

January 1982

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## Recommended Citation

George D. Brown. "*Pennhurst* as a Source of Defenses for State and Local Governments." *Catholic University Law Review* 31, (1982): 449-464.

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# PENNHURST AS A SOURCE OF DEFENSES FOR STATE AND LOCAL GOVERNMENTS

*George D. Brown\**

Tucked away toward the end of the Supreme Court's opinion in *Pennhurst State School and Hospital v. Halderman*<sup>1</sup> is a road map to possible state and local defenses to suits brought under 42 U.S.C. § 1983<sup>2</sup> and federal grant suits in general. *Pennhurst* involved a challenge to conditions at a state facility for the mentally retarded. The Court held that the "bill of rights" section of the Developmentally Disabled Assistance and Bill of Rights Act of 1975<sup>3</sup> did not impose obligations upon states receiving federal funds under the Act.<sup>4</sup> The plaintiffs also had potential claims under two sections of the Act which required participating states to make "assurances" to the Secretary of Health and Human Services concerning the treatment furnished to individuals.<sup>5</sup> While these claims were not before the Court, Justice Rehnquist, joined by four other Justices, discussed four possible obstacles to bringing suit under these provisions. All four may prove to be important state and local defenses if later enshrined in holdings.

Justice Rehnquist indicated that the assurance claim could be brought under section 1983. He first noted that section 1983 protects "rights secured" by federal law and questioned whether "assurances" to the Secretary could be treated as rights belonging to the plaintiffs.<sup>6</sup> Second, he noted that section 1983 would not apply if the remedy which the Act contained were viewed as exclusive.<sup>7</sup> Third, Justice Rehnquist suggested that the remedies available to a section 1983 plaintiff challenging the conduct of a federal grantee might be limited to a declaration of noncompliance and

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1. 101 S. Ct. 1531 (1981).

2. 42 U.S.C. § 1983 (Supp. III 1979).

3. *Id.* §§ 6000-6081 (1976 & Supp. III 1979).

4. 101 S. Ct. at 1540.

5. The plaintiffs claimed that 42 U.S.C. § 6011 (Supp. III 1979) and 42 U.S.C. § 6063(b)(5)(C) (Supp. III 1979) granted them the right to bring suit. 101 S. Ct. at 1545.

6. 101 S. Ct. at 1545.

7. *Id.*

an injunction requiring either compliance or foregoing federal funds.<sup>8</sup> Finally, he touched on the merits, noting that the particular facility might not be subject to the Act's conditions since it did not receive federal funds.<sup>9</sup>

Justice Blackmun, concurring in the judgment, disassociated himself from these statements. He suggested that the plaintiffs, "the intended beneficiaries of the Act," could sue under either an implied right theory or under section 1983.<sup>10</sup> He also felt that the facility was covered by the Act since it was part of the state's overall program, which did receive funds.<sup>11</sup> Justice White's dissent, joined by Justices Brennan and Marshall, also disagreed with the majority as to the availability of relief under section 1983. Justice White's discussion of the issue dealt only with the "exclusive remedy" exception, finding it inapplicable.<sup>12</sup> As discussed below, he did agree as to the remedies available in such a suit. It must be emphasized that the majority's discussion of the "assurances" claim is dictum. (Justice Blackmun labeled it "advisory"). Nonetheless, it is significant that five Justices reached out to suggest these limits. In large part, the dictum reflects the concern of some Justices that the Court may have gone too far in *Maine v. Thiboutot*.<sup>13</sup> Two of the four limits are aimed directly at *Thiboutot*. The reasons for the Justices' concern and the impact of the new limits require an understanding of that case.

### I. THIBOUTOT AND ITS CONSEQUENCES

Federal courts are not common law courts of general jurisdiction. Therefore, in order to bring a federal claim, it is not enough that the plaintiff assert a violation of federal substantive law. A plaintiff must also convince the court that federal law authorizes a suit to redress that violation. In some instances, Congress provides expressly for suits. In other cases, courts "imply" a right of action as a matter of statutory interpretation. When state and local governments or their officials are defendants, 42 U.S.C. § 1983 may provide the cause of action. This section declares that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured

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8. *Id.* at 1545-46.

9. *Id.*

10. *Id.* at 1547 (Blackmun, J., concurring).

11. *Id.* at 1548.

12. *Id.* at 1549 (White, J., dissenting).

13. 448 U.S. 1 (1980).

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 . . . .<sup>14</sup>

For many years, lawyers were uncertain whether section 1983 provided a right of action for violation of *all* federal statutes, or whether it was limited to "laws" within the area generally referred to as civil, or equal rights. In *Maine v. Thiboutot*,<sup>15</sup> the Supreme Court appeared to adopt the broad view, subjecting state and local defendants to section 1983 suits for violation of any federal statute.

The case involved a challenge by welfare recipients to a reduction in their payments, which they asserted violated federal law. The action was brought in state court and resulted in a ruling favorable to plaintiffs. On writ of certiorari, the state sought review of a ruling by its Supreme Judicial Court that plaintiffs were entitled to attorney's fees under section 1988, the Civil Rights Attorney's Fees Awards Act of 1976.<sup>16</sup> According to the Supreme Court, the case presented two issues: "(1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party in such an action."<sup>17</sup> In a somewhat cursory opinion, Justice Brennan, writing for a majority of six, answered both questions in the affirmative. In resolving the coverage issue, he emphasized the "plain language" of section 1983, i.e., its reference to "laws" in addition to the Constitution.<sup>18</sup> He also relied on numerous cases, such as *Edelman v. Jordan*,<sup>19</sup> which appeared to rest on the premise that section 1983 extended to statutory claims. Finally, he analyzed the legislative history as inconclusive, arguing that when Congress added the words, "and laws," to the predecessor of section 1983, it might have envisaged only equal rights laws, or it might have had a broader purpose.<sup>20</sup>

Having decided that the original challenge was a section 1983 action, Justice Brennan invoked the plain language of section 1983 to affirm the holding that an award of attorney's fees was proper. "Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit."<sup>21</sup>

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14. 42 U.S.C. § 1983 (Supp. III 1979).

15. 448 U.S. 1 (1980).

16. 42 U.S.C. § 1988 (1976).

17. 448 U.S. at 3.

18. *Id.* at 5-6.

19. 415 U.S. 651 (1974).

20. 448 U.S. at 6-7.

21. *Id.* at 9.

In a sharp dissent, Justice Powell chastised the majority for deciding the matter "almost casually"<sup>22</sup> and took issue with it on both legislative history and on the weight of prior decisions. Of particular concern to Justice Powell were the serious policy and programmatic arguments against extending section 1983 to all statutory claims. He noted that states and localities are engaged in "literally hundreds"<sup>23</sup> of cooperative programs with the federal government. He emphasized that with the broad scope of grant programs, there would be a vast increase in third-party grant litigation.<sup>24</sup>

Part of Justice Powell's objection to this impact of *Thiboutot* rested on federalism grounds: the spectre of the federal courts overseeing a broad range of state and local activities. He was also disturbed by the potential for a vast increase in damage claims against governmental grantees and their officials for violations of grant conditions. In the case of municipalities, he noted that the combined effect of *Thiboutot* and *Owen v. City of Independence*<sup>25</sup> could be strict liability for such violations.<sup>26</sup>

*Thiboutot* created consternation among state and local officials. One can identify at least three negative consequences likely to flow from the decision.

#### A. Increased Volume of Suits

From the plaintiff's perspective, one of the great advantages of *Thiboutot* is that there is no longer any right of action problem. Section 1983 provides an express right of action. This is particularly helpful to plaintiffs since the Supreme Court has begun to take an increasingly restrictive approach to *implying* rights of action.<sup>27</sup> Litigants have already begun to invoke *Thiboutot* in attempting to utilize section 1983 in cases involving federal grant statutes<sup>28</sup> and regulatory programs.<sup>29</sup> Grant litigation is a potentially fertile area, given the large number of interests created by grant statutes and "cross-cutting" mandates which further national policies such as nondiscrimination.

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22. *Id.* at 11 (Powell, J., dissenting).

23. *Id.* at 22.

24. *Id.* at 23-24.

25. 445 U.S. 622 (1980).

26. *Thiboutot*, 448 U.S. at 22 n.10.

27. *See, e.g.*, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981).

28. *See, e.g.*, *Meyerson v. Arizona*, 507 F. Supp. 859 (D. Ariz. 1981).

29. *See, e.g.*, *Chesapeake Bay Found. Inc. v. Virginia State Water Control Bd.*, 501 F. Supp. 821 (E.D. Va. 1980).

### B. Increased Availability of Attorney's Fees

As indicated, the actual holding of *Thiboutot* was that the plaintiffs were entitled to a recovery of attorney's fees. The relevant statute is the Civil Rights Attorney's Fees Award Act of 1976, which provides in part as follows: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."<sup>30</sup>

Since any federal statutory suit is, under *Thiboutot*, a section 1983 suit, attorney's fees are potentially available. This development comes just as what might be called "attorney's fees law" is a burgeoning new field, with developments largely favoring plaintiffs and their attorneys. A recent report by the Lawyer's Committee for Civil Rights Under Law concluded that

disputes over the amount of a fee are becoming increasingly complex, defense arguments more novel and innovative, and the fee computation portion of a case extremely time consuming. The end result, has, however, despite these difficulties been useful: the courts, whether willingly or not, are beginning to view public interest litigation as worthy and important litigation, and the fees awarded attorneys who undertake such cases are becoming larger.<sup>31</sup>

This development may, of course, lead to an increase in the number of suits brought, since independently-financed advocacy groups will have literally nothing to lose. In addition, from the defendant's point of view, the size of the fees themselves may become a problem. Litigation under federal statutes, such as grant programs, is frequently complex and time-consuming; multistaged proceedings, including appeals, remands, and rehearings, are frequent. Though probably not "ruinous," these outlays could constitute a serious drain on some defendants' treasuries.

### C. Damages

A third possible consequence of *Thiboutot* could be greater availability of damages. Under traditional implication doctrine, a court might be willing to imply a cause of action but, at the same time, find that a damage remedy was inappropriate. Since *Thiboutot* tells us that section 1983 means what it says, and since the statute provides in part that any defend-

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30. 42 U.S.C. § 1988 (1976).

31. LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW, COMMITTEE REPORT NO. 39 at 4 (Oct. 1980).

ant subject to it "shall be liable to the party injured," courts might feel that they have no choice but to rule that damages are an appropriate remedy. The interaction between *Thiboutot* and *Owen v. City of Independence*<sup>32</sup> becomes important at this point. *Owen* appears to establish strict municipal liability for violation of federal statutes as well as for violation of the Constitution. Justice Powell relied heavily on this point in his dissent in *Thiboutot*.<sup>33</sup> It should be noted, however, that the courts may still require the plaintiff to show tangible harm, as well as a federal law violation, before awarding actual damages.<sup>34</sup> While perhaps the most speculative of the possible consequences, the damages potential of *Thiboutot* should not be minimized.

In sum, state and local officials had every reason to be concerned about the decision. They have called for it to be overturned. A Senate bill to do this is progressing through the Judiciary Committee.<sup>35</sup> However, there are significant indications that the Court itself is having second thoughts about the broad sweep of *Thiboutot* and is in the process of creating narrowing principles. It is important for state and local lawyers to be aware of these developments and of promising new defenses to section 1983 statutory claims.<sup>36</sup> Furthermore, these developments extend beyond section 1983 to federal grant litigation generally.

## II. LIMITATIONS ON *Thiboutot*

### A. Congressional Foreclosure of Private Enforcement

Under the first *Pennhurst* exception, a court may treat the existence of alternative remedies in the statute which plaintiffs invoke as evidence of preclusion of a private right under section 1983.<sup>37</sup> This defense is particularly promising because the Court has already elevated it from the *Pennhurst* dictum to a holding. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,<sup>38</sup> the plaintiffs claimed injury to fishing grounds by discharges and ocean dumping of sewage and other waste. A principal issue before the Supreme Court was whether a right to bring the suit could be implied under either the Federal Water Pollution Control

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32. 445 U.S. 622 (1980).

33. 448 U.S. at 22 n.11.

34. See *Carey v. Piphus*, 435 U.S. 247, 264 (1978).

35. S. 584, 97th Cong., 1st Sess. (1981).

36. Plaintiffs' lawyers can be expected to rely heavily on *Thiboutot* and to continue urging that it be interpreted broadly.

37. 101 S. Ct. at 1545.

38. 101 S. Ct. 2615 (1981).

Act (FWPCA),<sup>39</sup> or the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA).<sup>40</sup> Both statutes contain elaborate enforcement mechanisms, including provisions for citizen suits. These provisions, however, do not authorize damages, which the plaintiffs sought, and they require notice to various parties, which plaintiffs had not given.

In addressing the implied right of action issue, Justice Powell utilized the Court's most recent approach—emphasizing the language of a statute and legislative history—in order to ascertain the intent of Congress.<sup>41</sup> He emphasized the “unusually elaborate enforcement provisions”<sup>42</sup> as evidence of congressional intent to bar any additional private judicial enforcement. The legislative history also supported this conclusion,<sup>43</sup> but it seems clear that the structure of the Act was the principal rationale.

Although the plaintiffs had invoked “a wide variety of legal theories”<sup>44</sup> to support their suit, they had not thought to raise section 1983. However, Justice Powell did it for them. He emphasized that *Thiboutot* was a recent decision and that its construction of section 1983 could have a significant bearing on the case.<sup>45</sup> Nonetheless, his opinion suggests that, like Justice Rehnquist in *Pennhurst*, he was eager to seize an opportunity to drive home the point that *Thiboutot* is not as broad as it seems.

He cited *Pennhurst* as recognizing “two exceptions to the application of § 1983 to statutory violations.”<sup>46</sup> These exceptions apply if Congress has “foreclosed private enforcement of [the] statute in the enactment itself,”<sup>47</sup> or if the statute which plaintiff invokes does not create “enforceable ‘rights’ under § 1983.”<sup>48</sup>

Justice Powell found the first exception applicable. His analysis is essentially a repetition of his reasoning for refusing to imply a right of action: that the comprehensiveness of the remedies provided in the FWPCA and the MPRSA demonstrated legislative intent to foreclose relief under section 1983.

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39. 33 U.S.C. §§ 1251-1376 (1976 & Supp.III 1979).

40. *Id.* §§ 1401-1444.

41. 101 S. Ct. at 2622-23. *See also* *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). The use of this approach omits the third and fourth “factors” listed by the Court in its implied right analysis in *Cort v. Ash*, 422 U.S. 66 (1975), namely, whether an implied right is consistent with the purposes of the statute and whether the suit basically involves state law matters. *Id.* at 78.

42. 101 S. Ct. at 2623.

43. *Id.* at 2625.

44. *Id.* at 2619.

45. *Id.* at 2626.

46. *Id.*

47. *Id.*

48. *Id.*

Justice Stevens, joined by Justice Blackmun, dissented as to the availability of a right of action under section 1983.<sup>49</sup> He expressed general agreement with the first exception relied upon by the Court—that a comprehensive remedial scheme can evidence a congressional decision to preclude other remedies—but stressed that the inquiry should focus on whether Congress intended to withdraw the section 1983 right of action, not on whether it intended to preserve it.<sup>50</sup> He relied heavily on the fact that both the FWPCA and the MPRSA contained “savings clauses” which preserved rights which litigants might have under other statutes as negating any such intent.

The net effect of *Pennhurst* and *National Sea Clammers* may be to “merge” section 1983 analysis with implied right of action analysis. Therefore, cases involving the latter issue will be utilized in exploring this defense. The defendant’s case is strongest when the underlying statute provides comprehensive remedies, including some judicial remedy for the plaintiff. This was the situation in *National Sea Clammers*. Whenever a federal statute contains a “citizens suit” provision, that should rule out any additional relief against state and local defendants. For example, in *Meyerson v. Arizona*,<sup>51</sup> the court found that such a provision in the General Revenue Sharing statute, although providing ‘very limited’ relief, precluded a section 1983 action.<sup>52</sup> Many federal statutes, however, do not contain any reference to private enforcement. The question for state and local defendants, in cases arising under such statutes, is how comprehensive the remedial scheme must be to bring the statute within the first *Pennhurst* exception. Defendants may be able to get some mileage out of the 5-to-4 Supreme Court decision in *Transamerica Mortgage Advisors, Inc. v. Lewis*.<sup>53</sup> In that case, the majority refused to imply a private right of action for damages under the Investment Advisers Act.<sup>54</sup> The opinion noted that “Congress expressly provided both judicial and administrative means for enforcing compliance . . . .”<sup>55</sup> These include empowering the Securities & Exchange Commission to impose administrative sanctions and to bring civil compliance actions in federal courts. Violations of the Act are also criminal offenses. Thus, the Court found it highly improbable that “Congress absentmindedly forgot to mention an intended private ac-

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49. *Id.* at 2630 (Stevens, J., dissenting).

50. *Id.* at 2631.

51. 507 F. Supp. 859 (D. Ariz. 1981).

52. *Id.* at 863.

53. 444 U.S. 11 (1979).

54. 15 U.S.C. §§ 80b-1 to 80b-21 (1976).

55. 444 U.S. at 20.

tion."<sup>56</sup> *Transamerica* may stand for the proposition that a wide range of governmental enforcement mechanisms shows that Congress intended to preclude private enforcement, either under an implied right theory or by extension of section 1983.<sup>57</sup>

The hardest case for defendants seeking to invoke the first *Pennhurst* exception arises when the only statutory remedies are fiscal sanctions such as suspension or termination of federal grant funds. This is the typical pattern in grant statutes. Indeed, it was the case in *Pennhurst* itself. Therefore, there may be considerable significance to the fact that, even in that context, Justice Rehnquist raised the possibility that "the express remedy contained in [the] Act is exclusive."<sup>58</sup>

Nonetheless, state and local defendants urging such a position upon a court will have to cope with the long line of Supreme Court "welfare cases" beginning with *King v. Smith*.<sup>59</sup> The major obstacle would be Justice Harlan's opinion in *Rosado v. Wyman*.<sup>60</sup> The specific issue in that case was not whether welfare plaintiffs had a right of action under the Social Security Act but whether they must first exhaust administrative remedies. A majority of the Court refused to order exhaustion, in part on the ground that the plaintiffs could not participate in the administrative proceeding. Justice Harlan stated:

We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.<sup>61</sup>

Perhaps this reluctance can be overcome by a showing that the administrative procedures do allow participation. Otherwise, despite Justice Rehnquist's suggestion, it is doubtful that a court would find them "exclusive."<sup>62</sup>

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56. *Id.* (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)).

57. This interpretation may be weakened slightly by the fact that the majority implied a limited private remedy, the right to void contracts with noncomplying advisers and to the refund of any fees paid. 444 U.S. at 19.

58. 101 S.Ct. at 1545.

59. 392 U.S. 309 (1968).

60. 397 U.S. 397 (1970).

61. *Id.* at 420.

62. *See Cannon v. University of Chicago*, 441 U.S. at 706 n.41.

*B. Focusing on the Existence of Rights*

Alternatively, using the second *Pennhurst* exception, state and local defendants may be able to argue that the federal statute the plaintiff invokes does not confer any rights upon him, as required by the express language of section 1983. Again, cases on implied rights of action may be relevant precedents. The first of the *Cort v. Ash*<sup>63</sup> factors involves the following question: “[I]s the plaintiff ‘one of the class for whose *especial* benefit the statute was enacted’—that is, does the statute create a federal right in favor of the plaintiff?”<sup>64</sup>

The question is how the court analyzes the plaintiff’s relationship to the statute. A good example is the 1980 decision of the United States Court of Appeals for the Fifth Circuit in *Rogers v. Frito-Lay, Inc.*<sup>65</sup> In this case, handicapped plaintiffs asserted that they had been the victims of handicap-based discrimination in their employment by federal contractors. The plaintiffs asserted that this conduct violated section 503 of the Rehabilitation Act of 1973.<sup>66</sup> That statute requires that every federal contract over \$2,500 contain “a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .”<sup>67</sup> A divided panel of the Fifth Circuit upheld the district court’s dismissal of the case on the ground that no private cause of action could be implied under section 503.<sup>68</sup>

The court analyzed section 503 as clearly conferring *benefits* upon handicapped persons. However, it concluded that the benefits did not rise to the level of *rights*, including the ability to sue to enforce those rights. The opinion contrasted this section with section 504 of the same Act, which states that “[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”<sup>69</sup>

The majority relied heavily on the Supreme Court’s statement in *Cannon v. University of Chicago*<sup>70</sup> that the “right-or duty-creating language of the statute has generally been the most accurate indication of the propriety of

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63. 422 U.S. 66 (1975).

64. *Id.* at 78 (quoting in part *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

65. 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

66. 29 U.S.C. § 793 (1976 & Supp. III 1979),

67. *Id.* § 793(a) (Supp. III 1979).

68. 611 F.2d at 1078.

69. 29 U.S.C. § 794 (Supp. III 1979).

70. 441 U.S. 677 (1979).

implication of a cause of action.”<sup>71</sup> In *Cannon*, Justice Stevens contrasted a provision stating that no person shall be discriminated against on the basis of sex in any grant program with a provision that forbade discrimination by any federal grantee on the basis of sex.<sup>72</sup> In terms of commands to the grantee, the two statutes are identical. Justice Stevens stated, however, that there would be much less reason to imply a cause of action under the latter formulation.<sup>73</sup> The difference in wording may reflect the accidents of draftsmanship rather than a conscious policy decision about creating judicially-enforceable “rights.” Nonetheless, section 1983 defendants should make the most of it.

In the regulatory context, state and local defendants may be successful in arguing that whatever duties they are under are not for the particular benefit of the plaintiff. In *California v. Sierra Club*,<sup>74</sup> plaintiffs attacked a large water project as violative of section 10 of the Rivers and Harbors Appropriation Act of 1899 which prohibits “[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States . . . .”<sup>75</sup> The Supreme Court reversed lower court holdings that plaintiffs had an implied right of action to enforce the Act. Relying in part on Justice Steven’s distinction in *Cannon*, the Court concluded that the Act was designed “to benefit the public at large” by clarifying Congress’ power in the area.<sup>76</sup>

In the case of suits based on federal grant statutes, the analysis becomes somewhat more complex. This is due to the nature of the grant device itself. Funds go to a governmental body (which is thus aided), but the ultimate beneficiaries are individuals. The question for the courts will be at what point these benefits become rights. Answers may not be too difficult in the case of categorical grants, which create specific entitlements, and cross-cutting strings such as Title VI of the Civil Rights Act of 1964,<sup>77</sup> which prohibits discrimination on the basis of race, color, or national origin in federally-assisted programs. However, as one moves into block grants, the picture is less clear. A good example is the statutory preference

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71. *Id.* at 690 n.13.

72. *Id.* at 693 n.14.

73. *Id.* at 690-93.

74. 101 S. Ct. 1775 (1981).

75. 33 U.S.C. § 403 (1976).

76. 101 S. Ct. at 1779. *See also* *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1978) (requirement that national securities exchange members and registered broker-dealers keep certain records does not create a federal right in favor of private parties).

77. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

of the Community Development Block Grant program<sup>78</sup> for activities benefiting low and moderate income people. Is a preference a right, or is the *Rogers* analysis applicable?<sup>79</sup>

After *Pennhurst*, it seems reasonably clear that state and local litigants can argue that preferences, bills of rights, and congressional findings in grant statutes do not create rights for section 1983 purposes. Of potentially great significance is Justice Rehnquist's questioning whether grantee assurances (to the grantor) of certain types of conduct confer upon third parties any rights to such conduct.<sup>80</sup> State and local litigants should pursue this argument vigorously, since such assurances are one of the standard features of the grant system.<sup>81</sup>

### III. OTHER DEFENSES TO FEDERAL GRANT SUITS

The implications of Justice Rehnquist's statements in *Pennhurst* extend beyond section 1983 to grant litigation generally. The two remaining defenses suggested by his opinion are considered in this section.

#### A. Limiting the Remedy

Apart from blocking suits altogether, the retreat from *Thiboutot* may limit the plaintiff's remedial options in a significant class of cases: third-party grant litigation. As indicated above, this is the area in which *Thiboutot*'s construction of section 1983 is likely to generate most new litigation. Third-party challenges to the award or administration of grants were a major growth area of grant litigation even before *Thiboutot*. In many instances, plaintiffs have sought relief which resembles specific performance, seeking an order that the grantee alter its conduct to benefit them.

A good example is *Camenisch v. University of Texas*.<sup>82</sup> A deaf student challenged the university's failure to provide him with a sign language interpreter as a violation of section 504 of the Rehabilitation Act of 1973<sup>83</sup> and HEW's implementing regulations.<sup>84</sup> The district court ordered the university to provide an interpreter, pending a decision on the merits, but

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78. Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5319 (1976 & Supp. III 1979).

79. 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

80. 101 S. Ct. at 1545.

81. *But see* *Lau v. Nichols*, 414 U.S. 563 (1974) (allowing private enforcement of assurances).

82. 616 F.2d 127 (5th Cir. 1980), *vacated*, 101 S. Ct. 1830 (1981).

83. 29 U.S.C. § 794 (Supp. III 1979).

84. 45 C.F.R. § 84.44(d) (1981).

conditioned this preliminary relief on plaintiff's filing a complaint with HEW.<sup>85</sup>

The United States Court of Appeals for the Fifth Circuit upheld the granting of preliminary relief, but ruled that it was error to require exhaustion of any administrative remedies.<sup>86</sup> It drew a sharp distinction between judicial and administrative resolution of such complaints, noting that the latter could only result in funds termination—a remedy which would hardly benefit the plaintiff.<sup>87</sup> The court relied heavily on Justice Stevens' opinion in *Cannon*. In other instances, courts have gone so far as to award damages to third parties asserting incorrect administration of grant programs.<sup>88</sup>

*Pennhurst* was a third-party grant case. Justice Rehnquist's statements cast considerable doubt on the availability of broad relief in such cases, whether brought under section 1983 or under an implied right theory. In dealing with the remedial question, he first stated that "[r]espondents' relief may well be limited to enjoining the Federal Government from providing funds to the Commonwealth."<sup>89</sup>

Taken literally, this statement means that no section 1983 suit could have been brought at all, since that statute only authorizes such suits against state and local officials. Justice Rehnquist may have meant that even if a section 1983 suit can be brought against the nonfederal defendants, the only remedy available would be analogous to that in a suit against the grantor agency: a declaration that the grantee is violating a federal norm and an injunction requiring it to cease violation or relinquish federal funds. His citation of Justice Harlan's opinion in *Rosado v. Wyman*<sup>90</sup> buttresses this interpretation. Justice Harlan stated in *Rosado* that "the unarticulated premise" in any third-party challenge is that the grantee has the choice of complying or foregoing the federal funds.<sup>91</sup> The three Justices who dissented on the merits in *Pennhurst* agreed with Justice Rehnquist on the remedial point.<sup>92</sup> In particular, Justice White singled out as inappropriate the appointment of a special master with broad powers over resident placement.<sup>93</sup>

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85. 616 F.2d at 129-30.

86. *Id.* at 134.

87. *Id.* at 135.

88. See Cappalli, *Federal Grants and the New Statutory Tort: State and Local Officials Beware!* 12 URB. LAW. 445 (1980).

89. 101 S. Ct. at 1545.

90. 397 U.S. 397 (1970).

91. *Id.* at 420-21.

92. 101 S. Ct. at 1556.

93. *Id.* at 1558.

The reaffirmation of the *Rosado* principle may be an important development in grant litigation. The Court, and numerous lower courts, have often appeared to abandon it, sanctioning specific relief in grant cases and even invoking the supremacy clause.<sup>94</sup> It is also noteworthy that the principle was revived in a section 1983 case, since that statute is exceptionally broad in terms of the remedies it authorizes. The practical effect of the remedial statements in *Pennhurst* is less certain. Certainly, state and local defendants will now advance the argument that damages are simply unavailable in grant suits. (In addition, states can also invoke the eleventh amendment.) They should also be able to argue that "systemic" remedies—such as the appointment of masters or court monitoring of compliance—are inappropriate in grant cases. The effect of the unavailability of specific relief is not clear. As a practical matter, an either-or decree may have the same effect. Many third-party complaints are already couched in such terms. At the very least, however, the grantee's "free choice" alternative of opting out of a grant program may increase its leverage in a particular lawsuit, since a court is likely to be extremely reluctant actually to order termination of funds.

#### B. *When Do Programs "Receive" Federal Assistance?*

In *Pennhurst*, Justice Rehnquist also raised the possibility that the state facility was not subject to any conditions in the federal grant statute, since it did not receive any funds under the Act.<sup>95</sup> This opens up an important new defense for state and local litigants in a relatively unexplored area of federal grant law: precisely what activities of a federal grantee should be treated as receiving federal assistance?

This inquiry is of great importance. For example, Title VI of the Civil Rights Act of 1964 forbids discrimination on the basis of race, color, or national origin in "any program or activity receiving Federal financial assistance."<sup>96</sup> Analogous provisions are found in section 504 of the Rehabilitation Act of 1973,<sup>97</sup> and Title IX of the Education Amendments of 1972.<sup>98</sup> In the case of a large entity such as a city or university, the question of what activities are federally assisted may become difficult.

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94. *E.g.*, *Townsend v. Swank*, 404 U.S. 282, 285-86 (1971).

95. 101 S.Ct. at 1545.

96. 42 U.S.C. § 2000d (1976).

97. 29 U.S.C. § 793 (1976 & Supp. III 1979) (handicap-based discrimination in federally-assisted programs).

98. 20 U.S.C. §§ 1681-1686 (1976) (sex-based discrimination in federally-assisted education programs). In other instances, individual grant statutes contain their own nondiscrimination provisions. *E.g.*, § 109 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (1976).

An important case in this area is *Board of Public Instruction v. Finch*,<sup>99</sup> involving HEW's authority to terminate funds under Title VI of the Civil Rights Act of 1964. Title VI states that termination "shall be limited to the particular political entity, or part thereof, or other recipient as to whom [a finding of noncompliance] has been made . . . ."<sup>100</sup> The court read the latter restriction as prohibiting HEW from condemning programs "by association."<sup>101</sup> The court emphasized the need for the agency to proceed on a program-by-program basis rather than terminating all education funds once any discrimination is found in a school district receiving federal funds.<sup>102</sup>

Recently, in *Othen v. Ann Arbor School Board*,<sup>103</sup> a Michigan district court utilized a similar analysis in holding that HEW's authority under Title IX<sup>104</sup> did not extend to school athletic programs unless those programs received federal funds. The court rejected the federal government's argument that it was enough that the school board received assistance.<sup>105</sup> The case may be of significance beyond the area of Title IX. Although that statute also contains a "particular program, or part thereof" limitation on the federal termination authority, the court viewed as the "key" inquiry the sweep of the general prohibition on sex-based discrimination in federally-assisted education programs.<sup>106</sup>

Nondiscrimination provisions do not always contain the specific limitations of Titles VI and IX. However, Justice Rehnquist's statements may encourage courts to focus more clearly on whether a particular program or activity does receive federal funds, as the court did in *Othen*.

The law in this area is still in a state of development. In *Meyerson v. Arizona*,<sup>107</sup> the plaintiff, who alleged handicap-based discrimination in violation of section 504, was a professor of psychology at the defendant university. He argued that the entire university should be regarded as a federally-funded activity or program.<sup>108</sup> On the other hand, the defendant argued that the only question was whether the psychology department could be so classified.<sup>109</sup> The Arizona district court rejected both argu-

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99. 414 F.2d 1068 (5th Cir. 1969).

100. 42 U.S.C. § 2000d-1 (1976).

101. 414 F.2d at 1077-79.

102. *Id.*

103. 507 F. Supp. 1376 (E.D. Mich. 1981).

104. 20 U.S.C. §§ 1681-1686 (1976).

105. 507 F. Supp. at 1381.

106. *Id.* at 1383.

107. 507 F. Supp. 859 (D. Ariz. 1981).

108. *Id.* at 862.

109. *Id.*

ments, stating that it could not yet determine whether "the nexus requirement of section 504" had been met.<sup>110</sup> As the law on this issue develops, it is important that the state and local perspective be presented with force and understanding.

#### IV. CONCLUSION

The lower courts are sometimes slow in discerning subtle changes in Supreme Court doctrine.<sup>111</sup> There are encouraging signs that the lower federal courts will resist plaintiffs' attempts to urge the broadest possible reading of *Thiboutot*.<sup>112</sup> Vigorous advocacy at the state and local level as well as awareness of the potential of *Pennhurst* and *National Sea Clammers* will be crucial in this respect, as well as in advancing new defenses to grant litigation generally.

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110. *Id.*

111. A good example is the area of implied rights of action. Many courts continue to apply, somewhat mechanically, the "four factor test" of *Cort v. Ash*, even though the Supreme Court has restricted it almost to the point of abandonment.

112. *E.g.*, *Meyerson v. Arizona*, 507 F. Supp. 859, 864 (D. Ariz. 1981). *See supra* notes 107-10 and accompanying text.