Chapter 3

Rights, Privileges, or Immunities Secured . . .

U.S. Const. amend XIV (1868)

§ 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

18 U.S.C. § 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .
§ 3.01 A Preliminary Word on Rights, Privileges, or Immunities Secured

The second element of § 1983 and § 242 is that the defendant “subject[]” or “cause[]” to be subjected the victim to a “deprivation” of “rights, privileges, or immunities secured” by the Constitution and laws. Section 242 is explicit that this means the Constitution and laws of the United States, while the Court read that requirement into § 1983 in Pennhurst State Sch. & Hosp. v. Halderman (1984).

Neither § 1983 nor § 242 establishes any rights, imposes any duties, or prohibits or regulates any conduct. Both are vehicles for enforcing rights emanating from another federal constitutional or statutory source. While § 1983 and § 242 require proof of a deprivation, the occurrence of the deprivation is determined by the underlying legal right and its source, not by § 1983. (Heffernan v. City of Paterson (2016); Baker v. McCollan (1979)).

PART A: ENFORCING THE CONSTITUTION

§ 3.02 ... By the Constitution

Both the Civil Rights Act of 1870 (in which § 242 was reenacted) and Ku Klux Klan Act of 1871 (of which § 1983 was a part) were enacted pursuant to Congress’ power under § 5 of the Fourteenth Amendment to “enforce the provisions” of the Amendment by “appropriate legislation.”

Sections 1983 and 242 primarily target the rights, privileges, or immunities secured by § 1 of that Amendment. But § 1 recognizes and protects a wide range of rights.

It prohibits states from depriving persons of the “equal protection of the laws,” which includes discrimination and harassment claims by public employees. (Stilwell v. City of Williams (9th Cir. 2016); Levin v. Madigan (7th Cir. 2012)). It prohibits states from abridging the “privileges or immunities of citizens of the United States,” although that provision has largely been stripped of any meaning or use, despite the best recent efforts of Justice Thomas, concurring in McDonald v. City of Chicago (2010) (Thomas, J., concurring in part and concurring in the judgment)). Most importantly for modern constitutional law and litigation, § 1 prohibits states from depriving persons of life, liberty, or property without due process of law. Zinermon v. Burch (1990) explained due process as two rights. “Procedural due process” requires government to follow fundamentally fair procedures before a person can be executed, imprisoned, fined, subject to damages or injunctive relief, or otherwise deprived of any property or liberty interest. “Substantive due process” prohibits government conduct that deprives a person of liberty, regardless of procedures used.

Sections 1983 and 242 also remedy deprivations of rights secured by the Constitution beyond § 1 of the Fourteenth Amendment. Plaintiffs can bring actions to enforce Fifteenth Amendment prohibitions on race discrimination in voting (Davis v. Commonwealth Election Commission (9th Cir. 2016)); Thirteenth Amendment prohibitions on the badges or incidents of slavery or involuntary servitude (United States v. Kozinski (1988); Nicholson v. Williams (E.D.N.Y. 2002)); Nineteenth Amendment prohibitions on
PART B: ENFORCING FEDERAL STATUTES

§ 3.07 Enforcing Federal Statutes

Federal statutory rights can be enforced in private civil litigation in a variety of ways. Congress may provide an express private right of action in the statute creating the federal right, authorizing an injured person to sue. It did so in statutes such as Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment (42 U.S.C. § 2000e-5(f)); the Americans With Disabilities Act (42 U.S.C. § 12117); Title II of the Civil Rights Act of 1964, prohibiting discrimination in places of public accommodation (42 U.S.C. § 2000a-3(a)); and the Age Discrimination in Employment Act. (29 U.S.C. § 623).

Absent express statutory language, litigants and courts look to three sources for a private right of action. Courts can imply a right of action from the right-creating statute. The right-creating statute can be enforced through a § 1983 action against a defendant who acts under color of state law and subjects someone to deprivation of a right, privilege, or immunity secured by that “law[]” of the United States. Or the statute can be enforced through a court-created equitable action for prospective (typically injunctive) relief, as described in Armstrong v. Exceptional Child Center (2015) and Ex Parte Young (1908).

A § 1983 claim has two elements: the defendant acted under color of state law and the defendant subjected the plaintiff to a deprivation of a right, privilege, or immunity secured by “the Constitution and laws.” “Laws” must refer to something other than the Constitution, otherwise that language becomes superfluous. It could only mean federal statutes. And because the phrase is unmodified, it refers to all federal statutes, not only civil rights or equality-protecting statutes. The Court recognized the first § 1983 “and laws” action in Maine v. Thiboutot (1980), finding that § 1983 could be used to enforce the Social Security Act, when the state failed to distribute federal funds to beneficiaries entitled to receive them under the SSA.

Implied private statutory rights of action and § 1983 “and laws” actions overlap. Both typically arise in cases brought to enforce Spending Clause enactments. Congress creates and funds federal programs, working through states or other public and private entities; the entities are given funds, with Congress dictating rules and conditions that fund recipients or administrators must follow. (Armstrong). Plaintiffs may claim that they were denied funds to which they were entitled because those funds were handled and distributed in violation of, or inconsistent with, the requirements of the federal statutes and in a way that violated their statutory rights. (Armstrong; Thiboutot). Alternatively, as in Alexander v. Sandoval (2001), Congress allocates funds and demands that the recipient refrain from engaging in some conduct, such as discriminating because of race, sex, or national origin; plaintiffs claim that the recipient discriminated against them, in violation of the statute.
§ 3.08  . . . And Laws

[1] Preliminary Constitutional Issues

It is easy, but erroneous, to view § 1983 “and laws” cases as an attempt to impermissibly use § 1983 to assert the Supremacy Clause (U.S. Const. art. IV, § 2) as an enforceable constitutional right. The Court in *Golden State Transit Corp. v. Los Angeles* (1989) explained that “and laws” actions rely on Supremacy-mandated preemption — the federal statute prevails over contrary state laws, regulations, policies, and practices because the federal statute is the supreme law of the land. The claim in *Thiboutot* was that state officials followed state law and policy in calculating and providing public benefits, but that those calculations contradicted federal statutory requirements. The Supremacy Clause operated structurally in establishing that when state laws and practices for determining federal benefit entitlements conflicted with the federal statute, the latter controlled.


“And laws” claims present a threshold jurisdictional quirk. Section 1983 creates a cause of action, a vehicle that empowers plaintiffs to go to court to enforce their rights and provides a remedy for any deprivation of a right. But for a plaintiff to bring his claim to federal court, the court must possess subject matter jurisdiction over the action, the authority to hear and decide the legal and factual issues present in the case. Section 1983 does not grant the court jurisdiction — it does not empower the court to hear and decide the case. That authority must come from another source.

Two statutes might give a district court jurisdiction over a § 1983 action. The first is 28 U.S.C. § 1331, granting district courts original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” Section 1331 previously included a $10,000 amount-in-controversy requirement, until Congress removed it in 1980. (Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, 94 Stat. 2369 (1980)).

The second source of jurisdiction is 28 U.S.C. § 1343(a)(3), enacted as a separate provision of the Ku Klux Klan Act of 1871. That section grants district courts original jurisdiction “of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens.” Stated more succinctly, § 1343(a)(3) grants district courts jurisdiction over civil actions arising under or brought under § 1983.

In recognizing § 1983 “and laws” claims for all federal statutes, regardless of subject matter, *Thiboutot* created a gap between the plaintiff’s cause of action and the federal court’s jurisdictional grant, at least at the time. Section 1331 granted jurisdiction over all civil actions, including § 1983 “and laws” actions to enforce all federal statutes, but only for claims for more than $10,000. Section 1343(a)(3) granted jurisdiction regardless of the amount in controversy, but only if the statute to be enforced in the “and laws” action was one providing for “equal rights of citizens.”
But a § 1983 action to enforce a non-equality statute on a claim worth less than $10,000 could not be brought in federal district court. Section 1331 would not be satisfied because the amount-in-controversy requirement was not met; § 1343(a)(3) would not be satisfied because courts did not have jurisdiction to hear actions to enforce non-equality statutes. Such claims could be brought under § 1983, but only in state court—as courts of general jurisdiction, state courts have concurrent jurisdiction over § 1983 claims. (Haywood v. Drown (2009)). Thiboutot insisted this gap was not illogical or problematic, but reflected Congress’ intent to leave certain low-value statutory claims in state court, while placing in federal court larger-value cases and all cases involving equality and equal rights.

By eliminating § 1331’s amount-in-controversy requirement in 1980, Congress eliminated the gap between cause of action and jurisdictional grant. There no longer can be a case in which a § 1983 cause of action is available but cannot be brought in federal court. Nevertheless, plaintiffs must identify and assert the appropriate grant as the basis for jurisdiction. If seeking to enforce a statute providing for equal rights of citizens, § 1331 and § 1343(a)(3) grant the court jurisdiction; if seeking to enforce any other statute, only § 1331 can be the basis for jurisdiction.


The Court in Gonzaga University v. Doe (2002) established a two-step inquiry for determining whether a federal statute can be enforced through § 1983.

First, the statute to be enforced must “unambiguously confer[]” a right on the plaintiff. A plaintiff only can enforce rights under § 1983, not mere interests or benefits. The statute must impose binding obligations on government or government officials that are not too vague or amorphous and that are sufficiently specific to be judicially enforceable. Statutory preferences or “nudges” towards some behavior are not sufficient. The statute must employ “rights-creating language,” typically language speaking of and to the persons benefitted by the statute. The statute, by its terms or as interpreted, must create “obligations ‘sufficiently specific and definite’ to be within the ‘competence of the judiciary to enforce.’” And the plaintiff must be part of the class the statutory right is intended to benefit. Courts examine the text, structure, legislative history, and prior judicial interpretations to identify an enforceable right. (Gonzaga; Golden State; Wright v. Roanoke Development & Housing Authority (1987); Pennhurst State School & Hospital v. Halderman (1981)).

If the statute creates a right, the right is presumptively enforceable through § 1983. The government may rebut that presumption by showing that Congress specifically foreclosed § 1983 as a means of enforcing the statute; intent to foreclose could be expressed in the enforced statute or implied when the statute includes its own sufficiently comprehensive and carefully tailored statutory enforcement scheme that is incompatible with individual enforcement through § 1983. Courts will not allow § 1983 enforcement when the statutory remedial scheme is more restrictive—by limiting remedies, imposing unique procedural requirements and limitations, or streamlining and expediting statutory remedies in response to special administrative needs. (City of Rancho Palos Verdes v. Abrams (2005); Stilwell v. City of Williams (9th Cir. 2016)).

Title VII of the Civil Rights Act of 1964 illustrates the analysis. The statute creates a statutory right to be free from adverse employment action because of race, sex, religion,
ethnicity, or national origin, including by state and local government employers. (42 U.S.C. §§ 2000e-2(a), 2000e(a)). The statute includes a private right of action, but requires that the plaintiff exhaust remedial processes through the Equal Employment Opportunity Commission before filing a civil action in federal court. (42 U.S.C. §§ 2000e-5(e), 2000e-5(f)(1)). Plaintiffs never enforce Title VII through § 1983, because Title VII’s statutory scheme reflects congressional intent to preclude such enforcement. Doing so would allow a plaintiff to avoid exhaustion by proceeding directly to federal court under § 1983 (which does not require exhaustion of administrative remedies), undermining Title VII’s administrative requirements and the policies of settlement and non-judicial resolution that Congress sought to further through that enforcement scheme. (Kielbasinski v. Sears Home Imp. Prods., Inc. (W.D.N.Y. 2008)).

Absence of a remedial mechanism in the underlying statute may suggest that Congress did not preclude a § 1983 claim, leaving § 1983 as the exclusive means for private federal enforcement and remedy for violations of the statutory right.

There has been long-standing confusion in the lower courts over how to enforce the prohibition on discrimination in contracting under § 1981 (§ 1 of the 1866 and 1870 Acts) against municipalities. In Jones v. Alfred A. Mayer Co. (1968) and Runyon v. McCrary (1976), the Supreme Court recognized that the early Reconstruction statutes prohibited private discrimination in the making and enforcement of contracts, were constitutionally valid enforcement legislation under the Thirteenth Amendment, and provided a private right of action against private discrimination. But in Jett v. Dallas Indep. Sch. Dist. (1989), a plurality held that § 1981 did not provide an independent federal cause of action for damages against local governments. Instead, § 1983 provided the remedial vehicle for enforcing § 1981 and its underlying rights against municipalities and government officers; § 1981 was the “law” enforced through § 1983 against persons acting under color of state law.

The Civil Rights Act of 1991 (Pub. L. 102-166, 105 Stat. 1077 (1991)) amended § 1981 to provide that the “rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.” (42 U.S.C. § 1981(c)). The Ninth Circuit held in Federation of African-American Contractors v. City of Oakland (9th Cir. 1996) that the 1991 Act overruled Jett and that § 1981(c) represented a stand-alone express cause of action for enforcing § 1981 against anyone acting under color. All other circuits have rejected that conclusion, holding that § 1981(c) declared rights, but did not establish remedies or a private right of action against governmental discrimination; Jett remains good law, and plaintiffs can enforce § 1981 against municipalities only through a § 1983 “and laws” action. (Buntin v. City of Boston (1st Cir. 2017); McCormick v. Miami University (6th Cir. 2012); McGovern v. City of Philadelphia (3d Cir. 2009)).

§ 3.09 Implied Statutory Rights of Action

Plaintiffs can privately enforce statutes through a private right of action implied from the statute to be enforced. This has become a doctrinal flashpoint, with the late Justice Scalia rejecting entirely the validity of the federal judicial power to create causes of action and arguing that the Court should abandon this line of cases and the exercise of this power.
In *Cort v. Ash* (1975), the Court identified four factors that determine whether a federal statute contains an implied right of action. All are grounded in separation of powers concerns—ensuring that the Court does not usurp the legislative power by rewriting the statute or ignoring what Congress enacted—and the touchstone is the intent of Congress in enacting the law. The first factor is whether the statute creates a federal right or imposes a federal duty in favor of the plaintiff as “one of the class for whose especial benefit the statute was enacted.” In *Alexander v. Sandoval* (2001), the Court identified this as the necessary, if not always sufficient, consideration and the focus in recent analysis. That is, there can be no private right of action if the statute does not create an enforceable federal right; if the statute does create a right, there may be further analysis to determine whether there is a private right of action.

Rights of action have been implied from two essential civil rights laws—Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), prohibiting discrimination because of race, color, and national origin in programs and activities receiving federal funds, and Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681), which uses identical language to prohibit discrimination because of sex in programs and activities receiving federal funds, notably universities. The Supreme Court implied a private right of action from Title IX in *Cannon v. University of Chicago* (1979), given the presence of a federal statutory right. By 1972, the year Congress enacted Title IX, lower courts had found an implied right of action in Title VI; because Congress modeled Title IX on Title VI and legislated against that legal background, Title VI has been treated as privately enforceable. (*Sandoval*).

But the implied-right-of-action analysis requires a precise inquiry into the specific provision to be enforced as to a specific class of persons and for a specific remedy. That there is a private right of action under one part of a statute does not establish a private right of action under another part. *Alexander* makes this point with respect to Title VI.

Title VI contains two relevant provisions. Section 601 (42 U.S.C. § 2000d) prohibits national-origin discrimination by recipients of federal funds, but only if the discrimination is intentional. Section 602 (42 U.S.C. § 2000d-1) authorizes federal agencies to “effectuate” the antidiscrimination rule of § 601; pursuant to that power, the Department of Justice promulgated regulations prohibiting recipients from enacting or enforcing policies, criteria, or methods of administration having the effect of discriminating on the prohibited bases.

The plaintiffs in *Alexander* challenged an Alabama policy requiring that drivers’ license exams be administered in English, arguing that the policy discriminated because of national origin by preventing non-English-speaking residents, who were more likely to have foreign national origins, from obtaining licenses. This was a claim for discriminatory effect, not discriminatory purpose. State law prohibited all non-English speakers from obtaining licenses, regardless of national origin. But the policy was more likely to deny licenses to non-U.S. citizens, imposing a disproportionate negative effect. The plaintiffs did not claim a violation of § 601 (which could not be violated by non-intentional discrimination), but of the DOJ regulations, enacted pursuant to § 602.

The question was whether § 602 implied a right of action, a separate question from the established conclusion that § 601 did so. A 5–4 Court held that § 602 failed on the first *Cort* factor, because § 602 lacked necessary language creating an enforceable federal right. The majority distinguished statutes focusing on the person regulated from statutes focusing on the persons protected, with only the latter reflecting congressional intent to create enforceable individual rights. And § 602 was one step further removed. Its language
targeted neither the rights-holder (persons seeking drivers’ licenses) nor the regulated funds recipient (Alabama), but the federal agencies charged with distributing funds, regulating funding recipients, and taking regulatory actions (such as promulgating the rules at issue) to protect rights-holders. A statute speaking to the federal government’s obligations in administering funds could not create enforceable rights in individuals.

§ 3.10 Linking § 1983 and Implied Private Rights

Dissenting in Alexander, Justice Stevens urged the plaintiffs to refile the identical Title VI challenge to English-only policies as a § 1983 “and laws” action enforcing § 602 and its regulations. Alabama officials acted under color of state law in promulgating and enforcing the English-only policy, and plaintiffs were deprived of rights secured by the laws of the United States in the federal regulations promulgated pursuant to a statutory delegation.

It seemed a promising strategy. The Court in Wilder v. Virginia Hospital Association (1990) hinted that the standard for determining whether a statute could be enforced through § 1983 was different than the standard for determining whether a private right of action could be implied from the statute itself. Moreover, implied rights of action are subject to separation-of-powers objections, that the court is exercising legislative authority in adding features to a statute that Congress did not include. Section 1983 “and laws” claims are not subject to the same objections. Congress enacted § 1983 as an express cause of action to enforce rights derived from other sources of federal law, including statutes. A court allowing an “and laws” action does not create a right of action where Congress had not created one, but applies a congressionally created right of action to a separate congressional enactment.

One year after Alexander, however, the Court in Gonzaga University v. Doe (2002) eliminated that option. The same 5–4 majority held that the first step of the § 1983 “and laws” analysis was the same as the first step in the implied-right analysis—Congress must have created an enforceable personal federal right in the underlying statute, using specific rights-creating language conferring rights on a class of specified beneficiaries.

Doe brought a § 1983 “and laws” action against a private university, claiming violation of the Federal Education Records Privacy Act (FERPA). The university disclosed to the state agency responsible for teacher certification that Doe, a recent graduate seeking a teaching certification, had sexually assaulted a fellow student; upon learning of the charge, the state denied his certification.* FERPA is a Spending Clause enactment, requiring educational institutions receiving federal funds to regulate access and disclosure of educational records; it provides that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records without consent.” (20 U.S.C. § 1232g(b)(1)). It also authorizes the Secretary of Education to enforce the statute,

* Doe filed his § 1983 action in state court, which found that the university acted under color of state law by disclosing Doe’s information to a state agency as part of the state-law teacher-certification process. This was a questionable conclusion, given prevailing understandings of under color. The Court declined to grant certiorari on that issue.
specifically by withholding federal funds from any educational institution that fails to comply with federal law. (20 U.S.C. § 1232g(f)).

Once the Court established that the implied right and § 1983 inquiries entailed the same first step, Alexander controlled the outcome and defeated Doe’s claim. Like § 602, FERPA contained no rights-creating language directed to rights-holders. Like § 602, it empowered a federal official, the Secretary of Education, to control distribution of federal funds, another “focus . . . two steps removed from the interests of individual students and parents” that might show an individual entitlement enforceable through § 1983. FERPA addressed the macro level of institutional policies and practices to ensure proper protections of student privacy in the aggregate; it did not address micro-level single instances of improper disclosure or the non-disclosure rights of any individual.

After Alexander and Gonzaga, the existence of an enforceable individual right indicated by rights-creating statutory language is necessary for a plaintiff to pursue either an implied-right or § 1983 action. The analyses diverge if the plaintiff clears that hurdle by adopting different defaults — Congress must affirmatively intend that a statute imply a private right of action, while Congress must affirmatively intend that § 1983 not be available to enforce a statute. These different defaults make sense. Congress created § 1983 more than 150 years ago to enforce federal rights established in other statutes; it presumptively wanted that existing litigation vehicle put to use enforcing new rights, absent some affirmative indication of contrary intent appearing in subsequent legislation.

Fitzgerald v. Barnstable School Committee (2009) considered a different link between § 1983 and implied rights of action. A grade-school girl was subject to sexually-based bullying on the bus and at school, but school officials did nothing to stop or protect her from the harassment, in violation of Title IX; she sought damages for the violation of her statutory rights under both Title IX’s established implied private right of action and § 1983.

The Court unanimously held that the plaintiff could enforce Title IX through both litigation vehicles. Inclusion of an express statutory right of action (as in Title VII) indicated congressional intent to preclude a § 1983 action, rebutting the presumption of § 1983 enforcement. But the Court declined to draw the same inference of legislative intent from an implied right of action, since, by definition, Congress said nothing about private enforcement. Moreover, Title IX lacked the comprehensive, carefully tailored, and restrictive statutory enforcement scheme that overcame the presumption of § 1983 enforcement. The remedies available through Title IX were identical to those available through § 1983, without requiring special notice, administrative exhaustion, or other special procedures. Using § 1983 to enforce Title IX “will neither circumvent required procedures, nor allow access to new remedies” not already available through Title IX’s implied right of action.

§ 3.11 Suit in Equity

In Ex Parte Young (1908), the Court recognized that a plaintiff may sue state officials in federal court for prospective relief to stop an ongoing or planned violation of federal law. In Armstrong v. Exceptional Child Center (2015), the Court held that the Young action was the “creation of courts of equity, and reflects a long history of judicial review of
illegal executive action, tracing back to England.” It was a “judge-made” remedy derived not from the Constitution or federal statute, but from the inherent powers of courts of equity.

The *Armstrong* plaintiffs provided rehabilitation services; they sued Idaho officials charged with providing Medicaid reimbursements, alleging that the state reimbursed for rehabilitation services at below statutory allowances. The relevant statute, § 30(A), required state officials to ensure that reimbursements were “consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers that care and services” were sufficiently available in the state. Section 30(A) and the Medicaid Act as a whole did not include rights-creating language and were not directed to the parties seeking reimbursement or to the patients needing their services; they were directed to the state officials responsible for establishing reimbursement plans and disbursing federal money and to the federal agency charged with approving appropriate plans. Section 30(A) thus was not enforceable either through § 1983 in light of *Gonzaga* or a right implied in the Medicaid Act in light of *Alexander*.

With those avenues to private remedy blocked, plaintiffs tried a third—the equity-based *Ex Parte Young* action, seeking to enjoin state officials from continuing to provide unlawfully low reimbursements that were inconsistent with federal law. But while courts of equity possessed the power to create the private injunctive action, the power was “subject to express and implied statutory limitations.” If Congress excluded private enforcement in the statute, whether implicitly or explicitly, plaintiffs could not circumvent that exclusion through the court’s equitable powers. The majority found that the Medicaid Act precluded an equitable action, given the availability of alternative remedies under the Act and the judicially unadministrable nature of § 30(A).

### § 3.12 Alternative Enforcement Mechanisms

Congress may indicate its intent to preclude an implied right, *Ex Parte Young* action, or § 1983 action by providing for other remedial mechanisms (besides private civil litigation) in the enforced statute. *Armstrong*, *Gonzaga*, and *Alexander* involved Spending Clause enactments, in which the primary statutory remedy for noncompliance would be for the federal government to withhold federal funds from the violating recipient or from the funded program in which the violations occurred. The Court’s emphasis on statutory language directed to the federal agency highlighted its special responsibility for ensuring compliance with federal law by controlling federal moneys.

But allowing government control of funds to preclude private enforcement limits how vigorously civil rights statutes can be enforced. Withholding often-substantial funds is an extreme sanction, often subject to specific, heightened, and deliberately slow administrative procedures. An agency is unlikely to impose this sanction and will hesitate to do so, certainly for individual or isolated violations. It would be extraordinary, and arguably unwarranted, for the Secretary of Education to withhold all federal funds from Gonzaga University because of an apparent single instance of improper disclosure. But absent some vehicle for private enforcement, the single isolated violation goes unremedied. This despite a real person suffering real harm in being denied his teaching certification because of the defendant’s unauthorized and violative disclosure.
Deferring to fund-stripping as the primary enforcement mechanism illustrates two recurring themes—the practical and political constraints on government enforcement of civil rights and the tension between catching and remedying individual civil rights violations as opposed to systemic violations. The federal government lacks the political will (and rightly so) to root out minor statutory violations with a blunderbuss weapon. And even for larger, systemic violations, stripping some or all federal funds hurts not the recipient of the funds (such as the state or the university), but the members of the public who are the intended beneficiaries of federal spending and who no longer will have available the important services the federal government guarantees with those federal funds. If the problem in Armstrong was that Medicaid reimbursements were too low to ensure provision of services in the state, stripping Idaho of all Medicaid funds worsens the absence of services. The problem with Gonzaga and Alexander, Pamela Karlan (2003) argues, is that they undermine private enforcement of civil rights in favor of a public-enforcement mechanism that never will be used.

§ 3.13 Parallel Constitutional and Statutory Claims

Congress protects and enforces the Constitution in two ways. It creates new statutory rights, whether broader, narrower, or co-extensive with constitutional rights, usually with some process for private enforcement. And it enacted § 1983 as a vehicle for direct enforcement of rights secured by the Constitution. The issue is what happens when the same conduct, transaction, or occurrence by the same or multiple connected defendants violates both a constitutional right and a statutory right. Can a plaintiff pursue both claims to vindicate both rights? Or does the statutory claim preclude the independent § 1983 constitutional claim, limiting the plaintiff to vindicating only the statutory right?

In Fitzgerald v. Barnstable School Committee (2009), the Court said the analysis turned on congressional intent—whether Congress intended the statutory rights and remedies to be exclusive and to preclude assertion of substantive constitutional rights. The question was not whether Congress envisioned and permitted statutory and constitutional claims proceeding side-by-side, but whether Congress intended to preclude that possibility. And the Court “should not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim.” This analysis focused on the nature and scope of the statutory rights compared with the nature and scope of the constitutional rights. Where the contours of those rights and protections—who can sue, who can be sued, the conduct that forms the basis for claims, the applicable legal standards, available remedies—diverged, Congress did not intend to preclude the § 1983 constitutional action.

Applying these considerations, Fitzgerald held that Title IX did not preclude a parallel and concurrent equal protection claim to recover for sex-based bullying. Title IX regulated the educational entities receiving funds, but the equal protection claim was necessary to reach individual actors such as teachers and school administrators. While Title IX applied to all educational institutions receiving funds, including private ones, § 1983 reached only entities and officers who acted under color of state law. Some conduct that might violate equal protection (or at least would be subject to heightened scrutiny)
was exempt from Title IX prohibitions. While an entity may be liable under Title IX where a single school administrator failed with deliberate indifference to respond to harassment, an entity was liable under § 1983 only if that administrator acted pursuant to a discriminatory policy, custom, or practice.

Parallel and concurrent claims arise when public employees sue for employment discrimination, asserting constitutional claims (commonly Fourteenth Amendment equal protection claims, but also First Amendment employee-speech claims) and claims under a federal statute prohibiting discrimination in employment on some basis. The prevailing view in lower courts is that Title VII does not preclude parallel constitutional claims for race- or sex-discrimination. (Henley v. Brown (8th Cir. 2012); Campbell v. Galloway (4th Cir. 2007); Valentine v. City of Chicago (7th Cir. 2006); Annis v. County of Westchester (2d Cir. 1994)).

That conclusion becomes stronger under Fitzgerald’s focus on divergent rights and protections. A Title VII claim is available only against the “employer,” meaning the entity, but not individual co-workers or supervisors; individuals who act under color can be liable under § 1983 for violating equal protection. Title VII protects employees, but not independent contractors (42 U.S.C. § 2000e(f); Farlow v. Wachovia Bank of N.C. (4th Cir. 2001)), while independent contractors are persons whose constitutional rights can be violated. (Board of County Commissioners v. Umbehr (1996)). An entity is liable for constitutional violations under § 1983 only if its employees or officers acted pursuant to a violative custom, practice, or formal policy; an entity is vicariously liable under Title VII for its employee’s conduct, unless it can show, as an affirmative defense, that it exercised reasonable care to correct or remedy any discrimination. (Faragher v. City of Boca Raton (1998)).

Although Title VII establishes a unique remedial scheme requiring plaintiffs to exhaust remedies with the EEOC before filing suit, that is insufficient to preclude the § 1983 constitutional claim. A plaintiff can bring both claims in a single action by complying with pre-litigation obligations for both § 1983 and the concurrent statute (notably exhaustion). Alternatively, a plaintiff can avoid Title VII’s remedial scheme and proceed only under § 1983 and the Constitution, even if the facts also suggest a violation of Title VII.

Courts might fear that plaintiffs will run to federal court with their constitutional claims in the first instance, avoiding Title VII to avoid exhaustion, thereby undermining its administrative regime. But there is no reason to see that as a significant problem. Given the differences in the scope of rights and protections, plaintiffs will not obviously ignore Title VII in favor of § 1983 in all cases. A plaintiff may choose to pursue the employer-government through Title VII, even with the burden of having to exhaust, rather than dealing with § 1983’s stricter proof requirements for entity liability.

Courts have followed a different course with respect to preclusion by the ADEA. Prior to Fitzgerald, every circuit to consider the issue had concluded that the ADEA precluded parallel § 1983 equal protection claims, because Congress intended the ADEA’s comprehensive statutory remedy to be the exclusive means for remedying all age-based employment discrimination. (Ahlmeyer v. Nevada System of Higher Education (9th Cir. 2009); Tapia-Tapia v. Potter (1st Cir. 2003)). Since Fitzgerald, however, lower courts have split on whether the analysis or conclusion has changed.

The Seventh Circuit in Levin v. Madigan (7th Cir. 2012) was the first to rely on Fitzgerald to find no ADEA preclusion. While Congress intended the ADEA to provide the exclusive remedy for violations of statutory rights, it said nothing about independent
§ 1983 claims to remedy acts of age discrimination that also violated the Fourteenth Amendment. As with Title VII, the ADEA's rights and protections diverged from constitutional rights and protections as to who can sue, who can be sued, and what conduct established a violation by the government entity. The Supreme Court granted cert. in Levin, but dismissed the writ as improvidently granted. (Madigan v. Levin (2013) (mem.)).

The Ninth Circuit in Stilwell v. City of Williams (9th Cir. 2016) reached the same conclusion as between a claim under the ADEA's retaliation provision and a § 1983 First Amendment claim, identifying numerous disparities between the statute and the First Amendment/§ 1983 over who can sue and be sued, how liability was established, and available remedies. The court emphasized that the ADEA was narrower than the First Amendment along each of those issues. While a narrower statutory enforcement scheme suggests preclusion of a § 1983 “and laws” claim to enforce the statute, a narrower statute does not preclude or prohibit enforcement of broader substantial constitutional rights.

The Third Circuit went the other way in Hildebrand v. Allegheny County (3d Cir. 2014). That court insisted that the touchstone remained congressional intent, particularly as shown by the comprehensiveness of the ADEA’s statutory remedial scheme. Fitzgerald did not require further indications of that intent and, in any event, the differences between the ADEA and the Equal Protection Clause were not so significant as to indicate congressional intent to allow both claims. On that final point, note that it contradicts how Fitzgerald described the relevant intent—the issue is not whether Congress intended or expected to allow both claims, but whether it intended to preclude the constitutional claim in favor of exclusive reliance on the statutory claim.