NOTE

Section 1983 and Horizontal Inequities: Addressing the Disparate Application of the Supreme Court's § 1983 Preclusion Jurisprudence to Similarly Situated Litigants

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ABSTRACT

Currently, the Supreme Court's jurisprudence as to § 1983 preclusion by federal statutes has lead to varying results in application amongst the federal district and circuit courts. The confusion has lead to an incentive for plaintiffs to bring additional claims under § 1983, which can lead to circumvention of tailored statutory programs designed by Congress. Additionally, defendants have incentives to stretch out litigation using preclusion defenses, which may adversely affect plaintiffs' ability to recover just compensation. This has lead, and will likely continue to lead, to a lack of uniformity within federal law, which will perpetuate unpredictability and horizontal inequity—similarly situated litigants in different jurisdictions have been and will continue to be subjected to disparate legal requirements. Any efforts to refine the Supreme Court jurisprudence will still leave the possibility of litigation on a case-by-case basis for every cause of action under every federal statute. As such, this is an area of the law where Congress could and should act to stem the confusion.

This Note argues that, in order to restore uniformity, predictability, and horizontal equity to the federal vindication of civil rights, Congress should amend § 1983 such that it only (1) provides a cause of action for violations of

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federal constitutional rights (2) where no other federal cause of action exists. This amendment to § 1983 would result in a coherent § 1983 preclusion doctrine that leads to consistent results, prevents plaintiffs from bringing repetitive claims, discourages defendants from needlessly protracting litigation, and preserves comprehensive remedial schemes crafted by Congress. Additionally, the proposed amendment would preserve the original statute's focus on vindicating civil rights violations and providing a neutral federal forum in which to do so.

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INTRODUCTION

Three young girls—two in junior high, one in kindergarten—were all allegedly subjected to sexual harassment and sexual abuse by male classmates.[1] All three sought help from their school administrators.[2] None of the three received it.[3] The first girl, a junior high student in California, was allegedly repeatedly sexually harassed by her male classmates and sexual assaulted by at least one male classmate.[4] After failed attempts to seek help from the school administrators, she eventually transferred schools out of fear for her safety.[5] The second girl, a sixth-grade student in rural upstate New York, was also allegedly repeatedly sexually harassed and assaulted by her classmates.[6] She too sought help from her school administrators but was eventually forced to withdraw and transfer to a new school.[7] The third girl, a kindergarten student in Massachusetts, was allegedly sexually harassed by a male classmate both on the bus to and at her school.[8] After school administrators failed to address the situation, her parents resorted to

1 *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 249–50 (2009); Bruneau *ex rel.* Schofield v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 752–53 (2d Cir. 1998); Nicole M. *ex rel.* Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1372 (N.D. Cal. 1997).

2 *See Fitzgerald*, 555 U.S. at 249–50; *Bruneau*, 163 F.3d at 752–53; *Nicole M.*, 964 F. Supp. at 1372.

3 *See Fitzgerald*, 555 U.S. at 249–50; *Bruneau*, 163 F.3d at 752–53; *Nicole M.*, 964 F. Supp. at 1372.

4 *Nicole M.*, 964 F. Supp. at 1372.

5 *Id.*

6 *Bruneau*, 163 F.3d at 752–53.

7 *Id.*

8 *Fitzgerald*, 555 U.S. at 249–50.

driving her to school, when she went at all.[9] These three girls, all facing similar situations of peer abuse and school neglect, each sought relief in her federal district court.[10] None were treated the same.

42 U.S.C. § 1983,[11] which codifies section 1 of the Civil Rights Act of 1871,[12] provides a civil remedy for plaintiffs who have been deprived of "any rights, privileges, or immunities secured by the Constitution and laws" by the state.[13] Though the statute had originally been interpreted to apply only to constitutional violations, in 1980 the Supreme Court extended the scope of rights that could be vindicated under § 1983 to include both those guaranteed by the federal Constitution and those guaranteed under federal statutory law.[14] Fearing that the expansion of § 1983 claims would overwhelm the federal court system, a subsequent Court made efforts to curb this expansion.[15] One of the doctrines the Court developed was the preclusion of claims under § 1983 when Congress had already established a comprehensive remedial scheme by statute.[16]

In subsequent decades, the Court further refined its § 1983 preclusion jurisprudence.[17] The tests the Court has set forth, however, created more confusion than clarity, leading to numerous circuit splits as to the appropriate application of the tests.[18] These circuit splits have led to disparate results for similarly situated plaintiffs who happen to reside in different jurisdictions. For example, of the three girls mentioned above, one was allowed by a California district court to pursue her § 1983 claims for violations of both Title IX[19] and the Equal Protection Clause,[20] whereas a New York district court and the Second Circuit held that Title IX's comprehensive remedial scheme precluded the second girl's § 1983 claims for violations of Title IX and the Equal Protection Clause.[21] The Supreme Court resolved one of

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9 *Id.*

10 *See Nicole M.*, 964 F. Supp. at 1380–81; *Bruneau*, 163 F.3d at 758; *Fitzgerald*, 555 U.S. at 251. See Part II.B, *infra*, for a more in-depth discussion of these cases.

11 42 U.S.C. § 1983 (2012).

12 Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (2012)).

13 *Id.* The subject of municipal liability under § 1983, while briefly mentioned in Part I.A, *infra*, is beyond the scope of this Note.

14 Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

15 *See infra* Part I.B–D.

16 *See infra* Part I.C.

17 *See infra* Part I.B–D.

18 *See infra* Part II.A.

19 Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a).

20 U.S. CONST. amend. XIV, § 1.

21 *Compare* Nicole M. *ex rel.* Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp.

the issues, holding that Title IX did not preclude the third girl's § 1983 claim for constitutional violations,[22] but it did not address whether Title IX precluded § 1983 claims for violations of Title IX.[23]

To restore uniformity, predictability, and horizontal equity[24] to the federal vindication of civil rights, Congress should amend § 1983 such that it: (1) provides a cause of action for violations of federal constitutional rights (2) only where no other federal cause of action exists. This amendment to § 1983 would result in a coherent § 1983 preclusion doctrine that leads to consistent results, prevents plaintiffs from bringing repetitive claims, discourages defendants from needlessly protracting litigation, and preserves comprehensive remedial schemes crafted by Congress. Additionally, the proposed amendment would preserve the original statute's focus on vindicating civil rights violations and providing a neutral federal forum in which to do so.

Part I of this Note explores the historical background of § 1983, focusing on its historical importance as a way to enforce the Fourteenth Amendment, its infrequent use up until the Court interpreted it to apply to federal statutory law in *Maine v. Thiboutot*,[25] and its preclusion by comprehensive remedial schemes after *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.[26] Part I also examines the various tests that the Supreme Court has set forth to clarify its § 1983 preclusion jurisprudence. Part II analyzes the resulting disuniformity created by the federal district and circuit courts through their attempts to apply the Supreme Court's § 1983 preclusion jurisprudence. Part III proposes a two-part amendment to § 1983 that would result in a coherent preclusion doctrine. Part IV addresses potential shortcomings of and proposed alternatives to the proposed

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1369, 1390 (N.D. Cal. 1997), *with* Bruneau *ex rel.* Schofield v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756–58, (2d Cir. 1998); *see also infra* notes 143–52 and accompanying text (discussing *Nicole M.* and *Bruneau*).

22 Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 251 (2009); *see also infra* notes 153–61 and accompanying text (discussing *Fitzgerald*).

23 *See, e.g.*, Doe v. Town of Stoughton, 917 F. Supp. 2d 160, 164–66 (D. Mass. 2013) (noting that *Fitzgerald* did not "explicit[ly]" address statutory preemption and holding that Title IX does preclude a § 1983 claim for violations of Title IX itself).

24 The term "horizontal equity" is normally used in economic contexts to refer to the equal tax treatment of individuals that are similarly situated. *See, e.g.*, David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 43 n.1 (2006) (outlining the history of the usage of "horizontal equity"). This Note has adopted the term to refer to the similar concept of equal legal remedies for similarly situated individuals.

25 Maine v. Thiboutot, 448 U.S. 1, 4 (1980); *see also infra* notes 43–53 and accompanying text.

26 Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

amendment and explains why other proposals to address the issue fall short of resolving the problem.

I. Historical Background of § 1983 and the Supreme Court's Evolving § 1983 Jurisprudence

A. The Early Expansion of § 1983 Claims

Section 1 of the Civil Rights Act of 1871 provided a federal cause of action "intended primarily to safeguard rights established by the Fourteenth Amendment" from "a recalcitrant South."[27] Originally called "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,"[28] the Act provided a cause of action for "deprivation of any rights, privileges, or immunities secured by the Constitution of the United States . . . ."[29] Section 1 of the Act was eventually codified with some changes as 42 U.S.C. § 1983. Under § 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 . . . .[30]

In the ninety years following its enactment, federal courts decided just twenty-one § 1983 actions, only nine of which reached the Supreme Court.[31]

This changed in 1961, however, when, in *Monroe v. Pape*,[32] the Supreme Court interpreted the phrase "under color of"[33] state law to include not only actions of state actors pursuant to state law, but also those that represent a misuse of the actor's apparent authority under state law.[34] *Monroe* involved thirteen Chicago police officers that,

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27 Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws*," 67 Geo. Wash. L. Rev. 51, 54, 56 (1998).

28 Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (2012)).

29 *Id.*

30 42 U.S.C. § 1983 (2012).

31 Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 500 n.2 (1985).

32 Monroe v. Pape, 365 U.S. 167 (1961).

33 42 U.S.C. § 1983.

34 *Monroe*, 365 U.S. at 184–87.

without an arrest or search warrant, broke into the Monroes' home early in the morning, forced the family to stand naked while they searched the house, and then detained Mr. Monroe for ten hours.[35] The Monroes filed suit against the officers claiming a violation of their Fourth Amendment rights, as incorporated against the state by the Fourteenth Amendment.[36] The officers argued that § 1983 should only apply to actions taken pursuant to state law, and that their actions were not pursuant to state law because they actually represented a violation of Illinois law—a violation for which state remedies would be appropriate.[37] The Court, after an exhaustive review of the legislative history,[38] rejected this argument.[39] It reasoned that the purpose of § 1983 could not be fulfilled if state officers were able to use their apparent authority under the state to violate the federal rights of citizens while remaining protected from federal intervention simply because that use was, unbeknownst to the citizens whose rights were violated, not officially authorized.[40] The *Monroe* Court then outlined several purposes that § 1983 was intended to serve: overriding invidious state legislation, providing a remedy where state law was inadequate either in theory or in practice, and providing a federal remedy supplementary to any state remedies.[41] As a result of the Court's willingness to expand the applicability of § 1983, a sharp increase in litigation followed the *Monroe* decision.[42]

This expansion in § 1983 litigation further increased when the Supreme Court, in 1980, expanded its applicability from only rights secured by the Constitution to both rights established under the Constitution or any federal statute in *Maine v. Thiboutot*.[43] *Thiboutot* involved a married couple with eight children that received Aid to

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35 *Id.* at 169.

36 *Id.* at 170–71.

37 *Id.* at 172.

38 *But see* Zagrans, *supra* note 31, at 502 (arguing that the Court was "flatly wrong" in its statutory interpretation in part because the Court "misused legislative history").

39 *Monroe*, 365 U.S. at 187.

40 *Id.* at 183–87 (adopting the interpretation of "under color of law" given to other Reconstruction-era statutes in *United States v. Classic*, 313 U.S. 299 (1941), and *Screws v. United States*, 325 U.S. 91 (1945)).

41 *Id.* at 173–74, 183; *see also* Pettys, *supra* note 27, at 62 n.70 (outlining the purposes of § 1983).

42 Pettys, *supra* note 27, at 63 n.72.

43 Maine v. Thiboutot, 448 U.S. 1, 4 (1980). Previously, the Supreme Court interpreted § 1983 claims were limited by the jurisdictional grant in 28 U.S.C. § 1343 to laws providing for "equal rights" or protection of "civil rights." *See generally* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 615–19 (1979) (discussing history of § 1983 claims and corresponding jurisdictional limitations).

Families with Dependent Children ("AFDC") benefits for three of the children, from the husband's previous marriage, under the federal Social Security Act ("SSA").[44] Based on its interpretation of the SSA, the Maine Department of Human Services notified the father that when calculating the amount of the benefits to which he was entitled for the three children from his previous marriage (the calculations were based in part on the father's financial situation), it would no longer make an allowance for the part of his salary spent to support the other five children, even though he was legally obligated to support them as well.[45] After exhausting their state administrative remedies, the Thiboutots brought a § 1983 claim challenging Maine's interpretation of the SSA as a violation of their federal statutory rights.[46] They also requested attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, which is codified at 42 U.S.C. § 1988.[47]

Writing for the Court, Justice Brennan held that a plain language interpretation of the statutory phrase "and laws" in the text of § 1983 extended protection to rights guaranteed both by the Constitution and federal statutory law[48] and that, by the same reasoning, attorney's fees under § 1988 should be available as a remedy.[49] Justice Powell, in a scathing dissent, derided the majority's interpretation of the legislative history, arguing that the phrase "and laws" referred only to civil rights provisions[50] and that, because of liberal pendant jurisdiction,[51] "ingenious pleaders" might find ways to recover attorney's fees in cases in which they succeed only on pendant claims.[52] Justice Powell concluded his dissent with an appendix listing twenty-eight federal statutes that possibly could now give rise to "civil rights" actions under

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44 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.); *Thiboutot*, 448 U.S. at 2–4.

45 *Id.*

46 *Id.* The Thiboutots also sought relief for all eligible class members. *Id.*

47 *Id.* The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012), provides in relevant part: "In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . of this title, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." *Id.* § 1988(b).

48 *Thiboutot*, 448 U.S. at 4.

49 *Id.* at 9.

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

51 The doctrine of pendant jurisdiction has since been largely adopted by Congress under 28 U.S.C. § 1367. Section 1367 provides federal courts jurisdiction over state law claims that are part of the "same case or controversy" as a claim over which the court has Article III jurisdiction. 28 U.S.C. § 1367(a) (2012).

52 *Thiboutot*, 448 U.S. at 24 (Powell, J., dissenting).

§ 1983.[53] The expansion of the availability of § 1983 claims under *Monroe* and *Thiboutot* would eventually lead the Court to attempt to limit the scope of these new doctrines.

B. Initial Attempts to Limit the Scope

Just one year after drastically increasing the applicable scope of § 1983 in *Thiboutot*, the Court took steps to limit the expansion of § 1983 litigation in two opinions authored by Justice Rehnquist: *Pennhurst State School & Hospital v. Halderman*[54] and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.[55]

Pennhurst involved an intellectually challenged minor who was a resident at Pennhurst, a state-run institution that provided housing for severely or profoundly intellectually challenged individuals.[56] She brought § 1983 claims seeking monetary and injunctive relief on behalf of herself and the other Pennhurst residents challenging the "unsanitary, inhumane, and dangerous" conditions at the facility as denying the residents' federal statutory benefits guaranteed by the Rehabilitation Act of 1973.[57] The Court, looking at the language of the Act and its legislative history, concluded that the Act was merely a funding statute and that it did not create any substantive obligations enforceable against the state through § 1983.[58] Thus, after *Pennhurst*, a federal statute must represent more than just "congressional 'encouragement' of state programs" via funding provisions before it creates a substantive right enforceable through § 1983.[59]

Additionally, *Sea Clammers* addressed whether Congress intended the statutory remedies provided by the Federal Water Pollution Control Act[60] and the Marine Protection, Research, and Sanctuaries Act of 1972[61] to provide the exclusive remedy for damage

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53 *Id.* at 34–37.

54 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

55 Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

56 *Pennhurst*, 451 U.S. at 5–6.

57 Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; *Pennhurst*, 451 U.S. at 6. The plaintiff had originally brought additional claims under the Fourteenth Amendment and the Eighth Amendment, *Pennhurst*, 451 U.S. at 5–6, but the Federal Court of Appeals for the Third Circuit avoided the constitutional claims by finding for the plaintiff on the statutory claim, *id.* at 8–9. Therefore, only the question of whether § 1983 provided a remedy for violation of the Act was before the Court.

58 *Id.* at 15–23.

59 *Id.* at 27.

60 Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

61 Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92–532, 86 Stat. 1052 (codified as amended in scattered sections of 16 and 33 U.S.C.).

to fishing grounds resulting from discharges and ocean dumping of sewage.[62] The National Sea Clammers Association brought a claim under § 1983 against the petitioners for allegedly interfering with their livelihoods by polluting the New York Harbor and Hudson River.[63] The Court held that where "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"[64] and that those set out in the two environmental statutes "demonstrate[d] not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983."[65] The Court noted that nothing in the statute demonstrated that Congress had intended to provide additional private causes of action under § 1983 that would allow plaintiffs to evade the detailed requirements set forth in the statutes and rejected the association's request for equitable and legal relief under § 1983.[66] Thus, after *Pennhurst* and *Sea Clammers*, plaintiffs bringing claims under § 1983 must demonstrate both that: (1) either a constitutional right or a substantive statutory right that Congress had intended to create had been violated and (2) that Congress had not provided a comprehensive statutory remedial scheme intended to provide the exclusive remedy for vindication of that right—in other words § 1983 was not precluded.[67]

C. Preclusion of § 1983 Claims for Statutory Violations

In subsequent cases, the Court provided additional guidelines for determining when a federal statute precluded a cause of action under § 1983. In *Blessing v. Freestone*,[68] the Court reiterated that "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[69] The Court then established a three-part test for determining whether a federal statute has created a right that may be enforced under § 1983.[70] First, "Congress must have intended that the

62 *Sea Clammers*, 453 U.S. at 4, 19. The Court addressed the issue of § 1983 preclusion even though the parties did not specifically raise it. The Court noted that it was an important issue and that the litigation had started well before the *Thiboutot* decision. *Id.* at 19.

63 *Id.* at 4–5.

64 *Id.* at 20.

65 *Id.* at 21.

66 *Id.*

67 *See generally Sea Clammers*, 453 U.S. 1; Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

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

69 *Id.* at 340.

70 *Id.* at 340–41.

provision in question benefit the plaintiff."[71] Second, "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence."[72] And third, "the statute must unambiguously impose a binding obligation on the States."[73] The Court noted, however, that establishing a federal right under the three-part test merely establishes a "rebuttable presumption" of enforceability under § 1983.[74]

Even if the three-part test is fulfilled, enforcement of the federal right under § 1983 may still be precluded. Because enforceability under § 1983 is a matter of congressional intent, courts must examine whether Congress specifically foreclosed a § 1983 remedy either by explicitly doing so in the statute creating the right or impliedly doing so through the creation of a comprehensive enforcement scheme, the purpose of which would be frustrated by allowing plaintiffs to bypass the requirements through a § 1983 claim.[75]

The Court then applied its test to the claim of five mothers, who were eligible for state child support, that the director of the state child support service had violated their rights under the SSA.[76] The Court held that § 1983 claims were not precluded by the SSA, noting that the scheme contained limited procedural requirements and allowed for no private cause of action.[77] The Court noted, however, that the respondent mothers had made no attempt to specify which rights they were claiming to have been violated and remanded the case back to the district court for factual findings.[78]

In *Gonzaga University v. Doe*,[79] the Court further clarified its test for whether a federal statute creates a right enforceable under § 1983. Chief Justice Rehnquist, again writing for the Court, addressed what he noted was "language in our opinions [that] might be read to sug-

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71 *Id.* at 340 (citing Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 430 (1987)).

72 *Id.* at 340–41 (quoting *Wright*, 479 U.S. at 431–32).

73 *Id.* at 341.

74 *Id.*

75 *Id.*

76 The plaintiffs contended that although they had properly applied for child support payments and despite their "good faith efforts to cooperate," the agency had failed to take adequate steps to procure the payments from the fathers. *Id.* at 337. The plaintiffs alleged that these failures were due to systemic structural defects, *id.*, and that such defects violated their rights under the statute for the agency to "substantially comply" with the requirements of the SSA. *Id.* at 333.

77 *Id.* at 346–48.

78 *Id.* at 341–46.

79 Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

gest that something less than an unambiguously conferred right is enforceable by § 1983."[80] Citing *Blessing* for having been responsible for the confusion, the Court then downplayed the previous three-part test and emphasized that plaintiffs could only bring a § 1983 action for the violation or deprivation of a concrete federal *right*, not simply for violation of a *federal statute*.[81] The plaintiff in *Gonzaga* had alleged that the university had violated his rights under the Family Educational Rights and Privacy Act of 1974[82] by improperly releasing education records without written parental consent.[83] The Court rejected the claim because it merely alleged the violation of a federal *statute* and not the violation of a federal right enforceable against the state, thus falling short of a viable § 1983 claim.[84]

The Court's attempts to clarify its § 1983 jurisprudence continued in *City of Rancho Palos Verdes v. Abrams*,[85] where Justice Scalia added another layer of gloss to the tests courts are supposed to use when determining whether a federal statute precludes an independent cause of action under § 1983. Scalia affirmed the tests espoused by Rhenquist in *Gonzaga*, but then added that "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not."[86] Because the remedies provided by the Communications Act of 1934[87] were much more restrictive than those offered under § 1983, the Court held that this demonstrated Congress's intent to preclude a § 1983 action for statutory violations.[88]

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80 *Id.* at 282.

81 *Id.* at 282–83. The Court in *Blessing* seemed to indicate that Title IV-D of the SSA did not give rise to individual rights. *See* Blessing v. Freestone, 520 U.S. 329, 344 (1997) ("In short, the substantial compliance standard [of Title IV-D] is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights."); *id.* at 345 ("Furthermore, neither the statute nor the regulation gives any guidance as to how large a staff would be 'sufficient.' Enforcement of such an undefined standard would certainly 'strain judicial competence.'" (citations omitted)). Even after pointing out these failings, however, the Court remanded the case to the district court for more factual determinations, noting that "[w]e do not foreclose the possibility that some provisions of Title IV-D give rise to individual rights." *Id.* at 345–46. This seems to be the source of the confusion indicated by the Court.

82 Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) (2012).

83 *Gonzaga*, 536 U.S. at 277–78.

84 *Id.* at 282–86.

85 City of Ranchos Palos Verdes v. Abrams, 544 U.S. 113 (2005).

86 *Id.* at 120–21.

87 Communications Act of 1934, 47 U.S.C. §§ 151–621 (2012).

88 *Abrams*, 544 U.S. at 122–27.

Thus, for rights guaranteed by federal statutes, courts should first determine whether a statute unambiguously secures a concrete right whose violation is enforceable against the state.[89] This creates a rebuttable presumption against § 1983 preclusion, which may be overcome by (some form of) explicit or implicit congressional intent.[90] Then courts should ask whether the statute presents a comprehensive remedial scheme such that allowing a plaintiff to circumvent it by bringing a § 1983 would frustrate congressional purpose.[91]

D. Preclusion of § 1983 Claims for Constitutional Violations

While the above cases dealt with whether § 1983 claims are precluded where a plaintiff is alleging a violation of a federal right secured by a statute, the Court employs a different test when the plaintiff is alleging a violation of her *constitutional* rights. In *Smith v. Robinson*,[92] the Court addressed the issue of whether a cause of action under the Education of the Handicapped Act ("EHA")[93] precluded a § 1983 action based on a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States,[94] as opposed to a violation of a federal statute.[95] In *Smith*, the petitioner, a child suffering from cerebral palsy, brought a claim for violation of the EHA and a claim under § 1983 for a violation of the petitioner's Fourteenth Amendment due process and equal protection rights after the Superintendent of Schools had informed the petitioner and his parents that the school would no longer fund his special education program.[96] In addressing whether the EHA precluded a cause of action under § 1983, the Court first noted that the two claims were "virtually identical" and that the EHA was set up to "aid the States in complying with their constitutional obligations . . . ."[97] The Court then went on to use the *Sea Clammers* analysis to find that the comprehensive remedial scheme under the EHA demonstrated Congress's belief that the EHA was "the most effective

89 *Gonzaga*, 536 U.S. at 283.

90 Blessing v. Freestone, 520 U.S. 329, 341 (1997).

91 Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981).

92 Smith v. Robinson, 468 U.S. 992, 995 (1984), *superseded by statute*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, *as recognized in* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

93 Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)).

94 U.S. CONST. amend. XIV, § 1.

95 *Smith*, 468 U.S. at 1013–14.

96 *Id.* at 995–97.

97 *Id.* at 1009.

vehicle for protecting the constitutional right" and should be the exclusive remedy.[98] The Court noted that allowing a plaintiff to circumvent the EHA through a § 1983 claim would "render superfluous most of the detailed procedural protections outlined in the statute . . . ."[99] Therefore, § 1983 claims were precluded by the EHA.[100] After *Smith*, when a plaintiff is bringing a § 1983 claim premised on violation of a constitutional right, a court should determine (1) whether the rights secured by the statute are "virtually identical" to those secured by the Constitution and (2) whether the statute provides a comprehensive remedial scheme.

In *Fitzgerald v. Barnstable School Committee*,[101] the Court once again employed the two-part test announced in *Smith* for preclusion of constitutional claims—though with an important difference. In *Fitzgerald*, the Court addressed whether a claim under Title IX of the Education Amendments of 1972 ("Title IX")[102] precluded a § 1983 claim for violation of both Title IX itself and the Equal Protection Clause of the Fourteenth Amendment.[103] In *Fitzgerald*, the petitioners filed suit against the local school system for inadequately responding to allegations that a third-grade boy had been sexually harassing their daughter on the school bus.[104] The Court first applied the *Sea Clammers* test, noting that the Court had "placed primary emphasis on the nature and extent of [the] statute's remedial scheme" when determining whether a statute precludes a claim under § 1983.[105] In the Court's opinion, Title IX lacked the comprehensive remedial procedures that were present in both *Sea Clammers* and *Smith*.[106] Only after noting this did the Court employ the *Smith* "virtually identical" test and compare the "substantive rights and protections" afforded by Title IX and by the Equal Protection Clause of the Fourteenth Amendment, finding that they diverged as to the actors that could be sued under each, the standards of liability, and the actions prohib-

98 *Id.* at 1009–13.

99 *Id.* at 1011.

100 *Id.* at 1013.

101 Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

102 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012). Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.* § 1681(a).

103 *Fitzgerald*, 555 U.S. at 250.

104 *Id.* at 249–50.

105 *Id.* at 253.

106 *Id.* at 253–56.

ited.[107] Therefore, the Court held that Title IX did not preclude constitutional claims brought under § 1983.[108] Whether *Fitzgerald* significantly altered the Court's § 1983 preclusion jurisprudence for alleged constitutional violations by applying the *Sea Clammers* test before the *Smith* test is currently unclear.[109]

II. Application and Negative Consequences of the Supreme Court's § 1983 Jurisprudence

Under the Supreme Court's current § 1983 preclusion jurisprudence, for rights guaranteed by federal statutes, courts should first determine whether a statute unambiguously secures a concrete right whose violation is enforceable against the state.[110] This creates a rebuttable presumption against § 1983 preclusion, which may be overcome by explicit or implicit congressional intent.[111] If Congress did not explicitly "forbid[ ] recourse to § 1983 in the statute itself,"[112] courts should then ask whether the statute presents a comprehensive remedial scheme such that allowing a plaintiff to circumvent it by bringing a § 1983 claim would frustrate congressional purpose.[113] For rights guaranteed by the Constitution, courts should first determine whether the rights and procedures guaranteed by the Constitution and the statute in question are "virtually identical."[114] If so, then courts should employ the comprehensive remedial scheme test.[115]

Despite the seeming clarity of the Court's tests, an unanswered question concerning the Court's analysis of preclusion of constitutional § 1983 claims is how much weight should be given to each prong of the test. In *Smith*, the Court seemed to indicate that the comparison of the substantive rights afforded by the statute and the Equal Protection Clause—i.e., asking whether they are "virtually identical"—was a threshold question that must be answered affirmatively before application of the *Sea Clammers* comprehensive remedial

107 *Id.* at 256–58.

108 *Id.* at 258.

109 *See infra* notes 116–18 and accompanying text.

110 Gonzaga Univ. v. Doe, 536 U.S. 273, 282 (2002).

111 Blessing v. Freestone, 520 U.S. 329, 341 (1997).

112 *Id.*

113 Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981).

114 Smith v. Robinson, 468 U.S. 992, 1009 (1984), *superseded by statute*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, *as recognized in* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 235 (1995).

115 *Id.* at 1009–13.

scheme test.[116] In *Fitzgerald*, however, the Court afforded primacy to the *Sea Clammers* test, noting only that the divergent rights afforded by Title IX and the Equal Protection Clause "lend[ed] further support" to the conclusion that Title IX did not preclude a § 1983 remedy.[117] Whether or not the "virtually identical" rights test of *Smith* is only an added factor that may buttress a finding of preclusion under *Sea Clammers* has led to additional confusion in the lower courts.[118]

A. Lower Courts' Attempts to Apply the Court's § 1983 Jurisprudence Have Undermined the Uniformity of Federal Law

Considering the Supreme Court's lack of clear guidance, it is little wonder that federal district and circuit courts have come to varying conclusions when applying the preclusion tests to different federal statutory schemes. For example, the circuit courts have approached the issue of § 1983 preclusion with respect to Title VII,[119] which prohibits employment discrimination based on race, color, religion, sex, or national origin, in various ways.[120] Some courts have found that Title VII completely precludes a claim under § 1983.[121] Other courts have found preclusion only when the § 1983 claim is premised solely upon a violation of a Title VII provision as opposed to a constitutional violation.[122] Additionally, other courts have upheld parallel § 1983 claims premised upon both Title VII and constitutional violations, basing the lack of preclusion on the "other laws" language in § 1983.[123] Similarly inconsistent results have also occurred with respect to preclusion of § 1983 claims by Title IX, which prohibits sex discrimination in federally funded educational programs (though the Supreme Court has held that constitutional § 1983 claims are not precluded by Title IX).[124]

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116 *See id.* at 1008–09 (noting the difference between § 1983 claims for statutory violations and § 1983 claims for constitutional violations).

117 Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256 (2009).

118 *See infra* Part II.A.

119 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012).

120 *See* Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265, 266 (1987) (outlining various approaches courts have taken and arguing against preclusion).

121 *See id.* at 279–82 (collecting cases).

122 *See id.* at 282–84 (collecting cases).

123 *See id.* at 284–85 (collecting cases).

124 *See supra* notes 102–08 and accompanying text; *see also* Beth B. Burke, Note, *To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 WASH. U. L.Q. 1487, 1492 (2000) (examining Title IX preclusion of § 1983 and arguing that preclusion should occur only when § 1983 claim is based solely on violation of Title IX).

Most recently, the Supreme Court had an opportunity in *Madigan v. Levin*[125] to resolve another circuit split involving § 1983 preclusion by the Age Discrimination in Employment Act of 1967 ("ADEA"). [126] Currently the First, Third, Fourth, Fifth, Ninth, and Tenth Circuits have held that the ADEA provides the sole federal remedy for age discrimination in the workplace.[127] In 2012, however, the Seventh Circuit, arguing that other circuits had misapplied the Supreme Court's § 1983 preclusion jurisprudence, came to the opposite conclusion in *Levin v. Madigan*,[128] and the Supreme Court subsequently granted certiorari. Although the Court's decision could have resolved the issue of § 1983 preclusion as to the ADEA, it was dismissed as improvidently granted when the respondent changed his legal position.[129]

Even had the Court addressed the merits, however, it would only have resolved § 1983 preclusion as to one statute. Litigation on the issue will continue. And as federal district courts and circuit courts continue to attempt to apply the Supreme Court's § 1983 preclusion jurisprudence, more confusion and circuit splits are likely to result. This inconsistent application by the lower courts undermines the uniformity of federal law with respect to § 1983 claims.

B. Inconsistent Application of the Court's § 1983 Preclusion Jurisprudence Leads to Disparate Results for Similarly Situated Litigants

Uniformity of federal law serves several important functions within the judicial system. Uniformity ensures the predictability of legal obligations, allowing individuals and governments to structure their behavior in ways that are socially productive.[130] Uniformity also helps to ensure that similarly situated litigants are treated equally, re-

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125 Madigan v. Levin, 134 S. Ct. 2 (2013) (dismissing as improvidently granted).

126 Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–634 (2012).

127 Hildebrand v. Allegheny Cnty., 757 F.3d 99, 110 (3d Cir. 2014) (finding ADEA precludes § 1983); Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1060–61 (9th Cir. 2009) (same); Tapia-Tapia v. Potter, 322 F.3d 742, 745 (1st Cir. 2003) (same); Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998) (same), *vacated on other grounds sub nom.* Bd. of Regents of Univ. of N.M. v. Migneault, 528 U.S. 1110 (2000); Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997) (same); Zombro v. Baltimore City Police Dep't, 868 F.2d 1364, 1369 (4th Cir. 1989) (same).

128 Levin v. Madigan, 692 F.3d 607, 617 (7th Cir. 2012) (finding no preclusion), *cert. granted*, 133 S. Ct. 1600 (2013), *and cert. dismissed*, 134 S. Ct. 2 (2013).

129 *Madigan*, 134 S. Ct. 2 (dismissing as improvidently granted).

130 Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994).

gardless of geographical differences, and, similarly, that governments are able to administer public law consistently.[131] Finally, uniformity can help maintain the perceived legitimacy of judicial authority.[132] This uniformity of federal law, in combination with the concepts of precedent and stare decisis,

> promotes private ordering of citizens' affairs by enabling them to plan their social and economic transactions with confidence that they act in compliance with existing law . . . [and] encourages private settlement of disputes by discouraging individuals from forum and judge shopping, furthers fair and efficient adjudication by sparing litigants the need to relitigate (and judges the need to reconsider) every issue in every case, and discourages a rush of litigation whenever a change of personnel occurs on the bench.[133]

The Supreme Court's § 1983 preclusion jurisprudence, by contrast, provides no such consistency. Consider, for example, the disparate results of the application of this preclusion jurisprudence with regard to Title IX in three nearly factually identical situations.

In the first case, a federal court in California held that a plaintiff could pursue claims under § 1983 for violations of both constitutional rights and violations of rights created by Title IX itself.[134] In *Nicole M. ex rel. Jacqueline M. v. Martinez Unified School District*,[135] the plaintiff, a female junior-high student, was allegedly subjected to repeated sexual harassment and at least one incident of sexual assault by fellow male students.[136] The plaintiff and her parents complained to supervisors at the school, but the plaintiff was eventually forced to transfer when no corrective action was taken.[137] The plaintiff then filed a complaint alleging, among other things, failure to prevent or

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131 *Id.* at 39.

132 *Id.* at 40; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (noting that the Court's power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands").

133 Stefanie A. Lindquist & Frank C. Cross, Stability, Predictability and the Rule of Law: *Stare Decisis* as Reciprocity Norm 4 (March 26, 2010), *available at* http://www.utexas.edu/law/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf (internal citations omitted).

134 Nicole M. ex rel. Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1390 (N.D. Cal. 1997).

135 Nicole M. *ex rel.* Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

136 *Id.* at 1372.

137 *Id.*

address sexual discrimination in violation of Title IX by the school district and a violation of § 1983 by the school principal.[138]

The California federal district court held that the plaintiff's Title IX claim did not preclude her claims under § 1983. The court allowed her to proceed on a § 1983 claim premised on violation of the Equal Protection Clause, as well as a separate § 1983 claim premised on violation of Title IX itself.[139] The court noted in discussion that other courts had examined the preclusion of constitutional § 1983 claims under both prongs of the Supreme Court's preclusion analysis—(1) *Smith*'s "virtually identical" rights inquiry and (2) *Sea Clammers*'s comprehensive remedial scheme test.[140] The court's actual holding, however, was less forceful. Rather than engaging in an analysis of the plaintiff's constitutional claims under *Smith*, the court found that Title IX did not preclude a claim under § 1983 based only on the fact that it did not contain provisions for enforcement comparable to those of Title VII or the EHA.[141] Without explanation from the court, it is difficult to ascribe meaning to its decision to forego the *Smith* preclusion analysis. It could signal a specific understanding of previous cases; for example, the court may have concluded that after *Fitzgerald*, the *Sea Clammers* test is the primary test even for constitutional § 1983 preclusion claims.[142] Alternatively, it may just as easily represent a failure to fully comprehend the tests set forth by the Supreme Court.

In contrast, the Second Circuit has held that Title IX precludes § 1983 claims for both constitutional violations and for violations of Title IX itself. In *Bruneau ex rel. Schofield v. South Kortright Central School District*,[143] the plaintiff, a sixth grade student, was also allegedly subjected to sexual harassment and sexual assault by other male students.[144] The case featured some obvious parallels to the plaintiff and her parents in *Nicole M.* Similar to that case, here the plaintiff and her parents brought the issue to the attention of the school administration before eventually withdrawing the plaintiff from the school after the issue was not addressed.[145] The plaintiff and her

138 *Id.* at 1371.

139 *Id.* at 1390.

140 *Id.* at 1380.

141 *Id.* at 1380–81.

142 *See supra* notes 91–92 and accompanying text.

143 Bruneau *ex rel.* Schofield v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 755–59 (2d Cir. 1998), *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

144 *Id.* at 752.

145 *Id.* at 753.

guardian *ad litem* then filed suit alleging violation of Title IX by the school district and bringing § 1983 claims for both constitutional and statutory violations by various school administrators.[146] The New York federal district court dismissed the plaintiff's § 1983 claims on summary judgment, and the jury found for the school district on the Title IX claim.[147] The plaintiff then appealed to the Second Circuit.[148]

The Second Circuit held that the plaintiff's § 1983 claims predicated on Title IX and on the Equal Protection Clause were precluded.[149] The court held that Title IX precluded a statutory claim under § 1983 because (1) Title IX presented a comprehensive enforcement scheme, and (2) although the Supreme Court had held in *Cannon v. University of Chicago*[150] that Title IX explicitly confers a federal benefit that could be vindicated under § 1983, its legislative history indicated that Congress had intended it to include an implied exclusive private right of action.[151] The court also held that Title IX precluded an Equal Protection Clause claim under § 1983 because the claims were virtually identical under *Smith*.[152] Thus, at the time, a plaintiff in the Northern District of California could pursue § 1983 claims premised on both constitutional violations and violations of Title IX itself, whereas a plaintiff in the Second Circuit could pursue neither.

Fitzgerald v. Barnstable School Committee[153] presented an almost identical factual situation, in which the Supreme Court (almost) resolved the split as to whether Title IX precluded claims under § 1983. The petitioners' kindergarten daughter had been sexually harassed by a third-grade boy on the bus on the way to school.[154] The parents contacted the principal and, after a police and internal investigation resulted in insufficient evidence to warrant any discipline, decided to drive their daughter to school.[155] When the incidents continued at school, the parents filed suit alleging a violation of Title IX by the school's governing body and violations of § 1983 by the school's gov-

146 *Id.* at 753–54.

147 *Id.* at 754–55.

148 *Id.* at 755.

149 *Id.* at 762.

150 Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

151 *Bruneau*, 163 F.3d at 756–57; *see also supra* Part I.C (explaining the Supreme Court's test for the existence of a federal right to which § 1983 would provide a cause of action).

152 *Bruneau*, 163 F.3d at 758.

153 Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

154 *Id.* at 249.

155 *Id.* at 249–50.

erning body and superintendent.[156] The Massachusetts district court dismissed both the statutory and constitutional due process § 1983 claims on summary judgment.[157] The First Circuit affirmed, and the Supreme Court granted certiorari to resolve whether Title IX precluded the constitutional § 1983 claim.[158]

The Supreme Court held that Title IX did not preclude a parallel claim under § 1983 for violation of the Due Process Clause.[159] The Court noted that (1) Title IX did not contain a comprehensive remedial scheme that would be circumvented by parallel or concurrent § 1983 claims, (2) Title IX "contains no express private remedy, much less a more restrictive one,"[160] (3) the substantive rights and protections afforded by Title IX diverged from those of the Due Process Clause, and (4) Title IX's legislative history did not indicate that Congress had intended otherwise.[161] The first and third factors correspond to the *Sea Clammers* and *Smith* tests, respectively, which represent the Court's two-part test to determine whether a statute has precluded enforcement of a constitutional right under § 1983.[162] The second factor, in contrast, was initially part of the test to determine whether a *statutory* right, as opposed to a *constitutional* right, is enforceable under § 1983.[163] The issue of whether Title IX precluded claims under § 1983 for violations of Title IX itself was, however, not before the Court.[164] Thus, after *Fitzgerald*, it is settled law that Title IX does not preclude § 1983 claims predicated on constitutional violations, but lower courts are still addressing the unanswered question of whether § 1983 claims as to violations of Title IX itself are precluded.[165]

Whereas uniformity in federal law ensures predictability, equal treatment, and judicial legitimacy, the Supreme Court's § 1983 preclusion jurisprudence, as applied to Title IX cases, has provided none of these. Six different courts (including the lower courts in *Bruneau* and

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156 *Id.* at 250.

157 *Id.*

158 *Id.* at 250–51.

159 *Id.* at 251.

160 *Id.* at 256.

161 *Id.* at 255–59.

162 *See supra* Part I.B.

163 *See supra* Part I.C–D.

164 *See Fitzgerald*, 555 U.S. at 251 (describing the issue presented as "whether Title IX precludes the use of § 1983 to redress *unconstitutional* gender discrimination in schools (emphasis added)); *see also id.* at 258.

165 *See, e.g.*, Doe v. Town of Stoughton, 917 F. Supp. 2d 160, 164–66 (D. Mass. 2013) (noting that *Fitzgerald* did not "explicit[ly]" address statutory preemption and holding that Title IX precludes § 1983 claims predicated on violation of Title IX).

Fitzgerald) came to three different conclusions in attempting to apply precedent to three nearly identical factual situations—no preclusion as to either statutory or constitutional § 1983 claims, preclusion as to both statutory and constitutional § 1983 claims, and no preclusion as to constitutional but maybe preclusion as to statutory § 1983 claims.[166] Before *Fitzgerald*, a student in California could pursue § 1983 claims both for violations of the statutory and constitutional violations, whereas the same student in New York would be unable to pursue either of these claims.[167] Similarly, a defendant in California would face potential liability under Title IX itself, under § 1983 for violating Title IX, and under § 1983 for constitutional violations, whereas a defendant in New York would only be potentially liable under Title IX.[168] Though some of the confusion and disparity has been resolved in the area of Title IX litigation, the Supreme Court's § 1983 preclusion jurisprudence—and the uncertainty and disuniformity that it creates—is not confined to Title IX, or any other area of the law.

C. The Court's § 1983 Preclusion Jurisprudence Creates Incentives for Plaintiffs to Bring Duplicative Claims or Attempt to Bypass Comprehensive Remedial Schemes

In addition to causing disuniformity, lower courts' allowance of § 1983 claims for violations of rights secured by either the Constitution or federal statutes also creates an incentive for plaintiffs to bring such claims instead of suing under alternative statutory causes of action when § 1983 would provide more desirable remedies, lower burdens of proof, or the ability to circumvent procedural requirements. Congress often specifically tailors these elements to the rights that it provides under federal statutes. For example, Title VII, which defines unlawful employment actions,[169] requires an employee to exhaust her administrative remedies by filing a claim with the Equal Employment Opportunity Commission within 180 days of the adverse employment action,[170] and balances the available remedies based on the burden of proof and whether the employee is alleging discrimination or retaliation.[171] In contrast, § 1983 does not require exhaustion of administra-

166 *See supra* Part II.B.

167 *Compare* Nicole M. *ex rel.* Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997), *with* Bruneau *ex rel.* Schofield v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998), *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

168 *See Nicole M.*, 964 F. Supp. 1369; *Bruneau*, 163 F.3d 749.

169 *See* 42 U.S.C. §§ 2000e-2, e-3 (2012).

170 *Id.* § 2000e-5(e)(1).

171 *See, e.g.*, *id.* § 2000e-2(m) (allowing motivating factor standard of proof for some viola-

tive remedies,[172] offers a wider array of remedies,[173] and provides a four-year statute of limitations for federal laws passed after 1990.[174] A plaintiff challenging a state regulation based on racial discrimination might be able to argue for a strict scrutiny standard when bringing a § 1983 Equal Protection Clause claim, whereas the same plaintiff in a jurisdiction where § 1983 claims were precluded by Title VII would be restricted to the burden shifting framework of *McDonnell Douglas Corp. v. Green*[175] were she to challenge the regulation as an adverse employment action. Additionally, resorting to a § 1983 claim might allow the plaintiff to entirely bypass the administrative remedy exhaustion requirement of Title VII.

An example of the latter situation can be found in *Henley v. Brown*.[176] In that case, a plaintiff attempted to bypass Title VII's administrative remedy exhaustion requirement using § 1983.[177] The plaintiff, a female previously enrolled in the Kansas City Police Academy, filed § 1983 Equal Protection Clause claims against academy officers for gender discrimination and sexual harassment.[178] The plaintiff never filed her claim with the EEOC as required by Title VII, and the district court granted the defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim.[179] The Eighth Circuit reversed and remanded, holding that Title VII did not preclude a plaintiff from bringing a constitutional § 1983 claim and did not require a plaintiff to go through the Title VII exhaustion of administrative remedies proce-

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tions); *id.* § 2000e-5(g)(2)(B) (restricting the availability of remedies when claim of violation brought under § 2000e-2(m) and employer demonstrates the same action would have been taken in absence of impermissible motivating factor); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2526–28 (2013) (discussing applicability of different burdens of proof).

172 *See* 42 U.S.C. § 1983 (2012) (stating that violators "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"); Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) (holding that exhaustion of state administrative remedies is not a prerequisite to bringing an action pursuant to § 1983).

173 *See generally* Sheldon Nahmod, *Damages and Injunctive Relief Under Section 1983*, 16 URB. LAW. 201 (1984) (discussing remedies available under § 1983); *see also* Jacob E. Meyer, Note, *"Drive-By Jurisdictional Rulings": The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 428–29 (2009) (noting "a full menu of remedies is generally available to plaintiffs under § 1983, including compensatory and punitive damages, and injunctive or declaratory relief").

174 *See* Meyer, *supra* note 173, at 430. For federal statutes passed before 1990, the statute of limitations is tied to the applicable state law period for personal injury torts. *Id.*

175 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (describing the burden-shifting framework for Title VII claims).

176 Henley v. Brown, 686 F.3d 634 (8th Cir. 2012).

177 *See id.* at 638–39.

178 *Id.* at 638.

179 *Id.*

dure.[180] Though the court did not address the issue of whether the plaintiff's allegations established a facially plausible § 1983 claim,[181] the case represents a concrete example of a plaintiff bypassing the remedial scheme that Congress has specifically tailored to workplace discrimination. The motivations of future plaintiffs to seek the most beneficially legal path to vindicating potential violations of their civil rights will only add to the inequity of presenting similarly situated plaintiffs and similarly situated defendants with disparate legal recourse.

D. The Court's § 1983 Preclusion Jurisprudence Creates Incentives for Defendants to Prolong Litigation

Another consideration is that defendants, especially those that could be held liable under municipal liability, are likely in a much better position financially than would be plaintiffs. Given the opportunity, such defendants could choose to stretch out litigation through interlocutory appeals on the issue of § 1983 preclusion. This could potentially affect plaintiffs' ability to sustain the costs of repeated appeals and adversely affect their ability to recover just compensation for civil rights violations they have endured.[182]

For example, in *Levin v. Madigan*, the district court denied the defendants' claim that the plaintiff's § 1983 claim for violation of the Equal Protection Clause was precluded by the ADEA.[183] The Seventh Circuit granted the defendants' interlocutory appeal but affirmed the district court's decision,[184] in the process becoming the first federal circuit to do so.[185] The Supreme Court then granted certiorari to address the newly created circuit split as to ADEA preclusion of § 1983.[186] During briefing, however, the issue arose as to whether plaintiff was even covered by the ADEA at all, as he was an appointed official.[187] After having successfully delayed the plaintiff's ability to pursue appropriate compensation through an interlocutory

180 *Id.* at 642–43.

181 *Id.* at 643–44.

182 Although a plaintiff who ultimately prevailed on her claim would have the opportunity to seek reasonable attorney's fees, *see infra* note 202 and accompanying text, it would by no means be assured that a plaintiff could sustain the costs necessary to reach this point or that the plaintiff would ultimately be successful in recovering attorney's fees.

183 Levin v. Madigan, 692 F.3d 607, 610 (7th Cir. 2012), *cert. granted*, 133 S. Ct. 1600 (2013), *and cert. dismissed*, 134 S. Ct. 2 (2013).

184 *Id.* at 621–22.

185 *Id.* at 616.

186 *See* Madigan v. Levin, 133 S. Ct. 1600 (2013).

187 Brief for Respondent at 9–10, Madigan v. Levin, 134 S. Ct. 2 (2013) (No. 12-872).

appeal and a petition for certiorari, the defendants' petition was ultimately dismissed as improvidently granted.[188] With the preclusion issue unresolved and six years worth of unnecessary legal expenses accrued,[189] the decision of the Seventh Circuit stands, and the circuit split on the issue continues.

As noted above, the tests the Court has set forth in its § 1983 preclusion jurisprudence have created more confusion than clarity, leading to numerous circuit splits as to the appropriate application of the tests. In order to restore uniformity, predictability, and horizontal equity to the federal vindication of civil rights, Congress should act to address the situation.

III. Proposed Solution: Amending § 1983

Congress should amend § 1983 such that it (1) only provides a cause of action for violations of federal constitutional rights (2) where no other federal cause of action to remedy the violation exists. Such an amendment would provide consistency and predictability, disincentivize unnecessary litigation, and preserve the tailored remedial devices that Congress has chosen for safeguarding civil rights.

First, this amendment should redefine the "deprivation[s] of any rights, privileges, or immunities" to which § 1983 applies from those "secured by the Constitution and laws"[190] to those "secured by the Constitution of the United States." This language mirrors the original language of section 1 of the Civil Rights Act of 1871, which was intended primarily to provide a cause of action for violations of the rights secured by the Fourteenth Amendment, not those secured by federal law.[191] Additionally, the phrase "unless such deprivation forms part of the same case or controversy under Article III of the United States Constitution as a claim for which a federal cause of ac-

188 Madigan v. Levin, 134 S. Ct. 2 (2013).

189 The complaint was originally filed on August 23, 2007, Complaint, Levin v. Madigan, No. 1:07-cv-04765 (N.D. Ill. Aug. 23, 2007), ECF No. 1, and was amended on September 27, 2007, Amended Complaint, Levin v. Madigan, No. 1:07-cv-04765 (N.D. Ill. Sept. 27, 2007), ECF No. 16. The defendants first raised the defense of preclusion in their motion to dismiss on November 26, 2007. The Individual Defendants' Motion to Dismiss Plaintiff's Amended Complaint, Levin v. Madigan, No. 1:07-cv-04765 (N.D. Ill. Nov. 26, 2007), ECF No. 36. The district court denied the motion on March 10, 2010. Levin v. Madigan, 697 F. Supp. 2d 958, 975 (N.D. Ill. 2010). The Seventh Circuit affirmed on August 17, 2012, Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), and the Supreme Court dismissed the case as improvidently granted on October 15, 2013, Madigan v. Levin, 134 S. Ct. 2 (2013). In total, six years were spent litigating the issue of § 1983 preclusion.

190 42 U.S.C. § 1983 (2012).

191 *See supra* notes 27–31 and accompanying text.

tion already exists" should be added following "secured by the Constitution of the United States." This language, which mirrors that used for supplemental jurisdiction under 28 U.S.C. § 1367,[192] is intended to prevent the use of § 1983 to circumvent the remedial procedures and devices established by Congress for violations of federal statutory rights. This addition would assure that a claim could not be brought under § 1983 where an existing cause of action under federal statutory law "derive[s] from a common nucleus of operative fact."[193] Thus, in relevant part, 42 U.S.C. § 1983 should be amended to read as follows:

> 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 of the United States, unless such deprivation forms part of the same case or controversy under Article III of the United States Constitution as a claim for which a federal cause of action already exists, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

This amendment to § 1983 would (1) promote consistency among the federal circuits in the application of federal statutory and constitutional law, (2) preserve judicial resources by removing the incentives for plaintiffs to bring, and defendants to challenge, claims aimed solely at avoiding procedural requirements or procuring remedies not available under federal statutes, and (3) ensure Congress's ability to carefully craft statutory schemes for specific civil rights violations.

A. Providing Consistency

The above-proposed amendment to § 1983 would resolve the splits among the various federal circuits as to when § 1983 is or is not precluded and provide consistency and predictability in the application of federal law. For example, applying the amended statute to the three Title IX cases mentioned in Part II.A would result in uniform availability of federal remedies. In each case, the plaintiffs filed a Title IX claim against the school district (or whatever corresponding body was receiving federal funds) and § 1983 claims against various other defendants. In each case, both the Title IX claims and the § 1983 claims derive from the same nucleus of operative facts—sex

192 28 U.S.C. § 1367 (2012).

193 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

discrimination and the failure of the school district to adequately remedy that discrimination. Therefore, the plaintiffs would be allowed to pursue the statutory remedies available under Title IX against the school district, but the claims under § 1983 would not be allowed. This uniformity would allow for predictability—each plaintiff would know which procedures to follow and which remedies to seek, and each defendant would know their potential liability—and horizontal equity—each similarly situated plaintiff and similarly situated defendant would be treated the same under federal law.

B. Disincentivizing Unnecessary Claims and Litigation

Additionally, the proposed amendment would disincentivize plaintiffs and defendants from raising duplicative and unnecessary claims and defenses. Plaintiffs and defendants would be forced to tailor their lawsuits to the applicable statutory requirements and focus their efforts and expenses on those claims. Additionally, defendants would lose the ability to unnecessarily prolong litigation through interlocutory or other discretionary appeals regarding § 1983 preclusion, which could potentially adversely affect a plaintiff's ability to recover just compensation. For example, under the proposed amendment, the plaintiff and the defendants in *Levin* would have avoided six years of litigation over the preclusion issue.[194]

C. Preserving Tailored Remedial Procedures and Devices

Finally, the proposed amendment would prevent plaintiffs from bypassing remedial schemes that Congress has specifically tailored to its grant of specific statutory rights. For example, the plaintiff in *Henley* who filed suit for gender discrimination would not have been able to bypass the administrative remedy-exhaustion requirement of Title VII by only bringing a § 1983 Equal Protection Clause claim because the facts supporting both claims would have been part of the same case or controversy that could have been resolved by following the procedural requirements Congress crafted in Title VII.[195] Although the proposed amendment would place some additional restrictions on prospective plaintiffs by limiting the theories of liability under which they potentially could recover, it would promote the goals of uniformity, predictability, and horizontal equity.

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194 *See supra* note 189 and accompanying text.

195 *See supra* notes 176–80 and accompanying text.

IV. Potential Counterarguments

Although several counterarguments could be—and have been—raised against amending § 1983, these counterarguments neither succeed in undermining the proposed amendment nor present superior solutions to the problems raised by the Supreme Court's § 1983 preclusion jurisprudence.

A. Amending § 1983 Would Not Merely Shift the Focus of Litigation

One potential counterargument to the proposed amendment of § 1983 would be that it merely shifts the focus of litigation from whether a cause of action exists under a statute to whether an existing cause of action would involve the same case or controversy as a prospective § 1983 claim. As to the latter, it is true that the question of whether or not an existing federal cause of action would constitute part of the same case or controversy of a § 1983 claim will still need to be answered. This, however, is a question that courts are well prepared to address. The language intentionally mirrors that used when federal courts decide whether a pendant state claim should be given supplemental jurisdiction as part of the same case or controversy as a federal anchor claim.[196] This preliminary question of subject matter jurisdiction has been answered by courts under the standard of "common nucleus of operative facts" since the phrase was coined by Justice Brennan in *United Mine Workers of America v. Gibbs*[197] in 1966. The well-established judicial standards for making threshold supplemental jurisdiction questions could easily be applied by courts at the initial stages of a case.[198]

As to the question of whether a federal cause of action exists, two options exist for resolving this issue. If a plaintiff raises a claim under a statute with an express cause of action, a § 1983 claim could simply be dismissed out of hand as unavailable. If a plaintiff raises a claim where the cause of action may or may not exist, the issue of the availability of an implied cause of action could still be addressed as a matter of law in the early stages of the lawsuit. If it were established that no

196 *See supra* note 192 and accompanying text.

197 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

198 Although the standards by which a court could answer this initial question are well established, another potential issue could arise in a situation where a plaintiff files a complaint with only a § 1983 claim. A potential solution would be to allow defendants to either raise the issue as an affirmative defense or to allow the plaintiff to proceed on a § 1983 theory. Perhaps a better alternative would be for the court to treat the availability of a § 1983 claim as jurisdictional and decide the issue sua sponte.

federal cause of action did exist, a plaintiff would still have the potential option of amending her complaint to raise a § 1983 claim.[199]

B. Limiting § 1983 Would Not Undermine Its Original Function as a Civil Rights Safety Net

An additional argument could be made that limiting § 1983 would undermine its original purpose as a safety net for those who find their civil rights violated by the government. The cause of action provided by § 1983 was initially "intended primarily to safeguard rights established by the Fourteenth Amendment" from "a recalcitrant South."[200] Plaintiffs who found themselves subject to unjust state laws could seek vindication of any deprivations of their constitutional rights in a neutral federal forum. After the proposed amendment, however, plaintiffs would still have access to a federal forum whenever their civil rights were violated. Though § 1983 claims would be precluded any time a plaintiff brought suit under a federal civil rights statute, the plaintiff could still take advantage of the federal forum. In a situation where federal law did not provide a cause of action to protect a particular right, § 1983 would still fill the gap it was originally intended to fill.[201]

C. Civil Rights Plaintiffs Would Not Be Deprived of Fee-Shifting Opportunities

Another argument against the proposed amendment of § 1983 is that it could potentially deprive plaintiffs of the ability to secure redress at all by removing the prospect of recovering reasonable attorney's fees under § 1988, thus dissuading potential plaintiffs from seeking adequate legal representation or from even pursuing litigation. This fear, however, is unfounded. Although plaintiffs may be restricted by the procedures inherent in the applicable remedial scheme, all federal civil rights laws permit the recovery by the prevailing party of reasonable attorney's fees.[202] Thus, plaintiffs bringing

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199 Again, if a plaintiff initially raised only a § 1983 claim, a defendant would have the option of raising an implied cause of action as an affirmative defense or the court could address the issue sua sponte.

200 Pettys, *supra* note 27, at 54–56.

201 *Cf.* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986) ("It cannot be denied that state court judges are often more immediately subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts." (internal quotation marks omitted)).

202 HENRY COHEN, CONG. RESEARCH SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 25 (2008), *available at* https://www.fas.org/sgp/crs/

constitutional claims under § 1983 could access fee-shifting under § 1988; and plaintiffs bringing statutory civil rights claims could access fee-shifting under the relevant statute.

D. Other Approaches to Addressing § 1983 Preclusion Are Not Superior

1. Treating § 1983 Preclusion as an Affirmative Defense Would Do Little to Remedy the Lack of Uniformity Resulting from the Doctrine

One author has argued that the best solution to the problems inherent in the Supreme Court's § 1983 preclusion jurisprudence would be to treat preclusion as an affirmative defense.[203] This argument, however, would do little to change the status quo. Although treating § 1983 preclusion as an affirmative defense instead of an issue of subject matter jurisdiction would generally prevent otherwise meritorious claims from being dismissed sua sponte by the court, it would not address the actual problems that result from the doctrine. Section 1983 preclusion would still be litigated on a case-by-case basis, and the lack of consistency that currently exists within the federal circuit courts would still remain. For the most part, § 1983 preclusion is already treated as an affirmative defense.[204]

2. A Judicial Rule Against Implied Preclusion Is Unrealistic Due to the Doctrine of Stare Decisis

Another author has argued that there should be a judicial rule against implied preclusion.[205] By implied preclusion, the author means any preclusion of § 1983 claims that is not explicitly mandated by Congress, which would include the Supreme Court's entire comprehensive remedial scheme preclusion jurisprudence.[206] While, as a general principle, this very well may be a workable solution, such a proposal would be difficult to implement given the doctrine of stare decisis. Though the doctrine, which requires courts to adhere to pre-

misc/94-970.pdf; *see generally id.* (discussing attorney's fees provisions for federal civil rights statutes).

203 *See* Meyer, *supra* note 173, at 415.

204 *See, e.g.*, Blessing v. Freestone, 520 U.S. 329, 346 (1997) (noting that for implied § 1983 preclusion, a defendant "must make the difficult showing that allowing § 1983 actions to go forward in these circumstances would be inconsistent with Congress' carefully tailored scheme" (internal quotation marks omitted)).

205 Rosalie Berger Levinson, *Misinterpreting "Sounds of Silence": Why Courts Should Not "Imply" Congressional Preclusion of § 1983 Constitutional Claims*, 77 FORDHAM L. REV. 775, 777–78 (2008).

206 *See id.* at 778–81.

vious decisions, is not absolute, its importance within the judiciary is well represented by a statement from Justice O'Connor's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "Liberty finds no refuge in a jurisprudence of doubt."[207] The doctrine requires courts to evaluate whether (1) a rule has proved to be impracticable, (2) whether the rule has engendered special reliance by society, (3) whether principles of law have developed to the point that the rule is an outlier, and (4) whether facts have changed in such a way that the rule is no longer applicable or justifiable.[208] Though the Court's § 1983 preclusion jurisprudence is arguably impracticable and has, because of its inconsistent application, arguably not justified any special reliance interest, the author presents no factual or societal changes that would justify overturning a doctrine that has been entrenched within the legal system since *Sea Clammers* in 1981. Additionally, a judicial rule against § 1983 preclusion would not address the ability of plaintiffs to bypass carefully tailored remedial schemes for certain civil rights violations. Although a statutory solution requires implementation by a sometimes-reluctant Congress, a legislative versus judicial solution is more appropriate here. Whereas Supreme Court justices have life tenure and are thus somewhat immune from political pressure, congressional representatives are more immediately subject to the will of the people. A statutory solution provides both a more immediate answer by bypassing stare decisis and an answer that can be adapted if future circumstances require it so to be. It would also accord with the tradition of Congress acting in this area to clarify and protect its statutory regimes from the Supreme Court's jurisprudence.[209]

Conclusion

Currently, the Supreme Court's jurisprudence as to § 1983 preclusion by federal statutes has lead to varying results in application amongst the federal district and circuit courts. The confusion leads to an incentive for plaintiffs to bring additional claims under § 1983, which can lead to circumvention of tailored statutory programs de-

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207 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

208 *Id.* at 854–55.

209 *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 2, 123 Stat. 5, 5 (noting that "[t]he limitation imposed by the Court . . . is at odds with the robust application of the civil rights laws that Congress intended"); Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 3, 105 Stat. 1071, 1071 (noting that one of the purposes of the act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

signed by Congress. Additionally, defendants have incentives to stretch out litigation using preclusion defenses, which may adversely affect plaintiffs' ability to recover just compensation. This has lead, and will likely continue to lead, to a lack of uniformity within federal law, which will perpetuate unpredictability and horizontal inequity. Any efforts to refine the Supreme Court's jurisprudence will still leave the possibility of litigation on a case-by-case basis for every cause of action under every federal statute. As such, this is an area of the law where Congress can and should act to stem the confusion.