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Section 1983 and the Spending Power: Enforcement of Federal “Laws”

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Summary

In *Gonzaga University v. Doe*, the Supreme Court in 2002 held that a student may not sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA). Section 1983, derived from the Civil Rights Act of 1871, authorizes suits against state officials and others acting “under color” of state law for deprivation of rights derived from the “Constitution and laws” of the United States. In 1980, in *Maine v. Thiboutot*, the Court interpreted section 1983 broadly to apply to all federal “laws,” not just civil rights laws. Since 1980, the Court has been divided over how to apply section 1983 to rights derived from federal spending statutes that provide federal money to states on condition that states use the money to implement federal programs and policies. The general rule, applicable until 1992, recognized a presumption that individual rights created by spending statutes are enforceable in section 1983 actions. The Court in *Gonzaga* confirmed a 1992 interpretation, based on the contractual nature of Congress’s spending power, that imposes a clear statement rule and reverses the presumption. Under *Gonzaga*, no right to sue under section 1983 is created unless Congress does so in clear and unambiguous terms. A statutory decision with strong constitutional underpinnings, *Gonzaga* can be viewed as an important element of the Court’s federalism jurisprudence. The case also represents a victory for Chief Justice Rehnquist, who has consistently opposed broad applicability of section 1983, and now apparently has a majority that supports his position. The implications for congressional drafting are clear: if Congress wishes to create rights in private individuals and make those rights enforceable, it should do so explicitly.

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Section 1983 and the Spending Power: Enforcement of Federal “Laws”

In *Gonzaga University v. Doe*, 122 S. Ct. 2268 (2002), the Supreme Court held that a student may not sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA). The holding itself would not be especially noteworthy had it been based on a straightforward reading of the statute. The Court, however, announced a broad rule derived from the nature of Congress’s spending power, and in doing so confirmed an interpretation that greatly narrows the availability of section 1983 as a means of enforcing private rights to sue state officials, if those rights are derived from a federal spending statute. The *Gonzaga* decision can therefore be viewed as an important element of the Court’s federalism jurisprudence. The case also represents a victory for Chief Justice Rehnquist, who has consistently opposed broad applicability of section 1983, and now apparently has a majority that supports his position. The implications for congressional drafting are clear: if Congress wishes to create rights in private individuals and make those rights enforceable, it should do so explicitly.

Background – 42 U.S.C. § 1983

During the 1960s and 1970s citizens increasingly resorted to federal courts for redress of grievances. Important legislation had been enacted (*e.g.*, the Civil Rights Act of 1964 and the Voting Rights Act of 1968), the Warren Court had recognized a number of individual and civil rights, and the Court was also generally receptive to judicial review. Several means were available to bring suit, and these included the doctrine of implied private rights of action as well as 42 U.S.C. § 1983. For a while, the Court was receptive to implied private rights of action, but when the Court tightened the rules during the 1970s, litigants increasingly looked elsewhere. Section 1983 was available for suits against state and local officials, and the Court’s decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), greatly broadened its possible applicability.

42 U.S.C. § 1983, enacted as part of the Civil Rights Act of 1871, and *as revised* in 1874, provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects . . . 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. [emphasis added]

Maine v. Thiboutot

In *Maine v. Thiboutot*, the Court held that the phrase “and laws” in section 1983 is not limited to civil rights and equal protection laws – or to any other subset of federal laws – but by its terms applies to *all* federal laws. Thus, the plaintiffs in that case could sue state officials under section 1983 for denial of welfare benefits that they allegedly were entitled to under the Social Security Act. The case was decided by a 6-3 vote. Justice Brennan’s conclusory opinion of the Court relied on the “plain meaning” of the statutory language¹ and on a history of recent litigation in which some courts – including the Supreme Court – had seemingly recognized section 1983 actions to enforce rights derived from the Social Security Act.² Justice Brennan’s opinion did not address the source of congressional power to enact the Social Security Act (the spending power).

Justice Powell’s dissent in *Thiboutot*, joined by then-Justice Rehnquist as well as by Chief Justice Burger, looked to the origins of section 1983 to counter the majority’s assertions. Section 1 of the Civil Rights Act of 1871, from which section 1983 is derived, did not contain the phrase “and laws,” but instead provided jurisdiction and a remedy for deprivations of rights secured by “the Constitution of the United States.” The phrase “and laws” was added by the Revised Statutes of 1874, and was not brought to Congress’s attention as a substantive change. Moreover, the Revised Statutes had divided section 1 into different sections by separating the remedy from the jurisdiction-conferring statute (now 28 U.S.C. § 1343(3)). Jurisdiction was extended only for claims secured by the Constitution or “by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.” Justice Powell argued that Congress could not have intended to extend section 1983 “beyond the reach of its jurisdictional counterpart.”³ Because of their common origin and purpose, the two provisions (§ 1983 and § 1343(3)) “were meant to be, and are, complementary,” the Court had held prior to *Thiboutot*.⁴ Justice Powell also voiced concerns over the federalism implications of the Court’s holding. No corresponding action is possible against federal officials implementing cooperative federal-state programs, yet the Court’s interpretation conferred on courts “unprecedented authority to oversee state actions

¹ “Given that Congress attached no modifiers to the phrase [and laws], the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.” 448 U.S. at 4. Dissenting Justice Powell offered a plain-meaning rebuttal. The majority read the phrase as if it said “Constitution *or* laws” rather than “Constitution *and* laws.” Attaching significance to the choice of “and” narrows section 1983’s scope to those laws that protect *constitutional* as well as statutory rights.

² Principal reliance was placed on *Rosado v. Wyman*, 397 U.S. 397 (1970), which had involved a pendent section 1983 claim, but other decisions were also cited. 448 U.S. at 4-6.

³ 448 U.S. at 19-20.

⁴ 448 U.S. at 21 (quoting *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 583 (1976)).

that have little or nothing to do with the individual rights defined and enforced by the civil rights legislation of the Reconstruction era.”⁵

Exceptions

A year later, the sweep of *Thiboutot* was limited somewhat by the Court’s decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Two categories of exceptions were created, one for statutes with language too vague or amorphous to create rights, and the other for statutes with comprehensive remedial mechanisms leaving no room for supplementation by way of section 1983 actions.

***Pennhurst* – No “Right” Created**

The Court in *Pennhurst* held that, despite its name, the Developmentally Disabled Assistance and Bill of Rights Act does not create rights in individuals that are enforceable in a section 1983 action. Justice Rehnquist wrote the Court’s opinion.⁶ The Act, which provided federal grants to states to develop programs to care for and treat mentally retarded persons, also contained a section captioned “rights of the developmentally disabled.” This “bill of rights” consisted of congressional findings that disabled persons “have a right to appropriate treatment, services, and habilitation,” and that states and the federal government have an “obligation” to provide services that are “appropriate to the needs of such persons.” There were two aspects to the decision.

On its facts, the case was distinguishable and fairly narrow. Read as a whole, the Act was “a *mere* federal-state funding statute.” The bill of rights section was merely a “general statement” of congressional findings, in a sense free-floating, and not specifically tied to a state’s acceptance of federal funding. Thus, the Act as a whole arguably did not purport to create judicially enforceable rights, and section 1983 was therefore inapplicable.

Justice Rehnquist also included general language about Congress’s spending power – language recently relied on by the Court in *Gonzaga University v. Doe*: “Legislation enacted pursuant to the spending power is much in the nature of a contract. . . . The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ . . . Accordingly, if Congress intends to impose a condition on the

⁵ 448 U.S. at 25. To “illustrate the nature of the ‘civil rights’ created by the Court’s decision,” Justice Powell included an appendix listing a “sample” of federal statutes, including grant programs, that could give rise to a section 1983 action. The Justice grouped statutes into three broad categories – “joint regulatory endeavors,” “resource management programs that may be administered by cooperative agreements,” and “grant programs.” *Id.* at 34.

⁶ Justice Rehnquist’s opinion was joined by Chief Justice Burger, and by Justices Stewart, Powell, and Stevens. Justice Blackmun concurred separately. Justice White dissented, joined by Justices Brennan and Marshall.

grant of federal moneys, it must do so unambiguously.”⁷ The issue was not, therefore, whether the Act purported to create rights in individuals, but “whether Congress in § 6010 imposed an obligation on the States to spend state money to fund [those] rights as a condition of receiving federal moneys . . . or whether it spoke merely in precatory terms.”⁸

***Sea Clammers* – Statute Precludes Section 1983 Remedy**

In *Sea Clammers*, the Court held that the Clean Water Act and the Marine Protection, Research, and Sanctuaries Act both contained a comprehensive remedial scheme – including specific authorization for citizen suits – that left no room for additional private actions under section 1983. “When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under 1983. . . . It is hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies including the two citizen-suit provisions.”⁹ Similarly, in *Smith v. Robinson*,¹⁰ the Court held that the Education of the Handicapped Act’s “carefully tailored administrative and judicial mechanism” created exclusive remedies that left no room for supplementation through section 1983 actions.

That section 1983's applicability was the general rule, and that *Pennhurst* and *Sea Clammers* were viewed as the exceptions to the rule, was evident in the Court’s approach in cases involving the housing and Medicaid programs.

[I]f there is a state deprivation of a ‘right’ secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.¹¹

⁷ 451 U.S. at 17.

⁸ 451 U.S. at 18.

⁹ 453 U.S. at 20. The vote was 7-2 on the section 1983 issue. Justice Powell’s opinion of the Court was joined by Chief Justice Burger, and by Justices Brennan, Stewart, White, Marshall, and Rehnquist. Justice Stevens, joined by Justice Blackmun, dissented in part, arguing that a private damages remedy was precluded not by the comprehensiveness of the remedial schemes (both laws had savings clauses), but rather because neither statute was enacted “for the special benefit of a particular class of which the plaintiff is a member.” 453 U.S. at 32.

¹⁰ 468 U.S. 992, 1009-12 (1994).

¹¹ *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987). This was a 5-4 decision. Justice White wrote the opinion of Court, and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O’Connor, joined by Chief Justice Rehnquist and Justices Powell, and Scalia, dissented.

Application of General Rule

In *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Court held that a public housing tenant could bring a section 1983 action to compel the local housing authority to comply with the Brooke Amendment to the Housing Act of 1937. The Brooke Amendment imposed a rent ceiling on low-income housing units funded by the Act, and HUD regulations specified that “rents” subject to the ceiling include a “reasonable” allowance for utilities. The Court majority brushed aside the issue of whether the statute and regulation conferred enforceable rights on tenants, asserting that the existence of such rights was “undeniable.” The Court also rejected the lower courts’ conclusion that HUD had the exclusive authority to enforce the tenants’ rights. The remedial devices were not sufficiently comprehensive, the Court explained, and, moreover, there were other indications that Congress had not intended to preclude private actions. Congress had explicitly precluded judicial review of one relatively narrow issue (HUD’s implementation of a phase-in of rent increases), based on HUD’s assurances that the limitation would not otherwise affect tenants’ ability to enforce their rights in federal court. The Court concluded that “nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude petitioners’ § 1983 claim.”¹²

A similar approach was taken in *Wilder v. Virginia Hospital Association*,¹³ in which the Court held that health care providers could bring a section 1983 action to enforce a reimbursement provision contained in the Boren Amendment to the Medicaid Act. The context was a federal grant to states. The Boren Amendment required that a state’s plan for medical assistance provide for reimbursement of services, with assurances “satisfactory to the Secretary” that the reimbursements would be “reasonable and adequate” for efficiently run facilities. The Court determined that this language granted health care providers a substantive and enforceable right to reasonable and adequate compensation. Distinguishing *Pennhurst*, the Court ruled that the language was not so “vague and amorphous” as to be unenforceable. Even though the Secretary was authorized to withhold funds for a state’s non-compliance, the Court thought that private actions were not foreclosed. Federal court suits by providers had been commonplace before enactment of the Boren Amendment, and the amendment did not eliminate the basis for these actions. The burden was on the state to show that Congress had intended to foreclose private actions, and the remedial scheme was not so comprehensive as to merit such an inference. Also, “the availability of administrative procedures ordinarily does not foreclose resort to § 1983.”¹⁴

¹² 479 U.S. at 429.

¹³ 496 U.S. 498 (1990). Justice Brennan wrote the Opinion of Court, and was joined by Justices White, Marshall, Blackmun, and Stevens. Chief Justice Rehnquist dissented, joined by Justices O’Connor, Scalia, and Kennedy.

¹⁴ 496 U.S. at 523.

A two-part test had emerged, first distilled in *Golden State Transit Corporation v. City of Los Angeles*,¹⁵ and then restated in *Wilder*.¹⁶ The first part of the test, whether the statute created an enforceable right, broke down into three sub-issues: (1) is the provision in question designed to benefit the putative plaintiff, (2) does the provision create obligations binding on the government, or is it merely an expression of congressional preference, and (3) is the interest “too vague and amorphous” to be enforceable by the judiciary? The test’s second part was whether Congress had specifically foreclosed a remedy under section 1983. Here the burden is on the state to show “by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.”¹⁷

Effective Overruling

Although the law seemed relatively settled on the proper approach to section 1983 actions seeking to enforce rights derived from spending statutes, both *Wright* and *Wilder* had been decided by 5-to-4 votes, and changed membership on the Court resulted in a quick about-face. Between *Wilder* in 1990 and *Suter v. Artist M.* in 1992, Justice Brennan had been replaced by Justice Souter, and Justice Marshall had been replaced by Justice Thomas. Both new Justices sided with the Chief Justice in *Suter*, and Rehnquist had obtained a majority to support his position. By 2002, the Chief Justice was able to say that “[o]ur more recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes.”¹⁸ Rather, *Pennhurst* has become the general rule, and *Wright* and *Wilder* had come to be viewed as the exceptions: “Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights.”¹⁹

From *Wilder* to *Gonzaga*

The path from *Wilder* to *Gonzaga* began (and almost ended) with *Suter v. Artist M.*²⁰ *Gonzaga* followed directly from *Suter*. In between, however, the Court had applied the *Wright-Wilder* framework of analysis rather than the *Pennhurst* framework in a case in which the Court held unanimously that the statute did not create a right enforceable under section 1983,²¹ so some question may have remained about the guiding principles.

¹⁵ 493 U.S. 103, 106 (1989) (Justice Stevens for a 6-3 Court majority) (not a spending power case).

¹⁶ 496 U.S. at 509, 520.

¹⁷ 496 U.S. at 520-21.

¹⁸ *Gonzaga University v. Doe*, 122 S. Ct. 2268, 2274 (2002).

¹⁹ 122 S. Ct. at 2273.

²⁰ 503 U.S. 347 (1992).

²¹ *Blessing v. Freestone*, 520 U.S. 329 (1997).

In *Suter v. Artist M.*,²² the Court held that no right enforceable under section 1983 was conferred by the Adoption Assistance and Child Welfare Act of 1980, which required states receiving funding to have a plan to make “reasonable efforts” to keep children out of foster homes. Rejecting an action alleging that no such reasonable efforts had been made, the Court concluded that “careful examination of the [statutory] language does not unambiguously confer an enforceable right upon the Act’s beneficiaries.”²³ Moreover, the implementing regulations were not specific, and did not provide notice to the states that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a condition on the receipt of funds from the Federal Government. While the Court could have followed *Pennhurst* on the facts, finding that the statutory language was too vague and amorphous to create enforceable rights, it also seemed to reject the approach of *Wright* and *Wilder* altogether. Rather than emphasizing the state’s burden to show that Congress had intended to preclude review, the Court instead emphasized the plaintiff’s burden to establish that Congress had unambiguously *authorized* review.

Muddying the waters a bit was the Court’s 1997 decision in *Blessing v. Freestone*.²⁴ The Court’s unanimous holding was not surprising: no right enforceable under section 1983 was conferred by title IV-D of the Social Security Act, which requires states receiving child welfare funding to “substantially comply” with requirements designed to ensure timely payment of child support. “Far from creating an individual entitlement to services,” the Court concluded, “the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State’s Title IV-D program.” What was a bit surprising is that the Court relied on the *Wright* framework rather than the *Pennhurst/Suter* approach.

Gonzaga

In 2002, the Court reverted to the *Pennhurst/Suter* approach to hold that the Family Educational Rights and Privacy Act of 1974 (FERPA) creates no individual rights that are enforceable under section 1983. *Gonzaga University v. Doe* was decided by a 7-to-2 vote, but there was only a 5-to-4 majority supporting the *Pennhurst/Suter* rationale.²⁵ Justice Breyer, joined by Justice Souter, concurred on the facts, but objected to use of a presumption to “in effect, pre-determine an outcome.”²⁶

²² *Suter* was a 7-2 decision, with Justices White, O’Connor, Scalia, Kennedy, Souter, and Thomas joining Chief Justice Rehnquist’s opinion of the Court. Dissenting was Justice Blackmun, joined by Justice Stevens. Justice White’s switch to the Chief Justice’s position, along with the votes of the two new Justices, Souter and Thomas, accounted for the different lineup Court majority.

²³ 503 U.S. at 363.

²⁴ 520 U.S. 329 (1997).

²⁵ Chief Justice Rehnquist’s opinion of the Court was joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Breyer, joined by Justice Souter concurred. Justice Stevens, joined by Justice Ginsburg, dissented.

²⁶ 122 S. Ct. at 2279.

FERPA is a typical federal spending statute that places authority to allocate grants, as well as primary enforcement authority, in a federal official. It provides in part that funds shall not be provided to any educational institution “which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization.” Funding may be terminated if the Secretary of Education finds that a recipient institution “is failing to comply substantially with any requirement of [the Act].”²⁷ Applying *Pennhurst*, the Court majority determined that Congress had not spoken “with a clear voice” in creating rights in students and their parents. The Court also moved to eliminate “confusion” attributed to *Blessing*’s reliance on the *Wilder* framework. In doing so, the Court added a new twist, declaring that the same standard (“no less and no more”) used to determine whether a statute creates a private right of action determines whether a statute confers rights enforceable under section 1983.²⁸ The issue in both inquiries is “whether Congress intended to create a federal right.” The answer was clear to the Court. “There is no question that FERPA’s nondisclosure provisions fail to confer enforceable rights.” FERPA’s provisions “speak only to the Secretary of Education,” and speak only of “institutional policy and practice,” not of individual instances of disclosure. FERPA’s focus, therefore, is “two steps removed from the interests of individual students and parents.”²⁹

Justice Stevens’ dissent criticized the Court’s approach for seeming to conflate the two separate inquiries of whether there is a right and whether there is a remedy. While the language from the majority opinion quoted above is focused on the issue of whether there is a “right,” Justice Stevens pointed to other language of the majority (“it is implausible to presume that . . . Congress intended private suits to be brought before thousands of federal- and state-court judges”)³⁰ that is directed instead at the remedy. This definition of a right in terms of enforcement, Justice Stevens asserted, “has eroded – if not eviscerated – the long-established principle of presumptive enforceability of rights under § 1983.”³¹ Justice Stevens also objected to the Court’s merging of section 1983 analysis and implied private right of action analysis. Heretofore, the Court had treated the two categories separately “because Congress expressly authorized private suits in § 1983 itself.” Consequently, Justice Stevens asserted, the separation-of-powers concern underlying the approach to implied actions – that Congress rather than the courts should control the availability of remedies – is not relevant to section 1983 actions.³²

²⁷ 20 U.S.C. § 1232g(b)(1) (funding restriction); 20 U.S.C. § 1234c(a) (enforcement).

²⁸ 122 S. Ct. at 2275-79.

²⁹ 122 S. Ct. at 2277.

³⁰ 122 S. Ct. at 2279.

³¹ 122 S. Ct. at 2285.

³² 122 S. Ct. at 2284. Justice Brennan had made precisely the same point in his opinion of the Court in *Wilder*. 496 U.S. at 508, n.9.

Implications for Drafting

For now, it appears that Chief Justice Rehnquist has carried the day, and that the contractual theory of the spending power that he set forth in *Pennhurst* and applied in *Gonzaga* now governs determination of whether laws enacted under the spending power create private rights that are enforceable through section 1983 actions. As Justice Breyer suggested in his *Gonzaga* concurrence, this test is strongly result-determinative. And the same could be said for the *Wilder* approach. The Court has seemingly veered from one extreme to the other, *i.e.*, from a presumption that a section 1983 remedy is available whenever Congress has used rights-conferring language without also including strong evidence that it intended to foreclose section 1983 action, to a presumption that no enforceable rights have been created unless Congress has said so in unmistakably clear terms. Results are usually determined by which test is applied, and not by real differences among the spending statutes at issue. Compare, for example, the holdings in *Wright* and *Wilder* with that in *Suter*: statutes requiring a “reasonable” rent allowance for utilities, and “reasonable and adequate” reimbursement of health care providers were held to create enforceable rights, while a statute requiring “reasonable efforts . . . in each case” to avoid placing children in foster care was held not to create enforceable rights.³³

The implications for drafting are clear. As long as the presumption against enforceable section 1983 rights governs, Congress will need to spell out any intent it may have to create such rights. And given the majority’s language in *Gonzaga*, explicit reference to section 1983 would be advisable. Anything less may be ineffective. *Pennhurst* and *Gonzaga* both demonstrate that including the term “right” or “rights” in the statute does not necessarily suffice to create rights enforceable under section 1983. Moreover, there’s a problem with statutory context. “Rights” not connected to terms and conditions of a state’s spending program may be viewed as free-floating and merely precatory, as in *Pennhurst*. On the other hand, if protecting a “right” is included as a requirement of a state plan that must be approved by a federal official in order for the state to qualify for funding, and the federal official is given the responsibility for monitoring state compliance and withholding funds in cases of substantial non-compliance, then the Court may employ its contractual theory of conditional grants to rule that additional remedies are inappropriate.

Prospective action may not be all that is required. Congress may have to revisit spending statutes if it wants to authorize private actions that at the time of enactment it may have assumed were available. In none of these spending cases did the Court focus extensively on what the enacting Congress intended; instead, the principal focus has been on the actual statutory language and structure. The Court has demonstrated a willingness to impose clear statement rules retroactively on statutes

³³ Note that *Wright* and *Wilder* had the same 5-to-4 alignment of Justices, except that Justice Kennedy had replaced Justice Powell on the dissenting side. As indicated above, n.22, the replacement of two Justices, as well as Justice White’s unexplained change of positions, accounted for the different alignments in *Wilder* and *Suter*.

enacted when no such clear statement requirement had been announced.³⁴ Indeed, Congress responded to the Court's decision in *Suter* with amendments designed to counter one aspect of the Court's interpretation.³⁵

³⁴ See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Rehabilitation Act of 1973, which authorized remedies against “any recipient of Federal assistance,” did not express in unmistakably clear terms a congressional intent to abrogate a state’s Eleventh Amendment immunity).

³⁵ 42 U.S.C. § 1320a-2, enacted by Pub. L. 103-382, § 555(a), 108 Stat. 4057 (1994); and 42 U.S.C. § 1320a-10, enacted by Pub. L. 103-432, 108 Stat. 4460. The two identically worded provisions provided that, “[i]n an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan.” The language expressly declared an intent to “overturn[] any such grounds applied in *Suter v. Artist M.*” but disclaimed an intent to alter that case’s holding.

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