Rights and Remedies

Marsha S. Berzon*

Coming here to participate in a lecture series named in honor of Judge Alvin and Janice Rubin is, for me, an occasion of great personal significance. In the summer of 1968, my husband Stephen and I arrived for Stephen’s clerkship with Alvin Rubin, then a district judge in New Orleans. Judge and Mrs. Rubin invited us to stay with them while we went apartment hunting, and continued throughout the year to be surrogate parents, inviting us to share holiday events and other special occasions with their family. I would visit chambers occasionally and meet Judge Rubin and Stephen for lunch.

I was at the time twenty-three years old. Alvin Rubin was the first federal judge—and, indeed, the first judge—I had ever met. I had not yet gone to law school, nor had I any plan to do so. I certainly had no thought that I would ever follow Alvin Rubin into the federal judiciary.

But life takes strange turns, and subliminal influences often take over when one is least expecting them. I spent that year quietly observing Judge Rubin’s combination of wit and wisdom; of enormous intelligence, broad knowledge, and good common sense; of hard work and preservation of time for friends and family; and of a profound commitment to both individualized justice and the development of sound, well-articulated legal doctrine. Most of all, I recognized that a man of great depth with an unwavering commitment to making the world a better place had found fulfillment in the law. By the end of the year, both Stephen and I had absorbed a vision of a life worth living, as well as a sense that personal attributes and devotion, not family connections or social status, would determine whether one attained such a life.

So I have no doubt that when, a year later, I decided to apply to law school, Judge Rubin’s model informed my choice. That he was a rare lawyer, and an even rarer judge, was something I learned only over the following years.

When I was nominated to the federal judiciary, Judge Rubin had, sadly, already passed away. I remember invoking his name at the first
of my two lengthy confirmation hearings—the atmosphere surrounding judicial confirmation hearings was very different in 1998 and 1999 from what it had been in 1977, the year Judge Rubin was confirmed to the old Fifth Circuit—as the ideal to which I aspired as a judge, which indeed he was and is. While awaiting confirmation, I thought often that I would so have liked to be able to sit down with Judge Rubin if I ever reached the bench to ask him for a roadmap, a guidebook, to the role and life of a judge.

Then, when the Senate finally voted and I indeed became a judge, a box of educational materials arrived from the Federal Judicial Center to prepare me for my new endeavor. In the box was a several-years-old tape recording of a conversation among four federal court of appeals judges chosen for their wisdom and wide respect. Among those judges, thank goodness but not surprisingly, was Alvin Rubin. So I had my tutorial from Judge Rubin after all, about how to prepare for argument, how to choose and work with law clerks, and how to undertake the myriad other daily tasks that absorb judges as they try both to get through the caseload and to provide litigants with the careful attention they are due.

As I embarked on my life as a judge four years ago, I drew on the practical advice Judge Rubin imparted in that taped conversation. But I also thought often about a very specific and critically important lesson concerning the legal system that Judge Rubin taught me in his courtroom in 1969.

Before Judge Rubin that year was the school desegregation case in Tangipahoa Parish. I remember Judge Rubin looking down from the bench, drawing on his considerable ability to appear both formidable and folksy at the same time, saying to the lawyers and parents before him something like: "Brown v. Board of Education was decided in 1954. My son Michael was just starting school at the time. Michael has now gone off to college, yet in Tangipahoa Parish black and white children still are not going to school together. So a black child who was five or six when Michael was would have gone entirely through school by now, always in segregated schools. That is not how our legal system works, and I am not going to allow it to continue." And he issued an injunction to ensure that it would not, while the other Louisiana district judges that year faced with similar cases failed to do so—and were promptly reversed by the Fifth Circuit, while Judge Rubin was affirmed.

The African-American children in Tangipahoa Parish had a right to attend integrated schools as soon as Brown was decided. So a

group of lawyers brought suit on their behalf under a post-Civil War statute, 42 U.S.C. § 1983, that allows civil suits for "redress" against persons "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subject[] . . . any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws . . ."

The problem Judge Rubin wrestled with that day in 1969 and sought to resolve is that a declaration of federal rights, whether by Congress or by a court, is most often insufficient as a practical matter, as it was in the 1950s and 1960s with regard to school desegregation, to bring about the change in people's lives full recognition of those rights would entail. Without means to oblige implementation of legal rights by those who would otherwise violate them—without the "redress" that Section 1983 contemplates—the declaration by courts or legislatures of those rights remains aspirational only. Judge Rubin had no trouble so recognizing, and placed the authority of the federal courts behind an order that the African-American children had the right to attend integrated schools not as an abstract proposition but as a day-to-day, operational reality.

Judge Rubin's appointment to the federal bench by Lyndon Johnson came at a unique moment of course—during the 1960s civil rights movement—but then, as now, in his words: "[T]o succeed [in federal court] . . . plaintiffs must prove that . . . defendants have in some fashion violated federal law and that, under the tests the law directs the court to apply, they are entitled to [relief]."

My aim in this lecture is to illuminate a bit of Judge Rubin's deceptively self-evident truth, by exploring the ways in which federal "rights" and "remedies," familiar concepts to judges new and old, have become focal points of contestation in the last thirty years. In those years, the federal courts have made the relationship between rights and remedies increasingly complex and contingent, with the result that courts are often faced with situations in which ascertainable rights cannot be enforced. Litigants are therefore at times not treated in accord with their recognized legal rights. Across the span of a single generation, the definitions of legally cognizable federal rights and remedies have changed considerably, indeed to an extent that makes one wonder if in today's legal landscape the "unlikely heros" of Judge Rubin's Fifth Circuit would find the legal tools that were at their disposal.

These developments are my subject. My ruminations include some concern that cutting off judicial redress for violations of

recognized legal rights in pursuit of various other, independently legitimate ends has costs for which the federal courts in recent years have not fully accounted.

********

To set the scene, and to emphasize the primacy that was attached to individual rights enforcement in federal courts during most of Judge Rubin's tenure, let me describe the case that became the inaugural argument of the Supreme Court's 2003 term. *Frew v. Hawkins* was heard on October 7 and concerned the authority of federal judges to enforce consent decrees, akin to court-supervised contracts, against state officials despite a state's claimed sovereign immunity. Sovereign immunity, for the uninitiated, is a concept of ancient origin that has, through the Supreme Court's interpretation of the Eleventh Amendment of the Constitution—in a series of five-to-four opinions countered by lengthy, contentious dissents—become a major limitation on citizens' ability to enforce against state governmental entities rights conferred by federal statutes as well as by the Constitution.

Absent knowledge of *Frew*'s recent pedigree, one would not have been surprised had it arisen in the 1960s; the district court judge, William Wayne Justice of Texas, is no stranger to cases of that decade, having also been appointed to the district court, like Judge Rubin, by President Johnson. An anecdote Judge Justice relates gives a sense of his views on rights and remedies:

Back about 1974, I was invited to the Aspen Institute for Humanistic Studies for a week-long symposium. The main participants were judges involved in institutional reform litigation. On about the fourth day, we were joined by then-Chief Justice Warren Burger, who took a seat directly across the table from me. In the course of discussing a paper prepared by Professor Abram Chayes, I advanced the proposition that, if a state has a function to perform, and does not perform that function, so that people are injured in their Constitutional rights, it is the duty of the federal courts to intervene to protect those rights. Justice Burger, without batting an eye, pronounced my views unconstitutional—which was the quickest reversal I've ever experienced. Government officials have a right not to take action, Chief Justice Burger said. They might have other priorities in mind. I thought he was wrong at the time, and I still do.  

---

As one news account put it, *Frew*:

challenges the power of federal courts to enforce their judgments, bringing to the fore many states' unhappiness with long-running federal court supervision of state institutional reforms. . . . [M]any states have found that consent decrees become frozen, instead of being 'dynamic' documents, said [a] Utah Assistant Attorney General . . . who filed an amicus brief for 19 states supporting Texas.8

The consent decree at issue was signed in 1996 between the state defendants and indigent mothers who sued Texas officials for failing to provide their children with health care under a federal-state Medicaid program. Judge Justice certified a class of one-and-a-half million children and retained supervisory jurisdiction over the consent decree.

In 1998, the plaintiffs filed suit to enforce the decree, alleging violations. The state responded in part that the Eleventh Amendment bars enforcement of the decree and that, in addition, the decree's provisions exceed the scope of the federal Medicaid law. In a 100-page opinion, Judge Justice rejected the officials' arguments, stating that their proposed "outcome would detract from the integrity of the court by allowing state defendants to avoid bargained-for obligations while receiving the benefit of escaping litigation and potential liability."9

For my purposes, the most relevant passage in the district court opinion concerns its jurisdiction to enforce the decree. Judge Justice, in the spirit of the institutional reform litigation common during the civil rights movement, held that "to sustain federal court jurisdiction . . . the remedies in the decree must only serve to: 1) resolve a dispute within the court's subject matter jurisdiction, 2) come within the general scope of the case made by the pleadings, and 3) further the objectives of the law upon which the complaint was based."10 Judge Justice also proceeded to apply a test not required in the civil rights era, that of examining under a recent Supreme Court decision, *Blessing v. Freestone*11 (to which I shall return, and which was, incidentally, the next-to-last Supreme Court case I argued as an advocate), whether the Medicaid Act as imported by the consent decree permitted redress for the plaintiffs. He had no trouble finding that it did.12

---

10. *Id.* at 666 (citing Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525, 106 S. Ct. 3063, 3077 (1986)).
The Fifth Circuit reversed. The court’s view, by failing to determine whether each alleged violation of the consent decree was a statutory violation actionable under Blessing. Moreover, the defendants were held not to have waived their Eleventh Amendment immunity merely by entering the consent decree: “[A] state can waive its Eleventh Amendment immunity by voluntarily invoking the federal court’s jurisdiction, but in the pending case the State did not do so; the state officials were sued as defendants.” The consent decree was thereby rendered effectively unenforceable.

I use this case as an illustration of the doctrinal hurdles that today’s federal Section 1983 plaintiffs encounter, and as a rare contemporary instance of attempted structural reform of a type prevalent in the civil rights era. Contrast the Fifth Circuit’s decision in the Medicaid case with the memorable Shakespearean reference Judge Rubin used in upholding a decree by the same judge, Judge Justice. Affirming Judge Justice in a case challenging the Texas Department of Corrections’ conditions of confinement, Ruiz v. Estelle, described as “the most comprehensive civil action suit in correctional law history,” Judge Rubin wrote for the Fifth Circuit in 1982:

The implementation of the district court’s decree can become a ceaseless guerilla war, with endless hearings, opinions, and appeals, and incalculable costs. But it is instead to be hoped that, if the state adopts the policy that inmates must be accorded their constitutional rights and that prison officials will not be permitted to indulge in petty practices designed to deny those rights, the period of judicial supervision can more speedily be concluded . . . . Constitutional peace is the consummation devoutly to be wished.

13. Frazar v. Gilbert, 300 F.3d 530 (5th Cir. 2002).
14. Id. at 543 (emphasis added).
15. Id. at 550 (emphasis added) (footnote omitted). The U.S. Solicitor General joined the plaintiffs in arguing at the Supreme Court that the Fifth Circuit’s Eleventh Amendment holding was wrong. The Court’s decision unanimously reversed the Fifth Circuit without deciding the waiver issue, emphasizing that: “Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.” Frew ex rel. Frew v. Hawkins, 504 U.S. __, 124 S. Ct. 899 (2004).
The type of sweeping remedy enforced by Judge Rubin's court is exceedingly uncommon these days. What scholars like Owen Fiss, by no means a dispassionate observer, and Abram Chayes identified in the 1970s as "structural injunctions" have receded from the remedial scene. Fiss defined a "structural injunction" as "the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution," adding that:

[t]he structural injunction represents the most distinctive contribution to our remedial jurisprudence drawn from the civil rights experience . . . The fate of the structural injunction has also been tied to that of the civil rights movement. The remedy grew in power and scope over a twenty-year period, beginning in 1954 and continuing until 1974.\(^4\)

More recently, federal courts, particularly the Supreme Court, have tended to be reluctant not just to accord broad structural remedies, but to accord any remedies at all in many instances, even when federal constitutional and statutory rights have been violated. Part of the reaction to broad judicial remedies, quite an understandable one, is that, as federal District Judge James Brady put it here in Baton Rouge recently when signing a settlement agreement in a desegregation case after 47 years of litigation, "at some point the law ends and people begin."\(^5\) My concern, however, is that, as is often the case with reactive jurisprudence, aversion to broad remedies has gone overboard in the other direction, with the result that individuals seeking narrow, traditional judicial remedies, in no way "structural" in the sense used approvingly by Professor Fiss and by others with opprobrium, are not able to obtain them.

For Judge Brady's truism cuts both ways. There are times when people cannot begin meaningfully to assert their own rights without assistance from the courts. Then law must come before people are abandoned to social forces.

For example: No one of age in Louisiana at the time Judge Rubin served in the New Orleans district court can forget that here, as in many other states, the law was an indispensable source of redress against real, palpable, widely-acknowledged injustice. Leander Perez Sr., the President of the Plaquemines Parish Council, is chronicled in the House Select Committee on Assassinations' report on the deaths

---


of President Kennedy and Dr. King as a "Louisiana political boss and virulent segregationist." He was "a virtual dictator in Plaquemines Parish." As Jack Bass, the author of Unlikely Heroes, a history of the old Fifth Circuit during the civil rights era, underscores, "in Plaquemines Parish, Leander Perez was the law." It is worth quoting at length the account of one lawyer who litigated against the Perez regime:

Plaquemines Parish had been run since the twenties by Judge Leander Perez, who had been a state district judge from 1920 to '24. He still used the title and was really the king or the emperor of Plaquemines Parish, which was an extraordinarily mineral-wealthy piece of land . . . . Judge Perez had put through a constitutional amendment in Louisiana to create a separate special form of government in that Parish so that everything was controlled by the Parish Council. The president of the Council was Judge Perez, the district attorney was Leander Perez Jr., and the vice president of the Council was . . . the judge's older son. They had tremendous wealth. If you wanted to get a license to look for sulphur or other minerals or oil in Plaquemines Parish, you needed to get a license from the Parish Council, and you could not get a license from the Parish Council unless you hired the Perez law firm to prepare this little form and submit it. The standing fee was literally a million dollars for a five-minute piece of work . . . . [Perez] was one of the people who first began to distribute the phony Protocols of the Elders of Zion and a number of other racist, anti-Semitic publications. He's the man who bragged that if Martin Luther King ever came to Plaquemines Parish, they had bought a little island in the Mississippi that was snake-infested and that had an old Spanish prison fort on it, and that's where Dr. King would be imprisoned if he tried to do anything in Plaquemines Parish. Perez was also excommunicated by the Archbishop of New Orleans because he physically tried to prevent the integration of the Catholic schools there in 1962 and '63.
In one typical denunciation of Plaquemines practices, the Fifth Circuit noted that:

[the School Board’s brief begins by stating: ‘This is not a typical school integration case . . . .’ This statement could not be more true. This Court recalls no record in any school case which revealed so graphically official attempts to destroy a public school system and to flout the mandates of the United States Constitution as interpreted by the federal courts.]

The Fifth Circuit also had occasion to grant relief for bad faith prosecution of Gary Duncan, the African-American whose other legacy for this Plaquemines Parish prosecution is Duncan v. Louisiana, a landmark Supreme Court case holding that a defendant in a misdemeanor case facing a substantial prison sentence—more than six months—is entitled to a jury trial. Also arising from the same events was Sobol v. Perez, a three-judge district court ruling that enjoined the prosecution of Duncan’s attorney for practicing law without a Louisiana license. The extensive trial concluded that Richard Sobol’s prosecution was unconstitutional because without out-of-state civil rights lawyers, the rights of African-Americans in the Plaquemines Parish of that day could not be protected.

Without access to legal representation—it was Sobol, the out-of-state lawyer, who represented Duncan in his Supreme Court case—and without a federal judiciary willing to provide meaningful relief, the dire situation in Plaquemines Parish would, I trust, have changed anyway, but much more slowly than it did, and with an unacceptable cost in injustice and truncated opportunities in life for many individuals. And, while the possibility of a repeat of the show trials in 1960s Plaquemines Parish is slim, there are several reasons why the availability of federal remedies remains critical.

First, Section 1983, the bulwark statute for federal civil rights litigation, applies in state as well as federal court. Limitations on its application curtail remedies available in state as well as federal court. So, for example, the Supreme Court has mirrored the Eleventh Amendment/sovereign immunity ban on suing states in federal court with a ruling in Will v. Michigan Department of State Police that states may not be sued in state court under Section 1983 either,

---

28. An interesting side note is that the young lawyer representing the United States in Sobol, and supporting the plaintiff, was future Professor Owen Fiss.
because they are not "persons" within the meaning of Section 1983.\textsuperscript{29} Similarly, the recent limitations on suing for violations of federal statutes under Section 1983 that I will discuss apply in state as well as federal court.

Second, as the Supreme Court has also held, in \textit{Alden v. Maine},\textsuperscript{30} states may refuse on sovereign immunity grounds to provide relief in their own courts for violations by the state of federally-conferred rights, and often do.

Third, many state court judges are elected and do not serve, as do federal judges, for life, assuming "good Behavior," with the result that they can be, and have been, ousted from office if they provide remedies to unpopular individuals for violations of federal rights. More likely than not, most elected state judges carry a sense of this reality, consciously or otherwise, with them in their daily work.\textsuperscript{31}

And fourth, finally, and to my mind most important: As the Supreme Court said in 1961 in \textit{Monroe v. Pape}, the "federal remedy is \textit{supplementary} to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."\textsuperscript{32} What that means to me is that federal rights are sufficiently important that in many instances we provide more than one forum in which they can be vindicated. This structural protection guards against the inadequacy of a single forum, whether that inadequacy arises from corruption, politicization, or simple inattention (the last being a real possibility in otherwise well-intentioned but vastly overburdened courts, and one well worth protecting against).

As the crest of the civil rights movement receded, and the Warren Court passed as well around the same time, doctrines developed that limit federal courts' authority to provide redress for the violation of federal rights. These doctrines—promulgated largely by Supreme Court decisions, and in lesser part by acts of Congress—both shaped and were shaped by a particular view of the proper role of the federal courts in our constitutional system.

To give some examples: In suits for damages alleging a violation of constitutional rights, state and local officials can only be held liable for damages if it would be clear to a reasonable official that his conduct was unlawful. So individuals whose constitutional rights

\begin{itemize}
\item \textsuperscript{29} 491 U.S. 58, 109 S. Ct. 2304 (1989).
\item \textsuperscript{30} 527 U.S. 706, 119 S. Ct. 2240 (1999).
\item \textsuperscript{31} See William J. Brennan, Jr., \textit{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." (quotation marks and citation omitted)).
\item \textsuperscript{32} 365 U.S. 167, 183, 81 S. Ct. 473, 482 (1961) (emphasis added).
\end{itemize}
have in fact been violated can be without remedy if the violators should not, in the law's view, have realized that they were infringing protected liberties.  

My point is not that this rule of qualified immunity makes poor sense. Individual government employees should not have to pay damages for a constitutional injury that they really did not know, and should not have known, they inflicted. Also, as the Supreme Court has made clear, courts must first decide whether a plaintiff's constitutional rights were violated and only then turn to the immunity question. It may well be, as Professor Jeffries of the University of Virginia has noted, that the impact of the immunity rule is to counteract a tendency by many courts to slow the development of constitutional doctrine if the cost is imposition of liability on governmental employees without palpable fault.

Still, for a variety of reasons—including the sovereign immunity concept I discussed earlier—individuals whose constitutional rights are violated by government officials may have no recourse other than a suit for damages against the offending official. One result of precluding such recourse is a gap between rights and remedies that can create an understandable resentment in the individuals affected, leading to the conclusion that they have been treated unjustly. Another is unending litigation in courts, such as mine, concerning not the prospective merits of constitutional issues but, instead, the backwards-looking, ultimately unproductive inquiry of when and to what degree a given constitutional right was enunciated in the past.

A second example of the overall phenomenon, before I get to the primary area I wish to discuss, is habeas corpus law as it now exists under a statute passed by Congress in 1996, the Antiterrorism and Effective Death Penalty Act. Under AEDPA, as it is known, state prisoners can obtain a remedy in federal court for unconstitutional convictions only if they can show that any state court decision concerning their asserted constitutional rights was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . " The sensible rationales for limiting habeas relief are, first, a need for finality in criminal proceedings and, second, respect for state courts, such that

33. See Saucier v. Katz, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158 (2001) ("If the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense.").
their decisions should not be overturned unless insubordinate or unreasonable. And because AEDPA is the balance Congress has struck, it is the one we judges enforce. Still, it seems to me important not to lose sight of the fact that that balance leaves people in prison—and subjects some of them to execution—even though their constitutional rights as understood under contemporary doctrine were violated when they were convicted. Once again, in pursuit of competing interests, the law leaves persons with no redress for the violation of their constitutional rights.

The limiting doctrine that will be the focus of this lecture, however, is neither of these developments but rather one manifested in two other lines of Supreme Court decisions. First, cases questioned whether a federal remedy is always available for the violation of a federal right. Now, some cases question whether a cognizable federal "right" exists in the first place. This play in two parts—first, the limiting of federal remedies, and then the limiting of federal rights—is by no means complete, and the question I wish to address is how the next act should be written.

My thesis, like the episodic restrictions on the ability of federal courts to fashion remedies for the violation of federal rights, also comes in two parts, and may appear somewhat anomalous on the surface. First, as a matter of legal analysis, vigilance in keeping rights and remedies conceptually separate is salutary, because the two are often confused in both legal and lay circles. And that confusion, I intend to demonstrate, can effect tremendous harm to legal doctrine and to individual rights enforcement. Second, as important as the distinction between rights and remedies is to clear legal analysis, resulting rules that exalt rights yet deny remedies create a blind spot in the courts' ability to further justice and, at the same time, diminish the public's perception of courts as justice-asserting institutions, thereby undermining confidence in the judiciary. A foundational tenet of our legal tradition is that courts are directed to fashion a remedy after finding an incursion on a right. For the sake of the legal system, this maxim should not be discarded lightly.

Before embarking upon my investigation of rights and remedies, however, I should delineate the boundaries of this discussion. First, I limit my remarks to federal rights. It goes without saying that many of the most important rights we enjoy daily—the right to enforce a contract, the right to exclude trespassers, the right to expect objectively reasonable behavior from others—are not federal. They are secured by the states. The subject of my analysis, however, will be federal rights, which have historically served the purpose of creating nationwide liberty and equality and conferring fundamental entitlements.
Second, as stated earlier, I aim to discuss the role of federal courts. State courts are indispensable to securing individual rights. Nonetheless, my focus on federal courts is justifiable because these institutions are available to everyone, regardless of the coincidence of state geography.

Finally, and I will only briefly state this point now because I will give it full consideration below, when I speak of the need for remedies, I mean the availability of an affirmative judicial remedy—or, in other words, the ability to go to court and sue for relief. There are, of course, ways in which we enjoy rights that do not involve the ability to bring a suit in court.

With these preliminaries aside, I begin with a convenient cliché, originally one of those eye-glazing Latin legal maxims, that was famously recited in Chief Justice Marshall’s opinion in *Marbury v. Madison*:

> "where there is a legal right, there is also a legal remedy."

When put that way, the proposition is misleading—so long as my rights are being respected, I neither have, nor need, a legal remedy. Rights do not appear only when they are infringed, however. The mystery of the cliché is dispelled by quoting Chief Justice Marshall’s complete sentence, which was taken from Blackstone: 

> "[W]here there is a legal right, there is also a legal remedy, ... whenever that right is invaded."

This leaves us with
a less imprecise cliché, but a cliché nonetheless, and one that does little prescriptive work for courts seeking guidance on the right-remedy relationship.

The Supreme Court’s jurisprudence of the last thirty years could be characterized as running counter to Marbury: not every invaded right necessitates a remedy, at least not a federal remedy. Beginning at least in the 1970s but, if one follows the threads carefully, well before that, the Supreme Court created analytical sustenance for the proposition that disembodied federal rights exist for which federal judicial remedies for affected individuals were never provided. As a result of this change in approach, rights and remedies, it seems, are no longer conjoined concepts.

One diagnosis of what has transpired since Congress and the Supreme Court have limited the ability of the federal courts to provide redress for violations of rights is that we have lost sight of the analytic unity between rights and remedies, as reflected in the Marbury cliché. This is not the problem. Rights and remedies have always been conceptually distinct. “Right” and “remedy” are not just two names for the same thing.

On reflection, this seems quite clear. A right is a tripartite relationship among a person, other persons, and the state; it is one person’s protected ability to make claims on or against others. The landowner’s right to exclude, for example, is his ability to determine whether another person may enter his land. Coupled with this right is his discrete power to do something about a violation of the right. Our landowner—at common law, at least—had two sorts of remedies: First, he had self-help; that is, a limited ability to take matters into his own hands and exclude or remove the trespasser without the involvement of the courts. Alternatively, he could bring an action in court for trespass or ejectment. This latter remedy, which relies on the power of a court to issue an enforceable order, is a cause of action or a right of action. Regardless of which remedy is chosen, the state is involved: either it supplies and empowers the courts that deliver the judicial remedy, or it grants the landowner some limited impunity for his use of force against the trespasser. While self-help violence has, fortunately, largely fallen into desuetude, the point remains that possession of a right is conceptually antecedent to the existence of a judicial remedy.

42. Cf. Ashby v. White, 92 Eng. Rep. 126, 136 (K.B. 1703) (Holt, C.J., dissenting) (“Where a man has but one remedy to come at his right, if he loses that he loses his right.”).

43. The confusion over rights and remedies often stumbles over the fact that a “cause of action” is also termed a “right of action,” leading some to assume that any right is just a right of action. An idiom does not an argument make, however.
There are countless ways of trying to describe a right. Whether we follow Justice Holmes, who termed it "a permission [on the part of the rights-holder] to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force," or Immanuel Kant, who treated rights as restrictions on each person's actions, again backed up by the coercive power of the state, the central point remains that the existence of an affirmative judicial remedy or a right of action is but one way the state may step in to support a claim of right. That rights come before judicial remedies is reflected in the language of the Declaration of Independence itself, which embodies the notion of natural rights: "[A]ll men are created equal, [and] endowed by their creator with certain unalienable Rights.... [T]o secure these rights, Governments are instituted among Men." The idea is that rights exist logically, if not temporally, prior to the existence of a state capable of providing a remedy for their infringement.

Not only do rights come before and have consequences apart from judicial remedies, but they also have jurisprudential value even when no affirmative right of action exists. The Fourth Amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" limits the government's authority to do certain things. It is the fact that we have this right—not the possibility that, should it be infringed, we might eventually be compensated—that provides the assurances of liberty and privacy the Fourth Amendment grants. The "right to be left alone" matters because we want to be left alone. Again, it is the prophylactic effect of the right, not our ability to sue intruders, that we value. When evidence is taken in an illegal search, the modern approach is first and foremost to exclude the illegal evidence from consideration. This is not a "remedy" in the common law sense—it is not compensation for the right violated, unless one considers avoiding punishment for a crime committed compensation—but rather a recognition that the right against illegal search must be respected by the judicial process.

Rights have other consequences, even when the rights-holder does not, or cannot, sue for remedy. A criminal defendant may raise a potential juror's right not to be excluded from the jury on protected grounds as a basis for invalidating a conviction. The

44. Oliver Wendell Holmes, Jr., The Common Law 214 (Dover 1991) (1881).
45. See Immanuel Kant, On the Relationship of Theory to Practice in Political Right, in Kant's Political Writings 73, 73 (H. Reiss, ed. 1999) (1793).
46. See Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will
juror’s right is not directly remedied, but, one hopes, future violations of the equal protection rights of other jurors are deterred. Importantly, both members of Congress and state legislators, if they are doing their job properly, take federal constitutional and statutory obligations into account when devising legislative solutions. The judicial doctrine of constitutional avoidance so assumes, and therefore determines the meaning of statutes against the presumption that Congress would not seek to tread on individual rights, another example of the ways in which rights exert legal influence quite apart from their ability to sound in tort should they be breached.

To state that rights and remedies are analytically distinct, and that one may logically exist without the other, does not itself answer the question that the Supreme Court has wrestled with for decades: When may an individual whose rights have been infringed invoke the remedial power of the federal courts? Two lines of cases map the Supreme Court’s efforts: implied right of action cases, and cases attempting to determine the scope of Section 1983, an express cause of action.

One way in which an individual becomes entitled to obtain a remedy in court is if Congress, in a statute, explicitly confers that right. Another is through statutes (and indeed the Constitution itself) that do not include an express right of action but nevertheless are recognized as giving rise to remedies in federal court. The preeminent example is the 1971 case Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, in which the Supreme Court recognized that the federal courts are available for claims that federal officers violated an individual’s constitutional rights, even though the Constitution does not provide an express right of action.

Section 1983 complements Bivens by providing an independent, express right of action for people whose rights have been infringed by state actors. The rights can have their origin in the Constitution or in

be unable impartially to consider the State’s case against a black defendant.

47. See Robert C. Post and Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 1947 (2003) ("The policentric model holds that for purposes of Section 5 power the Constitution should be regarded as having multiple interpreters, both political and legal. The model attributes equal interpretive authority to Congress and to the Court.").

48. See, e.g., INS v. St. Cyr, 533 U.S. 289, 300 n.12, 121 S. Ct. 2271, 2279 n.12 (2001) ("Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.") (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 108 S. Ct. 1392 (1988)).

federal statutes. The significance of Section 1983 cannot be overstated: Without some means of enforcing the rights "secured" by the Constitution and federal laws, there is always the risk, indeed the probability, that in some instances rights will be of little more than hortatory value.

That unenforceable rights would be ignored was precisely the concern that gave rise to Section 1983 in the first place. In the aftermath of the Civil War, Congress proposed, and the states of the former Confederacy were required to ratify, the Thirteenth, Fourteenth, and Fifteenth Amendments, which enunciated, inter alia, the right to due process and equal protection, and, for newly-freed slaves, the right to vote. It quickly became clear, however, that while the amendments had sufficed to create these rights, African-Americans in the South were faced with state governments unable or unwilling to play their role in the tripartite relationship of rights-holder, potential rights-infringer, and state. Congress then passed, in the Civil Rights Act of 1871, the statute that became Section 1983, providing for access to the federal courts by anyone "depriv[ed] of any rights, privileges, or immunities secured by the Constitution or laws" by a person acting "under color of" state law.

For the ensuing half-century, Section 1983 was only rarely invoked—nineteen cases were brought under Section 1983 between 1871 and 1936—50—but federal litigation for vindication of individual constitutional rights grew substantially thereafter. Especially after the Supreme Court in 1961 gave a broad construction to the words "under color of" state law, Section 1983 put teeth in the Due Process and Equal Protection Clauses and, through incorporation into the Due Process Clause, the Bill of Rights. By way of Section 1983, individuals had both federal rights and access to the federal courts to remedy constitutional wrongs committed by persons acting under color of state authority.

The next question faced by the Supreme Court as it contemplated Section 1983 suits was whether Congress actually meant to allow

50. James J. Park, The Constitutional Tort Action as Individual Remedy, 38 Harv. C.R.-C.L. L. Rev. 393, 412 n.81 (2003) (citing Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 199 (1983)); see generally id. at 412-13 (noting that Bivens was decided against a historical backdrop in which: “Despite its ambitious ideals and broad wording, § 1983 was inexplicably almost never utilized for more than seventy years .... While the Civil War fundamentally realigned the relationship between the federal government and the states, it took some time before it became common for individuals to appeal directly to the Constitution as a source of individual rights .... With the creation of the constitutional tort remedy, the Court established a system where the Constitution rather than state common law governs the prerogative of federal and state officials to inflict injury upon individuals.”).

individuals to sue to enforce "rights" created by all federal laws, as the plain statutory language indicates. That question was finally settled, after considerable disputation based on murky historical materials, in Maine v. Thiboutot. Thiboutot reaffirmed several earlier cases so holding, and several attempts in Congress thereafter to eliminate the remedy accorded under Section 1983 for violations of federal statutes failed.

The history of the interpretation of Section 1983, up to and including the Court's decision in Thiboutot, is a chronicle of enforcing an expressed congressional intent to provide remedies wherever there is a cognizable right, whether statutory or constitutional. By the time of Thiboutot, however, the history of the implied right of action cases had taken a different turn, one characterized by an uncoupling of rights and remedies theretofore foreign to federal jurisprudence.

The very concept—not to mention the term—of an implied right of action was unknown in the federal courts until at least the 1960s. Instead, the Marbury v. Madison maxim that the legal system will provide a remedy for infringement of a right held sway with regard to statutory as well as constitutional rights.

For example, in 1893, Congress enacted the Federal Safety Appliance Acts, which mandated that railways provide certain safety features on trains for workers. Several years later, a railway company employee named Rigsby fell off a rail car because of a defective handhold. Rigsby brought suit in federal court against the company, invoking the federal act section requiring secure handholds. Unlike Section 1983, there was no explicit statutory language in the Federal Safety Appliance Acts that Rigsby could point to as providing him with a right (1) to come to court and (2) to compel the entity that violated the statute and thereby injured him to pay for the harm caused. Instead, the statute was silent about whether employees could sue to enforce its dictates. Nonetheless, the Court allowed the suit for damages to go forward:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover

52. 448 U.S. 1, 100 S. Ct. 2502 (1980).
the damages from the party in default is implied. . . . This is but an application of the maxim, *Ubi jus ibi remedium* [Where there is a right, there is a remedy].

To the legal mind trained at the turn of the twentieth century, there would be no apparent problem here. Congress, through legislation, determined that certain acts were unlawful. The railroad broke the law. Those injured as a result sued to make the company comply with the statute, and the courts could both enjoin the railroad from continuing its unlawful action and award damages to the injured employee.

One reason for the Court’s lack of concern over whether there was an express, congressionally-approved right of action may be that the federal courts at that time were still broadly creating federal common law. In *Rigsby*, the Court relied on the following “doctrine of the common law:” “So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.”

The enactment and judicial development of the Railway Labor Act, passed in 1926, provides a more nuanced look at the ability of individuals to enforce their rights as established by legislation. In the Transportation Act of 1920, Congress had created the Railroad Labor Board to make decisions on employee representation, wages, and so forth. These decisions were supposed to aid in defusing labor disputes before employees went on strike. But when employees attempted to enforce the Board’s decisions by bringing suit in federal court to enjoin employers from disregarding them, the Supreme Court

54. Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39–40, 36 S. Ct. 482, 489 (1916). In a recent case considering whether a federal remedy exists under Section 1983 for claims of state malicious prosecution, *Rigsby* was invoked to argue against any federal cause of action. *See* Castellano v. Fragozo, 352 F.3d 939, 962 (5th Cir. 2003) (en banc) (Barksdale J., concurring in part, dissenting in part) (“The starting point for the new § 1983 claim’s being erroneous is the maxim ‘Ubi jus, ibi remedium’—‘Where there is a right, there is a remedy.’ *See, e.g., [Rigsby]*. Our federal system counterpoint is: ‘Where there is a right, there may not be a federal law remedy.’ Restated, it may be that the remedy must be through state law. This reflects, among other things, the limited powers granted by our federal constitution, the concomitant limited role of federal courts, and the proper balance between state and federal law.’”).

55. In a later case interpreting *Rigsby*, Justice Powell, dissenting, emphasized the pre-*Erie* context in which *Rigsby* was decided: “Under the regime of *Swift v. Tyson*, then in force, the Court was free to create the substantive standards of liability applicable to a common-law negligence claim brought in federal court.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 732, 99 S. Ct. 1946, 1976 (1979) (citation omitted).

56. 241 U.S. at 39, 36 S. Ct. at 484.
determined that Congress could not have intended the Board's decisions to be enforceable by the federal courts. Instead, these decisions were solely to be supported by the force of public opinion.57

This decision sent Congress back to the drawing board to craft a corrective statute. The resulting Railway Labor Act (RLA), 45 U.S.C. § 151 et seq., the product of negotiations between railway companies and employee representatives, did not contain any language that explicitly allowed individuals to bring suits in federal court to enforce their rights as expressed in the RLA.

When unions tried to enforce the RLA, they were met with the argument that, like the Transportation Act before it, the RLA merely conferred "an abstract right which was not intended to be enforced by legal proceedings."58 But this time the Supreme Court would not accept the view that Congress had created rights beyond the authority of courts to enforce. Stressing that the RLA imposed explicit, certain, and definite obligations upon the parties involved, not vague, general exhortations, the Court did not credit the notion that obligations defined by Congress in terms sufficiently clear for court interpretation were unenforceable. Once more the Court referred to the old maxim, "the right is created and the remedy exists," and once again it held that courts have the generative authority to supply remedial schemes that give life to inchoate but specific statutory rights.

Later cases, as well, indicate that as long as it appeared that Congress intended to create a clearly defined obligation or right, the courts routinely exercised their power to enforce such rights. Using language no federal court would now utter, the Supreme Court in 1944 pronounced: "[These rights] would be sacrificed or obliterated if[they] were without the remedy which courts can give for breach of such [duties] or obligation[s] and which it is their duty to give in cases in which they have jurisdiction."59 Similarly, in 1964, the Court advised that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."60

In short, the Supreme Court used to have a vision that federal courts are entrusted in part with redressing violations of rights conferred upon individuals by federal statutes. In the past, federal

57. Penn. R.R. Co. v. U.S. R.R. Labor Bd., 261 U.S. 72, 84, 43 S. Ct. 278, 283 (1923) ("Under the act there is no constraint upon [the parties] to do what the Board decides they should do except the moral constraint . . . of publication of its decision.").
courts, reflecting the Supreme Court’s approach, consistently found remedies whenever such violations were brought before them.

The uncoupling of rights and remedies in federal statutory cases occurred gradually during the course of the 1970s. In a series of cases, the Court first retreated from the broad “where there is a right, there is a remedy” maxim to consider factors other than the existence of a sufficiently specific statutory right. At first, the decisions included specific indications of congressional intent only as one of several such considerations. Then, as time went on, the Court declared that specific congressional intent to permit suits in federal court was the only relevant factor, abandoning any independent judicial role of ensuring redress for violation of federally-created rights.

Recently, the two lines of cases just described, on the availability of Section 1983 and on implied private rights of action, have begun to merge into a single doctrine. This trend came to a head in a Supreme Court decision in 2002, Gonzaga University v. Doe. In Gonzaga University, a plaintiff proceeding as John Doe sued his former university for informing the Washington state teacher certification agency that he was alleged to have engaged in sexual misconduct as a student. Doe sued under Section 1983, alleging that the disclosure violated the federal Family Educational Rights and Privacy Act of 1974.

The Privacy Act does not state that any judicial remedy is available to individuals harmed by violations of the law. Had Doe sued in 1899 or even in 1964, he could have argued that the Act nonetheless conferred substantive privacy rights upon him—I am leaving aside here some complications regarding the exact nature of the statute, a condition on grants of funds to the states, as a matter for another day—and that the federal judiciary should therefore, given its role of redressing violations of rights, devise an appropriate remedy.

As a consequence of the demise of the private right of action doctrine, Doe did not attempt that approach. Instead, he maintained that he had a cause of action through the express terms of Section 1983, as he was deprived of a right, secured by federal law, by persons acting under color of state law. The defendants argued, however, and the Supreme Court agreed, that the Privacy Act could not be enforced in a Section 1983 suit because the statute did not create any enforceable rights.

---

62. For an analogous result involving an administrative regulation, see Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003), a decision from which I dissented. See also Recent Cases: Federal Courts—Civil Rights Litigation—Ninth Circuit Holds That an Administrative Regulation Can Never Create an Individual Federal Right Enforceable Through § 1983, 117 Harv. L.
The line of cases from *Thiboutot* through *Blessing* had recognized that federal rights could be inferred from the intent and structure of the law in question. *Gonzaga University* raised the bar. Now, it appears, nothing “short of an unambiguously conferred right [will] support a cause of action brought under § 1983,” and, to confer such a right, Congress must use “rights-creating language.”  For this proposition the Court drew almost exclusively on the implied right of action cases, announcing that those cases “should guide the determination of whether a statute confers rights enforceable under § 1983.”

In the implied right of action cases, however, the courts were trying to discern, under the new doctrine, intimations of congressional intent regarding whether private enforcement of a statute was permitted. It was toward that end that explicit rights-conferring language was deemed critical, on the assumption that only such definite language would be sufficient to indicate that Congress meant to allow individuals thus singled out to come to federal court for relief even though there was no express cause of action applicable.

*Gonzaga University* thus weakened the analytic distinction between rights and remedies that I have been stressing, suggesting that there may be instances when, because there is no remedy, there must not be a right either. Yet Section 1983, the great post-Civil War civil rights statute, was, as we have seen, enacted precisely to provide judicial redress for violations of federal rights—including, as *Thiboutot* held, statutory as well as constitutional rights—where the rights-creating document does not. Indeed, the text of the Constitution *only* confers rights; judicial remedies for violations of constitutional rights are grounded either in Section 1983, or, as in *Bivens* actions, inferred from the Constitution.

Even many constitutional provisions long enforced under Section 1983 would not meet the standard *Gonzaga University* borrowed from the implied right of action cases. The First Amendment, for example, has always been understood to create individual rights to

---

Rev. 735 (2003) (agreeing with my position in *Save Our Valley*); Charles Davant IV, *Sorcerer or Sorcerer’s Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 Wis. L. Rev. 613 (disagreeing with my position in *Save Our Valley*).

63. *Gonzaga Univ.*, 536 U.S. at 283, 287, 122 S. Ct. at 2275, 2277. As I noted in dissent in *Save Our Valley*, it is possible that *Gonzaga University* applies only to statutes grounded in the Spending Clause, and that the prior, less language-focused standard applies otherwise. *See Save Our Valley*, 335 F.3d at 961 n.13 (Berzon, J., dissenting); *see also* *Livadas v. Bradshaw*, 512 U.S. 107, 117, 114 S. Ct. 2068, 2075 (1994) (holding that a non-Spending Clause statute can create rights by structural implication); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618, 106 S. Ct. 1395, 1400–01 (1986) (same).

64. *Gonzaga Univ.*, 536 U.S. at 283, 122 S. Ct. at 2275.
freedom of speech, religion, and press. But the text of the Amendment is only that "Congress shall make no law... prohibiting the free exercise [of religion], or abridging the freedom of speech or of the press." In contrast, the Fourth Amendment does speak of "the right of the people to be secure in their persons." Applying the standard suggested in Gonzaga University, one might think that the First Amendment is not enforceable under Section 1983, as it does not contain "rights-creating language," while the Fourth Amendment is, because it does employ such language.

A more likely inference, I strongly suspect, is that the Court does not mean to indicate that traditionally-recognized constitutional rights, however articulated, are to be subjected to the language-based standards for rights-creation articulated in the private right of action cases and in Gonzaga University. A clue that this is the case is the Bivens anomaly: with all the retrenchment in the implication of judicial remedies, there has been no suggestion of which I am aware that Bivens is of questionable validity.

Instead, explicit in both the statutory private right of action cases and in the Section 1983 statutory rights cases culminating in Gonzaga University is a separation of powers concern, a determination that it is for Congress and not the courts to prescribe the remedies available for violations of federal statutes, while courts are the principal institutions charged with enforcement of constitutional rights. Gonzaga University also noted that, in the context of Section 1983 suits against state entities, federalism concerns arise as well. Quoting from Will, the Court stated in Gonzaga University that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government', it must make its intention to do so 'unmistakably clear in the language of the statute.'"65

In the private right of action context, in my view, the emphasis on separation of powers concerns has considerable force; at least once Congress has been told of the withdrawal of the background understanding that the federal courts will devise remedies for violations of congressionally-conferred rights. For earlier-enacted statutes, as some but not all of the more recent private right of action cases have recognized, any fair judgment regarding congressional intent must take into account the likely expectation that remedies did not need to be spelled out with precision because the courts would provide them where necessary.

Section 1983, however, is another matter entirely. That statute was, as we have seen, enacted precisely to ensure judicial remedies, and precisely because of a special concern with the need for federal remedies to "secure" federal rights against state infringement.

65. Id. at 286, 122 S. Ct. at 2277.
Section 1983, in other words, was passed to codify the "where there is a right, there is a remedy" maxim, precluding for cases within its reach the kind of retrenchment regarding the scope of federal judicial remedies that has occurred with regard to private causes of action generally. Any separation of powers analysis, consequently, must take into account that original, expressed congressional intent and give effect to it.

Further, protection of federal statutory rights is at bottom the protection of federal constitutional rights, given the Supremacy Clause of the Constitution. The legislative history of Section 1983 has been read to so reflect, and the addition of the term "laws" to the current version of Section 1983 can be explained precisely by the concern to make clear that Supremacy Clause violations, as well as others, are covered. 66

Section 1983, therefore, directly addressed the intended constitutional balance between the states and the federal government, without the need for elaboration in this regard by later Congresses. Rather, as long as a federal statutory enactment can be understood as creating a "right" in the functional sense I have described, no intention by the Congress that enacted the statute is pertinent to the question whether there is a cause of action under Section 1983. And in determining whether a statutory enactment has created a "right," just as constitutional language is, as I have shown, not determinative, so congressional language, rather than the actual attributes of the asserted right, is not terribly useful in deciding whether a particular statute is of the type covered by Section 1983.

66. See Cass R. Sunstein, Section 1983 and the Private Enforcement of Federal Law, 49 U. Chi. L. Rev. 394, 409 (1982) (concluding with respect to Section 1983, its predecessor statute of 1871, and relevant legislative history that: "It is no doubt true that Congress was primarily concerned with providing a remedy for constitutional violations and unlawful invasions of rights protected by civil rights laws. But it is consistent with the historical evidence to understand the underlying purposes as more general than that, reaching all violations of federal law. This conclusion is supported by the fact that the predecessor to section 1983 made laws other than the civil rights laws enforceable against the states at the time of the revision [of 1874]."). In Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 99 S. Ct. 1905 (1979), Justice Powell noted in a concurring opinion that while Congress may have intended to include protection of federal statutory rights in its 1871 legislation, the impression of the Commissioners appointed shortly thereafter to revise the nation's laws was that courts could conclude that "only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were . . . intended." Id. at 631-32 (Powell, J., concurring) (quoting Revision of the United States Statutes as Drafted by the Commissioners Appointed for That Purpose 362 (1872)). The addition of "laws" in the 1874 revision that created present Section 1983 eliminated this ambiguity identified by the Commissioners.
Of course, later Congresses can, with respect to particular statutes, decide that enforcement under Section 1983 should not be available. Well-developed doctrine, usually denominated as the Sea Clammers principle after the Supreme Court case in which it was announced, so recognizes, and sets out how to determine whether a later Congress intended for a particular statute to be enforced against state actors through means provided within the statute itself, rather than via Section 1983. That is the proper inquiry regarding the role of later-enacted statutes in limiting the application of the fundamental Civil Rights statute—did the later Congress withdraw the default Section 1983 remedy in favor of another? As repeals by implication are, traditionally, disfavored, the circumstances in which such withdrawal of the Section 1983 remedy should be, and have been, found are relatively rare.

Enforcing a right to educational privacy protected by a federal statute may seem far removed from enforcing, as Judge Rubin did in the Tangipahoa Parish case, the equal protection right to desegregated schools. But insofar as the basic issue addressed by Section 1983, the obligation of states to accord rights legitimately conferred upon citizens by the federal government, is concerned, the pertinent considerations differ little. Also, and critically, in most, although not all, instances, the individuals seeking to enforce federal statutory "rights" through Section 1983 are the least privileged and empowered among us—single parents seeking child support, as in Blessing, or indigent parents seeking health care for their children, as in Frew. So while the problems have changed, the need for remedies as well as rights to improve people’s lives endures. My conclusion, then, is that Section 1983 incorporated into federal law—for those more recent cases as well as for the school desegregation cases of the 1960s—the common law maxim proclaimed in Marbury, and removed it from the realm of judge-made rules, which can be modified or abandoned as times change.

The remedies implemented during Judge Rubin’s years on the bench filled some shameful holes in the enforcement of our laws and individual rights. While the issues brought to court today are different, and may be less cataclysmic to the individuals affected,

69. See, e.g., Blessing v. Freestone, 520 U.S. 329, 347–48, 117 S. Ct. 1353, 1362 (rejecting argument that Section 1983 was not available as a remedy because of remedies available in the statute providing the right and noting that: “Only twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983: in Sea Clammers . . . and Smith v. Robinson, 468 U.S. 992 (1984).”).
rights deprivation remains tantamount to the denial of justice. Resort to the courts for a remedy is a critical means of seeking redress in many circumstances. Where, as in applying Section 1983, judges have been accorded authority to provide remedies, it is our duty to do so, rather than leaving rights inchoate and abstract, without substance in real people's lives.

Examples like Judge Rubin's, with his legacy of 1,079 published opinions,\textsuperscript{70} loom large in our personal and judicial pantheons. The imperative becomes to draw strength from the past and channel, rather than succumb to, what the literary critic Harold Bloom calls the author's anxiety of influence, the apprehension "that greatness may be unable to renew itself, that one's inspiration may be larger than one's own powers of realization."\textsuperscript{71}

Justice Ginsburg last year concluded a lecture on "Four Louisiana Giants in the Law" with a quotation from Judge John Minor Wisdom's eulogy to Judge Rubin: "[W]ith his encyclopedic knowledge of the law and towering intellect, he was able to find means of redressing unfairness, within the bounds of legal propriety, when others might have despaired and yielded to circumstances apparently beyond their control."\textsuperscript{72} I have attempted in these remarks to show how the "bounds of legal propriety" have shifted for federal rights and remedies in the last thirty years. The more doctrine changes, however, the more evident it is how our task as federal judges remains the same: to find those means.

\textsuperscript{71} Harold Bloom, \textit{Genius: A Mosaic of One Hundred Exemplary Creative Minds} 6 (2002).