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MISINTERPRETING "SOUNDS OF SILENCE": WHY COURTS SHOULD NOT "IMPLY" CONGRESSIONAL PRECLUSION OF § 1983 CONSTITUTIONAL CLAIMS

*Rosalie Berger Levinson**

Despite the clear text of 42 U.S.C. § 1983, its promise to protect constitutional rights has been obfuscated by the theory that Congress, by enacting civil rights laws, has "impliedly" foreclosed the historic use of § 1983 to vindicate constitutional wrongdoing. Increasingly, plaintiffs are being denied their right to vindicate constitutional wrongdoing, either because the new "preempting" federal statute does not trigger individual liability or because it makes institutional liability more difficult to establish.

It is counterintuitive to believe that Congress, in an attempt to expand equality or due process, intended to cut off existing remedies for constitutional violations. Nonetheless, a growing number of federal appellate courts are invoking the "implied" foreclosure doctrine to curtail § 1983 litigation. For example, some circuits have held that Title IX of the 1972 Education Amendments, which prohibits sex discrimination in schools that receive federal financial assistance, should be understood to preclude a remedy under § 1983 for gender-based discrimination by state educators. The same issue arises whenever civil rights statutes create "overlapping" remedies for civil rights violations.

The Supreme Court is poised to review this analysis. It has agreed to hear the following question: "Does an implied right of action under Title IX of 1972 Education Amendments preclude constitutional claims under § 1983 to remedy sex discrimination by federally funded educational institutions?" After tracing the genesis and expansion of the doctrine, this Article provides the arguments for rejecting "implied" congressional foreclosure of § 1983 constitutional claims that should govern this case and future cases.

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INTRODUCTION

In 1803, Chief Justice John Marshall proclaimed in the landmark decision of *Marbury v. Madison*, that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[1] Since then, the U.S. Supreme Court has struggled with the question of when courts should recognize a remedy for the violation of rights. The Court has grown increasingly reluctant to imply "enforceable rights" from federal statutes in the absence of an unambiguous manifestation of congressional intent. However, this Article focuses on textual constitutional rights and 42 U.S.C. § 1983,[2] which explicitly provides a cause of action to remedy federal constitutional violations perpetrated "under color of state law."

Despite the clear text of § 1983, its promise to protect constitutional rights has been obfuscated by the theory that Congress, by enacting civil rights laws, has "impliedly" foreclosed the historic use of § 1983 to vindicate constitutional wrongdoing. It is counterintuitive to believe that Congress, in an attempt to expand equality or due process, intended to cut off existing remedies for constitutional violations. Nonetheless, a growing

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Ultimately, Justice John Marshall determined that, although William Marbury had a right to the judicial commission he sought, the U.S. Supreme Court could not hear his case as a matter of original jurisdiction. The Judiciary Act, which authorized such jurisdiction, was unconstitutional.

2. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 . . . .

42 U.S.C. § 1983 (2000).

number of federal appellate courts are invoking the "implied" foreclosure doctrine to curtail § 1983 litigation.

Increasingly, plaintiffs are being denied their right to vindicate constitutional wrongdoing, either because the new "preempting" federal statute does not trigger individual liability or because it makes institutional liability more difficult to establish. For example, some circuits have held that Title IX of the 1972 Education Amendments,[3] which prohibits sex discrimination in schools that receive federal financial assistance, should be understood to preclude a remedy under § 1983 for gender-based discrimination by state educators. The same issue arises whenever civil rights statutes create "overlapping" remedies for civil rights violations.[4] Congress does not specifically state that it is precluding the use of § 1983 to enforce constitutional claims, but federal courts are "inferring" that Congress has done so, contrary to established rules of statutory construction.

The Supreme Court first recognized the "implied" foreclosure doctrine in 1981 to curtail the expansive use of § 1983 to enforce federal statutes unrelated to civil rights.[5] Subsequently, in *Smith v. Robinson*,[6] the Court invoked the doctrine to hold that the Education of the Handicapped Act (EHA) preempted equal protection claims brought under § 1983.[7] The Court reasoned that this was a unique situation where use of § 1983 would destroy Congress's carefully crafted administrative scheme to identify and assist educationally handicapped children, and that it would subject local school districts to unintended attorney fee awards.[8] The Supreme Court has not rendered another constitutional preclusion decision in the twenty-four years since *Smith* was decided, but federal courts have increasingly misinterpreted and expanded its reasoning.[9] Further, many courts have confounded the question of whether § 1983 may be used to enforce newly created federal *statutory* rights with the question of whether a federal statute manifests congressional intent to preclude the historic use of § 1983 to vindicate federal *constitutional* rights.[10] Although the Supreme Court has made it increasingly more difficult to enforce federal statutory rights under

3. Title IX provides that "[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." 20 U.S.C. § 1681(a) (2000).

4. *See infra* Part III.B.

5. *See infra* Part I.

6. 468 U.S. 992 (1984).

7. *Id.* at 1009.

8. *Id.*

9. *See infra* Part III.

10. *See infra* Part III.

§ 1983,[11] these cases should not be read to breathe new life into the heavily criticized *Smith* decision.[12]

The Supreme Court is on the brink of deciding the validity of this doctrine in the context of a Title IX claim.[13] After tracing the genesis and expansion of the doctrine, this Article provides the arguments for rejecting "implied" congressional foreclosure of § 1983 constitutional claims that should govern this case and future cases. Part I of this Article traces the genesis of the preclusion doctrine that was initially used to prevent § 1983 from vindicating federal statutory violations. Part II explains the Court's misguided expansion of the congressional foreclosure theory in *Smith v. Robinson* to cut off § 1983 constitutional claims. Part III describes the circuit split over whether federal civil rights statutes, such as Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the 1972 Education Amendments, preempt constitutional claims brought under § 1983. Finally, Part IV explains why the implied congressional preclusion theory is ill-conceived and should be rejected when constitutional rights are implicated.

I. THE GENESIS OF IMPLIED CONGRESSIONAL PRECLUSION—FEDERAL STATUTORY RIGHTS

Congress enacted § 1983 during the Reconstruction Era to guarantee protection for the rights secured by the recently ratified Fourteenth Amendment—namely due process and equal protection.[14] The key concern was to provide an impartial federal forum for a state's violation of constitutional rights.[15] However, the text of § 1983 creates a remedy not only for constitutional violations, but also for the violation of rights secured by the laws of the United States.[16] Initially it was believed that § 1983 was limited to enforcing laws "providing for equal rights" or civil rights because 28 U.S.C. § 1343(3), which is the jurisdictional counterpart to § 1983, contains this limiting language.[17] Nonetheless, in 1980 the Supreme Court

11. *See infra* Part I.

12. *See infra* Part II.

13. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 2903 (2008); *see also infra* notes 108–15, 160–61 and accompanying text.

14. *See* Maine v. Thiboutot, 448 U.S. 1, 25 n.15 (1980) (Powell, J., dissenting).

15. *Id.* at 20.

16. *See supra* note 2. The original text of the Civil Rights Act of 1871 created a private cause of action only for the deprivation of constitutional rights. *Thiboutot*, 448 U.S. at 15. In 1874, Congress, in its comprehensive revision and codification of the United States statutes, added the phrase "and laws" to § 1 of the Civil Rights Act. *Id.* at 7. Although the statutory revisions were meant only to "clarif[y] and reorganize[] [existing law] without changing substance," *id.* at 8 n.5, when Representative Lawrence read the new provision on the floor of the House of Representatives, he stated that the revised provisions "possibly [show] verbal modifications bordering on legislation," *id.* at 7–8 (citing 2 CONG. REC. 825, 827 (1874)). Thus it was unclear whether Congress intended to substantively change the statute.

17. The statute provides that,

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of

ruled that "and laws" means precisely what it says: "Congress attached no modifiers to the phrase . . . ."[18] Thus, § 1983 provides a remedy for violation of all statutes, including the Social Security Act at issue in this case, even though this is not a law aimed at guaranteeing equal rights.[19]

In a stinging dissent, Justice Lewis Powell opined that state and local government would now be liable for violating dozens of federal statutes that Congress had enacted over the past half century, contrary to the original goal of § 1983, which was to vindicate civil rights violations.[20] Further, because the Court expressly held that attorney's fees could be recovered for statutory suits, plaintiffs had a strong incentive to sue under § 1983.[21]

One year later, the Supreme Court responded to this expansive interpretation of § 1983 by recognizing two exceptions to using § 1983 as a cause of action to vindicate violations of federal statutory rights:

1. Where the federal statute does not create specific enforceable rights, privileges, or immunities within the meaning of § 1983;[22] and

2. Where Congress has foreclosed such enforcement of the federal statute either explicitly *or implicitly* in the statute's remedial scheme.[23]

As to the first exception, it is well established that § 1983 provides only a cause of action—a vehicle for enforcing rights that have their source in the Constitution or a federal statute.[24] Thus, the reference to "enforceable rights, privileges, or immunities" in § 1983 focuses on whether Congress

> any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress *providing for equal rights* of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343(a)(3) (2000) (emphasis added). In *Chapman v. Houston Welfare Rights Organization*, the Supreme Court held that § 1343(3) did not give federal jurisdiction over violation of statutory rights that did not secure "equal rights." 441 U.S. 600, 603 (1979). Although the Court did not address the "and laws" language in § 1983, a concurring opinion by Justice Lewis Powell, joined by Chief Justice Warren Burger and Justice William Rehnquist, urged that "and laws" should be read as "no more than a shorthand reference to the equal rights legislation enacted by Congress." *Id.* at 624 (Powell, J., concurring).

18. *Thiboutot*, 448 U.S. at 4 ("[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.").

19. *Id.*

20. *Id.* at 22 (Powell, J., dissenting). Justice Powell pointed to historical evidence suggesting that the words "and laws" "was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress." *Id.* at 12. Justice Powell stated that the majority's interpretation ignored "the lessons of history, logic, and policy." *Id.* He then provided an appendix listing twenty-eight federal statutes that could now arguably subject states to § 1983 litigation. *Id.* at 34–37.

21. *Id.* at 24.

22. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

23. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

24. IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:20, 1–899 (1987).

has definitively created rights that may be enforced under § 1983. Initially, the Supreme Court exhibited a great willingness to find statutorily enforceable rights.[25] In *Livadas v. Bradshaw*, it broadly proclaimed that statutory rights claims should be "generally and presumptively available" under § 1983.[26]

However, in recent years, the Supreme Court has ratcheted up the test for finding federal statutory rights. It has rejected claims where the statutory requirements were considered too "vague or amorphous" to be judicially enforceable by private parties[27] or where plaintiffs could not show that they were the intended beneficiaries of the law.[28] Further, in *Gonzaga University v. Doe*,[29] the Court ruled that federal statutory claims cannot be privately enforced under § 1983 unless Congress manifests an intent to confer individual rights "in clear and unambiguous terms."[30] The Court

25. *See, e.g.*, Livadas v. Bradshaw, 512 U.S. 107, 133 (1994) (holding that the National Labor Relations Act was sufficiently clear and mandatory so as to create collective bargaining rights on behalf of employees); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 510–12 (1990) (holding that the Boren Amendment to the Medicaid Act, which required states to adopt reasonable and adequate rates for medical services, created enforceable rights on behalf of hospital providers); Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 432 (1987) (holding that the Brooke Amendment to the Housing Act conferred benefits on tenants that were "sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983").

26. *Livadas*, 512 U.S. at 133.

27. *See, e.g.*, Suter v. Artist M., 503 U.S. 347, 363–64 (1992) (holding that the requirement that states take "reasonable efforts" under the Adoption Assistance and Child Welfare Act was too vague and amorphous to create individually enforceable rights under § 1983).

28. Blessing v. Freestone, 520 U.S. 329, 340–41, 343 (1997) (holding that custodial parents whose children qualify for state child support under Title IV-D of the Social Security Act may not sue under § 1983 to redress deficiencies in a state's child support enforcement law because the plaintiffs could not show that the requirement was intended to benefit individual children and custodial parents, rather than simply providing a yardstick for the Secretary to measure the system-wide performance of a state's Title IV-D program).

29. 536 U.S. 273 (2002).

30. *Id.* at 290. The Court held that the Family Education Rights and Privacy Act, which prohibits educational institutions that receive federal funds from disclosing educational records without consent, lacked the kind of "rights-creating language" necessary to demonstrate congressional intent to create new rights because the provision focused on those regulated rather than on the individuals protected. *Id.* at 290. The nondisclosure provision spoke in terms of institutional policies and practices and mandated that recipient institutions "comply substantially" with the Act's requirement, thus negating congressional intent to confer individual rights. *Id.* at 287–88. Significantly, the Court reasoned that the question of whether a statute creates a private cause of action is identical to the initial question used to determine whether a statute creates rights enforceable under § 1983, namely whether "Congress intends to create new individual rights." *Id.* at 283–84, 286. Previously, the Supreme Court had emphasized that the § 1983 inquiry

> is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. In implied right of action cases, we . . . determine "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative

adopted a textualist approach, mandating that the "text must be 'phrased in terms of the persons benefited,'"[31] and that Congress "make its intention [to create rights] 'unmistakably clear in the language of the statute.'"[32]

In contrast, this Article discusses congressional foreclosure of a remedy for *explicit* federal constitutional claims, and thus there is no need to imply any "rights." Nonetheless, this history is important because it demonstrates that the foreclosure theory arose from the Court's concern that laws having nothing to do with civil rights could be enforced under § 1983. Further, the Court's adoption of a strict textualist approach militates against its use of a doctrine founded on judicial "inference" of unstated congressional intent.[33]

As noted, the second exception to the enforceability of federal statutes asks whether Congress explicitly or implicitly intended to foreclose the use of § 1983 to enforce the statutory rights.[34] Although Congress certainly has the authority to decide that § 1983 is not available as an enforcement mechanism for its newly created statutory rights, it has never made specific reference to § 1983 in any federal statute. However, the Supreme Court has held that courts may "infer" congressional intent to foreclose a § 1983 cause of action where a law has its own "comprehensive enforcement mechanisms."[35] The rationale is that Congress would not have intended to

source of *express* congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case.

Wilder, 496 U.S. at 508 n.9 (citations omitted); *see also* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 18–19 (1981) (reasoning that a plaintiff's failure to prove that a private cause of action may be inferred from a statute does not necessarily preclude a remedy under § 1983 based on that statute). Although, in *Gonzaga University v. Doe*, Justice Rehnquist noted the analytic overlap between implying causes of action and recognizing statutory rights, he acknowledged that the analysis is still distinct because a claim of implied rights requires a finding of a remedy within the statute, whereas § 1983 provides presumptive relief once a plaintiff establishes a privately enforceable right. 536 U.S. at 283–84.

31. *Gonzaga*, 536 U.S. at 284 (citing Cannon v. Univ. of Chi., 441 US. 677, 692 n.13 (1979)).

32. *Id.* at 286 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)). For a critique of this new, more stringent approach, see Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 HOUS. L. REV. 1417, 1419–20 (2003) ("[T]he *Gonzaga* decision places a heavy and unnecessary burden of proof on plaintiffs by requiring unambiguous and explicit evidence that Congress intended to create an individual right benefitting a class including the plaintiff.").

33. The Supreme Court's strong presumption against finding federal statutory rights is founded on separation of powers concerns, namely that legislative action, rather than judicial policy making, should govern. *See, e.g.*, *Gonzaga*, 536 U.S. at 300 (Stevens, J., dissenting) ("[O]ur implied right of action cases reflec[t] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." (citing *Wilder*, 496 U.S. at 509 n.9) (internal quotation marks omitted)); *see also supra* note 30.

34. *See supra* note 23 and accompanying text.

35. *Middlesex*, 453 U.S. at 19–20. The Court reasoned that the existence of express remedies in the environmental laws at issue demonstrated that Congress "intended to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21. More broadly, the Court explained that Congress can implicitly cut off recourse to § 1983 "[w]hen

permit plaintiffs to circumvent a carefully crafted remedial scheme by invoking § 1983 to enforce statutory rights.[36]

The Supreme Court initially indicated that it would not lightly imply congressional intent to cut off a § 1983 suit.[37] Thus, although plaintiffs carry the initial burden of proving that a federal statute creates enforceable rights, the burden then shifts to the government to demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement [of the right]."[38] Further, the Court indicated that the existence of administrative remedies in a statute should not alone preclude § 1983 litigation,[39] and that preclusion should be viewed as the "exceptional case."[40]

However, in recent years the Supreme Court has made it easier for the government to demonstrate implied foreclosure. For example, in *City of Rancho Palos Verdes v. Abrams*,[41] the Court assumed that the Telecommunications Act created rights on behalf of individuals,[42] but it ruled that the comprehensive nature of the Act demonstrated Congress's intent to foreclose the use of § 1983 to enforce these rights.[43] Although refusing to adopt a flat rule, the Court reasoned that where a law creates its own private judicial enforcement remedy, this is "ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983."[44] The Court conceded that, despite the availability of a judicial

the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 20. As the dissent opined, the Court ignored the explicit "savings clauses" in the statutes that preserved "any right which any person (or class of persons) may have under any statute or common law." *Id.* at 29 (Stevens, J., dissenting).

36. *Id.* at 20; *see also* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting) ("When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.").

37. Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423–25 (1987) (reasoning that nothing in the Brooke Amendment, or its legislative history, indicated congressional foreclosure and the remedial mechanism was not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of tenants' rights secured by federal law"); *see also* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 427–29 (1982) (suggesting several criteria that courts should use in implementing this exception to *Thiboutot*, such as whether the statute creates an independent cause of action against state officials or whether it demands consistency and coordination in enforcement).

38. *Wright*, 479 U.S. at 423; *see also Wilder*, 496 U.S. at 508 (holding that congressional intent to preclude must be found in the enactment).

39. *Wilder*, 496 U.S. at 522.

40. Livadas v. Bradshaw, 512 U.S. 107, 133 (1994); *see also Wilder*, 496 U.S. at 520 (asserting that "'[w]e do not lightly conclude that Congress intended to preclude reliance'" on § 1983 statutory claims (quoting *Wright*, 479 U.S. at 423–24)).

41. 544 U.S. 113 (2005).

42. *Id.* at 120.

43. *Id.* at 126–27.

44. *Id.* at 121. The Court distinguished earlier decisions permitting § 1983 claims as cases where the federal statute did not provide a private judicial or administrative remedy.

remedy in a statute, a "presumption" of foreclosure "can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983."[45] Nonetheless, this presumption appears to shift the burden onto plaintiffs to disprove "implicit" foreclosure, contrary to earlier Supreme Court rulings that imposed a heavy burden on the defendants to present specific evidence clearly demonstrating congressional intent to foreclose a § 1983 cause of action.[46] As discussed in Part III, some appellate courts have erroneously relied on *Rancho Palos Verdes* to justify their inference of congressional foreclosure of constitutional claims.

II. IMPLIED CONGRESSIONAL FORECLOSURE OF CONSTITUTIONAL CLAIMS: *SMITH V. ROBINSON*

The Supreme Court took the implied congressional foreclosure doctrine established in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*[47] one step further in 1984. In *Smith*, the plaintiff, a special education student suffering from cerebral palsy, alleged that he was denied equal educational opportunity because of his learning disabilities.[48] He

Id.; *cf. Wilder*, 496 U.S. at 522 (reasoning that a law's administrative remedies should not alone preclude a § 1983 cause of action).

45. *Rancho Palos Verdes*, 544 U.S. at 122. It is noteworthy that concurring opinions by five Justices urged a more cautious approach. Justice Stephen Breyer emphasized that "context, not just literal text" should be examined in assessing congressional intent with respect to a particular statute. *Id.* at 127 (Breyer, J., concurring). Justice John Paul Stevens similarly stated that legislative history, not just text, must be examined to determine whether a statute's "comprehensive and exclusive remedial scheme" impliedly foreclosed the § 1983 remedy, characterizing *Rancho Palos Verdes v. Abrams* as the "exceptional case." *Id.* at 129, 131 (Stevens, J., concurring) (emphasis omitted). On the other hand, the Court found that the "savings clause" in the Act, which *specifically* stated that this statute should not be construed to limit other available remedies, did not negate *implicit* preclusion of litigation under § 1983. *See id.* at 126.

46. *See supra* notes 37–40 and accompanying text. Justice Stevens, in his concurrence, opined that the Court was too quick to rebut the presumption of enforceability under § 1983, and he urged that preclusion be found only in exceptional cases. *See Rancho Palos Verdes*, 544 U.S. at 131 (Stevens, J., concurring).

The impact of *Rancho Palos Verdes* on the use of § 1983 to enforce federal statutory rights is already being felt in the lower courts. For example, in *A.W. v. Jersey City Public Schools*, 486 F.3d 791 (3d Cir. 2007), the court, relying primarily on *Rancho Palos Verdes*, reversed its earlier holding that a § 1983 damages action may be brought against public school officials to enforce rights under the Individuals with Disabilities Education Act (IDEA): "[T]he Supreme Court's discussion of the availability of § 1983 as a vehicle for redressing violations of federal statutory rights in *Rancho Palos Verdes* has tipped [the scales] definitively, and we are now convinced that our ruling in [*W.B. v.*] *Matula* is no longer sound." *Id.* at 799 (citation omitted). The court explained that because the IDEA includes an express, private means of redress, § 1983 relief to remedy violation of IDEA-created rights was unavailable absent some "'textual indication, express or implicit, that the [statutory] remedy is to complement, rather than supplant, § 1983.'" *Id.* at 802 (quoting *Rancho Palos Verdes*, 544 U.S. at 122) (alteration in original).

47. 453 U.S. 1 (1981)

48. Smith v. Robinson, 468 U.S. 992, 995 (1984).

sued for relief under two federal statutes, the EHA[49] and the Rehabilitation Act,[50] as well as under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The plaintiff was granted relief under the EHA by the lower courts. Because the EHA did not contain a fee provision, the plaintiff relied on his constitutional claims brought under § 1983 to secure attorney's fees.[51]

The Supreme Court rejected the § 1983 claim, reasoning that Congress intended the EHA to be the "exclusive avenue" for the vindication of the right to a publicly financed special education.[52] First, the Court noted that § 1983 could not be used to enforce federal statutory rights created under the EHA, because the Act provided its own comprehensive enforcement mechanism.[53] The Court then refused to recognize the equal protection claim, which was "virtually identical" to the statutory claim, holding that Congress also intended to preclude the use of § 1983 to enforce a constitutional right to equal educational opportunity.[54] The Supreme Court conceded that preclusion was a grave decision,[55] and it left open the possibility of pursuing due process claims where school districts fail to comply with the procedural requirements of the EHA, because the Act itself contained no provision for enforcement of the decisions made by administrative agencies.[56]

The need to avoid an award of attorney's fees dominated the Court's analysis. The majority cited the court of appeals' ruling that "Congress could not have intended its omission of attorney's fees relief [in the EHA] to be rectified by recourse to § 1988,"[57] and it repeated the concern that "fees would become available in almost every case" if litigants could obtain them by simply tacking on a § 1983 claim.[58] The majority conceded that the Supreme Court had permitted fees where plaintiffs succeeded on statutory claims, even when constitutional claims were left unaddressed, but this "was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is

49. 20 U.S.C. §§ 1400–1485 (2000).

50. 29 U.S.C. § 794 (2000).

51. *Smith*, 468 U.S. at 1005. Section 1988 provides that the prevailing party in an action prosecuted under § 1983 may be awarded reasonable attorney's fees. 42 U.S.C. § 1988 (2000).

52. *Smith*, 468 U.S. at 1009.

53. *See id.* at 1008 n.11.

54. *Id.* at 1009.

55. *Id.* at 1012 ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim.").

56. *Id.* at 1014 n.17; *see also* Robinson v. Pinderhughes, 810 F.2d 1270 (4th Cir. 1987) (holding that § 1983 may be used to enforce an administrative decision rendered under the Education of the Handicapped Act (EHA)); Manecke v. Sch. Bd., 762 F.2d 912, 919 (11th Cir. 1985) ("The plain language of the statute itself . . . suggests that Congress must not have intended the EHA to be the exclusive method to redress *denial of access* to that very mechanism.").

57. *Smith*, 468 U.S. at 1003.

58. *Id.* (footnote omitted).

dispositive."[59] Allowing fees here would be contrary to the rule that, to secure fees, the constitutional claim must be "reasonably related to plaintiff's ultimate success."[60]

In rejecting the plaintiff's Rehabilitation Act claim, which also would have provided fees, the Court suggested why the EHA does not contain a fees provision, namely "Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children."[61] It reasoned that Congress wanted to ensure a free appropriate public education, but at the same time limit the financial burden imposed on local government—allowing fees and damages would be contrary to this carefully constructed balance.[62] In essence, the majority echoed the defendant's concern that "petitioners simply are attempting to circumvent the lack of a provision for attorney's fees in the EHA by resorting to the pleading trick of adding surplus constitutional claims."[63]

Although the concern for fees was a driving force, the core holding of *Smith* is that plaintiffs who bring constitutional claims pursuant to § 1983 that are "virtually identical" to the statutory claims will be precluded if there is evidence that Congress intended the statute to serve as the exclusive remedy.[64] In *Smith*, the majority found that "Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute."[65] The Act required that "fair" and "adequate" hearings be conducted by the state and that "each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review."[66] The Court emphasized that allowing the § 1983 action would encourage circumvention of the carefully crafted procedural requirements set forth in the Act.[67] *Smith* mandates, then, both a determination that (1) the federal statutory claims are "virtually identical" to the constitutional claims, and (2) that the remedies provided in the statute indicate congressional intent to preclude a Constitution-based § 1983 claim.[68] Recovery under § 1983 is foreclosed only if both factors are satisfied.

59. *Id.* at 1007 (citing H.R. REP. NO. 94-1558, at 4 n.7 (1976)).

60. *Id.* at 1007 n.10. "[W]here it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley* [*v. Eckerhart*] . . . requires that fees not be awarded on the basis of those claims." *Id.* at 1009 n.12.

61. *Id.* at 1020.

62. *Id.* at 1021.

63. *Id.* at 1005.

64. *Id.* at 1009.

65. *Id.*

66. *Id.* at 1011 (citing 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415 (2000)).

67. *Id.* at 1011–12 ("No federal district court presented with a constitutional claim . . . can duplicate that process.").

68. *Id.* at 1013.

The dissent in *Smith* attacked the majority for its use of the congressional foreclosure doctrine, opining that there was no indication that Congress intended to restrict, rather than enlarge, rights available to children who were denied their right to an equal educational opportunity in public schools.[69] Congress apparently agreed that the Court had misconstrued its intent, and it responded swiftly by enacting the Handicapped Children's Protection Act, which provides that "[n]othing in the EHA shall be read to foreclose relief under any other federal law," thus, in essence, overturning the *Smith* holding.[70] Perhaps, in part, because of the sharp rebuke from Congress, the Supreme Court since 1984 has not invoked the congressional foreclosure doctrine to preempt plaintiffs from bringing constitutional claims under § 1983.[71] Several appellate courts, however, have misconstrued the maligned decision to broadly restrict civil liberties.[72]

III. THE CIRCUIT SPLIT ON IMPLIED CONGRESSIONAL FORECLOSURE

The issue of implied congressional foreclosure of constitutional claims has generated significant litigation and circuit splits. For example, courts are divided as to whether Title IX, which prohibits gender discrimination by federally funded educational institutions, should be interpreted to preclude § 1983 gender biased claims.[73] The U.S. Courts of Appeals for the First, Second, Third, and Seventh Circuits have held that, by enacting Title IX, Congress intended to partially or wholly "preempt" plaintiffs from bringing § 1983 equal protection claims alleging gender discrimination in education.[74] In contrast, the U.S. Courts of Appeals for the Sixth, Eighth, and Tenth Circuits have flatly rejected such arguments.[75] Similarly, the federal courts disagree as to whether Congress, when it amended Title VII

69. *Id.* at 1025 (Brennan, J., dissenting).

70. The Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified at 20 U.S.C. § 1415(*l*)), provides that, "Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution . . . ." The Act thus allowed EHA rights, as well as constitutional rights, to be enforced under § 1983. W.B. v. Matula, 67 F.3d 484, 493–94 (3d Cir. 1995); *cf.* A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007) (holding that the successor to EHA, the IDEA, is not enforceable under § 1983).

71. Surprisingly only nineteen Supreme Court decisions cite to *Smith* and none use its analysis to support congressional foreclosure of § 1983 constitutional claims. The Supreme Court has ruled that Title VII provides the exclusive remedy for federal employees alleging race discrimination in employment, thereby trumping a § 1981 claim. Brown v. Gen. Servs. Admin., 425 U.S. 820 (1976). However, this case did not involve constitutional claims or § 1983. *See* Zewde v. Elgin Cmty. Coll., 601 F. Supp. 1237, 1248 (N.D. Ill. 1984) (rejecting Title VII's preclusion of constitutional claims and distinguishing *Brown* as raising "no question of implied or express repeal of an existing and clear legislative grant of redress for constitutional violations; nothing akin to § 1983 had been on the books for federal employees").

72. *See infra* Part III.

73. *See* Education Amendments of 1972, 20 U.S.C. § 1681; *see also supra* note 3.

74. *See infra* notes 79–115 and accompanying text.

75. *See infra* notes 116–29 and accompanying text.

of the Civil Rights Act of 1964 to reach state and local government, intended to preclude government employees from bringing constitutional claims under § 1983.[76] This part explores these cases, as well as those raising the same issue regarding Title VI, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).

Ironically, Title IX, which on its face does not include *any* private cause of action,[77] has been interpreted by many appellate courts to preclude a § 1983 equal protection claim, whereas Title VII, which includes a comprehensive remedial scheme with both administrative and judicial remedies,[78] has generally not been found to supplant constitutional claims under § 1983. The thesis of this Article is that neither the text nor legislative history, nor any other theory of statutory construction, warrants a finding that Congress intended Title IX or Title VII to foreclose the § 1983 remedy.

A. *Congressional Foreclosure Under Title IX*

In *Bruneau ex rel. Schofield v. South Kortright Central School District*,[79] the Second Circuit held that Title IX precludes a separate count under § 1983 for violation of a student's equal protection rights. Eve Bruneau, a twelve-year-old student, was relentlessly harassed by her male classmates who snapped her bra straps, poked and pinched her body, and called her "whore," "bitch," and "lesbian."[80] Eve's teacher told her she would have to learn to handle the situation, and school authorities refused to transfer Eve to another class, despite her parents' repeated pleas for help.[81] To succeed under Title IX, Eve would have to prove that school officials acted with actual knowledge of the harassment and with deliberate indifference.[82] Further, she could not sue the school officials responsible for ignoring her sexual harassment claims.[83] In contrast, § 1983 creates individual liability

76. *See infra* notes 171–75 and accompanying text.

77. *See infra* notes 153–56 and accompanying text.

78. *See infra* notes 167–68 and accompanying text.

79. 163 F.3d 749 (2d Cir. 1998).

80. David Behrens, *An Unwanted Lesson in Law*, NEWSDAY (N.Y.), Nov. 18, 1996, at A5.

81. *Id.*

82. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–52 (1999) (holding that school districts are not liable for student-on-student sexual harassment unless they actually knew of and deliberately ignored redressing the violation); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (holding that students could not sue their school districts for their teachers' sexually harassing or abusive conduct unless the students could show that an "appropriate person" with actual knowledge of the harassment and with the ability to take corrective action was deliberately indifferent to that knowledge).

83. Officials in their personal capacities are not liable under Title IX. *See, e.g.*, Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262 (2000) (holding that members of a school board could not be sued in their individual capacities under Title IX in an action alleging sexual harassment by fellow students); Hartley v. Parnell, 193 F.3d 1263, 1270 (11th Cir. 1999) (holding that school superintendent could not be held liable under Title IX for a school teacher's alleged sexual abuse of a student); Kinman v. Omaha Pub.

for those who act "under color of state law,"[84] and it does not impose the onerous "actual knowledge" standard for entity liability.[85] Nonetheless, the court reasoned that the sexual harassment allegation under the Equal Protection Clause was identical to the Title IX claim, and thus it dismissed the § 1983 claim.[86] The court reasoned that where § 1983 and Title IX claims are based on the same factual predicate, "Title IX provides the exclusive remedial avenue."[87]

In *Williams v. School District*,[88] the Third Circuit similarly held that, because the plaintiff's constitutional claims were "subsumed" in the Title IX claims, the district court erred in addressing the constitutional claims brought under § 1983 once it ruled on the Title IX issue.[89] The court explained that Title IX's comprehensive scheme precluded litigants from bringing equal protection claims under § 1983, thereby applying the statutory "comprehensiveness" test to what was clearly a Constitution-based § 1983 claim.[90] Although the comprehensiveness of a statutory remedial scheme may be a factor in assessing congressional intent to

Sch. Dist., 171 F.3d 607, 610–11 (8th Cir. 1999) (finding that teacher involved in a sexual relationship with a student could not be held liable under Title IX in her individual capacity); Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1018–21 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998) (holding that only a grant recipient can violate Title IX, and thus neither principal nor assistant principal could be sued in their individual capacities).

84. A defendant acts under color of state law when he "ha[s] exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). Such government officials may be sued for damages in their personal capacity—subject, however, to an absolute or qualified immunity defense. Thus, if school officials (teachers, principals, or other employees) sexually harass or otherwise violate the equal protection or due process rights of other teachers or students, they may be held liable in their personal capacity for any resulting injury. *See* BODENSTEINER & LEVINSON, *supra* note 24, §§ 1:03, 1A:03–1A:18.

85. If a policy maker commits the wrongdoing, the entity is liable, even for a single decision of that official. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (holding that government entities are responsible for the acts and decisions of their employees with policy-making authority). For government wrongdoing by non–policy makers, plaintiff must prove that a policy or custom caused the deprivation of rights or that a failure to train, supervise, or screen demonstrated deliberate indifference to constitutional or federal statutory rights, which caused their violation. *See* BODENSTEINER & LEVINSON, *supra* note 24, §§ 1:6–1:7.

86. Bruneau *ex rel.* Schofield v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 757–58 (2d Cir. 1998).

87. *Id.* at 758.

88. 998 F.2d 168 (3d Cir. 1993).

89. *Id.* at 176.

90. *Id.*; *see also* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) (holding that a pregnant teen dismissed from her high school's chapter of the National Honor Society for engaging in premarital sex could not pursue her gender discrimination claim under § 1983 because Title IX's statutory scheme provided an enforcement mechanism comprehensive enough to preclude relief under § 1983); Kemether v. Pa. Interscholastic Athletic Ass'n, Inc., 15 F. Supp. 2d 740 (E.D. Pa. 1998) (holding that plaintiff's constitutional claims pursued through § 1983 are subsumed within her Title IX claim, and must be precluded).

foreclose Constitution-based § 1983 relief, it should not be viewed as a decisive factor, as it is when plaintiffs seek to use § 1983 to enforce statutory rights. When Congress carefully constructs a remedial scheme for enforcing statutory rights, it is easier to infer that that remedial scheme, and not § 1983, should be used.[91] Further, the court ignored the first of *Smith*'s two-pronged analysis—the requirement that the statutory and constitutional claims be "virtually identical"—in ruling that both due process and equal protection claims were preempted.[92]

The Seventh and Third Circuits have taken a somewhat more nuanced approach to the preclusion doctrine, adopting a "partial" preemption position. The Seventh Circuit initially held that all § 1983 litigation alleging sex discrimination by public educational institutions was preempted by Title IX. In *Boulahanis v. Board of Regents*,[93] the Seventh Circuit reasoned that Congress intended Title IX to be the exclusive regime for redress of sex discrimination in athletic opportunities at federally funded institutions, thereby foreclosing a § 1983 equal protection claim.[94] The court acknowledged that Title IX did not reach claims brought against individual school officials, but, rather, only the recipient of the federal financial assistance was a proper defendant.[95] Nonetheless, it upheld the district court's determination that the availability of a claim against the institution "preempts" all remedies for sex discrimination under § 1983.[96]

Subsequently, the Seventh Circuit reevaluated its conclusion regarding total preemption. In *Delgado v. Stegall*,[97] it held that Title IX foreclosed claims against Western Illinois University officials under § 1983, but it permitted the § 1983 suit to proceed against the teacher who sexually harassed the plaintiff.[98] The court found "no hint" in the "background or history of Title IX" that Congress intended to supplant relief sought against individual wrongdoers.[99] Indeed, in interpreting Title IX, the Supreme Court in *Gebser v. Lago Vista Independent School District*[100] stated that its decision did "not affect any right of recovery an individual may have . . . against the teacher in his individual capacity . . . under [§ 1983]."[101]

91. *See supra* Part I.
92. *See supra* Part II.
93. 198 F.3d 633 (7th Cir. 1999).
94. *Id.* at 640.
95. *Id.*
96. *Id.*; *see also* Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862–63 (7th Cir. 1996) (holding that a § 1983 claim based on the Equal Protection Clause is subsumed by Title IX because plaintiff alleged only one set of facts that could not give rise to two causes of action).
97. 367 F.3d 668 (7th Cir. 2004).
98. *Id.* at 675.
99. *Id.*
100. 524 U.S. 274 (1998).
101. *Id.* at 292.

Similarly, in *Doe v. Smith*,[102] the Seventh Circuit reaffirmed its holding that Title IX "'furnishes all the relief that is necessary to rectify the discriminatory policies or practices of the school itself.'"[103] It thus barred the § 1983 claims against the school district and against the officials sued in their official capacities whose challenged conduct related solely to their implementation of district policy.[104] Because Title IX already provided a cause of action against the school district, which was the recipient of federal financial assistance, the court held that any § 1983 claims against the school district were essentially identical and precluded.[105] However, the court then ruled that Title IX should not be interpreted to preempt § 1983 liability against a school official sued in his individual capacity whose misconduct could not be rectified under Title IX.[106] It reasoned that foreclosing individual liability claims would be contrary to Congress's goal in enacting Title IX, which was to avoid the use of federal funds to support discriminatory practices and to shield individuals against those practices.[107] Thus, although Title IX foreclosed the § 1983 claim against the school district, the dean who was charged with sexually harassing and abusing students was subject to liability under § 1983. Congress would not have intended to destroy a federal remedy for sex discrimination by school officials who cannot be sued under Title IX because this would insulate the individuals directly responsible for the injury.

In *Fitzgerald v. Barnstable School Committee*,[108] the case that will be heard by the Supreme Court this term,[109] the First Circuit relied on *Smith* for the proposition that a sufficiently comprehensive remedial scheme precludes constitutional claims that are virtually identical to those that could be brought under that regime.[110] The court reasoned that plaintiffs' equal protection claim, which challenged the school's failure to respond to reported peer-on-peer sexual harassment, was virtually identical to the claim brought under Title IX.[111] As to the second step in *Smith*, i.e., whether Congress intended the constitutional claims to be precluded by Title IX, the court decided that the comprehensiveness of Title IX's remedial scheme indicated that:

> Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions—and that is true whether suit is brought against the

102. 470 F.3d 331 (7th Cir. 2006).
103. *Id.* at 339 (quoting *Delgado*, 367 F.3d at 674).
104. *Id.* at 338.
105. *Id.* at 339.
106. *Id.* at 340.
107. *Id.* at 339.
108. 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 128 S. Ct. 2903 (2008).
109. The certiorari question is discussed *infra* notes 160–61 and accompanying text.
110. *Fitzgerald*, 504 F.3d at 179.
111. *Id.*

> educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response.[112]

At first blush, the First Circuit appears to have adopted the total preclusion approach. The court in *Fitzgerald* rejected plaintiffs' claims against the school's decision makers in their individual capacities, a cause of action not available under Title IX.[113] However, the court cautioned that its holding should not be read to imply total foreclosure of constitutionally based § 1983 actions. Citing the Seventh Circuit decision that would allow plaintiffs to sue individual school officials who were immediately responsible for the injury, the court noted, "[W]hen a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution, a claim premised on that independent wrong would not be 'virtually identical' to the main claim."[114] Because in this case the claims brought against individual members of the school committee who failed to remedy the peer-on-peer harassment were identical to the claims brought under Title IX against the institution, the court reasoned that the § 1983 claim was precluded by Title IX's remedial scheme.[115]

In contrast, the Sixth, Eighth, and Tenth Circuits have held that Title IX should never be interpreted to foreclose overlapping constitutional claims. In *Crawford v. Davis*,[116] the Eighth Circuit ruled that a student at the University of Central Arkansas, who alleged that she was subjected to sexual harassment and that school officials failed to respond to her complaints, was not precluded from bringing suit under § 1983 to enforce both rights under Title IX as well as claims alleging the denial of equal protection.[117] The court reasoned that because Title IX does not expressly authorize private suits and does not include administrative enforcement procedures, Congress did not design Title IX to supersede other remedies.[118] Subsequently, in 1999, the Eighth Circuit, like the Seventh Circuit, invoked *Gebser* to permit the plaintiff to bring § 1983 claims against her teacher for equal protection and due process violations.[119]

112. *Id.*
113. *Id.*
114. *Id.* at 180.
115. *Id.* Although plaintiffs sued the school superintendent, they did so only with respect to his role as the school committee's ultimate decision maker, not his capacity as an individual immediately responsible for the injury. *Id.*
116. 109 F.3d 1281 (8th Cir. 1997).
117. *Id.* at 1284.
118. *Id.* The court's conclusion that Title IX rights are also enforceable under § 1983 raises a more difficult question. Indeed, the U.S. Court of Appeals for the Eighth Circuit appears to be the only circuit that permits Title IX rights to be enforced under § 1983. *See supra* Part I.
119. Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999); *see also supra* notes 100–01 and accompanying text.

Similarly, the Tenth Circuit, in *Seamons v. Snow*,[120] held that Title IX did not preclude a football player from proceeding simultaneously under Title IX and under § 1983 to vindicate due process, equal protection, and First Amendment violations where school officials failed to take action against the perpetrators of a hazing incident and instead transferred the plaintiff to another school.[121] The plaintiff alleged that the coach fostered the hostile environment and that the school officials' response violated his constitutional rights.[122] The court asserted that Title IX should not be interpreted to supersede constitutional claims under § 1983 because Title IX does not have an express provision for a private right of action.[123] Neither the Eighth nor Tenth Circuit courts undertook an extensive analysis of why they were rejecting preclusion. Indeed, neither court discussed *Smith* and its "virtually identical" test.[124]

In contrast, the Sixth Circuit has provided an extensive analysis of the congressional foreclosure doctrine. It has long held that *Smith* should not impede plaintiffs from bringing constitutional claims independent of Title IX claims because there is no "legislative history indicating a congressional intention to preclude reliance on section 1983 as a remedy."[125] In 1996, the appellate court ruled that plaintiffs bringing due process, rather than equal protection, claims under § 1983 were not "preempted" by Title IX because the constitutionally based claims were not "virtually identical" to the Title IX claims.[126] Six years later, the Sixth Circuit addressed the more difficult question of whether plaintiffs bringing equal protection claims, closely analogous to Title IX claims, were precluded by the federal statute. In *Communities for Equity v. Michigan High School Athletic Ass'n*,[127] plaintiffs alleged that the Michigan High School Athletic Association discriminated against female high school athletes by scheduling girls' sports to play in disadvantageous, nontraditional seasons.[128] The district court found that the actions of the association violated both the Equal Protection Clause and Title IX. The Sixth Circuit affirmed the judgment based solely on the Equal Protection Clause violation.[129]

120. 84 F.3d 1226 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000).

121. *Id.* at 1233–34.

122. *Id.* at 1230.

123. *Id.* at 1233–34.

124. *See id.* (reasoning only that *Sea Clammers* resolved preemption of § 1983 statutory claims and thus was inapplicable to any constitutional violations).

125. Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723 (6th Cir. 1996).

126. *Id.* The court emphasized that both prongs of the *Smith v. Robinson* test must be met, requiring virtually identical constitutional and statutory claims and congressional intent "to preclude reliance on section 1983 as a remedy." *Id.*

127. 377 F.3d 504 (6th Cir. 2004).

128. *Id.* at 506–10.

129. *Id.* at 515.

The association filed a petition for certiorari, asking the Supreme Court to adjudicate the implied foreclosure question.[130] Instead, the Court vacated the decision and remanded for further consideration in light of its intervening decision in *Rancho Palos Verdes*.[131] As discussed in Part I, the Court in this case held that a federal statute that creates rights and its own private judicial enforcement remedy should be presumed to foreclose § 1983 enforcement of that statute.[132] *Rancho Palos Verdes* involved the analytically distinct question of whether § 1983 may be used to enforce federal *statutory*, not *constitutional*, rights.[133] It is unclear, then, why a remand was necessary.[134] The Court's action just adds to the confusion in the lower courts and appears to invite them to conflate congressional foreclosure of statutory claims under § 1983 with congressional foreclosure of constitutional claims.

On remand, the Sixth Circuit did not accept the bait. Instead, it carefully traced the history of *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*.[135] It explained that both *Sea Clammers* and *Rancho Palos Verdes* dealt with attempts to enforce federal statutory rights through the "and laws" language of § 1983, whereas the issue of congressional foreclosure of constitutional rights implicates the *Smith* analysis.[136] It reasoned that, where plaintiffs seek to enforce rights created by Congress, it is more difficult to argue that § 1983 can be invoked to provide remedies, such as damages and attorney's fees, that go beyond those authorized in the statute itself.[137] The court asserted that the "bedrock for the *Sea Clammers* principle" is "whether Congress intended the remedies in the substantive statute to be exclusive"

130. *See* Petition for Writ of Certiorari, Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity, 544 U.S. 1012 (2005) (No. 06-1038) (noting the circuit split on the issue).

131. *Michigan High Sch. Athletic Ass'n*, 544 U.S. 1012.

132. *See supra* notes 41–45 and accompanying text.

133. *See supra* Part I.

134. In *Rancho Palos Verdes*, Justice Antonin Scalia reasoned that, because the Telecommunications Act (TCA) had a thirty-day time frame for initiating enforcement actions, permitting suit to enforce TCA rights under § 1983 (where the statute of limitations is two to three years) would be fundamentally incompatible with this streamlined and expedited statutory scheme. He expressed concern about affording plaintiffs a "more expansive remedy under § 1983" than that available under the federal statute, and he cited *Smith* for the proposition that "[t]he crucial consideration is what Congress intended." *Rancho Palos Verdes*, 544 U.S. at 120–21 (internal quotation marks omitted). Arguably, a broad reading of Justice Scalia's concern could also envelop constitutional claims. As discussed *infra* in Part IV, such an expansive reading of *Rancho Palos Verdes* is unwarranted and ill-advised. In any event, it is difficult to see how plaintiffs' ability to bring an implied cause of action transforms Title IX into an "exceptional" statutory scheme that is "unusually comprehensive and exclusive." *Id.* at 131 (Stevens, J., concurring). Further, the concurring opinions stressed that "the availability of a private judicial remedy [does not] conclusively establish[] a congressional intent to preclude § 1983 relief." *Id.* at 122; *see also infra* note 164.

135. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 681–83 (6th Cir. 2006).

136. *Id.* at 683–84.

137. *Id.*

and reasoned that "[t]o allow the plaintiffs in such cases to benefit from the additional remedies available pursuant to § 1983 would create an end-run around the substantive statutory remedies and contravene Congress's intent."[138]

In contrast to the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes*, the court explained that plaintiffs in *Communities for Equity* were asserting violations of the Fourteenth Amendment, which would be actionable "even if Congress had never enacted Title IX."[139] The question, then, was "whether Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence when it enacted Title IX in 1972."[140] Answering this question in the affirmative should be much more difficult.[141] Based on this distinction, the court was not persuaded that *Rancho Palos Verdes* required it to alter its previous rejection of the congressional foreclosure doctrine.[142]

The Sixth Circuit panel proceeded to address the more appropriate question of whether *Smith* provided an impediment to bringing constitutional claims together with Title IX claims for the same wrongdoing. The court stressed that *Smith* required both a showing that the constitutional claims were "virtually identical" to the statutory claims *and* that Congress intended the constitutional grievances to be pursued only through that statute:[143] "Recovery under § 1983 is precluded by *Smith* only if both factors are satisfied."[144] Although the plaintiff's § 1983 claims alleging violation of the Equal Protection Clause could be viewed as "virtually identical" to the statutory claims, the court nonetheless refused to find congressional intent to preclude use of § 1983 to enforce those claims.[145] It reasoned that there was no evidence that Congress intended Title IX to be the exclusive remedy for an equal protection violation, but not a due process violation, and thus the "preemption" argument failed with

138. *Id.* at 684.

139. *Id.*

140. *Id.*

141. *See* Zewde v. Elgin Cmty. Coll., 601 F. Supp. 1237, 1246 (N.D. Ill. 1984) ("It is one thing to say, as the Supreme Court did in . . . [*Sea Clammers*], that a comprehensive and specific statute like the [Federal Water Pollution Control Act] demonstrates implicit congressional intent to repeal the § 1983 right of action for violations of that statute. It is quite another thing to say . . . that the comprehensive Title VII framework demonstrates implicit Congressional intent to repeal the § 1983 right of action for concurrent violations of the Constitution.").

142. *Cmtys. for Equity*, 459 F.3d at 684.

143. *Id.* at 685 (internal quotation marks omitted).

144. *Id.* (citing Smith v. Robinson, 468 U.S. 992, 1009 (1984)); *see also* Beth Burke, Note, *To Preclude or Not to Preclude? Section 1983 Claims Surviving Title IX's Onslaught*, 78 WASH. U. L.Q. 1487, 1512 (2000) (noting that some courts fail to properly apply the "virtually identical" prong of the *Smith* test by "combin[ing] all the alleged constitutional violations without analyzing each claim separately under the *Smith* test").

145. *Cmtys. for Equity*, 459 F.3d at 685.

regard to both constitutional claims.[146] It also cited with approval the Eighth and Tenth Circuit holdings that Title IX's remedial scheme is not comprehensive enough to permit an inference of congressional preemption.[147] The contrary holdings from the Second, Third, and Seventh Circuits failed to distinguish *Sea Clammers*, which concerned application of § 1983 to enforce federal statutory law, from the question of the availability of a § 1983 remedy to enforce independent constitutional rights.[148]

The Sixth Circuit did not address the "partial" preclusion position adopted by the Seventh Circuit, which allows individual liability claims under § 1983 against those most directly responsible for the wrongdoing, while precluding suit against the entity.[149] Partial preclusion suffers from the same statutory interpretation problem as total preclusion. It insulates public school districts that lack "actual knowledge" of constitutional wrongdoing, even where policy makers cause the injury or school officials act with "deliberate indifference" to constitutional rights violations, thereby triggering entity liability under § 1983.[150] It is difficult to fathom that Congress, in its attempt to ensure equal educational opportunity, intended to cut off an existing, more effective remedy, even if the claims against the entity under Title IX are "virtually identical" to the equal protection claim brought under § 1983. In light of the reported increase in sexual harassment of students by fellow students and teachers,[151] the partial preclusion doctrine creates minimal deterrence and threatens to leave many

146. *Id.* at 687 ("We have found no decision, either by the Supreme Court or our sister circuits, holding that Congress intended Title IX to be the exclusive remedy for one claim but not another . . . .").

147. *Id.* at 688.

148. *Id.* at 689.

149. *See supra* notes 97–107 and accompanying text.

150. *See, e.g.*, Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004) (holding that Title IX foreclosed § 1983 claims against a state university that lacked actual knowledge of a teacher's sexual harassment); *cf.* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1135 (9th Cir. 2003) (agreeing "with . . . other circuits that have considered similar issues that[, where school district is sued for an equal protection violation,] the plaintiffs must show either that the defendants intentionally discriminated or acted with deliberate indifference").

A proposed amendment to Title IX would change the standard of liability for sexual harassment victims suing under Title IX to require only "constructive" notice—where an entity knows or should know of the conduct and yet fails to take corrective action. The Fairness and Individual Rights Necessary to Ensure a Stronger Society (FAIRNESS) Act (Civil Rights Act of 2008), H.R. 5129, 110th Cong. §§ 101, 111–12 (2008).

151. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998) ("The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience."); Dawn A. Ellison, Comment, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2051–52 (1997) (citing numerous findings that sexual harassment is "disturbingly prevalent in our nation's school systems").

victims without an effective civil rights remedy, thereby perverting the goals of the congressional enactment.[152]

The Sixth Circuit in *Communities for Equity* placed great emphasis on the fact that, unlike the statutes in *Sea Clammers* and *Rancho Palos Verdes*, which explicitly designated judicial remedies, Title IX contains no express remedy other than a funding cutoff for noncompliant educational institutions.[153] In *Cannon v. University of Chicago*,[154] the Supreme Court found an "implied" cause of action under Title IX for plaintiffs who have been discriminated against on the basis of sex.[155] However, the Sixth Circuit reasoned that, in ascertaining congressional intent to preempt, the inquiry should be "focused on the statute itself" rather than the judicially created right of action.[156] Further, it noted that, when the Supreme Court in *Cannon* found an implied private cause of action under Title IX, it examined the legislative history and concluded that Congress did not intend for the statutory remedy—funding termination—to be the exclusive avenue for relief.[157] The second prong of *Smith* requires some showing of congressional intent to foreclose a § 1983 remedy, and this legislative history demonstrated that Congress did not intend to cut off alternative ways to remedy gender bias.[158] As the Sixth Circuit explained, the question under *Smith* is "whether Congress intended to create an enforcement scheme so comprehensive that it could serve as the *exclusive* avenue for relief, thus precluding claims under § 1983."[159] Thus, even though the Court in *Cannon* implied a private cause of action from "congressional silence," this does not support implied foreclosure of constitutional claims under § 1983.

152. *See* Erwin Chemerinsky & Catherine Fisk, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 792–93 (1999) (arguing that the court should adopt the employer liability standard of Title VII because of the nondelegable duty of schools to protect children from discrimination and the minimal deterrence the actual notice standard has in the educational context); Meghan E. Cherner-Ranft, Comment, *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891 (2003) (arguing that because Title IX provides inadequate relief for plaintiffs in sexual harassment and sex discrimination suits, it should not be read to preclude suit under § 1983).

153. *See* 20 U.S.C. § 1682 (2000).

154. 441 U.S. 677 (1979).

155. *Id.* at 689; *see also* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72–73 (1992) (extending the implied cause of action to include a claim for monetary damages).

156. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 689–90 (6th Cir. 2006).

157. *Cannon*, 441 U.S. at 709–12.

158. *See Cmtys. for Equity*, 459 F.3d at 690–91; *see also* Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997) ("[T]he [*Cannon*] Court has indicated that the sole express enforcement mechanism contained in Title IX is not exclusive."); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723 (6th Cir. 1996) (noting that in *Cannon* the "Court concluded that implying a private right of action would . . . complement . . . the public remedy explicitly created in the statute").

159. *Cmtys. for Equity*, 459 F.3d at 690–91.

As noted, the Supreme Court is poised to review this analysis. It has agreed to hear the following question: "Does an implied right of action under Title IX of 1972 Education Amendments preclude constitutional claims under 42 U.S.C. § 1983 to remedy sex discrimination by federally funded educational institutions?"[160] In finding congressional intent to foreclose § 1983 constitutional claims, the First Circuit relied on the "comprehensiveness of Title IX's remedial scheme—especially as embodied in its implied private right of action."[161] As framed, the certiorari question focuses on whether congressional intent to provide the exclusive means of relief can be implied from a statute that itself contains no express private remedy at all.

The thesis of this Article is that, even where a statute includes explicit administrative and judicial remedies, such as Title VII, this should not lead courts to infer congressional intent to cut off a § 1983 remedy where federal constitutional rights have been violated. The Court in *Rancho Palos Verdes* stated that where the federal statute creates explicit judicial remedies, it will presume congressional intent to foreclose the use of § 1983.[162] Significantly, however, *Rancho Palos Verdes* addressed only the question of whether § 1983 can be used to enforce federal statutory rights where the statute already has an explicit private remedy that is sufficiently comprehensive so as to permit an inference that Congress intended that remedy to be exclusive.

Permitting statutorily created rights to be enforced only through statutory remedies, which Congress has carefully constructed, is understandable. However, applying *Rancho Palos Verdes* and its presumption of preclusion to hold that comprehensive federal statutory remedies foreclose a historically recognized remedy for constitutional violations ignores the fact that the *Smith* inquiry is and should remain distinct.[163] A broad reading of *Rancho Palos Verdes* would mean that plaintiffs pursuing constitutional claims of race or sex discrimination against their government employers would be presumptively "preempted" by Title VII, because this statute, unlike Title IX, contains express administrative and judicial remedies.[164]

160. *See supra* note 108 and accompanying text.

161. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 179 (1st Cir. 2007).

162. *See supra* notes 41–45 and accompanying text. This decision reinforced the already well-accepted view that the express judicial remedy under Title VII, as well as the implied judicial remedy under Title IX, precludes a claim under § 1983 to vindicate Title VII or Title IX rights.

163. *See supra* notes 139–44 and accompanying text.

164. As indicated, *see supra* note 134, such a broad reading of *Rancho Palos Verdes* may not be warranted in light of the concurring opinions. Justice Breyer's concurrence emphasized that the TCA involved "deferential consideration[s] of matters within an agency's expertise." Rancho Palos Verdes v. Abrams, 544 U.S. 113, 128 (2005) (Breyer, J., concurring). In contrast, it is clear that because the Supreme Court implied a private cause of action under Title IX, Congress did not intend to rely solely on agency expertise, but rather presumed that enforcement by private attorneys general was permissible. Justice Stevens stated that he would foreclose § 1983 remedies for federal statutory rights only in

As discussed in the next section, inferring that Congress "intended" this result when it sought to expand the civil rights of government employees is ludicrous.

B. *Congressional Foreclosure Under Title VII*

Title VII, which prohibits employment discrimination on the basis of race, color, sex, religion, and national origin, was extended to cover government employers in 1972.[165] Like Title IX, Title VII does not allow for individual liability claims.[166] In addition, it imposes caps on damages,[167] and it has stringent filing and administrative agency exhaustion requirements.[168] Plaintiffs often bring § 1983 claims where Title VII deadlines have not been met or where they seek to hold individual government officials liable for sexual or racial harassment and discrimination.[169] Because of the comprehensive nature of Title VII's remedial scheme, the use of § 1983 to enforce Title VII rights has been rejected by most courts.[170] A few courts have gone further. They have relied on *Smith* to disallow § 1983 claims to enforce constitutional rights where such claims are "so tied up with their cause of action under Title VII

the most exceptional cases, and he also indicated that the TCA was such a case because the Act was tailored to foster an expedited review process that would not be available under § 1983. *Id.* at 129–32 (Stevens, J., concurring). Further, Justice Stevens emphasized that legislative history was essential. *Id.* The legislative history of Title VII in no way suggests preclusion of constitutional claims. *See infra* notes 173, 175 and accompanying text.

165. 42 U.S.C. § 2000e(a) (2000) defines the term "person" to include "governments, governmental agencies [and] political subdivisions," as well as their agents.

166. Although not explicitly in the text, the appellate courts have unanimously ruled that Congress did not contemplate individual liability. *See, e.g.*, Dearth v. Collins, 441 F.3d 931, 933 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 153 (2006); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1179 (9th Cir. 2003); Mandell v. County of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003); Worth v. Tyer, 276 F.3d 249, 262 (7th Cir. 2001).

167. *See* 42 U.S.C. § 1981a(b)(3). The cap on compensatory and punitive damages, which excludes back wages and interest, as well as other relief available under Title VII before the damage remedy was added in 1991, goes from $50,000 to $300,000 depending upon the number of employees.

168. *See id.* § 2000e-5(e). A charge of discrimination must be filed with the Equal Employment Opportunity Commission within 180 days, or 300 days if the state in which the discrimination took place has a "deferral agency." In addition, a suit must be filed in court within 90 days of receipt of a right-to-sue letter from the EEOC. *Id.* § 2000e-5(f)(1); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165, 2169 (2007) (holding that a challenge to an employee's paycheck, which reflects past discriminatory salary decisions by gender-biased supervisors, is time-barred unless an intentionally discriminatory pay decision occurred within 180 days of the filing of an EEOC complaint).

169. In addition, plaintiffs may seek to avoid the caps on compensatory and punitive damage awards. *See supra* note 167.

170. *See, e.g.*, Lakoski v. James, 66 F.3d 751, 755 (5th Cir. 1995) (noting that several circuits have agreed that "Title VII's comprehensive remedial scheme precludes § 1983 suits based upon violations of Title VII rights").

that they are, in the Court's view, nearly unidentifiable as discrete claims."[171]

However, the majority of courts have rejected the argument that Congress, by extending Title VII to reach government employers, intended to foreclose the historic use of § 1983 by victims of unconstitutional discrimination.[172] The Seventh Circuit, for example, closely examined the legislative history of section 2 of the Equal Employment Opportunity Act of 1972 and found nothing to suggest congressional intent to displace the

171. Torres v. Wis. Dep't of Health & Soc. Servs., 592 F. Supp. 922, 930 (E.D. Wis. 1984); *see also* Morris v. Oldham County Fiscal Court, 201 F.3d 784, 794–95 (6th Cir. 2000) (holding that a plaintiff who claims he was retaliated against for filing suit under Title VII can only pursue relief under Title VII because Congress did not intend for this violation to provide the basis for a § 1983 First Amendment retaliation claim; rather, Congress chose to limit Title VII liability to employers only, and a plaintiff cannot use § 1983 to circumvent Congress's intent through an individual liability lawsuit); Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995) (noting that plaintiff "cannot bring an action under § 1983 for violation of her Fourteenth Amendment rights because [she] originally could have instituted a Title VII cause of action"); Arendale v. City of Memphis, No. 05-2190B, 2006 WL 3053402, at *8 (W.D. Tenn. Oct. 24, 2006) ("'[W]here the plaintiff asserts that [he] has been retaliated against for filing a complaint under Title VII, [his] sole federal remedy is the cause of action provided for under Title VII.'" (alterations in original) (quoting *Morris*, 201 F.3d at 794–95)); Breech v. Scioto County Reg'l Water Dist. #1, No. 1:03CV360, 2006 WL 2422924, at *8 (S.D. Ohio Aug. 21, 2006) (also quoting *Morris*, 201 F.3d at 794–95); Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 265, 278–87 (1987) (discussing *Torres* and its progeny and explaining that the court incorrectly relied on *Brown v. General Service Administration*, 425 U.S. 820 (1976), which held that Title VII was the exclusive remedy for federal employees, thereby defeating a § 1981 claim, and *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), which held that § 1985(3) could not be invoked to redress violations of Title VII—because neither involved § 1983).

172. Booth v. Maryland, 327 F.3d 377, 383 (4th Cir. 2003) (finding that a § 1983 claim is not preempted by a Title VII claim and that "'[a]lthough discrimination claims against municipal employers are often brought under both Title VII and the equal protection clause (via [S]ection 1983), the two causes of action nonetheless remain distinct'" (quoting Thigpen v. Bibb County, Ga. Sheriff's Dep't, 223 F.3d 1231, 1239 (11th Cir. 2000))); *Thigpen*, 223 F.3d at 1237–39 (holding that Title VII is not the exclusive remedy for public sector employment discrimination and thus a § 1983 equal protection claim may proceed alongside a Title VII employment discrimination claim); Southard v. Tex. Bd. of Criminal Justice, 114 F.3d 539, 548–50 (5th Cir. 1997) (holding that Title VII does not preclude female correctional officers from asserting sexual harassment and sex discrimination claims under § 1983, even if the claims arose from the same facts as officers' Title VII claims because the Constitution provides rights independent of Title VII to be free from discrimination by public employers); Annis v. County of Westchester, N.Y., 36 F.3d 251, 254–55 (2d Cir. 1994) (holding that Congress did not intend to make Title VII the exclusive remedy for employment discrimination claims, and thus such claims can proceed without satisfying the procedural requirements of Title VII); Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994) (reasoning that nothing in the Civil Rights Act of 1991 or its legislative history demonstrates that Congress intended, by creating a damage remedy for Title VII, to supplant § 1983); Notari v. Denver Water Dep't, 971 F.2d 585, 587–88 (10th Cir. 1992) (holding that a § 1983 claim may be independent of Title VII even if the claims arose from the same factual allegations and even if the conduct violates both § 1983 and Title VII).

existing § 1983 remedy for Fourteenth Amendment violations.[173] Further, the Civil Rights Act of 1991, which expanded Title VII to provide a limited damage remedy for intangible injury,[174] such as emotional distress, should not be interpreted to preempt § 1983's uncapped damage remedy. As the Eleventh Circuit has explained, it would be perverse to conclude that Congress, while enlarging remedies under Title VII, simultaneously intended silently to extinguish the remedy that § 1983 had provided for government employees for many years.[175]

The Supreme Court's recent decision in *CBOCS West, Inc. v. Humphries*,[176] lends support to the view that Congress, in enacting Title VII, did not intend to foreclose existing remedies. In arguing against recognition of a retaliation claim under § 1981, a post–Civil War provision that broadly prohibits race discrimination in the making and enforcement of contracts,[177] the defendants contended that permitting retaliation claims under § 1981 would allow plaintiffs to circumvent Title VII's specific remedial mechanism. The Supreme Court rejected the "overlap[ping]" claims concern, specifically noting that "'Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.'"[178] Although § 1983, unlike § 1981, does not create substantive rights, the Supreme Court's discussion of Congress's purpose in enacting Title VII provides a powerful argument against "implied" foreclosure of § 1983 constitutional claims.

The ramifications of permitting congressional foreclosure of § 1983 constitutional claims where Congress enacts explicit civil rights legislation go beyond Title IX and Title VII. For example, Title VI prohibits race-based discrimination by recipients of federal financial assistance.[179] Title VI provided the model for Title IX, and the two laws are parallel except that Title VI prohibits race discrimination, not sex discrimination, and applies to all programs receiving federal funds, not only education programs.[180] Specifically in the context of preclusion, the Seventh Circuit ruled in *Doe v.*

173. Alexander v. Chi. Park Dist., 773 F.2d 850, 855 (7th Cir. 1985) ("Congress intended to retain preexisting remedies."); *see also* Levit, *supra* note 171, at 287–88 (criticizing the preemption theory as unwarranted by the congressional history of Title VII and positing that, "Congress contemplated and consciously rejected amendments which would have made Title VII the exclusive remedy for unlawful employment practices").

174. *See supra* note 167.

175. Johnson v. City of Fort Lauderdale, 114 F.3d 1089, 1091–92 (11th Cir. 1997), *superseded on other grounds on reh'g*, 148 F.3d 1228 (11th Cir. 1998) (reasoning that Congress, in enacting the Civil Rights Act of 1991, did not implicitly render Title VII the exclusive remedy for employment discrimination claims, and thus race discrimination allegations could be pursued under § 1983).

176. 128 S. Ct. 1951 (2008).

177. 42 U.S.C. § 1981 (2000).

178. *CBOCS*, 128 S. Ct. at 1960 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974)).

179. 42 U.S.C. §§ 2000d to d-7.

180. *See id.*; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

Smith that Title VI provides "adequate statutory recourse for the alleged discrimination," and thus the plaintiff's § 1983 claim against the school district, alleging that the district "generally turned a blind eye to [Dean of Students'] abuse of African American boys" in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, was foreclosed.[181]

Other courts have interpreted the ADEA and the ADA to foreclose equal protection claims brought under § 1983.[182] Because claims of age or disability discrimination trigger only rational basis review under the Equal Protection Clause,[183] this doctrine is invoked less frequently and has fewer consequences. Nonetheless, these cases demonstrate how dangerous the

181. Doe v. Smith, 470 F.3d 331, 334, 338 (7th Cir. 2006). The court focused primarily on the Title IX claims brought by Doe, but preceded its discussion by stating that its analysis applied equally to Title VI. *Id.* at 338. As discussed *supra* notes 102–07 and accompanying text, the U.S. Court of Appeals for the Seventh Circuit, while precluding the § 1983 suit against the district and school officials sued in their official capacities, permitted the individual capacity § 1983 suit against the dean charged with sexually harassing and abusing African American boys to go forward. In the context of a Title VI action joined with a § 1983 equal protection claim, the court in *Williams v. Wendler*, 530 F.3d 584 (7th Cir. 2008), reasoned,

> When Congress enacts a comprehensive scheme for enforcing a statutory right that is identical to a right enforceable under 42 U.S.C. § 1983, which creates a civil remedy for violations of federal rights (including constitutional rights) under color of state law, the section 1983 lawsuit must be litigated in accordance with the scheme.

Id. at 586; *see also* Travis v. Folsom Cordova Unified Sch. Dist., No. 2:06-CV-2074, 2007 WL 529840, at *6 (E.D. Cal. Feb. 20, 2007) (holding that "Title VI subsumes § 1983 claims which fall within Title VI's prohibitions"); Alexander v. Underhill, 416 F. Supp. 2d 999, 1006 (D. Nev. 2006) ("[T]his court concludes that Title VI is sufficiently comprehensive so as to evince the congressional intent to foreclose a section 1983 remedy.").

182. *See, e.g.*, Grey v. Wilburn, 270 F.3d 607, 610 (8th Cir. 2001) (holding that, where plaintiff's § 1983 claim was predicated on the same factual allegations as his Americans with Disabilities Act and Rehabilitation Act claims, the court would not recognize a separate and independent claim under the Equal Protection Clause); Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998), *abrogated on other grounds by* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000), *cert. granted and judgment vacated*, 528 U.S. 1110 (2000) (holding that age discrimination claims brought under § 1983 were preempted by the Age Discrimination in Employment Act of 1967 (ADEA) because this Act provides a comprehensive statutory scheme within which to address age bias complaints); Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1367–71 (4th Cir. 1989) (holding that the detailed procedures under the ADEA foreclose an equal protection claim brought under § 1983); Cisneros v. Colorado, No. 03CV02122, 2005 WL 1719755, at *8 (D. Colo. July 22, 2005) (finding that a claim of age discrimination brought pursuant to Section 1983 is preempted by the ADEA); Cataldo v. Moses, No. 02-2588, 2005 WL 705359, at *15 (D.N.J. Mar. 29, 2005) (concluding that the ADEA precludes a claim brought under the Equal Protection Clause); George v. Kan. State Univ., No. 90-2274-0, 1991 WL 205024 (D. Kan. Sept. 9, 1991) ("[T]he Fourth Circuit carefully examined the provisions of the ADEA [in *Zombro*] and concluded that they demonstrated congressional intent to foreclose age discrimination claims under section 1983. Although not bound by *Zombro*, th[is] court finds the reasoning therein persuasive and adopts it in full." (citation omitted)).

183. Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 328–30 (1993) (applying rational basis analysis to a law that discriminated against the mentally retarded); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (applying rational basis analysis to age bias claim).

implicit foreclosure doctrine is in that it may be used to trump individual or entity claims for irrational age or disability discrimination.

IV. WHY IMPLIED CONGRESSIONAL PRECLUSION OF CONSTITUTIONAL CLAIMS SHOULD BE REJECTED

To critique the judicially created congressional preclusion doctrine, it is important to understand why the Supreme Court originally adopted it and how it has strayed from those initial underpinnings. As this Article explains, the Supreme Court created the congressional preclusion doctrine for two reasons. First, it sought to rein in the use of § 1983 to enforce non–civil rights statutes based on its belief that Congress never intended § 1983 to be used in this way.[184] Second, in light of the vast expansion of the federal bureaucracy, including dozens of federal laws intended to be implemented by state and local governments, the Supreme Court feared that a broad interpretation of § 1983 would subject those governments to significant liability.[185] Growing concerns based on federalism and separation of powers have led the Supreme Court in recent years to cut back on the use of § 1983 to enforce federal statutes. However, as this section explains, neither separation of powers, reflected in rules of statutory construction, nor federalism, justifies preclusion of § 1983 constitutional claims.

The Supreme Court's decision in *Smith* to extend implied foreclosure to include constitutional claims was ill-conceived in light of the historic purpose of § 1983, which was to vindicate constitutional violations perpetrated under color of state law.[186] When Congress seeks to expand civil rights, it is counterintuitive to believe that Congress intends to foreclose this historic use of § 1983. When the judiciary "infers" this, it violates separation of powers. It engages in a form of policy making that belongs to the legislative branch. The *Smith* opinion was in large part motivated by the narrow concern that plaintiffs should not secure attorney's fees by simply adding "surplus" constitutional claims.[187] The Court suggested that Congress likely purposefully excluded a fee provision in the EHA so as to conserve resources for educating needy children.[188] Congress's swift reversal of *Smith* demonstrates that courts should tread warily when interpreting modern civil rights statutes to foreclose § 1983

184. *See supra* Part I.
185. *See supra* Part I.
186. *See supra* notes 14–15 and accompanying text.
187. *See supra* notes 57–60 and accompanying text.
188. *See supra* notes 61–62 and accompanying text. The fees question is not an issue when claims are brought under Title IX or Title VII because both include their own fee provision: 42 U.S.C. § 2000e-5(k) (2000) allows fees for the "prevailing party" in a Title VII action; 42 U.S.C. § 1988(b) permits fees in suits pursued under various civil rights provisions, including § 1983, Title IX, and Title VI.

constitutional litigation.[189] Although Congress may expressly state that its statutory remedy must be used in lieu of § 1983, the doctrine of "implied" foreclosure is a usurpation of legislative power.[190]

Further, implied foreclosure of constitutional claims is contrary to accepted rules of statutory construction. In his dissent to *Smith*, Justice William Brennan acknowledged that disallowing plaintiffs to bypass a detailed and comprehensive administrative scheme established in the EHA by bringing suit directly under § 1983 may be consistent with the established principle of statutory construction "that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes."[191] Justice Brennan explained that this rule may require that EHA claims first be exhausted before seeking redress under § 1983. However, it does not mean that suit under § 1983 and attorney's fees are unavailable, because there is no "repugnancy," and nothing in the language or the legislative history of the EHA reflects Congress's intent to bar recovery of fees for those who prevail under § 1983. Instead, the Court should have followed the familiar rule of statutory construction that "[r]epeals by implication . . . are strongly disfavored."[192] As Justice Brennan opined, the denial of § 1983 and § 1988 relief to individuals seeking a free appropriate education

189. Congress's response to numerous restrictive judicial interpretations of its civil rights laws, including Title IX and Title VII, demonstrates that Congress intended these enactments to be read broadly to expand rights. See, for example, 42 U.S.C. § 2000d-7, in which Congress abrogated the states' Eleventh Amendment immunity in response to a judicial decision imposing this barrier; and the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (2000), in which Congress reversed a Supreme Court decision by unequivocally mandating that the judiciary give Title IX a "broad application," whereby any program that discriminates on the basis of sex in an institution that receives federal funds may be held liable, regardless of whether that particular discriminatory program receives federal funds. Further, the Civil Rights Act of 1991 had as its stated purpose the need "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." Pub. L. No. 102-166, 105 Stat. 1071, 1071 (codified at 42 U.S.C. § 2000e). The Act overturned some seven or eight Rehnquist Court rulings that had reduced individual protection from discrimination by narrowly construing Title VII, as well as 42 U.S.C. § 1981, which prohibits race discrimination in the making of contracts. *See* BODENSTEINER & LEVINSON, *supra* note 24, § 3:11 (discussing changes to § 1981); *id.* §§ 5:36–5:38 (discussing revisions to Title VII).

190. The Supreme Court has noted that, because § 1983 provides an "'alternative source of *express* congressional authorization of private suits,'" the difficult separation of powers concerns triggered when the Court implies a right of action are absent. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 n.9 (1990) (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981)).

191. Smith v. Robinson, 468 U.S. 992, 1024 (1984) (Brennan, J., dissenting) (citing Watt v. Alaska, 451 U.S. 259, 267 (1981); Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976); Morton v. Mancari, 417 U.S. 535, 551 (1974)).

192. *Id.* at 1026 (citations omitted). The dissent emphasized that the fee provision was enacted after the EHA and that the majority's ruling undermines the enactment of this provision. *Id.*

> runs counter to well-established principles of statutory interpretation. It finds no support in the terms or legislative history of the EHA. And, most importantly, it undermines the intent of Congress . . . . It is at best ironic that the Court has managed to impose this burden on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children.[193]

In recent years, Supreme Court Justices and constitutional scholars have engaged in a contentious debate regarding the appropriate role of the Court in construing federal statutes. Reflecting separation of powers concerns, Justice Antonin Scalia and Justice Clarence Thomas have insisted on a strict textualist approach, urging judges to examine only statutory text.[194] Other Justices have emphasized the importance of looking to legislative history and context in interpreting statutes.[195] For example, Justice Stephen Breyer believes that courts should determine congressional intent and that a key interpretative resource is legislative history.[196] Others have urged that statutory interpretation should be based on an assessment of a law's

193. *Id.* at 1030–31.

194. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14–37 (Amy Gutmann ed., 1997). In *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831 (2008), Justice Clarence Thomas closely examined statutory text, cautioning that "[w]e are not at liberty to rewrite the statute to reflect a meaning we deem more desirable," *id.* at 841. *See also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

195. See, for example, the concurring opinions of Justice Breyer and Justice Stevens in *Rancho Palos Verdes*, 544 U.S. 113, 126–32; *see also supra* note 45, and Justice Anthony Kennedy's dissent in *Ali*, joined by Justice Stevens, Justice David Souter, and Justice Breyer, urging that although statutory interpretation "requires respect for the text," this should not "foreclose consideration of the text within the whole context of the statute as a guide to determining a legislature's intent. To prevent textual analysis from becoming so rarefied that it departs from how a legislator most likely understood the words when he or she voted for the law, courts use certain interpretative rules to consider text within the statutory design." *Ali*, 128 S. Ct. at 841 (Kennedy, J., dissenting).

196. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992). Justice Breyer has scored a significant victory for his approach in the recent decisions of *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (holding that 42 U.S.C. § 1981 (2000), which prohibits race discrimination in the making and enforcement of contracts, encompasses a retaliation claim), and *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943 (2008) (holding that the federal sector provision of the ADEA, 29 U.S.C. § 633a(a) (2000), prohibits retaliation against a federal employee who complains of age discrimination). Although the plain text of neither § 1981 nor § 633a(a) expressly refers to retaliation, the Court relied on "the pertinent interpretive history" of these provisions, namely stare decisis, to recognize retaliation claims under both. *CBOCS*, 128 S. Ct. at 1955. Justice Breyer in *CBOCS* conceded that "the statute's language does not expressly refer to [retaliation]," but stated that this was not determinative. *Id.* at 1958. Justice Samuel Alito, who authored *Gomez-Perez* suggested that he was not straying from text—rather, he was "guided by our prior decisions interpreting similar language in other antidiscrimination statutes." *Gomez-Perez*, 128 S. Ct. at 1936. However, Justice Scalia and Justice Thomas, in their dissents to both decisions, chastised the majority for ignoring the text of these statutes. *See CBOCS*, 128 S. Ct. at 1961–62 (Thomas, J., dissenting); *Gomez-Perez*, 128 S. Ct. at 1951 (Thomas, J., dissenting).

underlying purpose,[197] or that it should reflect the communicative process whereby laws are actually enacted.[198]

All of these methods of statutory interpretation have been amply critiqued by constitutional scholars. Strict textualists contend that an examination of legislative history is highly subjective and indeterminate and that it ignores the principle of legislative supremacy set forth in Article I of the Constitution.[199] Those who oppose strict textualism argue that language is inherently ambiguous and that the realities of the legislative process mandate looking beyond text to examine congressional purpose.[200] In particular, scholars have noted that the text of employment discrimination statutes, like Title VII, often reflect political compromise between members of the two political parties as well as compromises between the House and Senate, thereby justifying a closer look at legislative history to ascertain congressional intent.[201]

Significantly, none of the proposed methods of statutory interpretation justifies the doctrine of implied congressional foreclosure. The strict textualists on the Supreme Court, including Justices Scalia and Thomas, have long expounded the dangers of making inferences from congressional silence. Because neither Title IX nor Title VII, nor any of the other civil rights statutes, mentions § 1983, implied foreclosure violates separation of powers and fails to show proper respect for the legislative branch of government. If the "plain meaning of the statute's text" is the only

197. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (1958) (contending that judges must first decide the purpose of a statute); Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1920–31 (2006) (providing pragmatic and theoretical arguments for "intentionalism"); *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434, 464, 468 (1989) (arguing that courts should interpret federal statutes aspirationally, to improve on the legislative process by examining various substantive canons). More recently, Professor Cass Sunstein has observed that, for the "hard statutory questions," "policy arguments . . . often play a central role, even in a period in which 'textualism' has seemed on the ascendancy." Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2592–93 (2006).

198. Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007) (contending that, because the compression process—compressing multiple sources of information into a single statutory command—generates laws, some interpretive effort to unpack their meaning is required and communication theory provides guidelines for doing so).

199. *See, e.g.*, Easterbrook, *supra* note 194, at 61 (criticizing legislative history as subject to manipulation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696–705 (1997) (criticizing the use of legislative history as indeterminate). Justice Scalia criticizes legislative history both on grounds that it is indeterminate and that it is subject to manipulation. *See* Scalia, *supra* note 194, at 31–36.

200. *See supra* notes 196–97.

201. James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001, 1016–18 (2007) (discussing the empirical research on the Supreme Court's use of legislative history and citing numerous decisions in which the Supreme Court has relied heavily on legislative history to assist in construing race and sex discrimination statutes).

legitimate criterion for statutory interpretation,[202] implied congressional foreclosure of § 1983 constitutional claims should be rejected.

The nontextualist approach, which seeks to ascertain congressional purpose, primarily by examining legislative history, yields the same result. The legislative history of each of the modern civil rights statutes demonstrates Congress's intent to expand civil rights by creating additional, not substitute, remedies for their vindication.[203] In general, the Supreme Court has recognized that statutory "repeals by implication are disfavored."[204] In *North Haven Board of Education v. Bell*,[205] the Court rejected the argument that Title VII and § 1983 foreclosed the use of Title IX to reach sex-based employment discrimination. The Court reasoned, "even if alternative remedies are available and their existence is relevant . . . this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination."[206] Similarly, the Court in *Gebser* cautioned that its interpretation of Title IX did not affect individual capacity claims that could be brought under § 1983.[207] And, as discussed in Part III.B, the Court recently rejected the argument that Title VII should preclude a retaliation claim under § 1981, instead recognizing that "'Title VII was designed to supplement, rather than supplant, existing laws.'"[208] More broadly, the Court has acknowledged that "[s]ubstantive rights conferred in the 19th century [civil rights acts] were not withdrawn, *sub silentio*, by the subsequent passage of the modern statutes."[209] Although § 1983 does not itself create substantive rights, it provides the vehicle by which to enforce constitutional rights—the right to seek redress for their deprivation "under color of state law"—and thus courts should be reluctant to infer *sub silentio* withdrawal of this significant tool for vindicating constitutional wrongdoing.

Nothing in the legislative history of any of the modern civil rights laws justifies congressional foreclosure of § 1983; rather, Congress has merely provided alternative ways to reach civil rights violations. The core criticism of using legislative history to ascertain congressional intent is that it is indeterminate and can be manipulated by activist interpreters. However, only gross manipulation of legislative history leads courts to

202. Scalia, *supra* note 194, at 16–17.

203. *See supra* notes 157–58, 173–75 (discussing the legislative history of Title IX and Title VII, respectively).

204. Hagen v. Utah, 510 U.S. 399, 416 (1994).

205. 456 U.S. 512 (1982).

206. *Id.* at 536 n.26; *see also* CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1959–60 (2008) (rejecting the argument that the Court should not recognize a retaliation claim under § 1981 because this would overlap with Title VII and allow plaintiffs to circumvent Title VII's specific remedial mechanism).

207. *See supra* notes 100–01 and accompanying text.

208. *CBOCS*, 128 S. Ct. at 1960 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974)); *see supra* notes 176–78.

209. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 377 (1979).

construe modern civil rights statutes as evincing congressional intent to foreclose the use of the historically recognized cause of action for vindicating constitutional wrongdoing perpetrated under color of state law. There is absolutely no discussion of this subject in the legislative history. In 1972, when Congress enacted Title IX and expanded Title VII to reach state and local government employees, the doctrine of implied foreclosure of constitutional claims was unknown. It was not until 1984 in *Smith* that the judiciary crafted this new, ill-conceived rule of statutory construction.

Some lower courts that have rejected § 1983 constitutional claims assert that Congress, through its more focused civil rights law, has "preempted" § 1983.[210] This use of the term "preemption" is misplaced. Preemption refers to the doctrine whereby a federal statute trumps an overlapping state law.[211] Unlike "implied" preclusion, it is not a purely judge-made doctrine; rather, it has its source in the Constitution, namely the Supremacy Clause of Article VI. Further, even under federal preemption doctrine, the Supreme Court has recognized that preemption of state laws should not occur absent evidence of a "clear and manifest purpose of Congress."[212] Where there is no explicit preemptive language in a federal statute, the Court has recognized "implied preemption" only where Congress has pervasively regulated an entire field or where there is conflict preemption: "where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[213] Applying this doctrine by analogy, mandating government compliance with both constitutional norms enforceable under § 1983 and federal statutory nondiscrimination laws is not a physical impossibility, nor

210. *See, e.g.*, Boulahanis v. Bd. of Regents, 198 F.3d 633, 640–41 (7th Cir. 1999) (holding that plaintiffs' claims against individual officials under § 1983 were preempted by Title IX); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) (holding that Title IX "preempted" § 1983 claims for Fourteenth Amendment violations). Even those courts that have rejected congressional preclusion frequently use "preemption" terminology. *See* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 687 (6th Cir. 2006); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723 (6th Cir. 1996).

211. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 392–96 (3d ed. 2006).

212. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).

213. Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–48 (1963)). A plurality opinion relied on implied preemption. Justice Kennedy concurred in the judgment, contending that preemption was mandated by the *express terms* of the federal statute in question. *Id.* at 109 (Kennedy, J., concurring in part and concurring in judgment). However, he criticized the plurality's "undue expansion of our implied preemption," arguing that "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that preempts state law." *Id.* at 109, 111; *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265–90 (2000) (arguing that there is no constitutional basis for "obstacle" preemption).

may § 1983 be viewed as an "obstacle" to accomplishing the antidiscrimination objectives of modern civil rights statutes.

Finally, as to federalism concerns, even the most conservative Justices understand that state sovereignty arguments give way when state or local government officials violate the Fourteenth Amendment. In upholding Congress's power to enact Title VII and to hold state government liable for discrimination against government employees, Justice William Rehnquist in 1976 explained that "[w]hen Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."[214] He observed that the Fourteenth Amendment "quite clearly contemplates limitations on [state] authority"[215] and represents a "shift in the federal-state balance."[216] Congress enacted § 1983 precisely to guarantee protection for Fourteenth Amendment rights.[217] Principles of federalism or state sovereignty that might otherwise be an obstacle evaporate when Congress seeks to enforce the Civil War Amendments because these amendments were specifically designed to expand federal power and to restrain state sovereignty.[218] The whole purpose of § 1983 was to vindicate constitutional wrongdoing, and it is clear that federalism concerns are at their lowest ebb when plaintiffs through § 1983 seek to remedy Fourteenth Amendment violations.

CONCLUSION

Since 1984, the Supreme Court has not invoked *Smith* to preclude the use of § 1983 to enforce constitutional rights. Congress responded swiftly to rebuke the Supreme Court's misinterpretation of its statute in *Smith*, and the Court has not again treaded into these murky waters. However, congressional foreclosure is increasingly being used in the lower courts, and thus, it is time for the Supreme Court to acknowledge its error and to reverse the decision. In the alternative, *Smith* should be limited to cases where both of its factors are satisfied—namely there must be a showing that (1) the federal and statutory claims are "virtually identical" *and* that (2) the remedies provided in the statute indicate congressional intent to preclude reliance on § 1983 because § 1983 litigation would obstruct the newly created congressional scheme. *Smith* presented a unique situation where the

214. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
215. *Id.* at 453.
216. *Id.* at 455.
217. *See supra* notes 14–15 and accompanying text.
218. *See* United States v. Georgia, 546 U.S. 151, 158–59 (2006). In *United States v. Georgia*, Justice Scalia acknowledged the well-established principle that Congress has the authority to vindicate violations of the Fourteenth Amendment, even where states will be subject to money damages. *Id.*

Court feared that fee awards would eat up scarce resources. In addition, it arguably believed that Congress intended for public school students to vindicate their right to equal educational opportunity via a multilevel review process that would best ensure a child's correct placement. At most, *Smith* should be read as a *sui generis*/one-way ticket decision.

Further, the Supreme Court should clarify that its decision in *Rancho Palos Verdes* involved only the issue of congressional preclusion of federal statutory claims under § 1983 and does not control constitutional claims. The Supreme Court's unfortunate remand of the *Communities for Equity* case, involving Title IX's alleged foreclosure of § 1983 constitutional claims, has fueled further mischief in the federal appellate courts. The Court now has agreed to resolve the current circuit split on the Title IX question, and it should take this opportunity to intern or severely restrict *Smith* and leave to Congress the task of assessing the best way to vindicate violations of our constitutional and civil rights.