Act. Nevertheless, the Court specifically acknowledged that private individuals could sue for injunctive relief under the private rights of action in these statutes, pursuant to Ex parte Young. Subsequently the Court upheld on narrow grounds the abrogation of sovereign immunity for damages claims under the Americans with Disabilities Act provisions covering public services and programs.

The Rehabilitation Act provides an alternative for obtaining damages as well as injunctive relief for people who have disabilities and allege discrimination in employment and in state services. This statute does not abrogate state sovereign immunity but rather requires the states to waive sovereign immunity as a condition of receiving federal funds. While the Supreme Court has not addressed the issue, numerous federal circuits have upheld the validity of the Rehabilitation Act’s waiver of state sovereign immuni-

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63Id.
64Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001); Early Roberts Court, supra note 1, at 233–34; see FEDERAL PRACTICE MANUAL, supra note 4, ch. 8.1, § I (Enforcing Federal Rights Against States and State Officials).
66Alden, 527 U.S. at 729.
67Kimel, 528 U.S. at 62; Garrett, 531 U.S. at 356 (2001); see Early Roberts Court, supra note 1, at 233–34).
68Kimel, 528 U.S. at 83–86; Garrett, 531 U.S. at 366–68.
70Garrett, 531 U.S. at 374 n.9; see my Ex Parte Young as a Tool to Enforce Safety Net and Civil Rights Statutes, 40 UNIVERSITY OF TOLEDO LAW REVIEW 819, 833 (2009).
71United States v. Georgia, 126 S. Ct. 877 (2006); Tennessee v. Lane, 541 U.S. 509 (2004); see my Scorched Earth and Fertile Ground: The Landscape of Suits Against the States to Enforce the ADA, 41 CLEARINGHOUSE REVIEW 298 (Sept.–Oct. 2007).
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