

1-1-2007

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RANCHO PALOS: PRECLUDING SECTION 1983's RELIEF THROUGH IMPLIED RIGHTS
OF ACTION AND IMPLIED REMEDIES.

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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Kathleen Payne
Spring, 2007

INTRODUCTION

Section 1983 is intended to redress violations of federal constitutional and statutory rights by persons acting under the color of law, “state actors.”¹ Throughout the history of section 1983, two inquiries, though shifting in form, have consistently remained at the core of section 1983’s ability to redress statutory violations. First the violated statute must grant a federal right.² Not all statutes create federal rights and thus simply alleging a violation of a federal statute will not suffice.³ Second, even if the plaintiff has successfully asserted the violation of a federal right, the statute must not expressly or impliedly foreclose section 1983 relief.⁴

Three terms integral to understanding section 1983’s role in remedying violated rights are right, right of action, and remedy. Although judicial opinions at times use those terms in an interchangeable manner,⁵ such treatment is unfortunate. Section 1983 jurisprudence is best served when they are treated as separate and distinct terms.

A statute can create a federal right through either express statutory provisions or impliedly.⁶ The Constitution provides the clearest example of expressly granted rights. For example, the Fourth Amendment gives us the right to be secure from unreasonable search and seizures.⁷ In contrast many civil rights statutes impliedly grant rights. Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 grant implied rights by using language that has “an unmistakable focus on the benefited class.”⁸ Title IX states “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁹ This is the type of rights-granting language that the Court has specifically pointed to as statutorily creating implied rights.¹⁰

In addition to being able to grant rights either expressly or impliedly, Congress can also provide a right of action to vindicate those rights either expressly or impliedly. The Educational Handicapped Act (now named Education of Individuals with Disabilities Act), which was at issue in *Smith v. Robinson*¹¹ and the Telecommunications Act at issue in *City of Rancho Palos Verdes v. Abrams*,¹² both contain express rights of action, whereas Title IX and Title VI have implied rights of action.¹³

If a statute contains an implied right then logically everything that follows from the implied right will also be implied. It is not possible for a statute to have an implied right and then an express cause of action to defend that right. Thus once the Court finds an implied right, we know that the statute will contain either no right of action or an implied right of action. And if the statute contains an implied right of action then the remedies will be implied as well.

Express rights differ in this regard. A statute granting an express right may contain an express right of action, an implied right of action, or no right of action. The Constitution expressly grants rights but does not provide a right of action to enforce those rights.¹⁴ This is where section 1983 traditionally enters the picture—it provides the right of action to enforce violated rights.¹⁵

Further even if an express right of action accompanies the express right, the statute may still be silent as to what remedies the Court may apply in granting relief. The Telecommunications Act provides an express right of action, but is silent as to what remedies apply.¹⁶ When a statute grants a right of action but is silent as to what remedies are available the Court may imply all necessary remedies.¹⁷

There is a presumption favoring section 1983's applicability whenever a federal right is violated.¹⁸ This presumption operates regardless of whether the right is express or implied,

regardless of whether there is already a separate right of action and regardless of whether remedies are already available to the plaintiff. Nevertheless this presumption favoring the application of section 1983 may be rebutted if the statute expressly or impliedly forecloses its use.¹⁹ Express foreclosure occurs in circumstances where the statute uses language similar to— “the remedies in this statute are intended to be the exclusive remedies.” Alternatively statutes impliedly foreclose the use of section 1983 when they “contain comprehensive enforcement mechanisms.”²⁰

This Paper argues that exceptions to section 1983’s general applicability that are premised on Congressional intent should only apply to statutes that contain express provisions thereof. Once the Court begins to consider what is implied in a statute, the inquiry into whether section 1983 applies should end. Thus if the Court finds an implied right section 1983 can be used to redress a violation of that right, if the Court finds an implied right of action for the violation of a right then 1983 can still be used, and finally if the Court implies remedies then section 1983 must remain applicable. Therefore in express right cases the Court should not use implied rights of action, or implied remedies as evidence that congress intended to foreclose section 1983 relief.

Nevertheless in *City of Rancho Palos Verdes v. Abrams*²¹ the Court precluded section 1983 relief when a statute contained an express right of action but no express remedies.²² Even though the statute lacked express remedy provisions, the Court concluded that the availability of remedies within the violated statute created an inference that those remedies are to be the exclusive relief unless there are textual indications that other remedies, for example section 1983 relief, should apply.²³ The question that necessarily follows is whether implied rights statutes

that contain implied rights of action and implied remedies will be used to preclude section 1983 relief and consequently 42 U.S.C. § 1988 attorney's fees.

This Paper suggests that the Court should not preclude section 1983 relief in implied rights cases by using implied rights of action and implied remedies as evidence of Congress's intent. When a statute on its face is silent as to the existence of a right, or a right of action or the existence of remedies, then how could it contain provisions indicating that the implied right of action or implied remedies, which it does not mention, preclude section 1983 relief? If Congress has not foreclosed 1983 relief through express provisions then the Court ought not to find that it has been foreclosed.²⁴

This Paper proceeds in three parts. Part I considers how implied rights and implied rights of action are created and discusses the Court's use of implied remedies in rectifying violations of federal rights. Part II discusses two circumstances where the comprehensive enforcement mechanism exception is used to foreclose section 1983 relief. It considers the comprehensive enforcement mechanism exception's role in cases where the Court either implies a right, a right of action or a remedy. Part III outlines how *Rancho Palos* affects section 1983 and further details how the Court could use the broad language in the *Rancho Palos* decision to preclude section 1983 relief in implied right—implied right of action cases. It argues that limitations to section 1983 relief should be based on congressional intent and that congressional intent to foreclose section 1983 cannot be found in implied rights of action and implied remedies. Part IV uses the Sixth Circuit decision in *Communities for Equity v. Michigan High School Athletic Association*²⁵ (*Communities for Equity*) to outline the current divide on section 1983's applicability to statutes containing implied rights and implied rights of action. Part V suggests an alternative method of precluding section 1983 relief, including looking to the purpose of the statute.

I. DEFINING IMPLIED RIGHT, IMPLIED RIGHT OF ACTION, AND IMPLIED REMEDY.

This Part discusses when a statute creates an implied right, an implied right of action, and implied remedies. This Part will provide the necessary basis for understanding how implied rights, implied rights of actions, and implied remedies fit into the determination of whether section 1983 applies. It also provides background information that will aid in demonstrating how the inquiry into whether congress has foreclosed section 1983 remedies should end once the Court finds an implied right, an implied right of action, or an implied remedy.

A. When does a Statute Contain an Implied Right?

Because finding an express federal right merely consists of pointing to the statutory language that expressly grants that right, a straight forward task, this section will focus on when implied rights are created in federal statutes. Prior to *Gonzaga University v. Doe*, the standard for finding an implied federal right actionable under section 1983 consisted of a less than exacting three part test. The test is best summarized in *Blessing v. Freestone*.²⁶ First, Congress must have intended that the provision in question benefit the plaintiff.²⁷ Second, the right claimed to be protected by the statute must not be so vague and amorphous that its enforcement would strain judicial competence.²⁸ Finally, the statute must unambiguously impose a binding obligation on the states—the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.²⁹ In *Blessing* the Court left open the possibility that Title IV-D created federally enforceable rights for mothers of children who were eligible to receive

child support services and remanded the case to the district court for a determination of what rights were specifically being asserted by the plaintiffs.³⁰

While *Gonzaga* did not overrule earlier section 1983 implied right case law and the corresponding *Blessing* three factor inquiry, it did reject the notion that the preceding cases permitted “anything short of an unambiguously conferred right to support a cause of action brought under section 1983.”³¹ Under *Gonzaga* a statute creates private rights, implied rights, when the text is phrased in terms of the persons benefited.³² It held that the requirements to create implied rights enforceable under section 1983 are the same requirements for the creation of a new right enforceable under an implied right of action.³³ As an example of statutes creating implied rights enforceable under an implied right of action, the Court pointed to Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 which had “an *unmistakable focus* on the benefited class.”³⁴

B. Creation of an Implied Right of Action

An implied right of action can be used to fight a violation of either an express or implied right. The Court most often considers its utility in implied rights cases. In addition to clarifying what constitutes an implied right, the *Gonzaga* decision also elaborated on when a statute creates an implied right of action. The Court distinguished between implied rights enforced through section 1983 and implied rights enforced under implied rights of action, by noting that when a plaintiff sues under an implied right of action, the plaintiff “still must show that the statute manifests an intent to create not just a private right but also a private remedy.”³⁵ Whereas,

plaintiffs suing under section 1983 do not have to show a congressional intent to create private remedy because section 1983 supplies remedies for vindication of federal rights.³⁶

Thus, in implied right of action cases the judicial task is to determine whether the statute displays an intent to create not just a private right, an implied right, but also a private remedy, an implied remedy.³⁷ Statutory intent on creating a private remedy is determinative.³⁸ Without it, an implied right of action does not exist.³⁹ Consequently, if a statute creates an express or implied right and the statute does not manifest an intent to create a remedy then no right of action will be implied. However, if a statute creates a right then it will be actionable under section 1983 when a state actor violates it.⁴⁰ Thus inquiring into whether a statute creates an implied right of action seems to be most important when a federal right is violated by someone other than a “state actor.”

Under this scheme an implied right’s enforceability under section 1983 does not depend on whether the statute itself has an implied right of action. Nevertheless the possibility of using an implied right of action to foreclose section 1983 relief has been left open. This is what is at stake in the circuit split concerning Title IX, which contains an implied right, an implied right of action, and necessarily implied remedies.

C. Implied Remedies

Implied remedies can be used with both express rights of action and implied rights of action. When a statute contains an express or implied right of action or when a section 1983 action applies, a court can afford all necessary relief.⁴¹ Hence when a statute contains a right of action but lacks remedial provisions all remedies are impliedly available.⁴² For implied rights

cases the Court has stated that implied rights of action are only available if a court finds an intent to create a remedy.⁴³ Under this reasoning a statute will either have both an implied right of action and implied remedy or neither.⁴⁴ If there is no intent to create a remedy then the statute does not contain an implied remedy nor an implied right of action. In contrast “plaintiffs 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.”⁴⁵ Further section 1983 supplies all remedies necessary.⁴⁶

Prior to discussing *Rancho Palos*’ potential effect on both implied right-implied right of action cases or express right-implied right of action cases, further elaboration of the current exceptions to section 1983’s general applicability is necessary. Currently there is at least one well established limiting factor that precludes section 1983 relief—the comprehensive enforcement mechanism. Even if a court finds that a statute creates a federal right the defendant can show that section 1983 should not be used to enforce that right because the statute in question contains a comprehensive enforcement mechanism.⁴⁷ Part II discusses the two situations where a comprehensive enforcement mechanism can preclude section 1983 relief.

II. The Comprehensive Enforcement Mechanism Exception to Section 1983: Finding Congressional Intent to Foreclose Section 1983 Relief.

As Part I previously detailed, Congress can create express or implied rights—this Part discusses when Congress precludes section 1983 relief for those rights. Recognizing circumstances where section 1983 cannot be used to vindicate violated federal rights is important in effectuating congressional intent. The presumption in favor of enforcing federal rights under

section 1983 can be rebutted by showing that Congress has foreclosed such enforcement.⁴⁸ Such a foreclosure can occur either expressly or impliedly.⁴⁹ Express foreclosure occurs in circumstances where a statutory provision states that either the remedies in this statute are exclusive, or that section 1983 does not apply to the statute. Because instances of express foreclosure are easy to identify and express foreclosure is not particularly relevant to implied right-implied right of action cases this Part focuses on the comprehensive enforcement mechanism exception.

The comprehensive enforcement mechanism exception can preclude 1983 relief in two situations. The first situation is where the statute lacks an express right. Here finding a comprehensive enforcement mechanism can cut off the inquiry into whether the statute has an implied right. The comprehensive enforcement mechanism is in a sense used to find that Congress intended not to create actionable federal rights under a particular statute. Thus the Court can use it to preclude private actions without delving into the traditional implied right inquiry. This is what happened in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*⁵⁰ (*Sea Clammers*) the case that established the comprehensive enforcement mechanism exception.⁵¹ Next the comprehensive enforcement mechanism exception can foreclose section 1983 relief when the statute contains both an express right and an elaborate remedial scheme.

While it is acceptable for the comprehensive enforcement mechanism exception to be used to foreclose section 1983 relief when there is an express right, it is inappropriate to do so when the right is implied. Consideration of the roots of the comprehensive enforcement mechanism inquiry illustrates its inadequacy in addressing whether section 1983 is an appropriate source of relief to remedy an implied right violation. The seminal comprehensive enforcement mechanism case, *Sea Clammers*, concerned statutes with express causes of action,

express remedies, and most notably express enforcement requirements, which included providing notice sixty days prior to the commencement of the action.⁵²

A. *Sea Clammers*: Foreclosing Section 1983 Relief Prior to Finding an Implied Right.

Foreclosure by a comprehensive enforcement mechanism first emerged when the Court considered two environmental protection statutes in *Sea Clammers*.⁵³ Each statute provided an express right of action through citizen's suit provisions.⁵⁴ The Court precluded section 1983 relief prior to determining if the statute created rights and accordingly declined to decide whether the two statutes granted implied rights.⁵⁵

The Court found that the enforcement mechanisms, including citizen suit provisions evidenced Congress's intent to foreclose a section 1983 remedy under the statutes and accordingly did not reach the issue of whether the statutes created rights within the meaning of section 1983.⁵⁶ The Court reasoned that in light of the "elaborate enforcement provisions" within the two statutes one could presume that Congress intended not to authorize additional judicial remedies through section 1983.⁵⁷

In *Sea Clammers* the requirements for bringing suit were part of the statutes' enforcement mechanisms.⁵⁸ Had the statutes not contained citizen suits with express remedies, there would have been "other enforcement mechanisms," namely criminal or civil suits brought by government entities.⁵⁹ What the case left unresolved is the effect that these "other enforcement mechanisms," being those that did not authorize a private right of action, would have on precluding 1983 if there was an implied right. As noted in some circuit decisions express enforcement mechanisms that do not directly vindicate the violated federal right are usually not

considered comprehensive enforcement mechanisms for the preclusion of 1983 relief.⁶⁰ It is unlikely that the Court will ever find that “other enforcement mechanisms” such as criminal penalties and suits by government entities—mechanisms not involving a private right of action—would ever be considered sufficient in redressing an implied federal right violation. It seems incongruous that the Court would find that Congress intended to create an implied right but then foreclose any private action to vindicate that right.

Sea Clammers established the general proposition that “[w]hen remedial devices provided in a particular Act are sufficiently comprehensive they may suffice to demonstrate congressional intent to preclude the remedy of suits under section 1983.”⁶¹ Later this exception came to be phrased as whether the statute contained a comprehensive enforcement scheme that is *incompatible* with individual enforcement under section 1983.⁶²

B. *Smith v. Robinson*: Preclusion of Section 1983 Relief when a Statute Contains an Express Right and Express Remedial Provisions.

A variation of the comprehensive enforcement mechanism has been used to preclude the award of attorney’s fees for a violation of a constitutional right when there is an identical statutory right and the statute contains an elaborate enforcement mechanism. In *Smith v. Robinson*, the Educational Handicapped Act precluded section 1983 relief for “identical” constitutional claims.⁶³ In *Smith* parents sued under the Education of the Handicapped Act⁶⁴ (EHA), and the Due Process and Equal Protection Clauses of the Fourteenth Amendment pursuant to section 1983 alleging that their handicapped children were being denied a free appropriate public education.⁶⁵ The Court framed the issue as whether “Congress intended the

EHA to be the exclusive avenue through which a plaintiff may assert those claims.”⁶⁶ In answering this question in the affirmative the Court reasoned that in light of the comprehensive nature of the procedures and guarantees it was hard to believe that Congress intend to allow plaintiffs to skip those procedures and go directly to court under section 1983.⁶⁷ Thus section 1983 could be not used for the violation of the rights granted under the Educational Handicapped Act. The EHA enforcement procedures could not be bypassed by bringing suit directly under section 1983.⁶⁸

Consequently by precluding section 1983 relief, comprehensive enforcement mechanisms ensure that Congressional intent specifically evidenced through elaborate remedial schemes is preserved. If Congress went through the pains of establishing a mechanism to enforce a specific statute, a statute that either expressly grants a right or doesn't, then it is reasonable to conclude that Congress intended the mechanism to be followed and not skipped by resorting section 1983. Undoubtedly, the comprehensive enforcement mechanism has its place in section 1983 jurisprudence. However, such an exception which is premised on the intent of Congress can only go so far. The comprehensive enforcement mechanism should only reach express statutory provisions. Once the Court begins to consider what is implied in a statute, the inquiry into whether section 1983 applies should end. Thus if a statute lacks an express right of action and express remedies then section 1983 should apply.

Regardless of which situation the comprehensive enforcement mechanism is used, there must be "express provision or other specific evidence from the statute that Congress intended to foreclose [section 1983 relief].”⁶⁹ However the force of this statement is called into question by the *Rancho Palos* decision. The next Part explains *Rancho Palos*' significance to section 1983

case law and explores the potential for courts to use the *Rancho Palos* decision to preclude section 1983 relief based on a finding of implied remedies.

III. PRECLUSION OF SECTION 1983 RELIEF IN *RANCHO PALOS*.

A. The *Rancho Palos* Decision.

Although the traditional exception to section 1983 applicability in redressing violations of federal rights is the comprehensive enforcement mechanism, the development of other exceptions is possible. Indeed, in *Rancho Palos* the Court seemed to seize on the “incompatible” aspect of the comprehensive enforcement mechanism to hold that a statute requiring plaintiff to bring suit within 30 days of final administrative action and providing for expedited judicial review foreclosed section 1983 relief.⁷⁰ The Court essentially concluded that the 30 day statute of limitations is incompatible with the general rule that the state statute of limitations for personal-injury torts apply when bringing claims under section 1983.⁷¹

In addition to the statutory provisions that arguably are incompatible with section 1983 relief, the Court provides a second line of reasoning to support its holding: whether the violated statute affords private remedies at all. The Court couches the case’s issue in terms of remedies; it stated that “[t]he critical question, then, is whether Congress meant the judicial remedy expressly authorized by § 332(c)(7) to coexist with an alternate remedy available in a § 1983 action.”⁷² Although it is logical to conclude that a statute expressly authorizing a private right of action would also authorize remedies, to claim that those remedies cannot coexist with section 1983 remedies does not necessarily follow. At this juncture, it is interesting to note that the

statutory provision at issue in *Rancho Palos* does not provide any express remedies.⁷³ Rather the Court found the provision of remedies in what relief district courts usually afford under the statute.⁷⁴ If the statute does not mention the types of remedies allowed—as is the case in *Rancho Palos*—then how could the remedies be inconsistent with section 1983, which essentially allows all types relief.⁷⁵ Similarly when a statute lacks express remedies, the availability of all remedies is implied and courts are charged with applying those necessary to remedy the violation.⁷⁶

To make this line of reasoning more sensible, the Court restrained the general presumption which favored using section 1983 to redress federal rights violations.⁷⁷ It noted that in all the cases where it has held that section 1983 relief is available the violated statute did not provide a private judicial remedy or, in most of the cases, even a private administrative remedy.⁷⁸ Although the Court declined to hold that the availability of a private judicial remedy conclusively establishes a congressional intent to preclude section 1983 relief,⁷⁹ its stance still serves to the presumption favoring section 1983 relief. Without citing any authority, the Court stated that “[t]he ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant § 1983.”⁸⁰ Thus if a statute provides a remedy, then the presumption is now against section 1983 relief.

It is interesting to note that the Court may not have even had to consider whether the statute in and of itself foreclosed section 1983 relief. Following its own reasoning in *Gonzaga*, the Court could have decided the case on the basis that the statute does not contain a federal right. Although there is a right of action in the Telecommunications Act, it’s questionable whether there is a federally protected right. TCA prohibits state and local governments from regulating

wireless services on the basis of environmental affects and from unreasonably discriminating among providers of functionally equivalent services.⁸¹ In that purpose where is the unmistakable focus on the benefited class?⁸² Who is the benefited class for that matter? Certainly the benefited class can not be everyone who applies for a permit to build a radio tower and gets denied. Further the Act does not grant everybody the right to build radio antennas. Not every statute that provides benefits to people creates rights. FERPA which was at issue in *Gonzaga v. Doe*, clearly benefits students, as it prevents the unauthorized release of personally identifiable education records, and yet it does not grant a federal right to students.⁸³ This would have been a more solid position from which to deny section 1983 relief.

Finally, one important consideration present in the *Rancho Palos* decision concerns the effect of awarding attorney fees under 42 U.S.C. § 1988 which is made applicable under section 1983. The Court reasons that “[l]iability for attorney’s fees would have a particularly severe impact in the § 332(c)(7) context, making local governments liable for (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme.”⁸⁴ While the Court is aware of this policy reason, it does not give the potential fee shifting sufficient weight. Section 1983 was prompted by the desire to have important constitutional and federal rights vindicated and so was section 1988, which awards attorney’s fees to the prevailing party in 1983 actions.⁸⁵ The Court should not be reluctant in considering whether this is the type of right violation where state and local governments should pay the prevailing plaintiffs’ attorney’s fees.

What is most troubling about this presumption is that it was created in a case that dealt with implied remedies and accordingly applies to implied remedies. Precluding section 1983 relief based on implied remedies threatens to eviscerate much of section 1983’s enforcement

powers.⁸⁶ Section B discusses how the conception of remedies in *Rancho Palos* may be used to foreclose section 1983 relief in implied right–implied right of action cases and in express right–implied right of action cases. It argues that implied rights of action with implied remedies should not be used to foreclose section 1983 relief.

B. Extending *Rancho Palos*: Implied Rights of Action and Implied Remedies should not have a Preclusive Effect in Implied Right Cases.

As *Rancho Palos* has established, the existence of a remedy reverses the presumption favoring section 1983 relief in express right of action-implied remedy cases.⁸⁷ What remains to be seen is whether implied remedies in implied rights of action cases will have that same effect. As Part I discussed an implied right of action exists only when a court finds that Congress not only intended to create a federal right, but also a remedy.⁸⁸ Although the Court has yet to preclude section 1983 relief in implied rights cases through implying a remedy, the Court’s reasoning in *City of Rancho Palos Verdes v. Abrams* makes this a distinct possibility.

Rancho Palos’ presumptive reversal could have two substantially narrowing effects on section 1983 litigation. First, following the Court’s line of reasoning leads one to conclude that any statute with an express private right of action also provides some sort of remedy. In *Rancho Palos* there clearly was an express right of action—plaintiffs were authorized to bring their suits within 30 days of the agency’s final determination, and the claims were subject to expedited judicial review.⁸⁹ Because there was a right of action and district courts have applied what they have determined to be appropriate relief in these Telecommunications Act cases, the Court concludes that the statute also provides a remedy.⁹⁰ The existence of that remedy forecloses

section 1983 relief unless there is textual evidence that section 1983 may still be utilized.⁹¹

Thus, if there is an express cause of action then section 1983 relief is precluded unless something in that statute—which does not mention remedies in the first place—indicates that section 1983 relief applies. What textual indications—short of saying section 1983 applies to this statute—would rebut the presumption favoring foreclosure of section 1983 relief has yet to be determined.

Implied remedies in express right of action cases should not preclude section 1983 relief because they are created by the judiciary and not by Congress. Allowing implied remedies to have a preclusive effect on section 1983 would give the judiciary too much arbitrary power over discerning when section 1983 and consequently section 1988 award of attorney's fees are applicable to a case. Since section 1983 can provide all necessary remedies,⁹² it is unclear what types of remedies could be implied that would be inconsistent with 1983 remedial scheme unless one is look to section 1988's award of attorney's fee. Thus under this scheme it appears that the main aim of narrowing section 1983 is not to preclude the appropriate remedy for plaintiffs but rather to preclude section 1988 attorney's fees. If this is the Court's main objective then it should fashion a more directly related exception. The Court should consider looking at the purpose intent of the enacted legislation.⁹³

The second potential narrowing effect and the one that this Paper is most concerned with is whether a finding of implied remedies in implied right of action cases will also reverse the presumption favoring 1983 relief. As Part II illustrated, the Court readily applies the appropriate relief when it has found an implied right of action based on the principle that federal courts may grant all necessary relief when federal rights are violated.⁹⁴ Consequently the second part of this discussion focuses on implied rights of action precluding section 1983 relief. If the Court determines that the overall scheme of the statute does not foreclose finding an implied right, then

the Court might follow the *Rancho Palos* line of reasoning and consider whether the presence of an implied right of action forecloses section 1983 relief. The finding of an express cause of action and implied remedies that were incompatible with section 1983 relief in the *Rancho Palos* decision could easily be expanded to finding implied remedies that are incompatible with section 1983 in implied right of action cases.

The very purpose of section 1983 was to ensure that constitutional and federal statutory rights could be vindicated.⁹⁵ Likewise section 1988 was designed to assist in this goal by providing an incentive to attorneys to bring those actions.⁹⁶ When a statute that does not expressly provide a right of action, but instead contains an implied right, an implied right of action and an implied remedies to vindicate that right, it seems to be too great an exercise of judicial interpretation to determine that the implied remedy precludes section 1983, when the statute is expressly silent to all of this. Reading too deeply into a statute for an intent to preclude section 1983 could result in arbitrary distinctions that may well contravene Congress's intent behind promulgating sections 1983 and 1988.

Communities for Equity v. Michigan High School Athletic Association (Communities for Equity), which the Supreme Court remanded to the Sixth Circuit for reconsideration in light of the *Rancho Palos* decision, provides an illustration of what is at stake in implied right cases. In *Communities for Equity* the plaintiffs prevailed on their equal protection claim and thus their Title IX claim was not decided.⁹⁷ At issue is whether an implied right of action under Title IX would preclude relief under section 1983 for plaintiff's equal protection claim in light of the *Rancho Palos* decision.⁹⁸ Part IV discusses the *Communities for Equity* case and the role Title IX is poised to play in further implied right jurisprudence.

IV. TITLE IX'S ROLE IN ADDRESSING WHEN SECTION 1983 IS APPLICABLE TO IMPLIED
RIGHT AND IMPLIED RIGHT OF ACTION CASES

The Court's reasoning in the *Rancho Palos* decision could be expanded so that a finding of implied remedies in implied right of action cases would also reverse the presumption favoring 1983 relief. This is what is at stake in the circuit split concerning Title IX. Some circuits have held that the implied right of action in Title IX forecloses 1983,⁹⁹ whereas other circuits, including the Sixth Circuit, say that nothing in Title IX forecloses 1983 relief.¹⁰⁰ The Sixth Circuit's most recently considered this issue in *Communities for Equity*.¹⁰¹ Although the Supreme Court has denied certiorari to *Communities for Equity*,¹⁰² the inevitable resolution of the circuit split will affect the possible role implied rights of action and implied remedies will play in implied right cases.

Section A in this Part discusses the current relationship between implied rights of action and implied rights enforceable under section 1983. It uses Title IX case law to highlight the issue of whether an implied right of action precludes section 1983 relief. Section B explains the current Title IX controversy as illustrated in *Communities for Equity* and the potential Title IX may play in implied right jurisprudence.

A. The Debate about Relationship Between Implied Rights and Implied Rights of Action using Title IX as an example.

There have been a few implied right cases where a section 1983 claim was not raised but the Supreme Court still found an implied right of action and applied appropriate remedies.¹⁰³

While section 1983 relief would have been precluded in some of the cases because someone other than a state actor violated federal right,¹⁰⁴ the question of whether the statutes contain an implied right of action remains. The Court has established and refined factors that should be considered in determining whether a statute contains an implied right of action.¹⁰⁵ First, is the plaintiff a member of a class who is a special beneficiary to the statute? Second, is there any explicit or implicit indication of legislative intent to either imply or preclude a private right of action? Third, would implying a right of action be consistent with the underlying scheme of the statute? Finally, would a right of action be something traditionally left to the state?¹⁰⁶ “The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.”¹⁰⁷ In contrast, section 1983 cases lack these concerns because it is a source of express congressional authorization of private suits.¹⁰⁸

What the two types of rights of action do have in common is the presumption of the availability of all appropriate remedies unless Congress has expressly indicated otherwise.¹⁰⁹ Thus it seems that the most significant distinction between implied rights of action with implied remedies and the remedies of a section 1983 action is the availability of attorney’s fees. Section 1988 is a fee shifting provision in which the prevailing party in section 1983 litigation may get their attorney’s fees paid by the losing party.¹¹⁰ The rationale behind section 1988 is to vindicate important federal and constitutional values.¹¹¹ Thus the question then becomes whether attorney’s fees should be awarded in non-civil rights and non-constitutional rights type actions. Thus, this Paper suggests that whether relief under section 1983 is available should not be premised on whether a separate implied right of action with implied remedies exists. This section addresses the cases where a state actor violated a federal right and the Court was silent as

to section 1983's applicability.¹¹² Most at issue are those statutes where the Court has found an implied right of action without considering whether section 1983 would be an appropriate avenue for relief.

Title IX seems to be the key battle ground in this debate. In *Cannon v. University of Chicago*¹¹³ the Court held that private parties could sue to enforce the prohibitions of Title IX of the Education Amendments of 1972¹¹⁴ against gender-based discrimination in any educational program supported by federal funds.¹¹⁵ The Court's justification relied in part on the fact that Title IX had been derived from Title VI, that Congress understood private remedies were available under Title VI, and that Congress intended similar remedies under Title IX.¹¹⁶ The *Cannon* decision also presented a debate about the nature of Title IX authorization of private suits. The Court recognized that

“the language added to § 1988 by the 1976 amendment, and the legislative history surrounding it, do indicate that many members of Congress may have assumed that private suits were authorized under Title IX and, more importantly, that many Members felt that private enforcement of Title IX was entirely consistent with, and even necessary to, the enforcement of Title IX and the other statutes listed in § 1988.”¹¹⁷

In another Title IX case, *Davis v. Monroe County Board of Education*,¹¹⁸ the Court found a limitation to Title IX implied rights of action. It held that for peer to peer sexual harassment a right of action would only be available if the recipient, state actor, acted with deliberate indifference to known acts of harassment in its programs or activities.¹¹⁹ In *Franklin v. Gwinnett Public School*¹²⁰ the Supreme Court reversed the district court's decision that only equitable relief was available under Title IX and held that Title IX provided a damages remedy for the student alleging sexual harassment from a coach employed by the school district because the Court presumed the availability of all appropriate remedies unless the United States Congress had expressly indicated otherwise.¹²¹

One indication that not every provision of Title IX provides a private right of action is that in *Alexander v. Sandoval*,¹²² the Court held that there is no implied right of action under the disparate impact regulations of Title VI.¹²³ Further evidence is found in the *Cannon* opinion as well where the Court stated that “[t]he supporters of the legislation did not intend it to amend Title IX to include an express cause of action where none existed before. Instead, they clearly only meant to provide attorney's fees in the event that that statute as it had always existed implicitly created a cause of action.”¹²⁴ The debate over implied rights of action in Title IX is still ongoing and is further complicated by section 1983's role in it. Section B discusses the most recent Title IX right of action case.

B. Communities for Equity: The most recent Chapter in the Implied Right, Implied Right of Action Debate.

Communities for Equity (CFE) a group comprised of parents and student athletes brought a class action lawsuit against the Michigan High School Athletic Association (MHSAA) alleging that MHSAA's scheduling of sports seasons discriminates against female athletes.¹²⁵ The district court concluded that MHSAA's actions violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Civil Rights Act.¹²⁶ The Sixth Circuit affirmed on the ground that MHSAA's scheduling of sports seasons violated the Equal Protection Clause and did not reach the Title IX and state law issues.¹²⁷ The Supreme Court vacated the Sixth Circuit's decision and remanded the case for further consideration in light of *Rancho Palos*.¹²⁸

On remand the Sixth Circuit applied the *Smith* framework of the comprehensive enforcement mechanism to consider whether Title IX precluded a section 1983 claim for an

equal protection violation.¹²⁹ It pointed to the fact that CFE brought a section 1983 claim only to redress the alleged violation of the Equal Protection Clause of the Fourteenth Amendment as a critical distinction between the present case and *Sea Clammers* and *Rancho Palos*.¹³⁰ Accordingly it addressed two issues, “(1) whether CFE’s Title IX claims are “virtually identical” to its constitutional claims, and (2) whether the remedies provided in Title IX indicate the Congress intended to preclude reliance on § 1983.”¹³¹ The Sixth Circuit reached the second issue first and appropriately concluded that although there is an implied right of action under Title IX, Title IX does not contain a comprehensive enforcement mechanism—the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds.¹³² Although *Rancho Palos* left open the possibility that implied rights of action could foreclose section 1983 relief, the Sixth Circuit reasonably declined to engage in that line of reasoning.

V. LOOKING BEYOND REMEDIES AND ENFORCEMENT SCHEMES—DETERMINING SECTION 1983’S APPLICABILITY THROUGH OTHER AVENUES.

This Part suggests an alternative method for determining whether section 1983 should apply to a particular statute. Apart from comprehensive enforcement mechanisms and statutorily created—expressly or impliedly—remedies, section 1983 could be precluded through a purposive approach.¹³³ A purposive approach would include looking to the legal context in which both the legislation at issue and sections 1983 and 1988 were enacted, which would include the prevailing judicial precedents at the time.¹³⁴ Formulating a determination on whether a section 1983 action is foreclosed premised on those two legal contexts and purposes will best effectuate Congressional intent and avoid arbitrary judicial decisions.¹³⁵ Much case law

recognizes the primary purpose of section 1983, which is to aid in a broad remedy for violations of federally protected civil rights.¹³⁶ Section 1988 was enacted for similar purposes—it was intended to protect important federal and constitutional values.¹³⁷

Indeed Justice Breyer’s concurrence in *Rancho Palos* advocated for such an approach. He argued that the context in which the Telecommunications Act was enacted shows that Congress saw a national problem, namely the inconsistent and patchy state and local wireless communication requirements.¹³⁸ In rejecting the possibility of deploying a national wireless communication system, Congress decided in favor of leaving states and local authorities free to make certain decisions subject to minimum federal standards and judicial review.¹³⁹ Thus the purpose of the statute was to ensure wireless communications were consistently regulated. In light of section 1983’s purpose to aid in remedy civil rights violations, it seems that section 1983 should not apply to the Telecommunications Act. Also it is questionable whether the Telecommunications Act even creates an implied right.¹⁴⁰

Applying the purposive approach to Title IX further illustrates its utility. While the history of Title IX is complex and fraught with a certain level of ambiguity, there are indicators that granting relief under section 1983 has not be foreclosed by Congress in Title IX implied rights of action cases. First section 1988 was amended to expressly provide for attorney’s fees in Title IX actions.¹⁴¹ Second Congress has not specifically foreclosed the use of section 1983 to vindicate Title IX violations. In contrast, Congress is currently considering an amendment to section 1988 and section 1983 that would foreclose section 1983 relief and section 1988 attorney’s fees for statutes prohibiting picketing at military and other funerals.¹⁴² Even if Congress’s lack of action is not a sufficient indication the section 1983 still applies to Title IX there is other evidence apart from Congressional intent that supports this conclusion. A section

1983 action does not circumvent Title IX procedures, or afford additional remedies not available in Title IX.¹⁴³

Although there is debate about whether every provision of Title IX allows for a private right of action, it is clear that if there is an implied right of action then section 1988 attorney's fees may be awarded to the prevailing plaintiff. Further, both equitable relief and damages are available under Title IX. Because attorney's fees and all necessary remedies are available under an implied right of action under Title IX, nothing in Title IX is incompatible with affording section 1983 relief. Recall that the Court found inconsistencies between the express right of action and implied remedies in the Telecommunications Act and section 1983. It found the 30 day statute of limitations to be incompatible with the general rule that the state statute of limitations for personal-injury torts apply when bringing claims under section 1983.¹⁴⁴ Further it reasoned that section 1988's attorney's fee provision would have the severe impact by making local governments liable for legal expenses of large commercial interests.¹⁴⁵ Both of these concerns are absent in Title IX's provisions. Thus under both a purposive approach and even in light of *Rancho Palos Verdes* Title IX would not preclude section 1983 relief.

CONCLUSION

Currently the relationship between implied rights enforceable through implied rights of action and implied rights enforceable under section 1983 is in a state of flux. Whether implied rights of action with implied remedies will be used to foreclose section 1983 relief has yet to be determined. This Paper has attempted to outline the current issues surrounding the implied right of action debate. It suggests that implied rights of action and implied remedies are ill suited—

either as comprehensive enforcement mechanisms or under the *Rancho Palos* reasoning—for precluding section 1983. It argued that preclusion of section 1983 relief in implied right, implied right of action, or implied remedy cases should be premised on the history and congressional intent behind section 1983 and 1988.

The Supreme Court remanded *Communities for Equity* to the Sixth Circuit for reconsideration in light of *Rancho Palos*. The Sixth Circuit has again affirmed the district court's decision by holding that Title IX lacks a comprehensive enforcement mechanism to evidence Congress's intent to foreclose section 1983 relief.¹⁴⁶ Although the Supreme Court has declined to grant certiorari to *Communities for Equity*,¹⁴⁷ eventually it will rule on the circuit split on whether Title IX forecloses section 1983 relief. In the meantime though, courts, specifically the Supreme Court, should reconsider what can preclude section 1983's application. Implied rights, implied rights of action, and implied remedies should not be used to foreclose section 1983 actions. While the ultimate outcome in *Rancho Palos* that section 1983 does not apply to the Telecommunications Act seems appropriate, the Court should have used alternative means to foreclose a 1983 action.

Further when the Court does rule on the Title IX circuit split it should hold that Title IX does not preclude section 1983 relief. There is no evidence of congressional intent to foreclose section 1983 relief in Title IX implied rights of action cases. More broadly, the *Rancho Palos* presumption favoring remedies granted in a statute as the exclusive avenue for relief should not apply when the statute does not contain express remedy provisions. Even if the Court declines to limit this presumption the Court should determine that *Rancho Palos* does not apply in implied right-implied right of action cases.

¹ 42 U.S.C. § 1983 (2000).

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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. . . .” *Id.*

² *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). “In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law.” *Id.* (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989)).

³ *Blessing*, 520 U.S. at 340.

⁴ *Suter v. Artist M.*, 503 U.S. 347, 355-56 (1992); *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990).

⁵ *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). The Court stated that “the critical question, then, is whether Congress meant the judicial remedy expressly authorized by § 332(c)(7) to coexist with an alternate remedy available in a § 1983 action,” but went on to speculate about what remedies were afforded. *Id.* at 120-21. In light of district court holdings it stated that “The remedies available, moreover, perhaps do not include compensatory damages (the lower courts are seemingly in disagreement on this point), and certainly do not include attorney’s fees and costs.” *Id.* at 122-23. Thus, although the Court couched the issue in terms of “express remedies,” it went on to admit that the statute does not expressly authorize any particular remedy.

⁶ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002).

⁷ U.S. CONST. amend. IV.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

⁸ *Gonzaga*, 536 U.S. at 284.

⁹ 20 USCS § 1681.

¹⁰ *Gonzaga*, 536 U.S. at 290.

¹¹ 468 U.S. 992 (1984).

¹² 544 U.S. 113, 120 (2005).

¹³ *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

¹⁴ *See Albright v. Oliver*, 510 U.S. 266, 271 (1994) (stating that “Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. The first step in any such claim is to identify the specific constitutional right allegedly infringed.”) (internal citations and quotations omitted).

¹⁵ *Id.*

¹⁶ 47 U.S.C. § 332(c)(7)(b)(v) (2000).

¹⁷ *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

¹⁸ *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (stating that “[a]s remedial legislation, § 1983 is to be construed generously to further its primary purpose.”).

¹⁹ *Suter v. Artist M.*, 503 U.S. 347, 355-56 (1992); *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990).

²⁰ *See Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981).

²¹ 544 U.S. 113 (2005).

²² *Id.*

²³ *Id.* at 122

²⁴ Express provisions means either provisions that explicitly say “using other remedies is foreclosed,” or express provisions that are so elaborate that they constitute a “comprehensive enforcement mechanism.”

²⁵ 459 F.3d 676 (2006).

²⁶ 520 U.S. 329 (1997).

²⁷ *Id.* at 340.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 346.

³¹ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

³² *Id.* at 284 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 692 (1979)).

³³ *Id.* at 290.

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- ³⁴ *Id.* (emphasis in the original) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979)).
- ³⁵ *Id.* (internal quotations omitted) (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).
- ³⁶ *Id.*
- ³⁷ *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)).
- ³⁸ *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 812, n. 9 (1986) (collecting cases).
- ³⁹ *Alexander*, 532 U.S. at 286-87.
- ⁴⁰ *See Gomez v. Toledo*, 446 U.S. 635, 638-639 (1980) (“As remedial legislation, § 1983 is to be construed generously to further its primary purpose.”).
- ⁴¹ *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).
- ⁴² *See Id.*
- ⁴³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (stating that “a plaintiff suing under an implied right of action still must show that the statute manifests an intent “to create not just a private right but also a private remedy.”) (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).
- ⁴⁴ *Id.*
- ⁴⁵ *Id.* at 285.
- ⁴⁶ *Felder v. Casey*, 487 U.S. 131, 139 (1988).
- ⁴⁷ *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 8 (1981).
- ⁴⁸ *Suter v. Artist M.*, 503 U.S. 347, 355-56 (1992); *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990).
- ⁴⁹ *Blessing*, 520 U.S. at 341.
- ⁵⁰ 453 U.S. 1, 8 (1981).
- ⁵¹ *Id.*
- ⁵² *Id.* 33 U.S.C. § 1365(b)(1)(A) authorized prospective relief only and the citizen plaintiffs first must give notice to the EPA, the State, and any alleged violator. 33 U.S.C. § 1415(g) authorized injunctive relief provided notice was given to the Administrator or to the Secretary, and to any alleged violator.
- ⁵³ 453 U.S. 1 (1981). The two statutes at issue were the Federal Water Pollution Control Act (33 U.S.C. 1251) and the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1401).
- ⁵⁴ *Sea Clammers*, 453 U.S. at 8.
- ⁵⁵ *Id.* at 16. The Court stated that “[i]n fact, it is clear that the citizen-suit provisions apply only to persons who can claim some sort of injury and there is, therefore, no reason to infer the existence of a separate right of action for “injured” plaintiffs.” *Id.* (citing 33 U. S. C. § 1365 (g)).
- ⁵⁶ *Sea Clammers.*, 453 U.S. at 19.
- ⁵⁷ *Id.* at 14.
- ⁵⁸ *See Sea Clammers*, 453 U.S. at 20. (“It is hard to believe that Congress intended to preserve the § 1983 right of action when it created *so many specific statutory remedies, including two citizen-suit provisions.*”) (emphasis added)
- ⁵⁹ 33 U.S.C. § 1365(b)(1)(B); 33 U.S.C. § 1415 (g)(2)(B)-(D).
- ⁶⁰ *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997).
- “The only enforcement mechanism that Title IX expressly provides is a procedure to terminate federal support to institutions that violate Title IX. This is a far cry from the “unusually elaborate enforcement provisions” of the statutes at issue in *Sea Clammers* [], which expressly provided for citizen suits and enforcement by government agencies.” *Id.*
- ⁶¹ *Sea Clammers*, 453 U.S. at 20.
- ⁶² *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (citing *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994)) (emphasis added).
- ⁶³ *Smith*, 468 U.S. at 1005.
- ⁶⁴ 20 U.S.C § 1400. Include substantive information about the procedures under this act.
- ⁶⁵ *Smith*, 468 U.S. at
- ⁶⁶ *Id.* at 1009
- ⁶⁷ *Id.* at 1011-12.
- ⁶⁸ *Id.*
- ⁶⁹ *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423 (1987)
- ⁷⁰ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-21 (2005).

⁷¹ *Id.* at 124; *see* *Wilson v. Garcia*, 471 U.S. 261, 275, 276 (1985) (the statute of limitations for section 1983 claims generally is the state statute of limitations of personal-injury tort claims).

⁷² *Id.* at 120-21. (emphasis added)

⁷³ *Id.* at 122-23 (stating that “[t]he remedies available, moreover, perhaps do not include compensatory damages (the lower courts are seemingly in disagreement on this point), and certainly do not include attorney’s fees and costs.”)

⁷⁴ *Id.* at 122, 124.

⁷⁵ *See* *Felder v. Casey*, 487 U.S. 131, 139 (1988). (finding that the central purpose of 1983 is to provide damages or equitable relief to individuals whose federal or constitutional rights have been violated by a state actor).

⁷⁶ *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

⁷⁷ *See* *Main v. Thiboutot*, 448 U.S. 1, 4 (1980).

⁷⁸ *Rancho Palos Verdes*, 544 U.S. at 120-21 (referring to *Blessing v. Freestone*, 520 U.S. 329 (1997), *Livadas v. Bradshaw*, 512 U.S. 107, 133-34 (1994), *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 108-09 (1989), *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 521 (1990), *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 427 (1987)).

⁷⁹ *Rancho Palos Verdes*, 544 U.S. at 122.

⁸⁰ *Id.* at 122.

⁸¹ 47 U.S.C.S. § 332(c)(7)(b)(i),(iv) (2000).

⁸² *See supra* Part I.A for a discussion on when a statute creates an implied right.

⁸³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289 (2002).

⁸⁴ *Id.* at 123.

⁸⁵ *Owen v. City of Independence*, 445 U.S. 622, 636 (1980) (quoting *Cong. Globe*, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger)). *See* *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 466 (1982) (affirming the 9th Circuit’s reasoning that a publicly-funded organization is eligible to receive attorney’s fees under section 1988 so long as it is advancing important constitutional values).

⁸⁶ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (explaining that state actors can be sued directly under § 1983 for monetary, declaratory, or injunctive relief).

⁸⁷ *Rancho Palos Verdes*, 544 U.S. at 122.

⁸⁸ *Gonzaga*, 536 U.S. at 284.

⁸⁹ *Rancho Palos Verdes*, 544 U.S. at 120-21.

⁹⁰ *Id.* at 122-23.

⁹¹ *Id.* at 122.

⁹² *See* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978).

⁹³ *See* *infra* Part V.

⁹⁴ *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

⁹⁵ *See* *Felder v. Casey*, 487 U.S. 131, 139 (1988) (finding that the central purpose of 1983 is to provide damages or equitable relief to individuals whose federal or constitutional rights have been violated by a state actor).

⁹⁶ *Owen v. City of Independence*, 445 U.S. 622, 636 (1980) (quoting *Cong. Globe*, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger)).

⁹⁷ *Cmtys. for Equity v. Mich. High Sch. Ath. Ass’n*, 377 F.3d 504, 506 (2004).

⁹⁸ *Cmtys. for Equity v. Mich. High Sch. Ath. Ass’n*, 459 F.3d 676 (6th Cir. 2006).

⁹⁹ *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 176 (3rd Cir. 1993); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862-63 (7th Cir. 1996).

¹⁰⁰ *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 722-24 (6th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997).

¹⁰¹ *Cmtys. for Equity v. Mich. High Sch. Ath. Ass’n*, 459 F.3d 676 (6th Cir. 2006).

¹⁰² *Mich. High Sch. Ath. Ass’n v. Cmtys. for Equity*, 2007 U.S. LEXIS 3813 (2007), denying cert 459 F.3d 676 (6th Cir. 2006).

¹⁰³ *See, e.g.,* *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677, 692 (1979)

¹⁰⁴ *See* *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). A stockholder brought suit under the Securities Exchange Act alleging that a merger was authorized based on false and misleading proxy statements. *Id.* at 429-30. The Court found an implied right of action for derivative and direct suits and applied all remedial relief necessary to effectuate congressional intent. *Id.* at 431. Interestingly the Court was not bothered by the indirect nature of the right violation, and noted that stockholder injuries typically flow from damage done to the corporation, rather than damage directly inflicted upon the stockholder. *Id.* at 432.

¹⁰⁵ *Cort v. Ash*, 422 U.S. 66, 78 (U.S. 1975).

¹⁰⁶ *Id.*

¹⁰⁷ *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 (1990).

¹⁰⁸ *Id.* (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)).

¹⁰⁹ *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). In this implied right of action case the Court stated that federal courts may adjust their remedies in order to grant the necessary relief when a federal right is violated and that when there is a general right to sue federal courts may use any available remedy to make good the wrong done. *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). “[A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.” *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (discussing the availability of remedies under Title IX).

¹¹⁰ 42 U.S.C. § 1988 (2000).

¹¹¹ *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 466 (1982) (affirming the 9th Circuit’s reasoning that a publicly-funded organization is eligible to receive attorney’s fees under section 1988 so long as it is advancing important constitutional values).

¹¹² *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Franklin v. Gwinnett Pub. Sch.*, 503 U.S. 60 (1992);

¹¹³ 441 U.S. 677 (1979).

¹¹⁴ 20 U.S.C. § 1681 (2000).

¹¹⁵ *Cannon*, 441 U.S. at 689.

¹¹⁶ *Id.* at 694-703.

¹¹⁷ *Cannon v. University of Chicago*, 441 U.S. 677, 688 (U.S. 1979) (internal quotations omitted) (citing the lower court opinion 559 F.2d at 1079).

¹¹⁸ 526 U.S. 629 (1999).

¹¹⁹ *Id.* at 631

¹²⁰ 503 U.S. 60 (1992).

¹²¹ *Id.* at 75-76.

¹²² 532 U.S. 275 (2001).

¹²³ *See Id.* at 288-89. The Court reasoned that since Section 602 “focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating,” it does not create a private right, or private right of action. *Id.* at 289.

¹²⁴ *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979).

¹²⁵ *Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n*, 377 F.3d 504, 506 (2004).

¹²⁶ *Id.*

¹²⁷ *Id.* at 513, 515

¹²⁸ *Mich. High Sch. Ath. Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005).

¹²⁹ *Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n*, 459 F.3d 676, 684 (6th Cir. 2006).

¹³⁰ *Id.* (stating that “CFE invoked § 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment. This is a critical distinction.”)

¹³¹ *Id.* at 685.

¹³² *Id.* at 686.

¹³³ For a discussion of a purposive approach in the Title IX context see Fisk & Chemerinsky, *Civil Rights without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RTS. J. 755 (1999). “The preferable approach would have been for the Court to have undertaken a purposive analysis, considering whether vicarious liability best achieved the central goals of the legislation.” *Id.* at 758.

¹³⁴ *See Mank, Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815 (2002) arguing that courts should consider the legal context in which Congress enacted statutes.

¹³⁵ *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (Justice Breyer concurring) (stating “that context, not just literal text, will often lead a court to Congress’ intent in respect to a particular statute”).

¹³⁶ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685 (U.S. 1978); *Monroe v. Pape*, 365 U.S. 167, 171-172 (1961) (“Congress has the power to enforce provisions of the Fourteenth Amendment 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.”); *Owen v. City of Independence*, 445 U.S. 622, 636 (1980) (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68

(1871) (Rep. Shellabarger)(stating that the primary purpose of section 1983 is to aid in “the preservation of human liberty and human rights.”).

¹³⁷ See *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 466 (1982) (affirming the 9th Circuit’s reasoning that a publicly-funded organization is eligible to receive attorney’s fees under section 1988 so long as it is advancing important constitutional values).

¹³⁸ *Rancho Palos*, 544 U.S. at 127-28 (Justice Breyer concurring) (citing H.R. Rep. No. 104-204, pt. 1, p. 94 (1995)).

¹³⁹ 104th Congress H.R. Rep. No. 104-458, p 207-08 (1996).

¹⁴⁰ See supra text accompanying notes 81-83.

¹⁴¹ Civil Rights Attorney’s Fees Awards Act of 1976 (CRAFAA), Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (2000)).

¹⁴² 110th Congress HR 1613 (March 20, 2007). “The remedies with respect to a claim under this section are limited to injunctive and declaratory relief where the deprivation consists of a violation of the right to freedom of speech secured by the Constitution, and such violation is the result of a statute, ordinance, regulation, custom, or usage which prohibits or restricts picketing, protesting, or demonstrating at a funeral or any other ceremony, procession, or memorial service held in connection with the burial or cremation of the dead.” *Id.*

¹⁴³ *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996).

¹⁴⁴ *Id.* at 124; see *Wilson v. Garcia*, 471 U.S. 261, 275, 276 (1985) (the statute of limitations for section 1983 claims generally is the state statute of limitations of personal-injury tort claims).

¹⁴⁵ *Rancho Palos Verdes*, 544 U.S. at 123.

¹⁴⁶ *Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n*, 459 F.3d 676 (6th Cir. 2006), *aff’g* on reh’g, *Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich., 2001).

¹⁴⁷ *Mich. High Sch. Ath. Ass'n v. Cmtys. for Equity*, 2007 U.S. LEXIS 3813 (2007), denying cert 459 F.3d 676 (6th Cir. 2006).